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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/00KF/LSC/2013/0123**
Property	:	**11A Palmeira Avenue, Westcliff-on-Sea, Essex SS0 7RP**
Applicant	:	**Fairhold (Huddersfield) Ltd.**
Respondent	:	**David Anthony Hewitt**
Date of transfer from Southend County Court	:	**26th September 2013**
Type of Application	:	**To determine reasonableness and payability of service charges and administration charges**
The Tribunal	:	**Bruce Edgington (lawyer chair)** **Stephen Moll FRICS** **David Cox**
Date and venue of hearing	:	**14th January 2014 at Southend Magistrates' Court, 80 Victoria Avenue, Southend-on-Sea Essex SS2 6EU**

DECISION

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1. In respect of the amount claimed by the Applicant from the Respondent in the Southend County Court under case no. 3XI76874, the decision of the Tribunal is as follows:-

		£	decision
14/06/11	balance service charge	97.34	payable
24/06/11	on a/c of service charges	594.25	"
25/12/11	"	814.71	"
24/06/12	"	814.71	"
25/12/12	"	2,044.00	"
	Ground rent	195.00	no jurisdiction
	Statutory Interest	219.70	no jurisdiction
	Legal costs	480.00	for the court
		5,259.71	

Hence, the amount which is reasonable and payable so far as the service charges are concerned is £4,365.01

2. This matter is now transferred back to the Southend County Court under case no. 3XI76874 to enable either party to apply for any further order dealing with those matters which are not within the jurisdiction of this Tribunal or any other matter not covered by this decision including enforcement, if appropriate.

Reasons

Introduction

3. On 1st February 2013, a county court claim was issued by the Applicant claiming £4,365.01 in service charges from the Respondent plus interest, court fees and costs. The Respondent filed a defence on 18th February 2013. By an Order made on the 17th September 2013 by District Judge Molineaux, the case was transferred to this Tribunal and the court proceedings were stayed pending a determination. This Tribunal has inferred that the question as to whether the service charges claimed were payable and/or reasonable was transferred. This is the only matter in the court proceedings which are within this Tribunal's jurisdiction.

4. The 'defence' reads as follows:-

> *"The amount I owe from the management company is for maintenance fees of the property. But as far as I can see, no maintenance has been carried out and the property has gone into disrepair. Also, as a result of negligent maintenance, my own property has no suffered further damage as a result of simple maintenance measures such as not clering and maintaining the gutters.*
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> *After going such a long period without any visable work, and the property going into disrepair, I do not accept the amount owed for work clerly has not been done. And as a result, I will now have to pay further costs at my own expense to the exterior of my property as a result of poor maintenance (where water build up in the gutters has leaked into my weather boarding, this is basic maintenance of any property. So how the maintenance company have decided I owe 5500 GBP is simply ridiculous. If the money was spent on the property I would like to see evidence of this and also what the money was spent on. And why has simple maintenance not been carried out?*
>
> *It is very simple, if the work was carried out and the property was in good repair I would pay my bill. However, th property is in a ridiculous condition and how anybody would accept to pay over 5500GBP for a 24 month period without anything being done is just insane. There has been no value to the money paid for maintenance on this property for all the years I have owned this property, which is since 2007. It is about time they stopeed taking*

money for no services provided"(sic)

5. Despite the clear and uncontested fact that a significant part of the claim is for insurance and ground rent, there is no admission made for any part of the claim in the papers and no payment was made of any amount prior to the proceedings. The Applicant filed a reply which basically said that there is no defence to the claim.

6. After transfer to this Tribunal, directions were made that the Applicant file a statement justifying the claim and the Respondent file a statement saying exactly what he was contesting and why.

7. From the documents filed within the hearing bundle, it appears clear that a service charge account was produced for the year ending 31st December 2010 and the supporting invoices are also in the bundle. The Respondent had paid the amount on account for that year and there is a balance due from the Respondent of £97.34. He makes no mention of any specific challenge to this figure in his defence to court proceedings or any subsequent statement.

8. For subsequent years, where the claim is for money on account of service charges, there are also service charge accounts and supporting invoices. Once again, there is no specific challenge to individual items of expenditure save for insurance.

9. Of particular relevance to the issues referred to by the Respondent, letters appear to have been written to him on a regular basis pointing out that substantial works need to be undertaken to the property but as service charges have not been paid, they cannot be undertaken. On the 27th August 2010, the managing agents suggested a meeting to discuss what needed to be done and how it was going to be paid for. A suggestion was made in that letter for a 5 year plan.

10. On the 19th March 2012, a letter was written saying that the following work had been identified as requiring attention:-

    Roof repairs
    Window glass repairs to the common staircase serving flats C and D
    Dampness at the foot of the stairs to that common staircase
    Decoration of that common staircase
    Repairs to porch soffit outside flat A
    Repairs to coping on the dwarf wall to the front parking area
    External decoration to the whole building

    Some effort was made within that letter to assess the likely cost of some of these works.

11. In fact a consultation in respect of some of this work had been commenced on the 17th February 2011 but had not been carried through in the basis that there were still arrears of service charges.

The Inspection

12. The members of the Tribunal inspected the exterior of the building in which the property is situated on a bright and dry winter morning. It is a 3 storey building constructed of part rendered/painted brick under a main roof of interlocking concrete tiles with other small tile and flat roofs and some tile cladding. The guttering is modern.

13. The building was probably erected in the early 20th century along with several adjoining similar properties in a residential area fairly close to Westcliff railway station with trains to central London. It is within walking distance of the sea front and Westcliff and Southend town centres.

14. The decorative state is poor and the Tribunal noted that some work is being done to the flat roof adjacent to the decorative gable to the front elevation on the south western corner of the building. As far as the windows are concerned, the lease provides that these belong to the tenants and at the side and rear in particular, various tenants appear to have replaced the old wooden frames with uPVC and aluminium frames from time to time.

The Lease

15. The Tribunal was shown a copy of what seems to be the original lease. It is dated 31st July 1984 and is for a term of 99 years from the 25th March 1984 with an increasing ground rent. The Land Registry copy entries relating to the freehold title refer to another lease relating to 11A under a different title number to the subject property. However, this is a second floor flat and it is presumed that an error has occurred in registration. The Applicant may wish to check this to avoid possible problems in the future.

16. There are the usual covenants on the part of the landlord to maintain the common parts and structure of the property, and to insure it, and the Respondent is liable to pay a proportion of the total charges for the building. It appears that the proportion is agreed at 18.94%. As no issue is raised in the defence about the proportion or payability of any item of service charge, these reasons will not repeat the relevant provisions in the lease.

17. The lease provides that the windows and window frames are part of the demises i.e. they belong to the tenants. There is an obligation on the landlord to decorate the exterior of the building but it does not make it clear whether this includes the window frames. As many of the window frames have been replaced by tenants, particularly at the side and rear of the building, with frames that do not need decoration, the Tribunal concludes that implying a term that the decoration of window frames should form part of the service charge would be unfair on those tenants. Thus it is probable that decoration of the window frames themselves should be undertaken by individual tenants.

18. Having said that, it would be sensible for the landlord and the various tenants affected to agree that when the exterior of the building is decorated, the wooden frames should also be decorated and the cost can be split between such tenants on a basis to be agreed in advance. This is likely to save on scaffolding costs.

19. The most significant clause which is relevant to these proceedings is clause 4 which says that the landlord must insure the property and maintain it but this will only be "*SUBJECT to prior contributions by the Tenant and the tenants of the other flats in the Building who are liable to contribute a fair proportion of the estimated costs to be incurred by the Landlord...*".

20. The communal garden is subject to unusual provisions which may well prove to be void for uncertainty. It is the tenant's responsibility to keep the communal gardens in a reasonable condition and pay a reasonable proportion of any cost. The landlord is specifically excluded from any responsibility to maintain the garden. The tenant has a right of way over the garden and a right to use it only as a garden. However, there is no mention of any process by which maintenance is undertaken detailing who takes the initiative and what the other tenants are supposed to do or contribute to the cost.

21. Clause 3(2) provides a contractual basis for the landlord to claim interest from the lessee at 4% above Barclays Bank base rate or 14% per annum whichever is the higher. However, as the Applicant appears to have claimed interest in the court proceedings pursuant to Section 69 of the County Courts Act 1984, the Tribunal will leave the question of interest to the court.

22. Clause 3(13) allows the Applicant to claim "*all expenses including solicitors' costs and disbursements and surveyors' fees incurred by the Landlord incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 or incurred in or in contemplation of proceedings under Sections 146 and 147 of that Act...*"

The Law

23. Section 18 of 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'.

24. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. This Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable and, if so, whether it is payable.

The Hearing

25. The hearing was attended by several people representing the Applicant i.e. Azmon Rankohi (legal 'consultant'), Derek Strand (former property manager), Ben Jarvis (current property manager) and Mrs. Sarah Belsham (regional manager). Mr. Hewitt appeared in person.

26. Prior to the commencement of the hearing, the Tribunal chair introduced the members of the Tribunal and then asked various questions of clarification. Firstly, he asked the Respondent whether he had received the letter of 27th August 2010 which suggested the meeting and an agreed schedule of works. He said that he could not remember but he had been working abroad at the time and

his flat had been sublet. He also could not recall receiving the subsequent letters from the Applicant's managing agent although he had some recollection of at least one. It was clarified that none of the tenants had responded to this overture. The Tribunal commented that this was indeed unfortunate. If there had been such a meeting, these proceedings would probably not have been necessary.

27. The next question to be clarified was whether the Respondent had actually paid anything towards his ground rent or insurance. He said he had not. He had offered the ground rent after the court proceedings had started but this had been refused for some reason which the Tribunal did not follow. Any offer of payment should always be accepted, if necessary by confirming that it is accepted on account of any claim and under protest.

28. The Respondent said that when he bought the property in 2007, it was in reasonable decorative order. However, there had been no day to day maintenance. He complained that there was no guttering adjacent to a flat roof which had meant that water had poured onto that roof necessitating early replacement. He complained about guttering being blocked. When it was pointed out to him that, unusually, most of the guttering could actually be accessed and cleared fairly easily from the windows of the property, he had no answer as to why the tenants had not dealt with this themselves, if it was causing damage to weatherboards and soffits.

29. The Applicant's representatives confirmed that the other tenants had now paid most if not all of their service charges and that the monies paid by them and owing from the Respondent did include some element of sinking fund to cover future liabilities.

Discussion

30. The facts of this case are not unusual. Many long leaseholders consider that as they do not own the freehold of the property in which their flat is located, they can just sit back and wait for the freeholder to incur the cost of works before making any contribution. It often comes as a shock when something substantial has to be done such as renewing a roof or decorating the exterior of the building. These 'shocks' can usually be avoided by (a) purchasers having a survey undertaken before they buy a lease to have an idea of future expenditure and (b) landlords making sure that there is a sinking fund or reserve to spread the substantial costs.

31. On the other hand, many landlords consider that they can just wait for the tenants to pay money in advance before honouring their repairing obligations to do any substantial work to a building. Often the lease will make no provision for payments on account for such work.

32. In this case, however, the position is that the lease is well drawn from the landlord's point of view. The specific provisions relating to repairs and maintenance are clear i.e. the landlord does not have to do such work until the tenants pay their service charges. Very often, a landlord in these circumstances

will want to keep his property in good repair in order to preserve his investment, but in a case such as this, where there appear to be substantial arrears and also substantial works, this landlord has decided to wait for monies to be paid. That is precisely what the lease allows it to do and the Respondent would or should have been aware of that when he bought the lease. If he was not so aware, then he would have easily been able to take his own advice as to his legal obligations.

33. Furthermore, the Respondent made no effort to pay even his ground rent, let alone the cost of running repairs and insurance before the legal proceedings were commenced. He has raised the issue of insurance at the very last minute but did not mention this in his defence to the court action. He complains that the landlord has not kept the property in good repair. However, the landlord in this case has dealt with some day to day maintenance work and has made considerable efforts to try to effect the necessary expensive work whilst, at the same time, warn the tenants of the potential cost. To its credit, the landlord has also suggested a means of spreading the work and cost over 5 years.

34. 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 charges cases such as this. 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."*

35. It was for this reason that the Tribunal directions were made for the parties to state exactly what their cases were. The Applicant has set out exactly what service charges have been incurred and has indicated what it wants to do to the property. The question of insurance has only been raised at the last minute. Whilst it is true that some of the earlier premiums look rather high, the Tribunal has no knowledge of the claims record for the property and the Respondent has produced no alternative quotes for premiums on a like-for-like basis. There is no evidential basis for the Tribunal to determine that any of the premiums have been excessive.

36. The management fees again look rather on the high side for a property where the Applicant acknowledges that neither the gardens nor the internal common parts are maintained by the landlord. However, having now inspected the property, the Tribunal concludes that this is actually quite a difficult property to maintain in view of its construction and exposure to winds containing salt from the

Southend sea front. The management fees are therefore reasonable.

37. The Tribunal sees nothing particularly excessive about the other service charge items claimed.

Conclusions

38. As far as the landlord's legal costs are concerned, there are representations that these are claimable because of Clause 3(13) of the lease set out above. The representations of the Applicant are quite correct when they say that such costs can be allowed as being incidental to the service of a section 146 notice or in contemplation of proceedings under section 146 and 147 of the **Law of Property Act 1925**. However, it is this Tribunal's view that each case must depend on its facts. The Tribunal's directions order required specific detail of how and when the decision was taken by the Applicant to forfeit this lease. The Applicant decided not to give this information.

39. Forfeiting a long residential lease is an extremely rare step to take. If costs are incurred 'incidental to' or 'in contemplation of' work preparing for forfeiture, then the Tribunal needs to know that a decision has been taken to do just that. If no decision has been made to forfeit, then how can it be said that a certain action was taken 'incidental to' or 'in contemplation of' preparatory work for forfeiture? On balance, and drawing an inference from the Applicant's refusal to give the information as ordered, the Tribunal determines that the Applicant has made no decision that it intends to forfeit this particular lease. The Applicant will therefore have to convince the court that a costs order is appropriate within its general jurisdiction to award costs.

40. As to the balance of the service charge matters in dispute, the Tribunal finds in favour of the Applicant landlord for 3 main reasons. Firstly, the lease terms are quite clear in saying that all service charges, including payments on account, must be met before the decorative and repair works have to be done by the landlord. Secondly, the Respondent has not satisfied the Tribunal that the charges incurred are unreasonable and thirdly, the Applicant has made efforts to get the tenants together to plan a reasonable and cost effective way forward but those efforts have been rebuffed by the tenants.

The Way Forward

41. It is absolutely clear that expensive work needs to be done to put this property into a reasonable condition. This will benefit the Applicant in the sense that its freehold interest will maintain its value. However, it will benefit the tenants more because it will probably make it easier for them to sell or mortgage their leasehold interests.

42. The tenants need to meet with the landlord's representatives and agree a way forward on the basis of the 2010 letter. Such works are likely to involve the landlord having to enter into the consultation process which will mean that the tenants will be able to comment on any proposals and put forward their own nominated contractors for any work. Whilst a landlord is not obliged to accept proposals, it is obliged to take them into account and be ready to explain why it

has not done so.

43. As the cost of any work to the property has to be ultimately paid by the tenants, it is clearly in their own interests to be as involved in this process as they can be. With the greatest of respect to all concerned, simply 'burying their heads in the sand', so to speak, and expecting the landlord just to sort things out, is likely to be slower and more expensive for them.

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Bruce Edgington
Regional Judge
15th January 2014