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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/22UC/LSC/2015/0029**
Property	:	**5 Elderberry Gardens, Witham, Essex CM8 2PT**
Applicant	:	**Searsleigh Ltd.**
Represented by		**Mr. C. Hoggarth**
Respondent	:	**Alan Robert Yates**
Date of transfer from the county court at Chelmsford	:	**9th March 2015**
Type of Application	:	**To determine reasonableness and payability of service charges and administration charges**
The Tribunal	:	**Bruce Edgington (lawyer chair)** **Evelyn Flint DMS FRICS IRRV** **Cheryl St Clair MBE BA**
Date and venue of hearing	:	**16th June 2015, Rivenhall Hotel, London Road, Rivenhall End, Witham, Essex CM8 3HB**

DECISION

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1. In respect of the amount claimed from the Respondent for service charges in the sum of £720.00, the amount which the Tribunal considers to be payable is nil.

2. In respect of the amount claimed from the Respondent for administration charges in the sum of £2,770.00, the amount which the Tribunal considers to be payable is nil.

3. In respect of any claim by either party for contractual or statutory interest, damages for breach of covenant and otherwise, court fees and costs, these are matters for the court to determine. Having said that, the lease makes no provision for the payment of contractual interest.

4. This case is now transferred back to the county court sitting at Chelmsford under claim number A19YP597 so that any matters not dealt with in this decision such

as the counterclaims, interest, costs and enforcement can be dealt with.

Reasons

Introduction

5. On the 9th September 2014, the Applicant, as the management company for the buildings in which the property is situated, issued a claim in the county court to recover service charges, variable administration charges, interest and costs totalling £3,794.60 from the Respondent. The way in which the claim has been issued is somewhat confusing in that a service charge statement of account is annexed which seems to show a 'brought forward' figure in the sum of £2,025.00 in addition to the claim. As this has not been mentioned in the claim form itself as being part of this claim, the Tribunal will ignore it.

6. A detailed defence, counterclaim and witness statement was filed at court by the Respondent, from which it becomes clear that there is some 'history' to this case. The Respondent has lived in the property since 1988 and was a director of the Applicant between June 2005 and September 2008 after the managing agent previously employed did not do a good job. Mr. Yates says that he was personally responsible for managing the 36 flats in 2 blocks during that period.

7. He disputes the claim. He makes no mention of the service charge element claimed save to say that if any money is owed, he has a defence of setoff as his windows have not been maintained and, because of this, the frames are rotten in places. He also claims management fees and expenses incurred when he was director. As far as administration charges are concerned, he says that the issue is a legal one i.e. whether this Applicant can claim these amounts from this Respondent as (a) the lease makes no provision for them and (b) he has the defence of setoff.

8. The order from the court says that "*this matter be sent*" to this Tribunal for it to determine "*whether the service charges are reasonable and/or payable*". The only thing a court can transfer is so much of a case which enables the Tribunal to determine a 'question' within its jurisdiction. The claim itself only refers to an unpaid "*Service Charge for period 01/08/2013 – 07/08/2014*". However when looking at the detail in the schedule attached, a large part of the claim consists of variable administration charges allegedly due. As the payability and reasonableness of both service charges and variable administration charges are within this Tribunal's jurisdiction, it is inferred that the District Judge intended to include the administration charges in his reference to this Tribunal.

9. For the avoidance of doubt, such matters as the recovery of contractual or statutory interest, court fees, housing disrepair claims, the sort of counterclaim for charges and expenses set out by the Respondent and enforcement are matters which this Tribunal cannot deal with and, thus, remain in the court's jurisdiction.

10. The preparation for this case by the Applicant leaves a lot to be desired. It was ordered to file and serve a statement setting out, amongst other things:-

    - Why it describes the claim as being for service charges when it seems clear that a large proportion is for administration charges

- Its justification in principle and in law for the disputed demands made and
- A single sheet of A4 paper should be attached setting out exactly what is allegedly owed, to include the date incurred, a full description of the item claimed, the amount and any payments made

11. A letter was sent to the Tribunal on the 19th April sending a copy of the minutes of the company's Annual General Meeting on the 14th July 2013 which the Respondent did not attend. A letter was then sent to Mr. Yates on the 15th July 2013 enclosing a 'service charge certificate'. This is also in the bundle and claims service charges for August 2013 to July 2014 i.e. is a claim on account of service charges with a demand for £720.00 in respect thereof. Further, the directions order stipulated the documents which had to be in the bundle to be lodged prior to the hearing. Many were not included and it was late being filed.

12. So far as the Respondent is concerned, he was only ordered to file and serve a statement in response to anything filed by the Applicant. However, he telephoned the Tribunal office on the 10th June to say that whilst he had received some letters from the Tribunal, he had not received the directions order. He added that he had been having problems with his mail being delivered but he could not really give another address where things could be sent. He also mentioned that because of a medical condition, he had difficulty in travelling far.

The Inspection

13. As the claim did not include any details of the service charges claimed and the Applicant failed to supply any details of actual service charges incurred – as opposed to payments on account – as ordered by the Tribunal, no pre-hearing inspection of the property was considered by the Tribunal to be necessary and none was requested by the parties.

The Lease

14. The lease is dated 16th December 1974 and is for a term of 99 years commencing on the 24th June 1974. It is in modern tri-partite form with a landlord, a tenant and a management company. The Applicant is named as the management company. A copy of the lease was in the bundle provided for the Tribunal.

15. There are the usual covenants on the part of the management company to maintain the common parts and structure of the property and to insure it. As no issue is raised in the claim or the defence and counterclaim about any particular item of service charge, these reasons will not repeat the relevant provisions in the lease.

16. As far as payment of service charges is concerned, the relevant parts of the lease are clause 3(5) and Part IV of the Schedule. Clause 3(5)(a) says that on completion of the lease a deposit is lodged with the management company which will be retained as a security against non-payment and will be repaid, without interest, at the end of the term. Clause 3(5)(b) then says that the management company can collect three ninety-sixth parts of the annual service charge from the tenant.

17. Part IV of the Schedule then sets out what can be included in the service charge. It says that the management company must keep proper books of account and

then, on 31st March in every year, prepare a service charge account and have it audited with a certificate being sent to the tenants with a demand for payment "*credit being given for any amount which shall already have been paid under Clause 3(5)(b) of this Deed*".

18. The problem with this is that clause 3(5)(b) does not allow for any money to be claimed in advance of the service charges being actually incurred, because it says that the only amount payable is that certified by the accountant up to 31st March in each year. The only other payment mentioned in this clause is if the landlord takes over management which has not happened in this case.

19. There are only 2 provisions in the lease which mention costs as service charges or variable administration charges. Clause 2(5) contains a requirement on the tenant "*to pay all costs charges and expenses (including Solicitor's costs and Surveyors' fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a Notice under Sections 146 and 147 of the Law of Property Act 1925...*".

20. The other provision is in the service charge regime set out in Part IV of the Schedule to the lease which allows the management company to "*employ such staff or agents for the performance of its obligations hereunder as it shall think fit*" and recover the cost thereof.

21. There is no provision allowing the management company to recover contractual interest from a tenant.

22. In so far as it is relevant, the windows and window frames are included in the demise to the tenant but the management company is required to decorate with 2 coats of 'good paint', "*not less frequently than once in every third year*"

The Law

23. Section 18 of the **Landlord and Tenant Act 1985** ("1985 Act") defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'.

24. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. This Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable and, if so, whether it is payable.

25. Paragraph 1 of Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the Schedule") defines an administration charge as being:-

> *"an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable... in connection with a breach (or alleged breach) of a covenant or condition in his lease."*

26. Paragraph 2 of the Schedule, which applies to amounts payable after 30th September 2003, then says:-

"a variable administration charge is payable only to the extent that the amount of the charge is reasonable"

27. Paragraph 4 states that any demand for an administration fee must be accompanied by a summary of the rights and obligations of tenants in the form prescribed by the appropriate Regulations. None of the demands seen by the Tribunal contained such information.

28. Finally, paragraph 5 of the Schedule provides that this Tribunal may make a determination as to whether an administration charge is payable which includes, by definition, a determination as to whether it is reasonable.

The Hearing

29. The hearing was attended by Mr. Hoggarth on behalf of the Applicant and Mr. Yates. There was a discussion about whether the hearing should proceed because Mr. Yates said that he wanted to lodge his own bundle. It transpired that both Mr. Hoggarth and Mr. Yates have had problems with their post. Mr. Yates had not had some items of post from the Tribunal and Mr. Hoggarth had not had a copy of the defence and statement in support which had been filed at the court. The Tribunal chair located a spare copy of these which were handed to Mr. Hoggarth who took them away with him.

30. The Tribunal chair took the view that he ought to set out the legal position to both individuals i.e. that the lease did not allow service charges to be claimed on account, it did not allow for administration charges and did not allow for interest. With regard to the counter-claim, this was not within the jurisdiction of the Tribunal and would have to go back to the court.

31. Both parties were then asked for their views and they both accepted that if that was the legal position, the Tribunal might as well continue with the hearing. There was no application for an adjournment by either.

Discussion

32. This case raises an issue which this Tribunal sees on many occasions. Whilst, in theory, it is reasonable and acceptable for tenants to self manage their blocks of flats, problems often occur when one tenant or faction of tenants fall out with others. It is often over service charges for the simple reason that some tenants are often keen to keep the building in tip top condition because they can afford to pay and others simply cannot or will not afford high service charges. After all the level of services being provided to support the service charges levied can often be a very subjective thing.

33. From what the Tribunal can gather, this is what happened here. Mr.Yates managed the 2 blocks for over 3 years on behalf of the Applicant but others thought the cost was too high and he became unpopular. Clearly the rift has continued and Mr. Yates says that he is owed money for management fees and moneys he loaned the Applicant which outweigh the service charges allegedly owed. He says that evidence of this, including invoices, were lodged with the company's accountants at the time. Having said that, it seems that the person at the accountants who dealt with the company died shortly after, presumably in 2008 or 2009.

34. This situation has been compounded because the Applicant management company has been 'agreeing' at its general meetings to do things which are against the terms of the lease seen by the Tribunal e.g. by claiming monies on account of service charges, by claiming interest and by claiming administration fees. These, together with the creation of a sinking fund, may well be thought to be sensible management tools. However, at the end of the day, any claim by a landlord or management company is under the law of contract i.e. it must be a claim which is supported by the terms of the lease. If not, there has to be a variation of the leases either by agreement or a variation order from this Tribunal under the terms of the **Landlord and Tenant Act 1987**.

35. Mr. Yates raised a further matter at the hearing over the proportion of service charges being collected from the tenants. As has been said, his proportion is three ninety-sixths of the total service charges. The amount being claimed is approximately an equal share i.e. the total figure claimed of £720 is about an equal share of £26,055.00 when divided between 36 flats. Mr. Yates's contractual share is actually £781.65. The directors of the Applicant management company should note that this is an example of Mr. Yates actually raising a point which is against his own interests which does, perhaps, at least show some goodwill on his part.

36. As far as the service charges are concerned, the detailed defence and statement filed by the Respondent with the court makes no admissions with regard to the reasonableness of the service charges claimed and the Applicant has failed to give any detail of such service charges actually incurred and audited (as opposed to a claim on account) to the Tribunal, despite being ordered to do so.

37. As far as the claim for variable administration charges is concerned, they are only recoverable if the lease provides for them to be paid. The Schedule makes it clear that such charges must be 'payable' i.e. the lease must make provision for them. This one does not. The costs payable in the event of a section 146 or 147 notice i.e. the preliminary steps to forfeiture, are only those incurred by the landlord, not the management company. In any event, the recent Upper Tribunal case of **Barrett v Robertson** [2014] UKUT 0322 (LC) makes it clear that for this sort of clause to apply, the work claimed for had to be in contemplation of or actually in respect of forfeiture, which has not even been mentioned in this case.

38. The other provision for the recovery of the cost of employing people or agents does not apply because there is no evidence that the costs claimed are for that.

39. Further, the said detailed defence and statement sets out exactly why the Respondent considers that he owes no monies. He claims that the Applicant has not decorated his window frames since 2007 and some parts of them are rotten as a result. Further he sets out why he did not claim all his charges when he was solely responsible for managing the 2 buildings and attaches a schedule to the defence setting out monies allegedly due to him from the Applicant totalling £3,619.91 up to September 2008.

40. The problem with the claim for monies arising from his management duties is that the counterclaim is dated 9th October 2014 which is over 6 years from when

the debt was incurred. Mr. Yates told the Tribunal that he had raised some invoices at the time and the accountants, as well as the Applicant's directors, were aware of the situation. However, if 6 years have passed since the debt was incurred and no court proceedings have been started for recovery, the court may take the view that this claim is statute barred.

Conclusions

41. As the lease makes no provision for payments on account of service charges and no evidence has been supplied to justify the payability or reasonableness of service charges actually incurred with the necessary audited accounts to support them, the claim for service charges must fail. As there is also no provision in the lease for the recovery of administration charges or interest, those claims must also fail.

42. It is absolutely clear to this Tribunal that the present directors of the Applicant need to meet with Mr. Yates and try to reach agreement. If he did put his own money into the Applicant company to stop it being dissolved, that should surely be recognised. If the accountants are aware of the claim from 2008, then as the Tribunal was told that the firm of accountants is the same (albeit that the person handling the account has, sadly, died), there should be some record of this in their files.

43. The present state of affairs surely cannot continue. Apart from anything else, the cost to the taxpayer of this continuing litigation is unreasonable and disproportionate.

The Window Frames

44. The Tribunal is conscious of the fact that it has not dealt in any detail with the allegation that the window frames have rotted as a result of the alleged failure to decorate the window frames. The problem with this is that it is, in effect, a housing disrepair claim over which the Tribunal has no jurisdiction, despite its representations to successive governments that it should have.

45. What the court will need is some expert evidence to show, on the balance of probabilities:- whether there has been a failure to decorate; whether there is rotting; if so, whether this has been caused by any failure to decorate; if so, whether the window frames need to be replaced or repaired as a result and what the cost directly arising from the failure to decorate would be.

46. Thus, if the Respondent intends to pursue this claim, he will need to have that evidence to hand when he applies for a hearing date to resolve that issue. It will have to be filed with the court and served on the Applicant. He would be well advised to seek legal advice on this and what preparatory orders he will need from the court before being able to rely upon such evidence.

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Bruce Edgington

Regional Judge
17th June 2015