9945

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	LON/00AM/LSC/2014/0050
Property	:	Flat 2, 72 Nightingale Road, London, E5 8NB
Applicant	:	Quadron Investments Limited
Representative	:	Salter Rex, managing agents
Appearances for Applicant:	:	(1) Mr B Preko, associate partner, Salter Rex (2) Mr Daniel Hill, property manager, Salter Rex
Respondent	:	Questor Properties Limited
Representative	:	Mr R Sandler, legal representative (retired solicitor)
Appearances for Respondent	:	Mr Sandler
Type of Application	:	Liability to pay service charges and administration charges

Tribunal Members	:	(1) Judge A Vance (2) Mr F Coffey, FRICS (3) Mrs J Hawkins, BSc MSc
Date and venue of Hearings	:	14th May 2014 at 10 Alfred Place, London WC1E 7LR
Date of Decision	:	22.05.2014

DECISION

Decision of the Tribunal

1. The tribunal makes the determinations as set out under the various headings in this Decision.

2. The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

3. Since the tribunal has no jurisdiction over ground rent, county court costs and fees, this matter should now be referred back to the County Court.

Introduction

4. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of service charges and administration charges payable by the Respondent in respect of the service charge years 2011 and 2012.

5. Proceedings were originally issued in the Northampton County Court under claim no. 3YS03305. The claim was transferred to the Barnet County Court and then in turn transferred to this tribunal, by order of Deputy District Judge Rea on 22.01.14.

6. The relevant legal provisions are set out in the Appendix to this decision.

7. Numbers appearing in square brackets in this decision refer to pages in the hearing bundle

8. The Respondent is the lessee of Flat 2, 72 Nightingale Road, London, E5 8NB ("the Property") which is situated in a Victorian terraced building, converted into three flats ("the Building").

9. The freehold interest in the Building is vested in the Applicant. The Applicant engages Salter Rex, as managing agents, to deal with the day to day management of the Building. Mr Preko informed the tribunal, at the hearing, that no written agreement to provide these management services has been entered into by the Respondent and Salter Rex.

10. An oral case management hearing took place on 20.02.14, attended by Mr P O'Reilly of Salter Rex and Mr Sandler. Directions were issued to the parties on the same day.

Inspection

11. Neither party requested that the tribunal inspect the Premises and the tribunal did not consider this to be necessary or proportionate.

The Lease

12. The relevant lease is dated 04.10.95 and was entered into between (1) Stuart Jerrold Ifield and Hilarie Ruth Ifield and (2) Annette Bryant for a term of 125 years from 25.03.95. The Respondent has the benefit of the unexpired residue of that term.

13. The relevant provisions of the lease can be summarised as follows:

(i) The lessee covenants to pay, by way of further or additional rent, sums incurred by the lessor in insuring the Building in accordance with the lessors covenant at clause 5(b) of the lease - *preamble at page 4.*

(ii) The lessee also covenants *"to pay all costs charges and expenses (including Solicitors' costs and Surveyors' fees) incurred by the Lessor for the purposes of or incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925....."* - *clause 3A(iv).*

(iii) The lessee also covenants to pay a 25% share of the costs, expenses, outgoings and matters mentioned in the Fourth Schedule to be paid by half yearly instalments on the 25th December and 24th June in each year - *clause 4(b).*

(iv) The costs, expenses and outgoings referred to in the Fourth Schedule includes the lessor's expense of maintaining repairing and renewing the main structure of the Building; the cost of cleaning and lighting the passages, landings, staircases and common parts; managing agents' fees and *"all other expenses (if any) incurred by the Lessor in and about the maintenance and proper and convenient management and running of the Building".*

The Hearing

14. The tribunal is required to determine if service charges of £1,032.82 and an administration charge of £60 (as referred to in paragraphs 3b and 3c of the particulars of claim in the county court proceedings) are payable by the Respondent and if the costs have been reasonably incurred.

15. At the hearing, Mr Preko confirmed that the sum of £1,032.82 comprises sums demanded from the Respondent in respect of the service charge years ending 24.12.11 and 24.12.12. The accounts for the year ending 24.12.11 **[130]** and 24.12.12 **[177]** show the following heads of service charge expenditure

Expenditure	2011	2012
Accountancy	£140	£147.50
Building Repairs	£89.76	-
Electricity	£726.98	£(313.94)
Insurance	£714.44	£752.52

Management Fee	£936	£954.00
Service Charge	£287.28	£(287.28)

16. The Applicant challenged the following items of service charge expenditure in both years:

(i) Accountancy Fees

(ii) Insurance

(iii) Management Fees

17. The Respondent had, initially, challenged electricity costs as being excessive and not reasonably incurred. However, that challenge was dropped at the hearing, although Mr Sandler contended that the manner in which Salter Rex had dealt with electricity costs evidenced poor management.

18. Two days prior to the hearing the Respondent handed in further documents, namely, a further copy of its Statement of Case and copies of the documents annexed to that statement. The start of the hearing was delayed while the tribunal considered these documents and the parties numbered them **[230-276].** The Applicant had seen these documents prior to the hearing and did not require further time to consider them.

19. During the course of the hearing the Applicant provided the tribunal and the Respondent with a copy of the First-tier Tribunal decision in LON/00AM/LSC/2012/0432 concerning Flat 3, 149 Amhurst Road. The tribunal also provided all parties with a complete copy of the Upper Tribunal decision in ***Ralph Rettke-Grover v John Elliott Needleman and Ann-Marie Wolfryd*** [2010] UKHT 283 (LC) as the copy annexed to the Respondent's statement of case was incomplete. The Applicant had sufficient time to consider this decision over a short interval.

20. Mr Sandler also provided a copy of a document that was attached to a letter **[64]** sent to him by Mr O'Reilly dated 04.03.12 and which described the management services that are said to have been provided by Salter Rex. That letter and breakdown was copied to the tribunal and appears in the tribunal's file but not the hearing bundle.

Decision and Reasons

21. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

Accountancy Fees

22. The amounts in issue are £140.00 for the service charge year ending 2011 and £147.50 for the service charge year ending 2012.

23. The Respondent disputed that it was liable to pay these costs as there was no provision in the lease allowing recovery of the costs of an accountant. It relied on the decision in ***Rettke-Grover v Needleman*** and argued that if the Applicant wished to instruct an accountant to certify the annual service charge accounts it had to bear the cost itself. Further, the limited number of accounts entries and the absence of a requirement in the lease for a yearly statement of account did not merit the appointment of an accountant in any event.

24. The Applicant acknowledged that the lease does not require annual service charge accounts to be certified by an independent accountant but argued that this was good practice. It relied upon guidance issued by the Association of Residential Managing Agents **[61]**, of which it is a member, and which states *that "all annual statements of account should be subject to an examination by an independent accountants before issuing to lessees"*. It also relied upon paragraph 6 of the fourth schedule of the lease, arguing that the costs were costs recoverable from the Respondent as they were incurred by the lessor in respect of *"maintenance and proper and convenient management and running of the Building"*.

Decision and Reasons

25. The question of whether or not certification by an independent accountant represents good practice is irrelevant to the issue of whether or not these costs are recoverable from the Respondent under the terms of the lease. It may be good practice, but if the lease does not allow for recovery from the Respondent, the Applicant has to bear the costs itself.

26. The tribunal does not accept that costs incurred in the engagement of an accountant to provide certified service charge accounts can be said to be costs incurred in respect of *"maintenance and proper and convenient management and running of the Building"*. The costs of an accountant are too remote from the type of costs that the tribunal considers this clause was intended to cover, namely costs incurred in respect of the Building itself (and which are not recoverable under other provisions in the lease). In other words there has to be a close enough connection to the actual maintenance; management or running of the Building itself. The tribunal does consider this requirement is met. The tribunal in the *Amhurst Road* case reached a different conclusion as to the construction of an identical clause but that decision is not binding on this tribunal.

27. The tribunal also notes that the breakdown of management services provided by Salter Rex refers to *"Preparation of accounts in accordance with the terms of the lease and providing copies of these to the lessee"*. This wording suggests that the preparation of accounts was to be undertaken by Salter Rex and not external accountants. Given the small size of the Building and the few heads of expenditure involved, the tribunal's view is that the preparation of the simple service charge accounts required should be well within the ability of a competent managing agent. However, as it is the tribunal's determination that the accountancy costs are not recoverable under the terms of the lease in any event, the tribunal does not need to consider whether or not the costs were reasonably incurred.

Insurance

28. The amounts in issue are £714.44 for the year ending 2011 and £752.52 for the year ending 2012.

29. The Respondent's position was that the provisions of the lease did not allow for recovery of the costs of insurance as a service charge item, which was the practice followed by the Applicant. Mr Sandler submitted that the wording of the lessees' covenant at page four of the lease requires the lessor to demand the costs of insurance as rent, alongside ground rent, and not as part of the service charge. He contended that this was clear from the wording of that covenant which obliges the lessee to pay:

> *"by way of further or additional rent sums incurred by the lessor in insuring the Building .....to be paid without any deduction on the half yearly day for the payment of rent next ensuing after the expenditure thereof"*

30. Mr Sandler also referred to fact that the insurance certificate for the year commencing 01.08.11 **[67]** was in the name of one of the former lessees' Mr Collins and not in the lessor's name. This, he suggested, could potentially have resulted in some difficulties in recovery under the policy.

31. No issue was taken by the Respondent about the quantum of these costs.

32. The Applicant's case was that these sums had been properly demanded and were payable by the Respondent. It also relied on paragraph 5 of the fourth schedule as allowing recovery of these costs. That paragraph refers to:

> *"the cost of insurance against third party risks in respect of the Building if such insurance shall in fact be taken out by the Lessor."*

Decision and Reasons

33. The tribunal does not agree that paragraph 5 of the fourth schedule is relevant to these costs. The clause relates to third-party insurance which is purchased by an insured (first party) from an insurance company (second party) for protection against another party's claims (third party). This is an entirely different form of insurance to that taken out by the Applicant to meet its obligations under clause 5(b) of the lease and for which it has demanded payment from the Respondent

34. Nor does the tribunal agree with Mr Sandler's interpretation of the lease. The lessees covenant at page four of the lease provides for the costs of insurance to be treated as rent. This is a common provision which allows a lessor to access the methods of recovery available to pursue outstanding rent from a lessee. The clause does not operate to prevent the lessor from recovering such costs through the service charge.

35. These costs clearly fall within the definition of a service charge in s.18 of the 1985 Act as it is 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 services, repairs,

maintenance, improvements **or insurance** or the Landlord's costs of management, and the whole or part of which varies or may vary according to the relevant costs.

36. As such, the lessor is entitled to demand the cost as a service charge. The reference in the covenant for the lessee to pay these costs on the *"half yearly day for the payment of rent next ensuing after the expenditure thereof"* operates to state when payment should be made, not how it should be demanded. The Applicant is entitled to include the demand within its service charge demand which, as per clause 4(b), is also payable by half yearly instalments.

37. Nothing, in the tribunal's view, turns on the insurance certificate commencing 01.08.11 being in the name of one of the former lessees. Mr Sandler confirmed that the Respondent was satisfied that the Building was adequately insured during the period in question and there is no evidence to indicate that there would have been any problems with the lessor seeking to recover under the policy. Nor is there any dispute that the sums demanded have been incurred by the Applicant or as to the reasonableness of those costs.

38. The tribunal therefore determines that both the sums in dispute are payable by the Respondent and that the costs have been reasonably incurred.

Management Fees

39. The amounts in issue are £936 for the service charge year ending 2011 and £954 for the service charge year ending 2012.

40. Mr Sandler conceded that these sums would be reasonable if a full and proper service had been provided by Salter Rex. However, he contended that the service provided was inadequate for the following reasons:

(i) A health & safety report had been commissioned in April 2013 but no action taken to implement any of the recommendations set out in the report. The agents, he said, had also taken inadequate action to deal with bicycles belonging to the occupants of the upper flat that were blocking the communal area.

(ii) The Respondent believed that the managing agents had not visited the Building at all since they were appointed in 2011 and suggested that the evidence indicated that the agents had not obtained a full set of keys to the flats until some months after their appointment **[137] [205]**which, it says, could have caused problems in an emergency situation.

(iii) Late payment charges had been incurred, unnecessarily, in respect of electricity costs, for example in the bills at **[83 -86]**.

41. Mr Preko submitted that the sum charged was the lowest fee possible and that many managing agents would not consider managing a property of this size unless a much higher fee was charged because it would not be cost-effective.

42. He explained that the Building had not been managed well for some time before their appointment and that outstanding electricity bills had not been paid. The Applicant instructed them to pay the sums demanded but as the bills were based on

estimated readings this resulted in the high electricity costs shown in the service charge accounts for the year ending 2011. Once the electricity company had carried out a reassessment of the bills based on actual meter readings, revised bills were provided which is why a credit of £313.94 is shown in the 2012 accounts.

43. Salter Rex had, said Mr Preko, acted responsibly to avoid the electricity supply being cut off. He also submitted that it had provided appropriate management services to the lessees. He confirmed that the costs of dealing with pre-sale enquiries and enforcement action referred to in the breakdown of management services are not passed on to lessees through the service charge.

Decision and Reasons

44. The tribunal determines that the sums in issue are payable by the Respondent and that they have been reasonably incurred. There is insufficient evidence to the contrary.

45. The letter from Salter Rex to the Respondent dated 02.07.12 **[250]** enclosing a copy of the Fire Safety and Health & Safety Risk Assessment carried out on 03.04.13 sets out action needed by the Respondent and not the Applicant. The Respondent was asked to ensure that the doors to the Property were fire resistant doors that met the appropriate standard and also asks that the communal areas to be kept free from hazards such as bicycles and push chairs. The contents of this letter are entirely appropriate and relate to action required by lessees. Mr Sandler has not provided any substantive evidence that there were matters identified in the Risk Assessment that required the lessor's attention and which had not been dealt with.

46. The Respondent is a company who sub-lets the Property. It is not realistically in a position to know first-hand if Salter Rex have carried out visits to the Building. Mr Preko told the tribunal that visits are carried out and no witness evidence to the contrary has been provided by the Respondent from the actual occupants of the Building suggesting otherwise. We accept Mr Preko's account.

47. The late payment charges are small in amount and appear to relate to the period before Rex Salter paid the outstanding bills initially demanded before their appointment and possibly prior to the Applicant's acquisition of the freehold interest in the Building . In any event, regardless of whether or not that is correct, the tribunal does not accept that the evidence suggests that these charges were incurred through poor management.

Administration charge of £60

48. The sum of £60 is referred to in a letter dated 03.09.13 from Altermans solicitors to the Respondent in which reference is also made to outstanding ground rent and service charges. Details of what the £60 relates to are said to be included in a schedule attached to the letter. However, no schedule is appended to the letter in the hearing bundle and Mr Preko was unable to provide a copy or clarify what the £60 sum related to.

49. Mr Sandler argued that this sum was not recoverable as an administration charge under the terms of the Respondent's lease as the relevant clause at (clause 3A(iv))

that referred to costs relating to preparation or service of a section 146 Law of Property Act 1925. That, he says, was a long way off.

50. Mr Preko agreed that there was no evidence in the hearing bundle to indicate that service of a section 146 notice was being contemplated but pointed out that county court proceedings had been issued.

Decision and Reasons

51. In the light of any explanation as to what this sum relates to the tribunal is not satisfied that the cost has been reasonably incurred. Nor is it satisfied that it is payable as an administration charge under the terms of clause 3A(iv) of the Respondent's lease as there is no evidence at all (either in the documents or by way of witness evidence) that the costs either related to, or were incidental to, the preparation and service of a notice under section 146 of the Law of Property Act 1925. The tribunal recognises that issuing county court proceedings might be a precursor to service of a section 146 notice. On the other hand, the Applicant may just want to recover the debt that it considers is outstanding, with no intention to forfeit the Respondent's lease or serve such a notice.

Other Matters

52. The tribunal has no jurisdiction over ground rent or county court costs. The sum of £949 referred to in the paragraph 4a of the particulars of claim appears to relate to costs in the county court and therefore falls within the county court's jurisdiction. This interpretation is supported by the contents of an email from Altermans to Mr O'Reilly dated 26.02.14 **[66]**. It does not seem that the sum of £949 has been demanded from the Applicant as an administration charge. The letter from Altermans to the Respondent dated 03.09.13 **[18]** only refers to the sum of £60 being sought in respect of an administration charge. The sum of £949 is therefore not payable by the Applicant as an administration charge.

53. If this tribunal is wrong in that respect and the sum of £949 (or a lesser sum such as the figure of £336 referred to in Altermans' letter of 03.09.13) has been demanded from the Applicant as an administration charge the tribunal considers that such sum would not be payable by the Respondent. This is because of the absence of evidence that the costs either related to, or were incidental to, the preparation and service of a notice under section 146 of the Law of Property Act 1925.

Application under Section 20C

54. The Respondent sought an order that the costs incurred by the Applicant in connection with these proceedings should not be regarded as relevant costs when determining the amount of service charge payable by him. Mr Sandler argued that there had been no proper attempt by Salter Rex to engage with his correspondence such as his letters at **[224 -229]** and those at page **[237]** onwards. He conceded

that his letters had received responses from Mr O'Reilly but asserted that the responses received were not satisfactory.

55. When exercising its' discretion as to whether or not to make a s.20C order the tribunal has to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the degree to which the Respondent has succeeded in this application.

56. The Applicant has, to a large degree, been successful in this application and weighing up all the above factors the tribunal does not consider that it is just and equitable for it to make an order under section 20C of the 1985 Act. It is not satisfied that Salter Rex had failed to engage substantively with Mr Sandler's correspondence. Letters from Mr O'Reilly at **[56]**, **[59]**, **[64]**, **[226]** and **[228]** suggest otherwise.

The next steps

57. This matter should now be returned to the County Court. The parties should ensure that an explanation is provided to the court as to the amount payable by the Respondent to the Applicant for the two service charge years in question in light of conclusions reached in this determination.

Name: Amran Vance **Date:** 22.05.14

Annex

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18 - Meaning of "service charge" and "relevant costs"

(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 – Limitation of service charges: reasonableness

(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 – Liability to pay service charges: jurisdiction

(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 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.

[.....]

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
  (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
  (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
  (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
  (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
  (a) specified in his lease, nor
  (b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to a leasehold valuation tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject matter of an application under sub-paragraph (1).