

12164



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

Case reference : LON/00AG/LSC/2016/0462

Property : Flat 2, 9 Guilford Street, London
WC1N 1DT

Applicant : Osman Ismail, Ismail Ismail,
Djanan Ismail

Representative : Osman Ismail

Respondent : Professor P Dolton

Representative : Self

Type of application : For the determination of the
reasonableness of and the liability
to pay a service charge

Tribunal members : Judge Hargreaves
Helen Gyselynck BSc MRICS

**Date and venue of
hearing** : 10 Alfred Place, London WC1E 7LR
2nd May 2016

Date of decision : 2nd May 2016

DECISION

Decisions of the Tribunal

- (1) Ismail Ismail and Djanan Ismail are added as Applicants, being co-freeholders.
- (2) The Tribunal determines that the sums referred to below are reasonable and payable in respect of the year to 29th September 2016 but that none of the amounts are currently payable by the Respondent because no valid demand was made pursuant to *s21B Landlord and Tenant Act 1985*.
- (3) The Tribunal makes an order (if required and for the avoidance of doubt) under section 20C of the Landlord and Tenant Act 1985 so that none of the Landlords' costs of the Tribunal proceedings may be passed to the lessees through any service charge.
- (4) Any other costs issues will have to be referred to the county court, as will the question of the ground rent (if any is outstanding), the Tribunal having no jurisdiction in respect of the same.

REASONS

The application

1. The Applicants seek a determination pursuant as to the amount of service charges payable by the Respondents in respect of the sums referred to below, the matter being referred to the Tribunal by the county court. Directions were given at a case management conference on 26th January 2017, and the parties' respective positions are documented in a bundle provided to the Tribunal, to which reference is made where necessary. The directions are at p79-82, and outline the following items as disputed: (i) common parts electricity £29.20 (ii) repairs £8 (iii) management fee £80 and (iv) buildings insurance £367.71. The figures are not substantial but it appears that Professor Dolton has been unhappy at the management of the property for a number of years. It may well be that a number of issues have been indirectly settled by the hearing.
2. The relevant legal provisions are set out in the Appendix to this decision.

The lease

3. The lease is at p32, dated 27th April 1990. The insurance provisions are contained in clause 2(vii) and the service charge provisions in clause 2(viii)(a)-(k). The landlord is not entitled to claim the insurance

premium in advance of having paid it. The service charge provisions provide for the leaseholder to pay a sum on account, the "Contribution", and a payment towards a "Reserve Fund", which has never been demanded. The accounts should be certified in writing but apparently never have been, though the Tribunal construes subparagraph (a) as giving it the power (in addition to statute) to determine the right amounts. The parties had not read the lease as carefully as one might expect and in particular had overlooked the provisions of clause 2(viii)(h) which limit the fees of the landlord where a managing agent is not instructed to 15% of the service charges (or less dependent on an RICS scale). The Respondent's contractual liability is a 20% share of the relevant charges.

4. Until summer/early autumn 2016, Ismail Ismail, one of the three Applicants, was managing the property himself on their account. Osman Ismail, who appeared before the Tribunal, runs a property management company (Lycium Properties Limited) which took over the management in 2016 and issued the service charge demand and documents at p2-5 of the bundle, in October 2016. 85% of the properties managed by Lycium belong to Osman Ismail and his wife, a considerable number. Osman Ismail has no property management qualifications as such, being an engineer by profession, but with about twenty years' experience of running a considerable portfolio of properties owned by himself and his wife. She does not have any management qualifications but is a member of ARLA. He pointed out that Professor Dolton had never raised the s21B issue before: be that as it may, Lycium was on notice of the point from November (p9) and have had plenty of time to remedy the situation, but failed to really consider the effect of the point.
5. This is not a case which required an inspection.

The issues

6. Having heard evidence and submissions from the parties and considered all of the documents provided, the Tribunal has made determinations on the various issues as follows. Our findings relate to the demand issued on 31st October 2016 in respect of the year 2015-2016.
7. **Electricity:** Mr Ismail claimed that Professor Dolton should pay 20% of £146, being based on direct debits for a period of 16 months. Since there appears to have been a refund of £200 to the landlord by npower in this period, which was not accounted for, the Tribunal determined that an appropriate approach, looking at the documentation provided by npower and the leaseholders (which is incomplete), is to proceed on the basis that a year's common parts electricity amounts to about £140, and 20% of that is **£28**, which is a reasonable sum for the leaseholder to pay. Obviously if a corrected and certified account is provided which

relates to the actual amount of electricity consumed, that can be taken into account in future if it represents an underpayment.

8. **Repairs:** there is no dispute that the sum charged to Professor Dolton, **£8**, is reasonable. Whilst we accept that the leaseholder has the right to call for supporting accounts, we would urge Professor Dolton to consider proportionality in respect of charges like this.
9. **Insurance:** this is a different matter, and the first time Professor Dolton saw the relevant documents was on reading the trial bundle. That evidenced a miscalculation in Lycium's demand which reduces the sum charged to Professor Dolton to **£357.70**. On analysis this sum is made of buildings insurance plus terrorism cover, plus IPT. Whilst Professor Dolton queried a reference to rent cover in the sum of £145,000, the Tribunal accepts Mr Ismail's explanation that this is part of a block policy. We accept the rebuilding figure and an explanation from Mr Ismail as to how the insurance is placed, which demonstrates a reasonable commercial approach. We are satisfied that the recalculated figure of £357.70 is a reasonable sum for Professor Dolton to pay. If he considers that it is based on an undervalue of building costs, he will have to adduce evidence to that effect.
10. **Management charges:** Professor Dolton explicitly accepted that the **£80** charge was reasonable. In the light of the lease provisions which limited the landlord's own charges to 15% we consider the proper figure would be less, but not by any appreciable amount, and in the circumstances conclude that the figure is in fact reasonable. Obviously in the future, management charges will have to be supported by appropriate invoices.

Application under s.20C

11. At the end of the hearing, the Respondent was invited to apply for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal determines, for the avoidance of doubt, that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Applicants may not pass any of their costs incurred in connection with the proceedings before the Tribunal through the service charge. The failure to make a proper demand was of critical importance in reaching this conclusion.

Judge Hargreaves

Helen Gyselynck BSc MRICS

2nd May 2016

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.

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).