12276

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BK/LSC/2016/0494**
Property	:	**Flats 1,2,3, 393 Harrow Road, London W9 3NF**
Applicant	:	**Christopher Wheatcroft (1) Helen Angwin (2) Pranom Karnharn**
Representative	:	**Mr Wheatcroft and Ms Angwin in person ; Ms Karnharn did not attend**
Respondent	:	**Assethold Limited**
Representative	:	**Mr Gurvits, Eagerstates Managing Agents**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Judge Abebrese, Stephen Mason BSC FRICS FCIArb, Mel Cairns.**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**17 July 2017**

DECISION

Decisions of the tribunal

(1) The tribunal determines that apportionment of the obligations of all of the applicants on construction of the wording in the lease as contained within paragraph 8 of the particulars is **1/5. The tribunal** dismisses **the respondent's interpretation of the lease on apportionment.**

(2) The determination above shall be applied to all works/services carried out and all years which form part of this application.

(3) **Management fees and insurance** should also be determined on the basis of 1/5 split between leaseholders

(4) The tribunal makes the determinations as set out under the various headings in this Decision.

(5) No application was made to the tribunal under Section 20c so no order was made.

(6) The tribunal determines that the Respondent shall pay the Applicants their cost of making the application and their hearing cost within 28 days of receipt of this decision.

(7) The tribunal determines that the conduct of the respondent in this application is **not** vexatious and or unreasonable and makes no further orders on cost under Rule 13 of the Tribunal Procedural Rules 2013.

The application

1. The applicants seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") [and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act")] as to the amount of service charges administration charges] payable by the Applicantss in respect of the service charge years 2009/2010; 2010/2011; 2011/2012; 2012/2013; 2013/2014; 2014/2015; 2015/2016 and 2016/2017 .

2. The core disputes in this application which require resolution by the tribunal may be summarised as follows. The correct proportion of the total expenditure that the lessees are required to pay. The lessees contend that in accordance with the particulars of lease under paragraph 8 they are required to contribute 1/5 of the total expenditure. The respondent's contend that they have issued demands for payments on the basis of 1/3 apportionment of the total expenditure in accordance with a long standing agreement which has never been formalised.

3. The applicants also require a determination as to the reasonableness of the charges in particular, whether the work could have been carried out at a lesser cost. Furthermore that the consultation requirements under Section 20 of the 1985 Act has not been complied with in relation to management fees.

4. The lessees also seek an order under Section 20C of the 1985 Act preventing the respondent from recovering their legal costs incurred in this dispute as service charges payable by the lessees.

5. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

6. The Applicants appeared in person at the hearing and the Respondent was represented by Mr Gurvits of Eagerstates Limited.

7. The parties agreed the issues as set out above before the tribunal invited the applicants to set out their case.

8. The applicants directed the tribunal to pages 127 to 129 of the bundle which sets out the service charges for the years 2010/2011 and they state that they are seeking clarification as they are of the view that they may have been overpaying for this period and others.

9. The tribunal were also referred to page 210 in relation certificate of insurance which had only recently been provided to them, they maintain that they are seeking transparency and clarity. The insurance certificates are provided in the bundle at pages 197-212. Mr Gurvits explained that the certificates for the residential part of the premises is separate from the commercial premises even though they have the same insurers. It was made clear that the issues in this application only concern the residential part of the premises. It was also noted that the insurance figure for the period 2009/2010 is much lower than subsequent years (pages 215 and 216), Mr Gurvits could not assist as he was not employed during this period.

10. The respondent contends that the applicants have not provided an alternative quote for the insurance and that it is placed with an external broker. They maintain that there is no requirement to select the cheapest quote and they maintain that they do not receive a commission. In their statement of case the respondent explains that the only years when there was an additional charge for insurance was 2010/2011 when the charging structure was changed and a lower management fee was charged. The position now is that there is a fixed management fee for each year, save for major works and therefore no additional fee has been charged.

11. In respect of the asbestos survey the applicants are not adverse to paying but they seek clarity regarding the charges. The estimated charge is £400. Mr Gurvits stated that survey would focus only on areas where there was suspect asbestos.

12. The applicants did not provide an alternative quote for fire health and safety and the only issue is whether or not it is reasonable. The respondent argue that there is a legal requirement to have a survey under the Regulatory Reform (Fire and Safety) Order 2005. This provides that all communal areas are required to undergo a survey. The respondent provided a copy of the survey.

13. The emergency telephone line charges are being disputed by the applicants because they claim the cost has risen to £48 which is a rise of 33 per cent in one year between 2015/2016. The applicants question the reasonableness of the charges and they in any event question whether the line is functional.

14. The management fees are also in dispute. The respondent claims that the years in question cover two separate charging structures. In the period 2010/2011 he explained that a lower fixed fee was implemented but there was an additional fee charged on top of each repair item. Mr Gurvits was of the view that there had been slight increases over the years but the increases were not disproportionate. The last management fee he argued works out at £240 per unit. The management fees for the last payment is set at £864, the applicants question the reasonableness of the charges.

15. The applicants question the cost of the external decorations, they submit that the cost should not be split and it should be shared with the commercial leaseholders. The issue for the tribunal is whether the split should be on the basis of 1/5 or 1/3.

16. The issue in the claim of charges for the re-carpeting is whether the estimates provided by the applicants should have been considered the respondent is of the view that it should not be because it was provided at a very late stage of the consultation period. The applicants did nominate a contractor during the first stage of the consultation period but they were too expensive, the second quotation offered by the applicants was cheaper but submitted late.

17. The applicants accept the Section 20 process in respect of the electrical cupboards and they submitted that the point here is not about the charges but the relationship between themselves and the respondent. The applicants did not provide an alternative quote. The total cost is £1791.

18. It was accepted by the respondent that the charges in respect of the pressure jetting of the drains should be shared between the five owners hence 1/5 as it covers all of the building commercial and residential.

19. In respect of the issue regarding the appropriate apportionment of the charges it was submitted by the applicants that the lease states that the proportion which is payable by the applicants is 1/5. The respondent not relying on the terms of the lease argue to the contrary that the appropriate apportionment is 1/3. The applicant's case is that in the past they have offered as gesture of good will, and on a year on year basis to pay 1/3 of the cost of maintenance and the repair of the interior common parts since it services the flats only.

20. The applicants have also offered as again as a gesture of good will a payment of 1/3 payment of the insurance policy which benefits the residential flats only. The respondent according to the applicants are asserting that expenses for the building should be split, horizontally so that the applicants are responsible for all the cost associated with internal and external maintenance for the building above the commercial shop level. The applicants argue that if it is the case that the commercial lessees do not make any contribution to the expenditure than this is a breach of the lease.

21. The respondent's representative Mr Gurvits submitted that there has always been a long standing agreement with the leaseholders that the charges relating to the residential areas would be divided by three. He maintained that the flats were purchased on this basis by the applicants and it would be unfair for the applicants to be permitted to renege from the agreement.

22. **Mr Gurvits accepted that the terms of the lease states expressly that apportionment should be on the basis of 1/5 division** but rely on the points made above in that there is a long standing agreement between the parties which has not been formalised, this is flatly rejected by the applicants. Mr Gurvits referred the tribunal to page 129 and an invoice dated 2 September 2011 for the period 2010/2011 for service charges which states that share of the cost is 1/3, this he argued is an example of the practices which had developed between the applicants and the respondent.

23. Both parties upon request by the tribunal provided the tribunal with further information on cost following the hearing of the appeal.

The background

24. The property which is the subject of this application comprises of commercial premises, a shop in the basement and ground floor level and three flats above which form the subject matter of this application.

25. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

26. The applicants hold a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

The issues

27. At the start of the hearing the parties identified the relevant issues for determination as follows:

    (i) The payability and/or reasonableness of service charges for years falling between 2009-2017 as described in paragraph 1 above.

    (ii) The apportionment of the cost to be charged under the terms of the lease.

28. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

Payability and or reasonableness of the service charges

29. The tribunal determines that the lease does impose an obligation on the applicants to pay service charges to the respondent. It is further determined that the reasonableness of the amount is to be determined on the basis of the express wording of the lease in paragraph 8 of the particulars of the lease.

The tribunal's decision

30. The tribunal determines that the amount to be paid by the applicants is 1/5 of the cost as expressed by paragraph 8 of the particulars of the lease.

Reasons for the tribunal's decision

31. The tribunal concluded that the wording of the lease on the issue of apportionment was clear, unambiguous and therefore binding on all parties to the lease. The lack of clarity had led to the applicants paying inconsistent sums of money in previous years. Furthermore, the applicants due to lack of clarity offered as a good will gesture to pay 1/3 which would have been contrary to the wording of the lease.

32. The tribunal did not find any evidence of a long standing agreement between the parties as argued by the respondent in this application.

33. The specific items being claimed in this application such as asbestos works; insurance; fire, health and safety services; management fees and the emergency line are all to be determined according to the paragraph 8 of the particulars of the lease.

34. The tribunal in determining all of the above has taken into consideration all of the evidence both oral and documentary provided by both parties.

Consideration of Rule 13,Tribunal Rules 2013

35. The tribunal requested that the applicants provided to the respondent full details of all their legal cost incurred in making this application and the respondent to make their comments. The tribunal upon receipt of all the relevant information make the following determination under Rule 13 and careful consideration of the principles laid down in **Willow Court Management Ltd v Alexander 2016 0290 UKUT.**

The tribunal's decision

36. The tribunal determines that the conduct of the respondent does come within the ambit of either Rule 13 (a) or (b) and the cost sought by the applicants is not recoverable.

Reasons for the tribunal's decision

37. The tribunal determined that the cost incurred under Rule 13 (a) by the applicants were not improper, unreasonable or resulting from the negligent act or omission of the respondent for the following reasons. The terms of the lease in relation to apportionment of the cost as indicated above is clear, however the applicants had offered to pay on 1/3 basis as opposed to 1/5, this was because they had been made to believe by the respondent that this was the correct split of the cost. The applicants had also previously made payments on the basis of 1/3 and this is supported by documentary evidence.

38. The tribunal finds that the respondent has not conducted themselves in such a manner so as to come within the wording of Rule 13 (a) because the evidence showed that the applicants were genuinely confused regarding the appropriate apportionment. The applicants had made payments on a 1/3 basis previously but they had also made it known to the respondent that this was not the appropriate level of payment. The respondent on the other hand was of the view that there was a long standing arrangement where the 1/3 basis was to be applied. The conduct of both parties was justifiable because there was a clear need

for the tribunal to determine the matter and to clarify the position. The conduct of the respondent was proper and reasonable and an award of wasted costs is not appropriate in the circumstances.

39. The tribunal also determines that the respondent has not acted unreasonably in defending the application for the reasons stated above. Therefore both limbs of Rule 13 have not been met, the high threshold in respect of the respondent having acted unreasonably has not been satisfied and an order has not been made.

Application under s.20C and refund of fees

40. At the end of the hearing, the applicant's also made an application for a refund of the fees that they had paid in respect of the application/ hearing[1]. Having heard the submissions from the parties and taking into account the determinations above, the tribunal orders the respondent to refund any fees paid by the applicant's within 28 days of the date of this decision.

41. No application was made in respect of Section 20c and no order is made by the tribunal. The respondent however usefully indicate that they would not be seeking to enforce any of their cost in the proceedings through service charges.

Name: **Judge Abebrese** **Date:** **17 July 2017**

[1] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "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 by or on behalf of the landlord, or a superior landlord, 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 a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions 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.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
- (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "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.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "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.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

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

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).