



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **MAN/00BN/LSC/2014/0086**

Property : **37 Lloyd Wright Avenue, Beswick,
Manchester, M11 3NJ**

Applicant : **The Way Beswick (zone 4) management
Limited**

Representative : **Shoosmiths**

Respondents : **Drs Timothy and Bindu Onyenobi**

**Type of
Application** : **Landlord and Tenant Act 1985 – s 27A &
Commonhold and Leasehold Reform Act
2002 – schedule 11 paragraph 5**

**Tribunal
Members** : **Judge JM Going
Deputy Regional Judge J Holbrook**

Date of decision : **10 June 2015**

DECISION

THE DECISION

The service charges demanded by the Applicant from the Respondents for the periods from 1 November 2012 to 31 March 2014 in the sum of £414.85 are reasonable and payable.

The Applicant does not have a contractual right under the Lease to recover the additional administration charges, being the Applicant's solicitors charges, directly from the Respondents.

BACKGROUND

1. On 24 March 2014 the Applicant issued a county court claim for £916.25 plus the Court fee and solicitors costs. The Applicant claimed £564.85 was money due by way of service charge and that additional legal fees were due in the sum of £351.40. The figure of £564.85 was made up of £414.85 in respect of service charges and further administration charges of £150 relating to steps connected with recovery of arrears. The Respondents issued a defence and counterclaim.

2. On 8 July 2014 an Order was made transferring the claim to the Tribunal.

3. On 11 November 2014 the Tribunal issued its original set of directions.

4. On 8 April 2015 following the submission by the Applicant of a completed set of accounts for the service charge period in dispute, the Tribunal issued a further set of directions making it clear that it would when making its determination also consider not solely whether the service charges in respect of the periods in dispute are payable and/or reasonable but also as to whether the administration charges sought by the Applicant from the Respondents are payable and/or reasonable.

5. In such directions the Tribunal directed that the Applicant must explain by reference to the Lease of the property, or otherwise the basis on which the administration charges, being the solicitors costs claimed by the Applicant from the Respondents are payable by the Respondents. The Applicant was specifically asked to explain the basis or authority for charging such charges directly to the Respondents as opposed including them within the service charges.

FACTS AND SUBMISSIONS

6. The property is part of the estate of 41 dwellings built approximately 6 years ago.

7. The Respondents are the owners of the property which is held under a Lease ("the Lease") dated 29 January 2010 and made between Lovell Partnerships Limited (1) the Respondents (2) and the Applicant (3).

8. Lovell Partnerships Ltd initially dealt with the collection of the service charges under the Lease.
9. In November 2012 Urban Bubble Limited ("the managing agents") were instructed by the Applicant as property managers for the estate and issued a service charge demand for the period from 1 November 2012 to 31 December 2012 for £48.81.
10. In January 2013 the managing agents issued a further service charge demand for the period from 1 January 2013 to 31 December 2013 for £292.83 referring to a balance due of £341.64.
11. These demands were based on budgets.
12. In January 2013 the Respondents made a telephone call to the managing agents. The tenor and content of the call appears to be disputed between the parties, but the Respondents refer to a request for a breakdown/explanation of the increase in service charges relative to previous years where they had been restricted to annual payments of £35, and the Applicant maintains that the Respondent would not answer security questions and stated that he wasn't going to pay any arrears and was going to take the Applicant to Court if it attempted to pursue the charges
13. The Applicant instructed its solicitors who on 12 April 2013 issued a letter to the Respondents demanding a total of £494.64 made up of the service charges £341.64 previously referred to and what were referred to as "an arrears recovery fee" of £90, a "pass to the legal team" fee of £60 and a disbursement of £3.
14. There followed various correspondence and telephone calls between the Respondents and the Applicant's solicitors.
15. The Respondents referred the matter to the Property Ombudsman.
16. The Respondents state that the case was closed by the Ombudsman in November 2013 without any determination as to the reasonableness of the service charges. The Applicant's solicitor stated that they did not receive any correspondence from the Ombudsman and he had indicated that the Respondents had failed to supply the necessary paperwork to enable them to investigate matters.
17. Following the issue of the county court claim by the Applicant the Respondents in their defence and counterclaim admitted and paid the amount of £414.85 but disputed the additional administration charges and legal costs.
18. The Respondents claim that the service charges paid were exorbitant being a 736% increase on the charges of £35 per annum which had previously been charged.
19. The Respondents also maintain that the completed accounts include excessive amounts spent on management fees and on gates which could have

been avoided by proper management. The Respondents also complained that the managing agents should have maintained the street lighting and this contributed to an increase in burglaries and additional fees for maintenance of gates which had been vandalised.

20. The Applicant confirmed that street lighting was the responsibility of the local Council not of the Applicant, and maintained that the management fees equated to £78.20 inclusive of VAT per property per annum which is in line with industry standards. The Applicant explained that the service charges charged by the developer prior to the instruction of the managing agents of £35 per annum were token payments as a consequence of a common practice of developers to either pay estate charges in full or charge only a nominal fee during the early stages of a development where parts of the common areas may not have been developed or completed and require no maintenance and/or to compensate for discomfort caused by the ongoing development of the estate.

21. The Applicant also whilst not providing any confirmation from the terms of the Lease as to the payability of the administration charges maintained that the Respondents had repeatedly failed to acknowledge an obligation to pay the service charges, that the Respondents had been uncooperative and obstructive from first contact and that this had driven the various legal steps undertaken by the Applicant.

22. In response to the specific request in the Tribunal's further directions for an explanation as to the authority for the administration charges to be payable directly by the Respondents the Applicant's solicitors stated that they do not think it equitable that the Respondents neighbours should be made contribute towards the legal costs in this matter.

THE LEASE

23. The Lease in clause 4 includes covenants by the Tenant.

"4.1 to pay the rent during the term...

4.2 to pay the estimated service charge to the management company by 4 equal quarterly payments in advance on the payment dates...

4.7 to pay all expenses including solicitors costs and disbursements and surveyors fees incurred by the landlord incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 or incurred in or incurred in contemplation of proceedings under section 146 or 147 of that Act or of proceedings on account of arrears of rent for forfeiture of this Lease or for the recovery or attempted recovery of those arrears notwithstanding forfeiture is avoided otherwise than by relief granted by the Court and to pay all expenses including solicitors costs and disbursements and surveyors fees incurred by the landlord of and incidental to the service of notices and schedules relating to defects or wants of repair decoration replacement or renewal rising before the expiration or sooner determination of the term whether the notice be served during or after the expiration or sooner determination of the term..."

24. The definitions contained in clause 1 of the Lease refer to:-

“the estimated service charge” being £300 for the first accounting year and for the next and each subsequent accounting year such sum as shall be certified by the management company as being a reasonable estimate of the expenditure likely to be incurred by the management company by way of service charge during such accounting year

“the service charge” as the tenant’s proportion of the common parts charges

“the common parts charges” as the matters set out in part one of the 3rd schedule payable in accordance with the provisions of part 2 of the 3rd schedule

“the common parts” as the accessways the courtyards the car parking areas the footpaths the landscaped areas the bins stores the private street lighting the service installations on the estate (serving more than one property on the estate) and the walls gate pillars gates and fences on the estate other than those included in any property on the estate

“Tenant’s proportion” as a one forty one part in respect of expenditure in relation to the common parts or such proportion as the landlord the management company or their accountants may from time to time and at any time specify at its or their reasonable and proper discretion to be fair and reasonable in the circumstances.

25. The 3rd schedule of the Lease refers to:-

Part 1 – the common parts charges

.....

2. The payment of

2.1 the expenses of management of the common parts

2.2 a fair proportion of the expenses of the administration of the management company properly attributable to the estate

2.3 the proper fees of surveyors or agents appointed by the management company or in default by the landlord in connection with the performance of the management company’s obligations and powers in respect of the estate and with the apportionment collection of those expenses and fees between and from the several parties liable to reimburse the management company for them and in the expenses and fees for the collection of all other payments due from the tenants of other properties on the estate not being payment of rent to the landlord

3. The provision of services facilities and amenities improvements and other works where the management company in its or the landlord in its reasonable discretion from time to time considers the provision so to be for the general benefit of the estate and whether or not the management company has covenanted to make provision ...

Part 2

Provisions relating to the common parts charges

1. ... The common parts charges include the costs of: –

1.1 supplying providing purchasing maintaining renewing replacing repairing and keeping in good and serviceable order and condition all tools appliances materials services and other things which the landlord or the management

company may deem desirable or necessary for the maintenance upkeep or cleanliness and where relevant operation of the common parts...

1.4 For employing such persons as the management company may in its absolute discretion consider desirable or necessary to enable to perform or maintain the said services or any of them or for the proper management or security of the common parts

1.5. Setting aside such sums of money which shall be deemed items of expenditure incurred by the management company as the management company may reasonably require by way of reasonable provision for future expenditure on complying with its obligations under this Lease

2. The tenant shall pay the estimated service charge by equal instalments in advance on the payment dates

3. As soon as convenient after the expiry of each Accounting Year commencing with the accounting year now current there should be prepared and submitted to the tenant a written summary of the statement setting out the service charge in a way showing how it is or will be reflected in demands for payment of the service charge and showing money in hand. The statement will be certified by a qualified accountant as being in his opinion a fair summary complying with this requirement and sufficiently supported by the accounts receipts and other documents produced to him...

The Law

26. Section 18 of the Landlord and Tenant Act 1985 (" 1985 Act") provides that:-

(1) " service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent-

(a) which is payable, directly or indirectly, for services, repairs, maintenance improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs

(2) the relevant costs are the costs or estimated costs incurred or to be incurred in connection with the matters for which the service charge is payable

(3) for this purpose-

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to service charge whether they are incurred, or to be incurred, in the period for which the service charges payable or in an earlier or later period.

27. Section 19 of the 1985 Act confirms that :-

(1) Relevant costs shall be taken into account in determining the amount of a service charge

(a) only to the extent that they are reasonably incurred

(b) when they are incurred on the provision of services or the carrying out of works only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

28. Section 27A of the 1985 Act provides that:-

- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason of having made any payment.

29. Paragraph 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) provides that:-

(1) “administration charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly –

(a) for or in connection with the grant of approvals under his Lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his Lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his Lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his Lease

.....

(3) “variable administration charge” means an administration charge payable by a tenant which is neither –

(a) Specified in his Lease, nor

(b) Calculated in accordance with a formula specified in his Lease.

30. Paragraph 2 of Schedule 11 to the 2002 Act provides that:-

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

The Tribunal’s reasons and conclusions

31. The Tribunal began its determination by making a careful consideration of the Lease and the various written representations and submissions of the parties.

32. As one would expect the Lease includes covenants by the Lessee to have to pay the rent, as well as the Lessee’s proportion of the service charge expenses.

33. The Tribunal carefully reviewed the amounts which had been demanded by the Applicant from the Respondents, distinguishing between those which for ease of reference are hereafter referred to as “the general service charges”, which for the period beginning on 1 November 2012 and ending on 31 March 2014 amounted to £414.85, and the additional solicitors charges and costs hereafter referred to as “the administration costs”.

34. Having reviewed the nature of the development, the budgets and published accounts, and using its own knowledge and experience, the Tribunal concluded that there was no evidence that any of the general service charges were out of line with what might reasonably expected or the market norm.

35. The Tribunal did not agree with the Respondents contention that the 7 to 8 fold increase in 2012/13 from charges of £35 per annum was necessarily unreasonable.

36. The Tribunal found the Applicant's explanation for the purely nominal sums charged by the developer in the initial years as referred to above entirely plausible, and that it was both predictable and reasonable for the management company to raise the level of the estimated service charges in November 2012.

37. It was also noted that the original developer had in the Lease referred to the estimated service charge as being £300 for the first accounting year, which was at an almost identical rate to the general service charges demanded for the periods from 1 November 2012 to 31 March 2014.

38. Nor did the Tribunal agree with the Respondent's contention that service charges had been unreasonably incurred.

39. The Tribunal therefore concluded that the general service charges were both reasonable and payable by the Respondents.

40. The Tribunal then went on to carefully consider the administration charges.

41. Having studied the Lease carefully, the Tribunal concluded that it does not contain an express provision which makes the Respondents directly responsible for administration charges relating to a failure to make payments of service charges or estimated service charges by a due date.

42. There is a clear distinction drawn in the Lease between what is rent and what are service charges, and the service charges under the Lease are not reserved as rent

43. Clause 4.7 of the Lease refers to a lessee having to pay all expenses including solicitors costs and disbursements... incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 or incurred in or in contemplation of proceedings under section 146 or 147 of that Act or of proceedings on account of arrears of rent for forfeiture of this Lease or for the recovery or attempted recovery of those arrears notwithstanding forfeiture is avoided ... and of and incidental to the service of notices and schedules relating to defects or wants of repair decoration replacement or renewal...

44. Whilst clause 4.7 of the Lease refers to arrears of rent it does not make any specific reference to non-payment of service charges or administration charges

45. The Applicant was specifically tasked under the further directions to explain the basis or authority for charging the administration charges directly to the Respondents and the only explanation given was that the Applicant does not think it equitable that the Respondents neighbours should be made contribute towards the legal costs incurred by the Applicant.

46. There is no evidence, and nothing in the Applicant's statements, to suggest that the Applicant was in any way contemplating forfeiture of the Lease when issuing the demands for the administration costs

47. The Tribunal is aware that many modern Leases include an express provision stating that the Tenant shall be responsible for the Landlord's reasonable costs, charges and expenses in relation to the recovery or attempted recovery of arrears of service charges, but that does not mean that such clauses have inevitably to be implied. Indeed if there is any ambiguity in the wording of the Lease then the "contra proferentem rule" applies because the obligation is on a landlord who prepares a Lease to ensure that any obligation it seeks to impose on a tenant is clearly set out

48. The provisions of the Lease do provide for the Respondents to have to pay the Lessees proportion of the management company and agent expenses and fees charged and to be paid by all of the Leaseholders in the estate which on the wording of the Lease could include various administration charges. Nevertheless that obligation to share in the cost of joint expenses is quite distinct from the obligations specified in the Lease which fall exclusively on an individual Leaseholder.

49. Nor does the definition of "variable administration charge" as contained in paragraph 1(3) of Schedule 11 of the 2002 Act assist the Applicant. On a cursory reading it might be thought that that definition could allow any charges specified by a Landlord in respect of failure by the tenant to make a payment by the due date. However, that would not be correct because both the definitions of "administration charge" and "variable administration charge" contained in paragraph 1 of Schedule 11 of the 2002 Act specifically limit such charges to those which are "payable". The Tribunal is firmly of the view that the 2002 Act did not seek to introduce independent and new charges where none had previously existed but rather to regulate those that were already payable and so any charges should be reasonable.

50. The Tribunal is clear that for the administration costs to be passed on to a tenant there would need to be clear and unambiguous authority from within the Lease itself.

51. Because there is no such authority in the Lease, the Tribunal has concluded that there is no right for the Applicant to charge the Respondents directly with any of the administration charges.