12780

PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00/BK/LSC/2017/0415,**
Property	**:**	**Flat 9 Bishopsbourne , 134-136 Westbourne Terrace LondonW2 6QT**
Applicant	**:**	**Bishopsbourne Management Company Ltd**
Representative	**:**	**Mr T Salisbury of Counsel**
Respondent	**:**	**Mr R Hussain**
Representative	**:**	**Mr M Berkin of Counsel**
Type of Application	**:**	**S27A and s20C Landlord and Tenant Act 1985 , Schedule 11 Commonhold and Leasehold Reform Act 2002**
Tribunal Members	**:**	**Judge F J Silverman Dip Fr LLM** **Mr M Mathews FRICS**
Date and venue of Hearing	**:**	**10 Alfred Place, London WC1E 7LR** **12 April 2018**
Date of Decision	**:**	**01 May 2018**

DECISION

The Tribunal declares that the sums charged by the Applicants in relation to service charge for the year 2016 are reasonable.

The Tribunal is unable to make any determination in respect of the years 2013 and earlier because they have been subject to earlier litigation nor for 2014, 2015 or 2017 in respect of which no audited accounts or supporting documentation were presented to the Tribunal .

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The Applicant is restricted to recovery of the sum of £250 in relation to charges for damp proofing works in 2015 because they did not satisfy the Tribunal that the correct s20 procedures had been carried out.

The Applicant is not entitled to charge the Respondent an administration charge (£144) because the lease does not make provision for such a charge.

The application is remitted to the County Court to deal with outstanding issues relating to the counterclaim and costs.

The Tribunal makes no order under s20C Landlord and Tenant Act 1985.

REASONS

1 The Applicant is the management company which has the responsibility under various leases for the repair and maintenance of the premises known as Bishopsbourne 134-136 Westbourne Terrace, London W2 6QB (the property) which the Tribunal understands to comprise twenty two flats. The Respondent is the tenant of Flat 9 (the flat).

2 The Applicant issued separate proceedings against the Respondent in the County Court claiming arrears of ground rent, service charge and administration charges. In his Defence to those proceedings, the Respondent raised a number of issues by way of counterclaim. Those matters are not within the Tribunal's jurisdiction and the Application is therefore referred back to the County Court for it to determine the outstanding matters.

3 The County Court proceedings were transferred to the Tribunal on 05 October 2017 and Directions were issued by the Tribunal on 5 December 2017.

4 The hearing took place before a Tribunal sitting in London on 12 April 2018 at which Mr T Salisbury of Counsel represented the Applicant and the Respondent was represented by Mr M Berkin of Counsel.

5 A bundle of documents was presented for the Tribunal's consideration. Page numbers in the bundle are referred to below.

6 At the commencement of the hearing the Tribunal asked the parties to agree a list of issues for the Tribunal. Those matters are addressed in turn below.

7 The first two issues related to the effect of a previous County Court judgment and letter on the amounts claimed by the Applicants from the Respondent. The judgment had not been appealed by the Respondent neither had he applied to set it aside.

8 After lengthy discussions between the parties it was finally agreed that the credit of £15,259.15 shown on page 87 related to and settled the previous judgment debt incurred in 2013. In any event, the Tribunal pointed out that the 2103 debt had already been subject to litigation and that case could not now be re-opened. Further, that such a debt was now statute barred and for that reason also not open to discussion in the present case.

9 The amount in dispute in the present application was £7,095.56 in respect of service charges and major works plus £144 administration charges.

10 The Respondent did not dispute his liability to pay under the terms of the lease nor did he contend that any works carried out by the Applicants fell outside their obligations under the lease (Schedule 5).

11 The Respondent asked the Tribunal to consider the Applicant's accounts from 2013 onwards (prior to that date being statute barred). However, the Applicants' pre-2015 accounts had not been audited as required by the lease and were unsupported by any estimates, invoices or receipts. The Tribunal is therefore unable to make any declaration of reasonableness in relation to them.

12 No copy of the Respondents' 2015 accounts had been included in the hearing bundle nor had they provided any supporting evidence as above for their expenditure. They said that they had documentation for these sums but it was not in the bundle. An adjournment was requested by the Applicants so that they could provide the relevant documents. Although this application was supported by the Respondent the Tribunal declined to adjourn on the grounds that the only service charge years which were now to be considered by the Tribunal were 2015 and 2016 and only two individual items were in dispute amounting in total to £3,803.44. Since there was no challenge by the Respondent to either chargeability or payability and he had brought no evidence of unreasonableness, it would not be proportionate to incur a further day of the Tribunal's time in which to debate this matter. Additionally, it was considered that the Applicants who had at all times been represented by both solicitors and counsel had had adequate time and opportunity , including two extensions of time , in which to prepare their case and had failed to so do.

13 The Tribunal was unable to deal with the Applicants' 2017 accounts because no evidence of audited accounts had been provided, there was no supporting evidence with the accounts and in any event the Applicants had not yet served any demands on the Respondent for the sums due in that year. No challenge had been made by the Respondent to any items in the 2017 accounts.

14 The Applicants were asked to identify to the Tribunal the provision in the lease on which they relied in order to charge an administration charge. Clause 9 (page 135) which reads as follows was identified : 'The fees of the Company's Managing Agents for the collection of the rents of the flats in the Property and for the supervision of the provision of services and repairs to the Property and generally for the management thereof'.

15 The Tribunal does not consider that the wording of this clause is specific enough to encompass the recovery by the Applicants of fees incurred by them in enforcing tenants' covenants in the lease and that the sum of £144 for such action included in the Applicants' claim is not recoverable by them from the Respondent.

16 The Respondent challenged the Applicants' demand for boiler repairs (pages 160 and 165). These demands related to the individual boiler located in the Respondent's own flat. The responsibility for maintenance of this item lies with the Respondent, it is not a communal facility and is not a service charge item. As such it does not fall within the scope of the current application.

17 The only other item challenged by the Respondent was damp proofing which the Respondent asserted had not been done properly and had not been necessary. He did not allege that he had been overcharged neither had he

presented any alternative estimates for the work. The argument that this item was not a service charge item because the work was not done to the Respondent's flat is misconceived because the work was part of the repairs to the structure of the building. The Respondent's only evidence in support of his assertions was hearsay from other residents which the Tribunal considered insufficient to substantiate the allegation of unreasonableness.

18 However, the Applicants were unable to demonstrate that a proper s20 procedure had been engaged for this work , the sum which they are therefore entitled to charge for it is restricted to £250.00 per flat.

19 The hearing bundle contained an audited copy of the Applicants' accounts for 2016. The auditors would have checked invoices and receipts before issuing their certificate and the Respondent has not challenged any item in that year's accounts. The Tribunal is therefore able to make a declaration of reasonableness in relation to the service charge accounts for 2016.

20 No challenge was made by the Respondent to the accounts for 2014.

21 In relation to 2015, the comparative figures for that year are shown on the audited accounts for 2016. The 2015 figures are not out of line with those certified for 2016 and might by those standards be judged not to be unreasonable .

22 The Respondent made an application under s20C Landlord and Tenant Act 1985 which was opposed by Counsel for the Applicants. On the Respondent's behalf it was stated that the Respondent had requested information from the Applicants on several occasions and that the Applicants had failed to provide it. They had also not complied with the Tribunal's Directions. Although the Respondent has through the Applicants' default obtained a reduction in the sums claimed by the Applicant, his main arguments against his liability to pay were either misconceived or not sustained by the evidence. The Tribunal considers therefore that this is not a case where it is appropriate to make an order under s20C Landlord and Tenant Act 1985 .

23 The Tribunal did not consider it necessary to inspect the property.

24 This matter is now remitted to the County Court.

25 **The Law**

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).

Judge F J Silverman as Chairman
Date 01 May 2018

Note:
Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

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

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking