9239

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BF/LSC/2013/0459**
Property	:	**Flat 4, Shirley Road, Wallington, Surrey SM6 9QB**
Applicant	:	**Eileen Warwick**
Representative	:	**Roger Warwick**
Respondent	:	**Baldry Son and Chandler Limited**
Representative	:	**Rayners**
Type of application	:	**For the determination of applicant's liability to pay service charges**
Judge	:	**Margaret Wilson**
Date of Decision	:	**16 September 2013**

DECISION

1. This is an application by the leaseholder ("the tenant") of Flat 4, 8 Shirley Road, Wallington, Surrey under section 27A of the Landlord and Tenant Act 1985 ("the Act") to determine her liability to pay service charges in respect of insurance for the years 2010, 2011 and 2012. The determination is made on the basis of the papers alone, neither of the parties having asked for an oral hearing.

2. Directions for the determination were made on 25 July 2013 after an oral case management conference at which the tenant's son, Roger Warwick, represented his mother and agreed that the charge for insurance for the year commencing 5 November 2012 was payable and would be paid. The dispute therefore relates only to the charges made for insurance premiums payable by the landlord on 5 November 2010 and 5 November 2011.

3. The facts as they appear from the statements and documents lodged in accordance with the Tribunal's directions are as follows.

4. In accordance with its covenant in paragraph 2 of the seventh schedule to the lease the landlord insures the block, and by virtue of clause 2 of the lease the tenant covenants to pay *by way of further or additional rent* the amount which the landlord pays to insure her flat, *such last mentioned rent to be paid without any deduction not later than 14 days after the expenditure thereof and notification to the [tenant] by the [landlord].* The insurance is effected on a yearly basis, the premium payable in advance on 5 November in each year.

5. By paragraph 18 of the sixth schedule to the lease the tenant is required to pay to the landlord *an advance amounting to sixty-five pounds (or such greater amount as [the landlord] shall from time to time or at any time properly and reasonably stipulate in the said notice) as a float for ... every ... period of 12 months commencing on the 24th day of June in every year during the term hereby granted on account of the [landlord's] obligations referred to in clause 17 of this schedule.*

6. Clause 17 of the sixth schedule provides that the tenant must *keep the [landlord] indemnified from and against a proportion of all costs charges and expenses incurred by the [landlord] in carrying out its obligations under the seventh and ninth schedules hereto such proportions to be one twelfth*

part. The landlord's obligations under the seventh schedule include, as I have said, the obligation to insure.

7. Up to and including the insurance premium payable on 5 November 2009 the insurance premiums were included in the demand for service charges issued to the tenant. They were not so included in the demands for 2010 and 2011 but by a notice dated 27 November 2012 the landlord's agent demanded *insurance due 5/05/10 £246.07, insurance due 05/05/11 £258.38* and *insurance due 05/05 12 £271.30.*

8. The cost and adequacy of the insurance is not challenged, but the tenant submits, through her son, that by virtue of section 20B of the Act she is not liable to pay the sums demanded in respect of insurance for the years 2010 and 2011.

9. Section 20B of the Act provides:

> *(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.*
>
> *(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.*

It is not suggested that any notice compliant with subsection 20B(2) was given to the tenant.

10. Through its agent, Rayners, the landlord submits, firstly, that the "insurance rent" was not payable until 14 days after it was demanded on 27 November 2012 and is thus not covered by section 20B(1). It submits, secondly, that since the insurance premiums are reserved by the lease as rent a limitation period of six years applies to their recovery. Those two submissions can be taken together. They are incorrect. Section 18(1) of the Act defines *service charge* as:

> *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 cost.

It is thus the case that the cost of insurance is a service charge within the meaning of the Act notwithstanding that it is payable as rent. It is also quite clear from the words of subsection 20B(1) that the subsection is triggered when the costs were incurred by the landlord. They were incurred when they became payable by the landlord which was on the 5 November in each of the relevant years.

11. The landlord submits, in the alternative, that if the arguments set out above are rejected, then only £74.05 should be disallowed in respect of the year 2010 and £109.04 for the year 2011. That submission is based on the fact that for each of the years commencing on 24 June 2009 and 2010 it demanded of the tenant the sum of £650 as advance service charges under paragraph 18 of the sixth schedule, set out in paragraph 5 of this decision. The service charge account for the year ended 24 June 2010 shows a surplus of £2064.27 for the year and the account for the year ended 24 June 2011 shows a surplus of £1781.32. The landlord submits that, if its primary arguments are rejected, one twelfth of those surpluses, namely £172.02 in respect of 2010 and £148.44 in respect of 2011, should be regarded as attributable to insurance premiums for those years and only the balance disallowed by virtue of section 20B.

12. In my view that argument is also incorrect. In *Gilje v Charlegrove Securites (No 2)* [2003] EGLR, in which the application of subsection 20B to on account payments was considered, Etherton J, as he then was, said (paragraph 20) that *section 20B ... has no application where: (a) payments on account are made to the lessor in respect of service charges; (b) the actual expenditure of the lessor does not exceed the payments on account; and (c) no request by the lessor for any further payment by the tenant needs to be, or is in fact, made.* In the present case a demand for further payment of the full amount was in fact made and no suggestion was made until the present proceedings that the surplus was to be or was in fact applied to insurance premiums. In my view the whole demand is caught by subsection 20B.

13. Accordingly the sums demanded of the tenant for insurance in respect of the years 2010 and 2011 are not payable.

14. The landlord has asked that no order should be made under section 20C of the Act to prevent it from placing the costs it has incurred in connection with these proceedings on any service charge. It seems to me clear that it would not be just or equitable for the landlord to recover its costs from any of the leaseholders given that it is clear that the question of the recovery of insurance premiums was simply overlooked by the landlord, who has in these proceedings mainly relied on a wholly spurious argument to the effect that the insurance premiums are not recoverable as service charges.

15. If the tenant has paid an application fee in respect of the application and wishes to apply for its reimbursement under rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 she may do so by letter, her letter copied to the landlord who may respond within 14 days of receipt of the letter, whereafter the application will be considered.

Margaret Wilson