

10215



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

Case reference : **LON/00AQ/LSC/2014/0202**

Property : **Flat 20, Birchfield, 1 Palmerston Road, Wealdstone HA3 7HB (“the flat”)**

Applicant : **Miss Reena Mistry (“the tenant”)**

Representatives : **In person**

Respondent: : **Paddington Churches Housing Association Ltd (“the landlord”)**

Representatives : **Genesis Housing Association Ltd (“Genesis”)**

Type of application : **Liability to pay service charges**

Tribunal Judge : **Angus Andrew
Marina Krisko FRICS**

Date and venue of hearing : **16 July 2014
10 Alfred Place, London WC1E 7LR**

Date of decision : **23 July 2014**

DECISION

Decisions

1. No service charges are payable by the tenant in respect of the years ending 31 March 2011 and 31 March 2012.
2. The tenant is not liable to pay any interim on account payments in respect of the year ending 31 March 2013.
3. The landlord may not recover any of its costs incurred in these proceedings from the tenant through the service charge.
4. The landlord must by 22 August 2014 pay £315 to the tenant being the fees incurred by her in these proceedings.

The application and hearing

5. By an application dated 2 April 2014 the tenant sought a determination pursuant to section 27A of the Landlord and Tenant Act 1985 (“the 1985 Act”) of her liability to pay service charges in respect of the service charge years ending on 31 March 2011, 2012, 2013 and 2014. She also sought an order under section 20C of the Act preventing the landlord from recovering the cost incurred in these proceedings through the service charge. Finally she sought an order that the landlord reimburse her with the fees paid to the tribunal in connection with these proceedings.
6. On 9 April 2014 the tribunal sent a copy of the application to Genesis at the address shown in the copy statements provided by the tenant. On 10 April 2014 the tribunal gave notice of a case management conference to be held at the tribunal offices on 1 May 2014. Again the notice was sent to Genesis at the correct address. At the case management conference on 1 May 2014 the landlord did not appear and was not represented and no explanation was provided for its absence. Detailed directions were given by the tribunal judge, the first of which required the landlord to disclose various documents by 16 May 2014. At the case management conference the tenant handed in a letter dated 2 April 2014 from Genesis giving notice that all future notices to be served on the landlord should be served on Genesis at an address in Camden Town. This is recorded in the tribunal’s directions. The directions and all subsequent letters sent by the tribunal were sent to that address.
7. The landlord failed to comply with the tribunal’s directions and did not provide disclosure. Consequently on 9 June 2014 tribunal member Aileen Hamilton-Farey gave notice under section 9(3) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 that the landlord’s failure to comply with the tribunal’s directions “*may lead to them being barred from taking any further part in these proceedings and with a possible result that the Tribunal determines nothing is payable*”.

Notwithstanding that notice the landlords have not to this day either complied with the tribunal's directions or responded to tribunal correspondence. All that correspondence was correctly addressed and none of it was returned.

8. Notwithstanding the landlord's failure to engage in these proceedings the tenant prepared a comprehensive hearing bundle that included a detailed Scott schedule and such statements and correspondence as she had received from either the landlord or Genesis. The tenant attended the hearing and was supported by her father. The landlord did not appear and was not represented. Again no explanation was given for its absence. We adjourned the hearing for an hour. At our request the case officer made a number of telephone calls to Genesis at the various telephone numbers recorded in the documents included in the hearing bundle. The case officer's calls were answered but when she explained that she was ringing at the request of the tribunal she was told that anyone who might be able to assist her was either unavailable or in a meeting. She asked that a responsible official return her calls but by 11 am no response had been received.
9. In the circumstances we were faced with the choice of either proceeding with the hearing in the absence of the landlord or postponing the hearing to another date. The landlord has throughout failed to comply with its obligations in rule 3 of the 2013 rules to help the tribunal to further the overriding objective and to cooperate with the tribunal generally. In contrast the tenant had done everything that could be expected of her. She lives in Stanmore and she and her father had taken time off to attend the hearing and would be prejudiced by a postponement. The tribunal's limited resources would be eroded by a postponement. The landlord had already been given formal notice that it might be barred from taking any further part in these proceedings. For each and all of these reasons and having regard to the overriding objective and the need to deal with cases fairly, justly and proportionately we decided to proceed with the hearing and heard evidence from the tenant.

Background

10. The tenant purchased her flat on 17 June 2010 and on 28 June 2010 her solicitor's gave formal notice of her purchase to the landlord and copy of that notice is included in the hearing bundle. She lived at the flat until the end of that year after which she moved to her present address in Stanmore, which is not far away. She did not give formal notice of her change of address to Genesis because she attends at the flat on a regular basis to collect her correspondence. Thus despite her change of address she was adamant that she has received all correspondence sent to her at the flat.
11. The tenant heard nothing from either Genesis or the landlord until she received a letter dated 12 March 2013 informing her that she should pay a monthly on account payment of £34.02 from 1 April 2013. That letter was

accompanied by a service charge schedule giving various estimated heads of expenditure. The tenant set up a direct debit for payment of that monthly sum.

12. The next communication that the tenant received from Genesis was a statement of account dated 23 July 2013 that is said to refer to the period 1 April 2013 to 21 July 2013. It is a running statement and commences with an unexplained opening balance on 1 April 2013 of £1,634.16. Although the tenant's 3 payments of £34.02 are credited she has been debited with monthly on account payments of £87.47 notwithstanding the earlier letter of 12 March 2013. The account concludes by asserting that she is in arrears by £1,847.96. Not surprisingly the tenant was unable to understand this statement and over a period of time she repeatedly asked for an explanation that was never forthcoming. On 3 January 2014 Genesis sent a further statement of account to the tenant recording that her arrears had increased to £2,599.35. In that statement she has again been debited with monthly on account payments of £87.47 notwithstanding the earlier letter of 12 March 2013.
13. The tenant's repeated requests for an explanation of the arrears resulted in Genesis writing to her on 10 February 2014. Although not recorded in the letter it was accompanied by copies of the service charge accounts for the years ending 31 March 2011 and 31 March 2012 and a further running account dated 10 February 2014. The tenant told us that it was the first time that she had seen copies of the service charge account for those years. In the statement the tenant has again been debited with a monthly on account payment of £87.47 and there are also other unexplained charges that may possibly represent balancing charges from previous years although that is far from clear. The covering letter is forthright. It demands arrears of £2,706.25 and threatens that if those arrears are not paid within 7 days Genesis will contact the tenant's mortgage lender and inform it of the possibility of forfeiture action. In light of the tenant's repeated polite requests for explanations and information the letter can only be regarded as unhelpful.
14. Although not directly relevant to the disputed years the tenant received a further letter in March 2014 requesting her to increase the monthly payment from £34.02 to £55.43 and she complied with that request. That letter enclosed a booklet explaining her rights and obligations. The booklet was clearly intended to comply with section 21B of the 1985 Act and the regulations made under it. She told us that it was the first time that such a summary had been given to her.

Issues in dispute

15. The tenant took no issue with the monthly payments that she has made since 1 April 2013. She does however object to paying the arrears demanded by Genesis for a number of reasons.

16. In respect of the years ending 31 March 2011 and 2012 the tenant asserts that no service charge is payable because all the costs were incurred more than 18 months before she received a demand for payment. In short she relies on section 20B of the 1985 Act.
17. Secondly (and subject to her concession in respect of the monthly on account payments of £34.02) she asserts that no service charges are payable in respect of the four disputed years because in so far as the statements of account may be regarded as demands they were not accompanied by a statement of her rights and obligations as required by section 21B of the 1985 Act.
18. Finally she asserts that the landlord has failed to comply with the service charge provisions contained in her lease that are set out in clause 7 and in particular clause 7 (6) that reads as follows:

“7(6) As soon as practicable after the end of each Account Year the Landlord shall determine and certify the amount by which the estimate referred to in paragraph (a) of sub-clause (4) of this clause shall have exceeded or fallen short of the actual expenditure in the Account Year and shall supply the Leaseholder with a copy of the certificate and the Leaseholder shall be allowed or as the case may be shall pay forthwith upon receipt of the certificate the Specified Proportion of the excess of the deficiency. Omission by the Landlord from a certificate of any expenditure incurred in the financial year to which the certificate relates is not to preclude the inclusion of that expenditure in any subsequent certificate”.

19. The tenant asserted that neither the landlord nor Genesis has ever provided her with a copy of the certificate required by clause 7(6).

Reasons for our decision

Year ending 31 March 2011

20. No monthly interim advance payments were ever demanded from the tenant and none are now payable. Equally no balancing charge was demanded within 18 months of the year end. As the costs must have been incurred during that year section 20B is engaged and consequently the tenant is not now liable to pay any balancing charge.

Year ending 31 March 2012

21. Again no monthly advance payments were ever demanded from the tenant and the year having closed non can now be payable. As far as any balancing charges are concerned the only document received by the tenant within 18 months of the year end was the statement of account dated 13 July 2013. That was received by the tenant nearly 16 months after the year end, which

does not itself preclude section 20B being engaged: that would depend upon but when the cost incurred during the service charge year were actually incurred. Nevertheless we are satisfied that a running account does not amount to a demand for payment. There is no explanation of the opening balance. The account itself is inaccurate in that incorrect payments on an account have been debited to it. Even if the statement could be regarded as a demand it was not in any event accompanied by a statement of the tenant's rights and obligations. The account does not comply with the landlord's obligations contained in clause 7(6) of the lease in that the tenant had not being supplied with a copy of the required certificate or indeed the service charge accounts for that year. Consequently and for each of these reasons we are satisfied that any balancing charge for the year ending 31 March 2012 is not payable by the tenant.

Service charge year ending 31 March 2013

22. As with the two previous years no monthly advance payments were ever demanded from the tenant and the year having closed she can no longer be liable for them. On the basis of the documents sent to the tenant it would seem that Genesis have not yet prepared the year end accounts. Certainly neither a copy of those accounts nor the certificate required by clause 7(6) of the lease has been served upon the tenant. On the basis of the information available to us it cannot be said that section 20B (1) of the Act is engaged. That will be a matter for a future determination if and when the service charge accounts are issued and a demand for the balancing charge is made.

Year ending 31 March 2014

23. The monthly advance payments of £34.02 are conceded by the tenant. The monthly sums of £87.04 debited to the statements of account remain unexplained. They have never been formally demanded and are not payable by the tenant. Furthermore the statements of account cannot override the formal demand made to the tenant on 12 March 2013 notifying her that from 1 April 2013 the monthly advance payment would be £34.02. Consequently we are satisfied that that is the only sum currently due from the tenant. Clearly a balancing charge may in due course become due if the landlord issues a timely demand that is consistent with its statutory and contractual obligations.

Reimbursement of fees and Section 20C

24. To the extent that the costs might be recovered through the service charge the right to recover them is a property right which should not be lightly disregarded. Section 20C however provides that a tribunal may "*make such order on the application as it considers just and equitable in the circumstances*". Those words permit us to take into account the conduct of the parties in deciding whether to make an order.

25. The tenant has been wholly successful in these proceedings. Even though the landlord was given notice that it might be barred from defending these proceedings it still failed to comply with the tribunal's directions. As observed it has throughout failed to comply with its obligations in rule 3 of the 2013 rules to help the tribunal to further the overriding objective and to cooperate with the tribunal generally. Even if the tenant had not been successful the landlord's conduct would have merited an order. Consequently and for each and all of these reasons it is just and equitable to make the order sought by the tenant. For similar reasons we order the landlord to repay to the tenant her fees of £315 incurred in making this application including the hearing fee, such fees to be paid within 28 days.

Name: Angus Andrew

Date: 23 July 2014

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 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) the appropriate 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.]

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.

Section 21B

- (1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.
- (2) The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.
- (3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.
- (4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.
- (5) Regulations under subsection (2) may make different provision for different purposes.

- (6) Regulations under subsection (2) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.