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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AH/LSC/2017/0335**
Property	:	**55 Queen Mary Road, London SE19 3NN**
Applicant	:	**Ms Natasha Jane Chivers**
Representative	:	**Ms N Chivers In Person**
Respondent	:	**South London Ground Rents Limited**
Representative	:	**J B Leitch Solicitors**
Type of Application	:	**Sections 20C and 27A Landlord and Tenant Act 1985 – determination of service charges payable and Schedule 11 Commonhold and Leasehold Reform Act 2002 – determination of variable administration charge payable**
Tribunal Member	:	**Judge John Hewitt**
Date and venue of Determination	:	**19 December 2017 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**20 December 2017**

DECISION

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The issues before the tribunal and its decisions

1. The issues before the tribunal are:

   1.1 Whether the respondent landlord is entitled to vary the amount of the contribution to Total Maintenance Expenditure payable by the applicant tenant from 25% to 50% with retrospective effect in respect of the Accounting Periods 2014/15, 2015/16 and 2016/17;

   1.2 Whether the amount of £475 under the heading 'Health and safety' incurred in the Accounting Period 2016/17 was reasonably incurred and is reasonable in amount and thus whether the applicant is obliged to contribute to those costs;

   1.3 Whether an administration charge in the sum of £36.00 demanded by the respondent's managing agents on 24 August 2017 [136] said to be in respect of 'Court action letter' is payable by the applicant; and

   1.4 The applicant's application under s20C Landlord and Tenant Act 1985 (LTA 1985) in respect of any costs that the respondent may have incurred or may incur in connection with these proceedings.

2. The decisions of the tribunal are:

   2.1 The respondent is **not** entitled to vary the amount of the contribution to Total Maintenance Expenditure payable by the applicant tenant from 25% to 50% with retrospective effect in respect of the Accounting Periods 2014/15, 2015/16 and 2016/17;

   2.2 As regards 2016/17 and the claim to £475 for 'Health and safety', only £105.60 of that sum was reasonably incurred and the applicant's contribution of 25% to that sum (£26.40) is payable by the applicant.

   2.3 The sum of £36.00 demanded by the respondent's managing agents on 24 August 2017 [136] said to be in respect of 'Court action letter' is **not** payable by the applicant; and

   2.4 An order shall be made (and is hereby made) to the effect that none of the costs incurred or to be incurred by the respondent 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 applicant.

3. The reasons for my decisions are set out below.

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

Procedural background

4. The application was made on 31 August 2017 [3].

5. A case management hearing (CMH) was held on 12 October 2017 and directions were issued on 17 October 2017 [61].

6. At the CMH both parties requested that the matters in issue be determined on the papers and without an oral hearing.

7. In accordance with directions I have been provided with a file of papers. The application form was to be taken as the applicant's opening statement of case. The respondent's statement of case in answer is at [66]. The applicant's statement of case in reply is at [74]. The respondent's statement of case in response is at [94].

The freehold, the lease and the variation of the lease

8. The freehold was registered at Land Registry on 12 May 1959. On 3 May 2013 the respondent was registered at Land Registry as the proprietor of the freehold interest [101].

9. The lease of the Property was granted on 2 June 2004. A copy is at [18].

   On 4 April 2014 the lease was varied as between the then lessee (Jessica Ellen Hodge) and the respondent [49].

   In essence, the variation concerned the amount of ground rent payable and does not directly affect the matters I have to decide.

10. On 15 December 2014 the applicant was registered at Land Registry as the proprietor of the lease [105].

11. So far as material to what I have to decide it may be noted that the lease:

    11.1 Grants a term of 125 years from 25 December 2002 at a ground rent which is now £400 pa., subject to review;
    11.2 It defines 'the Accounting Period' to be a period commencing on 1 April and ending on 31 March following;
    11.3 Specifies that the lessee's Service Charge Proportion is 25%;
    11.4 Clause 4.4 imposes a covenant on the part of the lessee to pay the Maintenance Service Charge at the times and in the manner provided for in the Fifth Schedule – to be recoverable in default as rent in arrears;
    11.5 Clauses 6.2 and 6.3 impose covenants on the part of the landlord as regards repairs, cleaning, lighting and insurance of the building;
    11.6 Clause 9, which is at the heart of this case, provides:

"RIGHT TO VARY MAINTENANCE & ESTATE CHARGE PERCENTAGE
It is hereby acknowledged as between the parties hereto that the Lessor shall be entitled from time to time throughout the said term in the event that the Lessor shall in its reasonable discretion consider it equitable so to do to vary the Lessee's share of Total Expenditure (referred to in the Fifth Schedule hereto) Provided always that the variation shall be reasonable in all the circumstances and that the Lessor shall as soon as practical thereafter serve notice in writing thereof upon the Lessee and shall therein (for information of the Lessee) set out the reasons and basis for any such variation"

11.7 The service charge regime is set out in the Fifth Schedule. It is not controversial. In summary it provides for:

The payment of equal interim instalments payable on account on 1 April and 1 October in each year;

As soon as practicable after the expiration of each Accounting Period for there to be served on the lessee by the lessor or its agents a 'Certificate' signed by the agents containing specified information, including:

- The amount of the Total Expenditure for that period;
- The amount(s) of the interim charges paid on account; and
- The amount of any excess or deficiency;

The certificate is stated to be conclusive and binding on the parties;

In the event that the actual Total Expenditure exceeds the amounts paid on account, the debit balance is payable within 28 days of the service of the certificate. In the event of a credit balance, the amount is to be credited to the lessee in computing the amount payable in succeeding Accounting Periods.

12. After the applicant had acquired the lease the respondent's managing agents made demands on the applicant as if her contribution to the service charge was 50%. When the applicant drew attention to the provisions of the lease that the contribution was specified to be 25% the managing agents made adjustments to the amounts demanded. An example of a credit note is at [146]. An example of a demand for a 25% contribution payable in advance dated 10 October 2016 is at [160].

13. Accounts for the Accounting Periods in issue are as follows:

2014/15 [108] They were signed off by accountants and by the managing agents on 26 January 2016.

2015/16 [116] They were signed off by accountants and by the managing agents on 18 October 2016.

2016/17 [125] They were signed off by accountants and by the managing agents on 21 September 2017.

The accounts contain quite a lot of unnecessary detail but do not quite comply with the requirements of the certificate as set out in the lease.

The lease does not impose an obligation on the landlord to provide accounts certified by accountants. The accounts are very simple and straight forward and hardly justify the annual cost of £276.

The accounts do not expressly make reference to the contributions payable by each of the two lessees and they do not expressly set out the amount of any debit or credit balances. Thus the purpose of the accounts is not clear.

Unless I have missed it I have not seen in the papers before me a certificate signed by the respondent's agents compliant with the provisions of the Fifth Schedule to the lease. Evidently the respondent issued a number of letters to the applicant alleging arrears of service charge but I have not seen them.

14. By a letter dated 15 March 2017 [58] the respondent's managing agents wrote to the applicant. The letter drew attention to the applicant's specified contribution being 25%; drew attention to the 50% payable the lessee of the other flat in the building; drew attention to the shortfall of 25% suffered by the landlord; drew attention to the provisions of clause 9 of the lease; and gave notice in the following terms:

> *"In light of the above we are writing to advise you that the Lessor has amended your service charge contribution to 50 percent, which is deemed reasonable as the building is shared by two leaseholders and therefor is fair for both to pay equal percentage to maintain the fabric of the building.*
>
> *We have therefore amended your service charge bill for April 2017 as well as retrospectively to reflect this change."*

15. As I understand it the respondent has applied the 50% contribution retrospectively to the Accounting Periods set out below claiming an additional amount is payable as shown:

2014/15	£352.40
2015/16	£213.75
2016/17	£322.68

16. Correspondence ensued to try to clarify and resolve matters. Although the respondent was not able to put forward any explanation as why the lease specified a contribution of 25% as opposed to 50% (and there could have been several reasons why that was done) the applicant indicated a willingness to agree a contribution of 50% from 2017/18

and going forward but asserted that it should not have retrospective effect.

17. The respondent persisted with claims to alleged arrears and in consequence the applicant issued these proceedings in order that the amounts payable in the years in question are determined.

18. The gist of the case for the respondent is that the building comprises two flats and it is reasonable that each pays a contribution of 50%. The respondent asserts that clause 9 permits the landlord to vary the proportion payable by the lessee where it is reasonable to do so, and that there is no restriction on any adjustment or variation having retrospective effect.

19. The applicant asserts that she purchased the lease on the basis of a contribution of 25%. That after purchase she drew attention to incorrect demands for 50%. The landlord's agent accepted that and issued credit notes and then correct demands and that whilst it is open to the landlord to make a variation where it is reasonable to do so, it is not open to the landlord to apply that variation with retrospective effect.

20. I prefer the submissions made on behalf of the applicant.

21. It has to be borne in mind that the lease is very clear and that there may well have been a good reason why the contribution was specified to be 25%. The respondent is a substantial and sophisticated investor in the residential ground rent sector. It is reasonable to infer that prior to purchase the respondent and/or its advisers will have carried out due diligence and investigated the service charge regime applicable to the building. Where service charge regimes give rise to complexity in management and/or the potential not to recover 100% of expenditure prospective purchasers will usually bear that in mid because it will have an impact on the price they are prepared to pay for the investment.

22. It is also to be borne in mind that the respondent agreed a variation of the subject lease in April 2014, but did not, at that time, evidently seek to agree a variation as regards the amount of the service charge contribution.

23. The respondent has not provided any evidence explaining the above points.

24. The lease falls to be construed on the facts and matters pertaining at the time of grant.

25. The service charge regime provides for fixed accounting periods, equal half-yearly payments on account and a balancing debit or credit shortly after year-end following the issue of a certificate.

26. Clause 9 empowers the landlord to vary the amount of the contribution where it is reasonable to do so. It might be thought that that may arise where some event has occurred to render the original scheme unreasonable or unworkable; perhaps where a landlord carries out works to create a new flat in a roof space. The applicant has not taken that point and has accepted that a move to a 50% contribution going forward from 2017/18 is not unreasonable.

27. The point I have to decide is whether the variation can occur with retrospective effect. I find that properly construed the clause does not allow that. It is plain the landlord must determine the variation and then give notice to the tenant. That plainly suggests notice going forward because some event has occurred to justify that. I am reinforced in this conclusion by the general provisions of the service charge regime. That is, for clear accounting periods with year-end certificates of the actual expenditure (and hence financial obligation) which are to be conclusive and binding on the parties. Where such a certificate has been given it is not open to the landlord to re-open the amount payable, save, perhaps in the event of manifest error. That is plainly not the case here because year-end certificates have been issued by or on behalf of the landlord in the knowledge that the applicant's contribution is limited to 25%. I find that if the original parties to the lease had intended that the amount of service charge payable could be varied after the conclusive and binding certificates had been issued, they would have made that clear in the lease. If the effect of a variation was intended to have retrospective effect the parties would have so provided. Thus in the absence of such express wording, it is more likely than not that the original parties intended that any variation made by the landlord was to have effect in the accounting period following that in which the notice of variation was given. In the subject case, that is the period 2017/18.

28. For these reasons I find and determine that the applicant's liability to service charges is a contribution of 25% of the costs reasonably and properly incurred in the years 2014/15, 2015/16 and 2016/17.

Health and safety costs

29. In the above three years the only challenge to the costs incurred is the cost of £475 incurred in 2016/17. The applicant says this item of expenditure was not included in the budget for 2016/17 and no adequate explanation to support the expenditure has been put forward.

30. The respondent says that the expense comprises three items:

Health, Safety & Fire Survey	£228.00
Asbestos Management Survey	£141.60
Buildings insurance revaluation	£105.60

31. The respondent has provided a copy of the health and safety survey. The building is very modest and the common parts very small. It is also clear that no major works have been carried out or are contemplated.

The accounts show that a health and safety expense of £144 was incurred in the period 2014/15. The 2016 report made no mention of the earlier report or what had occurred or changed to justify the cost of a much more expensive report. In the absence of any or any cogent evidence from the respondent to support the cost of £228 I am not persuaded that it was reasonable to incur such a cost. Even if a further report was justifiable it should have built on the 2014/15 report and been updated at modest cost.

32. The health and safety report of 13 February 2017 plainly says at [174] *"No asbestos materials were seen on the premises. Due to the type of construction hidden asbestos containing materials are liable to be present in the non-domestic parts of the premises."*

    Against that observation it is difficult to understand why an Asbestos Management Report was carried out in March 2017 at a cost of £141.60. The respondent has not put forward a coherent explanation to justify the expense. The respondent refers to a duty of care to contractors to be aware of any potential asbestos. The respondent goes on to say that a future asbestos survey may be required in the case of any major works which may be carried out in the future. It is self-evident from these representations that it was unreasonable to incur the cost of a survey in March 2017 at a time when no major works are contemplated. I find that it was not reasonable for the respondent to have incurred this expense.

33. I find that the cost of £105.60 for the buildings insurance revaluation was reasonably incurred and is reasonable in amount. In its representations, the respondent makes reference to *'changing of property prices and rebuild costs."* Property prices or values are irrelevant, but what is relevant are the rebuild costs. The lease obliges the landlord to insure *"to the full reinstatement value"*. That is essentially the rebuild costs plus site clearance and all professional fees. An occasional insurance revaluation can be justified but thereafter index linking by the insurer and cross-checking with professional indices of build costs is all that should reasonably be required, save in exceptional circumstances.

34. Thus to summarise I find that as regards 2016/17 the costs of £228.00 and £141.60 were not reasonably incurred and the cost of £105.60 was reasonably incurred and is reasonable in amount. The applicant's contribution to that expense is 25% and thus it amounts to £26.40.

Variable administration fee £36.

35. I have determined this is not payable. The respondent has not addressed the point. The respondent has not identified the provision in the lease relied upon as imposing an obligation to pay such a charge, the respondent has not shown that the respondent has incurred such a charge and the respondent has not shown that the amount of the charge was a reasonable amount.

If the charge was related to alleged arrears, the probability is that there were no such arrears payable because the respondent was pursuing sums (i.e. contributions at the rate of 50%) to which it was not entitled.

36. For the combination of these reasons I find this charge is not payable.

Section 20C application

37. The respondent avers that the terms of the lease permit the landlord to pass the costs of these proceedings through the service charge. The respondent does not cite the provision of the lease relied upon for that assertion. The Fifth Schedule limits 'Total Maintenance Expenditure' to costs incurred by the landlord on the matters set out in clauses 6.2, 6.3 and 6.4 of the lease. I am far from satisfied that costs of tribunal proceedings brought by the lessee are embraced within any of those clauses.

38. However, for the purposes of a s20C application I do not have to construe the lease.

39. The applicant has substantially succeeded in her application. The applicant is by far the successful party. I find it would be most unjust and unfair if the applicant was required to contribute to the costs of the respondent in its unsuccessful opposition to her application. In these circumstances and for the avoidance of any doubt I have therefore made an order pursuant to s20C.

Judge John Hewitt
20 December 2017

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.