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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AE/LSC/2013/0518**
Property	:	**Flat 5, Oman Court, Oman Avenue, London, NW2 6AY**
Applicants	:	**EL Benveniste & Hornsey Estates Ltd**
Representative	:	**Mr M Paine of Circle Residential Management Ltd**
Respondent	:	**Mr G Byrne**
Representative	:	**Mr J Byrne (brother)**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Judge I Mohabir** **Mr S F Mason BSc FRICS FCIArb** **Mrs L Walter MA (Hons)**
Date and venue of Hearing	:	**5 December 2013** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**22 January 2014**

DECISION

Introduction

1. This is an application made by the Applicants seeking a determination under section 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") of the Respondents' liability to pay and/or the reasonableness of interim service charges for the year 2008/09 in the sum of £1,060.70.

2. The Respondent is the lessee of the property known as Flat 5, Oman Court, Oman Avenue, London, NW2 6AY ("the property") pursuant to a lease dated 11 October 1993 made between Plasire Company Limited and the Respondent for a term of 125 years from 29 September 1986 ("the lease"). The Applicants are the present freeholders who have instructed Circle Residential Management Ltd ("Circle") as the managing agent.

3. The property is described as a 3-bedroom flat in a purpose built block of flats comprised of 23 flats in total.

4. The lessees' covenant to pay both an interim charge and the service charge is contained in clause 2(2) of the lease. This is payable in respect of those costs at clauses 2(2)(a)-(x) and those incurred by the landlord pursuant to the discharge of its obligations set out in clause 5 of the lease. Clause 2(2)(b) requires the lessee to pay on account two equal contributions on 25 March and 29 September in each year in relation to the annual budget estimate prepared by the lessor.

5. Clause 2(2)(a) requires the lessee to pay and contribute a proportionate part of the service charges demanded by the lessor. The lease originally provided that this was to be calculated by reference to the rateable value of the property when compared to the aggregate rateable values of the other flats in the building. However, by an agreement reached with the lessees and attended by the Respondent on 9 October 2007 the contractual rate for each flat was agreed. The Respondent agreed that the contractual rate at which his service charge contribution would be calculated is 5.30350% of the overall expenditure recoverable under the terms of his lease.

6. It seems that the Circle did prepare, on 26 January 2009, a budget estimate for the year ended 24 December 2009[1]. On 9 March 2010, Circle also prepared a statement of the actual expenditure incurred in that year[2]. It is accepted by Circle that no demand for the estimated service charges was served on the Respondent at the time. It is also accepted by Circle that the only demand served on the Respondent is dated 3 December 2012[3], which appears to include a balancing charge of £153.07 claimed in respect of the actual expenditure incurred in 2008/09.

7. On 16 July 2013, Circle made this application on behalf of the Applicants seeking a determination limited to the Respondent's liability to pay and/or the reasonableness of the total estimated service charges claimed for 2008/09 in the sum of £1,060.70. The various heads of expenditure and amounts upon which this figure is based is conveniently set out in the service charge statement dated 25 June 2013[4].

Relevant Law

8. This is set out in the Appendix annexed hereto.

Decision

9. The hearing in this matter took place on 25 September 2013. The Applicant was represented by Mr Paine of Circle. Mr J Byrne, the Respondent's brother, appeared on his behalf. It should be noted that the Tribunal was satisfied that Mr Byrne had complete authority to act on behalf of the Respondent in this matter.

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[1] see page 42 of the bundle
[2] see page 44 of the bundle
[3] see page 48 of the bundle
[4] see page 41 of the bundle

Section 20B

10. The first issue the Tribunal had to consider was whether the estimated costs in issue were recoverable at all by reason of section 20B of the Act. This point was raised in the Tribunal's Directions dated 20 august 2013.

11. Mr Paine submitted that section 20B only applied to costs incurred and had no application to estimated costs, which are claimed by the Applicants. The section was only concerned with actual expenditure. Therefore, there was no statutory time limit on the issuing of an estimated demand even though the relevant demand served on the Respondent is dated 3 December 2013. Mr Byrne made no submissions on this point.

12. The Tribunal concluded that the submission made by Mr Paine was essentially correct. The very same point was considered in the case of ***Gilje & Ors v Charlegrove Securities Ltd & Anor (No.2)*** [2003] 36 EG 110 where the Court of Appeal, in dismissing the tenants' appeal, held that section 20B of the Act had no application in relation to payments on account. It only did so where a landlord had spent more than he had demanded on account in which case he would have to raise a further demand within the 18 month period prescribed by section 20B.

13. In the present case, the Applicants were limiting the claim to the total on account sum of £1,060.70. It is clear that the Applicants' actual expenditure incurred in 2008/09 had in fact exceeded the sum demanded on account. They were not seeking to also recover the balancing charge of £153.07 from the Respondent. Even though it was not expressly raised as an issue and does not fall to be considered in this case, it seems that having regard to the decision reached in ***Gilje*** the balancing charge is irrecoverable by reason of section 20B of the Act.

14. Accordingly, the Tribunal found that section 20B did not apply to the estimated sum in issue and it could then proceed to deal with the issue of

reasonableness of the heads of expenditure challenged by the Respondent. These are dealt with in turn below.

Building Repairs

15. The budget estimate for this head of expenditure was £1,982, of which the Respondent's contribution is £105.12.

16. Mr Byrne simply submitted that the estimated expenditure was unreasonable because little or no repairs were carried out by the Applicants.

17. The Tribunal did not accept Mr Byrne's submission. As part of their evidence, the Applicants had provided the invoices for the actual expenditure incurred in 2008/09, which totalled £4,990. With the benefit of this hindsight, the Tribunal has little difficulty in concluding that the estimated expenditure of £1,982 was reasonable and was allowed as claimed. It should be noted that the Tribunal's finding is limited to the estimated cost and does not extend to whether the actual expenditure had been reasonably incurred and was reasonable in amount.

Buildings Insurance

18. The budget estimate for this head of expenditure was £5,500, of which the Respondent's contribution is £291.69.

19. Mr Paine said that the budget estimate had been based on an increase on the actual premium of £4,753.56 incurred in the preceding year. Mr Byrne submitted that the estimated sum could not be reasonable because the actual premium paid for 2008/09 was £3,676.53 and this was the figure he contended for.

20. It should be made clear that the Tribunal's determination on this issue can only be made on the basis of whether or not at the time the budget was prepared the estimate for this head of expenditure was reasonable.

It was not concerned with the actual expenditure incurred. Having regard to the sum paid in the preceding year, the Tribunal concluded that a budget estimate of £5,500 was reasonable and was allowed as claimed.

Year End Accounting

21. The budget estimate of £165 and the Respondent's contribution of £8.75 was agreed by Mr Byrne.

Management Fee

22. The budget estimate for this head of expenditure was £5,053, of which the Respondent's contribution is £267.99.

23. Mr Paine said that the management fee of his firm had been calculated at a unit rate of £215 plus VAT. The management duties carried out by Circle are set out at paragraph 14.4 of its statement of case and are self-evident. It is, therefore not necessary to set these out here again.

24. Mr Byrne complained that the management service provided by Circle was not reasonable. Management failures included misguided County Court claims, invalid section 146 costs being added to the service charge account, request for repairs to be carried out were ignored and that generally the management was not proactive. He submitted that half the management fee claimed was reasonable.

25. There was no evidence before the Tribunal to support Mr Byrne's assertion regarding misguided County Court claims and invalid section 146 costs being added to the service charge account. The evidence demonstrated that Circle was providing a reasonable management of the building by attending meetings with the tenants to reach a degree of consensus about the management of the building and the cost of doing so, replying to correspondence, placing the buildings insurance, effecting repairs (as evidenced by the invoices) and keeping proper books of account. For these reasons, the Tribunal determined that the

management fee of £215 plus VAT per unit was reasonable and it was allowed as claimed.

Electricity

26. The budget estimate for this head of expenditure was £1,800, of which the Respondent's contribution is £95.46.

27. Mr Byrne said that the bills relating to the actual expenditure incurred were different and amounted to £1,467.38, which was lower than the budget estimate.

28. For the same reasons set out at paragraph 20 above, the Tribunal found the budget estimate of £1,800 was reasonable and it was allowed as claimed.

Cleaning & Gardening

29. These two items were considered together. The budget estimates were £3,500 and £2,000, of which the Respondent's contribution is £185.62 and 106.07 respectively.

30. Mr Byrne submitted that the budget estimates were unreasonable because, whilst the cleaning costs had increased, it was erratic and inadequate. As to the gardening costs, he said that the monthly charge did not reflect the different levels of gardening required, for example, in the summer and winter months. Consequently, these costs should be halved.

31. Save for his assertions otherwise, Mr Byrne had provided no evidence to support those assertions. The overall budget estimates for gardening and cleaning did not on the face of them strike the Tribunal as being inherently unreasonable. The Tribunal accepted the evidence of Mr Paine that the cost should be spread evenly over a 12-month period. In the Tribunal's judgement, it would be unnecessary and impractical for a managing agent to speculate how estimated costs should be apportioned

for any given period when the annual budget is prepared. In addition, for the same reasons set out at paragraph 20 above, the Tribunal found the budget estimates of £3,500 and £2,000 respectively for the cleaning and gardening were reasonable and were allowed as claimed.

Section 20C & Fees

32. The Respondent had made an application under section 20C of the Act in relation to the Applicant's entitlement to recover the costs, if any, it had incurred in these proceedings. Mr Paine said that this was not opposed on behalf of the Applicant. Nevertheless, it was incumbent on the Tribunal to consider and determine the application.

33. Given that the Respondent had not succeeded on any of the issues in the substantive application, the Tribunal concluded that it was just and equitable that no order should be made preventing the Applicants from being able to recover any of the costs it had incurred in bringing this application. This does not mean to say that the Tribunal also finds that any such costs, if claimed, are reasonable. If they are disputed by the Respondent or any other tenant, then they will have to be the subject matter of a separate application made under section 27A of the Act.

34. For the same reasons set out above, the Tribunal makes an order that the Respondent should reimburse the Applicants the fees of £315 paid to the Tribunal to have this application issued and heard.

Judge I Mohabir
22 January 2014

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 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.

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).