111-40

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AU/LSC/2015/0285**
Property	:	**319 Caledonian Road, London N1 1DR**
Applicants	:	**Ms Sharon Lin Tay and Mr John Conolly**
Representative	:	**Mr A Briggs of counsel**
Respondents	:	**Mr Ahmed Abbobaker and Mr Aboobaker Abdul Gani**
Representative	:	
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**P M J Casey MRICS** **Trevor Sennett MA FCIEH**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**30 October 2015**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the Applicants are not liable to pay the sums of £904.64 demanded of each of them on 8 July 2015 in respect of the service charges budgeted for the year 2015/16.

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

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

(4) The tribunal determines that the Respondents shall pay the Applicants £280 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicants.

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 services charges payable by the Applicants in respect of the service charge year 2015/16.

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

The hearing

3. The Applicants were represented by Mr Aidan Briggs of counsel at the hearing and the Respondents were represented by Mr Zak Sladden of AM Surveying Property Services Ltd (AM) who they had appointed to act as managing agent in respect of the property.

The background

4. The property which is the subject of this application comprises of two one bedroomed flats formed by the conversion of the first and second floors of a three storied Victorian terraced building. The ground floor is a shop and there is a separate commercial unit in the basement.

5. Photographs of the building were provided in the course of the hearing. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

6. The Applicants hold long leases of the flats at the property which require the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease will be referred to below, where appropriate.

The issues

7. At the start of the hearing the parties identified the relevant issues for determination as follows:

   (i) Whether the Respondents, through its managing agent, was entitled to demand service charges in advance of incurring expenditure, under the terms of the leases or not;

   (ii) The payability and/or reasonableness of the service charges totalling £904.64 in respect of each Applicant's flat demanded on 8 July 2015 in anticipation of expenditure for the service charge year said to be from 1 May 2015 to 30 April 2016 as detailed in the expenditure budget accompanying that demand.

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

Service charges demanded in advance

9. The first question for the tribunal's determination is whether or not the Applicants' leases allow the Respondents to claim, either through its managing agents or otherwise, the payment of service charges in advance of incurring expenditure in respect of the items listed in the budget accompanying the demand for payment dated 8 July 2015.

The tribunal's decision

10. The tribunal determines that the leases do not allow the Respondents to claim payment in advance in respect of the heads of expenditure so itemised in that budget and accordingly neither Applicant is liable to pay any amount in respect of the demand for payment dated 8 July 2015.

Reasons for the tribunal's decision

11. The lease of the first floor flat was granted on 4 July 1986 for a term of 125 years from 25 December 1984 whilst that of the second floor flat was granted in (unreadable) 1985 for like term. The leases are in the same terms. Under Clause 3(ii) of the lease the lessor covenants with the lessee to insure the building of which the flat forms part and by

Clause 3(iii) covenants to repair and keep in repair the upper parts as defined in the Third Schedule and all passageways, service drains, etc but prior to commencing any such repairs or incurring any expense in connection therewith "may require the lessee to lodge with the lessor such sum as the lessor may reasonably require as representing the amount which it is anticipated the lessee will be required to contribute and pay in accordance with the covenants on the part of the lessee hereinbefore contained (such sum to be conclusively determined in the event of a dispute by the Surveyor for the time being of the Lessor)". Clause 2(6) contains the lessee's covenant to pay "on demand" a due proportion of the expense of making repairing, cleansing etc all ways passageways services etc party walls, party structures etc used in common and also to pay "on demand" one half of the cost incurred by the lessor in respect of Clause 3(iii) including lodging any sum demanded in accordance with the proviso to that Clause while at Clause 2(13) is the covenant to pay on demand a due proportion of the cost of insuring the building.

12. For the Applicant leaseholders Mr Briggs referred to an invoice at page 46 of the hearing bundle from a firm called Gani & Company who then acted as the Respondents landlords' managing agent. Dated 21 January 2013 and addressed to Dr Tay it sought payment of ground rent of £50 for the period 1 January 2013 to 31 December 2013, a £50 plus £10 VAT management fee and a contribution of £201.51 towards the cost of insurance cover for the period 24 January 2013 to 23 January 2014. This he said represented what had been the usual position up to that point as could be seen by the similar invoice for the following year. Demands in respect of works of repair were dealt with separately as shown by invoices in respect of redecoration and repair work carried out in 2010 at pages 48-51 of the bundle which also involved lodging a sum prior to commencement of works on the basis of an estimate of the cost of carrying out identified works.

13. On 12 February 2015 Gani & Company sent Dr Tay an invoice for ground rent, insurance contribution and management fee along the lines of the previous years but this time included the sum of £200 for service charges for 1 January 2015 to 31 December 2015. Dr Tay replied with payment for the first three items but pointing out the lease made no provision for such service charges and she had had assurances before buying the flat that services charges were ad hoc and there was no sinking fund. She did not receive a reply but on 26 May AM wrote to say they had been appointed managing agents. Dr Tay queried this with Gani & Company but got no reply but then received from AM the demand which is the subject of the application.

14. Mr Briggs submitted that there was nothing in the lease which provided for the kind of service charge regime AM were seeking to impose. The lessees covenanted to pay services charges on demand in respect of costs incurred by the lessor in complying with just two covenants: to insure and to repair, etc. For the first insurance cover had been placed

or was about to be at a known cost when the demand was issued and for the second whilst the lessor could demand a reasonable sum to be deposited prior to commencing works of repair etc those works must have been clearly identified and a reasonable estimate of the cost worked out. This could not possibly justify a demand for payment in advance of a generalized service charge.

15. For the Respondent Mr Sladden relied on the Respondents' Statement in Reply. The Respondents had covenanted to repair and insure the building which were management obligations and in their turn the Applicants had covenants to pay their share of the cost of providing those services through service charges. Moreover Clause 3(iii) made provision for sums to be paid in advance of works being undertaken and this justified the making of advance service charge demands. He accepted that the lease made no specific provision for a service charge year or accounting or balancing charges but said the period adopted was the 12 months from their appointment as managing agents.

16. We accept Mr Briggs' submissions on this point. The lease clearly provides for such sums as the Applicants may be required to pay in respect of insurance and repairs effected by the Respondents to be paid "on demand" and in respect of "the expense" not the estimated or anticipated expenses. Even the proviso to Clause 3(iii) is not a requirement to pay in advance, it is a requirement to lodge such sum as may reasonably be required as representing the amount it is anticipated the lessee will be required to contribute and pay, effectively a surety and it can only be interpreted as applying to clearly identified works of repair and similar the cost of which can be reasonably accurately estimated.

17. The demands for service charges in advance do not accord with the provisions of the leases and the Applicants are not liable to pay any part of them.

Service charge item & amounts claimed

18. We were invited by Mr Briggs also to consider the payability and reasonableness of the individual heads of expenditure included in the budget drawn up by AM and on which they based the disputed demand for service charges in advance.

19. The sum of £300 was included for General Maintenance as a contingency for ad hoc repairs to communal parts. Mr Briggs said no such item had ever before been suggested and there was no explanation where it came from. The photos showed the minimal common parts which the Applicants had recently re-carpeted and decorated (having first asked Gani & Company if there were any formalities to follow) and no such contingency was needed. More importantly there was no provision in the lease for such a sum to be demanded in advance of any

expenditure on works of repair which had been identified as being required.

20. Mr Sladden said the amount was based on experience. Small wants of maintenance such as leaf clearing from gutters would always arise and he relied again on clause 3(iii) as allowing the sum to be claimed prior to any works being identified or planned. He confirmed that he had not inspected the property.

21. We are satisfied that the lease does not provide for such contingency sums. Had it done so the amount would in our view have been reasonable. If the Respondents incur expense on works of minor maintenance such as gutter cleaning they are entitled to recover the expense by demanding the appropriate share from each of the Applicants at any time.

22. The sum of £300 was included in the budget to carry out a fire risk assessment said to be overdue. Mr Briggs conceded that in principle this could be claimed as a service charge but again only after the expense was incurred. He said the estimate was too high though as Dr Tay had obtained two lower quotes - £245 (p77) and £240 (p78) inclusive of VAT. The most that would be reasonable was £250 which should be apportioned as the insurance premium to ensure the shop and basement pay their share.

23. Mr Sladden said the amount included was an estimate from a reputable firm 4 Site Consulting, who did most of the fire risk assessments for properties managed by AM and as such was reasonable. It would only encompass the two flats so apportionment did not come into it.

24. We accept as Mr Briggs conceded that a fire risk assessment was something the Respondents should have done as part of his obligation to insure and as such the cost would be recoverable as a service charge from the Applicants though not in advance of the expenditure being incurred. However it would seem to us that to have any value the fire risk assessment should address the whole building with the cost apportioned as the insurance premium between all four occupiers. None of the quotes appeared to be on this basis.

25. The budget included a sum of £30 for banking administration charges £300 for accountants' fees to certify service charges and £25 for sundry expenses. None of these were provided for under the lease according to Mr Briggs who also said the amounts were unreasonable.

26. Mr Sladden sought to explain the figures but even he could not clarify the banking sum. He accepted the lease made no provision for service charge accounts or certification but still claimed the amounts as reasonable and what would appear in any budget.

27. We accept there are no provisions in the lease to justify a claim for these sums.

28. Included in the budget as an item shared with the shop and basement unit was the sum of £300 for insurance. This caused much confusion until Mr Sladden explained that he had extrapolated the annual insurance premium already paid and contributed to by the Applicants from the end of the period of cover, 23 January 2016, to cover the period to 30 April 2016 to bring insurance costs into line with his firm's self-selected service charge year. He also confirmed that AM had no role in the placing of the insurance or in claims handling. We do not need to refer to Mr Briggs submissions on the point, it is complete nonsense. The insurance is placed annually and around that time the Applicants receive an on demand invoice for their share.

29. The largest item by far in the budget is the management fee to be charged by AM at £750 including VAT. Mr Briggs accepted in principle that a landlord had the right to appoint a managing agent even if the lease made no specific provision for such an appointment but any contribution towards the managing agent's fees payable by a lessee would have to relate to the benefit received from the service and without specific provision in the lease such contribution could not be demanded before the managing agents did anything. The Applicants had always paid a management fee in relation to the insurance and collection of the ground rent and had paid their share of the professional fees associated with works of repair. None of the services to be performed by AM as set out in their contract at pages 94-106 of the bundle related to any Landlord's lease obligations as they proposed charging additional fees in respect of repairs. The sum claimed was totally disproportionate and no more than the previous £50 was reasonable. The Applicants would get no benefit whatsoever from AM in return for paying their fees.

30. Mr Sladden referred to the Respondents' statement of case prepared by AM. In particular he relied on the decision of the then Lands Tribunal in the case of Norwich City Council v Richard Marshall [2008 WL4698929] in support of the Respondents' right to require lessees to pay for the costs of management. His firm's fees were he claimed reasonable and would fall to £500 after the first year when set up costs had to be included. When asked by Mr Briggs why he had not included any evidence of other firms' charges he said AM knew their competitors' rates and theirs were in line with the market.

31. We agree with Mr Briggs submissions. Clearly a landlord can employ managing agents and recover the fees for doing so through the service charge even if there is no such specific provision, but the recovery is limited in such circumstances only to the management costs directly related to the landlord's management obligations, to insure and to repair. A management fee of £50 plus VAT has already been paid in

connection with insurance for 2015/16 and in our view is a perfectly reasonable fee for the management of this obligation. There are no works of repair, etc being carried out or contemplated and as such no management fee arises. AM have not even inspected the property to see if anything is needed; the Applicants say nothing is which we accept. Circumstances may arise in future which might justify a higher management fee that the £50 such as consultation in respect of major works but for the present any higher fee would be unreasonably incurred and hence not payable by the Applicants.

32. Although it is difficult to see how the lease provides for the same, for the avoidance of doubt Mr Briggs asked that an order be made under the provisions of S20C of the Act and also, if we found for the Applicants, an order under Rule 13(2) of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 requiring the Respondents to repay the Application and Hearing fees paid by Dr Tay.

33. Mr Sladden said he thought the application had been premature and no such orders should be made. In their statement of case the Respondents had asked for "contractual costs" of £800 plus VAT under clause 2(6) of the lease as the Applicants covenanted to indemnify the Respondent against "all costs, claims and demands and expenses arising out of or in connection with any of the same".

34. We have no hesitation in making the orders sought by Mr Briggs. As he said the Respondents never consulted about appointing managing agents and turned down mediation. The service charge year, the budgeted services and the in advance demands are all entirely constructs of AM which have no foundation in the lease.

35. If either party wishes to make application for a costs order under Rule 13(1) they should do so in writing to the Tribunal within 28 days of the date of this decision.

Name: P M J CASEY **Date:** 30 October 2015

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 AMatter 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 AMatter 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).