9352

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00BU/LSC/2013/0111**
Property	:	**Flat 32 Aura Court 1 Percy Street Hulme Manchester M15 4AB**
Applicant	:	**St. Lawrence's Management Company (No.1) Limited**
Applicants Representative	:	**Brady Solicitors**
Respondents	:	**(1) Mr. Jason Alexander** **(2) Mr. Sunil Mehta** **(3) Mr. Chandravadan Mehta**
Respondents Representative	:	**Latimer Lee LLP**
Type of Application	:	**Service Charge determination s27A(1), S20C Landlord and Tenant Act 1985, Commonhold and Leasehold Reform Act 2002, Schedule 11 Paragraph 5**
Tribunal Members	:	**Mr. John Murray Chairman** **Mr. Jack Rostron Valuer**
Date and venue of hearing	:	**6 November 2013 Tribunal Office 1st Floor 5 New York Street, Manchester M1 4JB**
Date of Decision	:	**12 November 2013**

DECISION

ORDER

1. The Service Charges on account for the Financial Year 2012 for Flat 32 are determined as follows:

Lease Part	Description	Total for Aura Court	Flat 32 %	Due
Part A	Residential Common Areas	£13536.44	2.128%	£288.05
Part B	General Common Areas	£27213.56	1.71%	£465.35
TOTAL				£753.40

2. The Administration Charge of £168 is payable.
3. No order is made under s20C Landlord and Tenant Act 1985

INTRODUCTION

1. This matter was transferred to the Tribunal by Order of Deputy District Judge Beattie sitting at Manchester County Court on 13 June 2013, for a determination as to the liability to pay and reasonableness of service charges under s27A Landlord and Tenant Act 1985 in respect of Flat 32 Aura Court 1 Percy Street, Hulme Manchester M15 4AB ("the Property"). The Respondents requested in their statement of case an order for limitation of recovery of legal costs in connection with this application under s20C of the same Act .

2. Whilst the proceedings were transferred by the County Court, no copy of the Particulars of Claim had been provided to the Tribunal by the County Court or the Parties prior to the hearing.

3. In the Applicant's response to the Respondents' statement of case they indicated at paragraph 15 that they were seeking service charge for the financial year 2012 only. After some discussion between the parties, and upon the Applicant's solicitor confirming that the Applicant had only intended to claim for the 2012 service charges it was agreed that the Tribunal would consider the service charges for that year alone.

4. The Applicant was seeking the sum of £919.99 on account of service charges for that year and the sum of £168 inclusive of VAT for referring the matter to solicitors .

THE PROCEEDINGS

5. Directions were issued by a Tribunal Member on 23 August 2013.

6. The Applicant was directed to file a statement of case with accompanying documents listed in the directions by 13 September 2013. The Applicant's statement of case was filed on 1 October 2013, but subsequently amended on the 22 October 2013. Only the amended statement of case was before the Tribunal.

7. The Respondents were directed to file their statement of case in response within 21 days of receipt of the Applicant's statement. This was served on 22 October 2013.

8. The Applicant filed a response to the Respondents statement of case and bundle of documents.

9. A Tribunal was appointed and an external inspection of the Property took place at 10:00am on Wednesday 6 November 2013. The Respondent's representative Mr. Jordan was in attendance, along with the Respondents' solicitor Mr. Simon. The Applicant did not attend the Inspection.

10. The substantive hearing of the application was on 6 November 2013 at the Tribunal Office in Manchester at 11.30 am . At the substantive hearing, the Applicant was represented by Ms. Brady, of Brady Solicitors. The Respondents were represented by Mr. Simon of Latimer Lee Solicitors.

THE INSPECTION

11. The Property is a flat in a purpose built development comprising 47 residential units and 5 commercial units, presently unlet. The Tribunal was told that the development was completed in around 2008.

12. The development is a three sided block, six storeys tall at the side that borders Stretford Road, stepping down to three storeys at the back, on Percy Street. There is a secure gated court yard area to the rear, and a ramp leading down to an underground car park below.

13. The development was found to be in a fairly poor state for its age. Partly this was as a result of its design, partly due to vandalism, and partly due to neglect by residents.

14. In the middle of the three sided courtyard, an open iron staircase led up to the top of the sixth floor. The staircase and the associated corridors were floored with timber decking, as would commonly (and more appropriately) be found in a domestic garden. As there was no covering to the elements, the staircase was wet, slippery, and covered with pigeon excrement and feathers. The timber clad walls were also wet, and green with algae, as water dripped down them from the roof.

15. The staircase wound around a lift shaft, clearly intended to be the main access and egress to the six floors at the front of the development. No lift had ever been installed by developers, and the shaft was actually bricked up. There was litter in the court yard area, and on the stairs. There were abandoned settees on the walkways. The grey cladding at the top of the building was dilapidated, mildewed and buckled in places. An iron spindle on the balustrade of the stairs was broken.

16. Four internal staircases were used to access the flats to the rear of the development. Two of the external doors to those staircases had locks on them, but two had had the locks removed, and so could be accessed by anyone able to gain access to the car park. Two of the stairwells had no carpets. External doors were in need of painting, as was the metal barrier to the ramp to the car park. Cupboards containing utilities equipment were left open having had their locks removed.

17. Pools of water lay in the courtyard and the underground car park, presumably as a result of poor drainage. Pallets had been placed in the pools to assist in avoiding wet feet, but presented tripping hazards, particularly when lights on timer switches ran out, and underground areas had to be traversed in the dark.

18. The Property is held under a lease dated 7 March 2008 granted for 125 years (less ten days) commencing on 1 January 2004.

THE LEGISLATION

19. The relevant legislation for service charges is contained within Sections s27A and s20C, Landlord and Tenant Act 1985 which read as follows:

s27A Liability to pay service charges: jurisdiction.

(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 the appropriate 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.

s20C Limitation of service charges: costs of proceedings.

(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 leasehold valuation tribunal or the First-tier 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 a leasehold valuation tribunal;

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

(ba) In the case of proceedings before the First-tier Tribunal, to the 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.

20. Under Schedule 11 of the Commonhold and Leasehold Reform Act of 2002 the Tribunal may determine payability of administration charges.

THE LEASE

21. By Clause 7.1 of the lease, the Respondents are obliged to pay service charges by 12 monthly installments in advance, with reconciliation of overpayments or sums due being the Applicant's responsibility under clause 8.3.2

22. Service Charges are defined as Part A and Part B Service Charges. In summary:-

(a) Part A service charges relate to the management of, and various services carried out to in relation to the Residential Common Parts, (which are common parts defined as servicing exclusively the flats as opposed to commercial premises), including the replacement, renewal, repair, maintenance decoration improvement and cleaning, lighting and heating, firefighting equipment, window cleaning and other amenities considered reasonable by the Applicants. The Respondents' contribution to this portion of the charge is 2.128%.

(b) Part B service charges relate to the maintenance, repair, renewal replacement decoration or cleaning of the the General Common Parts being all other common parts, which are shared in common with the commercial premises. The Respondents' contribution to this portion of the charge is 1.71%

23. Under the terms of the Lease, at Clause 8, subject to the "Part A and Part B Service Charges" being paid, the Applicant is obliged to carry out Services as set out in Parts I and II of the second schedule.

THE EVIDENCE AND SUBMISSIONS

24. The Applicant submitted an amended statement of case dated 22 October 2013. They referred to Mr. Alexander's "Particulars of Defence", although did not exhibit a copy.

25. The Applicant also submitted a bundle of documents. Regrettably none of the page numbers referred to in the statement of case resembled the pagination of the bundle.

26. The Applicant's opening submissions to the Tribunal were that the service charges were reasonable and therefore payable, and that the Respondents were obliged to pay them without deduction by virtue of clause 8 of the lease.

27. The Respondents filed their statement of case on 22 October 2013.

28. In their statement they asserted that they had funded a large part of the "startup" costs of management of the Development, lending at least £59,665 effectively to the Applicant and that this should be set off against future service charges.

29. The Respondents further disputed that the Applicant company was properly constituted. They stated that the sole Director, Mr. Shushil Aggarwal, was

appointed contrary to the Articles of Association, in that he was not a unit holder, in accordance with clause 2.2 of the Articles; Land Registry documentation suggested that he was.

30. The Respondents further objected to Mr. Aggarwal having been appointed by EMS, the managing agents, who would not have had authority to so appoint. This was a further complaint to a matter arising from those acting on behalf of the Respondents - the understanding that the managing agent was to be a director of the company, and have the account signed off, was mentioned by Darren Baggueley ("the Accountant"), who was described in the evidence of Mr. Jordan as being an accountant to the Respondents and their varoious companies in his email to EMS dated 22 July 2011.

31. The Respondents also pointed out that the constitution required that at least two directors should be appointed. Mr. Garnett for EMS stated that no one had been willing to stand, leaving him in a very difficult position, trying to manage Aura Court with little support from unit owners.

32. The Respondents effectively challenged the Applicant's ability to conduct it's affairs, to enter into contracts, to appoint managing agents or even legal representatives.

33. The Parties accepted that under the terms of the lease the Applicant was the correct entity to carry out services, and to collect service charges, and that in those circumstances the Tribunal would determine payability of service charges, and that a dispute as to the proper constitution of the Applicant company might be properly determined within the main County Court action.

34. The Respondents further asserted that the Applicant had failed to keep proper books of accounts in accordance with clause 8.2, so that reasonableness of service charges could not be assessed. They point out to correspondence with the Applicant's solicitors who they say acknowledged that service charge accounts and budgets had not been provided.

35. The Respondents alleged that the Applicant had breached covenants by not repairing and redecorating in accordance with the lease.

36. Ms. Brady drew the Tribunal's attention to the Court of Appeal case of **Bluestorm Ltd –v- Portvale Holdings Ltd [2004] EWCA Civ 289**, which had similarity on facts to the present case, in that one party to the lease had effectively transferred interests from the position of being Landlord to that of tenant as analogously (although not directly) had happened here. The (now) tenant sought to claim damages effectively for own breach of covenant. The Court of Appeal considered the effects of the wording of the lease that obliged the Lessor to only carry out works upon receipt of payment by the Lessee – terms very similar terms to clause 8 of the

Aura Court lease, which were sufficient to prevent a claim being made by the Lessees for breach of covenant.

37. The Tribunal determined that the Bluestorm case was immediately distinguishable from the case before it. The Respondents are not making a claim for breach of covenant before the Tribunal, but asserting that the costs of services are not reasonable, that what has been charged for has not been delivered, or not been delivered effectively.

38. Evidence was given by Mr. Garnett of the Applicant's Managing Agents EMS He confirmed that EMS, a firm of which he was a Director, had taken over management of the Property on 1 May 2011. At the time, he received instructions from two of the Respondents, Mr. Jason Alexander and Mr. Sunil Mehta. They were at the time directors of the company that was company secretary to the Applicant, and agreed to his firm's management charges based on £170 per unit.

39. Mr. Garnett agreed that this was a higher than usual charge because it had been anticipated that the building might be difficult to manage, in terms of what was required by way of services, coupled with problems with collecting service charges. He said that with the exception of the nine flats owned by the Respondents, all 38 of the other residential units were either up to date with the service charges or adhering to payment plans and that the arrears situation had improved.

40. Mr Garnett did not seem to know a great deal about the services provided at the development, despite them being the subject matter of the application. He was unaware of the hourly rate paid to his cleaners, and further enquiries had to be made of his office as to what the monthly spend was. The Tribunal was ultimately told that the spend was £297.50 was paid to a cleaning company, who had a schedule of work to get through. He did not know what the schedule was. He told the Tribunal that the cleaner was not asked to clean the pigeon debris as this was considered to be too expensive. The decking was jet washed once a year. He told the Tribunal that he visited on a quarterly basis.

41. Evidence for the Respondents was given by their consultant, Mr. Jordan. The Tribunal were told that none of the three Respondents were available to attend the hearing, and consequently they could give no evidence directly as to the construction of Aura Court and inherent defects, the alleged loan to the Applicant, or their involvement in instructing EMS in the first half of 2011. Mr. Jordan was unable to help much here as he had not been involved in all matters pertaining to the Respondent's partnership, nor working for them when Aura Court was built.

42. He did give some helpful comparisons in relation to a nearby building the Respondents had an interest in, and which he managed, particularly in relation to the costs of cleaning.

THE DETERMINATION

43. The Tribunal, with the agreement of the Parties restricted itself to determination of the payability of service charges for the year 2012. The Applicant sought the sum of £425.51 being 2.128% of the Part A (Residential Common Areas) and the sum of £494.48 being 1.71% of the Part B (General Common Areas)

44. No demand for actual service charges had been made, so the Tribunal was only able to consider the demand for service charges on account as set out in the statement of account dated 17 April 2013, and the budget at page 209 of the bundle. There was no evidence before the Tribunal that those service charges had been reconciled at a later date in accordance with clause 8.3.2 of the lease, which the Applicant is still obliged to do.

45. The Respondent had been unable to produce much evidence to support expenditure on service charges beyond audited accounts. The Managing Agent's knowledge of expenditure was not detailed, which was disappointing given that few services had actually been carried out.

46. For the most part services were not actually challenged by the Respondents, save for the costs of cleaning, which were considered excessive in light of the state of the property, and the management charge itself, which was felt to be high considering the lack of services provided.

47. Given that the claim was only for service charges on account, and not for actual service charges sought, the Tribunal was considering budgeted rather than actual spend.

48. Taking that into account, then the Tribunal considered that the budgets set for cleaning and management were too high.

49. The Tribunal determined that the charges sought on account for internal cleaning were not reasonable in light of what cleaning was contracted for by EMS, and determined to reduce the annual amount sought for internal cleaning to £2300, a reduction of £500 from the published accounts, and £1800 from the amount sought on account.

50. The Tribunal determined that the management charge was not reasonable.

51. Management charges sought in the budget of £10608 for management of what has effectively been an expenditure of £26800 were not considered to

be reasonable, particularly in the light of the condition of the property (not all of which was as a result of management), the lack of maintenance and general air of neglect. Effectively management had amounted to arranging for insurance and a cleaner, and overseeing a spend of around £3,000 on maintenance, on top of the no doubt difficult task of pursuing service charges from lessees who perceived they were not receiving the services the building requires. A lack of forward planning and proper budgeting, transparency and provision of information had not assisted the situation.

52. The Tribunal determined that reasonable management charges would be reduced to 15% of the total spend for the year 2012, which was considered to be at the high end of what would be a reasonable charge, taking into account difficulties in collecting service charges. Reducing the net expenditure of £26800 to £26300 (for the reduction in cleaning costs) would result in management fees of £3945.

53. Dividing this fee between Residential Common Areas and General Common Areas in the same proportions as currently would result in £2936.44 being charged for Part A service charges, and £1008.56 for Part B service charges.

54. The Total Service Charges on account for the Property for the year 2012 for Flat 32 would accordingly by £13536.44 for Part A and £27213.56 for Part B.

55. The Tribunal was also asked to determine the Administration Fee of £168 charged by the Applicant to the Respondents, and to make an order under s20C Landlord and Tenant Act 1985.

56. The Administration fee of £168 was determined to be reasonable. The evidence before the Tribunal was that the Respondents were in arrears of service charges on account, and that involved administration charges being incurred by the Applicant.

57. The Respondents maintained that they were not in arrears, as the Applicant was indebted to them.

58. It is not for the Tribunal to determine whether the Applicant is indebted to the Respondents for the loans referred to at paragraph 9 of the Respondents' statement. As the Applicant points out the Tribunal does not have jurisdiction to "set off" any alleged loans, but only to determine the service charges in accordance with s27.

59. The Tribunal did however consider the alleged loan in order to determine the payability of the administration charge, and the Respondent's application for an order under s20C.

60. The Tribunal noted that there was no documentation provided in relation to the loan agreement, and no historic accounts showing it as a liability.

61. An email to the Managing Agents EMS dated 18 March 2011 from the Accountant said that a loan of "approximately £27k" was owing to a number of "Jason's companies". He said they were aware of a number of other transactions from "20 plus other companies) "in the region of £18k". He said without spending weeks bringing the records of other companies up to date he could not put an exact figure on it – but it would be immaterial as "Jason has already agreed to write up to the perceived £50k of his money anyway at our meeting".

62. None of the Respondents were present to provide any further explanation.

S20c Application

63. The Tribunal refuses the application for an order under s20C. Whilst the Tribunal disallowed part of the cleaning budget, and reduced the management fee, it was determined to be inappropriate to exercise discretion under s20C given the level of the proposed management charges had originally been agreed to on behalf of all Aura Court residents by a company controlled by two of the three Respondents.