13007

First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/22UD/LSC/2018/0051**
Property	:	**Blocks 1, 2 & 3 Lions Row, Avenue Road, Brentwood, Essex CM14 5EQ**
Applicant	:	**Paul Meekcoms Self Representing**
Respondents represented by	:	**Gateway Property Holdings Ltd. Carly Melling – lay representative**
Date of Application	:	**18th July 2018**
Type of Application	:	**to determine reasonableness and payability of service charges and administration charges**
The Tribunal	:	**Bruce Edgington (Lawyer Chair) Stephen Moll FRICS John Francis QPM**
Date and place of Hearing	:	**18th October 2018 at Holiday Inn, Brook Street, Brentwood CM14 5NF**

DECISION

1. The Tribunal determines that the decisions taken by this Tribunal in 2017 as to the reasonableness and payability of service charges and administration charges under case number CAM/22UD/LSC/2017/0067 ("the 2017 decision") in respect of flat 7 would have been and are equally applicable to each flat in the whole property, subject to any adjustments in the proportions paid by each flat. The refunds of service charges set out in that decision must be applied to the other flats for the years dealt with.

2. The Tribunal also adopts the conclusions in paragraph 48 of the 2017 decision and the appropriate refunds must be applied to each leaseholder's service charge account.

3. The service charges for 2017 and 2018 must be reduced to reflect the determinations in the 2017 decision. Those proposed for 2019 which must also be reduced to the figures set out in paragraph 39 of this decision. The Tribunal cannot determine future unknown service charges and does not

agree with the Applicant's suggestion of a predetermined percentage increase.

4. Orders are made pursuant to section 20C of the **Landlord and Tenant Act 1985** ("the 1985 Act") and paragraph 5A, Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** preventing the Respondent from recovering its costs of representation before this Tribunal as part of any future service charge or administration charge.

5. As to the Applicant's claim for a refund of £300 Tribunal fees and £60 expenses, the Tribunal's determination is there has been unreasonable conduct on the part of the Respondent and it is ordered to pay £360.00 to the Applicant within 28 days from the date of this decision.

Reasons

Introduction

6. The Applicant is the original long leaseholder of flat 7 at the property and was involved as the Applicant in the litigation giving rise to the 2017 decision. That litigation started in the county court and related only to flat 7. The court transferred the case to this Tribunal so that it could determine what service charges and administration charges were reasonable and payable.

7. The Tribunal undertook that exercise and the 2017 decision must be read in conjunction with this one. It is well understood, and established by binding case law, that if a court transfers a case in this way, a Tribunal cannot change the case either by adding parties, adding properties and/or adding amounts. Thus, the Tribunal did not have the power to determine anything which was not in the court pleadings. However, it did take the opportunity to make a comprehensive analysis of the issues between the parties and give an opinion in order to assist both the court and the parties.

8. The Applicant alleges that the Respondent, through its managing agent, has corrected some of the claims against him, but has just ignored the Tribunal's determinations and opinions in most respects, particular in its claims against the other leaseholders for the same service charges and administration charges over the same period.

9. On the 3rd August 2018, the Tribunal made a directions order including a direction that the Respondent file and serve a statement justifying the disputed claims both in principle and in law. It added "*Such statement must answer the points raised by the Applicant. If the previous Tribunal's determinations as to what was reasonable have been ignored, a full explanation must be given as it must be absolutely clear to the Respondent that the decision will be the same as for flat 7 and hundreds of pounds of taxpayers' money will be spent on this further case*". The Respondent's answer to this will be seen below.

The Lease

10. In the 2017 decision, the following wording was put into this section and is repeated here. Obviously it relates only to flat 7 but it seems clear that the service charge provisions will be the same save for any change in proportion to be paid.

11. The bundle produced for that hearing included what appeared to be a copy of the lease which is dated the 27th September 2013. However, the length of the term is uncertain. It is clear that the copy lease seen by the Tribunal is wrong. On page 1 of the 5th section in the bundle, it states that the term commenced on the 1st December 2007, which date has been adopted by the Land Registry at page 16. However, on page 4 of section 5, it is said on another page in the lease that the term commences on the 1st December 2012.

12. It was then said: "*This matter must be rectified as a matter of urgency because it affects both the term and the ground rent. If 2007 is found to be the correct date, the term will have 115 years to run and the ground rent can be reviewed now. If the commencement date is 2012, the term will have 120 years to run and the present ground rent will continue for 5 years. A comparison with the other leases in the development should produce the answer as the term should be the same in all cases. The second Respondent, as freeholder, should resolve this.*" Whether this has been done is not known. Mr. Coe, in his evidence at page 138 in the bundle merely asserts that the term commenced on the 1st December 2007, but he produces no evidence to support that and does not explain the discrepancy.

13. The lease provides that the landlord shall insure the property and keep the building and grounds in repair. It can then recover 9.09% of the Estate Expenses and External Building Expenses plus 33.3% of the Internal Building Expenses for his or her particular Block from the leaseholder.

14. Clauses 3.2, 3.3 and the Fourth and Fifth Schedules deal with service charges. In essence, the landlord estimates the anticipated service charge for the ensuing year and is entitled to be paid one half of that amount plus a contribution towards a sinking fund on what are described in clause 3.2 as the 'half yearly days' which are defined in the Particulars as being 1st October and 1st April.

15. The maintenance year is defined as the 12 months up to 30th September in each year or such other period as the landlord stipulates. At the end of each maintenance year, the landlord must prepare a service charge account and then make what is described as a Maintenance Adjustment for the amount by which the estimate "*shall have exceeded or fallen short of the actual expenditure in the Maintenance Year*". The leaseholder then either pays any shortfall or is credited with any overpayment.

16. In the Third Schedule, the leaseholder covenants to pay "*on a full indemnity basis all costs and expenses incurred by the Lessor or the Lessor's Solicitors*" in enforcing the terms of the lease or in respect of any claim made by the leaseholder against the landlord. This is, in effect, repeated in the service charge provisions in the Fifth Schedule which also provides that the service charges can include "*all costs and expenses incurred by the Lessor....in the preparation and audit of the Service Charge accounts*".

The Law

17. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'.

18. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. This Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable and, if so, whether it is payable.

19. Paragraph 1 of Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") ("the Schedule") defines an administration charge as being:-

> *"an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable... directly or indirectly in respect of a failure by the tenant to make a payment by the due date to the landlord."*

20. Paragraph 2 of the Schedule, which applies to amounts payable after 30th September 2003, then says:-

> *"a variable administration charge is payable only to the extent that the amount of the charge is reasonable"*

21. Paragraph 5A then provides that a tenant can apply to this Tribunal to reduce or extinguish a liability to pay an administration charge.

The Inspection

22. The members of the Tribunal inspected the estate in the presence of the Applicant, Ms Melling and one other whose name was not given. The 2017 decision contains a full description and confirms that the estate consists of 3 modern blocks of brick/block construction under what appeared to be a composite tiled roof which has been made to look like slate. It remained in reasonable condition overall. It is in a pleasant residential area close to Brentwood station.

23. The 2 Tribunal members who were not part of the 2017 Tribunal inspected the buildings including the common parts of Block 2. It was noted in particular that there were no fire extinguishers which would require annual testing. This is not to suggest that such fire extinguishers are necessary, but is merely confirmatory evidence that detailed inspections, reports and tests are not required every year. The paint to the internal wall to the rear of Block 2 in the parking area was still flaking possibly caused by earth being put against the outside of the wall above the damp course. The 2017 decision mentioned this and said that the managing agents should rectify this as soon as possible because there is clearly a risk of long term damage. It was also noted that the problems with the gutters had not been resolved.

The Hearing

24. The hearing was attended by the Applicant and Ms. Melling. She said at the outset that the Respondent's main witness, Stuart Coe, was not able to attend the hearing as he had just left the employ of the managing agent.

This was of concern to the Tribunal because its members wanted to ask Mr. Coe a number of questions. Ms. Melling said that she would adopt the evidence in his statement but when she was questioned, it was clear that her knowledge of the facts set out by Mr. Coe were second hand and, in some instances, unknown.

25. Ms. Melling confirmed that her client's main case was that the 2017 decision only related to flat 7 and that the Tribunal could and should now reach a different decision as to the other flats based on the additional evidence now produced. It was put to her that the 2017 decision could only have been a determination of the overall service charges relating to the estate. They were then split in the proportion set in the lease for flat 7.

26. Further, the Respondent had asked both the First-tier Tribunal and the Upper Tribunal for permission to appeal that decision and both applications had been refused. The Tribunal chair then asked Ms. Melling to comment on the various points set out in the discussion section of this decision. She could not add anything and merely confirmed the points being made by Mr. Coe in his statement.

27. Mr. Meekcoms had presented a skeleton argument for the Tribunal to consider. This merely repeated the matters he had put in his application and statements save for comments about late evidence. He said that he wanted the Tribunal to do something about the loss of the reserve fund particularly because the Respondent was now asking for more money to go into a 'new' reserve fund. He confirmed that he was pursuing his prior written application for a refund of fees and £60 being part of the copying charges and postage for the bundles.

28. As to the reserve fund, the Tribunal asked Ms. Melling to explain what plan had been put together to reassure the leaseholders as to what costs the reserve fund was intended to cover. All she could say was that a surveyor would be instructed to draw up a plan to include the likely costs to be covered and timescales. She referred to an 'in house' surveyor. That had not yet been done and the figure now being requested was merely a figure put forward to get the fund 'off the ground'.

29. Mr. Meekcoms then criticised the request for payments on account which had recently arrived. He took the Tribunal through the figures and explained the substantial increases which had been made.

Discussion

30. The statement of Stuart Coe, adopted by Ms. Melling and commencing at page 134 in the bundle is very significant. Various points he makes can be summarised and commented upon as follows:

- He says that the 2017 decision only related to the Applicant and it cannot be presumed that the decision will be the same in respect of the other flats because the evidence might be different. As has been said, this statement just ignores the fact that the Tribunal in 2017 had to assess the reasonableness of the service charges for the whole estate and the individual buildings as is perfectly obvious from the decision itself. The suggestion that the service charges for each flat

would be assessed independently without any reference to the service charges for the whole estate and individual buildings makes no sense.

- The Tribunal's attention is drawn to the fact that the 2017 decision was appealed and the Respondent was not successful. In fact, the Respondent could not obtain the permission of either this Tribunal or the Upper Tribunal to proceed with an appeal for the reasons given i.e. that there was no merit in an appeal.
- A large number of cases are referred to. Most of them are First-tier Tribunal cases which are not binding on this Tribunal although they have, of course, been considered. It should be noted that this decision will not set out an assessment of each and every one of the numerous decisions provided. Some of the cases are binding such as **Schilling v Canary Riverside Development PTD Ltd** LRX/26/2005; LRX/31/2005 & LRX/47/2005. However the comment on that case is wrong for the reasons set out below.
- Mr. Coe then starts to give 'evidence' as to management fees from previous FtT decisions presumably on the basis that if he could not successfully appeal the 2017 decision, he will try to do it in another way. He then seeks to do the same with regard to the accountancy fees and the cost of out of hours emergency telephone lines.
- On the question of the health and safety inspections, he says that the Respondent "*does not accept that the health and safety fire risk assessment should be fixed by the Tribunal, nor is he* (sic) *aware that the FTT have powers to determine the frequency of this requirement under applicable Laws and Legislation*". The Tribunal has the clear and undisputed power to determine what is a reasonable service charge. It did so determine that issue in 2017 with the evidence available and the expertise of its members. The only evidence now produced is from a Michael Dray, who describes himself as a safety consultant, but all he does is produce the ARMA advice dealt with and considered by the Tribunal in the 2017 case.
- A further point on the issue of the annual health and safety report is made at paragraph 9 of his statement on page 137 when he says "*there may be a need to attend and/or review the report; the reasons being currently unforeseen or unknown by both the Respondent and/or their agent such as a change in circumstances in occupancy or Legislation given recent tragic events*". The 2017 decision said that there had to be an annual visit for a review and this was costed. The managing agent does, of course, inspect at least once a year as well in accordance with the RICS Code. Ms. Melling assumed that the 'tragic events' is a reference to Grenfell. Such a reference was entirely inappropriate because this case is about 3 relatively modern low rise buildings without cladding where the risks of death or injury in the event of a fire are different.
- Mr. Coe then starts to comment on the part of the 2017 decision which deals with how the reserve fund was dealt with by the Respondent or the previous freehold owner and/or the previous managing agent. He refers to comments being "*slanderous and defamatory*" without producing any evidence whatsoever to deal with the facts put to the Tribunal by co-employees of his and the Tribunal's conclusions. Whatever the Respondent may be saying,

the evidence in 2017 was that a substantial amount of money had apparently been taken from the reserves by the Respondent or its predecessor in title for unidentified purposes. That is bound to have an effect, however marginal, on the leasehold interests because potential buyers might be put off by this. The matter should be properly investigated and resolved – if necessary, by the police. The Respondent cannot, as it were, 'wash its hands' of this matter as reserve funds are held on trust for the long leaseholders. Possible breach of trust is a very serious matter.

- Mr. Coe then explains why he has refused to supply an account of what service charges have been claimed, despite the fact that Mr. Meekcoms is the Applicant and the account relating to flat 7 should have been supplied. He should know that there is nothing in section 27A of the 1985 Act to say that the applicant has to be either a leaseholder or a landlord. This application relates to the whole property and the Tribunal is clearly entitled to see the service charge accounts. In any event, letters of authority have now been produced and yet the necessary information for 2018 has still not been produced save for a demand for monies on account which must have been prepared, at least to some extent, on figures used in the 2018 accounts.

31. In **Schilling v Canary Riverside Development PTD Ltd** LRX/26/2005; LRX/31/2005 & LRX/47/2005 His Honour Judge Rich QC had to consider upon whom lay the burden of proof in service charge disputes. At paragraph 15 he stated :

> *"If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the Yorkbrook4 case make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard."*

32. Mr. Coe's interpretation of that decision is that it ruled "*...there is an evidential burden on the Applicant to prove unreasonableness where there is a Prima Facie case presented. It is the Respondents case that neither the Leaseholder or FTT provided evidential proof that the service charge was unreasonable in...*" the 2017 decision. Mr. Coe is confusing the burden of proof with proving a case. They are different things. In any event, as is clearly set out in the 2017 decision, the Tribunal relied upon the evidence presented to it and its own knowledge and experience. Mr Coe seems to have overlooked the fact that the Respondent failed to even be given permission to appeal. The decision stands, whether the Respondent agrees with it or not. It must be adhered to in full.

33. Mr. Coe's comments on the well known **Arrowdell** decision are basically correct but they have no relevance to this case. Even Mr Coe cannot set out why he thinks that the case applies to any feature of the 2017 decision.

34. There is also a statement from Ms. Melling in her own right. She represented the Respondent at the 2017 hearing. She also makes a number of additional points to try to overturn the 2017 decision. Most of the answers to the points she makes are dealt with and explained in the 2017 decision. However, her assertion that the Tribunal was suggesting a 'desktop' health and safety inspection is, quite simply, wrong. The Tribunal said that there would have to be a review every year and a visit to make sure there had been no changes. Such visit is costed and allowed.

Costs

35. Ms. Melling said that there would be no charge to the long leaseholders for her attendance at the hearing. She could not agree to the claim for the refund of fees or the expenses. She pointed out that there were no receipts for the expenses save for £7.30.

36. The claim for refund of fees was made, in writing, before the hearing. The Tribunal's jurisdiction is in rule 13(2) of the **Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013** ("the 2013 rules") and any determination has to be on the basis that it is just and equitable to make such an order. As far as costs incurred are concerned, this was made at the same time and is covered by rule 13(1) of the 2013 rules. The case of **Willow Court Management Company (1985) Ltd. v Alexander** [2016] UKUT 290 sets the standard for making such a claim.

37. It confirms the rule 13(1) criteria namely that there has to be a finding of unreasonable conduct which "*includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case*".

Conclusions

38. As to the main issues, the Tribunal's conclusions and determinations are as set out in the decision above. The decision about the sinking or reserve fund is only made because these are relatively new buildings with negligible external decorations which means that any substantial cost should not be incurred in the near future. Why monies should have been requested when no thought appears to have been given to what works need to be covered and when they are anticipated to be incurred was not explained.

39. As to the claim for monies on account, Ms. Melling was in some difficulties because she had no part in their calculation. Based on what Mr. Meekcoms had said, the 2017 decision and its own knowledge and experience, the Tribunal determined the reasonable total claims as follows:-

Item	claim(£)	Reasonable amount(£)
Landscape maintenance & repairs	3,632.00	2,000.00
Health and safety	600.00	160.00
Insurance	2,060.00	2,060.00
Management fees	4,063.00	3,100.00
Site inspections	480.00	nil
Accountancy fees	720.00	325.00

24/7 emergency service	264.00	185.00
Cleaning	229.00	229.00
Electricity	185.00	185.00
Repairs	550.00	550.00
Reserve fund	675.00	nil

40. No information was given about planned landscape maintenance and repairs to the estate save for some work to the trees around the buildings at what appears to be a proposed cost of £1,632. This seems remarkably high without any explanation. £2,000 has been allowed for both the tree work and repairs which does not, of course, prevent higher figures being claimed at the end of the year if they can be justified as being reasonable. The other amounts have been assessed on the basis of the other determinations of this Tribunal plus some small increases to reflect inflation.

41. The site visits have been disallowed because the Respondent has just told the long leaseholders that there will now be 4 visits per year without any reason being given. The RICS Code of Practice already says that the annual fee includes any necessary site visits.

42. As to the Respondent's costs in respect of this application, the Tribunal appreciates the indication given by Ms. Melling but makes the orders requested to reassure the long leaseholders. As to the return of the fees and expenses, the Tribunal determines that the Respondent has deliberately decided to disobey the Tribunal's 2017 decision. That behaviour on the part of a professional landlord and professional managing agent is unreasonable, and the order is that not only have the Tribunal fees to be refunded but the £60 also has to be paid. The Tribunal is satisfied that the actually expense incurred by the Applicant exceeded that amount and that it is a reasonable amount to partially cover the costs of copying and postage.

Bruce Edgington

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Bruce Edgington
Regional Judge
19th October 2018

ANNEX - RIGHTS OF APPEAL

i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.