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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AM/LSC/2013/0601**
Property	:	**55 Evelyn Court, Evelyn Walk, London N1 7PS**
Applicant	:	**LB Hackney**
Representative	:	**Mr N Clark (counsel)**
Respondents	:	**Mr & Mrs Fayodeka**
Representative	:	**Mr M Joslin MRICS (chartered surveyor)**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Miss J E Guest (tribunal judge)** **Mr M C Taylor FRICS (chartered surveyor)** **Mr C S Piarroux JP CQSW (lay member)**
Date and venue of Hearing	:	**10/02/2014** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**17/02/2014**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the total sum of £5,742.06 is payable by the Respondents in respect of the invoices numbered 1388277 and 2336347.

(2) The tribunal makes the determinations as set out under the various headings in this decision.

(3) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

(4) The tribunal determines that the Respondents shall pay the Applicant £190.00 within 28 days of this decision to reimburse the tribunal hearing fee paid by the Applicant.

(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")* as to the amount of service charges payable by the Respondents in respect of the service charges in relation to two invoices: the remaining balance of £4,166.77 outstanding in respect of invoice no. 1388277 and £1,5275.29 in respect of invoice no. 2336347.

2. Proceedings were originally issued in the Northampton County Court under claim no. 2YN10892. The claim was transferred to the Clerekenwell and Shoreditch County Court and then in turn transferred to this tribunal as per the order of District Judge Manners dated 15/08/2013.

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

The hearing

4. The Applicant was represented by counsel, Mr Clark, and the Respondents were represented by a surveyor, Mr Joslin.

5. On 06/02/2014, the Applicant sent a small bundle of additional documents to the tribunal and Mr Joslin. Mr Joslin had not received the additional bundle in time for the hearing so the tribunal arranged a

short adjournment at the start of the hearing to give Mr Joslin an opportunity to consider the documents.

6. Mr A Evans, the Applicant's Major Works and Disputes Resolution Manager, and Mr M Long, the Applicant's Head of Programme Management both gave oral evidence. The Applicant's Electrical Services Manager, Ms D Hill, was also called to give evidence but neither party put any questions to her. Also present for the Applicant was Ms L Enukora of the Applicant's Legal Department.

7. The Respondents were not present when the hearing started at 10am. The short adjournment to allow Mr Joslin to consider the small bundle of additional documents fortunately meant that the Respondents had both arrived by the time the hearing resumed at 10.30am. Although they were both present throughout the remainder of the hearing, neither Respondent gave oral evidence. The Respondents did not file/serve any witness statements and no other evidence was produced by the Respondents. In view of this, the hearing lasted just under half a day rather than the full day that had been anticipated when the tribunal set the matter down for hearing.

8. On 14/02/2014, the tribunal received further written submissions from the Respondents. No directions had been made by the tribunal that entitled either party to make additional submissions following the hearing on 10/02/2014. The tribunal, therefore, did not take the Respondents' further submissions into account when making its decision since there was no direction permitting them to do so and, furthermore, it would have been contrary to the overriding objective under Rule 3 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 that requires the tribunal to deal with cases fairly and justly.

The background

9. The property which is the subject of this application is a two bedroom flat situated on the 5th floor of a 10 storey building consisting of a total of 60 flats, known as 45-104, which forms part of the Wenlock Estate in Hackney.

10. 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.

11. The Respondents hold a long lease of the property which requires the landlord to provide services and the tenants to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

12. The Respondents disputed service charges in respect of the costs of major works undertaken to the block under the Decent Homes programme in 2006-2009. This had resulted in two invoices: an invoice numbered 1388277 in relation to the major works *("the first invoice)* and invoice numbered 2336347 in relation to lateral main works *("the second invoice").*

13. Having heard the Applicant's evidence and the submissions from both parties and considered all of the documents provided, the tribunal made determinations on various issues as set out below.

(1) Abritration

14. Mr Joslin submitted that Clause 11 of the lease placed a mandatory contractual obligation on the Applicant to refer the dispute to arbitration. Mr Joslin argued, in effect, that the tribunal had no jurisdiction to decide the dispute as Clause 11 required any dispute or difference to be determined by way of arbitration.

15. The Applicant's position was that the arbitration clause had not been invoked as the Respondents had not specified why the service charges were disputed. Mr Evans said in his oral evidence that the Respondents had been offered a discretionary loan in order to spread the costs over a 36 month period, which they accepted in February 2008. The Respondents made monthly payments under the loan agreement until April 2009 when the payments stopped. Mr Evans said one letter of complaint about the works was received from the Respondents dated 11/01/2010. After the Applicant took steps to recover the arrears, the tribunal was informed that the Respondents consulted LEASE, a free advice service, in the summer of 2010. The Applicant agreed to a suggestion of mediation on condition that the Respondents provide details of why the costs were disputed. Mr Evans said that the Applicant heard nothing further either from the Respondents or LEASE. Mr Evans also stated that a letter before action was sent on 26/04/2010 and then proceedings were issued in the County Court, which were stayed a number of times to enable the parties an opportunity to negotiate. Despite all this, Mr Evans said that the Respondents had still not indicated why the charges were disputed.

16. Mr Clark submitted that the Respondents had brought a counterclaim in the County Court (for unpaid housing benefit in excess of £100,000 that was subsequently struck out) so that the Respondents had thereby waived the arbitration clause. Mr Clark also submitted that the Respondents had failed to specify why the costs were disputed, in particular he referred the tribunal to the fact that the Respondents had not complied with paragraph 2 of the directions ordered at the case management conference on 19/09/2013 that required the Respondents to fully explain why the charges were disputed.

The tribunal's decision

17. The tribunal decided that it had jurisdiction to decide the matter.

Reasons for the tribunal's decision

18. The arbitration clause is void under section 27A (6) of the 1985 Act (see the Appendix). The Tribunal's jurisdiction under section 27A cannot be ousted by Clause 11 of the lease.

19. In the alternative, the Respondents failed to specify why the costs were disputed so that there was effectively no difference/dispute to refer to arbitration.

20. Further, the Respondents did not raise the issue when served with the County Court summons and, in fact, appeared at that stage to accept that the County Court had jurisdiction as they sought to pursue a counterclaim within those proceedings. The tribunal, therefore, considered that the Respondents had waived any requirement under the lease to refer the matter to arbitration in the event that the clause was not void under section 27A(6).

21. Accordingly, the tribunal had jurisdiction to decide the matter.

(2) "Due proportion"

22. The lease does not specify the method by which service charges are apportioned between the lessees. Clause 3 states that the lessee will pay a *"due proportion"* of the costs and expenses incurred or to be incurred by the lessor in carrying out its obligations and functions under Clauses 6 and 8 and in the covenants set out in the 9th Schedule.

23. Mr Evans explained the system that had been adopted by the Applicant to calculate the due proportion. He informed the tribunal that the Applicant used a method called the 'living space factor', which based charges on the size of the property. It was accepted by the parties that 55 Evelyn Court is a two bedroom flat. Mr Evans stated that this meant the property had a living space factor of 4.0.

24. In relation to the first invoice, Mr Evans stated in his oral evidence that the Applicant calculated the due proportion based on a total of 77.0 living spaces in respect of 45 to 64 Evelyn Court. The second invoice had been based on the total living spaces in the block, namely 45 to 104 Evelyn Court, which has a total of 230.0 living spaces. Mr Evans said that both methods were fair and reasonable and similar to that adopted by other local authorities.

25. Mr Joslin disputed the methods used by the Applicant to calculate the due proportion. In particular, he asserted that the Applicant was in breach of contract by unilaterally re-defining 'the block' as 45 to 64 Evelyn Court in relation to the major works. Mr Joslin pointed out that the lease defines the block as 45 to 104 Evelyn Court. Clause 3 refers to the lessor's covenants in the 9th Schedule, which relates to the block as a whole. Mr Joslin submitted that it, therefore, followed that any costs should be divided by the total number of flats in the block as defined by the lease.

The tribunal's decision

26. The tribunal decided that the method used by the Applicant to apportion costs was fair and reasonable.

Reasons for the tribunal's decision

27. Whilst it is correct that the lease defines the block as 45 to 104 Evelyn Court, this does not impose any contractual obligation on the Applicant to divide costs between those flats when calculating the due proportion.

28. The Applicant carried out a large programme of works to the block and the tribunal considered that it was fair and reasonable to divide the block in to smaller sections when apportioning the costs. This did not amount to a unilateral attempt to re-define the term 'the block'.

29. The living space factor is, in the experience of the tribunal, a common method adopted by local authorities. Such a method is fair and reasonable as it takes into account the likely number of occupiers.

30. Accordingly, the tribunal considered that the method adopted by the Applicant was fair and reasonable.

(3) Monthly payments

31. It was submitted by Mr Joslin that the Applicant is not entitled to claim the service charges by way of a lump sum payment. Mr Joslin relied upon Clause 3 that refers to service charges being payable monthly in advance.

32. Mr Evans gave oral evidence to the effect that the Applicant agreed to spread the costs on a monthly basis. It was submitted by the Applicant that Clause 3 did not limit the recovery of service charges to monthly payments as Clause 3 provides that the method of payment 'includes' monthly payments.

Tribunal's decision

33. The Applicant is entitled to seek payment of unpaid service charges as a lump sum.

Reasons for the tribunal's decision

34. The lease provides that payment of service charges can include monthly payments but there is no restriction in the lease that requires the Applicant to only recover costs on a monthly basis.

(4) Section 20 notice

35. The Respondents acknowledged in their statement of case that a section 20 notice had been served in relation to the Decent Homes works resulting in the first invoice.

36. However, Mr Joslin submitted that the Respondents had not received the section 20 notice that related to the lateral main work giving rise to the second invoice.

37. The Applicant produced evidence of the posting of the section 20 notice dated 07/09/2007, which it submitted had been sent to the property and to the Respondents' home address. Mr Evans informed the tribunal in his evidence that copies of the relevant paperwork had also been sent to the Respondents on 20/07/2010. Mr Evans stated that the Respondents had made no observations in relation to the first notice nor the second.

38. Mr Joslin questioned Mr Evans in relation to the consultation process that had resulted in the appointment of the contractor, Lovells, under a long term qualifying agreement *("LTQA")*. He also questioned Mr Long concerning Lovell's use of sub-contractors and the provision of a roof guarantee by a supplier.

Tribunal's decision

39. The tribunal decided that the Applicant had properly served the section 20 notice on 07/09/2007.

40. The tribunal did not make other determinations regarding the consultation process concerning the Decent Home works or the LTQA as, although these issues were explored by Mr Joslin, the matters were not pursued further.

Reasons for the tribunal's decision

41. Evidence of posting was produced and no evidence in rebuttal was adduced by the Respondents. Therefore, the tribunal accepted that the notice had been properly served.

Application under s.20C and refund of fees

42. At the end of the hearing, the Applicant made an application for a refund of the hearing fee[1]. Having heard the submissions from the parties and taking into account the determinations above, the tribunal does not order the Respondents to refund the fee paid by the Applicant within 28 days of the date of this decision.

43. At the hearing, Mr Joslin on behalf of the Respondents applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the tribunal determines that it is not just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Applicant may pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

44. The above decisions were made by the tribunal as the Respondents had not succeeded on any issue.

The next steps

45. The tribunal has no jurisdiction over ground rent or county court costs. This matter should now be returned to the Clerkenwell and Shoreditch County Court.

Name: J E Guest **Date:** 17/02/2014

[1] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a)in a particular manner, or

(b)on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

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.]

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 the

Upper 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) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(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.