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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/22UD/LSC/2018/0014**
Property	:	**Flat 12 Kensington Place, Priests Lane, Brentwood, CM15 8GA**
Applicant Represented by	:	**Raina Georgia Mocock Marc Brittain of counsel (accompanied by Anthony Hemmings, legal executive, but no solicitors on the record)**
Respondent Represented by	:	**Kensington Place (Freehold) Ltd. Simon Allison of counsel (KDL Law)**
Date of Application	:	**6th February 2018**
Type of Application	:	**to determine reasonableness and payability of service charges**
The Tribunal	:	**Bruce Edgington (Lawyer Chair) Gerald Smith MRICS FAAV Adarsh Kapur**
Date and place of hearing	:	**11th July 2018 at Romford County Court, 2a Oaklands Avenue, Romford RM1 4DP**

DECISION

1. The Applicant's application for an adjournment is refused.

2. The Tribunal determines that all the service charges claimed from or on behalf of the landlord and challenged in the application are reasonable and payable, including the only demand where there is evidence of non payment i.e. £4,228.31 in 2018.

3. Orders sought by the Applicant that the Respondent landlord be unable to claim its costs of representation as part of a future service charge demand and/or as administration charges are refused.

Reasons

Introduction

4. This is an application by the long leaseholder of the property of the property wherein she seeks determinations as to the reasonableness and payability of service charges claimed for the period 1st January 2013 to 31st December 2018 for 3 reasons. Firstly she records that there was a change in management on a date unknown and "*no maintenance or service of the property was carried out pursuant to the landlords obligations under the lease*". Secondly she says that she was told when she bought her lease that because her property had a separate entrance and garden, there would be a reduction in her service charges. Thirdly she says that she does not know what happened to the reserve fund. She adds that the service charges have gone up substantially but this is not, of course, a ground, on its own, for challenging them.

5. A directions order was made by the Tribunal on the 14th February 2018 timetabling the case to a final hearing. However, it became clear that the wrong landlord had been made a Respondent and an amended directions order was made on the 26th March, correcting the error and re-timetabling the case. A bundle of documents has been lodged. Both parties have provided statements of case with exhibits but it should be said that there has been considerable duplication with, for example, no less than 3 copies of the 26 page lease being included.

6. It is as well to record a chronology at this stage because this becomes relevant and important:-

Date	Event
2008	the estate in which the property is situated is built with 12 flats including this maisonette with allocated parking and communal areas
14.09.09	Applicant enters into her new lease of the property with Dolphon-Humbolt JV Ltd. as landlord and no management company. Countrywide Estatement Management were employed as managing agents
June 2013	Homes & Watson Partnership Ltd ('HWPL') take over management
May 2016	HML PM Ltd. ('HML') take over the business of HWPL
26.09.16	the Respondent bought the freehold by collective enfranchisement although the Applicant was not involved in this
31.12.16	Applicant pays or agrees service charges up to that date
10.03.17	Applicant pays service charges on account for 2017
30.01.18	Applicant writes to challenge service charges in general terms with no specific allegation save for "*notwithstanding the provision of the lease, I do not believe that I am liable to pay service charges for services, repairs maintenance, improvements or management. When I purchased the property in 2009 it was agreed that I do not need to contribute to the lift maintenance, window cleaning, door entry system or gardening*".
06.02.18	Applicant makes this application

11.04.18	After obtaining all dates to avoid, this hearing date was set and the parties were notified
13.04.18	Applicant states that she and her named counsel will attend the hearing
19.06.18	Applicant's representative writes to say that the Applicant "*is out of the jurisdiction and is likely to remain so until the end of July. Our counsel will also be on his annual holidays for the period 10 July to the end of August 2018*". A request is then made to vacate the hearing date and relist in September.
20.06.18	The tribunal writes to the Applicant's representative saying that as the Applicant agreed to the hearing date, she has chosen to be out of the jurisdiction and there is a large cost to the public purse in adjourning a case, the hearing will not be adjourned
26.06.18	Applicant's representative writes to Respondent's solicitors to say that the Applicant is still out of the jurisdiction and he has asked for an adjournment.
03.07.18	As the hearing bundles had not arrived, the inspection was cancelled and the hearing listed for dismissal purposes.
04.07.18	The Applicant's representative telephones the Tribunal office to say that the application should not be dismissed. He was told about the letter of the 20th June but said that it had not arrived – a copy was e-mailed immediately. A bundle arrived that day and the inspection and hearing were reinstated and the parties notified within 3 working days.
09.07.18	Applicant's representative, Anthony Hemmings, prepares a witness statement saying that the failure to file and serve the bundles in accordance with the directions order was *de minimis* and the case should not be dismissed. The hearing should go ahead. A further application to adjourn is made.

The Lease

7. The lease is dated the 14th September 2009 and is for a term of 99 years from 1st January 2008 with an increasing annual ground rent. The lease provides that the landlord shall insure the property and keep the building and grounds in repair with the tenant of this property paying 10.8% of the costs incurred. Payments on account can be collected and the lease allows the landlord to set up a reserve fund, sometimes called a 'sinking fund'.

The Law

8. Section 18 of the **Landlord and Tenant Act 1985** ("the 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'. Under section 27A, this Tribunal has the jurisdiction to determine whether service charges are reasonable or payable including service charges claimed for services not yet provided.

9. Section 20C of the 1985 Act and paragraph 5A, Schedule II of the **Commonhold and Leasehold Reform Act 2002** permit a leaseholder to apply for an order reducing or extinguishing a landlord's ability to claim its costs of representation from identified people as part of any future

service charge or administration charge.

The Inspection

10. The Tribunal members inspected the property in the presence of Mr. Simon Allison of counsel and Mr. Darren Boland from the managing agent on behalf of the Respondent. Neither the Applicant nor any representative was present.

11. The property is a semi-detached maisonette in a pleasant development close to Brentwood town centre. It is of mock Georgian style and constructed of brick under a tiled roof. The development consists of 2 buildings being a single three storey block of flats and then another smaller three storey block of flats to which the subject property is semi-detached.

12. The common parts consist of lawns, shrubs, allocated parking spaces for each flat, some of which are under cover, plus internal staircases for the blocks of flats with their own windows. For some reason the piece of lawn to the front of the subject property is fenced off with an entrance gate and the lawn at the rear is also fenced off. However, all the lawns seemed to the Tribunal members to be in a similar state of maintenance. For example, all the grass seems to have been last mown at about the same time.

The Hearing

13. This hearing was attended by Marc Brittain of counsel on behalf of the Applicant and he had Anthony Hemmings with him whom he described as being a legal executive. Messrs. Allison and Boland were there on behalf of the Respondent.

14. Mr. Brittain said that he was instructed to apply, once again, for an adjournment and if that was not successful, then he and Mr. Hemmings were not instructed to remain at the hearing.

15. The only ground for the application was that the full hearing should not have been re-instated. He was asked where his client was and the Tribunal was told that she was in Spain. When asked why she was in Spain, he said that he had no instructions. It was put to him by the Tribunal chair that if, for example, the Applicant had a relative abroad who had become ill and she had gone over there to look after that person, then the Tribunal may have had some sympathy. However, no reason had been given as to why the Applicant had chosen to absent herself. Mr. Brittain was unable to respond.

16. He then reiterated that he accepted that a bundle had been delivered late but it was only one day late. He said that it was a punative remedy to cancel the inspection and then just list the case to consider dismissal. However, having done that, it was wrong and unfair on the Applicant to then re-instate the full hearing on what was, in effect, 2 days' notice. The Tribunal chair said, again, that whatever hearing it was, why was his client not present? Again, no reply.

17. There was then a discussion about the letter written by Mr. Hemmings on the 19th June seeking an adjournment and the claim that he had not received a reply until he telephoned the Tribunal office on the 4th July following

receipt of the dismissal hearing notice. It was put to him that if such an important matter as an application for an adjournment had not been dealt with quickly, then any reasonable legal representative would have chased the Tribunal for a reply which did rather put a question mark over whether the only letter not received by Mr. Hemmings in this case from anyone should have been the letter of the 20th June turning down the adjournment.

18. The application to adjourn was, after all, an important matter to the Applicant because of the obvious arrangements that would have to be made – or not, as the case may be. If the application was not chased and the bundles were not delivered on time, then some may infer that the Applicant knew full well that the adjournment application had been unsuccessful and was merely trying to force an adjournment.

19. From the Respondent's point of view, the application to adjourn was always going to be opposed. It was clearly set out in the evidence that the failure to pay the 2018 demand had forced the Respondent to delay the major works. The Respondent was not a commercial landlord but was a company owned by the other residents and everyone had to pay their fair share of the cost before such cost was incurred.

20. Mr. Brittain and Mr. Hemmings were then told that the Tribunal had considered the application which was refused and the full hearing would proceed. They both left.

21. There was then some discussion about the merits of the Applicant's case. The service charges up to the 31st December 2016 had been the subject of litigation brought by the previous landlord which appeared to have been settled by means of a consent order produced by the Applicant, which was in the bundle. This did not say very much other than to have the judgment against the Applicant set aside upon terms i.e. payment by the Applicant of the court fee and £200 towards the landlord's costs. As no outstanding service charge debt was handed over to the current managing agent relating to the period before 31st December 2016, one can only presume that the Applicant paid any outstanding amount.

22. As far as 2017 is concerned, the Applicant paid the amount demanded on account without complaint. It was only after the 2018 demand was received that the 1st complaint was made to the Respondent via its managing agent and this was by letter dated 30th January 2018 which was in the bundle. The relevant part of the letter is quoted in the chronology above.

23. It is of note that (a) the letter does not seek to challenge the services provided, (b) it does not challenge the reasonableness of the amount claimed for any service charge, (c) it complains that the service charges have gone up substantially since 2009 and (d) it acknowledges that the lease provides for the service charges claimed but alleges an agreement in 2009 that she would not be charged for certain works to the common parts.

24. No evidence is produced dealing with how such agreement was reached or with whom, on behalf of the landlord. The Applicant was ordered by the

Tribunal in its directions order to disclose all relevant documents and there is none dealing with such an agreement.

Discussion

25. In **Schilling v Canary Riverside Development PTD Ltd** LRX/26/2005; LRX/31/2005 & LRX/47/2005 His Honour Judge Rich QC had to consider upon whom lay the burden of proof in service charge cases. In essence, he says that the party challenging the service charge must put up a *prima facie* case, so that the other party knows what is being challenged and why. At paragraph 15 he stated :

> *"If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the Yorkbrook4 case make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard."*

26. All of the evidence filed by the Applicant was considered by the Tribunal. Some of the issues raised can be summarised as follows:

(a) She had mentioned that she did not know whether the reserve fund had been passed to the current managing agent. The statement of Darren Boland from the managing agent dated 4th June 2018 states that all reserve funds were handed to the Respondent when it bought the freehold and there is an entry in the 2016 audited accounts, noted by the Tribunal, confirming the then total reserve fund at £5,400. In her subsequent statement dated 7th June, the Applicant continues to say that she doesn't know what happened to the reserve fund.

(b) As far as the 2017 service charge demand is concerned, she now challenges this by saying that she does not know what work was undertaken and that as she does not see why she should contribute to any lift, window cleaning of common parts etc. She does not seem to understand that the 2017 demand was for a payment on account of service charges to be incurred. As to the other matters, the lease tells her she must contribute to those other items i.e. she is contractually bound to pay towards them.

(c) She says that the freehold and leasehold titles are in conflict because her leasehold title says that the ground and first floors in the part tinted blue are included. The Tribunal saw a coloured version of the Land Registry title plans. The land tinted blue is also edged red i.e. the demise. The freehold title plan identifies the same land as the demise and neither includes any part of the garden save for a small patch of concrete outside the back door where chairs can be placed.

(d) She complains that she has not received the certified accounts for 2018. The evidence is that formal accounts have not yet been prepared for either 2017 or 2018.

(e) In the final paragraph of her last statement she again suggests that the garden areas adjacent to her property form "*part of my demised property*". The Tribunal has seen all the title plans and there is no doubt that they are not part of the demised property. As she is legally represented, the Tribunal has some difficulty in understanding why this is being pursued.

(f) The Applicant does not dispute that the major works are needed or that she has been consulted on those works.

27. In this case, the main challenge seems to be that certain items of service charge are not payable because the Applicant was told in 2009 that she did not have to pay them, despite what was in the lease. She acknowledges that the lease contradicts what she was 'told'. The problem with this argument is that she has clearly paid service charges over the years without question which include some services she claims to have been told she need not pay for. What she is saying, in effect is that she should pay less than the 10.8% in the lease and the other long leaseholders on this estate must pay more than their stated share, to make up for this.

28. The 1st complaint was received by the Respondent landlord in late January 2018 after she had been asked to pay towards the major works. She had been aware of these long beforehand because of the section 20 consultation process which included disclosure of the tenders for the work.

Conclusions

29. The way that this litigation has progressed has caused the Tribunal a great deal of concern. The Applicant gave the wrong Respondent in her application when she must have known who the freeholder was as there had been a collective enfranchisement process. In April she then agreed to attend the hearing with her named counsel (not Mr. Brittain) which had been fixed after obtaining everyone's dates to avoid. Three weeks before the hearing, the Tribunal is notified that the Applicant is out of the jurisdiction and is likely to remain so until the end of July. No reason is given for this. Her counsel has also, it is said, decided to take a vacation.

30. An application is then made for an adjournment until September 2018 which is immediately refused, in writing. Mr. Hemmings says that he did not hear back and but that application was not chased. No hearing bundle arrived on time and the sanction set out in the directions order was then brought into effect i.e. the inspection was cancelled and the hearing was turned into a consideration as to whether the application should be dismissed.

31. Upon receipt of the letter setting this out on the 4th July i.e. a full week before the hearing, Mr. Hemmings telephoned the Tribunal office and was told quite clearly that there would be no adjournment. By that time, the bundle had arrived and the Tribunal took the view that as all the arrangements had been made for the hearing and everyone knew that there would be a hearing, it would save a considerable amount in public funds and costs for both parties just to reinstate the inspection and then proceed to deal with the issues.

32. It is true that the notification of this did not apparently reach Mr. Hemmings until the 9th July. However, as has been said, the Applicant had known that there was to be a hearing in the 11th July and had agreed to attend some 2 months beforehand. She had given no reason, let alone a compelling one, as to why it was reasonable of her to just stay out of the jurisdiction and not attend when flights to and from Spain are frequent and relatively inexpensive.

33. As to the availability of counsel of choice, it is a fact of life that counsel are often unavailable at the very last minute because of part heard matters or emergency hearings in cases they are already conducting. Other counsel then have to step in and take the 'returned brief'. In Mr. Hemmings' statement of evidence to the Tribunal he says that he was told on the 29th June 2018 that the original counsel, Mark Jones, had become unavailable. Two things arise from this. Firstly, Mr. Hemmings wrote to the Tribunal on the 19th June, i.e. 10 days earlier, to say that Mark Jones would be on holiday for the hearing and secondly, Mr. Hemmings says that he then recovered the papers from counsel's clerk on the 29th June. As a hearing on the 11th July was still taking place, one wonders why he did not just leave the papers in chambers and deliver a brief or updating brief.

34. Taking all these matters into account and doing the best it can with the information available, the Tribunal determines that an adjournment is simply not justified and/or fair to the Respondent. A public hearing was offered and accepted for a convenient date and no compelling reason has been given for any adjournment which means that this decision does not contravene Article 6 of the European Convention.

35. As to the application itself, the Tribunal members, conscious that they were considering matters in the absence of the Applicant, considered her written evidence very carefully as is partly summarised above. Such evidence had been prepared or supervised by Mr. Hemmings who stated that he was her representative.

36. Her evidence is that court proceedings about service charges up to 31st December 2016 were before the county court and were resolved with a consent order. Section 27A of the 1985 Act says that this Tribunal has no jurisdiction where service charges have been agreed, admitted or resolved by a court. Even if none of these apply, it is clearly an abuse of process to ask this Tribunal to re-open that dispute.

37. Thus all the Tribunal is dealing with is the claims for service charges in 2017 and 2018. The Applicant has paid the 2017 charges without complaint at the time. Payment does not automatically mean admission or agreement but the Tribunal can take the circumstances of payment into account. In this case, the Tribunal considers that paying £2,500.31 in 2017 without any alleged protest or comment amounts to an admission.

38. The 2018 claim on account is for basically the same amount plus the major works. In the absence of any compliance with the principle set out in the **Shilling** case referred to above, the Tribunal finds that these charges are reasonable and payable.

39. As to the alleged agreement that the Applicant should not have to pay for service charges relating to common parts, there is no evidence to support that assertion. She had every opportunity to set the circumstances out in her statements and produce any documents such as a letter from solicitors or anyone else confirming the agreement. If the Applicant had been present at the hearing and had given evidence, it is difficult to see how the Tribunal could have then accepted, for the first time, evidence of such an explanation without the consent of the Respondent, which would clearly not have been forthcoming. It is also unlikely that a discussion between her and someone else could give rise to a change in the terms of a lease which would mean that the other long leaseholders on this estate would have to pay higher than their contractual proportions of the total service charges for the estate.

Fees and costs

40. The Applicant asks for orders preventing the Respondent from claiming its costs of representation. In those circumstances, such costs will have to be paid by the leaseholders who form the Respondent as it obtained the title by way of collective enfranchisement. In the circumstances of this case where the application appears to have very little, if any, merit, such orders would clearly be unreasonable and the Tribunal refuses to make them.

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Bruce Edgington
Regional Judge
12th July 2018

ANNEX - RIGHTS OF APPEAL

i. 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.

ii. 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.

iii. 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.

iv. 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.