12343

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/24UJ/LSC/2017/0007
Property	:	Flat 3, Kings Court, Kings Road, Lymington, Hampshire SO41 9GS
Applicant	:	Mrs Diane Chidsey
Representative	:	Mr John Gray
Respondent	:	Dant Estates Limited
Representative	:	Mrs Elizabeth Alexandra Rathbone (Director and lessee of Flat 4)
Type of Application	:	Liability to pay service charges
Tribunal Member(s)	:	Judge D Agnew Mr P D Turner-Powell FRICS
Date and venue of hearing	:	11th July 2017 at Southampton Magistrates Court
Date of Decision	:	25 July 2017

DETERMINATION

Background

1. On the 11th January 2017 the Applicant who is the long lessee of Flat 3 Kings Court, Kings Road, Lymington, Hampshire SO41 9GS ("the Property") applied to the Tribunal for a determination under section 27A of the Landlord and Tenant Act 1985 ("the Act") as to the payability of service charges sought by the Respondent Landlord for the periods ended 4th November 2014 and 2015. The Applicant also applied for an order under section 20C of the Landlord and Tenant Act 1985 that the Respondent should not be allowed to seek the costs of this application by way of any future service charge, an order for re-imbursement of fees and an order for costs in respect of her postage charges.

2. Directions were issued on 24th January 2017 requiring, amongst other things for the parties to serve statements of their respective cases which were complied with and the case came before the Tribunal for hearing on 11th July 2017.

Inspection

3. Although the Tribunal did Inspect the property immediately prior to the commencement of the hearing on 11th July 2017 when the Applicant and her representative, Mr Gray, were present, as will be evident from subsequent paragraphs of this decision, the condition of the premises was not in issue in this case.

4. For the record, however, the Tribunal found that the Property is one of 4 flats in a quiet residential part of Lymington. Before being let on long leases the building was used as flats for nurses. The fabric of the building appeared to be in fairly good order although the exterior render to the walls is in need of attention. The small garden and shrub hedge to the front was neat and tidy. The driveway to the rear where there is one parking space per flat is in good condition. The communal hallway and staircase were clean and reasonably decorated and the tiled floor is in good order. One slightly unusual feature is that there is a single storey dwelling which is attached to the building containing the flats but it would seem that this property is not liable for and does not contribute to any of the outgoings in respect of the 4 flats in the main block.

The issues

5. The Applicant's case is that the Respondent is completely ignoring the provisions of the lease and statutory provisions in respect of service charges. She says that the Landlord has failed to provide service charge accounts, has failed to deal with any surplus of payments over expenditure correctly, has failed to provide supporting documentation in the form of invoices and insurance cover for expenditure until

ordered to do so by the Tribunal, has failed properly to demand payment of service charges, that a statement of expenditure has not been done on an accruals basis and that the service charge year does not conform to the lease.

6. Included in the list of expenditure that the Respondent wishes to recover from the Applicant are two items that the Applicant says should have been included in service charges for periods which pre-dated her ownership of her flat. They are, specifically, two invoices totalling £410 the invoices for which were rendered in October 2013 and repayment of a loan made by Mrs Rathbone to the Landlord company (of which she is a Director) in 2011 or 2012 for repair of a damaged door. If these two items had been accounted for properly they would have been the liability of the Applicant's predecessor as lessee and not herself.

7. The final item in dispute concerns the buildings insurance premium that the Respondent seeks to recover from the Applicant. This includes cover for loss of rent suffered by the landlord in the event of the building being severely damaged or destroyed. The Applicant says that she should not be required to pay for this cover.

8. In response to the application, Mrs Rathbone candidly accepted that the Respondent had never issued any proper service charge accounts or service charge demands that complied with the various statutory requirements which are set out below. She explained that originally she had owned all 4 flats. One was subsequently let to her son who lives in New York. She, her son and Mr and Mrs Welch (who are the long leaseholders of Flat 2 which they let out) share the same approach to the management of the building. They seek to do so by agreement incurring as little cost as possible. They have never had much regard to the content of the leases. Mrs Rathbone simply makes a list of all the expenditure that has been made during the year to 4th November (which historically was the date when she did this), there would be an informal meeting of the residents to agree what works would need to be done and how much would need to be paid to cover this. Initially it was considered that £80 per month should be sufficient to cover routine expenditure and an amount to be set aside for internal redecoration or other more major items of expenditure in the future. Either she or Mrs Welch would seek estimates for the cost. Mr and Mrs Welch would do some work in the garden for which Mrs Rathbone made an ex gratia payment. She was quite willing to appoint an accountant to produce proper service charge accounts and to appoint a manager to manage the building if necessary but she hoped that the Tribunal would appreciate why the property had been managed as it had and would like if possible for the Tribunal to endorse the wishes of the three lessees other than the Applicant to continue in the same vein thereby keeping costs to a minimum.

The lease

9. The Applicant's lease is a new lease granted to her on 10th March 2014, so she is the original tenant and not an assignee of a lease. The term of the lease is stated to be for 125 years from 24th June 2007. Whilst it is not unusual for a lease to state that the term commences before the lease is executed it is unusual for the term to be backdated by as much as almost 7 years as in this case.

10. By Clause 2(b) of the lease the tenant is to pay the rent and by way of further rent the "Insurance Rent" and the Service Charge, the latter in accordance with Clause 4 of the lease. By Clause 4 the tenant covenants to pay the service charge. Clause 4.3 states that:-
"The Landlord shall as soon as convenient after each Computing Date prepare an account showing the Annual Expenditure for that Financial Year and containing a fair summary of Expenditure referred to therein and upon such account being certified by the accountant to the Landlord the same shall be conclusive evidence for the purposes of this lease of all matters of fact.

11. Clause 4.2 states that the "Computing Date" means 24th June in every year of the term "or such other date as the Landlord may from time to time nominate and "Financial Year" means the period from the commencement of the Term to the first Computing Date and thereafter the period between the two consecutive Computing Dates".

12. By Clause 4.4 "the Tenant shall pay the Initial Service Charge by equal monthly instalments for the first Financial Year". The "Initial Service Charge" is defined in Clause 1.11 as "the sum specified in the Particulars". In the Particulars the Initial Service Charge is stated to be £250.

13. By Clause 4.5 "the Tenant shall pay the Landlord's or the Accounting Agent's reasonable estimate of the service charge for each subsequent Financial Year on account by equal monthly instalments or such other payments dates as the Landlord or the Accounting Agent shall reasonably from time to time prescribe PROVIDED that if the Tenant shall not have received notice of such estimate in respect of any Financial Year it shall on monthly payment dates pay an amount equal to the last monthly payment on account in the previous Financial Year and any requisite adjustment shall be made to the first monthly payment after such notice is given".

14. By Clause 4.6 "if the Service Charge for any Financial Year shall:-
(a) exceed the sum paid by the Tenant pursuant to Clause 4.5 for that financial Year the excess shall be due to the Landlord on demand or
b) be less than the sum paid by the Tenant pursuant to clause 4.5 for that Financial year the overpayment shall be due to the Tenant....and any overpayment shall be credited against the Service Charge due from the Tenant to the Landlord for the next Financial Year."

15. By Clause 1.22 of the lease "Annual Expenditure" includes "such proper provision for services to be rendered in any subsequent financial year as the Landlord shall deem appropriate".

The relevant law

16. *By section 27A(1) of the Act:*
an application may be made to a [First-tier Tribunal (Property Chamber)] for a determination as to whether a service charge is payable be payable and, if it is, 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.

17. By section 18 of the 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 cost of management, and
(b) The whole or part of which varies or may vary according to the relevant costs".

18. By section 19 of the Act relevant costs are only payable to the extent that they are reasonably incurred and of a reasonable standard.

19. By section 21B(1) of the Act:-
"A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges."
There is a prescribed form of notice specified in the Service Charges Summary of Rights and Obligations....)(England) Regulations 2007 (SI 2007/1257).

20. By section 47(1) of the Landlord and Tenant Act 1987:-
"Where any written demand is given to a tenant of premises to which this Part applies, the demand must contain the following information, namely-
(a) the name and address of the landlord, and
(b) if that address is not in England and Wales, an address in England and Wales at which notices (including notices in proceedings) may be served on the landlord by the tenant".

21. By section 48(1) of the Landlord and Tenant Act 1987:-
"A landlord of premises to which this Part applies shall by notice furnish the tenant with an address in England and Wales at which notices (including notices in proceedings) may be served on him by the tenant."
By subsection (2) of that section:-

"Where a landlord of any such premises fails to comply with subsection (1), any rent, service charge or administration charge otherwise due from the tenant to the landlord shall..... be treated for all purposes as not being due from the tenant to the landlord at any time before the landlord does comply with that subsection.

22. By section 20B of the Act:-
"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....the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred".

Discussion and determination

23. The question as to what is meant by the "first Financial Year" under the lease is an important question to answer first of all because the lease provides that the service charge for that year is £250. This is a fixed amount and is not therefore a "variable service charge". Thus, if this fixed charge applies to the first year of the Applicant's lease which was executed in March 2014 then the Landlord would be entitled to receive as a contractual right the fixed sum of £250. In those circumstances the Tribunal would have no jurisdiction to determine the service charge for that year as section 18 of the 1985 Act defines "service charge" in the following provisions (including section 27A of the Act) as "where the whole or part of which varies or may vary according to the relevant costs".

24. What, then, is the "first Financial Year" under the lease? Is it one year from the commencement of the term in 2007 or one year from the execution of the lease in 2014? On balance, the Tribunal construes this as meaning one year from the commencement of the term. It may seem odd that this is so bearing in mind that by the time the lease was executed one year from the commencement of the term had long since passed. However, when the lease is construed as a whole this is the more likely meaning. For example, in Clause 4.2 "Financial Year" is stated to mean the period from the "commencement of the term to the first Computing Date". The Tribunal therefore construes the first Financial Year to be from 24th June 2007.

25. Thereafter the service charge may become variable if the Landlord gives the Tenant an estimate of the Service charge for the subsequent Financial Years and the Financial Year may be such date other than between 24th June in each year as the Landlord may nominate. The Tribunal finds that the Landlord has in effect nominated the financial year to be to the 4th November in each year. The lease does not require this nomination to be in any particular form and the Tribunal finds that by sending the Applicant details of income and expenditure made up to 4th November for 2014 and 2015, the Respondent has in effect nominated that date as the end of the financial year.

26. The Tribunal also finds that the Respondent has, on the balance of probabilities, given the Applicant a sufficient estimate of the likely costs for 2014 and 2015. Although the correspondence with solicitors from the time when the Applicant purchased her flat was not included in the hearing bundle it is clear from the evidence that the Applicant was aware that monthly payments of £80 were required to be paid towards the service charge and that amount was paid by the Applicant throughout the period to November 2015. During that period the Applicant paid 17 instalments of £80 per month indicating that she was aware of the estimate of likely cost by way of service charge.

27. The Tribunal finds therefore, that if and when the sum of £80 per month is demanded by a statutorily compliant demand for the period from March 2014 to 4th November 2015 that sum will be payable by the Respondent on account of the service charge costs for those years. The Tribunal finds that £80 per month is a reasonable sum for the Landlord to require to cover the estimated on-account service charges for this flat for the years in question. As the actual cost did not exceed the estimate section 20B of the Act does not apply (see Gilge v Charlesgrove Securities Limited [2002] 1EGLR 41). The demands will have to comply with section 21B of the Act and sections 47 and 48 of the Landlord and Tenant Act 1987. It was accepted by the Respondent that no statutorily compliant demands for these on-account payments have been made and so this will have to be rectified if the money that has been paid for these two periods can be retained by the Respondent. The Respondent will also be well advised to make compliant demands for the on-account payments for 2016 onwards.

28. The Tribunal finds that the Applicant cannot be responsible under the lease for expenditure incurred before she entered into the lease. Thus, the loan made by Mrs Rathbone to the Respondent for rectification of damage sustained in 2011 or 2012 cannot be debited to the Applicant's account, neither can the costs of £410 for decorating invoiced in 2013.

29. There will be a small surplus on the Applicant's account for 2014 and 2015 and the question is what is to happen to this surplus. The lease does provide for the on-account demand to include a provision for future years' expenditure and the Respondent says that any surplus was intended to go towards the payment of internal decoration that is due to take place shortly. If such a provision is included in the estimate the Tribunal finds that it can be put towards future expenditure as a sinking fund. If it is not, and there just happens to be less spent on estimated regular expenditure than was thought at the beginning of the year, then this should be credited against the lessee's future service charge liability. In a sense, it does not matter to the Applicant because she gets the credit one way or the other. The only time when it matters is if she were to sell her flat having contributed to works in the future of which she has had no benefit if the monies are added to a sinking fund. Having said that, a property where there is such a sinking fund is likely to be more saleable than one without. In this instance as there has been no specific identification of a part of the estimate to go towards a

sinking fund the Tribunal finds that the surplus on the Applicant's account should be set against the service charge liability for 2016. This will mean that when the decorating is done and proper demands made for payment by way of service charge, the Applicant will not have any monies in reserve to put towards this expenditure, although she will have had less to pay for the 2016 year.

30. As far as the insurance premium is concerned, the Tribunal finds that the cover for 2015 and 2016 was excessive in that it included cover for loss of rent by the Landlord and loss of book debts. It is unreasonable for a lessee of a flat in this block to contribute towards such cover for the landlord. However, the Applicant was unable to bring forth any evidence that this excessive cover affected the premium charged, and, if so, in what amount. The Tribunal has no way of being able to put a figure on this: to do so would be just to pluck a figure out of the air which it cannot do. The Tribunal notes that this cover has been excluded from the insurance for 2016. It cannot, however, find that the premiums charged were unreasonable without evidence as to what amount if any has been paid extra for the loss of rent and book debts cover.

31. The foregoing paragraphs effectively determine matters for 2014 and 2015. The Tribunal, however, wishes to express concern about certain matters concerning the management of this block. No doubt the current situation has been brought about by the best of intentions, namely to keep costs to a minimum. It is clear, however, that Mrs Rathbone has little knowledge of the intricacies of managing property and the operation of leases. The legislation with regard to such matters is extensive and onerous. Contravention of the provisions of the lease or the statutes governing residential leases can be serious for landlords. Informal arrangements in order to keep costs down may be all very well provided that everyone is in agreement but as soon as just one lessee requires strict adherence to the lease and the law, as here, the consequences can be serious financially. The Tribunal cannot give advice or direct that professionals be engaged to manage property but it is evident that one lessee in this block, namely the Applicant, is not prepared for there to be any departure from the lease or the statutory provisions even though this is likely to mean higher service charges for herself and the other lessees. If it comes to an application to the Tribunal the Tribunal is constrained by the lease and the legislation.

32. In this regard the Tribunal had some concern that the lessees of Flat 2 were obtaining estimates for decorating. This is the landlord's responsibility and the consultation provisions of section 20 of the Act will need to be complied with. Is this something that the Respondent or Mrs Rathbone feels able to do? If not, the appointment of a managing agent to manage the whole building should be considered seriously. The Tribunal heard that various managing agents had been appointed for different purposes. The Tribunal was concerned that Mrs Rathbone did not seem to understand the difference between such a managing agent and one whom she has appointed simply to be a buffer between

herself and the Applicant or letting agents who arrange the letting of her and her son's flat and Flat 2. The Tribunal is sure that Mrs Rathbone means well and has done her best in what is a minefield for the uninitiated.

33. There are other matters of concern which do not directly affect the determination that the Tribunal has made. For example, it would seem that service charge monies are simply mixed with other funds in the Respondent's bank account and are not readily identifiable or distinguished. If this is the case it can be overcome by a separate designated account being opened. If a managing agent for the block is appointed the funds will then be separately designated. Also, proper end of year service charge accounts should be prepared and sent to the lessees. Included in any budget for the following year should be an amount identified as being payment into the sinking or reserve fund and the amount standing to the credit of that fund should appear in the accounts. If a request for inspection of documents supporting service charge demands is made under section 22 of the Act the provisions of this section must be complied with, otherwise a criminal offence is committed (section 25 of the Act).

34. With regard to the application for an order under section 20C of the Act, the Tribunal finds it just and equitable to make an order as the application has highlighted several deficiencies in the management of the service charges and their recovery. In any event the Respondent stated that she had no intention of adding any costs of these proceedings to future service charges. The Applicant also requested an order for the re-imbursement by the Respondent of her application and hearing fee in the total sum of £300 and her postage costs of £24.92. Mrs Rathbone said that she would feel aggrieved if such an order were made as she has only done her best to keep costs to a minimum and has not charged anything for the management of the block.

35. The Tribunal determines that the Respondent shall re-imburse the Applicant with one half of the fees paid (£150). Although the applicant was justified in making the application the end result has been that the payments on-account of £80 per month have been found to be payable when compliant demands have been made. In those circumstances the Tribunal considers that the fairest outcome is for the fees to be shared equally between the parties. The postage of £24.92 comes under a different category. It is not a "fee" and therefore any order for re-imbursement would have to be made under Rule 13 of the Tribunal Procedure (First-tier Tribunal) Rules 2013. For such an order to be made a party must have behaved unreasonably in bringing, defending or conducting the proceedings and the bar as to what constitutes unreasonable behaviour is set high. The Tribunal does not find that the Respondent was unreasonable in defending or conducting the proceedings in this case and so makes no order for the Respondent to re-imburse the Applicant's postage costs.

Summary

36. Once proper demands complying with sections 21B of the Act and sections 47 and 48 of the Landlord and Tenant Act 1987 have been made the Applicant will be liable to pay and has paid £80 per month by way of service charge for the period March 2014 to 4th November 2015. Proper end of year accounts should be served for years ended 4th November 2014 and 4th November 2015. These should exclude the loan of £770 made by Mrs Rathbone to the Respondent and the sum of £210 for decorating in 2013. There should be no deduction in the amount recoverable for the insurance premiums in 2014 and 2015. Any surplus of income over expenditure should be credited to the next year's service charge liability. The Tribunal does make an order under section 20C of the Act and orders that the Respondent re-imburse the Applicant with one half of the fees incurred in making this application (£150).

Dated the 25th day of July 2017.

Judge D. Agnew (Chairman).

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal 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.

Dated the 29th March 2016
Judge D. Agnew (Chairman)