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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/00KF/LSC/2013/0099**
Property	:	**Ground Floor Flat,** **59 Silverdale Avenue,** **Westcliff-on-Sea,** **Essex SS0 9BB**
Applicant	:	**Westleigh Properties Ltd.**
Respondent	:	**Colin Andrew Miles**
Date of transfer from Southend County Court	:	**18th July 2013**
Type of Application	:	**To determine reasonableness and payability of service charges and administration fees**
The Tribunal	:	**Bruce Edgington (lawyer chair)** **Roland Thomas MRICS** **David Cox**
Date and venue of hearing	:	**30th October 2013** **Southend Magistrates Court, Victoria Avenue, Southend-on-Sea, Essex SS2 6EU**

DECISION

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1. The Tribunal determines the amounts claimed by the Applicant in the court proceedings as follows:-

Date	Item	Claim(£)	Decision
30.06.09	balance service charge '09	509.77	reasonable and payable
29.06.10	insurance	361.66	reasonable and payable
30.06.10	balance service charge '10	264.50	£176.25 is reasonable
29.06.11	insurance	371.75	reasonable and payable
30.06.11	balance service charge '11	270.00	£180.00 is reasonable
01.07.11	ground rent	50.00	no jurisdiction
01.01.12	ground rent	50.00	no jurisdiction
01.07.12	ground rent	50.00	no jurisdiction
05.07.12	insurance	395.64	reasonable and payable
03.10.12	legal expenses	300.00	not payable
26.11.12	balance service charge '12	456.00	£225.00 is reasonable

01.01.13	ground rent	50.00	no jurisdiction
11.02.13	interest on ground rent	13.90	not payable
11.02.13	interest on service charges	199.11	not payable
11.02.13	in house legal expenses	180.00	not payable
		3,522.33	

From the claim, the Tribunal therefore determines that the amount of £2,220.07 is reasonable and payable. The ground rent of £200 appears to be payable in addition although the Tribunal has no jurisdiction to determine that. Although the lease does not allow for the administration charges described as legal expenses and interest, it is, of course, open to the court to determine whether any costs or statutory interest should be awarded.

2. The application is transferred back to the Southend County Court under case no. 3YK50575 to enable either party to apply for any further order dealing with any matter not covered by this decision, statutory interest, costs and fees claimed in the court proceedings or enforcement.

Reasons

Introduction

3. On the 23rd March 2013, the Applicant, as freeholder of the building of which the property forms part, issued proceedings in the Southend County Court against the long leaseholder of the property claiming the sums referred to in the decision above.

4. The Respondent filed a 'defence' which does not actually amount to a legally arguable defence. It simply says "*I have been paying an agreed amount every month by Direct Debit on the understanding that Westleigh Properties would fulfil their responsibilities. Although these responsibilities have not been fulfilled, I am not sure if this is enough for me to file a counterclaim*". At the suggestion of the Applicant, the claim was transferred to a Leasehold Valuation Tribunal by order of District Judge Ashworth on the 8th July 2013. In fact, by that date, the Leasehold Valuation Tribunal had been subsumed into the First-tier Tribunal, Property Chamber which took over all of its jurisdictions and powers.

5. The Applicant was ordered to file and serve a statement justifying the claim. A statement from Nicola Warren from the managing agents, Gateway Property Management ("Gateway") dated the 30th September 2013 was filed and served very late and appears in the bundle of documents provided for the Tribunal at pages 1 and 2.

6. The Tribunal issued a directions order dated 11th August 2013. The Applicant was directed to file its statement by 30th August and, as has been said, it was filed a month late. The next direction was that the Respondent, armed with this information, must identify which service charges he was actually challenging and what he would consider to be a reasonable figure. He did file a bundle but this contained only some service charge demands, what appear to be insurance quotes and then a great deal of paperwork which just seems to be an analysis of past Tribunal decisions by a Mr. Beech together with extracts from a large number of such decisions.

7. Thus, despite the directions order he failed to file and serve any statement which complied with the direction which meant, of course, that prior to the hearing, neither the Applicant nor the Tribunal knew exactly what was being challenged and why.

The Inspection

8. The members of the Tribunal inspected the property in the presence of the Respondent and his lay representative, John Evans. Also present were Nicola Warren and Carly Greenhill from Gateway Property Management Ltd ("Gateway"), the Applicant's managing agent.

9. The building is a semi-detached house in Westborough Road, Westcliff-on-Sea but the communal entrance to the 2 flats in the building is in Silverdale Avenue. It was built in the early 20th century of solid brick and a 2 storey extension was added many years ago. The whole building now has an interlocking concrete tiled pitched roof. The front elevation and rear section of the building are rendered. There are uPVC and/or aluminium window frames.

10. There are small front, side and rear garden areas which are mostly concrete and there is a parking area at the back of the rear garden. The property is in fair condition but in shabby decorative order.

11. The same tribunal looked at this property 2 years previously when dealing with a similar dispute concerning the first floor flat. Very little had been done to it in the meantime although the garden was very much tidier and there would appear to have been some re-pointing around the communal door which the members of the Tribunal could not remember having been there before.

12. The Respondent took the members of the Tribunal into his kitchen where there was evidence of damp in 3 of the corners at various levels. It was impossible to determine the exact cause without further investigation but the main cause would appear to be condensation which may have been contributed to by minor cracking in the walls.

The Lease

13. The Tribunal was shown a copy of what is described as the counterpart lease dated 28th July 1995. The lease is for a term of 199 years from the 1st January 1995 with an increasing ground rent. Somewhat misleadingly, the lease describes itself as being for 61 Westborough Road. However, it was clear from an inspection of the Land Registry title documents and the property itself that 61 Westborough Road is on the corner of that road and Silverdale Avenue. The door to the property is in Silverdale Avenue and has now become known as 59 Silverdale Avenue.

14. There are the usual covenants on the part of the landlord to maintain the structure of the property and to insure it and for the lessee to pay half the cost of doing this as a service charge.

15. Of relevance to the issues in this case, the service charge provisions include the ability of the Applicant landlord to recover "*all other expenses (if any) reasonably incurred by the landlord in and about the maintenance and proper and convenient management and running of the Building including all fees or commissions payable to any agent and interest and other charges on any borrowings for the purpose of meeting his obligations*".

The Law

16. 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'.

17. 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.

18. Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") provides for the same conditions and jurisdiction with regard to administration charges which are defined as including payments demanded in addition to rent "*...in respect of a failure by the tenant to make a payment by the due date to the landlord...*".

The *Contra Proferentem* Rule

19. It could certainly be argued that the terms of the lease relating to administration charges are ambiguous. The general sweep up clause for the collection of fees and expenses for the management of the building could be argued – and it has been so argued in this case – to include administration charges.

20. In order to assist courts (and Tribunals) in these difficult matters of interpretation, the *contra proferentem* rule was devised many years ago. It is not, of course, the only rule of interpretation but it is, perhaps, the most relevant to this problem. It translates from the Latin literally to mean "against (*contra*) the one bringing forth (the *proferens*)".

21. The principle derives from the court's inherent dislike of what may be described as 'take it or leave it' contracts such as residential leases which are the product of bargaining between parties in unfair or uneven positions. To mitigate this perceived unfairness, this doctrine was devised to give the benefit of any doubt to the party upon whom the contract was 'foisted'.

22. In the case of **Granada Theatres Ltd v. Freehold Investments (Leytonstone) Ltd** [1958] 1 WLR 845, Mr. Justice Vaisey said, at page 851, that "a lease is normally liable to be construed contra proferentem, that is to say, against the lessor by whom it was granted".

23. The question for this Tribunal, therefore, is whether the general sweep up clause referred to would cover administration charges as defined by the legislation. As administration charges are very specifically defined and as no evidence has been produced of any actual expenditure incurred by the landlord, then *contra proferentem* would appear to dictate that a ruling is made in favour of the lessee.

The Hearing

24. The hearing was attended by those who were at the inspection plus Nigel Amos from the Applicant's insurance brokers. In order to satisfy itself as to the payability of the service charges, the Tribunal went through the figures presented by the Applicant in the bundle. The opening balance was what remained owing from service charges incurred in 2008 and 2009. Those for 2007 and some for 2008 had been the subject of earlier litigation and an agreement to pay at the rate of £75 per month. The Respondent had paid his £75 per month. The original debt had been paid off and the £75 per month was paid thereafter to cover ongoing service charges.

25. The Tribunal then questioned those from Gateway about subsequent charges. There was a figure of £300 plus VAT for some work to the gutters to include clearing and repairs. The invoice did not contain much information but the Tribunal was told that the work involved someone attending with a ladder and checking the rainwater goods including the joints and then clearing leaves etc. from the gutters and checking such joints.

26. There was also an invoice for the commencement of a Section 20 consultation process date 16th May 2012 in the sum of £333.33 plus VAT. As this did not form any part of the present claim, the Tribunal did not pursue matters in great detail. However, as it seemed clear that a surveyor was preparing the specification and dealing with any supervision, it will need to be proved in due course that sending out 3 letters to the lessees, dealing with any comments (none so far) and organising the tender process would justify that figure.

27. Having obtained all it wanted from Gateway, the Tribunal asked the Respondent what his case was. He repeated his 'defence' namely that he had been paying at the rate of £75 per month and he had understood that the earlier agreement was that this would cover the outstanding amount and any future amount. His representative, who was a friend, added that all the figures claimed seemed to be enhanced or at least higher than one would expect for other similar properties. It was alleged that there had in fact been no 'management'. It was also alleged that the Respondent had not received any Section 20 letter.

Conclusions

28. In a sense, the 'defence' is correct because there was an agreement in 2010 for the Respondent to pay outstanding service charges at the rate of £75 per month. However, that was only for such charges as had been incurred. It did not cover future charges i.e. those after 2008. Whether the Respondent had appreciated that at the time is not known. However, as it would be impossible to predict future service charges, this Tribunal finds it highly unlikely that the £75 was intended to cover future service charges.

29. As far as insurance premiums are concerned, this had not been mentioned either in the Respondent's defence to the court proceedings or in any statement to this Tribunal save for the insurance quotes in the Respondent's bundle. If it had been mentioned in good time, then separate directions would have been given including the obtaining of like for like competitive quotes. The Respondent tried to produce what he said were competitive quotes but there is no evidence to suggest that they are like for like quotes. The Tribunal used its own considerable knowledge and experience. Its view is that whilst the insurance premiums have historically been a little on the high side, they are just within the bounds of reasonableness and are allowed in full. The case law is clear on this topic i.e. landlords do not have to obtain and accept the cheapest quote. As long as they test the market on a reasonably frequent basis and obtain the insurance during the normal course of business, the premium is recoverable, even if a lessee could obtain cheaper insurance.

30. As far as managing agents are concerned, it is true that there is very little outward appearance of this property having been properly managed for some years. However, management is not only a matter of keeping the property in good decorative order and repair. There are a large number of statutory responsibilities imposed on a landlord for the protection of lessees and a managing agent has to undertake these. They are not immediately obvious to lessees but they do mean that staff have to be employed and costs have to be incurred as part of a regime designed to protect lessees from past generations of greedy landlords.

31. A firm of managing agents in the Southend area would, in the Tribunal's experience, expect to recover in the region of £175-225 per flat per annum plus VAT as a management fee. This assumes a reasonable level of management and would include, according to the RICS Service Charge Residential Management Code, visiting the property, preparing service charge accounts, annual budgets and normal business overheads. Thus the annual fee cannot be 'enhanced' by adding fees for accountancy, postage and bank charges where there is no

evidence that such charges have been incurred.

32. The level of efficiency displayed by Gateway does not exactly put them in a good light. Of the documents supplied by the Respondent, the statements sent to him by Gateway show the following claims:-

Date	Amount(£)
21 Oct 2011	2,757.68
23 Nov 2011	2,682.68
8 Feb 2012	2,777.68
22 Feb 2012	2,702.68
30 Apr 2012	2,552.68
11 Jul 2012	2,848.32
25 Jul 2012	2,773.32
11 Sept 2012	2,698.32
19 Feb 2013	3,642.33

33. The various demands add figures and take them away without any real explanation. As all the figures were gone through at the hearing, it is hoped that the Respondent now understands them. The annual figures claimed are those set out in the accounts.

34. There are 2 items of claim with which the Tribunal takes issue. Firstly, the management fee. When the 2011 case relating to the 1st floor flat was heard, the Tribunal had some sympathy for Gateway because they had just taken over from another company as managing agents who had not maintained the property and had not helped in the transition. On promises that Gateway would provide better services, the Tribunal said, in 2011, that £200 per flat per annum would be reasonable for them on the basis that they would provide a good service. However, as it has transpired, virtually nothing has been done to the property. There is a Section 20 consultation apparently in progress (although the Respondent denies this) which started in May 2012 but has still not concluded. It is at least possible that the lack of maintenance to the main structure has contributed to the damp problems suffered by the Respondent.

35. Taking all the various aspects of this matter into account, the Tribunal considers that £150 per flat per annum is reasonable for the period in question without any of the 'add-ons' as stated above.

36. The one thing Gateway has done is to organise someone to clear the gutters and look at the rainwater goods in general. It should be said, however, that the Respondent denies that anything was done because access would have to be obtained to the rear garden and no-one has asked him for a key. On balance, the Tribunal accepts the word of Gateway that something was done. However, the invoice for the work is in the name of a company associated with Gateway (Gateway Facilities Management Ltd.) and just refers to 'clean gutter and repair where necessary'. Those from Gateway said that they could obtain further detail but as this was the final hearing and they had been asked to justify their claim, the Tribunal decided not to adjourn just for this purpose.

37. Using its knowledge and experience, the Tribunal concluded that as the rainwater goods were plastic and modern and as it would have been impossible to 'test' the joints without rain or some other source of water (there were no outside taps which the Tribunal members could see), the only work undertaken would have been climbing up a ladder, clearing out the

gutters and just looking to see that there were no obvious stains on the wall or other tell tale signs of leaking. This would probably have taken an hour or so at the most and a reasonable charge for this would be £75 plus VAT i.e. £90 in total under current VAT rates.

38. As far as administration and legal charges are concerned, Ms. Warren argues that the general 'sweep-up' clause in the lease covers these. It does not. Administration charges are clearly defined in the 2002 Act and in order that they are payable on a contractual basis, the contract, i.e. the lease, must clearly say that they are payable. Even the collection of interest is only allowed if it can be proved that interest has actually been incurred. This is an old lease and it is unfortunate for the Applicant that it does not cover these items. However, when buying ground rent investments, the Applicant, as with any other landlord, must read the lease and realise its shortcomings. That is part of the investment 'risk'.

39. This was the determination of the Tribunal in 2011 with a lease in exactly the same terms. It is of great concern to this Tribunal that Gateway have continued to raise these charges, presumably in the hope that they would just 'get away' with it. Not only is this unprofessional but some would say that it has much more serious implications.

Summary

40. Thus, for the year 2010, the Tribunal reduces the management fee to £300 plus VAT i.e. £150 plus VAT for this flat. All the additional charges for accounting etc. are not payable. For 2011, the same is allowed taking into account the change in VAT rates. For 2012, the same amount has been allowed for management fees and £45 i.e. half of £90 has been allowed for the work to the rainwater goods.

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Bruce Edgington
Regional Judge
1st November 2013