12662

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AS/LSC/2017/0455**
Property	:	**256 High Street, Harlington, Hayes, Middlesex UB3 5DS**
Applicant	:	**Jatinder Kaur**
Representative	:	**R H Solicitors**
Respondent	:	**Anup Khosla**
Representative	:	
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**P M J Casey MRICS**
Date and venue of Hearing	:	**23 February 2018** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**6 March 2018**

DECISION

Decisions of the tribunal

(1) The tribunal determines that nothing is payable by the applicant in respect of the service charges (management fees) for the years 24 December 2012 to 24 December 2017.

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

(3) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

(4) The tribunal determines that the respondent shall pay the applicant £100 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the applicant.

The application

1. The applicant by an application to the First-tier Tribunal Property Chamber (Residential Property) dated 7 November 2017 seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the applicant in respect of the service charge years 2013 to 2017.

2. Directions for the conduct of the application were issued by the tribunal on 27 November 2017 identifying the application as being suitable for determination on the papers to be provided by the parties but also offering them an oral hearing if either sought such, neither did.

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

The hearing

4. The hearing bundle provided in accordance with the directions was read and considered by the tribunal on 23 February 2018.

The background

5. The property which is the subject of this application is a self-contained maisonette on the first and second floors of a three storey terraced building No 256 High Street, Harlington, Hayes, Middlesex UB3 5DS ("the property"). On the ground floor are shop premises No 230 High Street.

6. Photographs of the building were provided in the hearing bundle. 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.

7. The applicant holds 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. She has exercised her right to acquire a new lease under the provisions of Part II of the Leasehold Reform Housing and Urban Development Act 1993. Following a tribunal hearing on 30 October 2017 all the terms relating to the grant of the new lease were resolved save for landlord's statutory costs and outstanding arrears of ground rent and services charges. The applicant does not dispute the claimed arrears in respect of ground rent or insurance premiums but disputes claimed arrears of other services charge sums.

The issues

8. In the application form and in her statement of case the applicant disputes the respondent landlord's claim for £250 in each year 2013 to 2017 as services charges in respect of the purported fees of a managing agent. The payability and/or reasonableness of this sum each year is the sole issue for the tribunal's determination.

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

Managing agents' fees

10. The lease is dated 9 January 1985 and demises the property for a term of 99 years from 25 December 1984. Clause 2 of the lease contains the lessee's covenants including at 2(2) an obligation to pay $66^2/_3\%$ of the lessor's costs in insuring and repairing the property and at 2(2)(v) "the fees of the Lessor's Managing Agents for the collection of the rents of the flats in the said building and for the general management thereof ...". Clause 2(2)(vi) makes provision for payments on account of such contributions to be paid yearly in advance on 25 December in the sum of £100 or an increased amount as deemed reasonable by the Lessor's surveyor with the amount of the contributions ascertained at the end of each year with any balance owing to be paid within 14 days of notification. In the years in issue no demands have been made for payments on account nor for any yearend balance.

11. The applicant says that from her purchase in 2004 she had an arrangement whereby the respondent collect ground rent and insurance premium contributions from her mortgage provider who

increased her payments to cover these costs. She had not been aware the arrangement had ceased until 18 September 2017 when she received a demand from the respondent for arrears of ground rent, insurance, service charge and an administration fee totally £3,000.16 covering the period from 25 December 2012 to 24 December 2017 apparently as part of the completion process for the grant of the new lease. No Summary of Tenant's Rights and Obligations was attached to the demand but one was when it was reserved on 14 December 2017. The total amount included for managing agents' fees was £1,250.

12. The applicant disputes her liability to pay this sum on a number of grounds, both statutory and factual. She says the respondent is the sole direction of Arkay Commercial Real Estate Limited the firm purportedly appointed in 2012 as managing agents; indeed they share an address. The only document relating to this firm disclosed by the respondent is an unsigned invoice addressed to him dated 10 April 2016 which asks for fees of £375 per annum (including the shop) as management fees for the period 25 December 2012 to 24 December 2017 as well as other sums totally £2,000. The respondent's proof of payment of this sum is a copy of a bank account transaction record showing payment of £2,000 on 25 April 2016 to Acre Ltd. Among the other sums listed is an administration fee for a letter to the mortgage company for the property but this is referred to as an action to be undertaken by consent in an email from the respondent to the applicant's solicitor dated 30 October 2017. She has never had any contact with Arkay, any correspondence being directly with the respondent to whom the insurance broker directly addresses the invoices for insurance renewals. There have also been repair needs which she has had to deal with as the landlord has not responded to requests to act. The statutory grounds she relies on include invalidity of the September 2017 demand as no Summary of Tenant's Rights and Obligations was included, failure to consult over the appointment of Arkay, which she suggests is a qualifying long term agreement, thus limiting liability to £100 per annum and s20B of the Act in that sums had not been invoiced within 18 months of their being incurred. The applicant provided a second witness statement dated 25 January 2018 in which she sought to rebut amongst other matters the respondent's claim that he sought payment from the mortgage provided because the applicant failed to give an address for service and did not reside at the property.

13. In his statement in reply to the applicant's case the respondent makes the claim that the applicant does not reside at the property and "whenever the Respondent's Managing agents have inspected the Property internally, it is clearly evident that the Applicant is renting the property out ...". She had not provided an alternative address for service until her solicitor came on the scene in 2016. This was why he had sought payment from the mortgage lender in the past. He claimed Arkay dealt with insurance and inspected at least four times a year. He also quoted what he regarded as appropriate lease provisions.

The tribunal's decision

14. So far as the applicant's statutory objections to paying the amounts claimed are concerned the re-service of the demand with the Summary of Tenant's Rights and Obligations in 2017 constitutes a lawful demand. It is most unlikely that the purported appointment of Arkay required S20 consultation even though five years were invoiced in one bill (including a year and a half "in advance"). Such agreements with managing agents are usually annual rolling contacts terminable by fairly limited notice. No management agreement was exhibited in evidence however but the tribunal's view is that, if it existed, it was an annual agreement. However she is quite right with regard to the effect of s20B. The earliest she received any notification that the respondent claimed to have incurred costs in respect of management fees was the invalid demand made in September 2017. If the agreement were an annual rolling appointment the fees were incurred by the end of each year and accordingly the respondent can recover nothing for the period before April 2016, ie the fee for 2012/13, 2013/14, 2014/15 and ¼ of the fee for 2016/17.

15. Her more significant point however is whether the agreement was ever entered into in 2012. The picture painted by the documentary evidence is that there was no such agreement and the demand was an afterthought in the process of completing the lease extension. The respondent produces no evidence by way of a witness statement from anyone at Arkay involved in the management of the property. There are no copies of contemporaneous inspection notes or checklists nor letters to arrange internal inspection appointment as required by the lease. In the tribunal's opinion there was no 2012 management agreement with Arkay and the applicant has no obligation to pay the amounts demanded of her for management fees at £250 per annum for the period December 2012 to December 2017.

16. If the tribunal is wrong to so find the reasonableness of the sums claimed would need to be considered. In the five years of the supposed appointment Arkay failed to collect a single penny from the applicant for either ground rent or insurance contribution and took nearly 3½ years to render an invoice for their own annual fees. There is not a single piece of correspondence from Arkay in the bundle save that one invoice. No copies of letters to the applicant, the respondent nor the insurance broker. Such performance in the tribunal's opinion would warrant no payment of any fee whatsoever and on this basis also the applicant is not liable to pay any of the sums claimed as management fees.

Application under s.20C and refund of fees

17. In the opinion of the tribunal the respondent compelled the applicant to apply to the tribunal by maintaining an entirely unjustified claim.

Taking into account the determinations above, the tribunal orders the respondent to refund any fees paid by the applicant within 28 days of the date of this decision.

18. In the application form the applicant applied for an order under section 20C of the 1985 Act. Taking into account the determinations above, the tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the respondent may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

Name: P M J Casey **Date:** 6 March 2018

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

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.