10709

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BE/LSC/2014/0374**
Property	:	**The Rise, 52 – 56a Lant Street, London SE1 1RE**
Applicant	:	**The Rise SE1 Lessees Association and various lessees at the Rise as listed on the Directions including Southern Housing**
Representative	:	**Mr Mark Corrigan (representing the residential lessees)** **Mr Stephen Lee (representing Southern Housing)**
Respondent	:	**Tuscola (FC100) Limited**
Representative	:	**Mr Michael Gubbay**
Type of Application	:	**Liability to pay service charges**
Tribunal Members	:	**Judge Carr** **Ms Sarah Redmond BSc(Econ) MRICS** **Ms Sue Wilby**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**23rd March 2015**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the sums set out in Appendix 6 of the Respondent's bundle produced subsequent to the adjournment is payable by the Applicants in respect of the service charges for the years 2008 – 2011 at the percentages therein shown.

(2) The tribunal determines that the service charges demanded since that date are payable and reasonable other than the second audit charge demanded in 2012.

(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 so 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 s.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 2007/8 – 2014/15.

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

The hearing

3. The Applicants were represented by Mr Mark Corrigan, Chairman of the Lessees Association and Mr Stephen Lee of Southern Housing and the Respondent was represented by Mr Michael Gubbay.

4. The Applicants' bundle was only received by the Tribunal the day before the hearing. Moreover the documents were very extensive and difficult to relate to the issues identified in the directions. The Tribunal was very concerned that more than one version of the Scott Schedule had been produced by the Applicants. The Tribunal was concerned that it was difficult for the Respondent to identify the case against him.

5. Immediately prior to the hearing the Respondent made an application for an adjournment and for specific directions to be issued.

6. The most significant direction requested by the Respondent was for the Tribunal to use its powers to summons Moreland Estate Management and Ground Rent Trading Limited, the previous freeholder, to attend the hearing and answer questions relating to the service charge accounts for the subject property for the period up to 28 April 2011 which was the date that the Respondent took over the freehold.

7. The Respondent informed the Tribunal that he had tried several times to extract the information necessary to finalise the service charge accounts prior to 2011 and to answer the Applicants queries relating to that period, from Moreland Estate Management and Ground Rent Trading Limited. However he had received no cooperation from the previous freeholder.

8. The Tribunal considered whether it would be productive to adjourn the hearing and issue the summons requested. It determined that it would not issue such a summons. Not only was the request received very late, the Tribunal was not persuaded that issuing the summons would result in Moreland Estate Management and Ground Rent Trading Limited attending the Tribunal within a reasonable time frame (considering that the application was made in mid 2014) or indeed at all. Moreover if Moreland Estate Management and Ground Rent Trading Limited did attend the Tribunal there was nothing to indicate that it would have in its possession the necessary information. In addition the Tribunal were not party, and nor did it wish to be party to, the dealings between Moreland Estate Management and Ground Rent Trading Limited and the Respondent at the time the Respondent acquired the freehold. It may be, for instance, that the Respondent paid a reduced price for the freehold because of arrears of service charges.

9. In the circumstances of the case the Tribunal determined it was in the interests of justice to proceed with the hearing on the basis of the information available to the parties before it, and leave it to the Respondent to take any appropriate legal action against Moreland Estate Management and Ground Rent Trading Limited if the Tribunal determined that the Respondent was not owed service charges by the Applicants, or indeed if the Respondent had to reimburse the Applicants with charges already received.

10. The Tribunal declined to consider the other directions at this stage. Until the issues between the parties were clearly identified it was not appropriate to adjourn to enable witnesses to be called.

11. In the event, the Tribunal was able to adjourn consideration of some issues and enable the parties to make representations on these matters in accordance with further directions issued immediately after the first hearing.

The background

12. The property which is the subject of this application is a modern development comprising 15 affordable units at 56a and 52 residential units at 54 and 56 Lant Street. There are 35 underground car-parking spaces.

13. 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.

14. The Applicants hold long leases 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 specific provisions of the lease will be referred to below, where appropriate.

15. It is appropriate to note at this stage that the Respondent has not issued final service charge demands since he became the freeholder.

The issues

16. At the start of the hearing the Tribunal adjourned to enable the parties to identify the relevant issues for determination. The following issues were identified:

    (i) Whether the contracts for management services and maintenance were qualifying long term agreements which would trigger statutory consultation

    (ii) The reasonableness of the maintenance charges for the property

    (iii) Whether section 20B would prevent certain service charges being payable

    (iv) Whether audit charges for the period 25th March 2011 to 16th May 2011 are reasonable and payable

    (v) Whether the Respondent is entitled to build reserves in the way in which it did

    (vi) Whether the Respondent is entitled to charge interest in connection with a loan taken to cover the insurance premium

    (vii) The reasonableness and payability of service charges demanded prior to 2011 as there is no information available to support those charges

(viii) Whether the charges demanded for the period prior to 2011 has been correctly apportioned between the blocks

(ix) Whether the Respondent is entitled to costs under section 20C of the 1985 Act and whether there should be reimbursement of fees paid to the Tribunal

17. The Tribunal considered that there was sufficient information to determine issues (i) to (vi) without any further adjournment. The Tribunal adjourned for six weeks to enable the parties to prepare written submissions on issues (vii) – (ix). Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

Are the contracts for the provision of management services and maintenance qualifying long term agreements so as to trigger the statutory consultation procedures?

18. The Applicants argued that the Respondent had entered into contracts with Regent Property Management for management services and Bruce Knight for maintenance services which rolled over from year to year and therefore were qualifying long term agreements.

19. The Respondent argued that he had no contract with Bruce Knight for the provision of maintenance services. Bruce Knight were called out on an *ad hoc* basis to attend to the maintenance of the property. He agreed he had a contract with Regent Property Management for the provision of management services. He informed the Tribunal that it was renewable every 12 months. It had been renewed regularly since he took over the freehold. He argued that a landlord would be foolish to change managing agents annually without good reason as managing agents who are familiar with the property provide the best service. He agreed to provide a copy of his contract with Regent Property Management to the Applicants.

The tribunal's decision

20. The Tribunal determines that neither of the agreements are qualifying long term agreements for the purposes of the statutory consultation procedures.

Reasons for the tribunal's decision

21. The Tribunal accepted the evidence of the Respondent. There was no evidence to the contrary provided by the Applicants.

The reasonableness of the maintenance charges for the property

22. The Applicants considered that the charges demanded in relation to the works carried out by Bruce Knight were excessive. They pointed to the high first hour charge of £150, they suggested that this was duplicated for same day visits and they considered that Bruce Knight could have obtained materials cheaper than it was charging to the service charge account. They were also concerned that Bruce Knight was based in Watford and charging travel time to come into London to do work on the property. They pointed out that other contractors were available to do the work more cheaply.

23. The Applicants raised some issues on the invoices to illustrate their complaints. They also referred the Tribunal to an email from an employee of Regent Property Management suggesting that Bruce Knight's call out charges were too high.

24. The Respondent argued that Bruce Knight were a specialised firm that he was familiar with prior to his purchase of the property. He considered that the prudent landlord would use a highly qualified firm for maintenance issues in the early stages of ownership when the complexities of the property were not necessarily apparent. He did not consider that the location of Bruce Knight was a material issue as more locally based firms may have higher costs than those placed outside of London. He had replaced Bruce Knight with another, cheaper, firm recently. He considered that the maintenance needs of the building had stabilised and therefore that he was content to employ a firm without the high level of expertise of Bruce Knight. In connection with the costs of materials he pointed out that it was unclear whether prices obtained by the Applicants for certain parts were on a like for like basis, whether they included delivery costs and VAT. He also argued that Bruce Knight would be entitled to a small profit on materials purchased for the property, although he was not in position to say whether or not that had happened.

The tribunal's decision

25. The tribunal determines that the amounts charged by Bruce Knight for maintenance services are reasonable and payable.

Reasons for the tribunal's decision

26. The Applicants had not organised their papers in a way that allowed the Tribunal to check all the charges against invoices. Nor had the Respondent been given sufficient information to enable him to check whether there had been double charging or provide an alternative explanation, for instance that there had been more than one call recorded by Bruce Knight on a particular day, but that works were

carried out on different days. In the light of this the Tribunal determined to consider the matter as a generalised assertion of the maintenance charges were too high.

27. The Tribunal determined that the charges, whilst perhaps on the high side, fell within a reasonable band of maintenance charges. It accepted the Respondent's argument that it was entitled to employ a highly qualified specialist contractor in the early stages of its ownership of the property. In addition the Applicants had failed to provide sufficient evidence to suggest that the maintenance charges were not reasonable in the circumstances of the case.

Whether section 20B of the Landlord and Tenant Act 1985 prevents additional service charges being payable?

28. The Tribunal gave the parties some time to read significant cases on the interface between s.20B and interim service charge accounts. The Tribunal provided the parties with copies of Gilje v Charlegrove Securities Ltd [2003] EWHC 1284 and Holding & Management (Solitaire) Limited and Sherwin [2010] UKUT 412

29. The Applicants are concerned that the Respondent has not prepared final service charge accounts for the years he has owned the freehold. They suspect that he will issue demands for service charges to address the deficits that have occurred over these years. The Applicants argument, drawing on section 20B, is that the Respondent is prevented from demanding additional service charges in connection with his years of ownership because he has failed to provide final accounts for those years or issued demands within the time frame required by section 20B.

30. The Applicants asked the Tribunal to rule that any deficit on the service charge accounts since 2011 is not payable and that those deficits cannot be rolled forward in order to avoid the strictures of section 20B.

31. The Respondent pointed out he had not served any demands and that he was not sure what the Applicants were objecting to.

The tribunal's decision

32. The Tribunal declined to make a determination on this issue.

Reasons for the tribunal's decision

33. The Tribunal considered that it did not have the information before it that it needed to make the determination that the Applicants sought. Without specific demands for balancing service charges it was not

possible for it to determine when the liability for those charges arose and whether section 20B came into play.

34. The Tribunal can understand that the Applicants are anxious about their potential liabilities and the failure of the Respondent to issue final accounts. It suggests that the Applicants take legal advice and consider an application to the county court for an order that final accounts are produced.

Whether audit charges for the period 25th March 2011 to 16th May 2011 are reasonable and payable?

35. The Applicants told the Tribunal that two audits of the service charge accounts were carried out in the service charge year 2011/2012. The first was carried out for the period 25th March 2011 and 16th May 2011 for which £450 has been charged to the service charge account. The second was carried out for the period 25th March 2011 and 24th March 2012 which was charged to the service charge account at a cost of £1850.

36. Whilst the Applicants accept that the second charge is appropriately paid by the lessees, the first audit related to the sale of the freehold and not to the management of the service charges. In the opinion of the Applicants that charge should be borne by the Respondent.

37. The Respondent argues that the matter relates to the previous freeholder and that it is appropriate for the lessees to pay the costs of the additional audit as it protected their interests.

The tribunal's decision

38. The Tribunal determined that the audit fee of £450 is not payable by the lessees.

Reasons for the tribunal's decision

39. The Tribunal did not accept that the audit carried out for the period of March to May 2011 was a service provided to the lessees. Rather it was a transaction carried out in relation to the transfer of the freehold. As such it is not payable by the lessees.

Whether the Respondent is entitled to build reserves in the way in which it did

40. The Applicants point out that the Respondent has not followed the steps set out in the lease for the building of reserves.

41. The Respondent argued that although he had included a reserve fund in the budget in effect the budget was altered so that monies collected were set against service charge costs. He maintained that a separate bank account was not required.

The tribunal's decision

42. The Tribunal did not reach a determination on this matter.

The reasons for the tribunal's decision

43. Prior to the production of final accounts it is difficult to determine what has actually been paid (if anything) towards a reserve fund. As far as the tribunal could determine there had been no breach of the requirements of the lease at this stage.

44. The tribunal would add that it considers that it is good practice for a landlord to build up a reserve fund, although careful attention should be paid to the safeguards for the lessees set out in the lease.

Whether the Respondent is entitled to charge interest in connection with a loan taken to cover the insurance premium

45. The Applicants object to the charge to the service charge accounts relating to interest charged by Tuscola financing for a loan taken out to cover insurance premiums.

46. In their opinion the shortage of funds was attributable to the failure to produce accounts, the 6% charged is an excessive interest rate, and there is no provision entitling the Respondent to make this charge. They also suggested that the Respondent could have organised an alternative to taking out a loan, for instance paying the premium in instalments.

47. The Respondent points to the relevant clause in the lease which entitles him to charge this amount, he argues that 6% is the interest rate charged by the insurance company and is a good rate, and further argues that if the lessees had paid their interim charges there would have been no need for the loan.

The tribunal's decision

48. The Tribunal determined that the interest charge is payable by the lessees.

Reasons for the tribunal's decision

49. The lease allows for the charge and in the circumstances it was a reasonable course of action for the Respondent to take out the loan. The interest rate is reasonable.

The reasonableness and payability of service charges demanded prior to 2011

50. The tribunal is grateful for the work that all parties have done in preparing submissions on this question. It appears that they have made considerable progress in reaching shared positions on the reasonableness, payability and apportionment of the service charges demanded prior to 2011.

51. The tribunal notes that Southern Housing Group specifically accepts the figures produced by the Respondent in Appendix 6 of the bundle it produced following the adjournment.

52. The tribunal also notes that the lessees have also accepted the principles underpinning the Respondent's Appendix 6 although the figures they have produced contain some deductions because of what the lessees call 'the s.20B rule'. As noted above, the tribunal does not accept that the 20B rule is relevant until final accounts are served.

The decision of the tribunal

53. The tribunal determines that the service charges for the years prior to 2011 as set out in Appendix 6 of the Respondent's additional bundle set out service charges which are reasonable and payable.

Reasons for the tribunal decision

54. The parties are agreed that these figures represent the accurate position for the service charges.

Application under s.20C and refund of fees

55. In the application form the Applicants applied for an order under section 20C of the 1985 Act. Having read the submissions from the parties 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

Respondent may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

56. The Respondent further argued in his written submission that he was entitled to his costs under clause 7 of the Sixth Schedule (Part Two) of the Lease.

57. The Applicants deny that this clause gives the Respondent the ability to charge for his costs, and indeed point out that the clause quoted in the Respondent's submission is not present in the head lease for Block 56a.

58. The tribunal agrees with the Applicants' reading of the relevant clause and determine that the clause does not enable the landlord to recover its costs.

59. The tribunal would also point out that in its view, and in the light of its findings, it is entirely reasonable for all parties to bear their own costs.

Name: Judge Carr **Date:** 25th March 2015

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 20B

(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.

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.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

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

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

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

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

Schedule 11, paragraph 2

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

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
  (a) the person by whom it is payable,
  (b) the person to whom it is payable,
  (c) the amount which is payable,
  (d) the date at or by which it is payable, and
  (e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

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

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
  (a) has been agreed or admitted by the tenant,
  (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  (c) has been the subject of determination by a court, or
  (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
  (a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).