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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AJ/LSC/2014/0408**
Property	:	**157 Dehavilland Close, Northolt, Middlesex UB5 6RU**
Applicant	:	**Mr Sadik Noor**
Representative	:	**In person**
Respondent	:	**Canberra Drive (Block A) Management Company Limited**
Representative	:	**Mr James Naylor of CG Naylor LLP**
Type of Application	:	**For the determination of the liability to pay a service charge**
Tribunal Members	:	**Judge W Hansen (chairman)** **Mr P Roberts DipArch RIBA**
Date and venue of Hearing	:	**6 July 2015 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**14 July 2015**

DECISION

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Decisions of the Tribunal

(1) The Tribunal determines that all the service charges which are the subject of this application are payable with the exception of the sum of £18.51, being 4/69 of £319.24, for the year 2009/10.

(2) The tribunal is not satisfied that the Lease permits the recovery of legal costs through the service charge but if it is wrong it considers that it would not be just and equitable to make a section 20C costs order in favour of the Applicant.

(3) The Tribunal declines to make an Order under paragraph 13(2) of the 2013 Tribunal Procedure Rules in favour of the Applicant in respect of the reimbursement of the hearing and application fees paid by him.

(4) The Tribunal declines to make an Order under paragraph 13(1)(b)(ii) of the 2013 Tribunal Procedure Rules in favour of the Respondent which sought its costs of the proceedings under that provision.

The Application

1. The Applicant is the lessee of 157 Dehavilland Close, Northolt, Middlesex ("the Property") pursuant to a lease dated 19 August 1992 ("the Lease"). Fairway Property Investments Limited is the freehold owner of the Property. However it is Canberra Drive (Block A) Management Company Limited which covenants with the lessee to perform the obligations in Part IV of the Schedule to the Lease and is the party which is entitled to receive such service charges as are payable. On that basis Judge Korn identified Canberra Drive (Block A) Management Company Limited as the correct Respondent to this

application in his Directions dated 7 October 2014 and we agree with his conclusion and proceed accordingly.

2. The principal issue in this application relates to the Respondent's entitlement to service charges demanded from the Applicant since 2009 in the sum of £131.18 per annum by way of contribution to a reserve fund. The Applicant's amended application dated 11 September 2014 contends that "*It is the applicant's case that ... the ... conditions laid down by the Lease were not satisfied when the reserve fund was collected from him*". On that basis his application seeks reimbursement of 6 x £131.19 collected from him between 2009 and 2014 and/or a finding that these sums were not payable or reasonable. The other issues, allowed to be raised by a letter from the Tribunal dated 9 June 2015, relate to four miscellaneous service charge items. The Tribunal is therefore required to make a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the reasonableness and payability of the service charges which are the subject of this application. The relevant legal provisions of the 1985 Act are set out in the Appendix to this decision.

The Reserve Fund Issue

3. The material provision in the Lease is paragraph 14 of Part IV of the Schedule which provides as follows:

(a) *"The Company may at its option create and maintain a reserve fund of such sum (to be fixed annually) as shall be estimated by the Company or its managing agents to be reasonably required to provide a reserve fund for items of expenditure in connection with the provision of services facilities and amenities specified in this Part IV of this Schedule or any of them to be or be expected to be incurred at any time during the period commencing with the date upon which the estimate is made".*

(b) *The said reserve fund shall be kept in separate accounts and any interest on or income of the said fund shall be held by the Company in trust for the tenants of the flats of the Block and shall only be applied in accordance with the terms of Part IV of this Schedule."*

4. The Respondent is the Company identified in the Lease. The services to be provided by the Company under Part IV include the maintenance, repair, redecoration and renewal of the external walls and structure of the Property and the common parts, including an obligation to redecorate the external parts once every 3 years.

5. The Company has, since 1 April 2009, fixed an annual sum of £3,050 as being an appropriate provision to be made for the reserve fund relating to Block A (Nos. 148-171), of which the Property forms part. It has then demanded from the Applicant the annual sum of £131.18, by way of contribution to this fund, being 4.3011% of £3,050 (see e.g. pages 76 and 191).

6. The Applicant does not dispute the fact, and in any event, cannot sensibly dispute the fact that the Lease allows the Company to establish a reserve fund. Rather his contention is that the establishment of the fund must be done strictly in accordance with the lease and that this has not happened.

7. Specifically, his application complains that (i) he has not been provided "*with a fixed estimate as required*" (ii) he has not been told what "*the reserve funds collected from him will be used for*" and (iii) "*he is not aware whether the expenditure was incurred within three years from when the estimate was made*".

8. The Applicant expanded upon and developed his complaint in his witness statement (pp.140-143) where he says: "*I have paid an annual amount of 131.18 to a reserve fund that seems to be set to run to perpetuity. I have not been appraised on any future expenditure from which the reserve funds could be drawn nor seen anything which suggests there is an expenditure plan.*" He continues in paragraph 6: "*It is my evidence that while the reserve fund is provided in the Lease, its use in my case had not been reasonable and it was not clear*

whether the amount collected was reasonable as the money was collected before expenditure plans were made for the fund".

9. The Respondent resists the applications and relies principally on the evidence of Mr Mendelsson, a property manager employed by Crabtree Property Management LLP, the Respondent's managing agent. He explains at paragraph 10 of his first witness statement (page 147) how and why the decision was made to create a reserve fund, explaining that "*... most lessees prefer to pay smaller contributions over a period of time, rather than one large lump sum...*" He then explains how he liaised with a director of the Respondent in 2009 to set the annual reserve fund demand at £3,050, being a smaller sum than that demanded the previous year. He then explains at paragraph 12 what the estimate was based on, namely the costs of internal and external redecoration at a comparable site, together with the projected costs for works to the roof and car park, together with some provision in the event of an urgent project. A similar process of estimation has been gone through in each subsequent year as explained in paragraph 13 but the annual sum demanded has not changed, despite the fact that estimates for the works have increased, because the work has not yet been undertaken and the Respondent did not wish the reserve fund to become too large without being spent.

10. The current position is set out in a schedule at page 144 which shows a current reserve fund of £38,983 against anticipated expenditure on redecoration and emergency lighting amounting to £34,120. Mr Mendelsson says (at paragraph 15 of his witness statement) that the items of expenditure which he intended (and still intends) to use the reserve fund for included redecoration of the external walls and structure of the building, including roof, gutters and rainwater pipes, any other external communal areas such as the dustbin area and parking spaces, and the internal repair and redecoration of the communal areas. He further explains (at paragraph 16) that he had hoped to carry out the external redecoration in 2012 but his proposals

were objected to by the Applicant who was then a director of the Respondent. The Applicant was a director of the Respondent from 2009 until 2014.

11. The Tribunal accepts the evidence of Mr Mendelsson. It is corroborated by the contemporaneous documents and appears to accord with common sense and good practice. We note his letter to Mr Noor dated 18 November 2011 (page 168) giving him notice of the proposed "*2012 External Redecoration Programme – Canberra Drive Blocks A B and C, E, F, G, H*" and we note the Applicant's objection to those proposals (page 169).

12. Accordingly, insofar as the Applicant contended that the Lease required an expectation that the money would be used within 3 years of any estimate or demand, we find that there was such an expectation and intention. The fact that the works did not progress at that time was due to the Applicant's objection.

13. The Tribunal is also satisfied that the Applicant was sent all relevant demands (pp.76-81), budgets (pp. 189-190), statements of anticipated reserve fund expenditure (pp.191-194) and accounts (Tab 2). There is nothing in the Lease or paragraph 14 of Part IV of the Schedule which entitled him to any more or different documents as a condition precedent of the Respondent's right to create and maintain the reserve fund as it did.

14. The Applicant also complains, and gives six examples in his witness statement, of what he says is unplanned ad hoc expenditure where the reserve funds have been used or intended to be used, which he contends is illustrative of the misuse of the reserve fund and its accrual for the wrong reasons. However, when each of these examples were explored, it was clear that the Applicant had *assumed* that the reserve fund had been used whereas in fact it had not, save that the reserve fund has been earmarked to pay for necessary emergency lighting and

we see no difficulty with that use of the fund. In any event, we consider there to be no substance in the complaint made.

15. In sum: we conclude that the reserve fund has been created and maintained in accordance with the terms of the Lease, that it has always been the intention to use the fund for the purposes specified in paragraph 14 of Part IV to the Schedule, that it has always been the expectation that the fund would be used for those purposes within three years of any relevant estimate and that the sums demanded each year from the Applicant by way of contribution to that fund have been reasonable and are payable.

16. For the record we would also record the fact that although mention was made by the Applicant in his amended application of the RICS Code and section 42 of the Landlord and Tenant Act 1987, neither point was pursued at the hearing and Mr Naylor confirmed that the reserve fund is held in accordance with the terms of the Lease and the statutory trust under s.42 of the Landlord and Tenant Act 1987.

17. Finally, we note that Mr Mendelsson produced as an exhibit to his first witness statement a Report from Harkin Associates (pp.170-188), Building Surveyors, prepared in March 2015 and purporting to deal with the condition of Block A and a proposed 10-year maintenance programme. However, at the commencement of the hearing, the Tribunal acceded to an application by the Applicant to exclude this Report on the basis that it was expert evidence for which no permission had been given.

The Disputed Service Charge Items

18. There are four miscellaneous disputed items as follows: (i) purchase of refuse container: £319.24; (ii) bollard: £381.88; (iii) picnic table: £128.00; (iv) removal and replacement of old carpet in Block A, 160-171.

19. As to (i), it was conceded by the Respondent that the Applicant was entitled to a credit for his share of this item, being 4/69 of £319.24 in the service charge year 2009/10, i.e. £18.51.

20. As to (ii), the Respondent produced an invoice (page 2, DMM2) and identified the replaced bollard in photos recently taken by the Applicant and produced at the hearing. The Applicant identified a missing bollard in those photographs and disputed the charge. We are persuaded by the contemporaneous invoice and find this sum payable.

21. As to (iii), the table is in a communal area and can be used by any resident; it is not for a particular tenant. We consider that this cost was warranted by paragraph 5 of Part IV and was reasonable. There is an invoice (page 3, DMM 2) and we find this sum to be payable.

22. As to (iv), this relates to a carpet in a communal area. The existing carpet was old and needed replacement. There is an invoice (Page 4, DMM 2) which evidences the work and its cost, and we consider the cost reasonable and warranted by the terms of the Lease. We therefore find this sum payable.

Costs

23. At the conclusion of the hearing the Applicant applied for an order under section 20C of the 1985 Act that the Respondent should not be entitled to add the costs incurred in connection with these proceedings to his service charge. The Tribunal has a discretion in the matter which must be exercised having regard to what is just and equitable in all the circumstances: *Tenants of Langford Court v. Doren Ltd* (LRX/37/2000). We start by considering the terms of the Lease because the question of discretion only arises if the Respondent is, in principle, entitled to recover legal costs via the service charge. There must be a clear and unambiguous provision to this effect in the Lease. The Respondent relied on paragraph 13 of Part IV of the Schedule ("*The Company may employ such staff and agents for the performance of its obligations*

hereunder as it shall think fit"). The Tribunal is not satisfied that this entitles the Respondent to recover legal costs via the service charge. However, if we are wrong, we consider that it would not be just and equitable to make a section 20C order in favour of the Applicant having regard to our findings above.

24. The Applicant also sought an order under paragraph 13(2) of the 2013 Tribunal Procedure Rules for reimbursement of the fees that he had paid but we decline to make such an order having regard to our findings above and the outcome of this application.

25. Finally, the Respondent sought an order under paragraph 13(1)(b)(ii) that the Applicant pay its costs of the proceedings on the basis that he had acted unreasonably in his conduct of the proceedings. Whilst we have found against the Applicant on every point, we are not persuaded that his conduct was such as to cross the threshold and become unreasonable. We therefore decline to make such an order.

Name: Judge W Hansen **Date:** 14 July 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.