12545

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BE/LSC/2017/0105**
Property	:	**Apt C307, The Jam Factory, Greenwalk, London SE1 4TQ**
Applicant	:	**Mr S Lewis FRICS**
Representatives	:	**In person**
Respondent	:	**Jam Factory Freehold Limited**
Representative	:	**Mr K Gunaratna of Counsel**
Type of application	:	**Reasonableness of and liability to pay service charges – Section 27A and 20C Landlord and Tenant Act 1985**
Tribunal members	:	**Judge Lancelot Robson** **Mr C Gowman MCIEH**
Date and venue of hearing	:	**14th August 2017** **10 Alfred Place, London WC1E 7LR**
Date of decision	:	**5th December 2017**

DECISION

Decisions of the Tribunal

(1) The Tribunal determines that the Electricity charges for the service charge year 2015 (Item 48) demanded by the Respondent are reasonable and reasonably incurred.

(2) The Section 20 notices relating to major external works of redecoration in 2015 (item 63) were not defective, and were validly served. The Tribunal also noted the offer made by the Respondent relating to window repairs (referred to below).

(3) The Legal and professional fees demanded relating to 2015 (item 65) were reasonable and payable.

(4) The charge for Health and Safety works made in 2015 (Item 66) was reasonable and payable.

(5) For clarity, the Tribunal records that all other charges in dispute relating to final service charge accounts up to and including 31st December 2015 are properly payable. There was insufficient time to consider the estimated charges for 2016, but the parties may find the Tribunal's findings relating to the 2015 accounts of assistance in considering 2016.

(6) The Tribunal refused an application to make an order under Section 20C

(7) The Tribunal made the detailed decisions noted below.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 (the 1985 Act) as to the amount of service charges payable by the Applicant in respect of the service charge years commencing on 1st January 2013, 2014, and 2015, and the estimated service charge for the year commencing on 1st January 2016 under a lease (the Lease) dated 17th February 2004. A Section 20C Order (limiting the landlord's costs of this application) is also sought.

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

Background

3. The property is a two bedroomed flat in a large development of similar properties in a converted Victorian warehouse. Issues relating back to the conversion emerged in 2005. Management issues also emerged. A significant group of leaseholders (about 95) formed the Respondent Company and purchased the freehold in 2010 due to unsatisfactory management. Some leaseholders (it was not clear to the Tribunal if they were also shareholders in the Respondent) also applied unsuccessfully to the predecessor of this tribunal for the Appointment of a Manager in 2011. There have also been several other applications under Section 27A, leading to a decision of this Tribunal dated 21st May 2015. The previous professional manager, under various names, managed the development until December 2015, since when it has been managed by Messrs Cluttons. Both parties have been handicapped by the failure of the previous manager to hand over files and documents until very recently, which has affected their ability to make their respective cases. This resulted in important evidential documents being produced very late, and delays in finalising their respective cases. The Tribunal noted that there had been a significant meeting between the parties' representatives on 6th July 2017. The Tribunal also noted from the papers before it at the start of the hearing, that there were still 34 specific items of service charge in issue over a period 3 years, and at least 2 items of principle.

4. The Application was dated 17th March 2017. Directions were issued by the Tribunal after a Case Management Conference on 11th April 2017 (subsequently amended on 24th April 2017). The parties made written submissions, although it was not clear as to whether they had followed the Directions in so doing. The bundle received by the Tribunal prior to the hearing was not in good order, had no usable index, and a number of vital documents were missing. At the start of the hearing Counsel, Mr Gunaratna, advised the Tribunal that he had also noted this problem on receiving the papers, and helpfully produced copies of the missing documents as a core bundle for the parties and the Tribunal. The Tribunal dealt with a preliminary point on jurisdiction, and then considered the new documents (notably the Applicant's statement of case and the revised Scott Schedule) prior to commencing the substantive hearing. Despite the parties' efforts at the hearing, the bundles, and the Applicant's statements of case were difficult to follow. There were many cross-references to other issues and items. However the Tribunal has decided those issues which the Applicant agreed at the start of his oral submissions were the most important, i.e. Electricity, the validity of the Section 20 notices relating to Major works of Redecoration, Health and Safety, and Legal Fees. These items appeared in his initial statement of case dated 2nd June 2017. The Respondent also submitted a further undated detailed statement of case outwith the Tribunal's directions, but appears to have been produced on or about 5th August 2017 (only 10 days prior to the hearing). There a number of of other issues were also raised, but these have not been considered in view of the Applicant's agreement noted above, and the lateness of the other issues.

5. Mr Lewis appeared in person. Mr Gunaratna represented the Respondent. Both made oral submissions following the parties' written submissions. Also present supporting the Applicant was Mr Bond for part of the hearing, and another leaseholder. On behalf of the Respondent present were; Ms K. Bright, a solicitor and Ms T. Rudzko,

both of Messrs Bishop & Sewell, Mr B. Martin, of Cluttons (current Managing Agents), and Ms A. Keely, a Director of the Respondent.

Preliminary point

6. Mr Gunaratna submitted that the Applicant had in fact made a compromise agreement with the Respondent relating to matters in dispute prior to June 2015, and thus items in dispute prior to that date could not be further pursued by the Applicant. He referred to the witness statement of Ms Keely (which had been answered by the Applicant) as to the factual situation, including the terms of an email from the Applicant dated 5th March 2015 to Laurie Marsh. Mr Gunaratna accepted that mere payment of a charge was insufficient evidence of agreement, but he considered that the evidence showed that an agreement complying with the exception in Section 27A(4)(a) of the Act existed. He also accepted that each case depended on its own facts, but the case law appeared to support his contention. He referred to the terms of Section 27A, Woodfall on Landlord and Tenant; Vol 1, Chap 7 Section 12, at Para 7.192.1 (particularly the commentary on Section 27A(4)(a)) and the following cases; Avon Freeholds Limited v Garnier [2016] UKUT 477 (LC), Crosspite v Sachdev [2012] UKUT 321 (LC), Cain v London Borough of Islington [2015] UKUT 0542 (LC), Tintern Abbey Residents Association Ltd v Owen [2015] UKUT 0232 (LC). While he was also prepared to accept that the Applicant may not have had the intention to reach a compromise agreement, he had in fact done so, and the Respondent had believed that to be so. The terms of the email of 5th March 2015 were clear, and any objective observer would have considered an agreement existed. The test to be applied was an objective one, not a subjective one.

7. In reply, the Applicant submitted that he did not dispute the case law, but at no time had he intended to make a compromise agreement. He objected to the Respondent's suggestion that he was "blowing hot and cold" and that the application was an abuse of process. His application was an action of last resort. He had originally brought proceedings in 2011. That had been found to have been settled by a compromise agreement which the Respondent had unsuccessfully tried to appeal (see p.49 of his bundle). He had asked for mediation at the Case Management Conference. The Respondent had taken 15 weeks to reply. The meeting with the Directors in March 2015 at which the agreement was allegedly made had been suggested by the Applicant. The meeting focussed on Health and Safety issues and stability. He was concerned that the Respondent was ignoring him. Taking this point was a convenient way of interpreting the discussion. There was no mention of a compromise. The Respondent was aware he had been trying to elicit information since 2013. It had taken until August 2017 to get the relevant answers. He had not had legal advice relating to these proceedings.

Decision on preliminary point

8. The Tribunal adjourned to consider the submissions and evidence.

9. While the case law was not as helpful to Mr Gunaratna's submissions as it might have been, the Tribunal agreed that the effect of the case law was to clarify that it was necessary to take an objective approach to the question of whether an agreement had been made. The terms of the Applicant's email of 5th March 2015, recording the Applicant's understanding of the outcome of the meeting on 3rd March 2015 appeared very clear. The vital part stated;

.... "It is crucial that we have a very clear understanding of what we agreed. I set out my understanding of the Agreement reached as follows:

1. The LVT proceedings initiated by Bishop and Sewell to be withdrawn with immediate effect
2. SBL to bring service charge payments up to date (excluding the surcharge)
3. SBL to advise on measures to regularise the surcharge demand, viz a vis S20 Process
4. SBL to advise on measures to address Life Safety and H&S issues
5. We did not discuss the "penalty" being claimed under the LVT action. I am assuming this will be dropped."....

10. Ms Keely's statement of 24th June 2017 (not disputed by the Applicant at the hearing) confirmed that the Applicant had paid £4,905.84 on 15th March 2015. The Respondent's legal proceedings were withdrawn on 16th March 2015. Further payments of monies outstanding were made by the Respondent on 15th and 22nd June 2015, apparently leaving a balance of £112.76 outstanding.

11. The Tribunal decided that the evidence disclosed what appeared to be a clear agreement between the parties, following the terms of which, both sides had given consideration. The Tribunal considered carefully the full terms of the email of 5th March 2015, and the relevant correspondence, but concluded that there was nothing there which should alter its view that the Respondent had assumed there was an agreement based on the terms of the email of 5th March 2015, and that this assumption was a reasonable one.

12. In the light of the above, the Tribunal decided that the Applicant was legally debarred from raising matters arising prior to 22nd June 2015 in this application. However it also noted that this decision did not dispose of the application, as many matters in dispute also arose after 22nd June 2015, some of which, by virtue of the interim service charge demands, referred back to the beginning of the financial year

Matters Remaining in Dispute

13. As noted in paragraph 4 above, the Tribunal has decided the following items of principle; Electricity, the validity of the Section 20 notices relating to Major works of Redecoration, Health and Safety, and Legal Fees.

Electricity 2015

14. The Applicant submitted that he had no invoices for 2015, and that the invoices for previous years did not relate to Block C, there was a huge difference in the costs. He could not see any reason for the discrepancies. He had asked Cluttons to investigate but had had no answer. More than 50% of the properties in the Development, and also in Block C, were sublet, which affected the consumption.

15. The Respondent submitted that there were 13 meters on the estate, and 4 separate meters in Block C. Building contractors were onsite for a year and they used a lot of electricity. There were 10-15 people working They used heating and other types of equipment. There was also a restroom for staff created in about 2013. There was a summary of actions taken in 2012 to verify the accuracy of billing at p.58 (Tab 2) of bundle A.

16. The Tribunal decided that the Applicant's submissions were very vague. His evidence did not demonstrate that there were in fact inaccuracies in the allocation between the blocks either in the previous or current year. The documents indicated that there had been allocation problems in the past, but a major checking exercise had been carried out in 2012. Although the Applicant doubted whether the landlord had an accurate view of the meters, he gave no specific evidence. It was common ground that the individual invoices had only recently become available (in April 2017), due to the failure of the previous agents to hand them over in good time. There were no relevant invoices in the bundles. Also it was unclear where the Applicant's figures reported in the Scott Schedule had come from. The landlord's figures were significantly different and substantially supported by the "journal" accounts entries, and the annual service charge accounts certified by BDO, a firm of chartered accountants.

17. While the Tribunal would have preferred to see copies of the relevant invoices, the journal entries in the bundle were comprehensive, and the annual accounts had been certified by qualified accountants. Against that, the Applicant's submissions were very general, and insufficiently supported by evidence. On balance, the Tribunal considered that the electricity charges were reasonably evidenced and explained. The Tribunal thus decided that the charges for 2015 were reasonable.

Major Works 2015

18. The Applicant submitted that the Section 20 notices served in connection with the works were defective and thus invalid. The first notice dated 27th September 2013 was challenged on 25th March 2015, after the service of the 2nd notice issued on 2nd February 2015. In his view the notice was defective by failure to refer to the tenants' representations made in correspondence. In a letter dated 28th October 2014 the specification had been changed due to financial constraints. In his view the original specification had been descoped, particularly the decoration of all previously painted surfaces. In the event his windows (part of the "grey windows") had not been painted. In

answer to a question about the date of the end of the consultation period relating to the first notice, he considered that the 2nd notice had resurrected the first notice. The 2nd notice was a notice of estimates. Further, the specification had been changed again on 3rd June 2015. There was no reference to the grey windows being painted. Even after the work had been done the window to his flat still leaks. The Applicant also stated that at one point a cherry picker had appeared at the window. The frame had been rubbed down, but due to rain, the frame had only been partly repainted. The workmen never returned.

19. The Respondent submitted that there had been no defect in the Section 20 notices. The original intention was to do more extensive works, but rather less than was necessary had been collected due to arrears. The programme had been cut back to the more important items. Something like 2/3rds of the painting work had been done. They tried to ensure everyone got something from the works. The Applicants noted that the painting of the grey windows had not been raised before. However they had invoices for that work, (and in Ms Keeley's corrective witness statement dated 27th September 2017, the Respondent had confirmed with Mr Bithrey that the work had been done). Mr Gunaratna gave an undertaking in front of the Tribunal that if there was a problem with any work missed, particularly the window leak, it would be done using a cherry picker. Mr Lewis agreed to consider this offer. This matter has been confirmed in a letter seen by the Tribunal dated 13th November 2017 from the Respondent's solicitor.

20. The Tribunal considered the evidence and submissions. The Tribunal disagreed with the Applicant as to the effect of the correspondence surrounding the Section 20 notices. It decided that the notices appeared valid on their face and that no observations had in fact been received within the time limits specified in the notices which complied with the statutory time limits set out in the Service Charges (Consultation etc) Regulations 2003. The effect of the Upper Tribunal decision in 23 Dollis Avenue (1998) Limited v Vejdani 2016 [UKUT] 365 is that if a Section 20 notice is compliant on the face of it, consultees must make observations within the time limits specified, however much they have disagreed with the proposals or process. If they do not, they cannot complain that late (or early) observations have not been taken into account (or referred to) when challenging later notices. However the real problem in this case appeared not to be "descoping" work, but that the work had not been completed yet due to lack of funds. The Tribunal decided that the Section 20 notices were not defective. The Tribunal also noted the open offer made by the Respondent to deal with the Applicant's particular complaint.

Health and Safety

21. The Tribunal noted that the Applicant considered this item to be a critical matter. The Respondent did not disagree with that view, but doubted whether a Section 27A application was the correct way to deal with it.

22. The Applicant submitted that he had challenged the Section 20 process relating to fire safety works. These problems had been known to the Directors at least since 2009. The Applicant himself had been raising concerns since 2005. The subject was being treated in a cavalier way. There had been numerous reports. Some conflicted. He was also concerned that the estate insurance might be compromised. Last year some glass had been blown out in a storm, and hit the ground below. The Applicant alerted the Respondent on several occasions over his concerns about the defective fire seals. However the fire doors were still defective at the date of the hearing. Flammable materials were being stored in corridors and not being removed. While he accepted the charges were relatively small, the Applicant challenged whether they were properly incurred and whether the insurance was valid. In response to questions he confirmed that the charges concerned related to 2015. While the second Section 20 notice had not been served, there had been a report. He was not sure what the cost related to and the invoice had not been produced. The Respondent appeared to be in breach of its repairing and insuring covenants in the Lease.

23. The Respondent, as noted above, considered that much of the applicant's complaint fell outside the ambit of Section 27A. The charge for this work in 2015 related to a fire risk assessment by Peter Bailey. The previous agent (First Port) commissioned it. The item was noted in the journal entries, and was the very last item there. The actual invoice had only been discovered by the Respondent's agent a few days before the hearing.

24. The Tribunal considered the evidence and submissions. The journal entries produced by the Respondent showed that the charge concerned related to one item; £1,260 invoiced by Peter Bailey Associates for the preparation of a fire-proofing specification. The Respondent had issued an initial Section 20 notice of intention in January 2016 to do fire-proofing works. While it had taken almost a year to be done, the Tribunal considered that such a specification was a reasonable expense, and it was proper for it to be drawn up professionally, particularly in view of the Applicant's own declared concerns over many years. The Tribunal accepted that the Applicant's submission, i.e. that action should have been taken earlier and treated with more urgency, was not a matter which could properly be considered in a Section 27A application. The Tribunal decided that the charge was reasonable, and reasonably incurred.

Legal Fees

25. In view of time constraints at the hearing, the parties agreed to deal with this matter by written submissions after a meeting between them on 6th September 2017 to see if any items could be agreed. Both parties made written submissions.

26. The Applicant submitted that the Respondent in its written submissions, had only provided commentary in the Scott Schedule, but no evidence that expenditure, particularly in respect of costs relating to other blocks, could be charged to Block C.

27. The Respondent submitted that the apportionments of the disputed invoices were split between Blocks A, B, and C on the "normal" 93/42/59 apportionment, which was based on the number of flats per block. The Applicant had a full opportunity of inspecting the invoices and asking questions at the (September) meeting with Bishop and Sewell lasting 2 hours. In the light of the Respondents' answers to the questions raised in the Scott Schedule, and with the Applicant not providing alternative figures, the Respondent submitted that the sums demanded from the the Applicant should be deemed reasonable.

28. The Tribunal considered the evidence and submissions. It was disappointed that so few items appeared to have been resolved at the meeting in September. There were 11 items on the final Scott Schedule dealing with legal fees. From that Schedule, the Applicant had made no submission on invoice 83288 at all, and had apparently received detailed and ostensibly reasonable answers on all except one of the other invoices. Invoices 83584, 84301 (part), 85120, and 85393, related to ongoing litigation, which the Tribunal noted would have to be funded in advance of a decision. Invoice 0037 had been confirmed as recovered from the lessee concerned, so was presumably agreed. Invoices 83950, 84301 (part), 84721, 85120, 85122, and 85386, appeared to relate to general matters of concern to all blocks, even if some of the work had been occasioned by events in a particular flat or block. Invoice 85385 (and several others mentioned above) related to work done to enforce leases which had stopped short of action, or where the breaches were not admitted, but a compromise without proceedings had been reached.

29. The Applicant has effectively submitted generally that there was no power in the Lease to collect these charges. However, the 2015 decision, noted above, of which the Applicant is aware, found that the landlord's professional costs (in that case in relation to defending an application for the appointment of a manager of Blocks A, B, and C) are properly recoverable as part of the common parts service charge under the terms of the Lease. The Tribunal in that case went on at paragraph 67 to state; *"The key point is that the allocation must depend on the subject matter of the expenditure."* The Tribunal finds this formulation of considerable assistance.

30. The Lease was not particularly well drawn on the question of allocation, but the 2015 decision has clarified it to a considerable extent. Issues which affect all three blocks should be chargeable to all leaseholders, and the Tribunal found no fault with the Respondent's usual method of apportioning general costs. However the Tribunal decided that if costs properly relate to only one block, such costs should be paid by the leaseholders of that block. Also, where costs relating to one block or even one flat are not recoverable, or cannot reasonably be recovered, (e.g. if a matter is compromised or agreed, or the full costs of litigation are not ordered by a Court) or it is unclear if the subject matter of the expenditure should be allocated to one block or flat, then the

landlord is entitled to use its usual method for apportioning general costs. It also has the advantage of more fairly spreading unrecovered costs amongst the leaseholders.

31. The Applicant sought to challenge some invoices (e.g invoice 85385), apparently on the assumption that it was always possible to recover costs from a third party. However if an issue is compromised, or the landlord was wholly or partly unsuccessful in recovering costs, or had to pay the costs of others, this assumption would be unsound. The Tribunal decided that Paragraphs 1.1.2 and 1.1.3. of the Ninth Schedule to the Lease were sufficiently broad to cover such an eventuality. The Applicant sought to challenge other invoices on the basis that he disagreed with the reasons for the work (e.g. invoice 85120). The Tribunal rejected this approach, as it would allow a tenant to second guess the landlord, and thus effectively to elect which bills it wished to pay. It is for the landlord to decide the method of providing a service, subject only to the issue of reasonableness.

32. Invoice 85121 was exceptional. The Applicant's summary on the Scott Schedule was unclear; "costs to Lessee of Block C to be confirmed as recovered", which seemed contradictory. The Respondent's reply was equally Delphic; "This related to a water leak in a lessee's flat. Split between Blocks A B and C on the normal 93/42/59 apportionment." This appeared equally contradictory. The invoice itself referred to advice given relating to the terms of the lease of a specific flat. The Tribunal,on balance, decided that it was reasonable for the Respondent to charge this item by splitting it on the usual apportionment basis.

33. Thus the Tribunal decided on balance that all the invoices for legal fees were reasonable and recoverable under the block service charge.

Section 20C application

34. The Applicant also made a Section 20C application. The Tribunal notes that any order in a Rule Section 20C application deprives the landlord of some of its contractual rights under the Lease, and thus should not be made lightly. The Tribunal has a wide discretion. In this case, the landlord has been almost entirely successful in defending the application. It was not disputed by the landlord that the file from its previous agent was provided late, but this problem was not due to the turpitude or inactivity of the Respondent itself. In all the circumstances the Tribunal decided to refuse the application.

Tribunal Judge: Lancelot Robson 5th December 2017

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

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

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

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

Section 19

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

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

Section 27A

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

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

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

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

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

Section 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.