10051

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/29UH/LSC/2013/0145**
Property	:	**94B Union Street, Maidstone, Kent ME14 1EH**
Applicant	:	**Maxiwood Limited**
Representative	:	**Miss C Crampin, Counsel**
Respondent	:	**Ms U P Bello**
Representative	:	**(In person)**
Type of Application	:	**Determination of service charges under s 27A Landlord and Tenant Act 1985 ("the Act")**
Tribunal Members	:	**Judge E Morrison (Chairman)** **Mr A O Mackay FRICS (Surveyor member)** **Mrs L Farrier (Lay member)**
Date and venue of Hearing	:	**16 April 2014 at Medway Magistrates Court**
Date of decision	:	**1 May 2014**

DECISION

The Applications

1. On or about 8 March 2013, the Applicant lessor commenced proceedings in the county court against the Respondent lessee for unpaid ground rent and costs. By an Order dated 9 December 2013 the Applicant was given permission to amend its claim so as to include a claim for alleged arrears of service charges for years ending 24.03.10, 24.03.11, 24.03.12 and 24.03.13, and the issue of liability to pay and /or reasonableness of the service charges was transferred to the Tribunal for determination.

2. The Respondent also made an oral application for an order under section 20C of the Act that the Applicant's costs of these proceedings should not be recoverable from her through future service charges.

Summary of Decision

3. The service charges recoverable by the Applicant from the Respondent are as follows:

Year Ending	£
24.3.10	799.38
24.3.11	Nil
24.3.12	Nil
24.3.13	544.16

4. Liability to pay the service charge for year ending 24 March 2013 will only arise once a valid Demand has been served.

5. The Tribunal has not determined the extent to which these service charges have already been paid by the Respondent.

6. An order is made under section 20C of the Act.

The Lease

7. The Tribunal had before it a copy of the lease for the Property dated 22 June 2007. It is for a term of 125 years from 25 March 2007 at a yearly ground rent of £250.00 for the first 25 years, and rising thereafter.

8. The relevant provisions in the lease may be briefly summarised as follows:

   (a) The lessee agrees to pay on demand 20% of the costs and expenses incurred by the lessor in carrying out specified obligations (the service charge) (clause 1.2);

(b) An on account payment of the estimated amount of expenses to be incurred for a period not exceeding one year ahead may also be demanded (clause 4.2.1);

(c) The estimate must be certified by chartered accountants (clause 4.2.2);

(d) At the end of each accounting year chartered accountants must certify the amount by which the estimate has exceeded or fallen short of actual expenditure and the lessee is entitled to a copy of the certificate (clause 4.2.3).

The Inspection

9. The Tribunal inspected the Property on the morning of 16 April 2014, immediately before the hearing, accompanied by Mr P A Brotherton, the Applicant's Managing Director. The property comprises a semi-detached double fronted three storey building arranged as 5 cottages approached by a tunnel passageway from Union Street leading to a shingle surfaced yard. The original structure was probably built in the late 18th Century and subsequently altered and extended to arrive at its present form and layout. The structure was built with either solid or timber framed walls rendered and colour washed with some horizontal painted weather boarding to the upper elevations. The roofs are of various design and materials incorporating both mansard design clad in clay tiles and elsewhere of a simple pitched type and covered in slates or concrete tiles. From the Tribunal's limited inspection the property appeared to be in fair condition but with the need for external re-decoration and associated repairs approaching.

Procedural Background

10. Following transfer from the county court, a case management hearing was held on 18 December 2013. It was decided that the Tribunal would first address the issue of whether the service charges claimed had been properly demanded/ and or were out of time. The parties were directed to file evidence and submissions on this issue only. The further issue of whether the service charges were reasonable would be addressed, if necessary, at a later date.

Representation and Evidence at the Hearing

11. The Applicant had filed a statement of case signed by Mr Brotherton together with supporting documentation, and was represented at the hearing by Ms C Crampin of Counsel. The Respondent also submitted a statement of case with supporting documentation, and she represented herself before the Tribunal. The Tribunal heard oral evidence from Mr Brotherton and the Respondent.

The Law and Jurisdiction

12. The tribunal has power under section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when a service charge is payable.

13. Section 20B provides that costs incurred more than 18 months before a demand is made for their payment will not be recoverable unless within that period 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.

14. Under section 20C a tenant may apply for an order that all or any of the costs incurred by a landlord in connection with proceedings before a tribunal 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.

The Issues

15. In order to consider whether the service charges had been properly demanded and/or were out of time it was necessary to decide:

    (a) whether the relevant service charge demands were ever sent to the Respondent;

    (b) in respect of any demands that were so sent or notified, whether they were valid demands and/or were out of time by virtue of section 20B of the Act.

Issue (a): whether the relevant service charge demands were ever sent to the Respondent

The Applicant's case

16. Mr Brotherton explained that following Maxiwood's acquisition of the freehold of 94-98 Union Street, he had written to Ms Bello on 28 May 2008 at the 94B Union Street address, with a copy being sent to an address in North London which was her address as recorded in the Land Registry entries. This letter and Ms Bello's reply dated 20 June 2008 were in evidence. Ms Bello's letter was headed with the address of 6 Invicta Villa, The Green, Bearsted, Maidstone ME14 4DT. Mr Brotherton said he "got the address" from this letter and from that time onwards all demands and other correspondence for Ms Bello had been sent by post to 6 Invicta Villa. Mr Brotherton said he was unaware that Ms Bello had moved from that address until 2 September 2013, when

she told him during a telephone conversation that she had not lived at 6 Invicta Villa since 2010 and she provided him with a new correspondence address at 9 Falloden Court in London.

17. Mr Brotherton could recall speaking to Ms Bello on only two or three previous occasions. He produced copies of two letters sent to her at 6 Invicta Villa dated 18 January 2010 and 11 February 2010 respectively regarding unpaid rent and service charges, and said there had been a telephone conversation on a date somewhere between 11 February and June 2010, during which Ms Bello had agreed to pay £50.00 per month towards her service charge liability. He had recorded this by way of an undated manuscript note on the 18 January letter: "She will pay S/C at £50.00 per month". He denied that Ms Bello had told him about any change of address during that conversation. Mr Brotherton said he made notes of telephone conversations "nine times out of ten". He also explained that any papers not in fireproof filing cabinets had been destroyed in an office fire in April 2011.

18. Mr Brotherton said he had also spoken to Ms Bello by telephone once or twice following the issue of court proceedings. He did not recall a conversation in 2011.

19. As regards letters received from Ms Bello, Mr Brotherton accepted he had received a letter from her dated 24 December 2010,which was headed with the 94B Union Street address rather than 6 Invicta Villa. He had also received, around the time it was sent, a copy of a letter that Ms Bello had written to the Applicant's chartered surveyor dated 19 March 2011, headed in the same way, and which asked Mr Radley to use the 94B Union Street address for further correspondence. Mr Brotherton did not take these letters as meaning he should change Ms Bello's correspondence address to 94B Union Street.

20. It was submitted that as Ms Bello's letter of 24 December 2010 acknowledged receipt of a letter from the Applicant dated 7 December 2010, and that as Ms Bello's letter of 19 March 2011 referred to a letter from the surveyor dated 10 March 2011, she must have still been receiving post that was sent to 6 Invicta Villa.

21. Reliance was also placed on a letter Ms Bello had sent to the court on 14 September 2013 which stated "The last letter I received from Maxiwood dated January 2012 ...". A copy of a letter dated 25 January 2012 was in evidence, and it was addressed to Ms Bello at 6 Invicta Villa.

22. Mr Brotherton said that his company dealt with at least 2500 lessees. He runs the office and deals with the paperwork. He felt that if he had been informed of a change of address he would not have continued to send demands to 6 Invicta Villa.

23. It was submitted that Mr Brotherton's recollection of the 2010 telephone call was to be preferred and that neither of Ms Bello's letters in December 2010 and March 2011 were sufficient to put the Applicant

on notice that her address had changed. Therefore service charge demands had continued to be sent to the appropriate address at 6 Invicta Villa and Ms Bello must be taken to have received them.

The Respondent's case

24. Ms Bello accepted that 6 Invicta Villa had been her correspondence address until the end of March 2010. At the end of March or beginning of April 2010 she had left 6 Invicta Villa. In May or June she had telephoned Mr Brotherton and told him to use the 94B Union Street address for correspondence. She had no written record of this discussion but said she remembered it clearly.

25. When she left 6 Invicta Villa, Ms Bello arranged a postal redirection for a few months, and "for a while" she was also able to pick up post from 6 Invicta Villa as the new residents left it in the porch.

26. Between leaving 6 Invicta Villa and September 2012, Ms Bello lived sometimes at 94B Union Street and sometimes in London. There were at times short term tenants at 94B Union Street but Ms Bello said she was still able to pick up post sent to her there. She said she left 94B Union Street for good in September 2012, and arranged a postal re-direction to 9 Falloden Court.

27. With regard to Mr Brotherton's letter of 7 December 2010, Ms Bello said that she might have picked this up from the porch at 6 Invicta Villa. Her reply of 24 December noted that she had not received it until 23 December. Ms Bello submitted that heading her letter in reply with the 94B Union Street address was the normal way to provide a correspondence address.

28. Ms Bello said she had not received a letter from the surveyor in March 2010. However, she had seen the same letter that he had sent to another lessee at Union Street, as the lessees had been discussing the proposed works amongst themselves. Her letter of 23 March 2011 to the surveyor, copied to the Applicant, was headed with the 94B Union Street address and specifically asked that this address be used for further correspondence. She said she had also spoken to Mr Brotherton by telephone in February 2011.

29. As regards the letter of 25 January 2012, Ms Bello said this had been received by the tenants at 94B Union Street and forwarded by them to her in London. She surmised that although the letter was ostensibly addressed to her at 6 Invicta Villa, a copy had been hand-delivered to the 94B Union Street address. She had reverted to paying £50.00 per month after receiving this.

30. The Tribunal also asked Ms Bello to explain how she became aware of the county court proceedings, also served at the 6 Invicta Villa address. Ms Bello said she only discovered the claim when a credit check

revealed she had a default judgment registered against her and provided details of the court and claim number.

31. Ms Bello's case was that she had received no service charge demands after April 2010 until they were sent to her at 9 Falloden Court under cover of a letter dated 18 September 2013.

Determination

32. The Tribunal accepts the Applicant's submission that where a correspondence address has been established, it is for the recipient to notify the sender if she wishes that address to be changed. Until that is done, it is in order for the sender to use the last known address.

33. With regard to the telephone call that both sides accept took place sometime in Spring 2010, the Tribunal cannot be satisfied, on a balance of probabilities, that Ms Bello notified a change of address on that occasion. Neither Mr Brotherton nor Ms Bello could recall exactly when this conversation took place, and the only possible written record of that conversation is Mr Brotherton's undated jotting, which makes no mention of an address change.

35. The letter from Ms Bello dated 24 December 2010 is however clearly headed with the 94B Union Street address. In the view of the Tribunal, this letter was sufficient notice to the Applicant of a change of correspondence address. The only earlier letter from Ms Bello in evidence was dated 20 June 2008 and was clearly headed with the 6 Invicta Villa address. Although that letter did not specifically request that 6 Invicta Villa be used for correspondence, Mr Brotherton's own case was that this letter had caused him to start using that address, rather than 94B Union Street, for correspondence. Ms Bello's letters are all business-like, clearly written and professionally presented. Mr Brotherton gave no explanation as to why he did not react to the letter of 24 December 2010 in the same way as he did to the letter of 20 June 2008 as regards the address to be used in future correspondence. Even ignoring the earlier letter, the Tribunal considers that the letter of 24 December 2010 put the Applicant on notice of the address that Ms Bello was now using. If Mr Brotherton had any doubts about where to send correspondence, he should have sought clarification.

36. Furthermore, there was no evidence before the Tribunal that the Applicant has any effective data management systems or records. Despite having a property portfolio involving over 2500 lessees, no system-based record of Ms Bello's address or account was produced. Many of the letters addressed to her at 6 Invicta Villa have the wrong postcode typed on them. The only records of activity in relation to her account, such as payments received, are handwritten jottings on copy letters. The Applicant was not even able to produce an account ledger recording debit and credits for Ms Bello. Against this poor standard of

administration, it is understandable how awareness and activation of the change of address was overlooked by the Applicant.

37. Ms Bello was a credible witness and her explanations of how she came to receive the Applicant's letters of 7 December 2010 and 25 January 2012 and to see the surveyor's letter of 10 March 2011 are accepted. With regard to the letter of 25 January 2012, it seems quite possible, given the contents of the letter (which partly addresses a car parking issue) that copies would have been hand-delivered to the property address, even if also posted to 6 Invicta Villa. It is notable that Ms Bello has consistently reacted to those letters which she accepts that she did receive.

38. Accordingly the Tribunal finds that no service charge demands issued by the Applicant between 24 December 2010 and 18 September 2013 were sent to the Respondent. Demands issued before 24 December 2010 and those sent out on 18 September 2010 were sent to Ms Bello.

Issue (b): respect of any demands that were sent to Ms Bello, whether they were valid demands and/or were out of time by virtue of section 20B of the Act.

39. In light of the Tribunal's finding on issue (a), which was communicated to the parties during the hearing, Ms Crumpin conceded that no valid demands had been sent to Ms Bello for service charge years ending 24 March 2011 and 24 March 2012. Although the demands had been sent to 9 Falloden Court on 18 September 2013, the effect of section 20B of the Act is that these demands were out of time, save to the extent of any costs incurred during the final few days of the year ending 24 March 2012 which the Applicant did not wish to pursue. The Tribunal is therefore able to determine that no service charge is payable by Ms Bello for either of these two years.

40. With regard to service charge year ending 24 March 2010, the Applicant conceded that there was no effective on account demand as no estimate certified by an accountant had been obtained as required by the lease. However on 30 June 2010 the final certified account of actual expenditure for that year had been sent to Ms Bello, which noted total expenditure of £5,395.15, and Ms Bello's 20% share at £1079.03. A covering letter, although not clearly identified as a Demand, noted this latter sum and requested payment by return. The Tribunal accepts that this was a valid demand for £1079.03.

41. With regard to service charge year ending 24 March 2013, the Applicant relied on either of two letters, said to constitute demands, dated 4 April 2013 and 13 August 2013, which had been sent to 9 Falloden Court on 18 September 2013. The first letter enclosed the final certified account of actual expenditure for that year, noting Ms Bello's share at £544.16. The letter asked Ms Bello to "settle her Service Charge Arrears of £2605.74 by return". No breakdown of that figure was

provided. The second letter listed amounts said to be outstanding for rent and service charges.

42. The Tribunal finds that neither of these letters constitutes a valid demand. The only request in the first letter was that Ms Bello settle her arrears. There was no indication that the arrears figure demanded included the service charge just being notified for the first time. The second letter was simply in the nature of a statement of account; there was no demand for payment. It is unfortunate that the Applicant fails to issue discrete demands for each service charge bill and to distinguish these from running statements. The Tribunal finds that the service charge for year ending 24 March 2013 has not yet been demanded. However as Ms Bello was notified, by the letter of 4 April 2013, that these costs had been incurred as part of the service charge, section 20B does not prevent a further demand being made now in respect of these costs. Once demanded, the monies will be immediately payable by Ms Bello, pursuant to clause 1.2 of the lease.

Further determination

43. The Tribunal advised the parties of its decision on issue (b) and the parties then withdrew to consider whether they could reach agreement on the amount of service charges payable for years ending 24 March 2010 and 24 March 2013.

44. For year ending 24 March 2010, another lessee in the Union Street development had obtained a determination from the Tribunal which reduced the amount recoverable for that year from £1079.03 to £799.38 (Case No. CHI/29UH/LSC/2011/0026). The parties agreed that the sum of £799.38 should also apply to Ms Bello and therefore the service charge for that year is determined at £799.38. It is noted that the Amended Particulars of Claim in the county court proceedings refer to a balance outstanding from Ms Bello of just £51.81. In the absence of agreement, it will be for the court to determine whether this sum was in fact outstanding at the issue of proceedings given the reduction in the service charge now agreed.

45. For year ending 24 March 2013, Ms Bello said she would not challenge the figure of £544.16 and therefore the service charge for that year is determined in that figure, and will be payable once a demand is issued. For the avoidance of doubt, it was not due or payable when the county court claim was either issued or amended.

Section 20C Application

46. In deciding whether to make an order under section 20C a Tribunal must consider what is just and equitable in the circumstances. The circumstances include the conduct of the parties and the outcome of the proceedings. Ms Bello requested a section 20C Order and said she had tried to settle matters with the Applicant to try to avoid a contested

hearing. Ms Crumpin accepted Ms Bello had won on the address point but the Applicant was still going to recover some service charges. She suggested that an order limited to 50% of the Applicant's costs would be right.

47. The Tribunal finds that it is just and equitable for an order to be made that, to such extent as they may otherwise be recoverable, the Applicant's costs in connection with these Tribunal proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any future service charge payable by the Respondent. The Respondent has been the successful party in these proceedings. The service charge for two years has been found to be nil, in respect of one year it has been reduced and possibly nothing is owed, and in respect of the final year it is not yet due. It was entirely appropriate for Ms Bello to defend this claim and her position has been vindicated. The Applicant is a large commercial landlord. It would be inequitable for her to have to pay the Applicant's costs.

Concluding Remarks

48. This matter will now be remitted to the county court. The court should note that the issue of appropriation of Ms Bello's payments, whether to ground rent or service charge, has not been considered by the Tribunal.

Dated: 1 May 2014

Judge E Morrison (Chairman)

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.