

9028



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

Case Reference : **LON/00AZ/LSC/2013/0049**

Property : **Flat 1, 61A Sandrock Road, London
SE13 7TX**

Applicant : **Mr Praveen Kamlesh Anand
(Landlord)**

Representative : **A K Kumar, Cheal Asset
Management Ltd**

Respondent : **Mr Sarah Jenkins Dews (Tenant
(AKA Ms Sarah Jenkins Briggs –
maiden name)**

Representative : **None**

Type of Application : **Section 27A(1) Landlord and
Tenant Act 1985 Transferred by the
County Court**

Tribunal Members : **Mr P M J Casey MRICS
Mr H Geddes
Miss R I Emblin**

**Date and venue of
Hearing** : **17 June 2013
10 Alfred Place, London WC1E 7LR**

Date of Decision : **2 August 2013**

DECISION

Decisions of the tribunal

- (1) The tribunal determines that none of the service charges demanded for the years ending December 1998 to December 2011 are payable.
- (2) The tribunal makes the determinations as set out under the various headings in this Decision

The application

1. The Application, under S27A Landlord and Tenant Act 1985, for determination by the tribunal originated with a County Court claim made by Cheal Asset Management Ltd on behalf of the applicant freeholder, Praveen Kamlesh Anand, on 27 April 2012 .
2. The claim alleged that the respondent, Ms Sarah Jenkins Dews, as the tenant of Flat 1, 61A Sandrock Road, London SE13 7TX (the property) under a lease dated 26 June 1987 owed the applicant £11,487.09 in respect of unpaid service charges, administration charges and ground rents together with interest thereon totalling £9,960.49. The period over which the alleged arrears had accumulated was said to be the twelve service charge years up to the year ending 31 December 2011 but included the insurance premium to 30 December 2012 and two administration charges levied in early 2012 totalling £590.
3. By an Order dated 6 September 2012 District Judge Brett sitting at Bromley County Court ordered that the claim be transferred to the Leasehold Valuation Tribunal.
4. Following a pre-trial review (PTR) on 27 February 2013 before a tribunal at which the applicant was represented by Mr A K Kumar and the respondent appeared in person directions were issued the same day for the further conduct of the application and requiring the applicant to prepare and provide the bundle of documents for the hearing.
5. The PTR set out the sums claimed and the respondent's grounds for disputing the payability of those sums as set out in the defence to claim dated 25 May 2012 filed in the County Court.
6. The relevant legal provisions pertinent to the Tribunal's determination are set out in the Appendix to this decision.

The hearing

7. The hearing of the application took place as directed on 17 June 2013 at 10 Alfred Place. As at the PTR the applicant was presented by Mr A K Kumar of Cheal Asset Management Ltd and the respondent appeared in

person. The tribunal did not inspect the property given the nature of the issues in dispute.

8. At the start of the hearing issues arose regarding compliance with the directions. Miss Briggs claimed not to have received a copy of the hearing bundle though Mr Kumar said one had been sent. The bundle he had prepared did not contain a statement of case as such but did have a reply to the respondent's statement of case, though not that document, which the tribunal had not seen prior to this point. The bundle was also confusingly arranged and poorly paginated. Although the respondent's statement had been sent to him in time for inclusion in the bundle Mr Kumar said he had been "too busy" to do so.
9. Ms Briggs sought an adjournment of the hearing as she felt prejudiced by the possibility of documents she had never seen being included in the evidence. However the tribunal, having read the bundle and being aware of what documents she had seen, did not think she would be prejudiced if given an hour adjournment to read the bundle as most of the documents were "of a kind". This would also give the tribunal time to read her statement and enclosures.
10. Following this short adjournment Ms Briggs identified a number of documents, mostly demands and reminders, she said she had never seen before but although she hadn't been able to consider everything in detail she agreed to the hearing proceeding.

The background

11. The property which is the subject of this application is said to be a ground floor flat in a converted Victoria terraced house
12. The respondent has owned the flat since about 1988 when she purchased the leasehold interest. Then known as Sarah Jenkins Dews, she had since reverted to her maiden name of Briggs which Mr Kumar says had never been notified to the landlord as required by the lease hence the claim referred to her as Dews. Nevertheless we will refer to her as she is now known in this decision.

The issues

13. The tribunal explained to the parties, as had the PTR tribunal, that we had no jurisdiction in respect of the ground rent which remained a matter for the Country Court.
14. The applicant's claim is in respect of the insurance premium, management charge and accountant's fee in each of the years covered by the claim as well as various administration fees arising from non-payment of those sums and interest. The first three items were according to Mr Kumar recoverable as part of a service charge under

the provisions of the lease but as the service charge was not reserved as rent, up to twelve years arrears could be claimed.

15. At the PTR the respondent's defence to the claim in respect of these items was stated to be on the following grounds:
- (i) Failure to serve demands for Service/Administration Charges in the appropriate form
 - (ii) Section 20B of the Act (failure to inform/demand service charges within 18 months of them being incurred)
 - (iii) Failure to provide a copy of the insurance premium, schedule or proof of payment of the premium (as per the terms of the lease)
 - (iv) The lease does not oblige the respondent to pay Administration Charges as claimed.

The lease

16. The lease is dated 26 June 1987 and granted a term of 99 years from 25 March 1987. By clause 3(1)(b) the lessee covenanted "to reimburse the Lessor one half or other fair proportion of the cost of the insurance premium incurred by the Lessor under Clause 5(5) hereof". The lessee further covenants at clause 4(2) "To contribute and pay a fair and proper proportion of the costs expenses outgoings and matters mentioned in the Fourth Schedule hereto and to pay such sums in advance as the Lessor may reasonably estimate as being fair and reasonable in respect of works to be carried out by the Lessor in the future including such reasonable sums as shall be required for a reserve fund for such future expenditure". The Fourth Schedule at paragraph 1 deals with the costs and expenses of fulfilling the Lessors repairing etc obligations at paragraph 2 "The cost of insurance of the building against third party risks", at paragraph 3 it provides for "An addition of 10% to be added to the costs expenses ... referred to in the preceding paragraphs of this Schedule for administration expenses in the event that no managing agents ... are employed by the Lessor" and at paragraph 4 for "All expenses incurred by the Lessor in the employment of managing agents surveyors architects accountants and advisers to carry out the Lessor's obligations hereunder or employed to assist it".
17. Clause 5(3) and (4) set out the Lessor's repairing and redecorating obligations whilst 5(5) is the Lessor's covenant "To insure and keep insured the Building in the full rebuilding cost thereof against loss or damage by fire and usual comprehensive risks ... and shall upon request produce a copy of such policy of insurance and a copy of the receipt for the last premium paid to the Lessee ..." There is at Clause 6 a provision

if both Lessees wish for the Lessor on giving notice to allow them to take on some or all of the obligations under Clause 5(4) and (5).

18. The lease makes provision for the rent to be paid yearly in advance on the 25 March and at 7(c) for interest on arrears of rent and “any other moneys hereby covenanted to be paid by the lessee ...” but it is silent as to when and how service charges are to be paid or in respect of what period, though the applicant operates on the basis of each service charge year ending on 31 December.
19. The only provision for the payment of an administration charge is at Clause 3(1)f requiring payment of a solicitor’s fee of £10 for registration on disposition, etc.

The evidence

20. The applicant’s case as presented by Mr Kumar, who confirmed that he had no relevant legal qualification, was that all the sums claimed had been properly demanded from the respondent in accordance with the lease and relevant statutory provisions and as not reserved as rent up to twelve years of arrears could be claimed. He included in the bundle what he said repeatedly were copies of the demands actually sent at the time for all the years from 1998 save for 1999. The demands for the years to December 2003 had been retrieved from the managing agent’s (KPLA & Company the trading name of Cheal Asset Management Ltd) old computer system the later ones from their current system. Since 2007 the demands had been accompanied by the requisite statement of Tenant’s Rights and Obligations.
21. The demand for each year included 50% of the insurance premium paid to insure the building, 50% of KLPA’s management fee and since 2003, 50% of the fees of Kamlesh K Anand and Company, accountants, for preparing the annual statement of costs which Mr Kumar said accompanied the demands.
22. He included a letter from BK Insurance brokers confirming payment of insurance premiums from 2002/03 to 2011/12 save for 2004/5 which could not be traced nor could records for previous years. BK placed the insurance – for the last 3 years with Zurich and prior to that with Allianz. Neither the applicant nor the managing agents received commission and the sum insured was indexed each year.
23. In respect of the management fee Mr Kumar said the applicant had appointed KLPA as managing agent and copies of agreements dated 10 December 2005 and 8 December 2009 were included in the bundle. The agreed fee in 1998 was £75 per flat and was now £250 per flat. He accepted the applicant’s father was a partner in the firm and he was also the accountant whose fee rose from £100 in 2003 to £120 currently. He said the lease allowed for the recovery of these fees through the service charge and for interest to be charged on arrears.

24. In response to questions from the respondent he said the property had not required an insurance revaluation as indexing the sum insured when it was acquired was enough. It was the rebuild cost that mattered not the market value. He said the applicant had not been told the respondent had her own policy and anyway it was the applicant's obligation not hers. He denied any knowledge of her claim on her own policy in 1999/2000. Mr Kumar accepted the property had not been inspected for "a couple of years" but said KLPA had not been advised of any works needing doing and none had been charged for. The management fee was not for doing physical works but was the cost of carrying the landlord's responsibility.
25. When asked by the tribunal why the demands, which he had repeatedly said were true copies of what was sent to the respondent dated 4 January 2005, 6 January 2006 and 10 January 2007 had reference to reminders sent in December 2012 whilst on those for 2009/10 this had been poorly snowpaked out he said that this was an error in the template on the computer. He had provided proof of posting which we should accept though he accepted responsibility for errors that had crept into the documents.
26. The respondent read her statement of case in evidence. In it she identified the documents sent to her by the applicant on 27 March 2013 and highlighted where these fell short of compliance with the directions. We will not record here in any detail her evidence but she addressed the issues relating to service of demands/documents, insurance, management and accountancy fees and administration charges. We have had full regard to her Statement of Case and attachments and will refer to the relevant parts in the reasons for our decision under the various headings below.

The tribunal's decision

Reasons for the tribunal's decision

Service of demands

27. It is fundamental to an applicant's claim for alleged arrears of service charges to show that those sums have been lawfully demanded. The lease is silent as to when and in what manner demands are to be made and the respondent makes no issue of the service charge year adopted by the applicant. Statute law only requires by the provisions of S21B of the Act and The Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007 that demands made after 1 October 2007 must be accompanied by a statement of rights and obligations in the absence of which a tenant may withhold payment although S47 of the Landlord and Tenant Act 1987 requires that demands must contain the name and address of the landlord.

28. The respondent says in her statement that none of the demands for payment included in the bundle were sent to her on 27 March 2013 as required by the directions and having quickly read through the bundle she denied having received most of them at the time either, although she admitted receiving demands for 2009, 2010, 2011, and 2012 (the last being outside the claim period). Only the demand for 2011 had the statement of rights and obligations attached but even that failed as do the others to properly give the landlord's name and address, the address given being KLPAs.
29. There is thus a complete conflict of evidence in respect of demands. We do not accept Mr Kumar's explanation as to why "December 2012" appeared on the demands for the years ending 2005, 2006 and 2007 and, despite an attempt to obscure, those for 2008/9 and accept the respondent's evidence that she had received only the demands she acknowledges and that they failed to comply with statutory requirements. She had not commented on the earlier demands included in the bundle because she had not been sent them as part of the directed disclosure of documents prior to the hearing but we do not think we can place any reliance on Mr Kumar's evidence that these are copies of what was sent at the time. The certificates of posting do not help in respect of those earlier years.
30. The applicant has failed to discharge the burden of proof that rests with him to show that he has lawfully demanded the sums he claims are owed to him and accordingly we determine that none of these sums are payable by the respondent.

Reasonableness

31. The respondent explains in her statement why she felt the need to take out her own insurance and produced some very historic evidence of requests to the landlord to be given details of his policy but even if such requests were made and ignored it does not seem to us that that fact overrides the covenant to reimburse the landlord in accordance with Clause 3(1)(b) of the lease. The evidence is that the landlord has fulfilled his obligations under Clause 5(5) and whilst we can share her concern regarding the sum insured Ms Briggs provided no evidence that the cover is inadequate or the premium excessive. On the case put to us and the evidence, or lack of it, we accept that the amount of the insurance contribution for each year in question is reasonable.
32. So far as KLPAs' management fees are concerned the evidence is that apart from issuing demands for service charges that cannot be proven to have been lawfully made the managing agents do nothing. They have not organised any repairs or decorations in the whole of the time Ms Briggs owned the property, some 25 years, never carried out an insurance valuation and rarely if ever inspected the property. They do not place the insurance. The arrangement is clearly designed to circumvent the 10% proviso in the Fourth Schedule to the lease. In our

view the fee claimed is wholly unreasonable and no sum is payable in this respect.

33. Similar considerations apply to the accountant's fee which is disproportionate and unnecessary where the only service chargeable item is the insurance. Again we determine nothing should be payable for accountancy.
34. Having determined that none of the demands are payable it follows that none of the sums sought in interest charges or administration fees are payable either though we note there is no provision in the lease whereby the respondent has covenanted to pay any administration charges save in respect to dispositions.

Name: P M J CASEY

Date: 2 August 2013

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

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 the appropriate 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 the appropriate 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 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.

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.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

- (1) An application may be made to the appropriate tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.
- (3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
- (4) No application under sub-paragraph (1) 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.
- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
 - (a) in a particular manner, or
 - (b) on particular evidence,of any question which may be the subject matter of an application under sub-paragraph (1).