

10448



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **LON/00BB/LSC/2014/0364**

Property : **Flat 7 Russell House , Gillett Avenue London E6 3AS**

Applicant : **Russell House (East Ham) Residents Association Ltd**

Representative : **Mr R McElroy- Director Canonbury Management
Ms T Karmis – Admin Assistant
Canonbury Management**

Respondent : **Mr Sarif Parul Miah**

Representative : **None**

Type of Application : **For the determination of the reasonableness of and the liability to pay a service charge**

Tribunal Members : **Ms Haria – Judge
Mr Cartwright- Valuer
Mr Piarroux - Lay**

Date and venue of Hearing : **10 Alfred Place, London WC1E 7LR**

Date of Decision : **1 December 2014**

DECISION

Decisions of the tribunal

- (1) The tribunal determines that the sum of £820.50 is payable by the Respondent in respect of the following service charges:
 - a. 1 May 2013 - £278.12
 - b. 1 August 2013 - £278.12
 - c. 1 November 2013 - £264.26
- (2) The tribunal makes the determinations as set out under the various headings in this Decision
- (3) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.
- (4) Since the tribunal has no jurisdiction over county court costs and fees, this matter should now be referred back to the Chippenham and Trowbridge County Court.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Respondent in respect of the service charge years
2. Proceedings were originally issued in the Mayors & City of London County Court and the matter allocated to the small claims track by the Northampton County Court under claim no.A13YJ920. The claim was transferred to the Chippenham and Trowbridge County Court and then in turn transferred to this tribunal, by order of District Judge Asplin on 27 June 2014.
3. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

4. The Applicant was represented by the persons named on the front of this decision at the hearing and the Respondent did not attend and was not represented.

5. Mr McElroy informed the tribunal that he had tried exhaustively to contact the Respondent but had heard nothing from him. He stated that the service charge demands were served on the Respondent both at the property and at his address in Wiltshire as well as by email. He stated that he understood from the directors of the Residents Association that the Respondent had been in touch with them recently and had responded to emails. The tribunal had sent a copy of the directions to the Respondent and had heard nothing from him. The tribunal had regard to Rule 34 and 3 of the Tribunal Procedure (First - tier Tribunal) (Property Chamber) Rules 2013. The tribunal was satisfied that reasonable steps had been taken to notify the Respondent of the hearing and considered it to be in the interests of justice to proceed with the hearing.

The background

6. The property which is the subject of this application is a purpose built one bedroom flat on the fourth floor of a four storey building comprising 8 flats.
7. 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.
8. The Respondent holds a long lease of the property which requires the Applicant landlord to provide services and the Respondent tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

The issues

9. At the start of the hearing the Applicant identified the relevant issues for determination as follows:
 - (i) The payability and/or reasonableness of the service charges for period from 1 May 2013 to 31 December 2013.
 - (ii) The Respondent in a letter dated 24 January 2014 to the court had indicated that he will not pay his service charges until alleged failings in the services were put right. In particular, he claims that he has incurred substantial costs in remedying the Applicant's failures to attend to roof repairs. The tribunal is required to determine whether some or all the service charges claimed are set -off as a result of the Respondents claim.

10. Having heard evidence and submissions made on behalf of the Applicant and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

The Lease

11. The Lease is dated 29 October 1982 and is made between The Russell (Co-ownership No 2) Housing Society Limited (1) and Russell House (East Ham) Residents association Limited (2) and Shirley May Curran(3) ("the Lease").
12. The Lessee under Clause 1 and 2 of the Lease covenants to pay a maintenance charge on the days and in the manner described in the Sixth Schedule and to observe and perform the covenants and obligations set out in the Sixth Schedule.
13. Under paragraph 1(a) of the Sixth Schedule the Lessee covenants to pay to the Lessor one eighth part of the annual cost of carrying out the covenants in the Seventh Schedule. The covenants in the Seventh Schedule are basically the Lessor's covenant to insure the building, to maintain, repair redecorate and renew the common parts and to keep the common parts clean and lit.
14. Under paragraph 1(b) of the Sixth Schedule the Lessee covenants to pay to the Lessor one eighth of the estimated liability and contribution to the reserve fund each quarter. It provides that the annual cost is to be calculated to the 31 March each year and includes a balancing provision once the actual costs are known. Paragraph 1(b) further provides that the annual cost shall be the actual cost to the Lessor as certified by the Lessor's auditors of carrying out the obligations under the Seventh Schedule.

The Respondent's claim for set off:

15. The tribunal had before it a letter dated 24 January 2014 from the Respondent to the Court sent in response to the County Court Claim made by the Applicant. This letter alleges that the Respondent has suffered loss due to the major problems with the roof which the Applicant has failed to repair. It is claimed that damage has been caused to the ceiling of the property and the Respondent states "*It has cost me 15,000(sic) to buy materials and labour cost for builders to bring my home up to standard living condition*". In addition the Respondent claims he has incurred a further £600 plastering the walls where cracks have been caused by the leaks. He claims he has purchased and installed a new boiler at a cost of £900. He claims that due to the rainfall his electricity short circuited and he was without electricity for 2 days, the problem was resolved when it dried up. The Respondent states that he has informed Canonbury Management but

he is not taken seriously and is told that the roof work falls under major works. The Respondent also complains that the security doors are always left open. The Respondent states that until all major issues are taken more seriously and action taken he does not believe he should have to pay any service charge.

The Applicant's Case:

16. The Applicant relies on the provisions of the Lease in support of the service charges claimed.
17. Mr McElroy explained that the Applicant is a residents association, and the 8 leaseholders are members of the residents association and they are the Lessor's. He stated that Canonbury Management were appointed managers on 30 October 2009. He stated that they were limited in what they were permitted to do as managing agents, as all expenditure had to be authorised by the directors. He stated that until recently there were two directors but one of the directors has been imprisoned and so they are in the process of appointing a replacement.
18. Mr McElroy accepted that there is no provision in the Lease entitling the Lessor to recover administration charges or legal costs. He stated that there was a 7 year history of non payment of service charge, and these arrears including the legal costs have been paid in full by the Respondent's mortgage company. He stated that the Respondent must recognise the predicament of the resident's association of which he is a part, in that partly as a result of his non – payment there are insufficient funds to undertake the roof works.
19. Mr McElroy explained that the budget is set by the directors. He stated that the roof is some 20 – 30 years old and is susceptible to leakage as it is a flat roof and comprises of a wooden plywood base covered with mineral felt. He stated that the previous managing agents had undertaken numerous patch repairs to the roof but these had proved ineffective. He stated that there was no internal access to the roof, so it required scaffolding or a cherry picker. He explained that the directors decided they would stop patch repairs and build up funds for a full replacement of the roof. He stated it is estimated that this would cost in the region of £35,000. He stated a survey had been carried out and the general recommendation was that the roof was beyond repair and required replacement. Mr McElroy stated that a specification for the roof had been produced.
20. Mr McElroy stated that although he accepted there was a problem with the roof and was not contesting that there had been damage to the ceiling, he could not accept the costs claimed by the Respondent as they seemed excessive and very totally unsupported by any invoices or other documents. He stated the Respondent had not emailed them or sent a copy of the invoice for the works. He stated that he did not consider it

was reasonable for the Respondent to incur the costs of repairing and redecorating his ceiling prior to the roof being fixed. He stated that he could not see why a leak from the roof would affect the plaster on the walls, he said he suspected that there may also be an issue with condensation.

21. He stated that if they had been made aware the leaks were so severe the matter would have been put to the directors as a priority.
22. Mr McElroy stated that they had at their own cost sent an electrician to check out the electrics and he has produced a witness statement [56] which confirms that the intercom system, the electrical lighting systems and access control systems were all found to be working correctly except one of the LED lamps had been stolen from the socket.
23. In relation to the service charge Mr Mc Elroy referred to the Service charge estimate [92 -106] which shows the quarterly charge is utilised towards the following items:
 - (i) Capital Project 1 – this is the budget for the roof works
 - (ii) Internal cleaning – there is a weekly service
 - (iii) Contingency – this is the general reserve
 - (iv) Electrical – Intercom contract
 - (v) Gardening
 - (vi) Annual Management fees
 - (vii) Building Insurance
 - (viii) Company secretarial
 - (ix) Electrical supply
24. Mr McElroy stated that the standard management fee charged by Canonbury Management was £250 plus Vat per unit per block. In 2012 the directors negotiated a fee of £900 including VAT for this block. The higher management fee in 2013- 14 reflects the fact the extra work they are undertaking in relation to the proposed roof works.

Service charge of £ 278.12 – May 2013

The tribunal's decision

25. The tribunal determines that the Respondent is liable to pay the following sums:
- (i) £278.12 in respect of the quarterly service charge for the quarterly period ending May 2013,
 - (ii) £278.12 in respect of the quarterly service charge for the quarterly period ending August 2013, and
 - (iii) £264.26 in respect of the quarterly service charge for the quarterly period ending November 2013

Reasons for the tribunal's decision

26. The tribunal's jurisdiction in this case flows from the County Court Order of District Judge Asplin. The tribunal under s27A of the 1985 Act is only able to deal with issues in relation to service charges and therefore issues relating to ground rent, County Court interest, court fees, solicitors fees, all of which were included in the county court application, remain the jurisdiction of the county court.
27. The property is a one bedroom ex- council flat in a block of 8 flats on Mile End Road. The service charge is about a £1000 per year, this amount of service charge does not seem unreasonable for a property of this type. The tribunal considered the management fee to be quite low. Overall the tribunal considered the service charges to reasonable and finds that under the terms of his Lease the Respondent is liable to pay the service charges.
28. The Respondent has not disputed specific items service charge but has put forward a claim by way of set off. The Applicant accepted that there is a problem with the roof and the tribunal was satisfied with the explanation given by Mr McElroy that the directors of the Applicant had decided not to spend any more funds on patch repairs as these repairs were disproportionately expensive and they planned to conserve funds as they were in the process of undertaking a roof replacement. They had undertaken a survey, drawn up a specification and undertaken a s.20 Consultation.
29. The tribunal appreciated that the Applicant was in a Catch 22 situation as the cost of the temporary repairs would be substantial given that access to the roof required either a cherry picker or scaffolding, and also judging by previous experience it was likely that repeated repairs would be required as the patch repairs seemed to be ineffective.

30. The Respondent seeks to rely on the principle of equitable set off. The tribunal does not have a general jurisdiction to entertain counterclaims by tenants for damages. When establishing the amount payable by way of a service charge, it has a limited jurisdiction to allow deductions by way of equitable set off. This is, however, a discretionary jurisdiction which needs to be exercised with caution.
31. A set-off extinguishes a debt which would otherwise be due and owing. Equitable set-off (so far as relevant to this case) is a claim for damages arising from a breach of the terms of the lease by the landlord. Equitable set-off should be contrasted with legal set off. If a party has a judgment debt against the other, then the judgment creditor has a legal set off of the judgment debt against any other monies which may be owed by him.
32. It is clear therefore that an equitable set-off is a defence, and hence is a defence to a claim. However it is important to bear in mind the guidance offered by Lord Wilberforce in Aries Tanker Corporation v Total Transport Ltd [1977] 1 WLR 185) in which he stated that “ One thing is clear - there must be some equity, some ground for equitable intervention, beyond the mere existence of a cross-claim”.
33. On the basis of the witness statement of Michael Aaron Wood an advisor for Canonbury Management Client Services department [57] , the tribunal was persuaded that the Respondent had telephoned Canonbury Management in November/December 2013 on several occasions over a one or two week period. He was informed that there were insufficient funds to undertake the repairs and the matter was in the hands of the Applicant to consider and approve the collection of additional funds.
34. The Respondent is a member of the Resident’s Association i.e the Applicant in this case. The Respondent therefore has some control over the decisions made by the Applicant and could have approached the directors in order to authorise the repair or replacement of the roof and to expedite matters. It is also the case that the Respondent has a history of over 7 years non- payment of service charge and this must inevitably have placed an undue burden on the remaining leaseholders who continued to pay the service charge and the managing agents in ensuring sufficient funds were available for any necessary repairs. The Tribunal considered it naïve of the Respondent to continue to fail to pay the service charge yet demand that repairs are undertaken. In addition the tribunal considered the Respondent had not acted reasonably in undertaking works to repair the damage internally to the property without first ensuring that the cause of the leak had been identified and dealt with. The Respondent should have realised that it was futile to undertake works internally in the property without resolving the leak.
35. The tribunal accepted that the property had suffered some damage due to the leak in the roof. However, the tribunal did not find the amounts claimed by the Respondent to be credible or reasonable. The amounts claimed were unsubstantiated and for the reasons stated the tribunal

considers them to be unreasonably incurred and excessive. In this case for the reasons given although a cross claim may exist the tribunal was of the view that a ground for equitable intervention had not been made out. Accordingly, the tribunal did not allow any sum by way of set off.

Application under s.20C and refund of fees

36. At the hearing, the Applicant applied for an order under section 20C of the 1985 Act. Having heard the submissions and taking into account the determinations above, the tribunal determines 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 Applicant may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

The next steps

37. The tribunal has no jurisdiction over ground rent or county court costs. This matter should now be returned to the Chippenham and Trowbridge County Court.

Name: N Haria

Date: 1 December 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 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.