9913

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AZ/LSC/2013/0796**
Property	:	**231 Kirkdale, Sydenham, London SE26, 4QD**
Applicant	:	**Mr C Palumbo**
Representative	:	**In person**
Respondent	:	**Hamilton King Management Ltd**
Representative	:	**Ms K Evans**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Tribunal Judge R Percival** **Mr M Taylor FRICS** **Mrs L L Hart**
Date and venue of hearing	:	**2 June 2014 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**4 July 2014**

DECISION

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Decisions of the tribunal

(1) The tribunal determines that there was no jurisdiction to consider any service charge liabilities arising before 11 February 2013, as they had been determined by orders of the Chorley County Court dated 21 February 2011 (claim number 1CY00053) and the Northampton County Court dated 15 April 2013 (claim number 3YK20355).

(2) The tribunal further determines in respect of the service charge account for the service charge year starting 25 March 2013:

a. That the sum of £1,242.93 brought forward in respect of items accruing since 11 February 2013 was reasonable, insofar as it represented a claim for the payment of service charge.

b. That the charge in respect of the building insurance premium of £358.33 was not reasonable and that a charge of £312.73 should be substituted;

c. That the charge of £235.52 in respect of repairs was not unreasonable;

d. That the charge of £35.20 in respect of the management of major works in relation to the roof of the property was not unreasonable;

e. That there was no failure to consult the applicant in respect of the major works and that the charge relating to the major works was not unreasonable; and

f. That the management fee of £174.82 was unreasonable and that a charge of £131.11 should be substituted.

(3) The tribunal makes the determinations as set out under the various headings in this Decision.

(4) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

The application

1. The Applicant seeks a determination pursuant to section 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 as set out below.

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

The hearing

3. The Applicant appeared in person. The Respondent was represented by Ms K Evans, an accounts officer employed by the Respondent.

The background

4. The property which is the subject of this application is a purpose built two storey property containing two flats, both of which have separate external entrances. There are no communal areas.

5. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

6. The Applicant holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The Applicant's contribution is 48.56% which is based on rateable value. The specific provisions of the lease will be referred to below, where appropriate.

7. The lease is quadripartite between the lessor, a building society, the lessee and the maintenance trustee. The Respondent is effectively the successor to the maintenance trustee, and performs the functions of that office under the lease together with those of the surveyor or estate agent provision for the appointment of which is made in the lease at clause 6(A)1.

8. The Respondent was identified as the correct party at the case management conference, a finding not contested at the hearing.

The issues and determinations

9. At the start of the hearing, the parties agreed that the issues before the tribunal were as isolated at the case management conference and set out in the preamble to Judge Korn's directions of 28 January 2014, as follows:

- "Brought forward charge of £1,242.93 ...
- Building insurance premium of £737 ...
- Repairs budget £485...

- 10% admin fee (£72.50) charged for management of tender process for roof works ...

- Proposed roof works charge of £464.71 ... [failure to consult properly]

- Management fee of £360 ..."

10. In addition, the tribunal considered its jurisdiction as a preliminary matter.

Jurisdiction

11. The original application related to each service charge year from March 2010. However, the Respondent produced in their evidence two default judgments by County Courts (Chorley County Court dated 21 February 2011, claim number 1CY00053; and the Northampton County Court dated 15 April 2013, claim number 3YK20355), which determined the Applicant's liabilities for service charges up to 11 February 2013.

12. The Tribunal accordingly determined that the relevant matters had been the subject of a determination by a court, thus excluding our jurisdiction under Landlord and Tenant Act 1985, section 27C(4)(c). The Applicant did not resist this conclusion.

13. The period from 11 February 2013 to 24 March 2014

Charge brought forward

14. In a document dated 20 February 2014, the Respondent claimed the sum of 1,242.93 brought forward from the period from 12 March 2013 to 24 June 2013. The Applicant sought to understand the basis on which the relevant sums were brought forward. After Ms Evans had explained each item in accordance with the Respondent's case statement, referring to the Request for Payment document at page 10 of the Respondent's bundle, it became clear that the Applicant's concern was that the same figure appeared in other statements, including those for 2011/12 and 2012/13, at pages 29 and 30 in the Applicant's bundle. Ms Evans explained that the documents in question had been printed in July 2013, and as an artefact of the software used by the Respondent, the amount owing on the day of printing appeared at the bottom of each document. The sum included ground rent. The Applicant expressed himself as satisfied with this explanation and advanced no submissions.

15. The Tribunal determines that the service charge component of this sum was reasonable, there being no challenge to its reasonableness.

Building insurance premium

16. Although there was some lack of clarity at an earlier stage, at the hearing the parties agreed that the service charge demand for the service charge year from 25 March 2013 had been correctly based on a building insurance premium of £737.92 for the building as a whole. In accordance with the lease, the Applicant is liable for a share of 0.4856 of the total (£358.33).

17. The applicant submitted that the building insurance premium is excessive for the size and type of building. He particularly questions whether public liability of £10 million is necessary. He asks what steps the Respondent had taken to test the market.

18. The Applicant provided a quotation obtained through a broker from a reputable insurance company for £550.12 for the whole building.

19. The Respondent's case statement states their belief that the building insurance premium is not too high for the cover that the policy provides, which they describe as "extremely comprehensive". There have been no claims on the property to date. The case statement states both that the freeholder meets with the insurance broker quarterly at which quotations were discussed and the cheapest accepted, and that "costs are checked on an annual basis". It is asserted that, as far as the Respondent is aware, no commission is received by the Respondent company, the broker or the freeholder. In respect of the public liability figure, the Respondent states that there have been public liability claims at other properties in the freeholder's portfolio.

20. At the hearing, Mrs Evans said that in practice the insurance was arranged by the client freeholder rather than by the Respondent company. She was unable to assist the Tribunal as to the methods used by the freeholder, apart from as stated in the response. The freeholder negotiated insurance cover over a number of properties in its portfolio, but Mrs Evans was unable to say how many, or in what area they were located. She said she had been informed that a reduction in the level of public liability insured would make no difference to the premium, but was unable to say whether this was an effect of the freeholder aggregating a number of properties for the purposes of insurance, or not.

21. Mrs Evans relied on a letter from the insurance broker instructed by the freeholder dated 24 April 2014 (at page 120 of the Respondent's bundle) which she said indicated a number of areas in which the Applicant's quotation did not provide like-for-like cover compared with the Respondent's policy.

22. The Respondent's policy has a buildings sum insured of £279,097. The excesses on the policy are £375 for burst pipes and accidental damage, £2,500 for subsidence and £250 for all other insured damage. The limit of public liability indemnity is £10 million.

23. The Applicant's quotation is described as a commercial policy. The policy has the same buildings sum insured (or possibly the higher sum of £320,962 – the statement is ambiguous). There is an excess of £200 for damage generally, and £5,000 for subsidence. The limit of public liability indemnity is £2 million.

24. The coverage provided by the two policies in respect of unoccupied properties is differently worded, but are to similar effect (Applicant's bundle page 15, Respondent's bundle page 90).

25. The broker's letter relied on by Mrs Evans states that the cover provided by the Applicant's policy does not match that of the Respondent's, which is clearly true in respect of the public liability indemnity. However, it then goes on to say that the information supplied to the broker was insufficient to provide a "full comparison". The list of items of comparison set out in the letter is not a comparison between the two quotations, but merely a list of those features that the broker advises the Respondent should be considered in making such a comparison. The letter accordingly does not advance the determination of the issue.

26. The Tribunal concluded that the two policies were broadly alike in kind – this was not a case in which an owner-occupier/domestic leaseholder policy was being compared with a commercial block policy; and we note that there are no communal areas. However, there were significant differences of detail in the excesses, and in particular in the public liability indemnity.

27. If we accept the Respondent's argument that the level of public liability indemnity was immaterial to the premium, then we should discount that difference in cover in assessing the reasonableness of the Respondent's policy when considered in the light of the Applicant's quotation. We treat this submission (albeit that at this point in the comparison, it undermines rather than reinforces the Respondent's case) with some caution. Mrs Evans was not in a position to explain to the Tribunal either the basis of the claim, in the light of the fact that the insurance cover was negotiated on a portfolio basis, or its limits, in terms of the magnitude of the indemnity. However, it is certainly sufficient to conclude that the public liability indemnity difference is not fatal to the claim that the two policies are broadly like-for-like.

28. There are differences in the excesses, but they do not all go one way. The other terms of the policy attached to the Applicant's quotation are those to be expected in a policy of this type.

29. The Tribunal concluded that, although the two policies were not exactly like-for-like in all regards, they were sufficiently similar for the Applicant's quotation to cast considerable doubt on the Respondent's figure. However, it does not follow that the only reasonable premium would have been that provided by the Applicant. The Tribunal accepted that it was not unreasonable for the insurance to be agreed on a portfolio basis (provided that the result was not an unreasonably high figure for the property). It was also necessary to take account of such differences as there may be between the two policies. The Tribunal concluded that the fair outcome would be reflected by a figure mid-way between the Applicant's and the Respondent's premiums.

30. The Tribunal accordingly determines that the reasonable amount for the service charge year starting on 25 March 2013 is £644. The amount chargeable to the Applicant is therefore £312.73.

Repairs budget

31. The service charge account for the relevant year includes a charge of £485 for repairs for the building as a whole. The amount chargeable to the Applicant is £235.52. Any unspent portion of the charge will be credited to the Applicant.

32. The applicant contended that the charge for repairs was too high and based on mere guesswork. The charge had not been made in the past.

33. The Respondent, in its further response (Respondent's bundle E), asserts that the charge is reasonable. In evidence, Mrs Evans said that the property was "flagged" for scheduled re-decoration. Her evidence was that the properties were regularly inspected by the relevant Respondent's manager, although she was unable to say with what frequency. Reports were made of these inspections and filed. However, the service charge was set without regard to the inspection reports, and there was no planned maintenance regime, save for external redecoration. Mrs Evans was not able to assist the Tribunal as to what had actually been spent during the year.

34. Mrs Evans maintained that the same charge had been imposed in previous years, a claim the Applicant was prepared to accept. The account for the previous year provided in the Respondent's bundle (page 19), dated 17 June 2013, and based on actual expenditure, does not show any expenditure on repairs. The account shows a credit balance in favour of the Applicant of £198.53, but it is not clear to what the overpayment related. In 2011/12, there was no expenditure on repairs, and a balancing credit of £210.66. In 2010/11, £216.20 was actually spent on repairs on the Applicant's statement, but it is not possible to determine from that account what the estimated figure was (Applicant's bundle pages 53 to 56). There is no documentary evidence for anticipated costs in previous years except for 2008/9 and 2009/10.

In both of those years, the statements show both actual and anticipated expenditure. £485 is shown as the anticipated whole-building charge in both years, and in neither year was anything spent (Respondent's bundle pages 77 and 78). Correspondence between the parties includes a statement that the charge "had been at a similar ... level for many years" (Donna Bamford, email to Applicant at page 67 of Applicant's bundle).

35. The Tribunal considered that it would have been better to have had a fuller picture of expenditure in recent years (including the out-turn from 2013/14), but that it could not be concluded that a charge at this level was unreasonable.

36. The Tribunal accordingly determines that the service charge item relating to repairs is not unreasonable.

Roof works: administration fee

37. During the course of the service charge year 2013/14, emergency roof repairs became necessary. As part of the costs of this work, the Respondent charged £72.50, calculated on the basis of 10% of the successful tender. The sum payable by the Applicant was £35.20.

38. The applicant argued that the Respondent was only permitted under the lease to deduct 1% of the service charge ("maintenance contribution" in the lease) (fourth schedule, paragraph 2(b)). He repeated this argument in respect of the general management fee included in the service charge.

39. The Respondent argued that the lease provided for the employment of a surveyor or estate agent, and their reasonable remuneration, under clause 6(A)(i).

40. As stated above, the lease provides for a maintenance trustee as a party, and entrusts the maintenance trustee with calculating and administering what is, in the law, the service charge (section 18 of the 1985 Act). The lease makes provision, as the Respondent argued, for the employment of a surveyor or estate agent and their reasonable remuneration from the service charge. It is clear that the Respondent in practice performs the functions of both the maintenance trustee and the surveyor or estate agent.

41. The Tribunal also considered whether the administration charge was reasonable, if allowable under the lease.

42. The Tribunal concluded that the administration fee of the Respondent was the remuneration of the surveyor or estate agent under the terms of clause 6(A)(i) and could properly be added to the service charge. The

Tribunal also concluded that the sum charged for a process of emergency consultation, and the letting and consideration of tenders for the work is reasonable.

43. The Tribunal therefore determines that the overall administration charge for the roof works of £72.50 is reasonable. The amount payable by the Applicant is accordingly £35.20.

Roof works: consultation

44. The Respondent wrote to the Applicant at the property on 25 June 2013, giving notice of works requiring consultation under section 20 of the 1985 Act (Respondent's bundle, page 51). The letter set out a consultation period of 30 days, ending on 28 July 2013. It appears that the Applicant was living elsewhere at the time, and subsequently asked for correspondence to be sent to another address, but he agreed that he received the letter and took no point in respect of the address to which it was sent.

45. He contends that the consultation was not properly conducted, because he wrote to the Respondent with an alternative quotation during the consultation period, but this representation was not considered by the Respondent. He makes no other submissions in respect of the consultation exercise.

46. The Respondent's deny that they received such a communication from the Applicant at any time.

47. The Respondent's evidence was that he sent an alternative quotation from a (named) company that he had used in the past at some time before the close of the consultation, although he could not be sure when. He had put the quotation in the envelope without a covering letter, but had written a reference number which would have identified the property on the top. He had not kept any record of having posted the quotation or its contents. He could not remember how much the quotation was for, other than that it was less than the lower of the two that the Respondent had secured for the purposes of the consultation.

48. In a letter dated 17 July 2013 (Respondent's bundle page 56) concerned with various matters, the Applicant says "I am in the process of finding a roofing contractor, and will be in touch shortly". The Respondent replied asking for the details of the contractor to arrange access to the property. There is no evidence of a response to this letter.

49. In their letter to the leaseholders of 1 September 2013, following the consultation period, the Respondent stated that no observations had been received.

50. On the evidence before it, the Tribunal is not prepared to accept that the Applicant sent a quotation to the Respondent. It is clear from the letter of 17 July that the Applicant had it in mind to secure an alternative quotation, but equally that he had failed to do so eight working days before the deadline set in the Respondent's consultation letter. The circumstances of the sending of the quotation, as described by the Applicant, appear unlikely, although we would not say wholly incredible. Had the Applicant sent the quotation, we think it likely that he would have responded to the Respondent's letter of 1 September 2013, which stated there had been no observations, or he would have followed the matter up at some other point before the application to the Tribunal was made. As the only specific detail of the quotation that the Applicant remembered was the name of the building firm, he could have tried to secure a copy of the quotation from them before the hearing. He did not do so.

51. The Tribunal determines that the consultation was not flawed or ineffective, as submitted by the Applicant.

Management fees

52. The Respondent charged a management fee for the building as a whole of £360. The sum attributable to the Applicant is £174.82.

53. In his evidence, the Applicant said that he did not think the management fee would have been excessive had the services provided by the Respondent been reasonable, but the fee became unreasonable by virtue of the sub-standard level of management offered by the Respondent. His evidence was that the Respondent had never inspected the property to his knowledge. He accepted he would not have been aware of a purely external inspection. One example of poor maintenance was the dilapidated state of the fence at the front of the property, evident in a photograph in his bundle at page 33. He also pointed to the fact that the defect in the roof that required emergency treatment had not been noted.

54. In their case statement, the Respondent denied that the charge was unreasonable.

55. In her evidence, Mrs Evans said that the accounts were produced efficiently. She accepted that her personal knowledge of the working of the estates side of the Respondent's business was limited.

56. Mrs Evans was unable to assist the Tribunal in relation to the fencing, although she agreed that the state of the fencing would be readily apparent to even a purely external inspection. She tentatively suggested the fence might have been damaged by storms, but agreed this was purely speculative. She was unable to assist in any way as to whether

there had ever been any internal inspections of either flat. She could not say if the defect in the roof would have been apparent to an external inspection.

57. In considering the reasonableness of the management fee, the Tribunal also took into account the evidence related in paragraph 35# above. The evidence taken as a whole indicated that while there were some inspections of the property, their frequency was unknown, and they did not inform a programme of planned maintenance, because there was none (save in respect of external decoration). Mrs Evans was unable to contradict the Applicant's evidence that there had never been an internal examination since he took the lease, and we accept that evidence. The evidence of poor maintenance in respect of the fencing was clear.

58. The Tribunal accepts the Applicant's submission that the management fee was unreasonable because the standard of management provided by the Respondent was sub-standard. In the light of that finding, a reasonable fee would have been 75% of the fee charged in the service charge.

59. The Tribunal determines that the management fee element of the service charge of £174.82 was unreasonable. The reasonable figure would have been £131.11.

Section 20C of the 1985 Act

60. The Applicant made an application under section 20C of the 1985 Act that none of the costs of the present application should be passed on to the lessees in the service charge. He relied on his own financial circumstances, and argued that he had been justified in making the application.

61. The respondent did not contest the application.

62. The Tribunal determined that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Respondent may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

Name: Tribunal Judge R Percival **Date:** 4 July 2014

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 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

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.