11709

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/29UN/LIS/2015/0015**
Property	:	**Flat 2B, 8 Ethelbert Road, Birchington, Kent CT7 9PY**
Applicant	:	**Ethelbert Road RTM Company Limited**
Representative	:	**Mr Michael Lee**
Respondent	:	**Mr S Denman**
Representative	:	**In person (absent from hearing)**
Type of Application	:	**Liability to pay service charges**
Tribunal Members	:	**Judge Paul Letman** **Mr R Athow FRICS**
Date and venue Court	:	**26 July 2016, Margate Magistrates'**
Date of Decision	:	**12 August 2016**

DECISION WITH REASONS

The Application

1. The Applicant is and at all material times has been the landlord of the said property (hereinafter Flat 2B) under a lease dated 11 February 1982 for a term of 99 years commencing 01 January 1981 (the Lease). The Respondent has been and remains the tenant of Flat 2B under the Lease.

2. By Claim form dated 28 October 2014 the Applicant commenced County Court proceedings against the Respondent under claim number A2QZ566D, claiming the sum of £2,137.00 in service charges and additional costs in the sum of £360 (a total VAT inclusive sum of £2,497.00).

3. By order dated 10 March 2015 in the above proceedings the County Court sitting at Thanet transferred to this tribunal the task of determining whether the service charges claimed as aforesaid under the terms of the Lease are payable.

4. As appears from the demands (Requests for Payment) relied upon by the Applicant the relevant sum of £2,137 is actually claimed in respect of interim service charges and sums on account of section 20 works between 01 July 2010 and the end of 2014.

Background

5. Since this matter was transferred to the tribunal directions were made on 21 July 2015 following an unsuccessful mediation that took place on 16 July 2015. Those directions were not complied with at the time because attempts apparently continued between the parties to settle the matter.

6. A further case management conference, therefore, took place on 21 January 2016 and revised directions were issued, with a view to a hearing in May. Thus the matter first came before this Tribunal on 16 May 2016. On that occasion the Tribunal inspected the subject premises, and then commenced the hearing of this application at Margate Magistrates Court.

7. Soon into the hearing, however, it became abundantly clear to the Tribunal that it had simply not been provided with sufficient material to consider and fairly determine the matter. The Tribunal accordingly adjourned the determination, and the same day issued yet further directions specifying in some detail the additional documents it required.

8. Pursuant to those directions a bundle of further documents was provided to the tribunal by the Applicant. The Respondent also provided a short further submission, contesting all sums claimed save it appears the cost of insurance.

9. The matter was duly re-listed, and notice sent to both parties of the adjourned hearing. The matter came before the Tribunal again on 26 July 2016 at 10am in Court 2, at Margate Magistrates Court.

The Hearing

10. At the adjourned hearing Mr Michael Lee who identified himself as the legal officer of the managing agents Powell & Co (albeit his witness statement dated describes him as the legal officer of the Applicant) appeared as the representative for the Applicant. There was no appearance by the Respondent Mr Denman or any representative on his behalf.

11. The Tribunal waited 10 minutes or so and then adjourned the hearing to make appropriate enquires of its staff, confirming with them that Mr Denman had been sent a notice of the adjourned hearing, in the same form as that sent to the Applicant. The tribunal staff also then telephoned the Respondent's home, but there was no answer. In the circumstances the Tribunal was satisfied that the Respondent had been notified of the hearing. Indeed Judge Letman believed that he had seen the Respondent outside the court, though this was unconfirmed.

12. Further, in all the circumstances the Tribunal was satisfied that it was just to continue with the hearing in the Respondent's absence. In particular in this regard the Tribunal took into account the fact that this was an adjourned hearing, that the Tribunal had the benefit of hearing something from the Respondent on the previous occasion and of his written submissions then and subsequently, also that the issues in any event appeared to be relatively straightforward and the sums involved modest. The Tribunal was in no doubt that the matters contested by the Respondent could be properly and fully explored even in his absence, and that it was fair and just to both parties to continue.

The Lease

13. In so far as is presently material, the Lease provides at clause 1 for payment of ground rent in the sum of £25 per annum, payable in advance by equal half yearly payments on the 1st day of January and 1st day of July in each year.

14. Under clause 3(4) of the Lease the tenant covenants to pay a service charge, being a proportionate part of the expenses and outgoings incurred by the lessor in the repair maintenance renewal and insurance of the Building (containing Flat 2B) and the provision of services therein and the other heads of expenditure set out in the Fifth Schedule of the Lease.

15. Further, clause 3(4) contains typical machinery for the amount of service charge to be ascertained and certified by a certificate signed (at the discretion of the Lessor) by the auditors or accountants or managing

agents of the Lessor, for interim payments on account and for any balancing charge to be to paid thereafter. More specifically clause 3(4)(g) provides as follows:

'The Tenants shall if required by the Lessor 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 auditors accountants or managing agents (as the case may be) shall specify at their discretion to be a fair and reasonable interim payment.'

16. The Fifth Schedule 'Obligations services and other heads of expenditure to be undertaken by the lessor' includes provisions for repair and maintenance of the structure and exterior of the Building, insurance and more generally under paragraph (3), the following:

'To do all such acts matters and things as may in the Lessor's reasonable discretion be necessary or advisable for the proper maintenance or administration of the demised premises and of the Building including in particular (but without prejudice to the generality of the foregoing) the appointment of managing or other agents surveyors auditors and accountants and the payment of their proper fees in connection with the collection of the rents of the flats in the Building and the supervision and performance of the Lessor's covenants contained in this Lease and the provision of the certificates and accounts mentioned in sub-clause 3(4) of this Lease (the fees of such managing agents to be chargeable on the basis of all the flats in the Building being let at notional gross annual rentals equal to the current rack rentals thereof Provided that such fees shall at no time exceed the maximum allowed in respect of property let at those rental by the scales authorized for the time being by the Royal Institution of Chartered Surveyors and such managing agents shall on the written request of the Tenant furnish to him a statement showing the gross annual rentals assumed by them for this purpose and the calculations of their fees therefrom).'

The Law

17. Given that this application is concerned with interim payments raised before costs are incurred, the main relevant statutory provision is section 19(2) of the Landlord and Tenant Act 1985, that provides as follows:

'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.'

18. Further, it is suggested in the papers before the Tribunal that section 20B of the 1985 Act (the 18 month restriction) may be relevant, but no specific issue has arisen in this regard in relation to any item; unsurprisingly, given the interim demands on which the claim is based.

The Sums Claimed

19. The sums in issue comprise an interim demand dated 13 December 2010 in the sum of £600 claimed on account of planned section 20 works, half yearly interim service charge demands in the sum of £240 for each half year from 01 July 2010 through to 31 December 2014, and various sums in respect of the costs of these proceedings.

1) The Section 20 costs

20. As regards the £600 section 20 costs demanded on 13 December 2010 Mr Lee explained before the Tribunal that this related to major works to replace the external staircase of the building. He drew the Tribunal's attention to the related statutory consultation documentation (now added to the bundle), comprising at pp149-151 copy Notice of Intention dated 24 March 2010, copy Statement of estimates dated 09 November 2010 and accompanying inspection notice at pp152-154.

21. Also Mr Lee relied upon the supporting quotation from General Maintenance & Building Services dated 30 January 2010 in the sum of £5,320 inclusive of VAT at p.162, and a local authority Improvement Notice under section 11 of the Housing Act 2004 dated 19 July 2010 requiring remedial works to the external staircase to be completed by 24 December 2010. Finally, he referred to the incurred costs of these works, shown apparently in the sum of £4,815 in the Applicant's year ended 31 March 2012 accounts.

22. On the basis of the aforesaid material Mr Lee submitted that a claim on account of the proposed external staircase repairs of £3,600 for all flats, which the Applicant divided 6 ways so as to claim £600 from each leaseholder, was reasonable.

23. In relation to this claim and indeed as a general point the Tribunal raised with Mr Lee that to divide overall costs 6 ways is not strictly in accordance with the Lease which requires (clause 3(4)(e) refers) service charges to be apportioned on the basis of rateable value. In reply Mr Lee contended, that at least so far as past demands are concerned the Respondent has accepted this apportionment and is estopped now from contesting the same.

24. For the purposes of analyzing what may be a reasonable interim charge only, the Tribunal is prepared to accept this contention and the 6-way apportionment. No point has been taken in this regard by the Respondent in any event. Moreover, the likelihood is that the rateable values of the flats (taken from their date of abolition) are not significantly different from each other so that the assessment of any sum due on account that is 'no greater ... than is reasonable' seems unlikely to be materially affected.

25. Considering the actual section 20 amount claimed, therefore, on the basis of the 6-way apportionment and with the projected costs of works well in

excess of the £3,600, the Tribunal is satisfied that the sum of £600 was a reasonable charge within the meaning of section 19(2) of the 1985 Act. Further, on the premise that appears to have been accepted by the Respondent in making a payment towards this sum, that any payment was due with the 01 January 2011 half yearly rent, the Tribunal determines that this sum was at that date payable by the Respondent to the Applicant and the balance accordingly remains due and payable.

2) The Interim Charges

26. As to the annual interim charge claimed in the sum of £480 (a total claim of £2,880 for the block of 6 flats), the justification for this sum advanced by Mr Lee is that this is a reasonable interim demand given the various sums typically incurred in each service charge year by the landlord. The various sums are set out in the year end company accounts of the Applicant and comprise the following (1) Insurance (2) Maintenance and Repairs (excluding s20 major works) (3) Sundries (4) Bank Charges (5) Legal Costs, and (6) Management Charges.

27. In respect of each of these heads of claim Mr Lee sought to explain the charges, indicating that each would be incurred in every year and was therefore appropriately included in any assessment by the managing agents, Powell & Co management, of the fair and reasonable interim payment under clause 3(4)(g).

28. As regards the Insurance costs Mr Lee relied on clause 3(4)(e) of the Lease and the express reference to insurance therein, and in support of the actual amounts upon the copy insurance certificates for each year in question now added to the bundle at pp.127 to 148. These certificates he pointed out, show charges of £622.44 for the year ending 06/12/2009 (p.127), £657.86 for y/e 06/12/10 (p.128), £677.73 for y/e 06/12/11 (p.132), £748.55 for y/e 06/12/12 (p.136), £790.17 for y/e 06/12/13 (p.139), £822.09 for y/e 06/12/14 (p.141) and £880.62 for the y/e 06/12/14 (p.144).

29. Mr Lee also relied upon the fact that each year the Applicant incurs financing charges, because of a lack of funds, so as it might pay the insurance premiums on a monthly basis rather than in a single payment. The costs of such finance being in the order of about £50 per year. Mr Lee contended that these additional costs come within the scope of paragraph (3) of the Fifth Schedule. In terms of the reasonableness of the annual insurance costs, Mr Lee informed the Tribunal that the insurance was re-brokered when the Applicant first acquired the premises in or about 2009, and that the insurance would generally be reviewed if the year on year increase was above indexation.

30. As to the Maintenance and Repair costs in each year, Mr Lee again relied upon the express terms of clause 3(4)(e) of the Lease and for the actual costs incurred he relied upon the details shown in the annual company

accounts of the Applicant. Apart from major works in 2012 in the sum of £4,815 and in 2014 of £3,182, however, these accounts record expenditure of just £260 in 2011 (p.49) and nil in the other years in issue.

31. As to the Sundries costs Mr Lee was unable to explain to the Tribunal what these were for at all, and properly withdrew any reliance on these small costs (ranging from £13-15) for the purposes of justifying the interim charges claimed. In support of the Bank Charges of about £50 per year, however, he referred the Tribunal to pages 135, 138 and 145 of the bundle where lists of NatWest charges have been typed up for years 2010 to 2015. Although Mr Lee was unable to identify the bank account to which these related.

32. In relation to Legal Costs, Mr Lee contended that these are recoverable either under clause 2(7) of the Lease (dealing with proceedings under sections 146 and 147 of the LPA 1925) or paragraph (3) of the Fifth Schedule. As to the level of costs he relied upon the £120 shown in the 2012 accounts (p.54) and the sum of £2,645 in the 2013 accounts (p.59) supported by 2 invoices from Boys & Maughan, solicitors (pp.189 and 190) in relation to court proceedings involving another lessee, Mr David Ruffell. Further, Mr Lee asserted that in fact significantly more costs had been incurred subsequently.

33. Finally, as regards the Management Charges of £1,200 in 2010 and 2011, rising to £1,320 in 2012 through to 2015, Mr Lee explained that the charge of £1,320 comprised £600 paid to Powell & Co management of 153 Praed Street, London W2 1RL, who Mr Lee confirmed are the managing agents of the subject property, and £600 plus VAT in 'admin' fees charged to Powell & Co by 'The Right to Manage Organization Ltd' (RTMO Ltd) of 51 Swaffield Road, London SW18 3 AQ (the same address as the Applicant).

34. By way of substantiation Mr Lee produced an invoice dated 31 March 2011 from RTMO Ltd to Powell & Co, and 3 invoices from Powell & Co to the Applicant in the sum of £1,320 dated respectively 31 March 2012, 2014 and 2105 (pp.156 to 159 in the bundle). Mr Lee was questioned about these by the Tribunal, which queried why the sample RTMO invoice did not contain any VAT or company registration numbers. Mr Lee was unable to help the Tribunal in these respects. He was also unable to produce any management agreement for the building, despite this being required by recent direction 2.4 and the Tribunal asking again at the hearing.

35. Considering then the level of interim charge (that is no greater in amount than is reasonable) that these different heads of costs justify. The Tribunal accepts that Insurance costs are plainly within the scope of the service charge obligations under clause 3(4)(e) and the second paragraph of the Fifth Schedule. Further, on the basis of the evidence referred to above the Tribunal accepts that in respect of insurance premiums (total) on account payments of some £620 for the year commencing 01 January 2010, £650 for the year commencing 01 January 2011, £680 for year commencing 01

January 2012, £750 for the year commencing 01 January 2013 and £790 for the year commencing 01 January 2014, would be reasonable.

36. The Tribunal does not accept, however, that the insurance financing charges are within the scope of the service charge provisions. Therefore, no allowance falls to be made for these charges.

37. As for Maintenance and Repair costs, in most cases of course the expectation would be that minor repair costs, which would plainly be within the scope of the service charge provisions, would arise and, therefore, some allowance should be made. However, that is not this case. Here the level of management has been so wanting, as demonstrated by the fact that such costs have only arisen in 1 out of the 5 years in question despite the relatively poor condition of the building, that prospectively for each year the Tribunal cannot attribute any plan or intention, or barely even inclination, on the part of the Applicant to incur much in the way of such costs. Therefore, the Tribunal considers that in the particular circumstances of this case only a minimal allowance of £120 could properly be included in any interim payment for the years in question for this head of expenditure.

38. Given Mr Lee's concession in relation to Sundries no addition falls to be made for this head of costs. Whilst the evidence in relation to Bank Charges is not in the Tribunal's view sufficient either to justify any allowance on account of such charges.

39. As to Legal Charges, likewise the Tribunal makes no allowance. Clause 2(7) does not form part of the service charge provisions. Further, as a simple matter of interpretation in the Tribunal's judgement paragraph (3) of the Fifth Schedule, which in contrast makes no mention of solicitors or counsel, does not permit the recovery of such legal costs as service charges. A conclusion which in the Tribunal's view is also supported by and consistent with the decision in *Sella House v Mears* and subsequent authority to which Mr Lee was referred.

40. Lastly, considering the Management Charges. The Tribunal remains concerned at the lack of any written agreement, and the unsatisfactory nature of the few invoices produced in support. Further, Mr Lee was unable to give details of any meaningful level of management actually being carried out at these premises. In this regard, for example, the Tribunal notes that any minor repairs appear only to have been re-active to complaints from occupiers and to have been dealt with by others (the 2 letters from a Mr Maher in the bundle at pp.183 and 185 refer). Whilst notably in relation to the remedial works to the external stairs Thanet District Council found it necessary to go so far as to issue an Improvement Notice.

41. Remarkably also the service charge provisions of the Lease have not been followed; no certificates have been produced (the Applicant's company accounts are not certificates), no year end balancing charges raised. As for

RTMO Ltd it is impossible to discern what they are supposed to have done to justify their invoices (of which only 1 was produced). Indeed the Tribunal notes in passing that the address given for this 'company' is a residential address in SW18 rather than a business address. Overall it appeared to the Tribunal that the level of management has been wholly deficient and the charges levied excessive (to say nothing of them not being in accordance with the terms of the Lease). In the circumstances the Tribunal is of the view that no more than a token charge on account of management of £150 per annum could fairly and reasonably be included in any interim claim.

42. In summary, therefore, taking account of the reasonable charges that could properly and justifiably be included in the interim charge for each year, the Tribunal conclude that the following amounts satisfy the terms of section 19(2); the sum of £655 for the year commencing 01 January 2010, £685 for the year commencing 01 January 2011, £715 for year commencing 01 January 2012, £785 for the year commencing 01 January 2013 and £825 for the year commencing 01 January 2014. This amounts to total interim charges of £3,665 and thus a further liability on the part of the Respondent in the sum of £610.83.

3) Costs of Proceedings

43. Turning to the costs claimed by the Applicant, by way of separate claim rather than as service charges. As noted previously these comprise the £360 referred to in the Claim Form, a further sum of £800 and disbursements of £240 made up of £190 Court fees and £50 for rail fares. The claim for the latter amounts in the total sum of £1,040, being made by way of a Section 20C application.

44. As explained by the Tribunal at the hearing, the tribunal has only a limited jurisdiction to award costs under Rule 13 of the First-tier Tribunal (Property Chamber) Rules 2013, essentially where a party has acted unreasonably in bringing, defending or conducting proceedings. Any application for costs under this rule most appropriately being made, if at all, after and within 28 days of the Tribunal's decision disposing of all the issues in the application.

45. The application made under cover letter dated 05 May 2016 by the Applicant for costs in the sum of £1,040 is not such a Rule 13 application. Rather it is a wholly misconceived Section 20C application. Misconceived because section 20C of the 1985 Act provides only that a tenant may make an application for an order that all or any of the costs incurred or to be incurred by a landlord in connection with any proceedings before a court or tribunal are not to be recoverable as service charges.

46. Otherwise of course the Applicant may pursue a claim for its costs of the County Court proceedings in that Court, following this determination by the tribunal being notified to the Court and the matter being restored

before it. The merits of any such application is plainly outside the jurisdiction of this Tribunal and is not for it to comment upon.

47. Presently, therefore, the Tribunal makes no award of costs, though as indicated above that does not preclude the Applicant if so advised from hereafter making a Rule 13 application or subsequently pursuing its costs before the Court.

The Decision

48. For the reasons set out above the Tribunal determines that the amount payable by the Respondent (defendant, tenant) to the Applicant (claimant, landlord) is the sum of £1,210.83.

49. No award is presently made in respect of the Applicant's separate claim for the costs of these proceedings or for that matter of the County Court proceedings.

Appeal

50. Pursuant to rule 36(2)(c) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013/1169) ('the Rules') the parties are duly notified that they have a right of appeal against the decision herein. That right of appeal may be exercised by first making a written application to this tribunal for permission to appeal under Rule 52 of the Rules. An application for permission to appeal must be sent or delivered to the tribunal so that it is received **within 28 days** of the latest of the dates that the tribunal sends to the person making the application (a) written reasons for the decision or (b) notification of amended reasons for, correction of, the decision following a review (under Rule 55) or (c) notification that an application for the decision to be set aside (under Rule 51) has been unsuccessful.

Dated 12 August 2016