9271

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BB/LSC/2013/0281**
Property	:	**13A Redclyffe Road, East Ham, London E6 1DT("the property")**
Applicants	:	**Meryon Properties Limited**
Representative	:	**Miss L Walpole Legal Assistant Mrs Carol Nelson- assistant director-Circle Residential Property Management Limited**
Respondent	:	**Miss Laura Lewis**
Representative	:	**In person**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Also in attendance	:	**Mr Richard Lewis**
Tribunal Members		Ms M W Daley LLB (Hons) Mr Taylor FRICS
Date and venue of hearing	:	**17 July 2013** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	

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DECISION

Decisions of the Tribunal

(1) The Tribunal determines that the sum of £435.44 is reasonable and payable for the service charges in issue.

(2) The Tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

(3) The Tribunal makes an order for the reimbursement of the Applicant's Application and hearing fee.

The application

1. The Applicant sought a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to whether future service charges are reasonable and payable.

2. Proceedings were originally issued in the Northampton County Court on 12 April 2012, under claim No2QT41610 and were transferred pursuant to an order dated 27 March 2013.

3. Directions were given by the Tribunal on 21 May 2013.

The matter in issue

4. At the Directions hearing on 21 May an oral pre- trial review was held by the Tribunal in which the Applicant's representative confirmed that the sole issue to be determined by the Tribunal was the reasonableness and payability of the insurance in the sum of £435.44 (made up of the insurance premium of £417.94 and the contribution to the credit charge in the sum of £17.50).

5. The relevant legal provisions are set out in the Appendix to this decision.

The background

6. The property which is the subject of this application is a two storey building which has been converted into two flats.

7. The Respondent holds a long lease of the ground floor flat, which requires the landlord to provide services and the Respondent, as leaseholder, to contribute towards the cost of the service, by way of a variable service charge. The specific provisions of the lease will be referred to below, where appropriate.

The Hearing

8. At the hearing the Applicant was represented by Miss L Walpole, legal assistant and Mrs Carol Nelson- assistant director of Circle Residential Property Management.

9. Ms Lewis the Respondent was assisted by her father Mr Richard Lewis..

10. At the hearing the following additional documents were provided-:

    (i) A copy of the building plan (by the Applicant's representatives)

    (ii) A copy of the office copy entry for the premises (by the Applicant)

    (iii) A schedule of costs. (by the Applicant)

    (iv) A copy of an insurance certificate (by the Respondent)

11. Miss Walpole in her submissions on behalf of the Applicant referred to clauses 1 (h) 5 (b) and 7 (e) as the relevant provisions of the lease. These clauses were relied upon as creating an obligation on the Landlord to insure the property, and an obligation on the tenant to contribute to the cost of insurance by way of a service charge.

12. (Where the specific clauses are relevant, they are referred to below).

13. Miss Walpole informed the Tribunal that the specific arrangements for insuring the property were that the premises formed part of a portfolio of properties, which were managed on behalf of others, including the landlord, by Circle Residential Property Management Limited ("Circle Residential Property").

14. There were 200 properties in total, and the portfolio was insured through an insurance broker Lockton. The Tribunal were referred to a statement of terms which had been prepared for the purpose of the Tribunal hearing on 6 June 2013 and was addressed to " To Whom It

May Concern" and regarding "Circle Residential Management Limited Real Estate Portfolio Marketing History"

15. The Statement stated that -: *"Lockton Real Estate and Construction acts as insurance brokers for Circle Residential Management Limited in Respect of their Real Estate Insurance Portfolio."*

16. The Document detailed the fact that the last market testing exercise had been carried out in 2009/10, and that as a result of the exercise, the Brokers had recommended the renewal of the insurance Portfolio with Aviva Insurance Limited, as they had offered the most favourable renewal terms.

17. The statement further stated that-: *"... It was our opinion that Aviva provided a consistently high level of service and had been reasonable whilst negotiating renewal terms having avoided the knee-jerk reaction in the current market... Therefore, it was our recommendation to renew with Aviva for both the 2011 and 2012 annual renewals, as the terms were considered to still be competitive in the current market..."*

18. The Tribunal were informed that there was an internal system for managing the process, and that as the managing agents dealt with claims management, they were paid a fee, which represented 25 % of the total cost of insuring the portfolio.

19. The Tribunal queried the nature of the work undertaken for this fee, and were informed that the work involved taking calls, assisting with queries and logging claims forms. In answer to a question concerning the claims history for the premises, it was confirmed that there had been no claims made since 2009.

20. The Applicant's representative produced details of properties which were insured in the E6 area for a similar premium. Although this information was relied upon as demonstrating that the cost of the premium was reasonable, it was of limited value as the property was insured as part of the Circle Residential Property portfolio. There was also no information of the cost of insuring a similarly constructed property in another location. Given this the Tribunal could not see whether there were any negative factors which adversely influenced the cost of the premium.

21. The Applicant in their statement of case had referred to a number of leading cases *Forcelux-v-Sweetman [2001]2 EGLR and Berrycroft Management Co Limited –v- Sinclair Gardens Investment Ltd (1997) 29 HLR 444*. These decisions were relied upon in support of the Applicant's assertion that the landlord did not need to shop around to find the cheapest policy.

22. In cross examination, the Respondent raised the issue of whether the demands had been properly served, as she asserted that the service charge demands had not been properly served before the landlord issued proceedings. Ms Lewis stated that it was her case that she had not received a formal demand when she first moved to the property and that the first demand that she received was a letter in 2009 this was followed by County Court proceedings.

23. Ms Lewis in her reply stated that not receiving the demands was a common occurrence. Ms Lewis referred to the demand for 2012. The Tribunal were referred to a document served by the Applicant's managing agent on 27 March 2012. This was stated to be a pre-action letter. However Ms Lewis denied receiving this. Ms Lewis had instead received a letter on the same date which in addition to the cost for insurance also claimed legal fees of £90.00 and interest in the sum of £14.07.

24. The letter stated-: *"... It is our intention to commence recovery proceedings in relation to the above sums within 7 days of the date of this letter, such recovery action may include the issuing of a Notice pursuant to section 146 of the Law of Property Act 1925 and/or issuing a County Court Claim against you..."*

25. The Respondent also stated that the demand was not compliant as the Applicant has not served a notice in compliance with section 47 of the Landlord and Tenant Act 1987.

26. Section 47 of the Landlord and Tenant Act 1987 states-: *"Where any written demand is given to a tenant of premises to which this Part applies the demand must contain the following information namely- (a) the name and address of the landlord, and (b) if that address is not in England and Wales, an address in England and Wales at which notices (including notices in proceedings) may be served on the landlord and the tenant. 2. Where (a) a tenant of any such premises is given such a demand, but (b) it does not contain any information required to be contained in it by virtue of subsection (1) then...any part of the amount demanded which consists of a service charge... shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant."*

27. The Respondent was also concerned that the landlord was issuing proceedings without serving the demands and giving her the proper opportunity to pay for the service charges. In her statement of case she stated that she had received eight county court summons in circumstances were she queried whether the sums claimed were actually due. Miss Lewis considered that this amounted to harassment.

28. The notice headed "pre-action letter" although demanding the same sum, was different in one material respect, it gave the name of the landlord, and stated the address to be c/o of 8 Rockfield Business Park Old Station Drive, etc. This was the same address as the landlord.

29. On behalf of the Applicant, Miss Walpole asserted that all of the original demands were compliant with section 47, and that the process was that the demands were automatically generated there was a demand in February, then a first reminder and finally a second reminder was sent out to the leaseholders, she also stated that there was no reason for the landlord not to serve the notice, and that the landlord sent out all of the notices in the same way. Miss Walpole stated that there had been no complaint from the other leaseholder concerning the demands. The Applicant could see no reason why Miss Lewis would not have received the notices.

30. The Tribunal asked whether the Respondent had any difficulty in receiving mail. Miss Lewis stated that other than the mail sent by the managing agents, she was unaware of any difficulties with the post.

31. Ms Lewis also stated that she had no confidence in the landlord and managing agents, and as a result she did not believe in the absence of proof that the landlord had actually purchased insurance and as a result she had always arranged her own insurance, as "... the previous freeholder never contacted me regarding buildings insurance." Accordingly Miss Lewis referred to her current insurance premium in the sum of £283.63 as adequately covering the cost of building insurance.

32. Further, Ms Lewis asserted that unlike the landlord, she paid for her insurance in one premium, and as a result queried whether the credit charge was reasonable.

33. Miss Lewis produced a copy of the certificate as proof of payment.

34. The Applicants placed reliance upon clause 7 (e) of the Lease which states-: "...Unless such insurance shall become void or payment of the insurance monies shall be refused in whole or in part as a result of any statement act or default or omission by or on behalf of the Tenant or any occupier of the Property or Building or the Tenant's servants agents or licensees or any person under the control of the Tenant to keep the Building insured in such office in such name and against fire and such other risks in the full reinstatement value thereof and also if the Landlord shall so require in respect of the cost of demolition and site clearance consequent upon the rebuilding or reinstatement and also in respect of architects' and surveyors' and other professional fees..."

35. Miss Lewis also made submissions in respect of whether the previous landlord had complied with the Right of First Refusal under section 5 of The Landlord and Tenant Act 1987. However this was outside of the jurisdiction of the Tribunal as Section 10A dealt with the penalties for failure to comply.

Submissions on Application under Section 20C and refund of fees

36. The Applicant's representatives stated that they wished to apply for costs under Section 13(1) B of the new procedure rules 2013, the Tribunal invited the Application to make their cost application in writing, within 14 days, with the Respondent being provided with an opportunity of also serving a written reply.

37. The Tribunal received a letter from the Applicant's dated 19 July 2013 which contained the Applicant's written application together with a schedule of costs in the sums of £2183.62 for the hearing and £1,981.93 for the Pre Trial Review.

38. The Applicant's submitted that the reason for making an Application for costs is that-: The Respondent has acted unreasonably in defending the claim by- : *"(i)Failing to comply with the Direction in that they submitted their Statement of Case late and that they did not provide like for like quotations. (ii) Requesting an oral hearing at the Case Management Conference when the Applicant felt that it was a straightforward case that would be dealt with by means of a paper determination..."*

39. The Applicant also cited that the Respondent had failed to demonstrate that the premium was not reasonably incurred, in this regard they relied upon a decision in *Sinclair Garden Investment –v- Ms K l Baines (A Leasehold Valuation Tribunal determination).*

40. The Applicant further stated that-: *"As a result of this unreasonable stance by the Respondent, it is the Applicants submission that they have been forced to incur costs that could otherwise have been avoided..."*

41. By submissions dated 23 July 2013 and by a letter dated 29 July 2013 in reply the Respondent stated that there was a substantial dispute on facts in that the Respondent was contesting the validity of the service of the demands. Miss Lewis stated that -: *"... It was only at the oral hearing on 17 July 2013 that CRML stated that they use a computerised system which automatically sends out letters. They also stated that they have no record of these letters or those that should have been manually entered into their electronic diary."* Miss Lewis submitted that the Applicant did not provide proof of posting of the demand. In the circumstances, Miss Lewis stated that this was not a

straightforward case. Miss Lewis also provided copies of her insurance certificates, as proof that she had made her own arrangements to insure the property throughout the period that she had been the leaseholder.

42. In her letter dated 29/07/2013 Miss Lewis submitted that she wished the Tribunal to make an order under Section 20C of the Landlord and Tenant Act 1985.

The Tribunal's decision

43. The Tribunal having considered the oral and written submissions relied upon by the parties, determines that the service charge in the sum of £435.44 is reasonable and payable , the Tribunal finds that on a balance of probabilities the demand was served on the Respondent, although the Tribunal makes no finding concerning whether or not the document was received. The Tribunal on inspecting the demand is also of the view that the demand was compliant with section 47 of the Landlord and Tenant Act 1985.

44. The Tribunal noted that the Respondent had paid insurance herself, which indicates that there were issues in the past concerning the Respondent receiving the demands, and also some uncertainty in the Respondent's mind as to who her landlord was, and whether they were fulfilling their responsibilities under the lease.

45. Insofar as the Respondent was able to obtain cheaper insurance, the Tribunal noted that what was insured by the Applicant was in fact different from what the landlord was required to insure under the terms of the lease. The Tribunal noted that the cost of insuring both the first floor flat, the ground floor flat, and making an allowance for the roof void (which would need to be insured) and terrorism cover, using the figures produced by the Respondent £283.63 means that the actual difference between the Applicant's cost of insurance and the Respondent's is £151.81. The Tribunal considers that once the appropriate allowances are made, the difference is not significant, and the sum incurred has been reasonably incurred.

46. The Tribunal finds that the sum claimed is reasonable and payable. The Tribunal noted that the Respondent objected to the credit charge, and it may in future years be possible to negotiate whether this should be paid by the Respondent.

Application under s.20C and refund of fees

47. The Applicant at the hearing asked the Tribunal to make an order under section 13 of *The Tribunal Procedure (First- tier Tribunal) (Property Tribunal) Rules 2013*. The rules state-: (1) The Tribunal may make an order in respect of costs only- (a) under section 29(4) of the 2007 Act

(wasted costs) and costs incurred in applying for such costs; (b) if a person has acted unreasonable in bringing, defending or conducting in- ... (ii)a residential property case, or (iii) a leasehold case.

48. The Tribunal having considered the representations of the parties are satisfied that there was a genuine query in the mind of the Respondent as to whether or not the insurance had been paid, and although the Tribunal is satisfied that the demand was served, the Respondent asserted (with some credibility) that she did not receive the document and given that her credibility was in issue, it was reasonable for her to request a hearing so that her credibility could be tested. Given this, although the Tribunal have found against her the Tribunal have not found that she acted unreasonably in defending the claim, accordingly no order is made under section 13 of the procedure Rules 2013.

49. The Tribunal also consider that this is not a case in which there is a clause concerning payment of legal costs, and that the only clause which provides for payment of fees is clause 5 (k) of the lease which relates to forfeiture proceedings.

50. It was not asserted by the Applicant's representative at the hearing that there was any contemplation of forfeiture proceedings, accordingly the Tribunal finds that it does not apply on the facts before it, if the Tribunal is wrong then the Tribunal consider that it is not just and equitable to make an order under section 20 C of the Landlord and Tenant Act 1985 given the Tribunal's findings.

51. The Tribunal however determines that the Application and hearing fee are payable by the Respondent. The Applicant shall set out the sum due, which shall be payable within 28 days of the date of this determination.

Name: Ms M W Daley **Date: 29.08.2013**

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
 (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
 (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
 (a) "costs" includes overheads, and
 (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
 (a) only to the extent that they are reasonably incurred, and
 (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

 and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -
 (a) the person by whom it is payable,
 (b) the person to whom it is payable,
 (c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

<u>Section 20C</u>

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration 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 tenant or any other person or persons specified in the application.

(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to that tribunal;
(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Leasehold Valuation Tribunals (Fees) (England) Regulations 2003

Regulation 9

(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—

(a) specified in his lease, nor

(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.