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**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDEN-
TIAL PROPERTY)**

Case Reference : LON/OOBK/LSC/2012/0443

Property : Flats at 56 Westbourne Terrace, London W2 3UJ

Applicants : 56 Westbourne Terrace Freeholders Association (landlords)

Representative : SLC solicitors

Respondents : Mr and Mrs Perry and Ms Thorne (leaseholders)

Representative : Mr J. Ross of Forsters, solicitors

Type of Application : Seeking a determination of service charges under the Landlord and Tenant Act 1985

Tribunal Members : Professor J. Driscoll, solicitor (Tribunal Judge), Mr I. Jarero FRICS and Ms L. Hart

Date and venue of Hearing : Hearings took place on 29 January 2013 and 3 May 2013 at 10 Alfred Place, London WC1E 7LR.

Date of Decision : 1 September 2013

PRELIMINARY DECISION

Preliminary decision

1. The landlord or its managing agent may recover interim service charges in four instalments during an accounting period and it may during that period recover additional sums where the interim charges to be collected are insufficient to recover the costs incurred in the accounting period in progress.

Background

2. This case involves two applications both of them made by 56 Westbourne Terrace Freeholders Association Limited, the first against Mr and Mrs Perry (joint leaseholders) under claim number LON/00BK/LSC/2012/0443 and the second against Ms Thorn (another leaseholder) under claim number LON/00BK/LSC/2012/0656. Both claims originated in the Central London County Court and were transferred to this tribunal for determinations as to the recoverability of certain service charges.
3. The claims were made by the landlord company which is owned by the leaseholders. It is therefore a leaseholder owned company which has acquired the freehold and it is the landlord under the long leases of the flats. There are eleven flats and all but one of the leaseholders is a member of the company. It has brought proceedings to recover service charges and the main part of the claim is over major works where the respondent leaseholders claim that they were not properly consulted and that no proper demand for these charges has been made.
4. There is also a dispute over whether certain sums are recoverable as interim service charges.

The first hearing

5. Following the transfer of the proceedings to this tribunal directions were given at a pre-trial review held on 23 October 2012 and a two day hearing was arranged for 29 and 30 January 2013. The tribunal received the bundles of documents just before the start of the hearing (a previous application to the tribunal for an adjournment was refused). At the beginning of the hearing we were informed that there was some confusion as to the status of the applications and told that the parties wished to apply for an adjournment.
6. Mr C. Brooks of counsel (there was no instructing solicitor present) appeared with Mr R. Davies, the leaseholder of flats 9 and 11 and with representatives of the current managing agents (Gordon & Co) and a friend of Mr Davies (Mr Olive). Mr J. Ross a solicitor with Forsters appeared for the two leaseholders who are the respondents to the claims. Mr and Mrs Perry are joint leaseholders of flat 1 in the basement. Ms Thorn who lives abroad owns flat 10 and she has appointed Mr Perry to act on her behalf.
7. At the beginning of the hearing counsel sought an adjournment as there had apparently just been a shareholder's meeting where the current directors (which include Mr Davies) had been replaced by new directors which included Mr Perry. The new directors have instructed Ringleys Legal to withdraw instructions to the company's current solicitors the firm of S.L.C.. Ringleys were acting as managing agents. As there was such confusion we adjourned to allow the parties to speak to their advisors. Counsel then told us that having spoken to the Bar Council he had decided to withdraw, because of the doubts over whether he was still instructed, and he left the hearing.
8. We agreed a further adjournment as the leaseholders indicated a willingness to discuss informally the main dispute which is the charges for the major works. Later they told us that they had not reached agreement but were willing to attend a mediation meeting to see if the disputes could be agreed. The hearing was adjourned. The parties told us that they were willing to try to reach an agreement by mediation at the tribunal.
9. At a later date a mediation meeting was held at the tribunal but it did not lead to an agreement.

The second hearing

10. Since no agreement had been reached another hearing was arranged for 3 May 2013. On this occasion Mr K. Dare of counsel (instructed by S.L.C. Solicitors) appeared on behalf of the landlords. As before Mr Davies and Mr Olive attended along with representatives of Gordon & Co managing agents. Mr Ross appeared on behalf of the respondent leaseholders. After hearing various submissions on the interim service charge demands and payments the tribunal adjourned to consider making a preliminary ruling on those issues. Later that day we re-convened the hearing and gave orally our decision on interim payments which are summarised above and for which we give our reasons below. In summary, we decided that additional demands for interim payments may only be made during the accounting period which is in progress and that interim demands which included demands for the costs of major works for subsequent periods may not be made.
11. We then adjourned again as the parties indicated that they might reach agreement of other matters including the legitimate interim service charge demands for two accounting periods. In the event they were unable to reach agreement and another hearing was arranged for 8 July 2013 for the tribunal to hear further argument and evidence after which a full written decision with all of the determinations, including the determination given orally on 3 May 2013 would be given.

The third hearing

12. The members of the tribunal assembled for the hearing on 8 July 2013 but were told that the parties had reached agreement on all matters and that in consequence neither they nor their representatives would be attending the hearing. A hearing was, therefore, unnecessary and as the tribunal assumed that as all matters were now agreed that the file could be closed as the tribunal has no jurisdiction to make determinations where the parties have reached agreement. The case officer wrote to the court advising it that the parties have reached agreement over the disputed service charges. Later the case officer received communications from the solicitors for the parties that they still needed a written decision with reasons for the oral decision given on 3 May 2013.

The reasons for our preliminary decision

13. The issue is the proper construction of the service charge provisions for each annual 'accounting period'. These provisions allow for the recovery of landlord's total expenditure during the accounting period. Each leaseholder is required to pay his or her share of this expenditure. Mr and Mrs Perry pay 12.38% and Ms Thorne 7.45% of the landlord's expenditure. The provisions for the charges are set out in schedule 3 to the leases.
14. Schedule 3 also provides for 'interim charges' to be made. In this way the landlord can require each leaseholder to pay four interim payments during each accounting period. If these payments exceed the service charge the surplus is carried over by the landlord and credited to the leaseholder's account in computing the interim charges for the next accounting period.
15. Where, however, the service charge for a particular accounting period exceeds the interim charges (together with any surplus from the previous year carried forward) the leaseholder has to pay the excess to the landlord after the landlord gives the leaseholder a certificate setting out the total expenditure, the amount of the interim charges, and the amount of the service charges.
16. These (and other) lease provisions were later varied by a deed of variation executed on 30 October 1991. This deed added words to the service charge provisions in schedule 3 to the lease. These words read as follows: 'If the Lessor or its Managing Agents shall reasonably consider that an amount specified as the Interim Charge is insufficient for the Accounting Period in progress, The Lessor or its Managing Agents may increase it by a fair and reasonable amount during the said Accounting Period by written notice to the The Lessee, who shall be liable to pay the Interim Charge as revised in substitution for the amount originally determined and shall forthwith make up any arrears which have thereby become due'.
17. The parties disagree over the correct interpretation of the service charge provisions: do they allow for the landlord to recover additional interim charges for the costs of works that will be carried out during the accounting period following (as those representing the landlord contend) or is the landlord limited to recovering additional charges for expenditure incurred in the accounting period in progress (as those representing the leaseholders contend)?

18. As we indicated in giving our oral decision on this preliminary issue on 3 May 2013 we have concluded that the leaseholder's contentions are correct. Taken together the provisions for payment of service charges in schedule 3 of the lease are in principle a sensible set of provisions which allow the landlord (or its managing agents) to collect through four interim demands its estimated total expenditure for the accounting period in progress.
19. Should the final total expenditure for that period exceed the interim charges the leaseholders must pay the balance to the landlord. If on the other hand the interim charges exceed the total expenditure incurred by the landlord for a particular accounting period the surplus is carried over to the leaseholder's accounts for the next accounting period.
20. As revised by the deed of variation, the landlord or its managing agents can also issue a demand for increased interim payments but only where they reasonably consider that an amount already specified as an interim charge is insufficient for the 'Accounting Period in progress'. In other words, as the service charge provisions have been amended, the landlord can now increase the amounts to be collected for its expenditure for that accounting period. It cannot be used to collect, in effect, advance service charge contributions for costs it may incur for works or other service charges for a different accounting period. As revised the landlord is given more flexibility in the collection of interim charges but only for costs incurred during the period in progress.
21. For example, if the landlord discovers that it has underestimated its expenditure for a particular accounting period it can take steps to collect additional interim payments to cover the shortfall during the accounting period in question and the landlord does not have to wait until the end of the period to recover the shortfall between what it has estimated and what it spent.
22. Another example, is where unexpected works or services need to be carried out during an accounting period, the landlord can collect as interim charges its expenditure for these additional works or services.
23. However, the landlord cannot collect through interim charges its projected expenditure on works or services which will be carried out in a later accounting period. Thus in this case the landlord was not permitted under schedule 3 to the lease to collect interim demands for the costs of major works for subsequent accounting periods.

James Driscoll (Tribunal Judge)

1 September 2013

Appendix: The 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 20B

- (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.

Section 20C

- (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 leasehold valuation 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 a leasehold valuation tribunal;
 - (b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation 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).