FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOBE/LSC/2015/0229**
Property	:	**8 Painters Mews, London SE16 3XT**
Applicant	:	**Linfor Limited**
Representative	:	**Mr C Green, Solicitors' Agent** **Miss R Norkett, representing the Applicant Company**
Respondent	:	**Mr P McAdam Freud**
Representative	:	**Mr Stevens of Counsel, accompanied by Miss Rossberg**
Type of Application	:	**Application for the determination of the reasonableness and payability of service charges**
Tribunal Members	:	**Tribunal Judge Dutton** **Mr S Mason BSc FRICS FCIArb**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR on 12th October 2015**
Date of Decision	:	**10th November 2015**

DECISION

DECISION

The Tribunal determines that the sums claimed in the County Court at Central London in proceedings under claim number B8QZ821M are not presently payable for the reasons set out below. However, as no challenge was made to the quantum of the sums claimed and once the provisions relating to the preparation of the accounts for the years in dispute are resolved the amounts claimed will become due and owing. It may therefore be appropriate for the County Court to remain seized of this element once the accounting requirements have been met by the Applicant.

The Tribunal remits back to the County Court at Central London matters relating to ground rent, interest and costs. In addition, if the Respondent is intending to pursue a counter claim which is outlined in his letter to the Tribunal of 7th September 2015, such counter claim must be pursued in the County Court by way of such order as the Court requires to enable the advancement of same.

BACKGROUND

1. By an order dated 21st May 2015 issued by the County Court at Central London in case number B8QZ821M dispute Judge Jackson referred this matter to the First Tier Tribunal under the following wording: *"refer to rent protection scheme (Leasehold Valuation Tribunal)."* The matter came before the Tribunal for directions on 18th June 2015. Those directions confirmed that the County Court claim included service charge years 2013, 2014 and 2015. In fact the case was put to us on the basis that only the years 2013 and 2014 were being pursued. The directions also went on to record that Counsel acting for Mr McAdam Freud raised issues with regard to drains and an intercom but was told by the Tribunal that matters were limited to those which had been raised in the County Court. There was an indication that a separate application would be raised by the Respondent but there was no such application before us at the time of this hearing in October.

2. There is a history to the relationship between the Applicant Management Company, Linfor Limited and the Respondent. There have been proceedings previously and there is apparent from the papers a good deal of acrimony between the parties.

3. Prior to the hearing we were provided with two bundles, one prepared by the Applicants and one by the Respondent. In the Applicant's bundle was to be found the County Court proceedings, papers in support of the service charge accounts for the three years, the Respondent's reply, the Applicant's reply thereto and a copy of the lease.

4. In the Respondent's bundle we were provided with a case summary including medical reports, correspondence, statements from two other leaseholders at the property, 8 Painters Mews, London SE16 3XT (the property), accounts and photographs. We have noted what was said in these documents and will refer to them as necessary during the course of this decision. However, it is to be

remembered that both parties have had sight of these papers and we do not propose, therefore, to go into great detail as to that which is contained therein.

HEARING

5. Mr Green told us that the amount claimed on the claim form was £2,315.89 to which should be added court fees and fixed costs. The total sum in fact due in respect of service charges only was £1,678.29 by reference to page 42 of the Applicant's bundle. This did not include any charges for 2015 but was confined to £881.74 for the year 2013 and £796.55 for the year 2014. Mr Green requested that we remit back to the County Court interest, ground rent and costs issues.

6. Mr Green referred us to the County Court defence raised by Mr McAdam Freud. In that defence the Respondent says that firstly the service charge and ground rent notices are defective. There are no managing agents' or accountants' certificates as required by the lease and that the annual accounts' summary of expenses, statements of items and certificates have not been provided as required by the lease, despite written requests. His defence also goes on to say that there are a number of expenses claimed which should not be included, for example interest and bank charges and company accountant's charges. The defence goes on to allege that the Applicants have failed to prepare annual accounts as soon as practicable and that the claim should be withdrawn, struck out or stayed to enable the parties to refer the matter to the First Tier Tribunal.

7. Mr Green then referred to the directions where notice had been given to Mr Freud that additional matters could not be referred to and pointed out that no further application had been made.

8. To counteract the suggestion that there had been no certificates which complied with the terms of the lease, we were referred to documents in the bundle which were headed *"Ros Norkett trading as Kenwood Accountancy Services"* including the following wordings *"We report on the summary of costs on page 1 with respect for Linfor Limited for the service charge demanded for the year ended"* The certificate goes on to say *"We are of the opinion that the costs are fairly summarised and are supported by bank account statements, receipts and vouchers supplied to us by the officers of the company. In our opinion the reserve fund account has been properly prepared and in accordance with the accounts and records which have been produced to us"*. Certificates for 2014 were also produced in identical wording.

9. It is appropriate at this time to consider the terms of the lease relating to the provision of accounts. This is contained in the sixth schedule and says as follows under the heading Service Charge *"1(a) The amount of the service charge for each accounting year shall be estimated by the lessor or its managing agents as soon as practicable at the beginning of each accounting year and the tenant shall pay such estimated amount by two equal instalments in advance on the payment days in that accounting year and the decision of the lessor as to the estimated amount of the service charge shall be final and binding upon the tenant."* It should be noted that no estimated demands have been made and accordingly it is not necessary to consider this provision of the lease further.

10. The lease then goes on to deal with the requirement for the lessor to keep proper books of accounts, the provision of creating a reserve fund and at paragraph 4 the following wording:- *as soon as practicable after the end of the current accounting year and each succeeding accounting year when the amount of the lessor's expenses in such accounting year have been ascertained, the tenant shall within 14 days of demand being made pay the balance of the service charge due to the lessor or to be quoted in the books of the lessor or its managing agents with any amount overpaid."*

11. The lease then goes on the say at paragraph 5 as follows:- *the lessor shall procure that annual accounts of the lessor's expenses are prepared as soon as practicable after the end of each accounting year and shall as soon as practicable after the preparation thereof supply to the tenant a summary of the lessor's expenses of such accounting year and statements of (1) the amount (if any) standing to the credit of the tenant in the books of the lessor or its managing agents pursuant to paragraph 3(a) (of this Schedule) after deducting any amounts appropriated in accordance with such paragraph, (2) the total amount of the reserve fund (if any) maintained under paragraph 13 of Part 1 of the fifth schedule to this lease at the end of such accounting year and the amount thereof attributable to the tenant and (3) the amount attributable to the tenant of the interest or other interest(if any) added to the funds held by the lessor during such accounting year, pursuant to paragraph 3(g) of this schedule. Any decisions regarding the lessor's expenses shall be made by the lessor and the certificate of the said managing agents or, at the opinion of the lessor, accountant for the time being of the lessor as to any of the items mentioned in paragraph 5 of this schedule shall be final and binding upon the tenant.*

12. It is the Applicant's case that the lease does not require audited accounts and we were referred to the case of *Elysian Fields Management Company Limited v Nixon and Nixon [2015]UKUT 0427 (LC).*

13. We heard from Miss Norkett who had attended the Hearing with Mr Green. It was not wholly clear what her role was in the Respondent company. It appears that she had been the managing agent for the property but we were told that was no longer the case. She confirmed that estimated demands had not been made and that directors had used their own monies, and indeed reserve monies in earlier years. She also stated that in her view the only two years for which claims were being made were 2013 and 2014. It was not appropriate, she said, to include claims for 2015 as these had not been finalised or it seems demanded. As to the certificate she said that Kenwood Accountancy Services was her business and that the lease had been complied with. As to bank charges she told us that she considered this was covered by paragraph 1 of schedule 5 of the lease which states:- *"the expenses incurred by the lessor in carrying out the obligations under clause 5 of this lease except 5(3) and (4)."* The bank charges were £10 per month for the running of the bank account.

14. Under cross examination from Counsel acting on behalf of the Applicant, Miss Norkett confirmed she considered herself to be an independent person acting as an accountant, although she had no accountancy qualifications. She said she was self-employed and undertook accounting work for some 15 companies. Reference was then made to a letter which had purportedly been sent in January of this year but

she denied that it was from her. She confirmed, however, that she was not an employee of the Respondent but had been managing agent.

15. Our attention was drawn to a letter dated 15th May 2014 from Wedlake Bell addressed to the Applicant Company for the attention of Miss Norkett which contains the following paragraph:- *"You are required to prepare annual accounts as soon as practicable after the end of each accounting year and provide a summary of expenses and statements of the items referred to in paragraph 5 of schedule 6 of the lease. Paragraph 6 of schedule 6 of the lease also requires you to obtain a managing agents' or accountant's certificate regarding the service charge expenses for them to be final and binding on our client. Our client requires you to provide us with all such annual accounts, summary expenses, statements and items and certificates."* It is we believe accepted that by 15th May 2014 the certificates which we refer to above had not been produced. She accepted that in the accounts that had been produced, no reserved fund had been added in the year 2014/15, although the earlier year had referred to sums being claimed for sinking fund but neither accounts showed the balance held. Miss Norkett also told us that statutory accounts had been lodged at the Revenue but they were not available for us to view and it does not seem that they were sent to the Respondent.

16. In response to questioning concerning bank charges, Miss Norkett told us that a statement of account from NatWest had been provided showing the bank charges on a monthly basis and she confirmed that the statutory wording was added to the demands when they were sent out. She confirmed her view that as she was the managing agent at the time of the accounts in 2013 and 2014 she was entitled to make a charge for preparing the accounts as provided for in the lease. We were told that the demands for the 2013 accounts were sent out in April 2014 and from the documentation available it was her view that the accounts had been sent out within a reasonable period of time.

17. After a short adjournment, Counsel for the Respondent asked Miss Norkett what accounts were held by the Applicant and we were told that there was just one current account which also contained the sinking fund money and was not earning interest. She was also asked whether it was correct that Block Management had taken over the management of the building this year. She agreed that they had done so, she thought perhaps in March, and that she had retired about that time from dealing with the accounts and the management of the property.

18. There then arose a question relating to the requirements of Section 21 of the Landlord and Tenant Act 1985 as to the provision of information and the format of the accounts. This was raised by the Respondent in a case summary dated 24th September 2015, which was included in the papers before us. This document also included details of the Respondent's health. Initially Counsel for the Respondent proceeded to address us on the basis of the provisions of Section 21 which are not yet in force. However, on correction he submitted that the provisions of the current Section 21 applied. There having been demands for accounts, it was said by reference to the letter written in May of 2014 referred to above, and by reason of Section 21(6), the summary of the accounts should be certified by a qualified accountant, there being more than four dwellings at the property. It is right to say that there is no such certification as was accepted by Mr Green.

19. Mr Green in response, however, denied that the letter sent in May of 2014 did constitute a request as it was somewhat unclear as to the years being sought. It could not, he said, be a request for 2014 as the accounts had not been produced. In any event, he did not accept that Section 21 would override the lease. Further, he said that Section 21 was not referred to in the defence and that it was only permissible for us to deal with matters that had been transferred to us.

20. Mr Stevens, Counsel for the Respondent, replied that the fact that Section 21 had not been referred to should not dissuade us from dealing with the matter as there is a clear complaint that the accounts had not been certified within the wording of the defence. His submission was that the letter sent by Wedlake Bell in May of 2014 clearly constituted a request for information and that we had jurisdiction to deal with this element.

21. At this point Mr Freud gave some short evidence confirming that there had been a dispute for some 13 years between himself and the Applicant Company. He was of the view that Miss Norkett had been dealing with the management of the property for some six or seven years and that all he really wanted was for the property to be properly maintained and accounts to the property prepared in accordance with law.

22. In submission Counsel for the Respondent requested that we apply the provisions of Section 20C of the Act as proper accounts had been requested and had not been provided.

23. Mr Green had no particular views on the question with regard to the Section 20C order. He confirmed that there was a wish on the part of the Applicants to mediate but no such mediation appointment could be agreed. His view was that the defence did not raise the question of Section 21 and there were no grounds to dis-apply the terms of the lease.

THE LAW

24. The law applicable to this case is set out in the appendix below.

FINDINGS

25. We will deal firstly with the question of the accounting arrangements under the terms of the lease. The Respondent's defence on this point raises the lack of accountant's certificates and the late delivery of the accounts. Taking the last point first we find that the alleged late delivery of the accounts is not a factor. They seem to have been sent within a reasonable time. Further the lease does not make the delivery one of "time is of the essence". There is no evidence that the accounts have been produced so late as to justify the complaints made by the Respondent in this matter. Accordingly any attempt by the Respondent to avoid liability on that point is not be accepted by us.

26. Returning to the first element in respect of the accounts, we have set out above the provisions of the terms of the lease. In particular, at the sixth schedule, there is a requirement at paragraph 5 as to the matters to be included in the accounts. There is a failing on the part of the Applicant in that the reserve fund balances are not

included. Demands in respect of same are mentioned, but we could see no reference to the balance being held in the reserve fund account being disclosed, which in fact as we understand it, is in the ordinary account for which the service charge monies were held.

27. We do find that the letter from Wedlake Bell of 15th May 2014 clearly puts the Applicant on notice that a certificate is required and the line *"our client requires you to provided us with all such annual accounts, summary of expenses, statements and items and certificates"* is a demand which we find complies with the provision of Section 21(1) of the Act. This may relate only to the year 2013 but the Applicant has not heeded the requirement of the Act for the year 2014. Such a request for a written summary having been made, the requirements of Section 21(6) become operative whereby the summary should be certified by a qualified accountant. Miss Norkett confirmed that she was not a qualified accountant.

28. In those circumstances we find that the accounts are not compliant and that Mr McAdam Freud is not presently obliged to make payments as demanded based on these accounts for the two years. However, no challenges were made to the quantum of the service charges set out in the two years accounts. We find that the Applicant merely needs to have these accounts certified by a qualified accountant in accordance with Section 21(6), for a compliant demand to be sent and the Respondent will then be liable to make payment there under. It would appear therefore, that the Respondent has done no more than to achieve a delay in meeting his obligations, assuming the accountant is able to certify the existing accounts.

29. Insofar as the other elements of the defence are concerned, namely the inclusion of charges for interest, bank charges and accounting charges are concerned, we find as follows. The question of interest should be remitted back to the County Court for the decision to be made there. The bank charges seem to us to be wholly reasonable and to fall within the terms of the lease, in particular paragraph 1 of the fifth schedule as it is wholly reasonable for the Applicant Company to maintain a bank account and for the costs of such bank account to be recoverable as a service charge. In respect of the accounting charges, these are properly recoverable under the terms of the lease, see paragraph 8 of the fifth schedule, and the amounts claimed are therefore payable.

30. Insofar as the provisions of Section 20C are concerned, it does seem to us that the Applicants have not properly addressed the issues raised by the Respondent. Matters are clouded, we suspect as a result of the personal animosity between certain directors of the Applicant Company and the Respondent, but nonetheless following the letter sent in 2014 the Applicant should have taken stock and reviewed their accounting practices. In those circumstances we conclude it would be just and equitable to make an order under Section 20C of the Act. Accordingly the costs of these proceedings on the part of the Applicant are not to be recoverable as a service charge.

Judge: *Andrew Dutton*

A A Dutton

Date: 10th November 2015

Appendix of relevant legislation

Landlord and Tenant Act 1985

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 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 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 a leasehold valuation 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.

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.