10782

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AC/LSC/2014/0653**
Property	:	**130A Verulam Court, Woolmead Avenue, London NW9 7AW**
Applicant	:	**Verulam Court Limited**
Representative	:	**Mr C Fain of Counsel**
Respondent	:	**Ms S Mahdavi, tenant**
Representative	:	**Mr J Trussler of Counsel**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Judge E Samupfonda** **Mr C Gowman BSC MCIEH**
Date and venue of hearing	:	**10 Alfred Place, London WC1E 7LR**
Date of decision	:	**2 June 2015**

DECISION

Decisions of the tribunal

(1) The tribunal refused Mr Trussler's application to adjourn the hearing.

(2) The tribunal determines that the sum claimed in the Claim Form in respect of the reserve fund is payable by the respondent in respect of the service charges for the years 2011-2015.

(3) The tribunal makes an order under Rule 13(1) (b) of the Tribunal Procedure (First-tier-Tribunal) (Procedure) Rules 2013. This is limited to the legal costs incurred in preparing for and in attending the hearing on 8th April 2015.

(4) The tribunal determines that the respondent shall pay the applicant £4,869.00 by 30 June 2015 in respect of the legal fees.

(5) Since the tribunal has no jurisdiction over county court costs and fees, this matter should now be referred back to the Clerkenwell and Shoreditch County Court.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") payable by the Applicant in respect of the service charge years 2011 to 15 August 2014.

2. Proceedings were originally issued in the Northampton County Court Bulk Centre. The claim was transferred to the Clerkenwell and Shoreditch County Court under claim no. A00YP796 and then in turn transferred to this tribunal, by order of District Judge Sterlini on 11 December 2014.

3. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

4. The hearing of this matter took place on 8 April 2015. The applicant appeared and was represented by Mr C Fain of Counsel. The Respondent attended and was represented by Mr J Trussler of Counsel.

The background

5. The property which is the subject of this application is a two bedroom flat situated on an estate comprising 104 flats in 6 blocks with 6 lifts and extensive gardens and swimming pool.

6. A case management conference took place on 20 January 2015. Mr Fain represented the applicant and Mr Trussler represented the respondent. It was agreed that there were two issues to be determined by this tribunal. They were, the allocation of sums paid in respect of service charges by the tenant from 2011 to the date of claim and the reasonableness of the collection of the reserve fund. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

7. The applicant is the leasehold owner of the land and buildings comprised under title number NGL287416 and it is a management company limited by shares. The shares are owned by the lessees. The respondent holds a long lease of a two bedroom flat and parking space 18. The lease requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The apportionment of the service charges to each leaseholder is calculated by reference to the relative size of each flat. As a two bedroom flat owner, the respondent's percentage contribution is 1.127%.

The issues

8. At the start of the hearing the tribunal was informed by the parties that the respondent had paid all the service charge arrears as claimed in the county court shortly before the hearing and therefore she no longer challenged how the sums were allocated and this issue was now withdrawn. However the respondent indicated that she still sought to challenge the reasonableness of the collection of the reserve fund. It was accepted that the applicant is entitled by the lease to collect a reserve fund.

9. The tribunal heard submissions from Mr Fain and Mr Trussler. Mr Fain said that the applicant had some difficulty in understanding the basis of the respondent's challenge to the reserve fund. From the Defence filed, the applicant understood that the respondent was concerned that the amounts demanded were too high and she was also concerned about the costs incurred in respect of the lifts. He referred the tribunal to the witness statement of Mr Harvey Rose, a leaseholder of Verulam Court and a member of the Finance Committee that was formed by the Board of Directors for Verulam Court Limited. This gave an explanation of the reserve fund income and expenditure. In particular the statement set out how the reserve fund has been levied and the appendices show past

capital expenditure and the long-term projected expenditure (Long Term Plan)

10. Mr Fain said that the Long Term Plan was drawn up in 2007 and it was communicated to all leaseholders including the respondent through the Chairman's Review. The plan included the projected costs for replacing/refurbishing the lifts. A report as to the condition of the lifts was obtained from Technical Lift Consultants Limited dated 22 April 2014. This concluded that "the lifts are at an age when serious consideration should be given in completing a major modernisation to ensure future reliability."

11. Mr Fain took us to the sums allocated to the lifts in the reserve fund. The sums showed a deficit of £11,911 for the year 2013/14 because of the expenditure in the years 2010, 11 and 12 in refurbishing the lifts in Blocks B & C that was completed in 2014. He submitted that this was evidence which showed that the demands made were not high enough rather than too high as alleged by the respondent.

12. He further explained that the respondent had submitted an alternative quote and this was considered and rejected as her quote had not been obtained on a like for like basis. He referred the tribunal to the correspondence between the parties with regards to this issue.

The application to adjourn

13. Having heard Mr Fain's submissions, Mr Trussler asked for a short adjournment. When we resumed he made an application to adjourn this hearing. He said that although he had attended the case management conference, he had given little advice. He was not involved at the county court. When asked to clarify why an adjournment was required he said that the applicant had failed to respond sufficiently to the respondent's requests for additional information. When pressed by the tribunal to articulate what information remained outstanding he referred by way of an example to the respondent's enquiries regarding the use of cheques and being erroneously advised that cheques were not used when clearly they were. He reiterated that the respondent could not challenge the reasonableness of the reserve refund without additional information. After a short adjournment ordered by the tribunal for him to consider the reasons why he considered that an adjournment was necessary given that the only outstanding issue was a determination as to the reasonableness of the collection of the reserve fund, he told us that the planned 2008/9 upgrading of the CCTV system and the Woodmead Avenue gate had not been carried out. When asked what was still required in relation to the outstanding matter, Mr Trussler responded that he would need some time to clarify exactly what would be required by way of disclosure.

14. Mr Fain opposed the application. He said that he was not clear why the respondent wanted an adjournment. The respondent had seen the chairman's report as confirmed by her in her statement of case. In response to the queries that she raised, she was given the opportunity to inspect all the documents and did so on 14 July 2014. He referred to the email correspondence between the parties dealing with various issues and to a number of documents that had been served before issuing the county court proceedings and following the case management conference.

The tribunal's determination of the application to adjourn

15. The tribunal considered Mr Trussler's application. After a short adjournment we told the parties that the application was refused and that the hearing should proceed.

The tribunal's reasons

16. It was not clear what purpose an adjournment would serve at this stage. Although the respondent asserted that she had not received sufficient information, it was difficult to see what she did not receive as the information that was said to be outstanding was not clearly spelt out. Furthermore, the tribunal could see that the respondent had raised a number of queries and those queries were dealt with by the applicant as best as it could. The respondent inspected the accounts prior to the proceedings being issued in the county court. The respondent received the applicant's statement of case following the case management conference where the issues to be determined were identified and agreed by the parties. The issue now remaining before the tribunal is a very discreet point relating solely to the reserve fund. When asked to identify what was still required, Mr Trussler responded that he would need some time to clarify exactly what will be requested by way of disclosure. Whilst it is possible that the respondent considers that there are unresolved matters, this tribunal could not adjourn this hearing in order for the respondent to consider unidentified information that she may require for an unspecified reason. From the documents provided to the tribunal we considered that the applicant had supplied sufficient information that was relevant to the matter in dispute. We did not accept that the respondent was not in a position to challenge the amounts demanded through the lack of information. Furthermore we considered that an adjournment in these circumstances would result in unjustifiable waste of the tribunal's limited resources.

The reasonableness of the Reserve Fund

17. Mr Fain invited the tribunal to conclude that the landlord's costs are reasonable. He added that the landlord had carefully planned out its reserve fund demands, which is to the benefit of leaseholders, as

payments will be made over a long-term period thus avoiding issuing leaseholders with a huge bill once the works have been done.

18. In response, Mr Trussler simply reiterated that the respondent was not in a position to challenge the landlord's application.

The tribunal's determination

19. In the absence of any grounds being advanced in support of the respondent's challenge, the tribunal determined that there was no evidence upon which it could be satisfied that the demands made were unreasonable. Therefore the tribunal determines that the amount claimed in the Claim Form by the applicant is reasonable and payable by the respondent.

The landlord's application for costs under Rule 13

20. At the end of the hearing, Mr Fain invited the tribunal to make an order for costs under Rule 13 because in his view the respondent had behaved unreasonably in not paying her service charges as and when demanded and had no defence to the claim. Also the manner in which she had defended the claim had led to the applicant incurring disproportionate amount of legal costs, her defence was unclear despite being given numerous opportunities to explain her defence. He submitted a schedule of costs incurred so far at £14,607.28.

21. Mr Trussler opposed the application for costs. He said that to all intents and purposes the respondent has been acting as a litigant in person the majority of the time. She has had some difficulty in obtaining information from the applicant. She has defended this action not out of malice but in good faith and she has not acted unreasonably.

The tribunal's power to award costs.

22. The tribunal's power to award costs is contained in Rule 13 (1) (b) (ii) of the Tribunal (Procedure (First-tier Tribunal) (Procedure) Rules 2013 which states that

"the Tribunal may make an order in respect of costs only-

(b) *if a person has acted unreasonably in bringing, defending or in conducting proceedings in-*

(iii) *a leasehold case.*

23. The power to award costs pursuant to Rule 13 is discretionary and the wording of the provisions makes it clear that such an order may only be

made if a person's conduct of the proceedings is unreasonable rather than his behaviour generally. This is because the tribunal is essentially a cost free jurisdiction and it is designed to ensure that parties are not deterred from bringing or defending proceedings through fear of having to pay the successful party's legal costs.

24. Rule 13(6) provides that a tribunal may not make an order for costs without first giving the paying person an opportunity to make representations. At the end of the hearing the tribunal considered the cost schedule submitted by Mr Fain and decided that it did not provide a clear guide as to the legal costs incurred in preparing for and in attending the hearing. The tribunal therefore asked for further written representations together with a detailed breakdown of the costs and gave the respondent an opportunity to make representations.

The tribunal's decision

25. The tribunal considered the parties' written representations on this matter. In the landlord's representations dated 27 April 2015, the landlord claimed £5,663.35 in respect of fees for the preparation and attendance at the hearing. The claim for the whole proceedings came to £16,025,35. The landlord was entitled to instruct solicitors and counsel of their choice. In this case, the landlord instructed City solicitors DAC Beachcroft and the work done by DAC was carried out by an Associate, a senior solicitor at £260 per hour and a paralegal at £125 per hour. The landlord claimed £1,653.60 in respect of the Associate's attendance at the hearing. In assessing whether that was a reasonable fee we considered carefully the nature of the application, which is essentially debt collection and the circumstances. Whilst we accept that the work carried out as set out in the schedule was reasonable and therefore the cost incurred payable, in our view, there were no legal or factual complexities to justify the assistance of a senior solicitor at the hearing. Having considered this carefully, the tribunal decided that it would not be reasonable to require the respondent to pay the cost of an Associate attending the hearing in this case given the nature of the application, which we considered to be fairly straightforward. Furthermore, it must have become apparent to the landlord that the matters in dispute substantially narrowed when the respondent paid the service charge arrears the day before the hearing. The tribunal therefore consider that it would have been reasonable in those circumstances for the landlord to instruct an experienced junior solicitor to attend the hearing in order to assist counsel. The charging rate supplied by the applicant for a solicitor was £190.00 per hour. We find that the work carried out at the hearing was reasonable and on that basis we therefore determined that a reasonable and proportionate attendance fee for the solicitor's cost was £1007 plus VAT @20% =£1208.40

26. The landlord claimed £1,920 in respect of counsel's fees and the tribunal consider that the amount claimed was reasonable and wholly consistent with the standard of work carried out.

27. The landlord also claimed reimbursement of the hearing. A fee of £190 was paid. The tribunal has discretion under Rule 13(2) to order that the respondent reimburses the fee paid and in the light of this determination we have decided to exercise that discretion and order that the respondent reimburses the landlord the hearing fee. The landlord also claimed for travel, photocopying and courier charges. We do not consider that these are costs that properly fall under Rule 13 and may properly be considered as routine disbursements to be treated as part of the office overheads. We therefore make no order in respect of these costs.

28. In conclusion the tribunal has decided to make an order under rule 13(7) (a) and 13(2). We have reached this decision because we considered that the respondent behaved unreasonably. We acknowledge that leaseholders are entitled to challenge a landlord's costs and to demand an explanation as to how those costs were incurred or are to be incurred. Also leaseholders are entitled to make such challenges even in circumstances where the landlord has provided details. What concerned us in this case was the fact that the respondent despite being given numerous opportunities to articulate her defence failed to clearly do so. At the case management conference she agreed through her counsel to the outstanding issues to be determined. However it was said at the hearing that she required additional information and she sought to change the basis of her defence. There was no evidence from the respondent to challenge the applicant's case despite her being represented by counsel at the conference and at the hearing. The tribunal was also concerned by the late payments of the arrears of service charge. The application was issued in the county court on 15 August 2014 and this hearing was scheduled following the case management conference that took place on 20 January 2015. The respondent paid the arrears on 7 April 2015, a day before the hearing. It is these factors (the failure to articulate a defence, failure to provide evidence challenging the landlord's application and the late payment of the arrears) that led us to conclude that the respondent had behaved unreasonably. Had she made her payments earlier it is most likely that it would have avoided putting the applicants to unnecessary expenditure in its preparations and in putting together the hearing bundles. Furthermore the hearing time would have been substantially reduced as the issues outstanding before the tribunal would have been narrowed earlier. The tribunal concluded that in its view this behaviour was so unreasonable that it is only fair and reasonable to compensate the applicant for their legal costs occasioned by their attendance at the hearing on 8 April 2015.

29. We have therefore determined that the from the landlord's costs schedule dated 27 April 2015 the costs set out at paragraph 4 a to f (i)

are reasonable and payable but we have reduced the amount claimed in respect of the Associate's fees for the reasons set out above. We have disallowed the items claimed at paragraph 4 (f) (ii) (iii) (iv). Therefore the respondent must pay the sum of £4,729.00 to the landlord's solicitors. This should be paid by 31 July 2015.

30. The tribunal has no jurisdiction over county court costs. This matter should now be returned to the Clerkenwell & Shoreditch County Court.

Name: Judge E Samupfonda **Date:** 2 June 2015

Appendix of relevant legislation

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.]

(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.