9718

		**FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)**
Case Reference	:	**LON/OOAE/LSC/2013/0449**
Property	:	**Flat 45B, Chamberlayne Road, London NW10 3NB**
Applicant	:	**Ms J. Booth (leaseholder)**
Representative	:	**In person**
Respondent	:	**Mr B. Maghzian (landlord)**
Representative	:	**In person**
Type of Application	:	**Determination of service charges, variation of the lease and costs (under the Landlord and Tenant Acts 1985 and 1987)**
Tribunal Members	:	**Professor James Driscoll, solicitor, (Tribunal Judge) and Mr Richard Shaw FRICS (Tribunal Member)**
Date and venue of Hearing	:	**The hearing took place on 20 January 2013 at 10 Alfred Place, London WC1E 7LR.**
Date of Decision	:	**30 January 2014**

DECISION

The Decisions summarised.

1. The parties agreed several matters which are set out in a schedule prepared by the landlord. A copy of that schedule is attached to this decision. In relation to that schedule the parties told us at the hearing that they did not in fact agree on the costs of the insurance premiums for the service charge years 2005 - 2006 and 2007 - 2008.

2. The landlord agreed that he has not given the leaseholder notices under section 21B of the 1985 Act. The leaseholder is entitled to withhold payments until such notices are given to her by the landlord.

3. In addition, during the hearing the parties agreed the costs of employing Rentokill to deal with vermin in the building.

4. At the hearing the landlord told us that he no longer wished to pursue the costs claimed for changing the front door lock to the building.

5. As to the disputed matters for ease of reference we attach a copy of the second schedule prepared by the landlord and used at the hearing setting out the charges the parties could not agree on.

6. We determine that all of the costs claimed for clearing the main drain were reasonably incurred and recoverable in full.

7. We determine that the costs claimed for works to the intercom are not recoverable.

8. We determine that solicitors costs incurred by the landlord are recoverable in the sum of £250 (exclusive of VAT).

9. We determine that additional solicitors costs of £250 (exclusive of VAT) are allowable.

10. As to the major works for external works to the premises undertaken in 2011 we determine that the landlord failed to carry out the statutory consultation required by section 20 of the Act. We decided to dispense with the requirements in this case but we make it a condition of this dispensation that the landlord pays compensation to the leaseholder in the sum of £1,036 which reduces her liability to contribute to these costs to the sum of £2,000.

11. We determine that the costs of the electrical works of £500 are recoverable.

12. We determine the costs of insurance for the disputed periods are recoverable.

13. In the exercise of our powers in section 20C of the 1985 Act we determine that no costs incurred by or on behalf of the landlord relating to these proceedings can be recovered as a future service charge.

The Applications

14. The applicant is the leaseholder of Flat 45B in a four-storey building consisting of four floors (or levels). There is basement storage and the ground floor is a restaurant held under a business lease. There are two flats on the first floor: one is described as a studio flat (which is let under an assured shorthold tenancy); the other is a one-bed-roomed flat which is held on a long lease. On the second floor there is a maisonette held under a long lease. This is the one which is owned by the applicant.

15. In all there were three applications.

16. In the first, the applicant seeks a variation of her lease as she considers that her service charge contribution which is set at 55% of the landlord's expenditure in carrying out its responsibilities to insure, repair and maintain the building is too high. That application is made under Part IV of the Landlord and Tenant Act 1987.

17. The second application is for a determination of service charges under the provisions in the Landlord and Tenant Act 1985.

18. The third application seeks an order limiting the landlord's costs under section 20C of the 1985 Act.

19. A pre-trial review was held on 13 July 2013 when directions were given and an interim hearing was arranged for 25 September 2013 to find out (a) what is in dispute over the service charges and (b) how the parties are to prepare for a final hearing regarding service charges and the application under section 20C of the 1985 Act and (c) whether there are any possible grounds for a variation of the lease and whether that claim should be struck out as having no reasonable prospect of success or whether further directions should be given on that claim.

The first hearing

20. The respondent is the owner of the freehold of the building, the landlord of the studio flat, the landlord under the two long leasehold flats and the landlord under the business lease of the ground floor and basement. His wife (Mrs S. Khalili) is the leaseholder of the one bed-roomed flat.

21. The parties agreed at the hearing held on 25 September 2013 that the applicant's lease is to be varied by substituting the figure 30% into schedule 5 clause 2 of her lease as her service charge contribution in substitution for the existing figure of 55%. The hearing of the applicant's challenge to service charges, which was also scheduled for hearing on 25 September 2013, was adjourned until 20 January 2014.

22. The preliminary decision and additional directions were given by the tribunal in a decision dated 21 November 2013. The background to the disputes is set out in that decision.

The second hearing

23. The adjourned hearing in connection with the service charges took place on 20 January 2014. Both the parties attended. The leaseholder prepared a bundle of documents and as mentioned above the landlord prepared two schedules relating to what had been agreed and what remained in contention.

24. We heard submissions from each party and each of them made closing remarks. We did not think it necessary to carry out an inspection of the property. The parties agreed with us on this.

25. The leaseholder told us that she has not taken steps yet to vary her lease following the agreement with the landlord on the 25 September 2013 that her service charge contribution should be reduced from 55 to 30%. This will be delayed as she intends applying for the grant of a new lease (under the provisions in Part I of the Leasehold Reform, Housing and Urban Development Act 1993) and will ensure that the terms of the new lease will reflect this agreement. Pending this she and the landlord have agreed that the revised contribution should have effect. The landlord told us that to take account of the fact that this reduction is not strictly speaking retrospective that he proposed a reduced contribution of 33% for all the service charge periods (some of which date back to the period 2000 to 2001). In her written and oral responses the leaseholder did not disagree with this approach. We think this is a fair and sensible way to proceed.

Reasons for our decisions

26. In this section of the decision we consider each of the disputed items as they appear in the landlord's schedule of the disputed items (the second schedule) and the other disputed items referred to in paragraph 1 above and explain our reasons for reaching the decision.

27. First are the costs of certain electrical items which the leaseholder disputes. The landlord told us that these relate to an upgrading of the wiring in the building. We conclude that the leaseholder benefited from these works and that they were carried out by the landlord under his obligations in the lease. We determine that the leaseholder's share (£500) is recoverable.

28. Next are the costs of the insurance for the disputed periods . The leaseholder does not challenge the reasonableness of the premium but she is not convinced that it was paid or that the building was insured during that period. The landlord showed us various schedules relating to the insurance cover produced by his broker and he suggested to us that this would only

have been sent to him if the premium had been paid. Although some sort of receipt would have been preferable, on balance we accept that this premium was paid and the building was insured during this service charge period. As the landlord has substantial investments in the building (a flat which he rents and the commercial lease) we consider that it is highly unlikely that he would fail to insure the building. Accordingly we determine the costs of the insurance were incurred and properly chargeable as a service charge.

29. The next items are the costs of works to clear the drains to the building. In all, four sets of costs are claimed (see page 1 of the second appendix). The landlord told us that each of the flats and the commercial user (for some years a cafe or restaurant) use this drain which is also the main drain for other restaurants close to the premises. The leaseholder objects to paying as she claims that lorries used by the landlord in a previous business caused the blockage from the discharge of waste oil. On balance we prefer the landlord's explanation as such works are a likely consequence of a mixed-use premises and the leaseholder was aware that she was buying a flat in such premises at the time of purchase. We determine that the costs of these works (March 2012, November 2004, April 2004 and February 2005) were reasonably incurred and recoverable in full (in the total sum of £179.95).

30. Turning to the next item, which relates to the costs of intercom installation, the leaseholder was adamant that until 2013 her intercom never worked and no-one employed by the landlord has ever carried out remedial works. Until recently her visitors had to call her on their mobile phones (or shout from the street) to gain admittance. On balance we prefer her version of events and we determine that these costs (£158.40 and £114.17 respectively) are not recoverable as a service charge.

31. A solicitor's fee of £587.50 was charged for writing a letter before action to the leaseholder because she was in arrears with service charges and ground rent. (We told the parties that this tribunal does not have jurisdiction over ground rent recovery). Whilst the landlord has the right under the lease to employ solicitors we consider that the charge for writing one letter (and the associated work) is too high. We determine that the charge of £250 (exclusive of VAT) is recoverable from the leaseholder. For the same reasons we determine that a second charge in the sum of £250 is also recoverable (exclusive of VAT).

32. The next item is the most complicated part of the claims. It relates to costs of external decorative and some external roof repairs which the landlord claims cost the sum of £9,200 for which he claims a 33% contribution of £3,036 from the leaseholder. He told us that he was unaware of the statutory requirements in section 20 of the Act and in the regulations made under that provision. In any event, in his opinion as he is required under the lease to carry out external decorative works and to deal with urgent works he had to simply deal with the works. He obtained two quotations for the works which he says he copied to the leaseholder. However, she denied having received these and she told us that she only became aware of the works when the scaffolding was erected in or about

April 2012 after which the works started. The landlord showed us photographs of the building taken before and after the works. This suggested to us (and the leaseholder agreed) that the decorative works were of a reasonable quality.

33. The obvious difficulty for the landlord is that recovery of the costs where the statutory consultation requirements have not been complied with is limited to £250 per leaseholder unless the tribunal decides to dispense with these requirements. Our power to dispense is contained in section 20ZA of the Act. We are aware of the principles set out in the decision of the Supreme Court in the case of *Daejan Investments Ltd v Benson* [2013] UKSC 14 on the correct approach to dispensing with the consultation requirements and that this tribunal should consider the degree of prejudice suffered by the leaseholders in reaching such a decision. Dispensation should usually be granted, concluded the Court, as any prejudice suffered by the leaseholder can be compensated by the landlord for any losses and in some cases the landlord could also be required to contribute to the leaseholder's professional costs in seeking advice where the landlord has failed to consult.

34. The leaseholder told us that if she had had the opportunity she would have nominated her brother to bid for the contract. He is an experienced building and decorator, she told us and she considers that he would have made a competitive bid for the contract.

35. We consider that on balance this is a case where the tribunal should dispense with the consultation requirements but on conditions. The landlord was quite candid about the failure to consult though we are very surprised that he should be so ignorant of a set of important procedures that have been in force since 2003. We do not accept that the works were urgent and in our view the full statutory consultation could and should have been carried out. The leaseholder suffered prejudice as she had no opportunity of challenging the landlord's choice of contractor and to nominate her own contractor. We have therefore decided that dispensation will be granted but on the condition that he reduces her contribution by the sum of £1,036 . To summarise, dispensation will be granted on condition that the leaseholder's contribution is reduced by the sum of £1,036 and we determine that her contribution should be limited to the sum of £2,000.

36. This concludes our explanation of our determinations. Before dealing finally with costs issues we must record again our surprise when the landlord told us that he was not familiar with the consultation requirements in section 20 of the Act. He also told us that he is not familiar with the RCIS codes of management practice for both residential and commercial leases. So far the landlord has not appointed managing agents for the building. But he may find that appointing a professional manager will be in his interests and those of the residential and the commercial tenants. Such an appointments may also help to alleviate what is clearly a difficult and at times somewhat acrimonious relationship between the landlord and the leaseholder.

Costs

37. We considered the issues of costs and our discretion under section 20C of the 1985 Act. At the second hearing the landlord told us that he has incurred losses as a result of attending the tribunal. However, he was unable to adequately explain how he had incurred such losses. As he has not (for the most part) sought professional advice and he did not suggest that he incurred any legal or other professional costs in dealing with the applications.

38. In these circumstances we make a determination under section 20C of the 1985 Act that no costs relating to these applications should be included as part of any future service charges.

30 January 2014

Appendix of the relevant legislation

Landlord and Tenant Act 1985

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
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.
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 a Leasehold valuation 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 a Leasehold valuation 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.

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

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 leasehold valuation 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 a leasehold valuation tribunal;
(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation 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.
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.

Schedule 11, Commonhold and Leasehold Reform Act 2002

Meaning of "administration charge"

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.
Reasonableness of administration charges
2
A variable administration charge is payable only to the extent that the amount of the charge is reasonable.
3
(1)
Any party to a lease of a dwelling may apply to a leasehold valuation tribunal for an order varying the lease in such manner as is specified in the application on the grounds that—

(a)
any administration charge specified in the lease is unreasonable, or
(b)
any formula specified in the lease in accordance with which any administration charge is calculated is unreasonable.
(2)
If the grounds on which the application was made are established to the satisfaction of the tribunal, it may make an order varying the lease in such manner as is specified in the order.
(3)
The variation specified in the order may be—
(a)
the variation specified in the application, or
(b)
such other variation as the tribunal thinks fit.
(4)
The tribunal may, instead of making an order varying the lease in such manner as is specified in the order, make an order directing the parties to the lease to vary it in such manner as is so specified.
(5)
The tribunal may by order direct that a memorandum of any variation of a lease effected by virtue of this paragraph be endorsed on such documents as are specified in the order.
(6)
Any such variation of a lease shall be binding not only on the parties to the lease for the time being but also on other persons (including any predecessors in title), whether or not they were parties to the proceedings in which the order was made.
Notice in connection with demands for administration charges
4
(1)
A demand for the payment of an administration charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to administration charges.
(2)
The appropriate national authority may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.
(3)
A tenant may withhold payment of an administration charge which has been demanded from him if sub-paragraph (1) is not complied with in relation to the demand.
(4)
Where a tenant withholds an administration charge under this paragraph, any provisions of the lease relating to non-payment or late payment of administration charges do not have effect in relation to the period for which he so withholds it.
Liability to pay administration charges
5
(1)

An application may 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.
(2)
Sub-paragraph (1) applies whether or not any payment has been made.
(3)
The jurisdiction conferred on a leasehold valuation 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).
Interpretation
6
(1)
This paragraph applies for the purposes of this Part of this Schedule.
(2)
"Tenant" includes a statutory tenant.
(3)

"Dwelling" and "statutory tenant" (and "landlord" in relation to a statutory tenant) have the same meanings as in the 1985 Act.

(4)

"Post-dispute arbitration agreement", in relation to any matter, means an arbitration agreement made after a dispute about the matter has arisen.

(5)

"Arbitration agreement" and "arbitral tribunal" have the same meanings as in Part 1 of the Arbitration Act 1996 (c. 23).