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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/00KC/LSC/2014/0116**
Property	:	**Flats 2, 3, 4 and 6 Brittany Court, High Street South, Dunstable, Bedfordshire, LU6 3HR**
Applicant	:	**Clarkes Investment**
Respondent	:	**Mr D Kane**
Type of Application	:	**Section 27A Landlord and Tenant Act 1985 (the 1985 Act). Determination of the reasonableness and payability of service charges.**
Tribunal Members	:	**Mrs H C Bowers BSc (Econ) MSc MRICS** **Judge J Oxlade** **Mr M Z Bhatti MBE**
Date and venue of Hearing	:	**24th February 2015** **The Chiltern Hotel, Waller Avenue, Luton, Bedfordshire, LU4 9RU**
Date of Decision	:	**3rd March 2015**

DECISION

For the reasons given below, the Tribunal finds as follows:

- **The service charges of £1,375.32 for the service charge years 2007 to 2011 and 2013 are reasonable**
- **The sum of £1,375.32 is not payable, for failure by the Applicant to comply with section 21B of the Landlord and Tenant Act 1985**
- **The Tribunal has no jurisdiction over the ground rents for the years in dispute**
- **This matter is referred back to the County Court in Luton**

REASONS

Introduction:

1.) This is a transfer from the County Court in Luton. In an order dated 24th October 2014, Deputy District Judge Simpson transferred this case to the First-tier Tribunal (Property Chamber) [the Tribunal]. The court papers were received by the Tribunal on 26th November 2014. Directions were issued by the Tribunal on 1st December 2014. The county court claim under claim number A6QZ2427 was for the sum of £9,727.48. The summary of the claim was that the sums due arose from unpaid ground rent and service charges from 2007 to 2013, although the service charges for 2012 have been paid by the Respondent.

2) The Directions clarified the issues to be resolved by the Tribunal as being the payability and reasonableness of service charges, under section 27A of the Landlord and Tenant Act 1985 (the 1985 Act). The Directions confirmed that this Tribunal has no jurisdiction on ground rent.

The Law:

3.) A summary of the relevant legal provisions is set out in Appendix 1 to this decision.

Background:

4.) Clarkes Investments [the Applicant] is the freehold owner of Brittany Court [the subject property]. Mr D Kane is the long leaseholder of four flats, Flats 2, 3, 4 and 6 Brittany Court [the Flats].

The Lease:

5.) Copies of all four leases were provided. The lease for Flat 2 is dated 9th March 1966 and is for a term of 99 years from 1st January 1966; the lease for Flat 3 is dated 16th November 1965 and is for a term of 99 years from 17th September 1965; the lease for Flat 4 is dated 25th February 1966 and is for a term of 99 years from 25th February 1966 and the lease for Flat 6 is dated 30th March 1966 and is for a term of 99 years from 5th March 1966

6.) The lease for Flat 2 requires the tenant to pay 1/24th of the cost incurred by the Landlord in repairing and maintaining the roof of the Building and the paving on the verandas [clause 3(e)]. In the leases for Flats 3, 4 and 6 the obligation in clause 3(e) as summarised above, is extended to include a contribution to the redecorating of the exterior of the Building.

7.) Under clause 3(g) of each lease of the Flats, the tenant covenants to keep the demised premises insured. Also under clause 3(m) of each lease the tenants covenant to pay a fair proportion of the expenses in respect of repairing maintaining cleansing lighting the footpath staircases and passage that are coloured green on the lease plan.

8.) The "Building" is defined in the lease for Flat 2 as a building recently erected at number 122 to 140 High Street South Dunstable.

Inspection:

9.) The Tribunal had an opportunity to make an inspection of the subject property in the morning of 24th February 2015. The Tribunal was accompanied on behalf of the Applicant by Mr Crow of Clarks Investments, Mrs Diamond from Kirkby & Diamond, the managing agents of the development and Mr Clark one of the trustees of Clarks Investments. The Respondent, Mr Kane and his partner Miss Rowles also attended.

10.) The subject property is a purpose built mixed commercial and residential development. It is a three storey, detached block with retail shops on the ground floor; commercial space and one residential flat on the first floor and seven flats on the second floor. There are two car-parking areas at the rear of the building, one approached by a side road and one area accessed from an archway between the retail units. There are concrete, open stairs that lead to accommodation on the first and second floors and a metal fire escape at the rear of the property serving the second and first floors. There is an open balcony area giving access to each commercial and residential unit on the first and second floors. There is external, communal lighting to the rear of the block.

11.) The Tribunal noted the paintwork to the ground and first floor windows and doors but observed that the windows and doors on the second floor were UPVc units. The external painted items included a mix of down and soil pipes and a concrete canopy area over the retail units at the front of the development. The painted surfaces appeared to be in reasonable condition. However we noted some peeling paint to the concrete canopy area to the front of the block and we noted that most of the down and soil pipes were painted in two finishes; the upper parts had a gloss finish and the lower parts had a matt coat.

The Hearing:

12.) A hearing was held on 24th February 2014 at the Chiltern Hotel, Waller Avenue, Bedfordshire, LU4 9RU. The Applicant was represented by Mr N Crow, Mrs Diamond and Mr Clark. The Respondent Mr Kane and his partner Miss Rowles were in attendance.

13.) The extent of the Tribunal's jurisdiction was explained to the parties and with the assistance of Mr Crow and from the trial bundle the Tribunal was able to identify that net of ground rent the amount that was initially disputed was £9,127.48. However, the Applicant made concessions in respect of the maintenance charges for the 2007 to 2011 and the disputed amount reduced to £8,172.60 net of ground rent. Accordingly, three aspects of the service charges remained in dispute and these are now considered below.

14.) A common theme raised by the Respondent for all the sums being claimed was the failure to comply with section 21B of the 1985 Act. Mr Crow accepted that none of the invoices that were sent to Mr Kane contained the necessary

summary of rights and obligations and as such were not compliant with section 21B.

Representations:

15.) The Tribunal had the benefit of a trial bundle that explained each parties' position. The Tribunal had full consideration to both the written submissions and evidence included in the trial bundle, together with the oral evidence and submissions made at the hearing. A summary of each party's case is provided below. Reference is made to the page number in the bundle.

Insurance [Total - £6,399.44]: 2007 - £1,022.48; 2008 - £1,044.00; 2009 - £1,066.84; 2010 - £1,060.40; 2011 - £1,106.24 and 2013 - £1,099.48

Applicant's Case:

16.) Mr Crow explained that the landlord has insured the whole of the building from the commencement of their involvement in the development. Prior to 2007 they had re-charged the insurance premiums and all parties, including Mr Kane, had paid their proportion. After 2007 all the parties other than Mr Kane, had continued to pay. Mr Kane had ceased payments in 2007, but had made a payment in 2012 and has made payments from 2014. It is a historic and sensible arrangement for the landlord to insure and to recover the premiums and a feature of most modern leases. It was acknowledged that under clause 3(g) the tenant covenants to insure the area demised to him. Likewise it was accepted that there is no clause in any of the leases for the landlord to insure and recover the cost from the tenant.

17.) All the relevant invoices for the years in dispute had been dated and sent out to the Respondent on 25th February 2013. The insurance policies for each year in question ran from 1st January to 31st December. For 2011 the insurance policy was produced in 2011. The Applicant had paid for the premium on an instalment basis. Accordingly the premiums for August to December 2011 would have fallen within the 18-month date of the sum being invoiced to Mr Kane.

Respondent's Case:

18.) Miss Rowles stated that the Respondent had no issue about the amount of the premiums. She explained that following a meeting with Mr Crow the ground rent and insurance premium for 2012 had been paid. However, this was then followed by an email seeking the backdated charges for the service charge years to 2007 to 2011. Prior to 2007 there had been an assumption that the Respondent would be liable to pay the insurance premium. However, it had been brought to the Respondent's attention that there was no liability to pay the insurance premium to the landlord under the terms of the lease. As an additionally issue it was claimed that the invoices sent to the respondent were outside the 18 month period for the period that the charges were incurred.

Tribunal's Decision:

19.) The lease is the contractual relationship between the parties and it is the obligations in the lease that determine to what extent a tenant is liable to a landlord for any service charges. In this lease there are no provisions for the landlord to insure and to recover the premiums from the leaseholders. In fact the lease obligations make it clear that the tenant has the direct liability to insure. The arguments made by the Applicant that for the landlord to insure the whole building and recover premiums is appreciated and would certainly be regarded as good practice and a practical way in which to oversee this important aspect of property management. However, it is the contractual arrangement that must be followed and in this instance there is no contractual liability of the Respondent to pay to the Applicant any contribution for the insurance premium. Accordingly, the sums that the Applicant is seeking for the reimbursement of the insurance premiums are not recoverable under the terms of the lease. Therefore the Respondent is not liable to pay the amounts claimed.

20.) Whilst it is no part of this Tribunal's function to comment on a defect in a lease, it would encourage the parties to agree to vary all the leases or apply to this Tribunal for such variation. From the tenant's point of view the possible implications of not doing this are serious. Indeed, the Tribunal is somewhat surprised that conveyancers and lenders have not picked up the point before now.

21.) There is no obligation in these leases for the landlord to insure the building. If the other leases are in the same format and if other tenants have not insured and have no money, the chances of re-instating the whole building are slim if the landlord has insufficient money to cover the shortfall.

22.) As has been said, the usual practice is for the landlord to insure the whole building and collect a proportion of the premium from each tenant. The advantage is that the tenants can see the insurance policy and will know that their interests are protected

Maintenance [Total - £933.16]: 2012 - £496.00; 2013 - £437.16

Applicant's Case:

23.) Mr Crow acknowledged that there were no invoices in the bundle, but there was a summary of the charges for 2012 in an email (p143). The total sum for the year was £3,007 and there was an explanation as to how the proportions were calculated. There was no summary for 2013, but it was accepted that the figures would have been similar to the previous year and in similar proportions. On reflection Mr Crow accepted the 50:50 split of cleaning costs as suggested by Miss Rowles and also accepted that the weed treatment and skip hire related to areas for which the Respondent had no liability. He further accepted that taking a similar approach to the 2013 service charge year would be reasonable.

Respondent's Case:

24.) Miss Rowles explained that the leases restricted the tenant's liability for costs incurred in relation to work done to areas marked green on the lease plan. These areas were generally identified as being the access ways, stairs and the external corridors on the upper storeys. Accordingly the cost of £600 for 24 weeks cleaning to general areas, included areas that were not included in the green shaded areas on the lease plan. Accordingly those costs should be reduced. In her opinion the cost should be split 50:50 between the areas shaded green on the lease plan and the other areas. Likewise the weed treatment and the hire of a skip were costs that were incurred in respect of the car parking areas and outside the areas for which the Respondent was obliged to contribute.

Tribunal's Decision:

25.) The Tribunal notes Mr Crow's acceptance of the Respondent's interpretation of the lease and agrees with the Respondent's submissions. Accordingly, if the weed treatment and the skip hire are removed from the charges and the cleaning charges are reduced from £600 to £300, then the overall charges for 2012 would reduce to £2,377. Each flat's proportion would be calculated at £99.04, giving a total sum due from the Respondent for the Flats at £396.16.

26.) Using an approach accepted by Mr Crow, if the same deductions are made to the 2013 service charge year on a proportionate basis, this would reduce the Respondent's contribution from £437.16 to £349.16. The Tribunal finds as reasonable the total maintenance charges for both 2012 and 2013 of £745.32. Mr Crow acknowledged that the Applicant had not complied with the provisions of section 21B of the 1985 Act (see paragraph 13 above). Therefore, whilst these sums would be due under the provisions of the lease, there are not payable by the respondent until the Applicant has served invoices in compliance with section 21B.

Re-decorating [Total - £840.00]: 2012 - £840.00

Applicant's Case:

27.) The relevant clause for the recovery of costs in relation to the redecoration of the building, is clause 3(e) of the lease. Mr Crow conceded that the wording of that clause in the lease of Flat 2 meant that this flat was not liable to contribute towards the redecoration work. T Tedder Painting and Decorating carried out the re-decoration work that started in August 2012. The undated invoice is on page 262 and is for £5,100. Mr Crow explained that £100 related to the re-decoration of the interior aspect of a door of a commercial unit retained by the Applicant. Only £5,000 had been recovered from the service charges and this sum had not been subject to any VAT. Another quotation had been obtained from another contractor for the sum of

£5,180 excluding VAT (p261). Mr Crow had no recollection of any instructions regarding the painted finish of the soil/down pipes.

Respondent's Case:

28.) Miss Rowles indicated that the wording in the lease for Flat 2 was different to the other flats. In the opinion of the Respondent the work was not of a high standard and alternative quotations had been obtained that were considerably less. She wondered why a local contractor had not been used as this would have been cheaper. Three alternative quotations had been obtained. S Brackley, described as a commercial and domestic decorator quoted £2,110 but there was no indication as to VAT status. The description of the work makes no mention of the ground floor windows and doors and the doors on the first floor level. Abbott Decorators quoted £2,340 with no VAT payable, but this quote seemed to omit the re-decoration of the fire escape and is a little vague regarding the doors and windows to be included. A J House Maintenance quoted £2,200 with no indication of the VAT status. No mention is made of the ground floor doors and windows. Mr Kane acknowledged that these quotations were obtained after the initiation of the court proceedings. He had walked the contractors around the development and each were provided with the same description of the work to be undertaken.

Tribunal's Decision:

29.) It is clear that the wording in the lease for Flat 2 does not include any liability for a contribution towards the redecoration of the development. As such there is no service charge liability for flat 2 for this item of expenditure. In respect of the amount payable for the other flats, the quotations provided by the Respondent are of some interest. However, the Tribunal are not satisfied that these quotations are on exactly the same specification of the work that was undertaken. In particular none of the alternative quotations appeared to include the ground floor doors and windows. Additionally, using the Tribunal's general knowledge as an expert tribunal, the Tribunal finds that the costs incurred by the Applicant to re-decorate a three storey mixed commercial and residential development are not excessive. Accordingly, the Tribunal finds that the cost of £210 per unit is reasonable. As there is no liability for Flat 2, the total sum due from the Respondent is reduced to £630.

30.) However, as mentioned above there has been no compliance with the provisions of section 21B of the 1985 Act (see paragraph 13 above). Therefore, whilst these sums would be due under the provisions of the lease, there are not payable by the respondent until the Applicant has served invoices in compliance with section 21B.

The next steps

31.) This matter should now be returned to the County Court in Luton.

Chairman: *Helen C Bowers* **Date:** *3rd March 2015*

Appendix 1

LANDLORD AND TENANT ACT 1985

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 provision of services or the carrying out of works, only of 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.

20B.— Limitation of service charges: time limit on making demands.

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

21B Notice to accompany demands for service charges

(1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.
(2) The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.
(3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.
(4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.
(5) Regulations under subsection (2) may make different provision for different purposes.
(6) Regulations under subsection (2) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Section 27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation 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 it which it is payable.....
(2) Subsection (1) applies whether or not any payment has been made.
(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred fro 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 it 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 subject of determination by a court, or
(d) has been 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.