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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/00KG/LSC/2018/0016**
Property	:	**GFF, 23 Feenan Highway, Tilbury, RM18 8ER**
Applicant **Represented by**	:	**GR12 Ltd.** **Martin Paine lay representative**
Respondent **Represented by**	:	**Leroy Kraku** **self representing**
Date of Application	:	**rec'd 16th February 2018**
Type of Application	:	**to determine reasonableness and payability of service charges and administration charges**
The Tribunal	:	**Bruce Edgington (Lawyer Chair)** **Stephen Moll FRICS** **Chris Gowman BSc MCIEH MCMI**
Date and place of hearing	:	**4th June 2018 at Thurrock Hotel, Ship Lane, Aveley, Thurrock RM19 1YN**

DECISION

1. The Tribunal determines the challenged amounts in respect of service charges in the following way:

Item	£ Claim	£ Reasonable
Building repairs	360.00	360.00
Year end accounting	162.30	nil
Buildings insurance	158.06	158.06
Surveyor's fees & expenses	240.00	240.00
Health and safety	300.00	300.00
Management fee	363.83	300.00

For the avoidance of doubt, the figures include any VAT element. Thus, for example, the Tribunal considers that a reasonable management fee is £250 plus VAT. It should also be explained that these figures are for the whole year ending on the 24th December 2018. Half of that amount is not payable until 24th June 2018. Finally, there was a dispute about whether the

insurance had been paid which the Tribunal could not resolve. However, it was puzzled that litigation between the parties resulted in an order in favour of the Respondent in 2017 (see below) because the Applicant had failed to insure the property. If that is the case, why are insurance premiums being sought for 2016, 2017 and, now, 2018?

2. No order is made pursuant to rule 13 of the **Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013** ("rule 13") requiring the Respondent to reimburse the fees paid to the Tribunal.

3. No order is made pursuant to rule 13 requiring the Applicant to pay any expenses to the Respondent.

Reasons

Introduction

4. This is an application by the landlord of the property wherein it seeks determinations as to the reasonableness and payability of service charges claimed on account for the year ending 24th December 2018 because, it is said, the Respondent has not paid them, whereas it now appears to be agreed that he paid £160 for an insurance premium in February 2018.

5. A directions order was made by the Tribunal on the 6th March 2018 timetabling the case to a final hearing and a bundle of documents was duly lodged. Both parties have provided statements of case with exhibits.

6. In essence, the Respondent effectively challenges every item of expenditure to be incurred. He also refers to some litigation culminating in a judgment dated 11th September 2017 wherein the Respondent obtained a judgment that the Applicant should pay him damages and costs totalling £11,099.49. Apart from the Respondent saying that these are damages for the Applicant's breach of the terms of the lease, there are no further details and the Applicant's witness does not refer to such litigation. At the hearing, Mr. Paine explained that the litigation resulted from a serious leak from the upstairs flat for which the landlord had not insured – hence the successful action against the Applicant landlord.

7. Further, the Respondent refers to answers given to preliminary enquiries raised in respect of the 1st floor flat in July 2017 when the Applicant says that no increase in service charges over 10% or £100 are anticipated in the following 2 years for this building.

The Lease

8. The lease is dated the 18th November 2013 and is for a term of 99 years from 1st January 2013 with an increasing annual ground rent. It is currently £250 per annum. The lease provides that the landlord shall insure the property and keep the building and grounds in repair with the tenant of this property paying one half of the costs incurred. Payments on account can be collected on the 24th June and 25th December and the lease allows the landlord to set up a reserve fund, sometimes called a 'sinking fund'.

The Law

9. Section 18 of the **Landlord and Tenant Act 1985** ("the 1985 Act") defines

service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'. Under section 27A, this Tribunal has the jurisdiction to determine whether service charges are reasonable or payable including service charges claimed for services not yet provided.

The Inspection

10. The Tribunal members inspected the property in the presence of the Respondent and he had someone with him. Mr. Paine also attended. The building in which the property is situated appears to have been part of an estate of public housing built in the middle of the last century of brick/block construction. It has an interlocking concrete tiled roof.

11. There is a very small communal hall in reasonable decorative order with a relatively large cupboard in it. The Tribunal members were not able to see inside the flat.

12. This ground floor flat has the advantage of quite a large garden area with vehicular access from the road. It was overgrown and not being used at the time of inspection. It was clear that some sort of structure had been removed from the rear of the property and the Tribunal was told that this had been a conservatory.

13. Feenan Highway is a reasonable residential area but west Tilbury is very run down and most of the shops in the High Street – known as Dock Road – appear to have been boarded up. On the other hand, there is a railway station with trains to central London and Lakeside Shopping Centre is a short car journey away.

The Hearing

14. This hearing was attended by Mr. Paine from the Applicant's relatively new managing agent, Circle Residential Management Ltd., and the Respondent who had 2 people with him, one of whom is the new leaseholder of the first floor flat.

15. The Tribunal chair started the hearing by asking Mr. Paine to go through the list of service charges requested in advance. It soon became clear that Mr. Paine's company had not been instructed long and the Applicant landlord appears to have either failed to manage the property OR had failed to pass over information relating to such management. As a simple example, Mr. Paine could not produce a copy of last year's service charge accounts.

16. The various items of service charge and the cases of the parties are set out under the discussion heading below.

17. Generally, everyone at the hearing conducted themselves in a very civil manner for which the Tribunal is grateful. Mr. Paine and Mr. Kraku gave evidence. The new leaseholder of the first floor flat also tried to assist the Tribunal by producing a copy of a surveyor's report prepared by Terry J Gregson FRICS FFBE MEWI to assist her in her purchase. The point of this

was to show that no surveyor's report nor health and safety report would be necessary. Regrettably it had to be explained that this was not the case.

Discussion

18. The Applicant was ordered to set out how it justified its claims both in law and in principle. Its agent has simply said that it has had to anticipate expenditure without any real knowledge of the property from the Applicant. The Respondent was ordered to say whether he challenges the claim and, if so, 'exactly why and what would the Respondent consider to be a reasonable amount?'. Apart from 2 quotes in respect of management fees, he has failed to do this. The only questions are whether the services to be provided are reasonable and whether the charges themselves are reasonable and payable.

19. As far as the **building repairs** item is concerned, the evidence is that the landlord passed no information to the managing agent about the condition of the property and no inspection was made before the payment on account was requested. However, this is a fairly old building without a sinking fund. Mr. Paine's company manages about 2,500 properties most of which are in London and many of those are converted Victorian buildings. The figure requested was, to use a modern expression, a 'guestimate' of what he, Mr. Paine, thought should be set aside for unforeseen incidental expenditure. As some of the guttering may need attention in the not too distant future, the Tribunal agreed. It was also concerned that the Respondent owned the leasehold interest as an investment and yet he did not seem to have thought about what amount should be set aside for this sort of thing. A proper sinking fund would be a good idea.

20. In respect of the **year end accounting** item, the RICS Code of Practice, which the Applicant's managing agent claims to follow, the fixed management fee is to include, at paragraph 3.4, "prepare and submit service charge statements and demand service charge contributions", "produce annual spending estimates/budgets", "produce and circulate service charge accounts that comply with TECH 03/11". Mr. Paine also quoted from the Code. He quoted from paragraph 11.1. However, this appears to be an out of date version. The current version came into force on the 1st June 2016 and the relevant clause is paragraph 7.13 which says:-

> *"Service charge accounts should be subject to an annual examination by an independent accountant unless the costs cannot be recovered. The form of the examination will depend on the requirements in the lease and should be proportionate to the circumstances of the property. You should follow the guidance contained in TECH 03/11 as to*
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> - *The qualification and eligibility of the independent accountant; and*
> - *The alternative forms of examination, being an engagement to report on specified findings or an audit"*

21. It is interesting to note that, unlike Mr. Paine's quoted extract, this new version introduces 'proportionality' as a consideration. Further, it seems to this Tribunal that the RICS code is in conflict on this issue. One paragraph

says that the managing agent should include the preparation of accounts compliant with TECH 03/11 in its fixed management fee. The other says that if a separate fee is recoverable, then there should be an annual examination by an independent accountant.

22. One has to ask oneself what such an independent examination is intended to achieve? If the leaseholder wants to check the figures, he can arrange for the supporting papers to be inspected and pay for copies using powers given by the 1985 Act. He can then arrange for his own accountant to check them if necessary. Thus, this examination is presumably intended to protect the landlord and/or the managing agent. Is it surely being suggested that the landlord and/or the managing agent is only deserving of protection if the lease says that the fee can be recovered, otherwise, they don't need such protection? That seems to be exactly what this part of the Code is saying.

23. The Tribunal's view is that paragraph 3.4(f) takes precedence and an annual service charge account should be prepared by the managing agent and the fee for doing this is included in the annual fee. On the other hand, if there are extensive works to be undertaken involving several contractors, paragraph 7.13 could be used to justify an independent check. Accordingly, in this case, involving, as it does, a small property with 2 flats and just 3 invoices i.e. for the survey, the risk assessment and the management fee, the Tribunal has some difficulty in understanding the reasonableness of an additional fee for Year Ending Accounting.

24. As far as **insurance** is concerned, no evidence has been produced as to the premium payable although an insurance certificate has been produced confirming cover for the year commencing 1st September 2017. The Respondent challenges the amount but produces no evidence of any comparable insurance from another insurer. In the Tribunal's experience, a premium of £158.06 is certainly within the band of reasonableness for this property.

25. As far as **surveyor's fees and expenses** are concerned, the Tribunal was told that it was for the obtaining of an insurance valuation to include rebuilding costs. Both flats would have had to be inspected and the Tribunal considers that £200 plus VAT is reasonable.

26. Turning now to **health and safety**, the ARMA advice is that risks should be assessed and reported upon. They should then just be reviewed annually – not by way of a full re-assessment each and every year. Mr. Paine did not know when fire, health and safety and asbestos risks had last been assessed. He accepted that a full report was only needed once every 5 years or so and in the meantime, the managing agent's annual inspection should make sure that there had been no changes. Mr. Kraku could not say when the last inspection had been. Thus, on balance, the Tribunal considered that a report was necessary. £600 including VAT for the building is a little on the high side but just within the realms of reasonableness.

27. Finally, the issue of **management fees** is raised. The Respondent has produced some evidence that other agents would charge less. The Respondent also raises the issue of the contract with Circle Residential

Management Ltd. He claims that this is a contract for more than 1 year and as there was no consultation, any claim is limited to £100 per annum. In the case of **Corvan (Properties) Ltd. v Maha Ahmed Abdel-Mahmoud** [2018] EWCA Civ 1102, the Court of Appeal looked at a managing agent's contract which said "*the contract period will be for a period of 1 year from the date of signature hereof and will continue thereafter until terminated upon 3 months notice by either party*". Because the contract was for a period of 1 year plus notice i.e. the minimum period was more than a year, it was held to be a long term agreement requiring consultation.

28. The evidence in this case is that the agreement started on the 27th November 2017. Under the heading 'duration' in the standard terms, it says that the agreement "*...shall continue until terminated by either party under the provisions of Clause 5*". Clause 5 simply says that either party may terminate the contract "*...by giving to the other 6 calendar months notice*".

29. Lord Justice McFarlane in **Corvan** said in paragraphs 36 and 37:-

> "*36. The issue the court is invited to decide is whether it is determinative, for the purposes of assessing whether an agreement is for a term longer than a year, that an agreement involves a commitment to twelve months or more (as contended by the appellant), or that the maximum possible length of the period is greater than a year (as submitted by the respondent)*
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> *37. If it were necessary to do so, I would agree with the appellant's approach to this issue: the deciding factor is the minimum length of the commitment.....*

30. He further commented in paragraph 39 that "*the requirement that the contract be for a term of more than twelve months cannot be satisfied simply by the contract being indeterminate in length but terminable within the first year*". These comments would appear to be *obiter* but they are still very persuasive and appear to be supported by Lord Justice Lindblom and Lady Justice Rafferty. The court was saying, in effect, that an indeterminate contract which could be terminated within the first year did not require consultation i.e. it could only be for more than a year IF the minimum contractual period was more than a year as in **Corvan**.

Conclusions

31. Taking all these matters into account and doing the best it can with the limited information available, the Tribunal determines the issues in accordance with the decision above.

32. On the question of **management fees** it is clear to this Tribunal that the Court of Appeal's decision or comment should be followed in which case the agreement with the managing agent did not exceed 12 months and did not have to be consulted on. As far as the fees are concerned, it is part of the Tribunal's knowledge and experience that the average management fees charged by experienced agents in south Essex, some of whom are chartered

surveyors, are in the region of £250 per flat plus VAT. As this seems to be less than one of the quotations obtained by Mr. Kraku, the Tribunal did not seek further comments on its knowledge and experience. Mr. Paine had knowledge of the alternative quotations and could easily have checked their source before the hearing.

33. As far as the other figures are concerned, the Tribunal's reasons are set out in the discussion item above.

Fees and costs

34. The Applicant asks for its fees of £300 to be paid by the Respondent and the Respondent asks for unquantified expenses to be reimbursed on the basis that the Applicant has behaved unreasonably.

35. As to whether fees should be recovered, this was a careful balancing exercise. If the service charges were reasonable and the Respondent was contractually liable, the Applicant should surely have just issued court proceedings for their recovery. This would have involved a court fee which would have been recovered as part of the judgment. Why the Applicant felt it necessary to ask this Tribunal whether the services charges claimed were reasonable is not known. It suggests that they may have been in doubt about this.

36. The Applicant asked for the case to be dealt with on the papers without an oral hearing, presumably to avoid the hearing fee of £200. The reason why a hearing was ordered was the complete lack of information filed with the application (a) to explain why the charges claimed were reasonable and (b) the reason for the application i.e. was there a dispute?

37. E-mails have been produced to show that Mr. Paine had offered to meet Mr. Kraku but there is no suggestion that Mr. Paine was going to travel from Gloucester, where his office is, to London where Mr. Kraku lives for this discussion. Further, although it is not binding on the Applicant, it is clear that an assurance was given to the upstairs purchaser that nothing like the amount now claimed would be payable in service charges over the next year or two.

38. Taking all these matters into account and allowing for the fact that succeeding in a Tribunal case still does not bring costs shifting into the equation, the Tribunal concludes, on balance, that no fees are recoverable.

39. As to the Respondent's claim for expenses, he has not produced any evidence that the Applicant has behaved unreasonably in the way that it has conducted these proceedings and no order will be made in his favour.

Bruce Edgington

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Bruce Edgington
Regional Judge
5th June 2018

ANNEX - RIGHTS OF APPEAL

i. 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.

ii. 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.

iii. 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.

iv. 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.