



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

Case Reference : **BIR/OOCU/LIS/2015/0006**

Property : **26 Parish Court, 1 Church Place,
Walsall WS3 3HQ**

Applicant : **Church Walk (Bloxwich) Management
Company Limited**

Representative : **Mr A Tolson (Counsel)**

Respondent : **Mrs A Ogunlokun**

Representative : **None**

Type of Application : **Service Charge and Administration Charge**

Tribunal Members : **Judge D Jackson
Mrs S Tyrer MRICS**

**Date of venue of
Hearing** : **Priory Court Birmingham**

Date of Decision : **28 April 2015**

Permission to Appeal

The Respondent has by email dated 11th June 2015 applied for permission to appeal to the Upper Tribunal.

I give the Respondent permission to appeal on limited grounds.

I give permission in relation to that part of the decision which relates to the construction of the Lease and the finding that, notwithstanding the defect in the Lease referred to in paragraphs 13- 17 of the Decision, the Apartment Charge Proportion is 3.7037%.

Permission to appeal is refused in relation to other grounds to the extent that they can be identified from email dated 11th June 2015. The Lease produced is a Land Registry Office Copy of the lease referred to in the Property Register of Respondent's Title number WM 933737. The Tribunal was entitled to make findings of fact as set out at paragraph 27(f) of the Decision in relation to Management fee.

I do not review the Decision under Rule 55 as I am not satisfied that the limited ground of appeal is likely to be successful merely that it is arguable.

Judge D Jackson

Judge of the First-tier Tribunal

Dated: 29 June 2015



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DECISION

BACKGROUND

1. Page references in this Decision are to Applicant's Statement of Case Bundle Index.
2. The Applicant has issued a claim in the County Court against the Respondent (P72-73). The claim relates to failure to pay service charge of £2011.95 for the period 1/1/12 to 31/12/14. The Applicant also claims administration charges of £240 and legal costs of £677.50. The Respondent has filed a defence and counterclaim (p74-75).
3. On 30/12/14 the County Court transferred the case to the First-tier Tribunal for determination (p77).
4. On 11/2/15 the Tribunal issued Directions (p11-15).
5. The landlord is E and J GR Properties No 2 Ltd (p24-30). The Applicant Church Walk (Bloxwich) Management Co Ltd is the Management Company for the development. The Applicant has appointed Mainstay as their agent. The Respondent is the leaseholder (p17-23).

INSPECTION

6. The Property is a 2 bedroom first floor flat on a development totalling 27 flats all set within seven ground and first floor blocks. These are shown on the plan at page 71.
7. The Tribunal inspected the external and internal communal areas on the morning of the hearing.
8. The flats at Parish Court were built in 2007/8. The buildings were constructed with the benefit of a warranty and the structure of the building remains at present covered under this warranty. The exterior of the block appears to be adequately maintained and in good condition, with the exception of the flashing above the entrance canopies to two of the blocks (but not the block within which the Property is situated). The blocks are constructed around a central forecourt with allocated car parking spaces, communal gardens, grassed areas and two bin stores. These areas appeared to be well and consistently maintained.
9. The communal entrance hall, staircase and landing showed evidence of anti-social behaviour. Despite bi-weekly cleaning the areas were unclean with evidence of smoking and the deposit of rubbish and debris in the entrance hall. Pellet holes were evident which had damaged the glazed panels of the entrance door. On inspection it appeared that these had originated from a firearm fired from within the property. A number of other entrance doors to neighbouring blocks were also damaged in the same way. The door entry system and magnetic locks had been broken and unorthodox bolts had been fitted to a fire door. We were advised that drug and antisocial behaviour had been reported at the development. The electric wall heaters in the entrance hall were damaged and had been set alight. We were advised by Ms Darrheh from Mainstay that there had been thefts of the wall heaters in the past.

THE LEASE

10. The Respondent is the original tenant who purchased the flat prior to the completion of the construction "off plan" in 2007. A copy of the Lease is at pages 40-70. The Lease refers to Plot 25 Church Walk, Site B, Bloxwich. We find that Plot 25 ultimately became 26 Parish Court, 1 Church Place, Walsall.

11. At clause 2.1 the Tenant covenants to observe and perform the covenants in Schedule 7. In particular paragraph 6 of Part Two of Schedule 7 contains a covenant to pay the Landlord or the Management Company as the case may be the Apartment Charge Proportion of the Apartment Expenses.
12. Schedule 5 sets out the wide range of services comprised within Apartment Expenses. Schedule 6 deals with Payment of the Apartment Expenses. In summary this provides for payment in advance on 1st January and 1st July of one half of the estimated Apartment Charge Proportion of the Apartment Expenses. Any balance of actual expenditure in excess of the estimate is payable within 21 days of Accountant's Certificate.
13. The Lease is defective. Definitions and Interpretation (p44) contains a pair of square brackets where the % figure for Apartment Charge Proportion should be.
14. Mr Tolson confirmed that no application for rectification had been made. However that does not relieve the Tribunal of its duty to construe the Lease. In Mr Tolson's submission the fact that no % has been filled in does not mean that the Apartment Charge Proportion is nil. Mr Tolson submits that the appropriate figure is 1/27th or 3.7037%.
15. The Respondent did not seek to argue that no service charge was payable. Her case is that the amount is excessive. She felt a figure of £800 p.a. was reasonable. When asked at the hearing as to whether 1/27th was reasonable the Respondent was unable to put forward any other basis on which the Apartment Charge Proportion was to be determined.
16. We have to construe the Lease contra proferentem. We have to give business efficacy to the document and determine the intention of the parties so far as we are able from the wording of the document itself. Of course the Respondent was one of the original contracting parties and it is not her case that no service charge is payable.
17. We find that the only sensible construction of the Lease is that the Apartment Charge Proportion is 3.7037%.

SERVICE CHARGE

18. The Respondent in her email communications raises issues about historic service charge disputes and in particular the action taken by the Applicant to arrange for arrears to be settled by her mortgage lender. Although the counterclaim in the County Court is by no means clear the Respondent told the Tribunal at the hearing that the sum of £3000 claimed by her (p75) relates to monies paid by her mortgage lender directly to Mainstay/the Applicant. The Tribunal is not concerned with the counterclaim save to the extent it amounts to a set off or otherwise means that the service charges for the period under consideration are not payable. We are quite satisfied that there is no set off here. We have to determine solely the question of service charge for the period 1/1/12 to 31/12/14, which is the issue, sent to the Tribunal for determination by the County Court. We find that disputes about service charges prior to that period do not amount to a set off or other reason as to why service charge for the relevant period is not payable. We have no jurisdiction to consider matters prior to 1/1/12.
19. At paragraph 19 of Applicant's Statement of Case solicitors set out the disputed items. They are deficit of Apartment Service Charge for year to 31/12/12, Apartment Service Charge for the period 1/7/13-31/12/13, Apartment Service Charge for the period 1/1/14-30/6/14, deficit of Apartment Service Charge for year to 31/12/13 and Apartment Service Charge for the period 1/7/14-31/12/14.

20. Pages 78-106 contain the relevant demands for payment and Financial Statements prepared by Ormerod Rutter, Chartered Accountants. Financial Statements have been prepared for years to 31/12/12 (p80-86) and to 31/12/13 (p98-102).
21. No Financial Statements have been prepared for year to 31/12/14 and the Applicant relies on obligation in paragraph 3.1 of Schedule 6 to pay an estimated amount.
22. We find that the provisions of Schedule 6 have been complied with in terms of demands and certification. The Respondent at the hearing denied receiving demands for payment. However she confirmed her address on the demands was correct and further conceded that she had received numerous solicitors' letters and communications from debt collection agencies in relation to arrears. We did not find the claim made by the Respondent that she had not received written demands to be credible. Her claim is inconsistent with acknowledgement of receipt of other letters relating to arrears. We find as fact that written demands have been sent to the Respondent in the terms of the copies produced by the Applicant in the bundle.
23. We find that for the purposes of s27A of Landlord and Tenant Act 1985 that the Respondent is liable to pay service charges for the period 1/1/12-31/12/14 to the Applicant.
24. In accordance with Directions of 15/2/15 the Applicant has made disclosure of 3 lever arch files containing all relevant invoices in support of service charge expenditure on Apartment Expenses under Schedule 5 for the relevant period.
25. The Respondent has failed to substantially comply with Directions. She has produced a Response to applicant's statement by email of 8/4/15. She has also produced further emails on the day before the hearing. However she has entirely failed to identify any items of expenditure in dispute and has failed to produce any evidence to substantiate her contentions as directed at paragraph 4 of Directions.
26. We prefer the evidence of the Applicant. The service charge demands are well supported by the invoices in 3 lever arch files. For a substantial part of the period for consideration independent accountants have prepared Financial Statements. We do not find the emails from the Respondent to be persuasive. She deals with historic disputes and matters of complaint which are outside the jurisdiction of the Tribunal. She has failed to identify which items of expenditure are in dispute and has not produced any evidence to support her contentions.
27. At the hearing the Respondent when pressed did identify the following disputed items:
 - a) Gutter cleaning. Although budgeted for in 2012 no charges were incurred (p83). In 2013 the total incurred was £150 (p101). We find this amount to be entirely reasonable bearing in mind the size of the development.
 - b) Gardening. In both years costs were £1503. The Respondent claimed £700 was reasonable. The charge of £1503 is about £30 per week. There are grass and planted areas at the property. They are small in size but there are a significant number of grassed and planted areas spread over the development. We find the charges incurred are reasonable based on what we saw at inspection and the likely charges of a contractor to maintain the grassed areas at this development.
 - c) Contribution to Reserves. We find the amount reserved for both sinking fund and cyclical maintenance is reasonable in amount and recoverable under paragraph 26 of Schedule 5 to the lease (p56).
 - d) TV and satellite maintenance. There was no expenditure in 2012 and £354 in 2013. Over a 2 year cycle we find this sum reasonable.
 - e) Cleaning. This was £1512 in 2012 and £1657 in 2013 both below a budgeted figure of £1800. We were told at the hearing that there is a bi-weekly clean.

The Lease plan at page 7 shows the extent of the common areas of the seven blocks at both ground and first floor level. Cleaning costs are inevitably higher than they would otherwise have been due to antisocial behaviour. We find these sums to be reasonable.

- f) Management fee. The Applicant has appointed Mainstay as agents. The fees were agreed at the outset with a fixed 3% annual increase. Fees in 2012 were £6510 on a net expenditure of £27270 and £6650 in 2013 with net expenditure of £32724. This equates to approximately £200 plus VAT per flat which, in normal circumstances, we would regard as above what was reasonable for this type and size of development. However here we find higher fees are reasonable having regard to high level of antisocial behaviour that makes management of this development intensive and challenging.

28. The Respondent submits that a service charge of £800 per annum is reasonable. Whilst the amount of expenditure is higher than the Tribunal would expect for a development of 27 flats the expenditure has been adequately supported by receipts. In addition antisocial behaviour by residents and their visitors will significantly increase costs. We find that service charges for 2012 and 2013 as demanded in accordance with Financial Statements prepared by independent accountants is payable by the Respondent to the Applicant in accordance with s27A Landlord and Tenant Act 1985.

ADMINISTRATION CHARGES

29. Paragraph 19 of Applicants Statement of Case at page 7/8 identifies three "Late Payment" fees each of £48 and a "Debt Collection Referral" fee of £96, totalling £240.
30. Ms Darreh of Mainstay said that the directors of Mainstay set fees. The fee of £48 covered a single letter. The fee of £96 covered a single letter containing instructions to debt collection agency.
31. Mr Tolson conceded that there was no express provision in the lease covering administration fees. He also conceded that paragraph of Schedule 7 (P58) was a covenant enforceable only by the landlord. He relies on clause 2.1 at page 46. His submission was that failure to pay service charge was a breach of covenant and that the liability of the Management Company was for legal costs in recovering outstanding service charges.
32. We are not persuaded by Mr Tolson on this point. Clause 2.1 does not bear the construction he seeks to place on it. It is an indemnity clause which does not extend to the recovery of fixed sums for breach of covenant. We note that paragraph 26 of Schedule 7 (p63) does refer to administration charges for consents. However we find that there are no provisions in the Lease which permit recovery of late payment or debt collection referral fees.
33. In any event if we are wrong in our construction of the Lease we find the fees claimed in each case for a single letter are excessive and we find that £10 for late payment and £20 for a referral to a debt collector to be reasonable.

COSTS

34. There is also a County Court claim for costs of £677.50. Mr Tolson submitted that these costs were neither service charges nor administration costs. In his submission costs were a contractual matter for the County Court. We agree.

DECISION

35. Service Charges for the period 1/1/12 to 31/12/14 in the sum of £2011.95 are payable by Mrs Ogunlokun to the Applicant.
36. Administration Charges of £240 are not payable by Mrs Ogunlokun to the Applicant.
37. Legal Costs are remitted to the County Court for determination.
38. A right of appeal against this decision lies to the Upper Tribunal. A person seeking to appeal must make written application to the First-tier Tribunal which must be sent or delivered to the Tribunal within 28 days of the date that the Tribunal sends to the person making the application written reasons for the decision. Any application must identify the decision of the Tribunal to which it relates, state the grounds of appeal and state the result the party making the application is seeking.

Judge D Jackson

Judge of the First-tier Tribunal

Dated: 28 May 2015