11981

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**BIR/OOCW/LIS/2015/0062** **BIR/OOCW/LAC/2015/0008**
Property	:	**11 and 16 Abbots Way, Finchfield, Wolverhampton WV3 9LR**
Applicant	:	**Bantock Gardens Residents Association Ltd**
Representative	:	**Crooks Commercial solicitors**
Respondent	:	**Mr D Cockfield**
Type of Application	:	**Service charges and administration charges**
Tribunal Members	:	**Judge D Jackson** **Mr S Berg FRICS**
Date of venue of Hearing	:	**Determination without a hearing**
Date of Decision	:	**14 July 2016**

DECISION

Background

1. The Property is part of a development of 43 dwellings (23 flats, 5 maisonettes and 15 terraced houses).
2. The members of the Applicant Residents Association are the Lessees themselves (see Memorandum submitted with Statement of Applicant dated 29th April 2016).
3. The Applicant has chosen to appoint a Managing Agent. Regalty Estates Limited were replaced by Blocsphere Property Management Ltd with effect from 5th February 2015.
4. On 30th November 2015 Application was received by the Tribunal for a determination of liability to pay and reasonableness of services charges for service charge years 2014/15 and 2015/16 under s27A Landlord and Tenant Act 1985 ("the Act").
5. Application was also made on 30th November 2015 for a determination as to liability to pay an administration charge under Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("CLRA").
6. Directions were issued by the Tribunal on 21st December 2015, 4th March 2016, 7th April 2016 and 19th April 2016.
7. The Tribunal has considered Letter dated 18th February 2016 from solicitors for the Applicant enclosing accounts, budgets and written submission. We have also considered Statement of Applicant dated 29th April 2016. The Respondent has submitted "Service Charges Challenged by the Respondent" dated 17th March 2016 and "Respondents Final Statement" (undated) and annexures.
8. Neither party has requested an oral hearing. The Tribunal determined these applications, under Rule 31 without a hearing, on 23rd June 2016 following an inspection of the grounds and exterior of the development at Bantock Gardens.

The issues

9. The issued raised by the Applicant are set out in a Rider to the Applications:
   a) Service charges £846.41 (No.11) as set out in "Financial History Service Charge".
   b) Service charges £729.08 (No. 16) as set out in "Financial History Service Charge".
   c) Administration Charges £990 as set out in Schedule to the Application
   d) Legal fees £867 (No.11) and £867 (No.16).
   e) Reimbursement of fees.
10. The Respondents case as set out in "Service Charges Challenged" by the Respondent is that:
   a) The service charges are not payable because they have not been correctly demanded;
   b) The managing agents fees and other elements of the service charge are not payable under the terms of the Leases;
   c) The managing agents fees and other elements of the service charge are not payable as they have not been reasonably incurred;
   d) The weight to be attached to any evidence provided by the Applicant should be very restricted.
11. Directions No.1 dated 21st December 2015 required the Respondent to produce a list of the service charges challenged with a view to a Scott Schedule being prepared. However the Respondent has chosen not to challenge individual items but to base his submission solely on legal construction of the Leases. Accordingly Directions No.3 dated 7th April 2016 determined that no challenge has been made to individual amounts of any service or administration charges.

12. The Tribunal has therefore made a determination solely on the legal effect of the relevant provisions of the Leases. The Tribunal has not determined the reasonableness of individual items as that is not a matter raised by the Respondent and is not therefore an issue for determination.

The Lease

13. Flat 11 is held under the terms of a Lease dated 8th October 2002 and made between the Applicant (1) and Beryl Hargreaves (2). Flat 16 is held under the terms of a Lease dated 23rd September 2005 and made between the Applicant (1) and Stephen Eccleston and Margaret Worton (2). For the purposes of both applications the provisions of both Leases are identical.

14. Recital Vx provides:

"the Maintenance Expenses" means the monies actually expended or reserved for periodical expenditure by or on behalf of the Lessor at all times during the term hereby granted in carrying out the obligations more particularly contained in Clause 4.1 hereof and is more fully defined in Clause 4.4 hereof.

15. Clause 2 contains Lessee covenants:

To pay the rent and other monies hereby reserved and made payable at the times and in the manner in which the same are hereby made payable without any deduction (Clause 2.1).

To pay to the Lessor all costs charges and expenses (including legal costs and fees payable to a Surveyor) which may be incurred by the Lessor in or in contemplation of any proceedings under sections 146 and 147 of The Law of Property Act 1925 notwithstanding that forfeiture shall be avoided otherwise than by relief granted by the Court (Clause 2.14)

16. Clause 4 contains Lessor Covenants relating to, inter alia, structural repair, maintenance of garden and grounds, repair fixtures and fittings of the Block, internal and external decoration of the Block, to insure, employ staff, empty rubbish receptacles and cleaning the exterior of windows.
17. Clause 4.4, which would appear to be the main point of contention between the parties contains the following provisions (the passages marked in bold are the Tribunal's emphasis and will be referred to later in this Decision):

THE Lessee HEREBY COVENANTS with the Lessor that during the subsistence of the said term the Lessee will pay to the Lessor each year the Lessee's Proportion of the Maintenance Expenses (being such annual sum as may be determined by the Lessor as being necessary to ensure that each tenant of a Dwelling on the Property paying a fair proportion and the Lessor paying a fair proportion in respect of each of the completed Dwellings on the estate for the time being retained by it as hereinafter provided the aggregate amount properly and reasonably required to be expended by the Lessor and the amount of any reserves properly and reasonably required by the Lessor **in connection with the performance and observance during the whole of the term hereby granted of the covenants on the part of the Lessor contained in the Leases of all Dwellings on the Property including wages of all the Lessor's employees and servants and the administrative**

and office and other incidental expenses of the Lessor in effecting its incorporation and initiating and running its business) such payment to be made by four equal instalments on the usual quarter days in advance as provided in the Third Schedule hereto and so that on default by the Lessee in the payment of the whole or part of the Lessee's Proportion for any year the Lessor shall be entitled to distrait re-enter and exercise all or any remedies of the Lessor exercisable in respect of breach of covenant **PROVIDED ALWAYS that the certificate from time to time being of the Lessor or if the Lessor shall fail to produce such certificate within a reasonable time the certificate of the Surveyor for the time being of the Lessor as to the amount payable by the Lessee from time to time in accordance with this present sub-clause shall be conclusive and binding on the Lessor and the Lessee.**

18. Pausing at this point the Tribunal would observe that although the Leases were granted in 2002 and 2005 these would appear to be 999 year extensions of original Leases granted in the 1960's when the development was constructed. No doubt for reasons of costs the opportunity was not taken to modernise the Leases on extension and it appears that the original terms were repeated verbatim.
19. The Third Schedule headed "The Lessee's Proportion of the Maintenance Expenses" sets out that proportion as 0.91% and makes further provision for Auditor's Certificate, Account and payment mechanism.

Service Charges

20. The first issue raised by the Respondent is that service charges have not been correctly demanded because the Lease contains a condition precedent namely an Auditors Certificate.

21. The use of the term condition precedent has been disapproved by the Court of Appeal in **Leonora Investment Co Ltd v Mott MacDonald Ltd** [2008] EWCA Civ 857. The Tribunal is concerned solely with construction of the Leases in accordance with their own terms. In **LB Southwark v Woelke** [2013] UKUT 349 (LC) the Upper Tribunal decided that "it is necessary to identify the minimum requirements laid down by the Lease before the obligation to pay the service charge will be created".

22. The requirement for an Auditors Certificate is contained in the proviso to clause 4.4 (in bold at paragraph 17 above). Similarly paragraph 1 of Schedule 3 also refers to Auditors Certificate only within the proviso.

23. We find that, on a proper construction of the Lease, that the reference to an Auditors Certificate is relevant only where there is a dispute between the parties and is an attempt to make the Certificate binding on the parties. However such a provision is void under s27A (6) of the Act.

24. We find that an Auditors Certificate is not a necessary requirement and that an obligation to pay the service charge arises without such a Certificate.

25. We also reject the Respondent's submission in relation to his description of the Accounts as qualified. A copy of Service Charge Accounts for the period 5th February 2015 to 30th September 2015 has been produced by the Applicant with its Statement of 29th April. Those Accounts, prepared by Gordon Whelan Associates Ltd (Chartered Accountants) are detailed and contain criticisms, particularly of the

previous Managing Agents. Notes to the Accounts at paragraph 1 indicates that no audit has been carried out on costs grounds. However "an Independent Accountants report to the accounts has been prepared". We find that the Independent Accountants Report is sufficient to satisfy the requirements of paragraph 2 of Schedule 3 that "An account of the Maintenance Expenses ..... shall be prepared". An account is all that the Lease requires. There is no requirement for an audit. Gordon Whelan Associates have confirmed that their report has been prepared in accordance with best practice (TECH03/11).

26. We find that service charges have been correctly demanded.

27. The Respondent's second argument is that Managing Agents fees are not recoverable under the Leases.

28. If the Applicant wants to employ a Managing Agent there must be "explicit provision" in the Leases (**Embassy Court Residents' Association Ltd v Lipman** [1984] 2 E.G.L.R 60; see also **Gilje v Charlgrove Securities Ltd** [1992] 2 E.G.L.R 44 per Mummery LJ "courts tend to construe service charge provisions restrictively and are unlikely to allow recovery for items which are not clearly included"). We have considered the Leases and in particular the recitals and clause 4 and find that there is no express provision allowing the Applicant to employ a Managing Agent.

29. The Notes to the Accounts at paragraph 3 should have alerted the Applicant to this difficulty:

"Expenditure for the year includes expenditure relating to the administration and management of the Residents' Management Company, Bantock Gardens Residents Association Limited. There does not appear to be any provision within the leases for expenditure of this nature to be recovered through the service charges. However, the directors have decided to recover this expenditure as part of the service charge

expenditure for the period as the Company has no income to set off against this expenditure."

30. However there is a distinction between the cost of the employment of a Managing Agent and the Applicant's costs of management. Fees for general management are not recoverable but fees for managing are i.e. arranging for the carrying out of the Lessors obligations under clause 4.1 of the Lease (see for example **LB Brent v Hamilton** LRX/51/2005). This is supported by the first passage highlighted in bold in clause 4.4 set out in paragraph 17 above which entitles the Applicant to recover the expenses of running its business.

31. The Accounts show Management fees of £4,414 which is very nearly 10% of total expenditure (£44,422).

32. We determine that the Applicant's costs of management are 50% of that figure. Accordingly we reduce fees to £2,207. The Respondent is therefore not liable for 0.91% of that reduction, £20.08 and we reduce service charge payable by him for both flats accordingly.

33. In relation to Accountancy fees we find that those are recoverable under the terms of the Lease. Again, the first passage marked in bold in clause 4.4 covers this point. The Applicant has an obligation to produce service charge Accounts under Schedule 3 and in addition the preparation of accounts are administrative and office expenses of running its business.

34. We take the Respondents third and fourth points, which are essentially criticisms of the former Managing Agents, Regalty Estates Ltd, together.

35. The Rider to the Application contains two documents headed Financial History Service Charge. For Flat 11 the "Account Adjustment: Balance brought forward from previous Managing Agents (Regalty Estates) as of 3/2/15" is £463.55. The corresponding figure for Flat 16 is £342.22.

36. The Accounts contain a Report of factual findings:

The current Managing Agents were appointed on 5th February 2015. It has not been possible to substantiate any of the opening transactions prior to this date. As a result of this, we are unable to confirm the opening position was correctly stated in the accounting records at the date of handover.

37. Notes to the Accounts at paragraph 1 confirms that "The accounting information for the period from 1st October 2014 to 4th February 2015 has not been provided by the previous agents".

38. The burden of proof in relation to s27A applications is set out by HHJ Rich in **Schilling v Canary Riverside** LRX/26/2005 "it is sufficient for the tenant to raise the absence of a proper account in order to place upon the landlord an evidential burden to satisfy the tribunal that the costs have, in fact been incurred".

39. The burden of proof is very much a last resort. A Tribunal will normally try to do the best it can even with limited information. However, here, there is simply no material at all before the Tribunal in relation to expenditure 1st October 2014 to 4th February 2015. Accordingly the burden of proof is decisive and we find that the sum of £463.55 for Flat 11 and £346.22 for Flat 16 is not payable.

40. Service Charges claimed by the Applicant for Flat 11 were £846.41. We reduce that figure by £20.08 and £463.55 making a total payable by the Respondent to the Applicant of £362.78.

41. Service Charges claimed by the Applicant for Flat 16 were £729.08. We reduce that figure by £20.08 and £346.22 making a total payable by the Respondent to the Applicant of £362.78

Legal Fees

42. The Applicant claims legal fees of £867 for each flat. The Applicant has failed to set out whether those costs are recoverable as service charge, administration charge or contractual entitlement.

43. In order to recover legal costs through the service charge, clear and unambiguous lease terms are required (**St Mary's Mansions Ltd v Limegate Investments Co Ltd** [2002] EWCA Civ 1491). We find that there is no express term in the Leases which entitle the Applicant to recover legal fees as service charge.

44. It may be that the Applicant is seeking to recover legal fees under clause 2.14 under s146 Law of Property Act. The Tribunal has no jurisdiction in relation to contractual claims.

45. A separate application has been made in relation to administration charges under CLRA has been made. However that application does not seek a CLRA determination in relation to legal fees.

Administration Charges

46. The Applicant seeks a determination under Schedule 11 CLRA in relation to Administration Charges totalling £990 as set out in Schedule 1 to the application. The items claimed are all letters in relation to non -payment of service charge and relate to reminders and "passed to solicitors". These items fall within paragraph 1(1) (c) to Schedule 11 being amounts payable in respect of failure by a tenant to make payment by the due date.

47. Directions No. 1 dated 21st December 2015 at B10 required the Applicant to identify the provision in the lease relied upon which authorises Administration Charges.

The Applicant complied by producing a Submission dated 18th February 2016 identifying clause 4.4 as the provision relied upon in the Leases.

48. Schedule 11 does not create an entitlement to charge for Administration Charges. There must be an express provision in the Lease itself expressly referring to default charges or late payment fee.

49. We find that clause 4.4 does not contain an express provision entitling the Applicant to levy Administration Charges for late payment.

50. The first passage of clause 4.4 marked in bold by the Tribunal entitles the Applicant to recover administrative and office expenses of the Lessor in running its business. We contrast Administration Charges with costs of administration.

51. We find that reminder and late payment letters are administrative and office expenses which would routinely be issued by any well run business. Accordingly although Administration Charges as claimed are not recoverable, we find that the Applicant could recover costs of administration as part of Maintenance Expenses.

52. However, although it is possible for the Applicant to recover costs of administration through the service charge payable by all leaseholders, Administration Charges are not payable by the Respondent.

53. The claim is for 15 letters chasing up payment in one form or another. Had we found that Administration Charges were recoverable we would not have found the amounts claimed to be reasonable. The sums claimed are excessive and we would only have allowed £15 per letter.

54. We find that the sum of £990 is not payable under paragraph 5(1) of Schedule 11 to CLRA.

Decision

55. The Respondent is liable to pay to the Applicant the sum of £362.78 in relation to service charges (Flat 11) and the further sum of £362.78 in relation to service charges (Flat 16).

56. The Respondent is not liable to pay any sums by way of Administration Charges to the Applicant.

57. Legal costs of £867 for each flat are not recoverable as service charges.

58. The application for reimbursement of fees under Rule 13(2) is refused.

D Jackson

Judge of the First-tier Tribunal

Either party may appeal this Decision to the Upper Tribunal (Lands Chamber). A party seeking to challenge this Decision must first apply to the First-tier Tribunal for permission to appeal. Any such application for permission must be in writing, setting out grounds relied upon, and must be received by the Tribunal no later than 28 days after the date the Tribunal sends this Decision to the party seeking to challenge it.