9S37

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AM/LSC/2013/0569 & 0645**
Property	:	**Flat 3 St Mary's Court, 3 Defoe Road, London N16 0NP**
Applicant	:	**The Assembly Rooms Defoe Road Management Company Limited**
Representatives	:	**Ms J Touloumbadjian, managing agent, and Ms J Bonathan, director**
Respondent	:	**Ms C Cameron**
Representative	:	**Mr T Talbot-Ponsonby, Counsel**
Type of Application	:	**For the determination of the liability to pay a service charge**
Also present	:	**Mr H Cameron, father of Respondent, and Mr A Isaacs, uncle of Respondent**
Tribunal Members	:	**Judge P Korn (chairman)** **Mr D Jagger, MRICS**
Date and venue of Hearing	:	**18th November 2013 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**16th December 2013**

DECISION

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Decisions of the tribunal

(1) The tribunal determines as follows:-

- The Applicant complied with the consultation requirements in respect of the major works.
- The contributions to the reserve fund are reasonable.
- The percentage of the service charge charged to the Respondent (12%) for the period to which the application relates is reasonable.
- The debt management admin fees of £900.00 and the late payment fees of £240.00 are not payable.

(2) The tribunal notes that it has been agreed between the parties that the Lease does not provide for interest on late payments and that therefore interest is not payable.

(3) Accordingly, in relation to the amounts claimed in the County Court claim, the amount payable by the Respondent is £4,133.72 **less** the sums purported to be charged as interest. In relation to the amounts claimed in the separate tribunal application, the amount payable is £864.84.

(4) The tribunal determines that the Respondent shall not be required to reimburse the Applicant's application fee and hearing fee paid to the tribunal. The tribunal also declines to make a section 20C cost order.

(5) For the avoidance of doubt, nothing in this determination is intended to fetter the discretion of the county court in relation to county court interest or fees.

The application

1. The Applicant seeks, and following a transfer from the county court dated 4th July 2013, the tribunal is required to make a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("**the 1985 Act**") as to the reasonableness and payability of certain service charges charged to the Respondent.

2. The county court claim relates to alleged arrears of service charge and administration charge in respect of the years 2011 and 2012. The Applicant has also made a separate application direct to the tribunal in respect of the year 2013 which the tribunal has agreed to hear together with the transferred county court claim.

3. Leaving aside any county court interest and the court fee, the county court claim totals £4,693.72, of which £400.00 is described as "debt management admin fees", £160.00 is described as "late payment fees" and the remainder is categorised as arrears of service charge.

4. As regards the separate tribunal application, again leaving aside any county court interest the application is in respect of a total sum of £1,444.84, of which £500.00 is described as "additional debt management fee", £80.00 is described as "additional late payment fee" and the remainder is categorised as reserve fund service charge.

5. The relevant legal provisions are set out in the Appendix to this decision. The Respondent's lease ("**the Lease**") is dated 27th August 2002 and is between Croft Homes Limited (1) the Applicant (2) and the Respondent (3).

Structure of hearing

6. At the suggestion of the tribunal, it was agreed by both parties that Counsel for the Respondent would briefly explain the Respondent's objections to the service charges and administration charges before the Applicant presented its case.

7. In relation to the service charges, Counsel explained that the Respondent's concerns related to (a) major works and (b) the service charge percentage payable by the Respondent. In relation to the administration charges (late payment fees and interest), the Respondent's position was that there was no provision for these to be charged under the Lease.

Applicant's case on major works

8. Ms Touloumbadjian for the Applicant referred the tribunal to the details of the Applicant's planned maintenance programme and to the copy section 20 notices. No responses to the section 20 notices or related documentation were received from any leaseholders at any stage apart from some minor queries. In the Applicant's view the consultation process was carried out fully and properly. Three contractors quoted for the work.

Respondent's response on major works and certain other concerns

9. Mr Talbot-Ponsonby for the Respondent accepted that there had been consultation, but the Respondent was unclear as to what the consultation related to. The Respondent's main concern was the level of contribution towards the reserve fund. There were no service charge accounts and there was no formal survey stating what works needed to be carried out.

10. As regards the power to create a reserve fund, the Respondent accepted that clause 5.1.5 of the Lease contained a power to do so but Mr Talbot-Ponsonby noted that the clause only required the tenant to pay towards the cost of any reserve "properly and reasonably required". In Mr Talbot-Ponsonby's submission, the Respondent was not in a position to know whether or not a particular sum was "reasonably" required or not. She was being asked to take too much on trust and also felt that it was inappropriate to use the reserve fund for certain types of work.

11. The Respondent also felt that the total planned maintenance expenditure had been set at too high a level for each of the years in dispute. She was not aware of any major works that needed to be carried out.

12. Mr Talbot-Ponsonby said that the Respondent felt that she had very little information in relation to the actual service charge and did not understand why the Applicant was unable to produce detailed service charge accounts. He also noted that the actual service charge for 2012 included a 'contingency' sum of £1,097.53, which seemed strange.

Applicant's follow-up comments

13. Ms Touloumbadjian accepted that the service charge information that had been provided to the Respondent was inadequate and she said that the Applicant would do better in the future. She did not accept that it was inappropriate to use the reserve fund for certain types of work.

Applicant's case on service charge percentage

14. Ms Touloumbadjian accepted that the service charge percentage payable by Flat 2 had been reduced from 12.5% to 7% in 2010 but neither she nor Ms Bonathan knew why this had happened.

15. The Applicant had agreed to change all of the service charge percentages from January 2014, and this would result in the percentage of the service charge borne by the Property going down from 12% to 11.37%. However, until then the percentage payable by the Property was governed by the Lease, and this was clearly set out in the Lease as being 12%.

Respondent's response on service charge percentage

16. Mr Talbot-Ponsonby said that as it was agreed that it would be fairer for the Respondent to pay a lower percentage it was surprising that it had taken so long to agree an appropriate reduction despite the issue having been raised a long time ago.

17. It was also surprising that neither Ms Touloumbadjian nor Ms Bonathan knew why the percentage payable by Flat 2 had been reduced from 12.5% to 7%. There did not seem to be any obvious rationale for this reduction as Flat 2 seemed to be only slightly smaller than the Property.

18. Mr Talbot-Ponsonby also referred the tribunal to the relevant provisions in the Lease. The proviso to paragraph 9 of the Particulars stated that if the specified percentage of 12% was *"inappropriate having regard to the nature of the expenditure incurred or the premises in or upon the Estate benefited by the expenditure (or item of expenditure) or otherwise"* the landlord was *"at liberty in its discretion to adopt such other method of calculation of the Tenant's share of total expenditure ... as shall be fair and reasonable in the circumstances"*. Clause 4.11 of the Lease stated that *"if in the reasonable opinion of the Company it should at any time become necessary or equitable so to do the Company shall have power to recalculate on an equitable basis the Tenant's share of total expenditure ..."*.

19. In relation to the percentage properly payable by Flat 2 and the Applicant's obligation to enforce this, Mr Talbot-Ponsonby referred the tribunal to clause 6.4 of the Lease, the relevant part of which reads: *"provided that the Tenant has complied with all covenants ... on the part of the Tenant ... the Landlord shall enforce the covenants referred to in clause 3 and 5 contained in other Leases ... at the request of the Tenant providing the Tenant will indemnify the Landlord against all costs and expenses ..."*.

20. Mr Talbot-Ponsonby noted that prior to the reduction of Flat 2's contribution the service charge percentages in aggregate had added up to 105.5%. He submitted that the reasonable action to have taken in order to make each leaseholder's service charge reasonable under the 1985 Act would have been to credit the excess 5.5% back to the service charge account rather than reduce a particular leaseholder's service charge percentage by 5.5%.

<u>Respondent's position on administration charges</u>

21. The Respondent's case was simply that in Mr Talbot-Ponsonby's submission there was no provision in the Lease entitling the landlord to charge the late payment fees.

22. As regards interest, again there was no provision in the Lease for interest to be charged. As to whether county court interest could be charged, this was a discretionary matter for the county court but not an issue in respect of which the tribunal had jurisdiction to make a determination.

Applicant's response on administration charges

23. Ms Touloumbadjian felt that the late payment fees were covered by sub-clauses 5.1.3 and 5.1.4 of the Lease which entitled the landlord/management company to charge as part of the service charge the *"administrative and office and other incidental expenses of the Company in undertaking and running its business"* and *"the fees of Accountants and Managing Agents and other professional fees"*.

24. In relation to interest, the Applicant accepted that it was not payable under the Lease. The Applicant also accepted that county court interest was a discretionary matter for the county court and not an issue in respect of which the tribunal had jurisdiction to make a determination.

Tribunal's analysis and determinations

Major works

25. In relation to the major works, the Applicant has provided evidence of apparent compliance with the section 20 consultation process and the Respondent has failed to challenge that evidence in a meaningful way. Instead, the Respondent has focused on the reserve fund. Therefore in relation to the major works themselves in the tribunal's view there is no evidence of failure to comply with the consultation requirements which would limit the amount recoverable in respect of those works.

Reserve fund

26. In relation to the reserve fund, the Applicant has provided a copy of a planned maintenance programme prepared by a surveyor which, on the face of it, looks plausible. The tribunal has considered clause 5.1.5 of the Lease and is satisfied that it gives the landlord power to create a reserve fund and does not seek to limit the categories of expenditure which potentially could be the subject of a reserve fund. It is true that the clause in question requires the landlord to act "properly and reasonably", but that would be the case under the 1985 Act anyway and the Respondent has not produced any evidence to show that the Applicant has failed to act properly and reasonably in deciding how large a reserve fund to create at any one time. Looking at the size of the reserve fund during the years which are the subject of this application, the tribunal has no reason in the absence of any proper evidence to the contrary to conclude that the size of the reserve fund is unreasonably high.

27. The tribunal accepts that the Respondent has legitimate concerns about other aspects of the service charge. There seem to be no detailed service charge accounts and the Applicant has accepted that it needs to do better on this front. The Respondent is no doubt also influenced by

her concerns regarding the service charge percentages. However, on the specific issue of the reasonableness of the contributions to the reserve fund, the Applicant has provided sufficient information such that on the balance of probabilities - in the absence of a more incisive challenge from the Respondent - the contributions to the reserve fund are determined to be reasonable (subject to the tribunal's decision in relation to the service charge percentage).

Service charge percentage

28. The reason why and the basis on which Flat 2's service charge percentage was reduced, or deemed to have been reduced, from 12.5% to 7% is unclear. If the reason was solely to reduce the aggregate service charge percentage from 105.5% to 100% then, on the face of it, this seems an inequitable way to achieve this.

29. However, this application relates to the Property, not to Flat 2. In addition, it seems to be common ground between the parties that there has been no formal deed of variation or other binding method of variation of the lease of Flat 2. Therefore it is highly arguable that the Applicant has simply allowed a service charge shortfall to build up in relation to Flat 2 and that it is open to the Applicant to chase this as arrears. In practice, there may be arguments as to whether these 'arrears' are still recoverable in whole or in part, but arrears is what they appear to be.

30. In relation to the Property, the Lease states that the percentage payable is 12% and this is the percentage that the Applicant is seeking to recover (until the percentage is reduced as from January 2014). It is therefore hard to argue that the Applicant is not entitled to charge 12% unless one is able to demonstrate that the Applicant is under an obligation to reduce this percentage. The Lease provisions to which Mr Talbot-Ponsonby has referred give the landlord the power to change the service charge percentages in appropriate circumstances, but in the tribunal's view the Lease does not impose an obligation on the landlord to do so. If the Applicant **had** changed the Respondent's service charge percentage then it would have needed to do so in a fair way, but it has not in fact done so. In addition, the proviso to paragraph 9 of the Particulars seems to envisage a scenario in which the tenant's contribution towards a particular category of charge needs to be reviewed, as distinct from a simple variation of the service charge percentage for all services, whilst the power in clause 4.11 to recalculate the service charge percentage is a power which is framed in a subjective manner in that it depends on the landlord being of the (reasonable) opinion that the percentage should be changed.

31. As regards the proposition that the 12% allocation has effectively been rendered unreasonable for the purposes of section 19 of the 1985 Act by virtue of the reduction of Flat 2's percentage, the tribunal does not

accept this. Where, as here, the service charges add up to more than 100% there is a process available to leaseholders to apply for a variation of the relevant leases. If leaseholders choose not to pursue this option and the landlord simply seeks to enforce the contractually agreed percentage, that percentage is not rendered unreasonable simply by virtue of the landlord deciding to reduce another leaseholder's percentage. If there were clear evidence of bad faith then the tribunal would need to consider whether this could affect its analysis, but no evidence of bad faith has been provided and Ms Touloumbadjian's and Ms Bonathan's evidence was that they did not know the reason for the decision to reduce the percentage payable by Flat 2. In addition, they have now agreed to vary the percentages (as from January 2014) in a manner with which the Respondent is apparently satisfied.

32. As regards the argument that the landlord covenants to enforce the obligations in other leases, first of all the tribunal considers that this covenant is primarily aimed at having a mechanism for ensuring that leaseholders and occupiers behave in a neighbourly manner, but secondly the Respondent has failed to show how a failure to collect the full service charge amount from Flat 2 renders the Respondent's service charge percentage unreasonable.

33. Taking all of the above factors into account the tribunal determines that the 12% service charge percentage is reasonable in respect of the service charge years to which the application relates.

Administration charges

34. The tribunal agrees with the Respondent that there is no provision in the Lease for charging late payment fees or debt administration fees.

35. The general established principle is that payment clauses in leases are construed, in cases of ambiguity, in favour of the paying party. In this case, the Applicant relies on the reference to *"administrative and office and other incidental expenses of the Company in undertaking and running its business"* and *"the fees of Accountants and Managing Agents and other professional fees"*. Neither of these is considered by the tribunal to be wide enough to cover late payment fees, which are not expenses of the business but penalty charges for late payment, and neither are they professional fees. As regards debt administration fees, whilst it is slightly more arguable that these could fit within *"administrative and office and other incidental expenses"* the tribunal considers that clearer wording would be needed to entitle the Applicant to make a specific charge of this nature/amount for chasing up a specific debt.

36. In any event, sub-clauses 5.1.3 and 5.1.4 of the Lease are service charge provisions and therefore at most only entitle the Applicant to charge all of the leaseholders their service charge percentage of the relevant costs.

Therefore, these sub-clauses do not entitle the Applicant to charge the whole of the relevant costs to the Respondent direct.

37. Accordingly the tribunal determines that the late payment fees and debt administration fees are not payable.

38. As regards interest, the Applicant accepts that it is not payable under the Lease and there is therefore no dispute for the tribunal to resolve. County court interest is a discretionary matter for the county court and not an issue in respect of which the tribunal has jurisdiction to make a determination.

Cost Applications

39. At the end of the hearing, the Applicant made an application for reimbursement by the Respondent of the application and hearing fees. Whilst it is for the county court to decide the position in relation to the county court fee, in relation to the balance of the application fee and the tribunal hearing fee, the tribunal does not consider that these should be reimbursed by the Respondent. Whilst the Applicant has been successful on most issues, it has not been successful on all of them. Furthermore, whilst the tribunal has found in the Applicant's favour in relation to the particular service charge issues in dispute it has concerns regarding the lack of proper service charge accounts and the lack of information generally, and indeed the Applicant admitted during the course of the hearing that it could and should do better.

40. The Respondent applied for an order under section 20 of the 1985 Act that the Applicant should not be entitled to add its costs incurred in connection with these proceedings to the service charge. In view of the fact that that the Applicant has succeeded on most issues the tribunal declines to make a section 20C order. Therefore the Applicant can add its reasonable costs incurred in connection with these proceedings to the extent (if at all) that the Lease allows for these costs to be recovered.

41. There were no other cost applications.

Name: Judge P Korn **Date:** 16th December 2013

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.