9030

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BK/LSC/2013/0329**
Property	:	**355 Park West, Park West Place, London N2 8EE**
Applicant	:	**Citywise Investments Limited**
Representative	:	**Mr R. Tiwari; Property Manager, Citywise Investments Limited**
Respondent	:	**Daejan Properties Limited (Landlord)**
Representative	:	**Mr Simon Allison of Counsel**
Type of Application	:	**Section 27A Landlord and Tenant Act 1985 – Service charges**
Tribunal Members	:	**Mr L. W. G. Robson LLB (Hons)** **Mr J. F. Barlow JP FRICS**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**10th August 2013**

DECISION

Decisions of the Tribunal

(1) The Tribunal determined that the legal due dates for payment of service charges payable under the terms of Clause 2(2) of the lease dated 8th September 1981 (the Lease) are 24th December and 24th June in each year. The Tribunal therefore refused the Applicant's application to determine that the leaseholder was allowed to pay its service charge by monthly instalments.

(2) The Tribunal refused to make an order under Section 20C of the 1985 Act that all or any of the costs incurred, or to be incurred, by the landlord in connection with the application before this Tribunal, were 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.

(3) The Tribunal made an order under paragraph 10 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002 that the Applicant should reimburse the Respondent's costs of the hearing, such costs being limited to £500 (Due credit for this sum shall be given to the block service charge account). The Tribunal has no power in a "transitional case" to use Rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 in relation to costs matters.

(4) The Tribunal makes the other determinations as set out under the various headings in this decision.

The application

1. The Applicant seeks a determination pursuant to Section 27A of the Landlord and Tenant Act 1985 that it is entitled to make monthly payments of service charge in the service charge year commencing 24th December 2012 under clause 2(2) of a lease (the Lease) dated 8th September 1981, or otherwise.

2. The route to the hearing was slightly convoluted.

3. Directions were given by the Tribunal on 15th May 2013 for a paper determination. The matters in dispute appeared from the Application to relate solely to the question of whether the leaseholder was entitled to pay its service charges monthly. An application for reimbursement by the Respondent of the Applicant's fee paid to the Tribunal was also included. In accordance with Direction 6(e) the Applicant exercised its right to make a reply (dated 7th June 2013) to the Respondent's statement of case. In that reply, the Applicant appeared to additionally challenge whether the charges in question were reasonable. On 2nd July 2013 the Respondent wrote to the Tribunal requesting the opportunity to respond on the

question of reasonableness of the service charges. The matter was referred to a procedural chairman who decided that the question of whether the service charges had been reasonably incurred was raised in the reply. The Tribunal decided to adjourn the matter to an oral hearing.

4. Both parties had made formal statements of case with relevant documents annexed. Extracts from the relevant legislation are attached as Appendix 1 below.

Hearing

5. At the start of the hearing the Tribunal ascertained from Mr Tiwari that the Applicant wished to raise the following issues:
    a) that the terms of the Lease had been overridden by Sections 19, 27A and 20C of the 1985 Act, thus allowing the Applicant to make monthly payments
    b) that the terms of the Lease allowed the Applicant to make monthly payments;
    c) that any provision in the Lease for making payment by twice yearly instalments on 24th December and 24th June was an unfair term.
    d) that by custom and practice for 13 years the Applicant (and other lessees) had paid by monthly payments and the Applicant was thus entitled to continue to do so or, alternatively, it was a reasonable common practice.
    e) that the landlord's costs of the application chargeable to the service charge should be restricted by an order under Section 20C of the 1985 Act;
    f) that the Respondent should reimburse the fee paid to the Tribunal by the Applicant.
    g) that the Tribunal should make no order against the Applicant for costs unreasonably incurred under Paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 Act or (now) Rule 13 of The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules"), as requested by the Respondent in its statement of case.

6. The Tribunal noted that item 5a) above appeared to be a fresh issue, but Mr Allison considered that he could deal with the matter at the hearing.

7. Mr Allison disclosed that the Applicant had sent a cheque to the Respondent the previous day for the total sum outstanding on its account; £3,025.29. He considered that this event indicated the Applicant no longer wished to pursue the question of reasonableness of the amount of the charges. Mr Tiwari did not demur, and in the Applicant's reply dated 7th June 2013 had offered no specific evidence on this point. At the end of the hearing Mr Tiwari also withdrew the application for reimbursement of the Applicant's fees paid to the Tribunal (item f) above).

Applicant's Case

8. Mr Tiwari submitted;

a) that the effect of Sections 19, 27A and 20C of the 1985 Act overrode any unfair terms of the Lease, which he considered would include any term requiring the Applicant to pay large sums by twice yearly instalments. The Lease was signed in 1981 and the Act had been passed in 1985. Section 27A(1)(d) gave the Tribunal power to decide the dates of payment. Section 20C prevented the costs being demanded by the landlord from being paid by the tenant. He agreed in answer to questions that he was in fact referring to the Respondent's request for costs unreasonably incurred under Paragraph 10 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002 dealt with at item g) below. Section 19(1) and (2) limited the demand of such costs to no greater amount than was reasonable, particularly if such costs related to estimates, which the costs in issue were. The Applicant had always paid by monthly instalments. Thus the Applicant had a right to pay by monthly payments.

b) Clause 1 of the Lease set out the ground rent reserved. Clause 2(1) required the reserved rents to be paid on 24th December and 24th June in each year. Clause 2(2) reserved an additional rent (effectively the service charge, but he argued that nothing in the Lease made it clear when the service charge should be paid, and thus the matter should be resolved in favour of the tenant. Later he was asked to comment on the effect of the first part of clause2(2)(g), referred to by the Respondent, but he considered that was also not clear.

c) Mr Tiwari did not enlarge much further on his view that the provision for payment on 24th December and 24th June was an unfair term. He considered it was against the Lease terms and legislation, without being more specific.

d) Mr Tiwari submitted that since purchasing the Lease in 2000 the Applicant had paid the service charges by regular monthly instalments, and thus was entitled to continue to do so. He produced an account which he considered supported his view, showing regular monthly payments in 2007. It was unreasonable for the Respondent to refuse to do so after all this time. The Respondent had started to return cheques sent in. This was also unreasonable. Landlords commonly accepted rent by monthly instalments. It was good practice. The Respondent allowed other tenants to pay monthly. This was unfair to the Applicant. He did not accept the Respondent's view that the Applicant had not made regular payments. In his view the Applicant's account had always been more or less up to date at the end of each year. The Applicant could not afford to pay in two instalments.

e) Mr Tiwari considered that Section 20C protected tenants in two ways, firstly it prevented the landlord from making unreasonable charges for costs, and secondly it prevented the landlord from adding the costs of litigation to the service charge.

f) (withdawn)

g) He strongly refuted the Respondent's application for an order for costs on the grounds of unreasonable behaviour. His client had acted reasonably at all times. When the Respondent started to return its cheques, the Applicant had no other reasonable option but to make this application. In his reply to the Respondent's statement of case he felt that he had to respond to points made by the Respondent, he had not realised that would lead to a hearing. The Applicant had requested a paper determination. The Tribunal had decided on a hearing.

9. For the Respondent, Mr Allison submitted:
a) The Applicant had not understood the effect of Sections 19, 20C and 27A. None of them assisted the Applicant's case. The Tribunal had no jurisdiction under Section 27A to alter the terms of the Lease. The Applicant in fact seemed to be claiming that the word "reasonable" used in Section 19 applied to the time and method of payment, but in fact it only applied to the amount.

b) The Lease terms were very clear. By Clause 2(1) the rent was payable in two instalments on 24th June and 24th December in each year. Clause 2(2) reserved the service charge as an additional rent, and clause 2(2)(g) particularly made it clear that the service charge was payable at the same time as the rent reserved in Clause 2(1).

c) If the Applicant wished to contend that the Lease terms were unfair, the relevant legislation was the Unfair Contract Terms Act 1977, (which specifically excluded leases), and which was not a matter for this Tribunal As also mentioned by the Tribunal, Section 35 of the 1985 Act allowed applications to vary leases containing some types of defective terms, but this was not an application under Section 35.

d) The Lease terms required payment in two instalments. The Respondent had never agreed to receive payment by monthly instalments, while it may have accepted such payments in the past. In any event the Respondent drew attention to the Applicant's payment record for the service charge year from 24th June 2010 (in the bundle) which did not show regular monthly payments. Mr Allison submitted it was not true that the Applicant had made regular monthly payment for 13 years as it alleged. The only evidence from the Applicant was that 5 regular monthly payments had been made in 2007. In fact there were notable gaps. Payments were sporadic, often for unequal random amounts, and very often in arrears. The last time it had been in credit was on 24th December 2010 (although this was disputed by Mr Tiwari). The Respondent was not a bank and a source of credit. It had made it clear in its letters of 23rd August 2012 and 5th February 2013 that it could no longer accept this situation, and demanded payment in accordance with the terms of the Lease. Both parties were commercial entities. The Applicant appeared also to be developing an argument relating to waiver in relation to the acceptance of monthly payments at the hearing. Also it was alleged that the acceptance of monthly payments was common practice, but the Applicant had produced

no evidence in support of this contention. He would rely on the Tribunal's own experience on this point.

e) Section 20c was not intended to prevent the charge of costs. It was intended to limit the charge of certain landlord's costs to the service charge. In any event when such a charge was made the tenant was still entitled to the protection from unreasonable costs under Section 27A. Paragraphs 18 and 9 of the Fourth Schedule to the Lease entitled the Respondent to charge the costs of this application. The Application should not have been made. The Respondent was merely trying to collect the service charge in accordance with the Lease.

f) (not in issue)

g) Mr Allison clarified that the landlord was seeking an order in relation to the Respondent's costs of the hearing only. It was the Applicant's attempt to raise the question of reasonableness in its reply to the Respondent's statement of case that was unreasonable. Also the question of reasonableness of the service charge costs had eventually been accepted. The costs of preparing for the hearing were £1,188 as detailed in the witness statement of Ms V. Hawkins dated 26th July 2013. He considered that the Tribunal was entitled to make an unlimited award under Rule 13 of the 2013 Regulations, although the Tribunal was entitled to use either the 2002 Act or the 2013 Regulations, whichever it saw fit.

Decision

10. The Tribunal considered all the submissions and evidence carefully. The relevant Lease terms are as follows:

Clause 1 sets out the various ground rents payable throughout the term and ends: *"the yearly rent as aforesaid to be paid by equal half yearly payments in advance on the 24th day of December and 24th day of June in every year the first thereof (to be if necessary a proportionate part thereof calculated from the date hereof) to be paid on execution hereof"*

Clause 2(1):
"To pay the reserved rent at the time and in manner aforesaid

Clause 2(2)
"*To pay to the Lessor without any deduction by way of further and additional rent a proportionate part of the expenses and outgoings incurred by the Lessor for the repair maintenance renewal and insurance of the Building and the provisions of services therein and of the other heads of expenditure as the same are set out in the Fourth Schedule hereto such further and additional rent (hereinafter called "the service charge") being subject to the following terms and provisions:*

(a – (f) ...

(g) The Lessee shall with every half yearly payment of rent reserved hereunder pay to the Lessor such sum in advance and on account of the

service charge as the Lessor or its accountants or managing agents (as the case may be) shall specify at their discretion to be a fair and reasonable interim payment"

11. The Tribunal noted that in answer to questions Mr Tiwari had a rather discursive style of expression. On occasions he started by agreeing with a proposition before going on to take the opposite view. Also, although the matter was discussed, at no point did he specifically agree that the question of reasonableness of the service charge (item 6(f)) was actually agreed but this seemed the only reasonable interpretation of what he said at the hearing.

12. Dealing with the issues in dispute in order;

a) The Tribunal preferred the submission of Mr Allison. Mr Tiwari's interpretation of Sections 19, 20C and 27A strained the meaning of the words used to breaking point, and he offered no support for his interpretation. The Tribunal considered that the Applicant had misled itself (amongst other things) by taking the word "reasonable" out of context by assuming that all matters relating to service charges were subject to an overriding concept of reasonableness, whether or not such matters were dealt with specifically in the Lease. That cannot be right. The Tribunal is required by the Act to start with the lease terms which govern the agreement between the parties.

b) Again the Tribunal preferred Mr Allison's submissions. Any possible ambiguity created by Clauses 1, 2(1) and 2(2) was resolved by the terms of Clause 2(2)(g). The Tribunal decided that it was beyond doubt that service charge payments were payable at the same time as payments of the rents reserved by Clause 2(1), i.e. on 24th December and 24th June.

c) Mr Tiwari did not develop this argument much beyond the general assertion that the payment provisions were unfair. The Tribunal found this element unconvincing. The Tribunal did not totally accept Mr Allison's view that an unfair term in a lease could not be challenged under consumer legislation. In this case it was almost certainly a standard form document covering 355 units, although his point on the Unfair Contract Terms Act 1977 was correct. Nevertheless, in the absence of detailed argument on a specific unfair term, the Tribunal decided against the Applicant. Terms for payment of rent and service twice a year were common, and also terms for payment of rent and service charge only once per year. The particular circumstances of the Applicant did not make a term unfair.

d) The Tribunal agreed with Mr Allison that the argument relating to the effect monthly payments had been further developed by the Applicant at the hearing, beyond the ambit of its reply. Nevertheless, Mr Allison had met the point. The Applicant's case seemed founded on a statement from the Respondent dated 4th June 2007, showing 5 monthly payments of £333.05 between 10th January and 3rd May 2007, all made between 3rd and 10th of the month. However the immediately preceding payment of £270.37 on 9th January 2007 was unhelpful to the Applicant's case. The

statement of account dated 30th May 2013 for the period 1.12.10 to 23.6 13(covering the period challenged in the Application) showed payments ranging from £482.15 to £1,211.87, there being two instances of 2 consecutive identical payments and one instance of 3 consecutive payments. Mr Tiwari objected that some of these had been paid in late by the Respondent, and that at the end of December in each year the account was more or less clear, however the overall trend appeared to be progressively downward, with the account often being several thousand pounds in arrear for a period of several months. The Tribunal decided that the Applicant's case was unconvincing based on its payment record, and further that no evidence at all on the question of custom and practice was offered to support the Applicant's submission on that point, either in relation to this landlord or general practice. The Tribunal's own considerable general experience did not assist the Applicant in relation to its assertion of a general practice. While a number of landlords might consider allowing a tenant time to pay outstanding arrears, this fact alone could not displace the terms of the Lease. It was at most a concession which could be ended at any time. The Respondent had made this very clear in its letter of 23rd August 2012. The Tribunal thus decided against the Applicant on this issue.

e) Relating to the Applicant's application under Section 20C to limit the landlord's costs of this application being added to the service charge, the Tribunal's power is discretionary. The Tribunal was satisfied that arguably paragraphs 18 and 9 of the Fourth Schedule to the Lease entitled the Respondent to add such costs to the service charge. The Respondent has succeeded on all substantive points, and appeared to have behaved properly in attempting to collect the service charge and in defending the application. The Applicant's case seemed mostly founded on an erroneous view of the law. The Tribunal decided that it would make NO order under Section 20C, although due credit should be given to the service charge from money recovered under paragraph 10 (see paragraph (g) below).

(f) No decision required

(g) The Tribunal did not agree with Mr Allison's contention that it had power to use either the Paragraph 10 of Schedule 12 to the 2002 Act or Rule 13 of the 2013 Rules in deciding on an "unreasonable costs" order. This matter is not well known and thus needs publication more widely. Paragraph 3(7) of schedule 3 to the Transfer of Tribunals Functions Order 2013, states of transitional cases that: "An order for costs may only be made if, and to the extent that, an order could have been made before 1st July 2013." This means that in any ongoing LVT or RPT case started before 1st July 2013, but not determined before the transition to the First-tier Tribunal on that date should apply the old, pre-1st July costs provisions, not the new costs provisions in the new Rule 13. Although paragraph 10 of schedule 12 to the Commonhold and Leasehold Reform Act 2002 and paragraph 12 of Schedule 13 to the Housing Act 2004 have both been repealed in England from 1st July, they live on for transitional cases started before that date. In practice therefore, in pre-1st July 2013 cases an award of costs is limited to £500 and can only be made in the circumstances of those paragraphs.

The question for this Tribunal is whether the Applicant acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings, particularly from the point that it made its reply to the statement of case. The Tribunal considered that the most appropriate head of claim in this case was "unreasonably". The Applicant seemed not to have sought legal advice at any stage of the application. Certainly the application seemed misguided. Mr Tiwari suggested that the Applicant had no choice in making and pursuing the application, but there are several points which invalidate that point. Firstly the points taken had little merit as any experienced adviser aware of the facts should have advised. Secondly, the Tribunal considered that even a lay person with no legal experience should have concluded that the Applicant's interpretation of the Lease was not free from doubt, and at least sought advice (which can be obtained by any party without charge in this jurisdiction). Thirdly, the Applicant is a property company albeit with a portfolio of only four properties. The level of knowledge expected of a commercial party active in this type of investment should be higher than that of a lay person.

Mr Tiwari also submitted that it was the Tribunal's decision to hold a hearing. The Applicant had asked for a paper determination. However the Tribunal did not consider this a good point. Normally all parties are entitled to an oral hearing unless they agree otherwise. Both the Respondent and an experienced chairman of the Tribunal considered that the question of reasonableness of the amount of the charges had been raised in the reply. The Tribunal decided that a hearing was required to clarify the matter and take evidence. The Applicant only conceded that point, at the earliest, the day prior to the hearing. By that time the Respondent had already incurred the costs of instructing Counsel, and prepared to deal with a case on reasonableness. While the Tribunal accepted that the Applicant's conduct was unintentional, it decided that it was, in the circumstances of this case, unreasonable. The Tribunal is satisfied that the cost to the Respondent exceeded £500. It thus orders that the Applicant shall pay the costs of the Respondent incurred after the issue of the reply, limited to £500.

Chairman: L. W. G. Robson LLB (Hons)
Tribunal Judge

Signed: Lancelot Robson
Dated: 10th August 2013

Appendix 1

Landlord & 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.

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 leasehold valuation tribunal, or the Lands 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).....

(3) The court or tribunal to which 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 12, paragraph 10

(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where—
  (a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
  (b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—
  (a) £500, or
  (b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.