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26 AUG 2014

**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **CAM/22UB/LSC/2014/0043**

Property : **46 Calvert Drive, Basildon SS13 1TB**

Applicant : **Bowers Park Residents Association Limited**

Representative : **Mr Neil Harmsworth and Ms Carly Melling, both of Gateway Property Management**

Respondent : **Mrs Sharon Napthen**

Representative : **Mrs Sharon Napthen In Person**

Type of Application : **Section 27A Landlord and Tenant Act 1985 – determination of service charges payable
Schedule 11 Commonhold and Leasehold Reform Act 2002 – determination of administration charges payable**

Tribunal Members : **Judge John Hewitt
Mrs Evelyn Flint DMS FRICS IRRV
Mr David Cox**

Date and venue of Hearing : **Tuesday 29 July 2014
Basildon Magistrates Court**

Date of Decision : **18 August 2014**

DECISION

Decisions of the Tribunal

1. The Tribunal determines that:

- 1.1 The service charges claimed by the applicant in court proceedings claim number 3YM31236 which are payable by the respondent to the applicant are as follows:

Due date	Nature of payment	Amount
29.05.10	Balance brought forward	£357.05
01.04.12	Half yearly SC 1 st interim 2012/13	£277.60
01.10.12	Half yearly SC 2 nd interim 2012/13	£277.60
01.04.13	Half yearly SC 1 st interim 2013/14	£277.50

Those amounts were payable on the due date.

The service charges claimed in the court proceedings but which are **not** payable by the respondent to the applicant are as follows:

Due date	Nature of payment	Amount
01.04.11	Half yearly SC 1 st interim 2011/12	£277.60
01.10.11	Half yearly SC 2 nd interim 2011/12	£277.60

- 1.2 The following administration charges claimed in the court proceedings are **not** payable by the respondent to the applicant:

Date	Nature of payment	Amount
15.01.13	Legal expenses	£300.00
03.07.13	Interest	£ 50.42
03.07.13	Interest	£ 86.58
03.07.13	In House Legal Expenses re Summons	£180.00

It follows that none of the administration charges claimed in the court proceedings are payable by the respondent to the applicant

- 1.3 Of the additional claims (see para 5 below):

The following service charges are payable by the respondent to the applicant:

Due date	Nature of payment	Amount
01.10.13	Half yearly SC 2 nd interim 2013/14	£277.50

The following service charges are **not** payable by the respondent:

Due date	Nature of payment	Amount
01.04.10	Half yearly SC 1 st interim 2010/11	£277.60
01.10.10	Half yearly SC 2 nd interim 2010/11	£277.60

The respondent is entitled to the balancing credit of £64.47 in respect of the year 2009/10 because the respondent has paid or is obliged to pay the two interim payments demanded on account for that year.

The respondent is not entitled to the balancing credit of £67.38 in respect of the year 2010/11 because the respondent is not obliged to pay the two interim payments on account for that year.

- 1.4 The court fees of £95 and £40 and the claim to statutory interest pursuant to section 69 County Court Act 1984 also claimed in the court proceedings are matters in the exclusive jurisdiction of the court and the file shall be returned to the court so that those claims may be pursued if the applicant wishes to do so.
- 1.5 By consent an order shall be made, and is hereby made, pursuant to section 20C Landlord and Tenant Act 1985 (the Act) to the effect that none of any costs which the applicant may have incurred or which it may incur in connection with these proceedings are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the respondent.
- 1.6 No order shall be made as regards costs or reimbursement of fees paid to the tribunal in connection with these proceedings.
2. The reasons for our decisions are set out below.

NB Later reference in this Decision to a number in square brackets ([]) is a reference to the page number of the hearing file provided to us for use at the hearing.

Procedural background

3. On 15 July 2013 the applicant (the Manager) commenced court proceedings [A33] against the respondent (Mrs Napthen) - claim number 3YM31236. The applicant originally claimed the sum of £2,361.75.

The particulars of claim [A33/1] stated the claim was to recover service charges payable in advance but the statement of account [A33/2] attached to the particulars of claim in fact included some administration charges as well.

The original claim was made up as follows:

Service charges:

Balance brought forward		£357.05
01.04.11	1 st on account instalment 2011/12	£277.60
01.10.11	2 nd on account instalment 2011/12	£277.60
01.04.12	1 st on account instalment 2012/13	£277.50

01.10.12	2 nd on account instalment 2012/13	£277.50
01.04.13	1 st on account instalment 2013/14	<u>£277.50</u>
		£1,744.75

Administration charges:

15.01.13	Legal expenses	£300.00
03.07.13	Interest	£ 50.42
03.07.13	Interest	£ 86.58
03.07.13	In House Legal Expenses re Summons	<u>£180.00</u>
		£617.00

The Manager also originally claimed a court fee of £95.00 and interest pursuant to section 69 County Courts Act 1984.

4. The claim was defended. The proceedings appear to have had something of a chequered history and little purposeful progress was made.
5. In a document prepared by Mr Neil Harmsworth of Gateway Property Management, the Manager's managing agents, dated 03.02.2014 the Manager gave greater detail of its case and attached several documents. From paragraph 2.4 of that document the Manager alleges that further debits and credits have been added to the account since 18 July 2013 and sought to claim further sums as follows:

Service charges:

01.10.13	2 nd on account instalment 2013/14	£277.50
01.04.10	1 st on account instalment 2010/11	£277.60
01.10.10	2 nd on account instalment 2010/11	£277.60
27.01.12	Balancing credit 2009/10	-£ 64.47
27.01.12	Balancing credit 2010/11	-£ 67.38

Administration charges

22.08.13	HMCTS court fee	£ 40.00
18.11.13	Section 146 Notice Fee	£240.00

The manager expands on these entries in its statement of case [A2].

For ease of reference we refer to the above entries as 'the additional claims'.

6. In a document dated 13 March 2014 Mrs Napthen filed a defence to the claim and has set out a detailed 'response to Bower Park Residents Association's latest explanation of the alleged service charge due. That document is stamped by the county court at Southend as having been received on 25 March 2014.
7. Evidently a hearing took place before Deputy Judge Scolding sitting in the county court at Southend on 26 March 2014 when he heard a representative for the Manager (claimant in the court proceedings) and

the Mrs Napthen (defendant in the court proceedings) in person. The judge made an order which was drawn on 10 April 2014:

- “1. *Proceedings stayed pending determination by the First Tier Property Tribunal.*
2. *Claim transferred to the First Tier Property Tribunal.*”

We infer from this order that what the court transferred to this tribunal was both the original claim for the sum of £2,361.75 and also the additional claims. We do so because in the court proceedings both parties have addressed the matters raised in the additional claims and they are closely related to the original claim. Given the overriding objective of court proceedings and the overriding objective of this tribunal’s proceedings it is proportionate and efficient use of public resources that the issues between the parties as set out in the original claim and the additional claims are determined at the same time and in the one set of proceedings. The proposal to do this was notified to the parties and set out in directions given by the tribunal dated 6 May 2014.

8. The referral came on for hearing on Tuesday 29 July 2014.

The Manager was represented by Mr Harmsworth and Ms Melling of Gateway Property Management (Gateway). Mrs Susan Barnes, a director of the Manager was also present.

Mrs Napthen represented herself and she was accompanied and supported by her husband.

Given that the issues between the parties were mainly of an accounting or legal nature and that there was no challenge to the cost of services or the reasonableness of the services delivered, the tribunal decided that an inspection of the subject development would not be of assistance.

In case any misunderstanding concerning the additional claims arose during the course of the hearing, by letter dated 6 August 2014, the tribunal indicated its proposed decisions on those claims and invited the parties to make written submissions about them if they wished to do so. In response the tribunal has received a letter from Gateway Property Management dated 14 August 2014. The tribunal did not receive any submissions from Mrs Napthen.

The lease

9. The subject lease is dated 26 October 1988.
10. The lease was made between:
 - (1) Commission for the New Towns as the Lessor;
 - (2) Bowers Park Residents Association Limited as the Manager;
 - (3) The Regan Group Limited as the Contractor; and
 - (4) Robert Rosenthal and Gary Vincent Potts as the Lessee

11. The lease granted a term of 125 years from 1 April 1986 at a ground rent of £35 per year and on other terms and conditions therein set out.
12. At the hearing Mrs Napthen told us that she now pays her ground rent to Swan Housing Association. This was not disputed by the Manager. We infer that the freehold interest is now vested in Swan Housing Association.
13. The lease contains the following material provisions:

The Service Charge Regime

- 13.1 By clause 3(1)(a) a covenant by the Lessee to pay to the Manager within 14 days of demand a sum equal to cost incurred by the Manager in effecting insurance on the demised premises;
- 13.2 By clause 3(1)(b) a covenant by the Lessee to pay to the Manager a contribution to the expenses and outgoings specified in clause 3(2)(g) – the Service Charge;
- 13.3 By clause 3(1)(c) a covenant by the Lessee to pay to the Manager on demand half-yearly instalments on 1 April and 1 October in each year on account of the Service Charge liability, as the Manager or its accountants or managing agents certify to be a fair and reasonable interim payment;
- 13.4 For a financial year from 1 April until the following 31 March;
- 13.5 By clause 3(2)(b) an obligation on the Manager to ensure that the amount of the Service Charge is ascertained and certified by a Certificate signed by the Manager’s auditors or accountants or managing agents, acting as experts, as soon after the end of the financial as may be practicable.
- 13.6 By clause 3(2)(d) an obligation on the Manager to provide a copy of the Certificate to the Lessee on written request and without charge;
- 13.7 By clause 3(2)(e) an obligation on the Manager to ensure that the Certificate contains a summary of the expenses and outgoings incurred in the year in question together with a summary of the relevant figures forming the basis of the Service Charge;
- 13.8 By clause 3(2)(f) an obligation on the Manager as soon as practicable after the signature of the Certificate to send to the Lessee an account of the Service Charge payable by the Lessee for the year in question, due credit being given for all interim payments made by the Lessee;
- 13.9 By clause 3(2)(f) a covenant by the Lessee to pay to the Manager within 21 days the balance due of any Service Charge, or if the interim payments exceed the amount of the Service Charge an obligation on the Manager to repay to the Lessee within 21 days the amount of any overpayment;
- 13.10 Clause 3(2)(g) sets out definition of “*the expenses and outgoings incurred by the Manager*” but it is not necessary for us to list them here;

- 13.11 Clause 3(2)(h) provides that: *“The part of the expenses and outgoings incurred by the Manager specified in this clause shall be the whole thereof divided by twenty-one”*

Variable Administration Charges

- 13.12 By clause 3(1)(g) a covenant by the Lessee to pay to the Manager on demand all costs and expenses it may incur in connection with the recovery of any arrears of payments due to it from the Lessee; and
- 13.13 By clause 3(1)(h) a covenant by the Lessee to pay to the Manager interest on monies due to it from the Lessee and not paid within 21 days of such becoming due, at a rate of 4% above the base rate from time to time of Midland Bank Plc, or if no such base rate shall be declared at such rate as the Manger shall certify to be appropriate. The interest is payable from the date when the sum(s) became due down to the date of payment.

General

- 13.14 By clause 7 a covenant by the Lessor to observe and perform the covenants contained in the Sixth Schedule;
- 13.15 By clause 8 a covenant by the Manager to observe and perform the covenants contained in the Seventh Schedule.
14. By clause 3(2)(h) of the lease the contribution payable is one twenty first of the expenses and outgoings. It appears that the Applicant's estate incorporates some 57 flats but evidently the Respondent's obligation is to contribute to the expenses and outgoings of only a part of that estate.

Previous LVT decision

15. In 2010 Mrs Napthen made an application to the Leasehold Valuation Tribunal (LVT) pursuant to section 27A of the Act and pursuant to Schedule 11 to the Commonhold and Leasehold Reform Act 2002 and sought a determination of the service charges and administration charges demanded of her by the Manager, whose then managing agents were Countrywide Estate Management (Countrywide).
16. A copy of the decision of that tribunal (of which both Mr Cox and Mr Hewitt were members) is at [A15]. Of particular relevance is the appendix to that decision. A copy of the appendix was not included in the hearing file but copies were produced at the hearing by the tribunal and inserted into the hearing file as [A31/1].

The effect of the LVT decision was twofold.

First, that as at 1 October 2009 there was a debit balance on Mrs Napthen's service charge account in the sum of £657.05. That sum included the 2nd interim payment on account due on 1 October 2009.

Secondly the decision required the Manager to reimburse Mrs Napthen £250 in fees paid by her in connection with the proceedings and to pay £50 by way of costs.

17. Evidently, and it was not in dispute that, the Manager did not pay to Mrs Napthen the £300 in respect of fees and costs and that instead Countrywide credited that sum to Mrs Napthen's account thus reducing the debit balance to £357.05.

The starting point of the current claim

18. The Manager terminated its arrangements with Countrywide and engaged the services of Gateway as its managing agents effective 1 January 2012. The handover and provision of historic records and files did not go smoothly.
19. It appears that as regards Mrs Napthen's account Countrywide informed Gateway there was a debit balance of £357.05. Hence we see on a number of documents issued by Gateway an entry dated 27.01.12 showing a debit balance brought forward of £357.05.
20. Of course whilst that debit balance was correct as at 1 October 2009 it did not reflect any demands which may have been made of Mrs Napthen in respects of interim payments which the Manager was entitled (but not obliged) to demand on 1 April and 1 October 2010 and 1 April and 1 October 2011.

The service charge issues

21. During the course of the hearing Mrs Napthen queried whether it was correct that Countrywide should have credit her account with the £300 in respect of fees and costs instead of sending that sum to her. As Mrs Napthen's account was clearly in debit at that time we find it was not incorrect or improper of Countrywide to have done so. In cash terms as regards Mrs Napthen it is a purely negative point.
22. Also during the course of the hearing Mrs Napthen accepted that she had received demands for interim payments for 1 April and 1 October 2012 and 1 April 2013 and that these were payable by her.
23. The Manager was unable to produce copies of the interim demands dated 1 April and 1 October 2011 which, if they had been issued at all, would have been issued by Countrywide. Mrs Napthen did not accept that she had received demands for those payments. The tribunal adjourned slightly early and for an extended lunch break to enable Gateway to make contact with Countrywide and to clarify the position and if demands were sent to obtain copies. On resumption of the hearing a number of assertions were made that documents were being faxed over to the court, but none had arrived by the time the proceedings had come to a conclusion.

24. The statement of case served on behalf of the manager stated, in relation to the 'additional claims', at [A2] that post 18 July 2013 additional debits and credits had been posted to Mrs Napthen's account. These included a demand dated 20 August 2013 for interim payments on 1 April and 1 October 2010. We find that such a demand is much too late.
25. The lease entitles (but does not oblige) the Manager to demand an interim sum on account on 1 April and 1 October in each year. We find that to be entitled to such a payment the demand must be made prior to the due date for payment. It cannot be made retrospectively or late. Of course, if a demand is not made then the amount of any year-end balancing debit might be greater than would otherwise be the case. To be entitled to a year-end debit balance a landlord (or manager) must heed the requirements of s20B of the Act.
26. We infer from the 2013 demand for the two 2010 interim payments that no timely or contemporaneous demands had been made for those payments.
27. The Manager was unable to discharge the burden of proof to satisfy us that timely and compliant demands had been made in respect of interim payments due on 1 April and 1 October 2010 and 1 April and 1 October 2011. Accordingly we find, as a fact, that demands were not made to Mrs Napthen for interim payments on those dates. Subsequent to the hearing and under cover of a letter dated 14 August 2014 Gateway Property Management provided copies of two 'Application For Payment (Copy)' evidently issued by Countrywide and which include references to the two interim payments due on 1 April and 1 October 2010. The documents purport to have been issued on 18 June and 23 December 2010 respectively. Neither document is compliant with section 47 Landlord and Tenant Act 1987 because the name and address of the landlord is not given. We have not been provided with copies of the demands that it was said were actually given to Mrs Napthen. The evidence of Mrs Napthen, which we accept, was that she did not receive them. For these reasons we remain of the view that Mrs Napthen is not obliged to pay these sums.
28. Mrs Napthen made a submission that if year-end accounts were not provided within a timely period, then by reason of section 20B of the Act the interim demands for the year in question ceased to be payable. We reject that submission as it is bad in law. The point was considered by the High Court in *Gilje v Charlgrove Securities Limited* [2003] EWHC 1284 (Ch). The judge held that s20B has no effect where payments on account have been made and the actual expenditure incurred does not exceed the amount of the payments on account, such that there is no need for any further demand to be made to the tenant and no such demand is made. Of course if a late demand for a balancing debit made s20B might impact on the amount of the balancing debit payable but it will not have the effect of negating any

obligation to pay interim sums properly demanded or to give rise to an obligation to repay any interim demands which may have been paid.

29. Before moving on we wish to record that issuing court debt recovery proceedings against an individual is a very serious step and may lead to very serious consequences for a judgment debtor. In such circumstances we consider that it behoves a claimant to ensure that it is in possession of all necessary supporting documentation before it embarks upon the issue of court proceedings.

The administration charges issue

30. With regard to the administration charges claimed in the court proceedings. Directions 15.2 of the directions dated 6 May 2014 was in the following terms:

15.2 In relation to each of the administration charges claimed identify the clause in the lease relied upon as imposing the obligation on the Respondent to pay the charge, set out clearly when and in what circumstances the Applicant has incurred the charge, and set out all facts and matters relied upon that the amount of the charge is reasonable and was reasonably incurred.

There shall be attached to the statement of case copies of the demands given to the Respondent requiring her to pay the charge.

31. The Manager omitted to include any of this material in the hearing file. At the hearing the Manager handed in a document dated 30 May 2014 which purported to deal with a number of issues arising from the directions, including direction 15.2. The document runs to 5 pages, which we have numbered [A232-A236], but the attachments referred to in it were not provided to us.

Mrs Napthen said that she had received this document previously and had no objection to it being included in the hearing file and relied upon by the Manager.

32. It was not in dispute that the clause 3(1)(g) of the lease imposes an obligation on the lessee to pay certain costs incurred by the Manager in connection with recovery of arrears or other breach of covenant.

It was also not in dispute that clause 3(1)(h) of the lease obliges the lessee to pay to the Manager interest, at the rate of 4% above the base rate of Midland Bank Plc if sums due to the Manager are not paid within 21 days becoming due.

33. Despite direction 15.2 the Manager did not provide any evidence that it had incurred any of the costs claimed relating to arrears or to debt recovery. Ms Melling confirmed that no invoices had been issued by Gateway to the Manager in respect of any of the sums claimed. Ms Melling did not know what contractual arrangements, if any, existed

which obliged the Manager to pay the sums claimed to Gateway. Ms Melling said that the sums claimed were debited to Mrs Napthen's account by Gateway as part of its internal credit control procedures. Ms Melling was not aware of any contractual arrangements which obliged the Manager to pay these sums to Gateway in the event that they were not recovered from Mrs Napthen.

34. The Manager was unable to provide any compliant demands given to Mrs Napthen in respect of any of the administration charges claimed. Some demands were provided, examples are at [A201, A203, A204] but these were not compliant demands. First on the face of the demand it was asserted that the landlord was Bowers Park Residents Association Limited and an address for service of notices was given, but the landlord is not Bowers Park Residents Association, but Swan Housing Association. Secondly we were told that the demands as sent out would have had printed on the reverse side a summary compliant with The Administration Charges (Summary of Rights and Obligations)(England) Regulations 2007 SI 2007 1258. However the sample copies produced by Ms Melling from the file showed this not to be the case. Instead the demand had been printed on the reverse side with a summary which may have been compliant with The Service Charges (Summary of Rights and Obligations and Transitional Provisions)(England)Regulations 2007 SI 2007 1257.

Paragraph 4(1) of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 makes provisions with regard to notices to accompany a demand for the payment of an administration charge. Paragraph 4(3) provides that a tenant may withhold payment of an administration charge which has been demanded if paragraph 4(1) is not complied with in relation to the demand.

35. The above points are sufficient reasons for us to find that none of the administration charges claimed by the Manager are payable by Mrs Napthen. However, it may of assistance to the parties going forward if we make some brief comments about some of the charges claimed.

36. **Legal expenses £300**

Direction 15.2 required the manager, amongst other things, to set out all matters relied upon that the amount of the charge was reasonable. The Manager failed to comply with this requirement. All that the manager has done is set out a time line of the tasks undertaken, not all of which are directly related to the recovery of arrears. Although the charge-out rate is said to be £120 per hour +VAT no information is given as to the legal qualifications and status of the fee-earner who undertook the various tasks. The inference from what little information was given is that the persons concerned do not have legal qualifications.

The tasks undertaken appear to be limited to sending three chaser letters, an enquiry at Land Registry (purpose unclear), a notification to mortgage lenders (purpose unclear) and taking instructions.

Further, the charge was evidently raised on 15 January 2013, some six months before the court proceedings were issued.

There is no clear breakdown to show how the sum of £300 was arrived at and thus in any event we could not be satisfied that it was reasonable in amount.

37. **In-house Legal Expenses re Summons £180**

There is no express explanation of how this sum has been arrived at or what tasks were undertaken, when or by whom.

The time line at [A234] continues to set out a number of tasks down to the preparation of the hearing files for the tribunal hearing.

The vast majority of the tasks listed relate to the court proceedings and the subsequent tribunal proceedings.

The costs of the court proceedings are a matter for the court.

The tribunal has determined that none of the costs incurred by the Manager in connection with the tribunal proceedings are to be regarded as relevant costs to be taken into account in determining any service charges payable by Mrs Napthen.

At the conclusion of the tribunal hearing both parties were asked if they had any application to make as regards costs and neither party wished to make any such application.

38. **Interest £50.42 and £86.58**

The Manager was unable to explain how these sums had been calculated. They have been included in the court proceedings but the demand for them addressed to Mrs Napthen [A203] post-dates the issue of the court proceedings.

39. **Court fees £95 and £40**

These are matters for the court.

40. **Section 146 Notice Fee**

This is perhaps the most concerning fee. Evidently a section 146 notice was served, not upon Mrs Napthen, but on her mortgage lenders. It was served in November 2013 when the court proceedings were current and when the Manager was aware that the claim was a contested claim. The notice was served by the Manager, but the Manager is not the landlord. Section 146 Law of Property Act 1925 makes it plain that only a lessor, a landlord, can serve a notice pursuant to the section.

41. Despite close questioning Ms Melling was unable to provide any or any satisfactory explanation as to why the notice was served on the mortgagee lender or what proper purpose the notice was intended to

achieve. All that Ms Melling was able to say was that it was sent in accordance in with in-house credit control procedures.

42. We have no hesitation in making plain that to give such a notice in such circumstances is reprehensible and wholly inappropriate.
43. In its letter dated 14 August 2014 Gateway Property Management stated that this charge has been removed from the account.

Fees and costs

44. There were no applications for reimbursement of fees or in relation to costs and we have recorded this for the sake of good order.

Next steps

45. The next step is for the file to be returned to the court along with this decision so that the court is well-placed to make such further determinations as may be appropriate.

Judge John Hewitt
18 August 2014