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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BH/LSC/2015/0104**
Property	:	**Flat 5, Orchard Court, 239 Shernhall Street, London E17 9EB**
Applicant	:	**Mr Harjit Singh**
Representative	:	**Mr Qalab Ali of Hexagon Property Co Ltd**
Respondent	:	**Mr Eric Bondzie**
Representative	:	**In Person**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Tribunal Judge Richard Percival** **Mr Michael Mathews FRICS**
Date and venue of Hearing	:	**6 July 2015** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**10 August 2015**

DECISION

The application

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Respondent in respect of the service charge year ending in April 2014 and for the period from April to December 2014.

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

The hearing

3. The Applicant was represented at the hearing by Mr Qalab Ali, of Hexagon Property Co Ltd. The Respondent appeared in person.

4. At the start of the hearing, the Applicant handed up copies of the budget summaries and service charge demands for the service charge years ending in April 2014 (under cover of a letter dated 22 April 2013) and April 2015 (letter dated 26 June 2014). Mr Ali explained that they had been left out of the bundle by an oversight. The Respondent did not object to us receiving the documents.

The background

5. The property which is the subject of this application is a flat in a purpose built, two storey block built in the 1930s ("the building"). The flat is situated on the upper floor. Access is by an external staircase and a balcony. No inspection was necessary.

6. During the course of the hearing, we were told that seven of the eight leaseholders sub-let their flats on short tenancies, including the Respondent.

7. The Respondent holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge.

8. The lease includes a lessor's covenants to repair, to clean and light communal areas and to insure the building (clause 3(1) to (4)), and a corresponding lessee's covenant to contribute towards a service charge based on one eighth's of the lessor's expenses. The lease includes provision for £200 to be paid in advance on account of the service charge each year (clause 3(ii)(e). In addition, it effectively makes provision for service charge demands to be made in advance where the expenditure is of a "periodically recurring nature" (clause 3(ii)(d)).

9. In 2014, all of the leaseholders had challenged service charge demands made in respect of major works to replace the roof of the building. In a decision dated 12 June 2014, the Tribunal found for the landlord (LON/00BH/LSC/2014/0081). In the course of the decision, the Tribunal construed the terms of the lease as indicated in paragraph 8 above.

10. Subsequently, the leaseholders took steps to establish the right to manage under Commonhold and Leasehold Reform Act 2002, and a challenge to the process was dismissed by the Tribunal (LON/00BH/LRM/2014/0023). It was agreed that the operative date for the transfer of management responsibilities from the previous managing agent (and landlord's representative before us) was 8 December 2014.

The issues

11. At the start of the hearing the parties identified the relevant issues for determination as follows:

    (i) applications by the Respondent to adduce oral evidence;

    (ii) the amount of service charges payable by the Respondent in respect of the service charge year ending in April 2014 and for the period from April to December 2014 (the Scott schedule);

    (iii) the Respondent's claim for, in effect, set-off in respect of damage caused to his flat by the original failure to keep the roof in good repair: and

    (iv) whether the Tribunal should make an order under section 20C of the 1985 Act;

    In addition, the Applicant made an application for costs under the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the Procedure Rules"), rule 13.

Witnesses

12. Mr Bondzie applied to adduce oral evidence from three witnesses. No witness statements in respect of the evidence sought to be adduced were in the bundle.

13. The first proposed witness was the Respondent's sub-tenant in the property. He sought to introduce her evidence to support a solicitor's

letter and schedule produced for the purposes of litigation between the sub-tenant and the Respondent. He was content not to pursue the application on the basis that the letter and schedule had been included in the bundle.

14. The other two proposed witnesses were the leaseholders of other flats in the building, Ms Lewin and Mr Lightwalla. The Respondent maintained that statements (in some form) from both had been sent to the Applicant. The Applicant agreed that an email had been received from Mr Lightwalla, but denied that anything had been received from Ms Lewin. The email from Mr Lightwalla, containing his proposed evidence, had been received out the time limit set at the case management conference, and so was not included in the bundle by the Applicant.

15. Witness statements should have been properly and timeously submitted in respect of both proposed witnesses. However, having regard to the fact that the Respondent was acting in person and that at least an attempt to serve a statement had been made in respect of Mr Lightwalla, we agreed to hear his evidence. Should it be necessary, we said we would accommodate Mr Ali by way of adjournments or otherwise if new material came to light from Mr Lightwalla. In the event, it was not necessary to do so – Mr Lightwalla's evidence amounted to a small number of interventions which supported the Respondent's evidence, and for the most part it has not been necessary to separately identify it. We declined to admit Ms Lewin's evidence.

The Scott Schedule

16. In accordance with the directions, the parties had compiled a Scott schedule setting out those items in respect of which service charge was contested. The sums in the "cost" column were for the building as a whole, and we have persisted in using these costs hereunder, rather than the eighth part attributable to the Respondent. In each case, the issue was as to the reasonableness of the charge. There was no challenge to the right of the landlord to recover costs of the relevant description under the lease.

17. As a result of exchanges in advance of the hearing or at the hearing, the Respondent withdrew his objection to a number of items originally contested, specifically the building insurance, the asbestos survey, the installation of a notice board, and book keeping and preparation of certificates for service charge purposes.

18. The remaining issues related to a charge for unblocking a drain, management fees, communal cleaning and accountancy fees.

19. The prospective service charge demand for April 2013 to April 2014 included £846 for unblocking a drain. The invoice showed that the work done had involved high pressure jetting and the taking of a CCTV video of the drain.

20. The drain concerned was an uncovered waste water drain in the courtyard of the building. The Respondent's evidence was that drains generally were uncovered and blocked with vegetation and, in some cases, cement or other detritus. There had been a previous charge for the same service. The Applicant did not seriously contest that the drains were in a bad state of repair. He said that the work charged for had been effective for a period, and were still working "to an extent". But he said that the entire drainage system was, as he put it, "knackered" and needed major works to bring it up to a state of proper repair. The Applicant had not started a consultation process in relation to these major works, but would do so in the future. It had nonetheless been necessary to jet the drain to alleviate the immediate problem, and to allow a CCTV survey to be carried out. He confirmed that a grill had not been put on the drain after the jetting, that the tarmac in the area was in a poor state of repair, and there was vegetation growing through it at points. It was agreed that the drain had been jetted in 2012 at a cost of £525.

21. The Tribunal put to the Applicant that some medium level repairs could have been attempted, between mere clearing (and exploration, via the CCTV). The Applicant's response was confined to the contention that major works were necessary, and that the jetting was necessary in the short term.

22. The Tribunal concludes that the cost of the work undertaken was reasonable in the sense that the cost was appropriate for the work undertaken. However, it was not reasonably incurred in the absence of any attempt to prevent the blockage recurring. The Applicant could and should have undertaken the very basic work necessary to prevent the drain becoming blocked again within a short time, such as making good the surface and removing the vegetation.

23. *Decision*: the cost of the unblocking of the drain charged in the 2013/14 service charge (£846) was not reasonably incurred.

24. As regards management costs, the Applicant contended that, at £200 plus VAT per unit, the management fees were in line with industry standards and were reasonable. The work undertaken included compiling budgets, issuing demands, undertaking major works planning and consultations, dealing with repairs, keeping track of income and expenditure and so forth. Management tasks were performed to a reasonable standard.

25. The Respondent's case was that the fee would have been reasonable for a satisfactory service, but the service was not satisfactory. The leaseholders were not adequately consulted and proper information was not provided, the cleaning and other services were inadequately supervised, there had been inadequate follow-up to a health and safety report undertaken in 2011, and particular repairs had not been done proportionately or timeously (one example cited was a repair to a cold water tank).

26. In his response, the Applicant in truth shifted his position to say that if there were deficiencies in the management of the block, these were the fault of the leaseholders and their tenants, not the managing agent or freeholder. The "standard of living" of the tenants at the block was very poor (by which we took the Applicant to mean that the tenants were either impoverished or anti-social or both), and the leaseholders were not managing their tenants properly.

27. Mr Ali also said that it was difficult to manage the property properly when the leaseholders withheld service charges. Although the Respondent was the worst at maintaining payment, others also fell into arrears. Three leaseholders were in arrears currently. Mr Ali's answer to challenges to the quality of management, both in relation to this item in the Scott schedule and in response to other complaints during the course of the hearing, was frequently that the matter could not be dealt with because the leaseholders had not provided payment in advance to cover the expenditure.

28. The photographs provided of the property in the bundle confirm the evidence that the block generally was in a poor state. Rubbish, including large items like discarded furniture, was apparent in the (open) courtyard and on the balconies, and minor disrepair was evident.

29. The general impression, from the evidence of both parties, including the photographs, was of a block that was badly maintained and, no doubt, was difficult to maintain. In terms of the residential market, the block clearly occupies a position towards the bottom end of the private rented sector.

30. This no doubt means that it is a challenge to manage. In the end, the Applicant was not really contesting that management was poor, but rather was attempting to shift the blame to the leaseholders.

31. That the leaseholders are difficult, and that that difficulty extends to paying their contribution to the service charge, is no doubt relevant. However, the freeholder's obligations require it to provide what is, in the circumstances, proper management of the property. That some of the leaseholders are in arrears of service charge does not automatically make it reasonable for the freeholder to decline to perform basic

management functions. This is a difficult block. That means it requires more and better management, not that it is acceptable for the management to be poor.

32. *Decision*: The management of the block was sub-standard in all the circumstances. We consider that the management fee should be reduced to reflect the level of service to £960.00 rather than £1,920.00 for the service charge year April 2013 to April 2014; and £644.38 rather than £1,288.77 for the period from April to December 2014 (subject to demand).

33. In respect of communal cleaning, the Applicant provided a witness statement from the contractor, Abrar Khalid. He states that the block was cleaned once a month, and comprised sweeping of the balconies, stairs and forecourt, wiping down the doors, clearing litter and rubbish and cleaning windows up to the level of the first floor. In all, the work took three hours each month.

34. The Respondent's case was that the cleaning was to an inadequate standard. This in turn relied on two claims. The first was that the state of the property showed that the cleaning was inadequate. The second was that, in fact, cleaning was not undertaken every month, as claimed.

35. In respect of the first, it was the evidence of both parties that the building, and in particular the courtyard or forecourt, was frequently bestrewn with rubbish. But the evidence that the rubbish was not cleared monthly was slim.

36. In respect of the frequency of visits, the contention that the cleaners did not visit regularly rested on the Respondent's evidence, and that of Mr Lightwalla, that they had (respectively) only rarely, or never, seen the cleaners. However, both lived elsewhere, and Mr Lightwalla agreed that his regular visits were usually in the evening.

37. As the parties agreed, there was an often unacceptable level of rubbish at the property. Monthly cleaning was insufficient, a point we have taken account of in respect of our decision on the quality of management. However, that does not render the cleaning that was done unreasonable. The evidence that cleaning was less frequent than monthly is not compelling, and we reject it.

38. The cleaner's witness statement makes it plain, however, that they charge £40 for "machinery and plant" and £30 for "materials". Bearing in mind the description of the work undertaken, which we set out above, we consider this to be clearly excessive.

39. *Decision*: The claims for cleaning are generally reasonable. The amounts claimed for machinery and plant and materials by the cleaner

are, however, excessive. Accordingly, we consider that each should be reduced by 50%. The sum claimed for each visit as set out in the Scott schedule should be reduced by £35, but are otherwise payable by the Respondent.

40. The Scott schedule relating to the period from April to December 2014 includes two items for accountancy fees for preparation of the service charge accounts. Each is for £960.00. It transpired during the hearing that one was in respect of the accounts for the year ending in April 2014, and one for the April to December period.

41. The Respondent submitted that while the fee was in principle reasonable, the accounts had not in fact been prepared. The Applicant explained that the accountants had undertaken the work required, but would not release the accounts until their fees were paid in full; and the managing agent would not forward the fees until they were collected in full from the leaseholders.

42. We asked the Applicant why, as is normal with professional services, the service was not provided and then fees demanded. Mr Ali explained that they had informed the accountants that their fee would not be paid until the contributions were collected from the tenants, and their response had been to require advance payment before releasing the accounts.

43. *Decision*: It is not contested that the fees are reasonable, and we find that they are reasonably incurred. Both are accordingly payable by the Respondent. To the extent that the objection is to the failure of the landlord to secure that the accounts are finalised, regardless of the collection of all of the service charge contributions, we have taken that into account when considering the reasonableness of the management fee.

Set-off

44. The Respondent claimed that his flat had suffered internal damage as a result of water ingress during the major works to the roof. The damage was caused by inadequate protection of the roof during the works by the Applicant's contractor. While some repairs had been done to the flat, they were inadequate. He had, he said, provided the Applicant with an invoice for some £4,500 in respect of the damage.

45. It is open to the Tribunal to exercise our discretion to determine the issue on the basis outlined in *Continental Property Ventures Inc v White* [2007] L&TR 4, as in effect a claim for damages for breach of covenant that constituted a defence to a service charge in respect of which our jurisdiction under section 27A of the 1985 Act has been invoked.

46. However, it was clear that the determination of the issue would depend on questions of fact relating (at least) to the cause of the damage, its extent and the efficacy or otherwise of the repairs undertaken by the Applicant. No evidence had been exchanged on these matters. It was clearly hopeless to ask us to determine the question on such a basis.

47. *Decision*: the Tribunal could not determine the Respondent's submission by way of (in effect) set-off.

Section 20C of the 1985 Act

48. The Respondent applied for an order under section 20C that the costs of these proceedings should not be relevant costs for the purposes of calculation of a future service charge demand.

49. In support of the application, the Respondent merely said that he had not been given a demand for any fees.

50. The Applicant argued that it had been necessary to make the application. The Respondent had not paid any of the service charge demanded. He should have paid the charge and then challenged it, or at least that which he agreed was reasonable.

51. We should be slow to shut a landlord out of a contractual right to charge legal costs unless it is fair and equitable in all the circumstances to do so. It is true (which was unknown to the parties at the time) that on contested matters, the Respondent has been reasonably successful before us. However, he did agree a number of issues in advance of the hearing, which limits the extent of his success to a degree. Moreover, we agree that the application was not ill-advised.

52. We did not hear developed submissions on whether the lease would allow the recovery of legal costs, and make no finding whatsoever on that question.

53. *Decision*: We make no order under section 20C of the 1985 Act.

Costs

54. The Applicant made an application for costs under rule 13 of the Procedure Rules.

55. The Respondent had been unreasonable, the Applicant argued, first for the reasons set out in response to the Respondent's section 20C application, and secondly (in effect) in his conduct as a tenant. Neither comes close to satisfying the high threshold for unreasonableness under the Procedure Rules.

56. *Decision*: We make no order for costs.

Name: Tribunal Judge Richard Percival **Date:** 10 August 2015

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.

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 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

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.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
- (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
- (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
- (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
  (a) specified in his lease, nor
  (b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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 matter of an application under sub-paragraph (1).