11485

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AE/LSC/2015/0525 and LON/00AE/LSC/2016/0011**
Property	:	**First floor flat, 150 High Street, Harlesden NW10 4SP**
Applicant	:	**M Qamar MS Qamar YQamar**
Representative	:	**Andrew Walker, Mr and Mrs Simons Limited**
Respondent	:	**Ramesh and Ratan Budia**
Representative	:	**Raj Budia**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Judge Hargreaves** **Michael Taylor FRICS**
Date and venue of hearing	:	**10 Alfred Place, London WC1E 7LR** **19th April 2016**
Date of decision	:	**19th April 2016**

DECISION

Decisions of the Tribunal

(1) The Tribunal determines that in respect of the year 2014-2015 the sums of (i) £354.45 in respect of insurance premiums (ii) £83.34 in respect of communal electricity bills (iii) £100 in respect of roof repairs (iv) £100 in respect of a management fee are reasonable and payable by the Respondents.

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

(3) The Tribunal makes an order (if required and for the avoidance of doubt) 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 refuses the Applicants' application for Tribunal Rule 13 costs against the Respondents.

(5) Any other costs issues will have to be referred to the county court.

REASONS

The application

1. The Applicants seek 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 Respondents in respect of (i) a service charge demand dated 8th January 2015 (p20) and (ii) a service charge demand dated 26th June 2015 (p24).

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

3. Page numbers refer to those in the trial bundle prepared by the Applicants.

4. The two applications were referred by the county court at the end of 2015. Claim number B01TM578 was issued on 5th May 2015 (p142) and claimed (without pleading any particulars) unpaid service charges in the sum of £1097.29. It turned out that this claim related to the service charge demand at p20 of the bundle dated 8th January 2015.

5. The second application relates to claim number B38YM967 dated 19th June 2015 based on the invoice at p24 dated 26th May 2015 for £12,507.

6. The applications have had a somewhat tortuous procedural history which it is unnecessary to relate. The trial bundle was not exemplary (eg several of the exhibited invoices had nothing to do with the referred applications) and it was necessary to extract oral answers to the Tribunal's questions in order to clarify the basis of the Applicants' case and the Respondents' position in relation to it. That case was presented in the main by Andrew Walker, an employee of the relatively recently appointed managing agents Mr and Mrs Simons Limited, also represented by Mark Simons. Yasar Qamar, one of the three landlords, also appeared before the Tribunal. It appears that the handover between agents (within the last 18 months around November 2014) has not been completely efficient and Mr Walker had difficulties confirming certain issues due to lack of paperwork, though the decision to issue proceedings had been theirs. The Respondents were assisted by their son Raj Budia. There has a been a history of arrears by the Respondents, and various disputes over payments they are said to have made, but in essence their case as presented by Raj Budia is that they will pay against properly documented invoices, but resent being asked to pay for expensive property repairs, some of which he complains have been carried out badly by Saif Builders, run by one of the Applicants' relatives.

The lease

7. The Respondents are proprietors of the first floor flat above the ground floor shop premises at 150 High Street, Harlesden. There is a ground floor flat behind the shop which the Applicants let on an assured shorthold tenancy and which has, to put it neutrally, a problematic flat roof which required repairs in 2012 and 2014 which were carried out by Saif Builders (p66-68). There is a flat above the Respondents' flat. There is some evidence that substantial repairs are required to the property: see for example the London Fire safety report at p82 dated November 2014 and the builders' quotes at pages 78-81.

8. The lease (p146) was granted on 28th April 1984. It is straightforward but limited. The Respondents covenanted in clause 3 to pay the ground rent in advance on 25th March and 29th September and *"(b) secondly by way of additional rent and Lessee's contribution payable as hereinafter provided."* That takes us to clause 4(b) in which the Respondents covenant *"To defray (or in the absence of direct assessment on the Flat to pay to the Lessors one quarter of) all general and water rates and all othere taxes charges and outgoings payable in respect of the Flat or any part thereof"* and to clause 5(b) which contains a further covenant *"To pay one quarter of the expenses payable in respect of the Service Obligations."* Those are defined as *"the obligations undertaken by the Landlords to provide the services and other things specified in clause 6."* Moving to clause 6(a) the Landlord covenants to *"Pay all outgoings in respect of the Common Parts and of the Building and such sums as are charged for interest to*

the lessors for discharging the Service Obligations prior to receipt of the lessees' contributions for the same."

9. As a matter of construction of the lease, there is no express provision for seeking monies on account or for providing for a maintenance fund. The landlord has to fund the service obligations and then recover the expenses, if necessary charging interest paid on any loan obtained to do so. There is power to employ and charge for the services of managing agents: clause 6(g).

The claim for £1097.29

10. The service charge demand at p20 of the bundle was put together by Yasar Qamar though we were shown a final version on Mr and Mrs Simons Limited headed notepaper which was in the final form of the service charge demand made on the Respondents, who produced the demand and confirmed that they had received it. The Respondents confirmed that they have no objection to paying the sums claimed in respect of insurance (£354.45) and their share of the electricity bill (£83.34) and this is reflected in the orders above.

11. They objected to contributing to the cost of the roof repairs carried out in 2014 and produced a similar invoice for 2012 which they said they had paid. The Respondents therefore claimed that the 2012 repairs had been poorly executed by Saif Builders, the director being related (admittedly) to the Applicants. There being no proper evidence one way or the other, except for the necessity of carrying out repairs, we consider that a contribution of £100 by the Respondents is reasonable.

12. The next item claimed is set out as *"Management fee: (charge them up to £200)"* which was duly done. It is said by way of explanation that the £200 was charged by the previous managing agent, that there was an agreement in writing evidencing this amount, but that admittedly it was not in evidence before the Tribunal. It also seemed to us, doing the best we could on the evidence, that the previous agents had not managed the property for a full year in 2014 anyway. In the circumstances, while we accept that there is power to charge a management fee, we cannot be satisfied by any reasonable burden or standard of proof that the previous agents did actually charge £200 as opposed to inserting the figure suggested by Yasar Qamar. Taking everything into account, we consider that £100 is a reasonable figure on the evidence before the Tribunal.

13. The next item is expressed to be *"Maintenance Fund (charge them up to £300 each as loads of repairs required)."* Again, this was translated into a claim for £300. We can deal with this briefly: any claim for monies towards a maintenance fund has no contractual basis under the terms of the lease and is therefore not recoverable, whether reasonable or not. The Applicants have to pay first, recover later.

The claim for £12,507

14. This is contained in a service charge demand issued by Mr and Mrs Simons Limited on 26th May 2015 in respect of *"major works, project management and supervisory"*. It does not indicate when the amount charged is payable and there is no covering letter in the bundle. Less than a month later on 19th June, county court proceedings were issued. As none of the amount claimed had been expended by the Applicants, none of this invoice is recoverable, it being an attempt to obtain a payment on account, which is not provided for by the terms of the lease, as explained above, quite apart from issues as to when it might be payable

15. As this conclusion deals with the recoverability of this amount, it would be wrong for the Tribunal, and unnecessary for the purposes of this decision, to deal with whether the consultation process partly evidenced in the bundle and preceding the demand was valid or defective or requiring dispensation or whether the amounts if incurred would be reasonable. There is simply no evidence before the Tribunal, apart from anything else, on which it could reasonably and properly come to a decision on any of these alternatives, and it would be wrong to do so before any of the intended works have been carried out so far as costs and standards of work are concerned. Yasar Qamar said he *had* paid part of this bill, but since that was for other works to the building (and not the major works referred to in this invoice), that was to no avail, it being quite clear from the case as explained to the Tribunal, that the charges related to the s20 consultation partly evidenced at pages 73 and 77 (and if the landlord had paid for works in 2014 then those works could not have been the subject of consultation notices issued later in January 2015).

Application under s.20C and Rule 13 costs

16. At the end of the hearing, the Respondents were invited to apply for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal determines for the avoidance of doubt, 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 Applicants may not pass any of their costs incurred in connection with the proceedings before the Tribunal through the service charge, this being a case where, in particular, the Applicants had failed to succeed in respect of a significant sum by dint of not considering the straightforward effect of the construction of the relevant terms of the lease. The claims were exaggerated and unwarranted and criticism of a failure to mediate or correspond on the Respondents' part assumes that the Applicants' case was perfectly sound and well presented, which it was not.

17. The Applicants made in turn an application for their costs pursuant to Tribunal Rule 13. Bearing in mind the overall outcome of this application and the comments made in paragraph 16 above, that is something of a bold move. Although the Applicants claim that the Respondents in failing to participate actively in these proceedings beyond contributing one sheet of paper towards the bundle defended unreasonably, and whilst it is true that the Respondents could and should have been more pro-active about actually paying the sums they did not contest, it is stretching the concept of unreasonable behaviour to apply it to the Respondents when the terms of the lease have on the face of it been ignored by the Applicants to the potential disadvantage of the Respondents, whose decision to resist the demands has turned out to be well justified. Therefore the Tribunal will not make any order for costs in favour of the Applicants – apart from anything else, that would be inconsistent with the s20C order made above.

Judge Hargreaves

Michael Taylor FRICS

19th April 2016

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

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

Section 27A

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

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

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

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

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

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

Section 20

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

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

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

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

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

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

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

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

Section 20B

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

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

Section 20C

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

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

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

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

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
- (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
- (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
- (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

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

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

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

Schedule 11, paragraph 2

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

Schedule 11, paragraph 5

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

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

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

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

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

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

(b) on particular evidence,

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