9297

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**: MAN/00BZ/LSC/2012/0150**
Properties	**: 326 Lower Hall Street, St Helens, WA10 1GF**
Applicant	**: Mr O M Carton-Bruniau**
Representative	**: Ms T Dale, Managing Agent**
Respondent	**: Fairhold Mercury Limited**
Representative	**: Mr J Bates of counsel instructed by J B Leitch, solicitors**
Type of Application	**: Application for a determination of liability to pay and reasonableness of service charges**
Tribunal Members	**: P J Mulvenna LLB DMA (chairman)** **Mrs A E Franks FRICS** **Mr L Bottomley JP MIFireE**
Date and venue of Hearing	**: 26 September 2013** **Civil & Family Court, 35 Vernon Street, Liverpool**
Date of decision	**: 26 September 2013**

DECISION

DECISION

That the service charges generally levied by the Respondent for the years ended 31 August 2009, 2010, 2011 and 2012 are reasonable and payable by the Applicant.

DETERMINATION AND REASONS

INTRODUCTION

1. Mr Olivier Max Carton-Bruniau ('the Applicant') made an application to the Tribunal on 29 October 2012 for the determination of the reasonableness and payability of the service charges for the years ended 31 August 2011 and 31 August 2012 demanded by Fairhold Mercury Limited ('the Respondent') in respect of 326 Lower Hall Street, St Helens, WA10 1GF ('the Property').

2. The Respondent commenced proceedings in the County Court on 13 November 2012 for the recovery from the Applicant of service charge arrears, together with other outstanding arrears, in respect of the Property. On 31 January 2013, Deputy District Judge Rowley, sitting at Northampton County Court, ordered that the claim be stayed for six months pending consideration of the present application by the Tribunal.

3. The Property is a self-contained apartment on the third floor of one of two purpose-built blocks ('Block A' and 'Block B', together 'the Development') constructed in or around 2007 and in total containing 196 apartments. The Development is accessed at the front by secure doors in each block and to the rear by a private, gated road leading to a landscaped car park and to secure entrances in each block. Block A is a seven storey building and Block B, in which the Property is situated, is a five storey building. Both blocks have basements with car-parking, bin-store and boiler-room. The basement of Block A also has a caretaker's office and toilet facilities. The service charges for the two blocks (but not those common to the whole Development) are calculated separately to reflect the greater costs which might be expected to be incurred in respect of Block A as it has two extra floors. The internal common areas include secure entrance halls, together with lifts, stairs and landings in each Block giving access to all floors; basement car parking areas, including a car parking space allocated to the Applicant; modest ornamental landscaped areas; and bin stores. The Development is situated in a mixed residential/commercial/industrial area on the edge St Helens town centre and backs onto the Liverpool - St Helens – Wigan railway line.

4. The Applicant has a leasehold interest in the Property held under a Lease made between (1) Countryside Properties Land (One) Limited Countryside and Properties Land (Two) Limited and (2) the Applicant on 18 October 2008 for a term of 250 years from 1 April 2007 ('the Lease'). He sublets the Property.

5. The Respondent has a freehold interest in the Development and has engaged Mainstay Residential Limited ('Mainstay') as the managing agents for the Development. Mainstay succeeded a firm called Remus Management Limited ('Remus') in that capacity on 1 July 2011.

THE INSPECTION

6. The Tribunal inspected the common parts of the Development externally and internally on the morning of 26 September 2013. The Applicant was represented by Ms T Dale, his Managing Agent. The Respondent was represented by Mr J Bates of counsel instructed by J B Leitch, solicitors, together with Ms K Magill, Property Manager, Mr T Blodwell, Area Property Manager, and Mr J Hughes, Caretaker, who are all employed by the managing agents. The Tribunal also made an internal inspection of a vacant flat (430 Lower Hall Street) which had the same internal layout (a lounge/kitchen/diner, two bedrooms, one en-suite, and a separate bathroom/w.c.) as the property. The Tribunal found the Development to be maintained to a reasonable standard.

THE HEARING

7. Directions were issued by a procedural chairman on 4 December 2012. The parties have substantially complied with the Directions.

8. The substantive hearing of the application was held on 26 September 2013 at the Civil & Family Court, 35 Vernon Street, Liverpool. The Applicant was represented by Ms Dale. The Respondent was represented by Mr Bates, together with Ms Magill and Mr Blodwell.

THE LAW

9. The material statutory provisions in this case are as follows.

(i) The Landlord and Tenant Act 1985

Section 27A (1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to... (c) the amount which is payable'.

Section 27A (3) provides that an application may also be made 'if costs were incurred.'

Section 19(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.

(ii) The Commonhold and Leasehold Reform Act, Schedule 11, Paragraph 5 provides for applications to be made to a leasehold valuation 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.

THE LEASE

10. The Tribunal had before it a copy of the Lease which has been read and interpreted as a whole. In reaching its conclusions and findings, the Tribunal has had particular regard to the following matters or provisions contained in the Lease, none of which were the subject of dispute or argument by or on behalf of the parties:

(a) The definition of 'Service Charge', 'Services' and related expressions in Clause 1.

(b) The Tenant's covenants in Clause 4 and the Fourth Schedule.

(c) The Landlord's maintenance covenants in Clause 5.

(d) The computation of the Service Charge in the Fifth Schedule.

(e) The purposes for which the Service Charge is to be applied in the Sixth Schedule.

(f) The costs referred to in the Seventh Schedule.

THE EVIDENCE, SUBMISSIONS & THE TRIBUNAL'S CONCLUSIONS & REASONS

11. The Applicant has asked for a determination of the reasonableness of the service charges for the financial years 2008/09, 2009/10, 2010/11 and 2011/12. The Tribunal had before them the service charge demands for those years which complied with The Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007.

12. The Tribunal heard oral evidence and submissions from Ms Dale on behalf of the Applicant, together with oral evidence from Ms Magill and oral submissions from Mr Bates on behalf of the Respondent. The Tribunal also had before them the written evidence and submissions of the Applicant and the Respondent.

13. The Tribunal has considered the issues on the whole of the written and oral evidence and submissions now before them, has had regard to their own inspection and, applying their own expertise and experience, has reached the following conclusions on the issues before them.

14. The Applicant claimed that the service charges were unfair and that there had been unreasonable increases since Mainstay succeeded Remus. He raised four particular challenges which, if found to be sustainable might

have a material impact on the reasonableness of the service charges. They are:

(i) an unreasonable increase in the level of the service charge following the replacement of Remus by Mainstay as the managing agents;

(ii) inaccurate determination of the number of properties in the Development poor management;

(iii) a refusal to enter into a monthly installment arrangement for payment of the service charges rather than six months in advance;

(iv) poor management.

15. The parties' evidence and submissions, together with the Tribunal's decisions on these issues are as follows:

(i) Unreasonable increase in the level of the service charge following the replacement of Remus by Mainstay as the managing agents

15.1.1 The Applicant claimed that there had been an unreasonable increase in the level of the service charge following the replacement of Remus by Mainstay as managing agents for the Property. It had risen from £89.07 under Remus to £115.04 under Mainstay.

15.1.2 In support of his claim that the service charge was unreasonable, the Applicant referred the Tribunal to a comparable property, a flat at 368 Camp Street, Salford, which is also leased by the Applicant and was constructed by the same developer, Countryside Properties. In comparing the two properties, the Applicant made the point that, in the financial year 2010/11, the rent for the Camp Street property was £510.00 per month, the service charge £82.61 per month and that the service charge was 16.2% of the rent, whilst the rent for the Property was £425.00 per month, the service charge £115.04 per month and that the service charge was 27.06% of the rent.

15.1.3 The Respondent submitted that the levels of the service charges at the Property were reasonable and produced documentary evidence to support that submission. In relation to the comparable property, the Respondent submitted that the Tribunal should have regard to the different area in which that property was located and produced a leasehold valuation tribunal decision in relation to the development in which the comparable property is situated which suggested that the level of management and service provision was poor.

15.1.4 The Tribunal acknowledges that the comparable property is located in a different area which might have implications for the level of rent and on the nature and extent of the services required. In this respect, the Applicant has produced no evidence of the nature or extent of the services at the comparable property. Ms Dale gave evidence that the comparable property had a caretaker, cctv and security but did not address the extent of the service provision. The Tribunal is not, therefore, assisted by the comparable property. The Tribunal has noted the leasehold valuation

tribunal decision relating to the comparable property, but observes that it related to issues other than those which are the subject of the present application. The Tribunal is not, therefore, assisted by that decision.

15.1.5 In the light of these findings, the Tribunal must assess the position objectively on the basis of the evidence before it. On the basis of that evidence, which comprises the documentary evidence produced by the Respondent, the Tribunal finds that the service charges demanded in respect of the Property for the years in question were reasonable.

(ii) Inaccurate determination of the number of properties in the Development

15.2.1 The Applicant claimed that Mainstay, acting on the Respondent's behalf, miscalculated the number of flats in the Development, having based their calculations on three rather than two blocks. He claimed that this was evidence of poor management.

15.2.2 The Respondent said that Mainstay were advised by their predecessors (Remus) that there were 260 flats in the Development but that their subsequent calculation revealed that there were 196. This led to an increased service charge per unit, despite a reduction in the total costs of the services provided, but there was no backdated increase to reflect the actual position. It appears that there was an intention to construct a third block which, for reasons which are not material to the issues before the Tribunal, was not pursued.

15.2.3 The Tribunal finds that there was initially a miscalculation of the number of flats at the Development, but accepts that the miscalculation was not a culpable error by the Respondent and gave rise to no adverse impact on the service charges demanded from the tenants. The miscalculation did not, therefore, prejudice the Applicant.

(iii) Payment Frequency

15.3.1The Applicant claimed that he had asked Mainstay to accept monthly payments of the service charges, but had received no satisfactory response.

15.3.2 The Respondent said that all demands have been made in accordance with the Lease.

15.3.3 The Tribunal observes that the Lease provides that the service charges are payable half yearly in advance. In these circumstances, the Tribunal finds that the Respondent has acted reasonably in demanding payment on the basis provided by the Lease.

(iv) Poor Management

15.2.1 The Applicant has claimed that management is poor but has provided no detail or evidence to support the claim.

15.2.2 The Respondent has pointed to the lack of detail and evidence and relies on *Yorkbrook Investments Limited -v- Batten (1986) 18 HLR 25* (see paragraph 17 below).

15.2.3 The Tribunal accepts the Respondent's position for the reasons given below (paragraph 18 and following).

16. At the hearing, Ms Dale raised the possibility of the Applicant (and others) being called upon to make higher contributions by way of service charge because of the impact of the high number of vacant properties at the Development arising from repossessions and for other reasons. Although notice had not been given of this question, Ms Magill was able to address the issue by oral evidence. She said that there was no correlation between vacant properties and service charge arrears. If a property became vacant as a result of repossession, the mortgagee (or other person repossessing) would be invoiced for the service charge; in other cases, the lessee would remain liable for the service charge. If arrears had to be recovered by action, costs were sought and awarded. At worse, the position might give rise to a cash flow problem, but had no impact on the level of service charge. Ms Magill's evidence was not challenged. It appeared to the Tribunal to be reasonable and it was accepted without reservation.

17. The Tribunal have considered all of the issues individually and collectively to determine whether of or not the service charges for the years in question were reasonable.

18. In *Yorkbrook Investments Limited -v- Batten (1986) 18 HLR 25* it was held that there is no presumption for or against the reasonableness of standard or of costs as regards service charges. If a defence to a claim for maintenance costs is that the standard or the costs of the service are unreasonable, the tenant will need to specify the item complained of and the general nature – but not the evidence – of his case; once the tenant gives evidence establishing a prima facie case, it will be for the landlord to meet those allegations.

19. In the light of the evidence given, and the submissions made, by and on behalf of the parties, the Tribunal observes that the Applicant in this case has raised no sustainable issues, objective or evidence-based challenges as to value for money in relation to any of the individual costs recharged in respect of the service charges demanded by the Respondent. He has simply challenged them in general, subjective terms as he considers them to be excessive. In particular, no sustainable evidence has been produced of comparable service charges for comparable works and services at comparable properties which would suggest that the service charges are inherently unreasonable. The Applicant has referred to the service charge demanded in respect of what he describes as a similar block in Salford, but has provided no details of the services provided from which an objective assessment could be made. The Tribunal is aware from their own experience and knowledge that the service charges for the Property are not substantially different from those of other, similar developments in the immediate area or in the wider area of the Residential Property Tribunal's Northern Region. The Tribunal finds that the Applicant has not discharged the burden of proof as to the reasonableness of the standards of the

services and the costs incurred. The Tribunal finds, therefore, that they are reasonable and payable by the Applicant.

20. In relation to those aspects of the service charges which the Applicant has expressly challenged, the Tribunal finds, for the reasons given in paragraph 15 above that the challenges are without merit and are unsustainable. The Applicant's submissions are not accepted in relation to any of the issues raised.

21. The Applicant also raised issues in relation to the ground rent. The Tribunal has no jurisdiction to consider such issues.

COSTS

22. The Tribunal has power to award costs and/or reimburse fees under Rule 13 of The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 which provides, insofar as it is material to the present case:

'(1) The Tribunal may make an order in respect of costs only –

...(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in –

...(ii) a residential property case...

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or any part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.'

23. The Respondent submitted an application for costs on the basis that the Applicant had acted unreasonably by not accepting the reasonableness of the service charges at an earlier stage, particularly as there had been two earlier decisions of a leasehold valuation tribunal on similar issues in respect of the same Development, thus giving rise unnecessarily to the present proceedings.

24. The Tribunal considered that, as the Applicant was not a party to the previous proceedings before leasehold valuation tribunals and could not reasonably be expected to be aware of the decisions (he does not reside at the Property and no other reason has been advanced as to how he might have become aware of the decisions), there is no sustainable reason for imputing knowledge of those decisions to the Applicant. Having reviewed the whole of the documentation, the Tribunal is satisfied that there was sufficient scope to cause confusion in the minds of the lessees receiving the service charge demands. The correspondence referred to the wrong number of apartments at the Development, referred to a third block and failed adequately to deal with problems arising from the handover to Mainstay by Remus, including the apparent failure of Remus to make some payments or properly to account for expenditure. None of these shortcomings arose from deliberate obfuscation by the Respondent but

they did create a lack of clarity which inevitably gave rise to uncertainty by the lessees, including the Applicant, of the basis upon which they might assess reasonableness. In these circumstances, the Tribunal has determined that it would not be appropriate to award costs in this case.

25. The Applicant requested that an order be made under section 20C of the Landlord and Tenant Act 1985 that the costs incurred, or to be incurred, by the Respondent in connection with the proceedings before the Tribunal should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenants. The Tribunal has no evidence that the Respondent has acted unreasonably in any respect and the Respondent has, in any event, succeeded before the Tribunal. It would not be reasonable or proportionate to make an order.