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**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/21UD/LSC/2013/0040

Property : 2 Sandrock Hall, St Helen's Park Road, The Ridge, Hastings TN34 2RB

Applicant : Sandrock Hall Management (2006) Limited

Representative : Mr N Ridley, Director of Applicant

Respondents : Mr Mark Borg and Mr Paul Brasier

Representative : In person

Type of Application : Determination of services charges under s 27A Landlord and Tenant Act 1985 ("the 1985 Act") and determination of administration charges under Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act")

Tribunal Members : Judge E Morrison (Chairman)
Lady Davies FRICS (Surveyor Member)

Date and venue of Hearing : 19 July 2013 at Horntye Park, Hastings

Date of Decision : 25 July 2013

DECISION

Summary of Decision

1. The Tribunal makes no determination about service charges as by the date of the hearing the charges in question were no longer in dispute.
2. The administration charges totalling £1020.00 demanded by the Applicant are not payable by the Respondents.
3. An order is made, under s 20C of the 1985 Act, that the Applicant's costs of the proceedings before the Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondents or any other lessee at Sandrock Hall.

Subject Matter of the Determination

4. On 22 October 2012, the Applicant freeholder commenced proceedings in the county court for recovery of monies from the Respondents, who are jointly the lessee of Flat 2, Sandrock Hall. Specifically, the Applicant claimed £310.20 unpaid service charges, and £1020.00 unpaid administration charges (legal fees), together with interest thereon at the rate of 8% per annum. The First Respondent filed a Defence dated 13 November 2012, admitting the sum claimed in respect of service charges (which he said had been paid on 19 October 2012) but denying the claim for the administration charges.
5. On 19 February 2013 the District Judge in the Hastings County Court ordered that the claim be referred to the Leasehold Valuation Tribunal. The Tribunal (since 1 July 2013 the First Tier Tribunal, Property Chamber) has jurisdiction to determine disputed service and administration charges. It does not have jurisdiction to determine the claim for interest.
6. The First Respondent made an application under s 20C of the 1985 Act that the Applicant's costs of these proceedings should not be recoverable through future service charges against any of the lessees.
7. At the outset of the hearing, the parties agreed that the service charges were no longer in dispute. Accordingly the Tribunal was required only to address the administration charges and the section 20C application.

The Lease

8. The Tribunal had before it a copy of the lease for Flat 2. It is dated 25 October 2006 (replacing an earlier lease dated 7 June 1991) and is for a term of 999 years at a peppercorn rent.
9. The relevant provisions in the lease may be summarised as follows:

- (a) The lessee covenants to pay 1/12th towards total service charge expenditure. On account/interim service charges are payable quarterly during the year in such sum as the Lessor or its managing agents shall specify.
- (b) The service charge accounting period runs from 1 April – 31 March and if the total service charge for any such period exceeds the interim charges the lessee is to pay the excess within 28 days of service of a Certificate as referred to in paragraph 5 of the Fifth Schedule.
- (c) Paragraph 5 reads as follows:
 “As soon as practicable after the expiration of each Accounting Period there shall be served upon the Tenants by the Lessor or its Agents a certificate signed by such Agents containing the following information:-
 (a) The amount of the total Expenditure for that Accounting Period
 (b) The amount of the Interim Charge paid by the Tenants in respect of that Accounting Period together with any surplus carried forward from the previous Accounting Period
 (c) The amount of the Service Charge in respect of that accounting period and of any excess or deficiency of the Service Charge over the Interim Charge”.
- (d) The service charge expenditure includes the costs incurred by the Lessor in carrying out its obligations as set out in clause 6, which include responsibility for the repair and maintenance of the main structure of the building, and redecoration (but not repair) of the exterior windows.
- (e) By clause 3(11) the lessee covenants to pay the reasonable costs of the Lessor incurred in contemplation of proceedings under section 146 of the Law of Property Act 1925.

The Inspection

- 10. The Tribunal inspected the property on the morning of the hearing. Mr Ridley, Mr Borg and Mr Brasier were present. Sandrock Hall is a substantial 4-storey detached house built in c. 1815 which was converted into 12 flats in c. 1989. The property is of stone construction part tile and part clad in mock Tudor style under a plain tiled roof. It is approached along a roughly made up private drive and is situated in an elevated position within a mixed mainly residential area on the northern outskirts of Hastings.
- 11. The Tribunal inspected parts of the exterior of the building and part of the interior of Flat 2. Externally there was evidence of general disrepair, including poor and badly peeling paintwork, rotten woodwork, tiles missing or slipping from tile hanging to gable ends, defective sections

of guttering, vertical stone cladding at ground level coming away, and scaffolding to the rear of the property apparently supporting a large defective section of the main external wall which is awaiting a major rebuild. Internally there was damp staining to the corner of the basement bedroom and in the wardrobe to Flat 2. The First Respondent had placed a dehumidifier in the room to help to dry out the damp wall.

The Relevant Law and Jurisdiction

12. An administration charge is defined in paragraph 1 of Schedule 11 of the 2002 Act and includes an amount payable by a tenant of a dwelling which is payable directly in respect of a failure by the tenant to make a payment by the due date to the landlord or in connection with a breach (or alleged breach) of a covenant or condition in his lease. Under paragraph 5 of Schedule 11 an application may be made to a tribunal for a determination whether an administration charge is payable. If the amount of the charge is not specified in the lease, it is payable only to the extent that it is reasonable.
13. Section 21B of the 1985 Act provides that demands for payment of service charges must be accompanied by a Summary of rights and obligations, and a tenant may withhold payment of a service charge until this is complied with. Regulations prescribe the form and content of the Summary.
14. Under section 20C of the 1985 Act a tenant may apply for an order that all or any of the costs incurred in connection with proceedings before a tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

Representation and Evidence at the Hearing

15. Mr N Ridley, one of the three directors of the Applicant, presented the Applicant's case. He had filed a statement of case and bundle of supporting documentation. Mr Borg presented the Respondents' case. He relied on the Defence and supporting documentation filed with the court as his statement of case.

The Applicant's Case

16. Mr Ridley submitted that the Applicant had instructed solicitors, and thus incurred the legal fees of £1020.00 comprising the administration charges, because the Respondents had failed to pay the sum of £310.20 being the balance of service charges due for the period to 31 March 2012. This failure was a breach of the lease, which could lead to a section 146 Notice and forfeiture proceedings. Thus the legal costs were chargeable to the Respondents under clause 3(11) of the lease.

17. He relied on a Demand for service charges dated 12 June 2012. This noted total service charge expenditure of £11,385.00 for the period ending 31 March 2012. It also incorporated water waste charges of £200.00. The Respondents' share was stated to be £1148.00. It then noted there had been "payments received" of £652.80 and water payments of £185.00, leaving a balance payable of £310.20. It also noted "Wall repair charges £713.00 - £260.00 scaffolding charge. Credit balance available for use towards wall repair = £453.00". Mr Ridley said this demand had originally been posted to the Respondents from France (where he and his co-directors live) but accepted this had not been delivered by the postal service. A further copy of the Demand was hand delivered by a third party to Flat 2 on 10 July 2012.
18. Mr Ridley accepted that the Demand was unsigned but said he had been advised by solicitors that it met the requirements of the lease. He was unable to explain why paragraph 7 of the Particulars of Claim filed with the court (verified as true by a solicitor) referred to a "certificate signed by the [Applicant's] agents". He could identify no such certificate.
19. Although the Demand makes no reference to an accompanying section 21B Summary and there is no cover letter or similar document indicating service of a section 21B Summary, Mr Ridley stated that a Summary was always sent with every demand. There were no outside managing agents and the Applicant's directors, Mr and Mrs Ridley and a Mr Caldwell, prepare the paperwork. Mr Ridley was fairly sure that Mr Caldwell had prepared the Demand on this occasion.
20. Turning to the solicitors' charges there were two bills, one for £600.00 dated 5 September 2012, and the second for £420.00 dated 19 September 2012. The first bill was notified to the Respondents as an administration charge along with the solicitors' first letter to them, being a letter before action in respect of the unpaid service charges of £310.20. The second bill was notified to the Respondents as an administration charge along with the solicitors' second letter to them, which had been sent in response to a letter from Mr Borg dated 13 September 2012 raising various queries about the service charges.
21. Mr Ridley said it was reasonable to instruct solicitors due to non-payment of the service charges and he pointed to an email from Mr Borg dated 19 July 2012 which asked the Applicant to stop emailing him and to direct comments through its solicitor. The Applicant had not known at the outset what the solicitors' charges would be but there was an hourly rate and the time spent was itemised on the back of the bills. By going through solicitors the service charges had been paid.
22. Mr Ridley also addressed the Tribunal on the issues of disrepair raised by Mr Borg in his emails of July and August 2012. He admitted that there were matters to be attended to, including the wall repair, the damp problem in the Respondents' flat, defective tiles on gable ends, and redecoration of the exterior. In the Applicant's statement of case it

was said that Maltbys, a local firm of chartered surveyors, had been retained to organise work and carry out the consultation required under section 20 of the 1985 Act. However, before the Tribunal, Mr Ridley clarified that Maltbys had not yet been formally instructed. This was despite the fact that the Bundle contained a report on Sandrock Hall prepared by Maltbys in April 2013 referring to the Local Authority's intention to serve an Improvement Notice and the need for the Applicant immediately to obtain a structural engineer's report on the wall repair and to start section 20 consultation.

The Respondents' Case

23. Mr Borg did not accept that the Demand dated 12 June 2012, which he received on 10 July 2012, complied with the lease, as it was not a signed certificate as the lease required. He said there had been no accompanying section 21B Summary. He had previously obtained advice from the Leasehold Advisory Service about how the service charges should be demanded and so he was aware of the requirement for a section 21B Summary when the Demand arrived.
24. Mr Borg did not understand the figures in the Demand because of the reference to the wall repair. When he purchased Flat 2 in late 2011 he had been told that the previous lessee had made a one -off payment of £713.00 to cover the full cost of the wall repair. As set out in his email to the Applicant dated 16 August 2012, he thought that the Demand, when read with accompanying company accounts noting wall repair expenditure of £3120.00, was charging again for the same cost. In that email he invited the Applicant to discuss the matter with him in person or by phone. The Applicant replied by email on 17 August 2012 attempting to explain the figures. That email pointed out that the "payments received" figure in the demand of £652.80 comprised not just payment of interim charges but also £260.00 credited from the previous lessee's wall repair payment and other monies paid by that lessee. Mr Borg did not think that reply answered his query because it still seemed that he was being asked to pay for the wall repair.
25. In July 2012 Mr Borg had been in email contact with the Applicant regarding the damp problem in his flat and the general lack of maintenance to the building. He accepted that initially he had said he would not pay the service charge until he knew that the necessary work would be done. He said it was in the context of his concerns about the disrepair that he had asked the Applicant to communicate via its solicitor.
26. He regarded the solicitors' costs as exorbitant and also premature. Prior to receiving the solicitors' letter of 5 September 2012 he had not been advised that they would be instructed about the service charge arrears and the first he knew he got a "whacking bill". He accepted he had withheld payment of the service charge as leverage to try to get something done about the disrepair. He had asked to meet with the Applicant. It wasn't even possible to telephone the Applicant; they only

communicated by email. Today was the first time Mr Borg had met Mr Ridley. He had never met the other two directors.

27. In a reply to the solicitors' second letter of 19 September 2012, Mr Borg had confirmed that he now understood how the figure of £310.20 was arrived at. In the same letter he mentioned that there had been no section 21B Summary with the Demand, and noted that the service charge was not payable until 28 days after a Certificate was produced, referring to paragraph 5 of the Fifth Schedule of the lease. However he eventually paid the sum of £310.20 on 19 October 2012. His letter of 22 October 2013 states this was paid on a "without prejudice" basis. He told the Tribunal he had been advised to pay it "under protest".

The Determination

28. The Demand dated 12 June 2013 plainly does not amount to a Certificate as required by paragraph 5 of the Fifth Schedule of the lease. This is because (a) it is not signed by anyone and (b) it does not specify the amount of the Interim Charge paid. It is unsurprising that Mr Borg was confused by it as the source of the payments credited and how they relate the wall repair is not made clear.
29. On a balance of probabilities (the requisite standard of proof) the Tribunal is not satisfied that the Demand was accompanied by a section 21B Summary. There is no direct evidence, from the person who prepared and sent out the Demand, that the Summary was sent. There is no indirect evidence, such as reference to the Summary in any other documents sent to the Respondents with the Demand, that it was sent. Mr Ridley could only state what he believed to be the case. Mr Borg, who received the Demand, was clear that there was no Summary.
30. It follows from the finding in paragraph 28 that at the time when the solicitors were instructed and their fees incurred, the Respondents were not in breach of any obligation under the lease because no proper Certificate had been served, and there was therefore no basis for suing for unpaid service charges or for contemplating proceedings under section 146. It follows from the finding in paragraph 29 that, in any event, payment could be withheld until a section 21B Summary was served.
31. Accordingly, the costs incurred were not reasonably incurred in contemplation of section 146 proceedings and cannot be recovered pursuant to Clause 3(11) of the Lease.
32. The Tribunal adds that even if it had been established that there had been a valid Demand and that the Respondents had breached the lease by non-payment, only a very modest proportion of the legal costs would have been determined as reasonable for the Respondents to pay as an administration charge. Reasonable means reasonably incurred and reasonable in amount. In the view of the Tribunal it was unreasonable

and disproportionate to incur costs of over £1000.00 for pre-litigation correspondence relating to a debt of £320.10. Furthermore the work done simply cannot justify the level of charges. Two letters were sent to the Respondents, one a straightforward letter before action and the second a response to various points raised by Mr Borg (this finally gave a clear explanation of the figures in the Demand). To describe this as "protracted correspondence" in the Particulars of Claim is a gross inaccuracy. There is also a real question as to whether it was reasonable to instruct solicitors at all before making more effort to resolve matters directly with the Respondents who were new lessees, had queries about their first full service charge demand, and were clearly not simply seeking to avoid payment. Email is not always appropriate as the sole means of communication. Mr Ridley's unwillingness to engage with the Respondents was evident at the inspection and the hearing.

Section 20C Application

33. In deciding whether to make an order under section 20C a Tribunal must consider what is just and equitable in the circumstances. The circumstances include the conduct of the parties and the outcome of the proceedings.
34. Mr Borg submitted that if he was successful in opposing the administration charges there should be a section 20C Order as it would be unfair for the lessees to pay for costs that should not have been incurred. Mr Ridley said that the other lessees had not been asked if they agreed with a section 20C Order. He said that 6 of the 12 flats were owned by the Applicant's directors and a seventh was under their control. They didn't agree with a section 20C Order. If the lessees didn't pay the costs, he and Mrs Ridley would have to cover them, paying for the privilege of recovering service charges.
35. Because the substantive issue before the Tribunal has been decided in favour of the Respondents, the Tribunal determines that it is just and equitable for an order to be made that, to such extent as they may otherwise be recoverable, the Applicant's costs in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondents or any other lessees at Sandrock Hall.

Concluding Remarks

36. Mr Ridley explained that until recently nearly all the flats were owned by the directors of the Applicant and management was dealt with fairly informally. Now there are 5 flats unassociated with the freehold company, and the directors of that company all live in France. Hitherto there have been no managing agents appointed by the freeholder. The lessees are required to email the Applicant in France about any issues

arising. Mr Ridley was unaware of the RICS Service Charge Residential Management Code of Practice.

37. The view of the Tribunal is that local professional arms-length management would be of great benefit to both freeholder and lessees, and should assist in reducing the likelihood of future disputes. Not only are there immediate issues of disrepair which need to be addressed, but the nature of Sandrock Hall is such that a structured programme of inspection and maintenance is needed, and section 20 consultation with lessees is likely to be a recurring requirement.
38. The matter is now remitted back to the county court.

Dated: 25 July 2013

Judge E Morrison (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.