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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/00KF/LSC/2013/0136**
Property	:	**3a Cossington Road, Westcliff-on-Sea, Essex SS0 7NJ**
Applicant	:	**Regisport Ltd.**
Respondent	:	**Gregory James Keane**
Date of transfer from Southend County Court	:	**15th October 2013**
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 venue of hearing	:	**12th February 2014 at Southend Magistrates' Court, 80 Victoria Avenue, Southend-on-Sea Essex SS2 6EU**

DECISION

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1. In respect of the amount claimed by the Applicant from the Respondent in the Southend County Court under case no. 3YJ60439, the decision of the Tribunal is as follows:-

		£	decision
09/08/12	opening service charge balance	1,971.67	£881.59 payable
29/11/12	legal expenses	300.00	not payable
23/01/13	interest	72.60	for the court
23/01/13	in house legal ex's re: summons	180.00	for the court
23/01/13	court fee	95.00	no jurisdiction
		2,619.27	

Hence, the amount which is reasonable and payable so far as those service charges and administration charges are concerned is £881.59. However the court should note that there is clearly a set-off arising from the Applicant's breach of the terms of the lease which exceeds, by a considerable margin, the amount of the

claim.

2. This decision determines those service charge and administration charge matters and the time for asking for permission to appeal in accordance with rule 52 of the **Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013** runs from when this decision is sent to the parties.

3. The only issue arising from the pleadings in the county court claim which the Tribunal was unable to resolve was the reasonableness of the insurance premium raised by the Respondent in his defence which was one of the issues transferred by the court. This was because of the failure of the Applicant to comply with the Tribunal's directions which meant that the Tribunal did not have the evidence upon which to make a decision. At the suggestion of those representing the Applicant, this issue is adjourned for possible agreement and, in the absence of agreement, for the directions to be complied with and for either party to apply for a new hearing date.

4. If no hearing date is applied for by 31st March 2014 or if a date is requested before then and the insurance issue is resolved by the Tribunal (whichever is the later) this matter will be transferred back to the Southend County Court under case no. 3YJ60439 to enable either party to apply for any further order dealing with those matters which are not within the jurisdiction of this Tribunal or any other matter not covered by this decision including enforcement, if appropriate.

Reasons

Introduction

5. In or about early 2013, a county court claim was issued by the Applicant claiming £2,619.27 in service charges from the Respondent to include interest, court fees and costs. The Respondent filed a defence dated 20th February 2013. By an Order made on the 15th October 2013 by District Judge Dudley, the case was transferred to this Tribunal. This Tribunal has inferred that the question as to "whether the service charges claimed plus the insurance premiums were payable and/or reasonable" was transferred. These are the only matters in the court pleadings which are within this Tribunal's jurisdiction.

6. The defence reads as follows:-

> *"I am disputing the claimants full amount of £2,619.27. The first of three years of occupancy I paid the service charges and the property was not being maintained as per the lease-agreement. Since then I have asked for a detailed report of the service charges for the past 3 years. I have asked Regisport Ltd. (claimant) to repair the roof of my property and also repair the window frames and balcony (which under legal contract they are required to do) I have had to use my own funds to repair the leaking roof £800.00 (please see attached invoice) and also the window frames which cost me £3,145.00*
>
> *They have also been asking for an additional £746.66 for building insurance, and this is just my quarter as there are four other occupants. I have asked for evidence of the policy schedule and*

key facts illustration to see the premium from Pier Management Insurance who are appointed by Regisport Ltd.. But this is unnecessarily high. I request direction to Leasehold Valuation Tribunal as to whether or not Regisport Ltd. claim is valid."

7. After transfer to this Tribunal, directions were made that the Applicant file a statement (a) giving the claims record for the building (b) the methods of achieving a competitive quote for insurance, (c) full details of any commission paid (and in default an inference would be drawn that a substantial commission was being paid) and then (d) setting out its justification for the balance service charges. The Respondent was then ordered to obtain 2 written competitive insurance quotations and set out in detail what he was now challenging in view of the Applicant's statement and why.

8. The Applicant did file a statement from Michael Lawton dated 5th December 2013. He says that he has held the position of property manager for 7 years and he is currently Property Manager for Gateway Property Management Ltd. ("Gateway"). He says that the amounts claimed do not include insurance and he therefore does not produce the information ordered. He was also ordered to file one A4 sheet of paper setting out all the details of the claim including dates and descriptions of each item in the claim. The statement says that it attaches the A4 sheet of paper but the copy in the Applicant's hearing bundle does not (although the Tribunal was referred to page 46A of the Applicant's bundle at the hearing). The copy in the Respondent's hearing bundle does have an A4 sheet attached which sets out how the 'opening service charge balance' of £1,971.67 in the decision above is made up i.e.:-

		£
08/03/10	Countrywide admin charge	25.00
	VAT	4.38
12/03/10	General Repairs & Maintenance	26.44
01/07/10	Service Charge	757.57 (2010-2011)
10/12/13	Refund of Service Charge (bal chg)	(83.35) (2009-2010)
25/02/11	Countrywide admin charge	125.00
	VAT	25.00
01/07/11	Service Charge	698.65 (2011-2012)
02/11/11	Refund of Service Charge (bal chg)	(129.05) (2010-2011)
01/07/12	Service Charge	522.03 (2012-2013)
		1,971.67

9. Mr. Lawton points out, as is the case, that the window frames, balcony and roof are included in the demise. The Tribunal is not entirely sure of the relevance of this comment as it does not deal with the decorating and repairing obligations on the part of the landlord. As far as the management fee is concerned, Mr. Lawton says that despite what is in the leases, it is "*best quantified on a fixed fee basis and related to actual collection costs*".

10. The Respondent has not filed a statement at all but has filed a large bundle of correspondence from which it is clear that he has been challenging the service charges claimed, including insurance premiums, since 2010.

11. The Applicant failed to comply with the Tribunal's directions as to the filing of

hearing bundles. The Respondent therefore filed a bundle. The Applicant then filed another bundle but instead of taking Respondent's bundle into account, there is a duplication of many documents and just a large bundle of computer statements and copy invoices without any attempt at organisation. How the Tribunal was supposed to extract the issues from this chaos so that it knew what to concentrate on at the inspection is not clear.

12. The correspondence does make it clear that the Respondent had been continuously complaining about the condition of the exterior of the property. In fact a consultation in respect of some of this work had been commenced on the 2nd February 2010 but had not been carried through, presumably on the basis that there were still arrears of service charges. It is noted that a further consultation started on the 10th January 2014.

The Inspection

13. The members of the Tribunal inspected the property in the presence of the Respondent and a friend together with Mr. Ben Day-Marr MIRPM and a colleague from Gateway. The building had been a substantial single residence which Mr. Day-Marr subsequently said was built in 1910 but was subsequently converted into flats – possibly in 1984 which is the commencement of the long lease term.

14. It is of brick construction and now under a concrete interlocking tiled roof save for a large circular 'turret' which would appear to form part of the flat in the roof and has hanging tiles. From the front of the property the first floor appears in good condition and the ground floor is in need of maintenance as the window frames need maintenance/repair and the exterior paintwork is flaking.

15. The front garden did not appear to have been maintained for some time and liquid appeared to be emerging from under the front lawn area and running down into the road. The Tribunal was unable to see the rear garden very well, but from a look through a slatted gate, which was locked from the inside, it appeared to be reasonably well kept.

16. An inspection of the Respondent's flat was undertaken. It appeared to be very well kept and the Tribunal had evidence, which was not refuted, that the Respondent had paid for repairs to the balcony and his windows. He showed the Tribunal some evidence of water penetration under the window in the lounge and in a ceiling. The bathroom window glass had holes in it and the frame was in poor condition. There was also a fire escape which was blocked with items of furniture, toys and various other items which the Respondent said had been left there by someone else in the building a long time ago. The exterior of the building at this point was in very poor condition.

17. The property is located in a central position being within walking distance of Westcliff town centre and main line station which has trains into Southend town centre and central London. The Respondent said that apart from his flat, the rest of the building was sublet and there was questionable behaviour on the part of some subtenants such as alleged drug misuse. The common entrance to the side of the building was not in bad condition although the carpet appeared to be fairly dirty. The Respondent said that the only time it had been decorated in

recent years was by a lessee who wanted to sublet his flat.

The Lease

18. The Tribunal was shown a copy of what seems to be the original lease. It is dated 5th November 1993 and is for a term of 90 years from the 1st July 1984 with an increasing ground rent. The lease is very unusual in the sense that in most long leases, the freehold reversioner does not demise the structure, foundations and roof so that he can comply with the covenants as to providing subjacent and lateral support for the building. In this lease, the ground floor flat demise includes the footings and this first floor flat includes the roof. The flats include their respective window frames and all walls (except party walls), gulleys, drains, pipes, cables and wires. It is no part of this dispute, but the Tribunal does wonder what would happen if the covenants as to subjacent and lateral support were challenged. Indeed, the insurance arrangements may be considered to be in doubt. If the structure, foundations and roof have been demised, one wonders what the landlord's insurable interest is despite the obligation on the landlord to insure.

19. Be that as it may, clause 3(2) sets out the landlord's covenant to insure the building and provide a copy of the policy and receipts for all premiums paid. In clause 3(7) the landlord covenants to maintain, repair, decorate and renew those matters set out in the 3rd Schedule. Those include the common parts and structure of the building to include the roof, foundations, gutters and rainwater pipes. The obligations include decorating the exterior of the building and maintaining the paths and garden. The Respondent is responsible for 25% of the cost.

20. A significant clause which is relevant to these proceedings is in Part 1 of the Third Schedule at sub paragraph (v) which says that "*The fees of the Landlord for the collection of the rents demised in the Building and for the general management thereof such fees to be calculated as ten per cent of the total annual service charges payable in respect of the Building plus Value Added Tax at the prevailing rate per annum*". Clause 1 of the lease makes it clear that service charges are 'rent'.

21. The provisions for payment of service charges are not unusual. On the 1st July in each year the landlord can demand an advance contribution towards anticipated expenses to be incurred in the ensuing year. Then, "*as soon as convenient after the First day of July in each year the Landlord or his agents*" must produce a service charge account. Any surplus over the monies paid on account is retained by the landlord on account of the next year and so on. There is no explicit provision that payment of service charges must be made before the landlord will keep the building in repair. Clause 3(7) is the landlord's obligation to repair etc. which says "*(subject to contribution and payment by all the tenants of the Building)*". It doesn't say 'subject to prior contribution and payment' etc. In other words, it seems to be a straightforward contract that the landlord agrees to keep the exterior etc. in repair and, in consideration thereof, the lessees must pay the cost.

22. There is a contractual basis for the landlord to claim interest from the lessee. However, as the Applicant appears to have claimed interest in the court

proceedings pursuant to Section 69 of the County Courts Act 1984, the Tribunal will leave the question of interest to the court.

23. By a deed of surrender and new lease dated 26th September 2006, the term was extended to one of 180 years from the 1st July 1984. All the relevant terms so far as this dispute are concerned remain the same.

The Law

24. 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'.

25. 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.

26. Paragraph 1 of Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("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 for or in connection with the grant of approvals under* (the) *lease, or applications for such approvals."*

27. 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"*

The Hearing

28. The hearing was attended by those who attended the inspection. The Tribunal chair asked the Respondent whether he was still challenging the insurance premium and he said that he was. He had no evidence as to whether the alleged premium of £746.66 was for the whole building or just for his flat. The Tribunal expressed the view that if it was for just his flat (i.e. was nearly £3,000 for the building) then, subject to seeing any claims record or other exceptional feature, it was likely that this would be far too high. On the other hand, if it was £746.66 for the whole building then this was likely to be reasonable. These comments were made to help the parties try to resolve this issue, particularly as Gateway has nothing to do with the insurance.

29. Gateway took over management on the 18th July 2012. The Applicant did not send any representative of the previous managing agent, Countrywide. Nevertheless, the Tribunal had to go through the figures with the Applicant's representative, which it did. There were certain figures which did not seem to match the supporting invoices but regrettably Mr. Day-Marr was unable to assist. On the question of the management fees, he acknowledged what was in the lease. He produced a copy of the health and safety inspection following the inspection in 2013 although he could not produce the report following a similar inspection 2

or 3 years beforehand.

30. Apart from this, the hearing really dealt with the main issues. The Respondent said that he had paid the service charges to start with but the Applicant had not done anything to maintain the building and when he, the Respondent, saw his balcony collapsing and water was coming in through his windows and ceiling, he could not obtain any satisfaction from the Applicant or its agent and had to borrow money and spend thousands of pounds rectifying the defects.

31. On the other hand, Mr. Day-Marr said that he took over a £7,000 deficit in the service charge account for this property and he could not arrange to do any work without money.

Discussion

32. The facts of this case are not unusual. Many long leaseholders consider that as they do not own the freehold of the property in which their flat is located, they can just sit back and wait for the freeholder to incur the cost of works before making any contribution. It often comes as a shock when something substantial has to be done such as renewing a roof or decorating the exterior of the building. These 'shocks' can usually be avoided by (a) purchasers having a survey undertaken before they buy a lease to have an idea of future expenditure and (b) landlords making sure that there is a sinking fund or reserve to spread the substantial costs.

33. The Tribunal accepted the Respondent's basic submissions as to the reasons why he stopped paying. It is clearly the remainder of the lessees who are behaving in the way suggested in the previous paragraph of this decision.

34. On the other hand, many landlords consider that they can just wait for the tenants to pay money in advance before honouring their repairing obligations to do any substantial work to a building.

35. 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 charges cases such as this. 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."*

36. It was for this reason that the Tribunal directions were made for the parties to state exactly what their cases were. The Applicant failed to give evidence about

the insurance premium or provide bundles on time. The Respondent did not go through the service charges in detail and file a statement setting out his comments on each one. Having said that, it was clear that he had not seen the Applicant's bundle before the hearing and he may therefore not have been in possession of the copy invoices. He will no doubt note for future reference that he is entitled, on request, to inspect the supporting documents for a service charge and, upon payment of the cost of copying, he is entitled to copies.

Conclusions

37. This is a case which perhaps typifies the problems which can occur when either the landlord or the tenants do not fully comply with the terms of the lease. In this case, the landlord has clearly not complied with its obligations to keep the exterior of the property in repair. Whatever ambiguity there is in the lease about the balcony (which is not enclosed within the red edging of the 'demised part' in the lease plan), it is part of the exterior which is the landlord's responsibility. It is also, arguably, part of the structure.

38. The landlord clearly did not maintain the exterior of the window frames, the balcony or the roof because the Respondent has produced clear and undisputed evidence that he spent nearly £11,000 in total in repairing the balcony, roof, windows etc. The fact that the Applicant did not either do or prevent the need for these works means that the Respondent has paid for the works entirely and is not able to recover any part from the other lessees. Thus the Applicant's breach of contract would appear to have resulted in (a) repair works being arguably more expensive than they need to have been because of the failure to maintain and (b) the Respondent having to pay £11,000 out of his own resources when he should only have paid 25% of that sum.

39. Of the service charges themselves, the Tribunal concludes that the lease makes no provision for the recovery of administration charges and limits the managing agent's fees to 10% of the service charges. That must, of course, include the 'add-ons' such as accountant's fees, bank charges, out of hours fees etc. The Tribunal's decision on the actual charges is therefore as follows. They are based on a consideration of the only full year's actual charges included in the claim where there was supporting evidence i.e. for the year ending 30th June 2011 which the Tribunal determined, from page 60 in the Applicant's bundle as follows:-

Audit fees (£144)	-	not payable as all management must be included within the 10%
Electricity (£38.73)	-	payable and reasonable
Gardening (£293.75)	-	this only covers 2 months and invoices have been produced – payable and reasonable
Health & Safety (£211.50)	-	on balance the Tribunal finds that a health and safety check was reasonable and the amount claimed is vouched and reasonable and payable
Management fees (£852)	-	can only claim 10% i.e. £129.40
Professional fees (£1,034)	-	this consists of an invoice from First Prospect Ltd. for £587.50 in April 2010

following a section 20 Notice in February relating to a specification and tender documents. It is followed by an invoice for £446.50 in November from Morgan Sloane for a 'Stock Condition Survey'. Both firms are surveyors and These jobs should have been combined. A total of £750 is allowed.

Thus the total allowed for the year ending 30th June 2011 is £1,423.38 or £355.85 for the subject property. This would be a reasonable figure to claim for the subsequent year.

40. Moving on to the first item in the claim for £1,971.67, the Tribunal's determination is as follows, based on the assessment in the previous paragraph:-

		£	decision
08/03/10	Countrywide admin charge	25.00	not payable
	VAT	4.38	not payable
12/03/10	General Repairs & Maintenance	26.44	payable
01/07/10	Service Charge	757.57	unreasonable Reasonable sum £355.85
10/12/13	Refund of Service Charge (bal chg)	(83.35)	allowed as no invoices available for 2009
25/02/11	Countrywide admin. charge	125.00	not payable
	VAT	25.00	not payable
01/07/11	Service Charge	698.65	£355.85 is reasonable
02/11/11	Refund of Service Charge (bal chg)	(129.05)	allowed as no invoices available for 2010
01/07/12	Service Charge	522.03	£355.85 is reasonable
		1,971.67	

Thus, of the claim of £1,971.67, the sum of £881.59 is deemed to be reasonable and payable subject to the set off point made above.

The Way Forward

41. As far as insurance is concerned, the Tribunal has given an indication of its view. The parties should first of all check to see whether the £746.66 is for the whole building or just the subject flat. Hopefully the Tribunal's comments will assist with settlement.

42. As to the problems of managing this property, the other lessees must understand their obligations. This situation will either be resolved by agreement or litigation. An ideal situation will be for the Applicant to get the property up to a reasonable standard and then to agree with the Respondent and the other long leaseholders ("tenants") that the amount Mr. Keane has spent on the balcony,

roof and windows will be added to the charges for the current work and the whole will then be split 4 ways and paid. Mr. Keane will then receive a refund of the majority of his outlay, although arrears will also have to be taken into account in the final reckoning.

43. Thereafter, as the whole of the building has been demised, the tenants may just as well take over everything save for structural work, insurance, external decorations and repairs or consider the right to manage provisions. However, the tenants must understand that a building split into flats needs someone to spend time and effort managing it.

44. As the cost of any work to the property has to be ultimately paid by the tenants, it is clearly in their own interests to be as involved in this process as they can be. With the greatest of respect to all concerned (save for Mr. Keane), simply 'burying their heads in the sand', so to speak, and expecting the landlord just to sort things out, is likely to be slower and much more expensive for them.

....

Bruce Edgington
Regional Judge
17th February 2014