10923

FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AH/LSC/2015/0106**
Property	:	**Flat 2, 140 St James's Road, Croydon, Surrey CR0 2UY**
Applicant	:	**Mr Paul Whelton**
Representative	:	**In person**
Respondent	:	**Ms Shazna Choudhry**
Representative	:	**In person**
Type of Application	:	**For the determination of the liability to pay a service charge**
Also present	:	**Mr Mustafa Choudhry (Respondent's brother) Ms Adeline Martin (leaseholder of Flat 1)**
Tribunal Members	:	**Judge P Korn Mr A Lewicki FRICS**
Date and venue of Hearing	:	**29th June 2015 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**17th July 2015**

DECISION

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Decisions of the Tribunal

(1) The disputed service charges, namely those for the service charge year 2011/12, are not currently payable as the demand for payment of these service charges was not served in accordance with all of the requirements of section 47 of the Landlord and Tenant Act 1987.

(2) Subject to the above point the disputed service charges amounting to £2,978.33 are payable in full and therefore will become payable once the Applicant has fully complied with section 47 of the Landlord and Tenant Act 1987 in relation to that demand.

(3) It is noted that no cost applications have been made specifically in connection with these proceedings before the Tribunal.

(4) Under the terms of the County Court Order pursuant to which this matter was transferred to this Tribunal for determination, the Tribunal does not have jurisdiction to make a determination in relation to the disputed legal costs. The payability or otherwise of the legal costs therefore falls to be determined by the County Court together with County Court interest and court fees.

Introduction

1. The Applicant seeks and, following a transfer from the County Court, the Tribunal is required to make a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("**the 1985 Act**") as to the reasonableness and payability of certain service charges charged to the Respondent.

2. The County Court claim was for service charge arrears for the years 2010/11 and 2011/12 – amounting to £4,187.99 in aggregate – plus legal costs, County Court interest and costs. Part of the way through the County Court proceedings a partial settlement was agreed and this was formalised in a Court Order dated 8th September 2014.

3. One term of the Court Order was that there be judgment as to part for the Applicant in the sum of £1,209.66. The other term of the Court Order was expressed as follows: *"There being a genuine dispute as to the residue of the service charges claimed, the matter be transferred to the Upper Tier Tribunal (LUT) for determination of these issues following which the matter can be restored for determination of issues as to costs and interest if not agreed"*.

4. In our view it can safely be assumed that the intention of the County Court was to transfer the matter to the First-tier Tribunal Property Chamber (rather than to "the Upper Tier Tribunal (LUT)"), and no useful purpose would be served by referring the matter back to the

County Court for clarification. As regards the service charge claim, the Order gives judgment in the sum of £1,209.66, this being identical to the amount claimed by way of service charges for the 2010/11 service charge year, and it would therefore seem that the County Court's reference to the residue of the service charges was intended to relate to the service charges claimed for the 2011/12 service charge year, namely the sum of £2,978.33. This interpretation is also consistent with the understanding of both parties as expressed at a case management conference on 31st March 2015 and at the full hearing.

5. The other point to clear up is whether the County Court transferred to this Tribunal for determination the issue of the payability or otherwise of the legal costs being claimed by the Applicant as set out in the Arrears Schedule prepared by SLC Solicitors. In our view the County Court has not transferred this issue. The County Court Order refers to the service charge dispute and transfers the matter to this Tribunal for determination of *"these issues"*, adding the words: *"following which the matter can be restored for determination of issues as to costs and interest if not agreed"*. In our view this means that the County Court itself will deal with all costs issues unless they are agreed between the parties, and consequently this Tribunal does not have jurisdiction in this case to deal with the costs issues which form part of the existing claim.

6. Certain points were raised by the Respondent in written submissions, answered by the Applicant in written submissions and then not pursued further by the Respondent at the hearing.

7. At the hearing, the Applicant accepted after some discussion that the amounts being claimed were all advance charges based on estimates rather than actual charges based on costs already incurred.

8. The relevant statutory provisions are either set out in the Appendix to this decision or set out in the body of this decision. The Respondent's lease ("**the Lease**") is dated 4th October 1989 and was originally made between Mastercroft Limited (1) and Winston George Miller (2). The Respondent is the current leaseholder and the Applicant is her current landlord.

The issues

9. At the start of the hearing the Respondent stated that her challenges to the service charges for the year 2011/12 were limited to the following:-

- Demand not compliant with section 47 of the Landlord and Tenant Act 1987 ("**Section 47**")

- Failure to consult in relation to proposed works as required by section 20 of the 1985 Act ("**Section 20**")

- No invoices or receipts provided by the Applicant

- Service charges not payable in advance because Lease does not provide for this in the particular circumstances.

10. The Respondent had originally also raised an argument under section 20B of the 1985 Act but she informed the Tribunal at the beginning of the hearing that she no longer wished to pursue this argument.

Parties' submissions on the issues

Section 47

11. In the Respondent's submission, the demand for the disputed service charges of £2,978.33 was not compliant with the requirements of Section 47 as it contained the address of the landlord's agent and not the landlord's own address. In support of her position she referred the Tribunal to the Upper Tribunal case of *Beitov Properties Limited v Elliston Bentley Martin (2012) UKUT 133*. She conceded that the demand could be re-served.

12. The Applicant believed that he had complied with Section 47 as he had left the matter to be dealt with by his managing agent and the agent had told him that the demand was compliant with Section 47. His recollection was that at the County Court hearing the Judge had expressed the view that the demand was compliant with Section 47, but the Respondent disagreed that the County Court Judge had made any such statement.

Section 20 consultation

13. The Respondent noted that the budget for 2011/12 included an amount of £5,400.00 (to be split equally between the three flats) for proposed maintenance. She did not know what this related to, but this amount was above the consultation threshold and the Applicant had failed to go through a Section 20 consultation process. Therefore, in the Respondent's submission, the Applicant could not recover more than £250.00 per leaseholder. In written submissions the Respondent added that she had received no proof that the works had ever been carried out or would be carried out.

14. In written submissions on behalf of the Applicant, his solicitors stated that no contract for any works had exceeded £250.00 per flat and that there was nothing in the Lease to indicate that an estimate or contract

had to be provided. They also stated that the works to the building were self-evident.

15. At the hearing the Applicant said that the figure of £5,400.00 was based on the assumption that a series of works would be carried out, these being listed on a sheet within the hearing bundle headed "140 St James's Road Budget forecast 2012". However, most of these works had still not been carried out due to lack of funds. In any event, in his submission each element of the proposed works was below £250.00 per flat.

No invoices/receipts provided

16. In written submissions the Respondent stated that she had requested copies of receipts and invoices on numerous occasions but that none had been provided until 20th April 2015. At the hearing she added that she had seen no evidence of the building insurance for 2011/12.

17. In written submissions on behalf of the Applicant in response, the Applicant's solicitors stated that since April 2012 there had been no questions from the Respondent, no written requests for information and no attempt to make payment. There had been no correspondence of any kind from the Respondent to the Applicant until proceedings commenced. At the hearing the Applicant said that the building had been insured with "One Answer" until the end of 2013 and that insurance details had been sent to the Respondent.

Interpretation of Lease

18. The Respondent referred to clause 3(ii) of the Lease, which contains a covenant on the part of the lessee to *"contribute and pay upon demand one third of the costs expenses outgoings and other matters mentioned in the First Schedule hereto which contribution shall include payments in advance if required under the terms of an estimate or contract relating thereto"*. In her submission this was the operative provision relating to the payment of service charge and it limited the Applicant's ability to require advance payments of service charge to situations in which such advance payments were "required under the terms of an estimate or contract". In her submission, this did not apply to any of the items making up the disputed service charge.

19. The Applicant did not accept the Respondent's interpretation of clause 3(ii).

General comments

20. In written submissions the Respondent stated that the Applicant had been harassing her with late night telephone calls and leaving offensive and intimidating messages and threatening to involve the police.

21. As a general point, the Respondent added that in her view it was not reasonable for the Applicant to charge anything for the 2011/12 year.

22. In written and oral submissions the Applicant stated that the building, and in particular the Applicant's own flat, had suffered considerable damage from water ingress as a result of an unauthorised alteration at the Property. The Respondent had persistently failed to pay service charges since purchasing the Property. The Applicant denied that he had left the Respondent offensive or intimidating messages or made any unjustified accusations or false claims against her. The police had been involved because overcrowding in the Property had led to damage being caused, and lead had been stolen from the roof. On an inspection of the Property on behalf of the insurers, the loss adjuster had described the interior of the Property as being in very poor condition.

Tribunal's analysis and determinations

Section 47

23. The demand for the disputed service charges is undated but was apparently sent in April 2012. It gives the name of the Applicant and describes his address for the service of notices pursuant to section 47 of the Landlord and Tenant Act 1987 as 102 Hazelwick Road, Three Bridges, Crawley, West Sussex RH10 1NH. At the top of the demand the Applicant's name is given and he is described as Freeholder c/o Chase Property, 102 Hazelwick Road etc. The Applicant confirmed at the hearing that the 102 Hazelwick Road address is that of his managing agent Chase Property.

24. There is conflicting evidence as to what, if anything, the County Court Judge said in relation to the Section 47 issue. We consider it highly unlikely that even if the learned Judge did comment on this issue he would have intended to bind this Tribunal with his comments, and in any event we do not consider that he would have been capable of doing so. After all, the dispute in relation to the 2010/11 service charge year has been settled and the dispute in relation to the 2011/12 service charge year has been transferred to us for determination.

25. The relevant parts of Section 47 for our purposes (subsection (3) not being relevant here) read as follows:-

"(1) Where any written demand is given to a tenant of premises to which this Part applies, the demand must contain the following information, namely –

(a) the name and address of the landlord, and

(b) if that address is not in England and Wales, an address in England and Wales at which notices (including notices in proceedings) may be served on the landlord by the tenant.

(2) Where –

(a) a tenant of any such premises is given such a demand, but

(b) it does not contain any information required to be contained in it by virtue of subsection (1),

then (subject to subsection (3)) any part of the amount demanded which consists of a service charge ... ("the relevant amount") shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant."

26. The Respondent has referred us to the Upper Tribunal case of *Beitov Properties Limited v Elliston Bentley Martin*. In that case the relevant demands only contained the address of the managing agents and the Upper Tribunal held that this was insufficient. It was clear from the wording of section 47(1) that the purpose of the requirement was not merely for the landlord to provide a contact address but for it to give the landlord's own address, i.e. the place where the landlord is to be found.

27. The factual position in our case is the same as in *Beitov*. The Applicant has given the agent's address rather than his own address and therefore the demand does not fully satisfy the requirements of Section 47. It follows, as stated in subsection 47(2), that even if they are otherwise payable the service charges demanded are not due until the Applicant gives a notice to the Respondent furnishing the missing information.

<u>Section 20</u>

28. In our view the Respondent has failed to establish that there was a major works programme in respect of which the Applicant was obliged to consult. It is clear from written and oral submissions that the 2011/12 service charge demand was for advance payment of estimated service charges, and both parties accept this to be the case. Whilst the Applicant has provided a list of items intended to be covered by the

£1,800.00 allocated to "proposed maintenance", the details are brief, the different items are not obviously connected and there is no evidence that the works were all intended to be carried out at a similar time or as part a single job which would be tendered as a package. In the event most of these items have not yet been attended to, due to lack of funds, and the evidence indicates that at the time of the demand there was no programme of works in respect of which consultation would have been possible.

29. If in the future the Applicant does wish to carry out a set of major works he will at that stage be under an obligation to go through a consultation process if the proposed cost is above the consultation threshold unless he successfully applies for dispensation. However, in relation to the particular estimated charges described as "proposed maintenance" in the Applicant's projected accounts, in our view an obligation to consult has not arisen due to the lack of evidence that there are qualifying works in respect of which consultation is required. The Respondent could in principle have tried to argue instead that £1,800.00 was an unreasonable estimate of the amount of maintenance required for that year, but she has not sought to run this argument.

Invoices/receipts

30. It is common ground between the parties that the demand is for advance payment of estimated service charges. Therefore, the availability or otherwise of invoices and receipts is not relevant to the payability of these charges. Estimated charges are not based on receipts or invoices; they are an estimate of what the charges are expected to be. The estimate needs to be reasonable, as is clear from section 19(2) of the 1985 Act, but it is still an estimate.

Interpretation of Lease

31. Clause 3(ii) of the Lease contains a tenant's covenant on the part of the lessee to *"contribute and pay upon demand one third of the costs expenses outgoings and other matters mentioned in the First Schedule hereto which contribution shall include payments in advance if required under the terms of an estimate or contract relating thereto"*. The matters mentioned in the First Schedule include all costs and expenses incurred by the landlord for the purposes of complying with the landlord's obligations to (broadly speaking) manage and maintain the building and keep it lit, and therefore clause 3(ii) is the operative service charge payment obligation.

32. The wording of clause 3(ii) could be clearer. In our view it allows for the possibility that the landlord will sometimes want to levy a service charge based on actual costs and sometimes an advance service charge based on estimated costs. It is not a very sophisticated clause as, for example, it does not contain a mechanism or a timetable for converting

estimated charges into actual charges and then making a balancing adjustment, but nevertheless the ability of the landlord to *"include payments in advance if required"* does seem to allow for estimated advance charges.

33. What is meant by the phrase *"if required under the terms of an estimate or contract relating thereto"*? The Respondent's argument seems to be that the ability of the Applicant to demand payments in advance is limited to situations in which third parties require payment in advance when providing an estimate or entering into a contract with the Applicant. In our view, whilst the relevant wording is inelegant and is not crystal-clear, the better interpretation would be not to limit the wording in this way. Taken together, the words "shall include ... if required" suggest to us that the word "required" refers to the landlord, not to a third party, as a third party is not in a position to require payment from the tenant. On balance, in our view, the clause – in this respect – is stating that advance payments can be demanded if so required by the landlord, whether on the basis of an estimate provided by the landlord or on the basis of a contractual provision.

Generally

34. Whilst the Respondent raised various points in written submissions, she did not pursue or refer to all of these at the hearing as being points on which she was still relying following the exchange of written submissions.

35. On the basis of the written and oral submissions, we consider that the estimated service charge for 2011/12 is reasonable. Each estimated item seems reasonable in principle, the Applicant has in our view dealt satisfactorily in written submissions with the Respondent's written queries and the Respondent did not pursue any of her written queries at the hearing save as referred to above. Furthermore, the Respondent did not make any further submissions at the hearing as to the reasonableness of the amount of the service charge other than simply to assert that nothing should be payable.

36. Whilst the parties' conflicting narratives as to the history of this dispute are not strictly relevant to the payability of the 2011/12 service charge, on the basis of the written and oral evidence we find the Applicant's narrative more persuasive than that of the Respondent.

Cost Applications

37. No cost applications were made.

Name: Judge P Korn **Date:** 17th July 2015

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 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited ... unless the consultation requirements have been either – (a) complied with in relation to the works or agreement, or (b) dispensed with ... .

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.