12802

First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/00KF/LSC/2018/0002**
Property	:	**27a Lancaster Gardens, Southend-on-Sea, SS1 2NS**
Applicant	:	**Stefania Maulucci**
Respondent Represented by	:	**Seamoat Ltd. Hamid Soharbi (from BLR)**
Date of Application	:	**10th January 2018**
Type of Application	:	**to determine reasonableness and payability of service charges**
The Tribunal	:	**Bruce Edgington (Lawyer Chair) Evelyn Flint DMS FRICS IRRV Nat Miller BSc**
Date and place of hearing	:	**28th March 2018 at Southend County Court, Tylers House, Tylers Avenue, Southend-on-Sea SS1 2AW**

DECISION

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1. The Tribunal determines the challenged amounts in respect of service charges in the following way:

Date	£ Reasonable & Payable
30.06.15	1,200.06
30.06.16	1,245.20
30.06.17	1,107.96
Estimate for 2018	1,044.75

The Tribunal does not know whether any of these amounts have been paid. If payments which are more than the above amounts have been made, then the appropriate reimbursements should also be made within 28 days. As far as the Applicant is concerned, such reimbursement should only relate to the period from June 2015 when she acquired her interest in the property.

2. Orders are made pursuant to section 20C of the **Landlord and Tenant Act 1985** ("the 1985 Act") and paragraph 5A of Schedule 11 to the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act")

preventing the Respondent from being able to recover any costs of representation in these proceedings as part of any future service charge or administration charge.

Reasons

Introduction

3. This is an application by the long leaseholder of the property wherein she seeks determinations as to the reasonableness and payability of service charges claimed from her since she bought her interest in the property on 19th June 2015. At the hearing she said that she bought in 2016 but this does not appear to be correct. In her application form she says 19th June 2015 and it is noted that the first service charge certificate in the bundle is dated 21st September 2015 and is addressed to the Applicant.

4. Unfortunately, she has also included requests to make all sorts of orders and determinations as if she were expecting the Tribunal to carry out what can only be described as a public enquiry into the behaviour of the managing agent, BLR Property Management ("BLR") and its associated companies/agencies. She must understand that the only jurisdiction of this expert Tribunal is to determine the reasonableness and payability of particular service charges.

5. One other point which troubled the Tribunal was whether any of the service charges have been paid. Section 27A of the 1985 Act does say that mere payment does not necessarily mean admission or agreement of service charges but if there had been such admission or agreement at the time of any payment, then the Tribunal would have no jurisdiction. BLR has included a large bundle of invoices, statements and other documents as part of its client's case which do not make the position clear but they have not sought to suggest that there has been admission or agreement. The Tribunal will therefore assume that there has been no agreement or admission.

6. A directions order was made by the Tribunal on the 26th January 2018 timetabling the case to a final hearing and a bundle of documents was duly lodged. Both parties have provided statements of case with exhibits.

7. In essence, the Applicant effectively challenges every item of expenditure incurred including, in particular, insurance premiums and management fees. Her challenges to charges for surveyor's fees and work done or to be done appear to be based almost solely on the fact that the surveyors and contractors involved have a financial connection to the managing agent.

The Lease

8. The lease is dated the 20th October 1989 and is for a term of 99 years from 1st July 1989 with an increasing annual ground rent. The lease provides that the landlord shall insure the property and keep the building and grounds in repair with the tenant of this property paying one half of the costs incurred. Payments on account can be collected and the lease allows the landlord to set up a reserve fund, sometimes called a 'sinking fund'.

9. As to charges relating to litigation costs, clause 3(ix) provides that the tenant is liable to pay for legal costs incurred in contemplation of forfeiture.

However, there is no evidence to suggest that a decision has been made to forfeit the lease and this clause is probably not operational. (See **Barrett v Robertson** [2014] UKUT 0322 (LC).) In addition, however, the Fifth Schedule allows the landlord to recover legal costs as a service charge.

The Law

10. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'. Under section 27A, this Tribunal has the jurisdiction to determine whether service charges are reasonable or payable including service charges claimed for services not yet provided.

The Inspection

11. The Tribunal members inspected the property in the presence of the Applicant. They were also allowed access to the rear garden through the lower flat.

12. The property is mid terraced and close to Southend town centre including 2 commuter train stations to central London. Indeed, one of these rail lines is at the bottom of the fairly long rear garden and shielded, to a certain extent, by mature trees. The building was erected in the early/mid 20th century and is of brick construction with pitched interlocking concrete tiled roofs. The brickwork has a painted weather resistant covering.

13. The roof and the brickwork seemed to be in reasonable condition although external decoration is due. The subject flat has a uPVC window at the rear in the kitchen but the other windows have wooden frames, some of which are rotting away badly. The rear garden is in a poor condition and the Tribunal was told that this is because the long leaseholder of the ground floor flat died some time ago.

14. Of particular relevance was evidence in the front room of the subject flat. It is a lounge/diner although there was also a single bed in the room. It seemed clear from damage to the ceiling that there is a problem with the roof over the bay window, probably caused by water ingress. The Tribunal was told that relatively recently, ivy which had been covering the window in the bedroom behind the lounge had been removed and guttering had been replaced.

15. The only common part of the building was a very small lobby off which are doors to the 2 flats. Electricity meters and a small battery smoke detector were there but there was no room for furnishings.

The Hearing

16. This hearing was attended by the Applicant and the Respondent's witness Hamid Sohrabi from BLR. To his credit, he was as helpful as he could be and the relationship between him and the Applicant was not a bad one. He regretted that he could not assist the Tribunal more than he had because he was only put in charge of this property in August 2017. His first visit had been then and he was the one who presumably arranged for the ivy to be removed and the gutter to be replaced.

17. Dealing firstly with insurance, the Tribunal chair told Mr. Sohrabi about the **COS** Upper Tribunal case and he read out paragraph 67 of the decision which is set out below. Mr. Sohrabi was told that as far as the Tribunal could see, it was in exactly the same position as the judge in that case in view of the evidence produced by the Applicant. He told the Tribunal that he could not really assist. When asked why there was such a wide gap between the block policy premium and the new premium quoted by the landlord's own insurer for what appeared to be the same cover, he answered "I can't say why".

18. Turning to the question of commissions paid, the evidence was that out of the premiums paid in 2015, 2016 and 2017, there was something called 'CTL retained income' of £182.67, £129.03 and £134.20 respectively. There was no explanation for the term 'CTL retained income'. It was then said that BLR had commission of £545.23, £385.93 and £401.46 respectively. Mr. Sohrabi said that this was an error because that commission was paid into their client account by the insurer and some was then distributed by BLR to the broker. He could not say how much.

19. As far as the management fees were concerned, the claims for bank charges, postage and stationary were challenged and the Applicant could not produce any evidence to say that these were specific disbursements actually incurred.

20. Mr. Sohrabi was then told about the case of Ingledene Court referred to below where a well known and long established local firm of chartered surveyors had said that their fees for managing a property fairly close to the subject property in March 2018 were stated to be £175 plus VAT per flat in a building with 4 flats. Mr. Sohrabi was asked what evidence he could produce to substantiate the claim in his written evidence that £3,000 plus VAT was the 'industry norm' for managing a development. He did not answer. He was asked what comment he had to the suggestion that £175 plus VAT per flat was more like the 'industry norm' as he put it, even though the property in question had 4 flats. Again he could not or would not answer.

Discussion – general

21. The comments made by the Applicant in her statement of case that the Tribunal should make its own enquiries, are not either feasible or part of the judicial system in this country. In England, we have what is called an adversarial system which means that if a party brings a case, he or she has to prove it.

22. In **Schilling v Canary Riverside Development PTD Ltd.** LRX/26/2005; LRX/31/2005 & LRX/47/2005 His Honour Judge Rich QC had to consider upon whom lay the burden of proof. At paragraph 15 he stated :

"If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard

was unreasonable. In discharging that burden the observations of Wood J in the
Yorkbrook4 case make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard."

23. Thus comments asking for a ruling that managing agents cannot use companies and/or agencies in which they have a financial interest, are irrelevant. The only questions are whether the services provided or to be provided are reasonable and whether the charges themselves are reasonable and payable. In fact, the RICS service charge management code referred to below does say, under paragraph 10.1 that where a managing agent has a connection with any proposed contractor or supplier, then this should be declared to both the landlord and the lessees. BLR say that they comply with this code and the Tribunal noted their headed paper which says that their values include "*Customer focus, Trust, Team Work, Passion and Innovation*". Clearly they did not comply in this case.

Discussion – insurance

24. The biggest issue for the Tribunal to determine is the level of insurance premiums. This subject has been a consistent source of litigation over the years in situations such as this i.e. with professional landlords insuring large portfolios and demanding amounts which seem to far exceed the premium quotes which the tenant can obtain. The recent Upper Tribunal case of **Cos Services Ltd. v Nicholson and Willans** [2017] UKUT 0382 (LC) has provided an analysis of that history to include such well known cases as **Berrycroft Management Ltd. v Sinclair Gardens Investments (Kensington) Ltd** (1996) 29 HLR 444, **Forcelux v Sweetman** [2001] 2 EGLR 173 and **Havenridge v Boston Dyers Ltd.** [1994] 2 EGLR 73.

25. The general view, for some time, has been that provided a landlord with a block policy can show that insurance is competitively obtained through an insurance office of repute, the test of reasonableness has been met.

26. However, in **Waaler v Hounslow LBC** [2017] EWCA Civ 45, the Court of Appeal gave some thought to the whole question of whether service charge costs have been reasonably incurred. It said that in the context of repairs, section 19 of the 1985 Act "must have been intended to protect the leaseholder against charges that were contractually recoverable otherwise it would serve little useful purpose". The court then considered **Forcelux** and Lewison LJ said, at paragraph 37, "in my judgment, therefore, whether costs have been reasonably incurred is not simply a question of process: it is also a question of outcome."

27. In the **Cos** case, the amount charged for insurance for the years 2014, 2015 and 2016 were, for the whole building, £12,598.20, £12,670.02 and £13,561.94 respectively. The tenants obtained what were close enough comparables save for the fact that they were not block policy quotes and the First-tier Tribunal and then the Upper Tribunal determined that reasonable insurance premiums were £2,803.10, £2,819.08 and £3,017.65, again respectively for the years in question.

28. His Honour Judge Stuart Bridge said, at paragraph 67 of his decision,

> *"It remains a mystery, having heard the evidence adduced by both parties, why there is such a discrepancy between the premiums charged to the tenants under the landlord's block policy and the premiums obtainable from other insurers on the open market. It is a mystery which the landlord has been wholly unable to explain"*

29. The Applicant challenges the need for insurance against terrorism because the location of the property would be highly unlikely to be the subject of such an attack. As far as terrorism risks are concerned, the Upper Tribunal in the case of **Qdime Ltd. v Bath Building (Swindon) Management Ltd** [2014] UKUT 261 (LC) determined that as the Council of Mortgage Lenders ("CML") requires cover against 'explosion', the ordinary meaning of that word would include terrorism. This means, in effect, that if insurance is in the landlord's discretion, then it would be reasonable to insure against risks required by the CML.

30. In this case, it must also be mentioned that BLR has accepted that out of the premiums incurred in 2015, 2016 and 2017 for the whole building, of £1,950.91, £1,419.11 and £1,509.57 respectively, there was 'retained income' and commission of £727.90, £514.96 and £535.66 respectively, some of which was kept by BLR. They say that the consideration for their share of the commission is to act as the 'first contact' for claims and the arranging of remedial work. In **Akorita v Marine Heights (St. Leonards) Ltd.** [2011] UKUT 255 (LC), the Upper Tribunal said, albeit on an *obiter* basis, that an insurance commission paid for anything other than a service such as handling claims, was not payable by a tenant because that cost was incurred not in insuring the building but in paying the commission.

31. Whatever share of the commission was kept by BLR, they are only the first contact and they would normally arrange for ordinary repairs anyway through their own associated company. In addition, the evidence from BLR is that there have been no claims reported within the last 5 years which means that they have done absolutely nothing for the extra money they have received.

32. It should also be added that the Respondent was ordered by the Tribunal on the 26th January 2018 to provided details of any commission received by the landlord, the landlord's agent or any associated individual or company. There is no explanation of what the total commission is or what the landlord etc. receives. In ordering the provision of this information, the Tribunal warned, in writing as part of the order, that in the absence of a full answer, the Tribunal may conclude that a substantial commission had been paid. The commission admitted is about 30% of the premium excluding insurance tax.

33. The evidence provided by the Applicant consists of quotations from Covea Insurance plc (£762.47), Allianz (£489.48) and Ageas Insurance Ltd. (£385.97) All these quotes are for landlord's cover with the same cover details as provided by the landlords own insurance company, which is also Covea Insurance plc. They also include terrorism cover and the Insurance Premium Tax. The Applicant also said that one of the quotations was

excluding employers' liability but the Tribunal was not told which that was and could not locate any such exclusion.

Discussion – management fees

34. On the question of management charges, the Tribunal is conscious of the RICS service charge management code which BLR have said they comply with. On page 13, paragraph 3.4, the fixed annual charge should include administering building and other insurance; collecting service charges; arranging 'periodic' risk assessment e.g. health and safety, and visiting the property to check its condition. Basic fees are quoted as a fixed fee (paragraph 3.3) per annum. In other words, not a fixed fee plus other additions at the whim of the managing agents unless they are specific disbursements actually incurred for this property.

35. For the subject property, BLR have charged £352.80, £411.44, £391.44 and £431.01 for the years ending 30th June 2015, 2016, 2017 and 2018 respectively. They have also claimed the insurance commissions mentioned above. This is per flat and includes VAT. It is said by BLR that their minimum charge is £1,500 plus VAT per property "*which is actually below the industry norm of £3,000 + VAT per annum. We only manage this development at the current level of fees as it forms part of a larger portfolio*".

36. This Tribunal has dealt with local managing agents over many years. As was put to Mr. Sohrabi in evidence, it made an order appointing a manager in March 2018 in respect of Ingledene Court, Horace Road, Southend-on-Sea. The decision is public information as it is on the Tribunal's website. The appointed manager was a chartered surveyor from Hair and Son LLP which is a very long established and well known local firm of chartered surveyors, estate agents and property managers. The charge per flat in a house with 4 flats was £175 plus VAT. It is to the Tribunal members' knowledge that this is a fairly typical charging rate per flat in south east Essex for converted houses.

37. The additional claim for bank charges and postage is without any evidence whatsoever that such disbursements have been incurred in respect of this particular property. Where the management fee is supposed to cover collection of service charges etc., it seems to this Tribunal that this must include the postage and stationary. The evidence suggests that these postage and bank charges are just added to every claim for management fees on many properties managed by the managing agents as an estimate of what they think the total bank charges and postage is over all the properties in question. In other words, there is not even the most basic of calculations based on evidence.

Discussion – other service charges

38. Save for the substantial proposed works in respect of the fire alarm system and emergency lighting to the communal area plus exterior decorations, the Applicant's case is really put on the basis that as there is a financial link between BLR and its contractors, the charges must be unreasonable. There is no evidence put forward to show that the works have been inadequate or that another contractor would have charged less.

39. As far as the major works are concerned, the Tribunal cannot really come to any definitive conclusion. The work for the exterior decoration has not even started the consultation process and the work to the alarm system etc. has only reached stage 1 of the consultation process.

40. However, from what it can see, the Tribunal would only comment that the estimated cost of the fire alarm and emergency lighting for the very small common entrance way at £5,000.00 seems extremely high unless there is some alternative electricity supply being installed which does not seem to be the case. Mr. Sohrabi referred in his evidence to portable detectors being fitted in the flats although the obligation to fit fire resistant doors was being put on the shoulders of the leaseholders. The Respondent should carefully check on the terms of the leases before attempting to gain access to the flats as the leases do not seem to provide for this.

41. Even Mr. Sohrabi accepted that he was confused by his 'expert's' views as he has spent a considerable amount of time checking matters out with such people as Building Control Officers. Despite considerable cross examination of Mr. Sohrabi by the Tribunal members, the whole process seemed as confusing to the Tribunal members as it obviously did to both the Applicant and, apparently, Mr. Sohrabi. The Respondent must give careful consideration to this and explain matters fully both to the Applicant and to the solicitors for the estate of the other leaseholder before further costs are incurred.

42. As to the exterior and common parts decoration etc., the Tribunal indicated to the Applicant at the hearing that it could really do little about that as the section 20 process has not commenced. Having said that, Mr. Sohrabi did say to the Applicant in the hearing of the Tribunal members that BLR would normally chose the cheapest quote for any work and if the cheapest contractor was one nominated by the leaseholders, then that general policy would still be followed.

Discussion – Respondent's costs of representation

43. As to costs, the Respondent was reminded in the directions order (paragraph (9)) that the Applicant was seeking orders preventing the Respondent from claim its costs of representation in this application as future service charges or administration charges. It was ordered to give its response. It has not, from which the Tribunal concludes that such orders are not contested – particularly as the Respondent has not been represented by anyone other than BLR. The Tribunal considers that such orders are a reasonable reflection of the outcome of this case.

Conclusions

44. Taking all these matters into account and doing the best it can to work through the numerous schedules and copy invoices in the bundle, the Tribunal concludes that the following sums are reasonable and if the amount (if any) already paid exceeds those sums, then a repayment should be made.

		£	£
Date	**Item**	**BLR Certificate**	**Payable**
30.06.15	bank charges	10.00	nil
	insurance	975.46	244.74

	management fee	352.80	210.00
	repairs and maintenance	745.32	745.32
	postage	10.00	nil
30.06.16	insurance	709.56	244.75
	management fee	411.44	210.00
	fire safety	35.91	35.91
	fire risk assessment	180.00	180.00
	repairs and maintenance	93.60	93.60
	sinking fund	480.94	480.94
30.06.17	insurance	754.79	244.75
	management fee	411.44	210.00
	fire risk	207.00	90.00
	repairs and maintenance	75.10	75.10
	health & safety	77.91	77.91
	sinking fund	410.21	410.21
30.06.18	insurance	1,100.00	244.75
estimate	management fee	431.01	210.00
	fire risk	175.00	90.00
	professional fees	300.00	300.00
	repairs and maintenance	200.00	200.00

45. The Tribunal has taken the middle quote of the insurance premiums supplied by the Applicant; it has adopted the £175 plus VAT figure mentioned above for management fees and it has determined that the fire risk assessment figures claimed are excessive bearing in mind that remedial work is in hand. A full assessment every year is not required. The ARMA advice is that risks should be assessed and then just reviewed annually – not by way of a full re-assessment each and every year. This is particularly relevant for such a small common area where the review could have been undertaken by BLR on their at least annual visit.

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Bruce Edgington
Regional Judge
3rd April 2018

ANNEX - RIGHTS OF APPEAL

i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.