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**First-tier Tribunal
Property Chamber
(Residential Property)**

Case reference : CAM/00KF/LSC/2013/0047

Property : Flat 15 Chelsea Court,
138 Southchurch Avenue,
Southend-on-Sea,
Essex SS1 2RP

Applicant : Peter Mack

Respondent : Places for People

Date of Application : 9th March 2013

Type of Application : to determine reasonableness and
payability of service charges

The Tribunal : Bruce Edgington (Lawyer Chair)
Stephen Moll FRICS
Peter Tunley

**Date and place of
Hearing** : 29th August and 16th October 2013 at
Southend Magistrates' Court, Victoria
Avenue, Southend-on-Sea SS0 7NG

DECISION

1. The Tribunal determines that the Applicant is not entitled to any refund of service charges paid.
2. The Tribunal makes an order pursuant to Section 20C of the **Landlord and Tenant Act 1985** ("the 1985 Act") preventing the Respondent from recovering its costs of dealing with this application before the Tribunal as part of any future service charge demand.
3. The Tribunal orders the Respondent to pay the Applicant (a) the fees paid to this Tribunal in the sum of £250 and (b) the Applicant's expenses for attending the hearing on the 16th October which are assessed in the sum of £230.12. The total sum of £480.12 should be paid by the 31st October 2013.

Reasons

Introduction

4. The Applicant has a leasehold interest in the property granted by The North British Housing Association Ltd. They appear to have changed their name to that of the Respondent. The lease is dated 17th

September 1998 and is for 125 years from the 'commencement date' which is supposed to be in the particulars on the second page of the lease but is in fact blank in the copy supplied. This is regrettable and could make the deed void for uncertainty. The parties need to check this.

5. The landlord has to keep the building in which the flat is situated in good repair and there are the usual service charge provisions including a provision that the lessee shall pay 5% of the total service charge account for the building. This application relates to 3 complaints by the applicant namely:-
 - (a) The Respondent has not undertaken any significant repairs or maintenance over the years and the Applicant should therefore have a refund of monies allegedly expended and
 - (b) The Respondent has not managed the building well and the Applicant should have a refund of monies allegedly incurred in managing the building and
 - (c) The sinking fund is too large for a building of this age and construction and the Applicant should have both a refund of some of those monies and a reduction in the annual sums set aside in the sinking fund account.
6. The Tribunal ordered the Respondent to justify its expenditure and it filed a statement in time for the first part of the hearing seeking to do this and appending end of year accounts from and including the year ending 31st March 2013. These have been audited by chartered accountants but they can only look at the paperwork. Auditors would be unable to certify that the amounts expended were reasonable or that the work referred to in the invoices had been undertaken or undertaken to a reasonable standard.
7. Although the first directions order made no provision for any response from the Applicant, he chose to send in a much longer statement replying to the Respondent's case. He has annexed copy correspondence going back over many years.
8. As at 1st July 2013, the Leasehold Valuation Tribunal was subsumed into the First-tier Tribunal, Property Chamber which has taken over all its powers and jurisdiction.
9. The first part of the hearing in this case was held on the 29th August. It appeared that the Respondent wanted to rely on further evidence. The Applicant wanted a chance to consider this further evidence. The Tribunal agreed to adjourn the hearing to enable the paperwork to be completed and to give the parties the opportunity to narrow the issues. The case was therefore adjourned until 16th October and a further directions order was made so that the parties would know exactly what they had to serve and file, and when.
10. Further statements and invoices have been provided but it appears that the parties are no nearer to a compromise. In essence, the Applicant considers that he has been over-charged for years and the Respondent

refutes this. It is regrettable that the Applicant made no application earlier so that proper consideration could have been given to his complaints. He blames the Respondent for not informing him about the Leasehold Valuation Tribunal. Even if he is right, it is trite law to say that ignorance of the law is no excuse. Trying to sort out disputes going back over many years is almost impossible and it does appear that the Applicant has failed to avail himself of the opportunity to inspect the invoices, which is a protection in the 1985 Act which he could have taken up.

The Law

11. Section 18 of 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'.
12. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. This Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable and, if so, whether it is payable.
13. Section 20C of the 1985 Act allows a Tribunal, on application, to make an order that a landlord cannot recover its costs of representation before the Tribunal as part of any future service charge account. The Applicant has made such an application in this case.
14. Sections 21 and 22 of the 1985 Act explain what the lessee is entitled to i.e. a statement of account setting out what is to be paid and a requirement that a lessee must be allowed inspect the accounts, receipts and other documents supporting the statement of account free of charge. Assuming that copying facilities are available, a lessee is entitled to such copies as are requested subject to payment of reasonable copying charges.
15. Under its procedural rules, the Tribunal is able to award costs and expenses incurred by one party in very limited circumstances i.e. usually only when the other party has behaved unreasonably in connection with the proceedings themselves.

Limitation Period

16. The law relating to limitation i.e. the period before one's right to make any claim is extinguished, is complex. If the landlord were claiming, then either of 3 limitation periods could apply i.e. 18 months under section 20B of the 1985 Act, 6 years for collection of rent under section 19 of the **Limitation Act 1980** ("the 1980 Act") or 12 years if the services charges are not stated to be 'rent' as a specialty under Section 8 of the 1980 Act. A specialty is a claim under a deed such as a lease.
17. However, in this case the limitation period would apply to the Applicant lessee because it is he who is seeking to make a claim to recover overpaid service charges. This Tribunal has no enforcement powers, but it does consider that if any claim is irrecoverable through the courts, then there is no point in making a determination. It would

be a waste of time and resources and, thus, contrary to the 'overriding objective' which both the Tribunal and the parties must comply with. In this case, the Applicant is claiming damages for breach of contract and he must bring any claim within 6 years of the alleged breach (section 5 of the 1980 Act).

The Inspection

18. The members of the Tribunal inspected the property and the building in the presence of the Applicant and various members of staff from the Respondent on the 29th August. It is, as is agreed, a modern brick built construction under an interlocking concrete tiled roof with plastic soffits and weatherboards built in the mid/late 1990's. The common parts are basic with exposed brick walls for the main part and carpeted floors.
19. On the eastern boundary to the plot there is a wall which does show signs of needing at least decorative attention. There is a car park and grass/shrub grounds which are reasonably well maintained. Apart from the wall referred to above, there were no obvious signs of serious neglect.

The Hearing

20. The 1st part of the hearing on the 29th August was attended by the Applicant and also Wendy Hambridge, Paula Goodacre, Martyn Warnes, Martin O'Connor and Rachel Stott from the Respondent. As has been recorded, this hearing was adjourned as soon as it became obvious that important documentation was missing.
21. On the 16th October, the Applicant appeared as did Wendy Hambridge, Paul Goodacre, Martin O'Connor and Andy Rose from the Respondent. The Tribunal chair explained that the members of the Tribunal had read all the papers including the subsequent submissions in detail. Neither party suggested that this information should be repeated.
22. The Applicant had mentioned his membership of the Chartered Institute of Building in his submission. When asked about his qualifications, the Applicant said that he had none and that being a member of that Institute was a recognised status in itself. He said that he had been a project manager in a senior position in a construction company. He said that the flat had been bought as a home for him but since he was working abroad, it was now sublet.
23. In answer to another question from the Tribunal, the Respondent said that it had received no complaints from any other leaseholder in Chelsea Court. The Applicant was rather cynical about this, saying that he had heard others complain but they didn't have the courage of their convictions and had not pursued matters with the Respondent.
24. There was a discussion about both management fees and the projected liabilities to be paid from the sinking fund. On the question of management fees, it seemed clear to the Tribunal that those incurred up to and including 2008/9 were low and were reasonable. However, in the following year, the figure had increased dramatically to about

£195. As the Tribunal is not being asked to consider service charges after 2009, no determination is made about this figure. However, with a modern property of this construction, the Tribunal considers that this is at the very top end of the range of charges which would be reasonable if the property were being efficiently managed.

25. The problem, as the Tribunal sees it, is that the Respondent did not keep a proper check on what monies it should put into the sinking fund until the Applicant complained to the Ombudsman and to this Tribunal. Its management fee was then very reasonable and perhaps reflected the very basic management structure in place. It was then told by the Ombudsman that its procedures were inadequate and was forced to justify its figures and has now set out comprehensive calculations of future work planned. These steps cost money and are perhaps now reflected in the higher management charges.
26. As far as the sinking fund is concerned, the Respondent confirmed that it used the National Housing Federation schedule of rates and then prepared its cash flow forecast from 2013 based on the annual buildings maintenance index (BMI) to try to anticipate inflation. The Applicant was highly critical of this and repeated that all the Respondent was doing was guessing and had not prepared any figures until forced to do so.
27. Whatever the Applicant may think about the past, the process now used is a recognised process for the industry. When rates of inflation and precise years for renewals and refurbishment works cannot be predicted accurately, there was bound to be a certain amount of guesswork and the Tribunal would have anticipated that a senior project manager in a building company would appreciate this. The Respondent said that it would be reassessing the figures every 5 years and would make sure that the monies requested from lessees were adjusted if appropriate.
28. In response to a further question from the Tribunal, Mr. Rose agreed that perhaps the figures should be pushed back 5 years because the present 50 year maintenance reserve cashflow forecast did not actually reflect the true age of the property. He would make arrangements for this to be done.

Discussion

29. The applicant has complained to the Housing Ombudsman Service and a copy of their report commences at page 141 in the bundle. This report is important. It sets out the history of this matter in some detail and gives a chronology of complaints lodged by the Applicant over the years. It refers specifically to complaints about the eastern wall to the car park, a split and faulty lock on the door to the car park, faulty lighting and the security of the car park. It sets out the history to include the fact that some or all of the works were dealt with, dealt with badly, or not dealt with at all.
30. It sets out the Applicant's complaint that, in his view, the management fees were too much. It records the Respondent's original offer of

- compensation of £100, the further offer of another £100 and the various defects it found in the Respondent's procedures. The report takes a rather holistic approach to the whole problem. Whilst it records the legal responsibilities of the Respondent, it also set out and adjudicated upon the internal voluntary service promises made by the Respondent to its lessees, including its complaints procedure.
31. The report found the Respondent lacking in almost all respects of its service and awarded the Applicant compensation of £400 over and above the compensation offered by the Respondent, making a total of £600. In making this application to the Tribunal, the Applicant is repeating the accusations he made to the Ombudsman. He is adding further complaints. Amongst other things, he complains that a contractor has been used (Castle Point District Council) which does not undertake services of the kind described and that the sinking fund is far too large for a building which has been built to ensure minimal maintenance e.g. brick construction without render to avoid constant painting, uPVC windows and doors, plastic soffits and weatherboards etc.
 32. He confirms his written submission that the property has not been properly managed and he wants a refund of the monies paid. When asked whether he was seeking monies in addition to the compensation of £600 he had already received, he said he was. He thought that compensation and recovery of monies paid were 2 different things.
 33. The problem with this attitude is that, in law, the word 'compensation' is simply an attempt to put someone back into the position they would have been if the wrongdoing had not happened. The Applicant appears to think that the Ombudsman was only awarding punitive damages. The Tribunal does not agree with that.
 34. What the Applicant should appreciate is that according to the last demand which is the subject of this application i.e. that in February 2009 at page 181 onwards in the bundle, the monthly charge being demanded was £84.15 i.e. about £1,000.00 per annum. As was said at the hearing, it is this Tribunal's knowledge and experience that this is not unreasonable as a figure for service charges for a long leasehold property in the Southend area.
 35. If one adds to that the fact that, unlike probably the vast majority of blocks of flats, there is a sinking fund which is likely to cover the cost of major works in the foreseeable future, the total figures being demanded by this landlord are reasonable. Some would say that up to 2009, they have been more than reasonable with the low management fees being charged. The only danger for the future is that the Respondent should not let the 'sinking fund tail wag the building dog' i.e. by making it so expensive and cumbersome to administer, that it becomes an unreasonable drain on the lessees resources.
 36. The Applicant says that the sinking fund is too high but the figures are now available for him to see exactly how much it is so that an appropriate credit can be obtained from the purchaser when he sells his

lease; his lease will be easier to sell because of the sinking fund and it is not money he will lose. It is there, it is held on trust and can only be used for the benefit of the lessees.

Conclusions

37. Between the 2 parts of the hearing in this case, various documents were filed which included accusations and counter accusations. The Applicant is firmly of the view that he should have been advised of his 'rights' by the Respondent. For example, he complains bitterly about not being informed of the existence of the Leasehold Valuation Tribunal. He had been advised about the existence of LEASE which is a free government funded advice service.
38. This Tribunal cannot comment on this save to observe that people who buy property on long leases do have to accept that they are getting into complex legal relationships with their landlords. The Applicant, as a member of the Chartered Institute of Building and will obviously be aware of that. The Tribunal finds it difficult to understand why, if the Applicant felt so aggrieved that he was being overcharged and was being charged for work which was not done, he did not take the simple precaution of just asking LEASE what he could do about the situation – as he had been given their details – or paying for some legal advice, which is available to everyone. He had, after all received £600 in compensation.
39. This case has really turned into a claim by the Applicant for damages for breach of contract which this Tribunal has no power to adjudicate upon. In any event, as has been said, this Tribunal will not be making any determination in respect of monies which cannot be recovered because of the limitation period. For example, the invoices complained of from Castle Point District Council are no longer available because they are in the period 1999-2003 and the Respondent only retains invoices for 7 years. That part of the claim relates to a period outside the limitation period and the Tribunal will therefore make no determination on this issue one way or the other. If the Applicant has evidence that a criminal offence may have happened, he is obviously able to speak to the police.
40. On the balance of the claim, the Tribunal considers that the Applicant has been compensated for the failures in management over the years. Whatever may have gone on in the past, the management fees then being charged were well below market rates and it could perhaps be said that 'one gets what one pays for'. The management fees now appear to be going up but the service, particularly with regard to the sinking fund, has improved.
41. As far as costs are concerned, the Tribunal agrees with the Applicant that if he had not made this application he would have been unlikely to have received the information he now has. An order is therefore made pursuant to section 20C of the 1985 Act preventing the Respondent from recovering its costs of representation before this Tribunal as part of any future service charge. It is also ordered that the Respondent shall refund the Applicant for the fees paid to this Tribunal of £250.

42. As far as expenses are concerned, the Applicant seeks an order that the Respondent reimburse all his costs and expenses in the total sum of £1,223.76 i.e. £993.64 (to include the Tribunal fees) for preparation and attending the 1st hearing from where he is living abroad plus £230.12 for attending the 2nd hearing. This is a more difficult matter because the Applicant has not succeeded in respect of the main part of his application. Also, it should be said that he owns the leasehold interest in the property and must, by the very fact of ownership, accept that he will have to be in Southend on occasions to sort out any problems with or in the property.

43. These Tribunals are 'no costs' regimes. In other words, with informal procedures designed for people who are not represented (as opposed to the courts) even the winning party should not normally expect to be reimbursed for preparation or travelling to the hearing.

44. In this case, the Applicant has not even 'won'. He has been reimbursed the fees for the reasons stated. Expenses are considered in a different way and there will be no award for the 1st hearing. Having said that, it was the Respondent who was not ready for the 1st hearing and caused the adjournment. In those circumstances, the Tribunal holds that the Respondent did behave unreasonably in that respect and the costs of the Applicant attending the 2nd hearing should be reimbursed as stated above.

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Bruce Edgington
Regional Judge
18th October 2013

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