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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AZ/LSC/2016/0466**
Property	:	**86 Marvels Lane, London SE12 9PG**
Applicant	:	**Alexander Wadham-Corn (Development Co) Ltd**
Representative	:	**Miss K Gray, Counsel**
Respondent	:	**Mr Paul Fillery**
Representative	:	**In person**
Also present	:	**Mr N Anderson of Crabtree Property Management (managing agents for Applicant) and Mrs P Lambe (Respondent's sister)**
Type of Application	:	**For the determination of the liability to pay a service charge**
Tribunal Members	:	**Judge P Korn** **Mr L Jarero BSc FRICS** **Mrs R Turner JP**
Date and venue of Hearing	:	**28th April 2017 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**22nd May 2017**

DECISION

Decisions of the Tribunal

(1) The following sums are not payable by the Respondent:-

- the £7.00 management fee for the year ending 24th December 2011;
- the transaction charges (£3.25, £5.50, £5.75 and £2.50); and
- the £162.00 gardening charge for the year ending 24th December 2013.

(2) The £438.06 charge for the year ending 24th December 2014 and characterised as the "second uplift" to the major works costs is not payable in full and is instead limited to £250.00.

(3) All other charges which are the subject of this application are payable in full.

(4) The Tribunal declines to make a section 20C order, although it is noted that the Applicant accepts that it is not contractually entitled to put through the service charge any of the costs incurred by it in connection with these proceedings.

(5) The case is transferred back to the County Court for final disposal. For the avoidance of doubt, nothing in this determination is intended to fetter the discretion of the County Court in relation to County Court interest or 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 payability of certain service charges levied by the Applicant.

2. The initial claim was for £10,456.45 (plus interest and costs), but the Applicant subsequently conceded that some of the charges are not properly payable.

3. The disputed charges are now as follows (in each case the sum claimed being the Respondent's 25% share of the total):-

Service charge year ending 24th December 2011

- Management fee relating to health & safety/asbestos £7.00
- Repairs and maintenance £442.50

- Transaction charges £3.25

Service charge year ending 24th December 2012

- Health & safety/asbestos management £3.00
- Transaction charges £5.50

Service charge year ending 24th December 2013

- Gardening charges £162.00
- Health & safety £113.00
- Repairs and maintenance £312.00
- Transaction charges £5.75
- Major works £5,537.98

Service charge year ending 24th December 2014

- Second uplift to major works costs £438.06
- Work to chimney £105.00
- Transaction charges £2.50

4. The relevant statutory provisions are set out in the Appendix to this decision. The Respondent's lease ("**the Lease**") is dated 16th February 1967 and was originally made between Established Estates (Dulwich) Limited (1) and Edna Mary Field (2).

Mr Anderson's evidence

5. Mr Anderson of Crabtree Property Management LLP, the Applicant's managing agents, has provided a written witness statement. He has only worked at Crabtree since October 2016 and therefore has no personal knowledge of the historical backdrop to the dispute between the parties, although he notes in his statement that the Respondent has not paid any service charges since 2010.

6. He states that he considers a 10% administration fee to be reasonable in relation to the organising, instructing and supervising of contractors.

As regards the transaction charges being claimed, these relate to bank charges incurred in handling funds. Regarding the charges relating to health and safety, fire and asbestos management, he comments that in his view it is part of the maintenance of the building and a legal requirement to ensure that the common parts comply with legislation, including by taking preventative steps such as putting up 'no smoking' signs.

7. Regarding the major works, his witness evidence consists of an analysis of the relevant documents, including an Initial Inspection Report, a Schedule of Works, a Tender Analysis and a Schedule of Major Works Costs. He notes the delay of over a year between completion of the section 20 consultation and commencement of the works but is not in a position to explain the reason for the delay. He notes that more work was required than originally envisaged, leading to two cost uplifts. He further notes that no formal consultation took place following the first cost uplift but that the costs associated with the first uplift are not being sought as part of these proceedings.

8. Regarding the second uplift, Mr Anderson states that the costs of the second uplift are being sought as part of these proceedings and comprise the Respondent's 25% share of an invoice for £921.05 from Chrisalis relating to "Completion of int/ext redecs and repairs" and the Respondent's 25% share of an invoice for £831.20 from William Martin being the uplift of their professional fee charged at 15% of the final contract price. Mr Anderson speculates that the failure to consult the Respondent may not have caused him to suffer any prejudice in practice.

9. At the hearing, the Respondent put it to Mr Anderson that a Mr Milner had told him that gardening work would no longer be carried out and charged for. He also suggested to him that the tree belonged to the neighbouring property and that therefore any work to the tree should not be included in the service charge. In relation to the major works, he said that it did not look as though much work had been done.

The individual issues

Consultation – Applicant's case

10. The need for the major works was identified in the Initial Inspection Report, a specification was drawn up and the Applicant carried out the statutory consultation process. No observations were received from leaseholders at any stage of the consultation process and the Applicant entered into a contract for the works with Chrisalis. The quotation from Chrisalis was the cheapest one, and they had been recommended. Whilst the cost of the works later increased significantly from the original figure, the Applicant is not in these proceedings seeking a determination in relation to the main uplift in costs.

11. Further costs were incurred in 2014, of which the Respondent's share is £438.06, and a determination in respect of these further costs **is** being sought in addition to a determination in respect of the initial cost of the major works. The Applicant submits that whilst these extra costs were not the subject of consultation, they fall within a reasonable tolerance of cost increase in relation to a project of this type. In the alternative, the Applicant submits that the consultation requirements should be dispensed with in relation to these costs on the basis that there is no evidence that the further costs are inappropriate and that, in the Applicant's submission, the Respondent has suffered no financial prejudice.

Consultation – Respondent's case

12. The Respondent accepted at the hearing that he had received the consultation documentation. However, he objected to the cost of the major works, mainly on the basis that in his view very little work had been done. In addition, there were no smoke or fire alarms and the problems with the paving had not been addressed. He added that he had complained to the Applicant about damage to his windows leading to problems with damp, although there was no copy of his letter of complaint in the hearing bundle.

Consultation – follow-up by Applicant

13. Miss Gray said that the smoke and fire alarms and the work to the paving did not in the end form part of the specification, and so the work was not carried out and was not charged for.

Contractual recoverability – Applicant's case

Managing agents' fees

14. The Applicant accepted that there was no specific clause in the Lease expressly allowing recovery of management fees, but in its submission the provisions allowing recovery of the cost of carrying out works should also extend to managing agents' fees and to any other costs incurred in connection with those works.

15. Clause 2(f) of the Lease allows the Applicant to recover *"the costs expenses and outgoings specified in the third schedule"* and paragraph 1 of the Third Schedule refers to *"the costs of maintaining repairing cleansing and renewing the sewers pipes tanks cables wires and drains chimneys and flues party structure walls the said pathway and porch coloured yellow on the said plan and other parts of the premises used by the Lessee in common with the Lessor and the owner or lessee or occupiers of the adjoining or neighbouring premises"*.

16. In the Applicant's submission, the above wording is sufficient to cover managing agents' fees incurred in connection with the carrying out of any works, and in support of the Applicant's position Miss Gray has referred the Tribunal to the Supreme Court decision in *Arnold v Britton (2015) UKSC 36* and has also quoted from or referred the Tribunal to the decisions in *Lloyds Bank Plc v Bowker Orford (1992) 2 EGLR 44, London Borough of Brent v Nellie Hamilton (LRX/51/2005), Norwich City Council v Richard Marshall (LRX/114/2007), Wembley National Stadium Ltd v Wembley London Ltd (2008) 1 P&CR 3, London Borough of Southwark v Gary Paul (2013) UKUT 0375 (LC)* and *Waverley Borough Council v Kamal Arya (2013) UKUT 0501 (LC).*

17. As regards the managing agents' fees on the more minor items, Miss Gray said that these all fell under maintenance (or maintenance and repair).

Bank charges

18. In the Applicant's submission, the Applicant is required under the terms of the Lease to handle service charge contributions and it holds these sums on trust in a separate fund and therefore must hold a service charge bank account. If in holding that account it incurs fees then it should be able to pass these fees on to the leaseholders. If in order to permit it to do so the Tribunal needs to imply a term into the Lease then, following the decision in *Marks & Spencer PLC v BNP Paribas (2015) UKSC 72*, that is what it should do.

Contractual recoverability – Respondent's comments

19. The Respondent, who was not legally represented, did not have any specific comments to make on contractual recoverability.

Reasonableness of cost of specific items – Applicant's case

20. The health and safety charges represented a reasonable management fee in connection with the organising of health and safety inspections. The transaction charges were reasonable bank charges for operating the service charge account.

21. The £442.50 repair and maintenance charge for the year ending 24th December 2011 was supported by copy invoices in the hearing bundle. There was no evidence that the charges were unreasonable.

22. The £162.00 gardening charge for the year ending 24th December 2013 was properly payable because the tree was located in the common parts and it was supported by copy invoices. There was no evidence that the

cost was unreasonable, and it was clear from the surveyor's report that the tree needed to be dealt with.

23. As regards the £113.00 health and safety charge for the year ending 24th December 2013, this broke down into a number of different items and the copy invoices were in the hearing bundle. It comprised a health, safety and fire assessment plus a 10% management fee, electrical testing in communal areas plus a 10% management fee, and the installation of health and safety signs and notices.

24. The £312.00 repair and maintenance charge for the year ending 24th December 2013 was supported by copy invoices in the hearing bundle.

25. The major works were subject to competitive tendering and the Applicant chose the cheapest option.

Reasonableness of cost of specific items – Respondent's case

26. Specifically in relation to the tree works, the Respondent did not believe the tree to be part of the common parts. In relation to the electrical work he was not convinced that any work had been done.

Tribunal's analysis and determination

Gardening charges

27. The Third Schedule to the Lease sets out the costs and expenses to which the Respondent is to contribute via the service charge. It only contains two paragraphs and paragraph 2 relates to responsibilities within the building and is not relevant to the external areas. Paragraph 1 has already been quoted above, but it is worth setting it out again here. It covers *"the costs of maintaining repairing cleansing and renewing the sewers pipes tanks cables wires and drains chimneys and flues party structure walls the said pathway and porch coloured yellow on the said plan and other parts of the premises used by the Lessee in common with the Lessor and the owner or lessee or occupiers of the adjoining or neighbouring premises"*.

28. In our view, the above wording is not wide enough to cover the area on which the tree is situated. It is clearly not covered by the words *"sewers pipes tanks cables wires and drains chimneys and flues party structure walls"* nor by the words *"the said pathway and porch"*. That leaves the words *"other parts of the premises used by the Lessee in common with the Lessor and the owner or lessee or occupiers of the adjoining or neighbouring premises"*. The phrase "the premises" is not defined in the Lease; the Respondent's flat is defined as "the demised premises" and the building is defined as "the Building" but it is unclear what "the premises" is intended to cover. In addition, the phrase "other

parts of the premises used by the Lessee" does not apply to the tree: the Respondent does not have any rights in relation to the tree and does not use it in any meaningful sense. Furthermore, looking at the photograph of the site forming part of the hearing bundle one can see that the area containing the tree is surrounded by a combination of a wall and some stone slabs or bricks, and therefore it cannot be intended that leaseholders be able to access the tree or the earth surrounding it.

29. Therefore, whether or not the tree belongs to the Applicant, in our view the cost of maintaining it does not fall within the service charge.

Transaction charges

30. The Applicant accepts that there is no provision in the Lease expressly entitling it to put bank charges through the service charge, but it relies on the Supreme Court decision in *Marks & Spencer PLC v BNP Paribas*in in arguing that the Tribunal should imply a term into the Lease. In that case Lord Neuberger quotes with approval the statement of Lord Simon in *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings (1977) 52 ALJR 20* that *"for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract".*

31. In our view, the transaction charges in this case do not satisfy all limbs of Lord Simon's test. Whilst it is arguable that (1), (4) and (5) apply, we do not accept that (2) or (3) apply. As regards limb (2), it could easily be the case that the bargain between the original parties to the Lease was that the landlord would itself absorb the cost of transaction charges, and the contract is clearly effective in the absence of an implied term that the tenant is responsible for the cost of transaction charges. As regards limb (3), we simply do not accept that it is so obvious that it goes without saying that transaction charges on a bank account administered by the landlord should be put through the service charge.

32. In conclusion, therefore, the transaction charges are not payable.

Managing agents' fees

33. The Applicant accepts that there is no provision in the Lease expressly allowing the landlord to recover managing agents' fees through the service charge, and it has referred us to a number of cases dealing with

the question of the extent to which the obligation to pay these can be implied.

34. In *Arnold v Britton* the Supreme Court emphasised that when interpreting contractual provisions one needs to focus on the meaning of the words in their documentary, factual and commercial context, and Lord Neuberger did not accept that service charge clauses should be interpreted any more restrictively than any other contractual provisions.

35. In *Lloyds Bank Plc v Bowker Orford* it was held that a covenant requiring a tenant to pay *"the total cost ... of providing the services specified in section 2 ..."* entitled the landlord to recover the cost of employing managing agents to organise and supervise the provision of the services so specified. In *London Borough of Brent v Nellie Hamilton* the Upper Tribunal took the view that where the service charge included the cost of the landlord providing certain services (and the repair of the installations connected with the provision of those services) then – on a proper construction of the particular clauses in question – the total expenditure incurred in fulfilling the landlord's obligations was recoverable. This included the cost of arranging for work to be done and the cost of approving payment and therefore also the reasonable cost of employing agents to carry out these tasks. The Upper Tribunal followed the same approach in *Norwich City Council v Richard Marshall.*

36. In *Wembley National Stadium Ltd v Wembley London Ltd,* the High Court declined to interpret the definition of expenditure for service charge purposes so as to exclude management costs incurred in the provision of the services, rhetorically asking why a service charge should include the wages of an employee who applied tarmac to the surface of a car park but exclude the salary of the person who arranged for the employee to carry out the work and for the tarmac to be available. In *London Borough of Southwark v Gary Paul,* approved in *Waverley Borough Council v Kamal Arya,* the Upper Tribunal stated that there was *"a clear line of authority for the proposition that the overhead costs incurred in the maintenance and management of the building and estate falls within the provision 'all costs and expenses of or incidental to ...'".*

37. In the present case the key service charge provision on this point, as previously noted, is the provision that the tenant is to contribute towards *"the costs of maintaining repairing cleansing and renewing the sewers pipes tanks cables wires and drains chimneys and flues party structure walls the said pathway and porch coloured yellow on the said plan and other parts of the premises used by the Lessee in common with the Lessor and the owner or lessee or occupiers of the adjoining or neighbouring premises".* In our view, the line of cases referred to by the Applicant is authority for the proposition that to the

extent that the landlord carries out (for example) repair and maintenance, the recoverable "costs" of that repair and maintenance should include the reasonable cost of organising that repair and maintenance, whether that work is carried out in-house or by managing agents. Furthermore, there seems to us to be no reason in principle for distinguishing between major works and minor works in this regard, and therefore any reasonable management fee actually incurred as a result of the managing agents organising a programme of works or even a one-off item of repair is recoverable.

38. However, we would just emphasise that the Lease does not contain an express right to charge a management fee. Therefore, any implied right to include a management fee for the organising and supervision of any works or specific services cannot be used as a back-door route to enable the landlord to charge a general management fee. For a management fee to be payable it must reflect the organising, supervision etc of particular works or particular services which themselves expressly fall within paragraph 1 of the Third Schedule to the Lease.

39. In relation to the specific management fees claimed, we accept that they are all recoverable in principle as a matter of contractual interpretation. However, in relation to the £7.00 management charge relating to health & safety / asbestos management, this was challenged by the Respondent and there is no invoice or other evidence to show that the health and safety inspections to which it relates were carried out. Therefore, this £7.00 charge is not payable. As regards the other specific management fees, relevant copy invoices have been provided and the Respondent has not provided any evidence to show that the relevant works or services were not carried out or were sub-standard or that the cost was unreasonable. Therefore, the remainder of these charges are payable in full.

Major works – original cost

40. In our view the original major works charges of £5,537.98 are clearly payable. There is no argument that the Applicant failed to consult properly, and it chose the cheapest quotation. It relied on a surveyor's report to draw up the specification, and – despite the Respondent's comments – the evidence indicates that it carried out a significant set of works and that the charge of £5,537.98 was reasonably incurred and reasonable in amount.

41. Whilst the Respondent has raised an issue in relation to past problems with his windows, there is no evidence, or even complaint, that the current major works were themselves sub-standard.

42. Therefore, the initial cost of the major works (£5,537.98) is payable in full.

Major works – second uplift

43. In our view the Applicant has not provided a satisfactory explanation as to why it is only seeking a determination in relation to the second uplift to the major works cost at this stage and not to the first uplift. It seems to us to be wholly artificial to slice off this smaller uplift from the larger one and for the Applicant to seek a determination in its favour on the basis that the amount is not large. The Applicant's only witness, Mr Robinson, accepts that he does not know why the Applicant has chosen to pursue the second uplift but not the first uplift at this stage, and no reasonable explanation has been forthcoming.

44. It is accepted by the Applicant that it did not consult leaseholders in relation to these extra costs, and in the alternative it seeks dispensation. The Applicant has not made a formal application for dispensation and therefore the Respondent – who is not legally represented – has not been given an opportunity properly to consider the Applicant's arguments and to decide whether to take legal advice. In any event, the Applicant claims that the Respondent has suffered no financial prejudice but it has not done anything to substantiate this claim. It may well be the case that another cheaper and/or more effective solution could have been found, and in the absence of a formal application for dispensation or any evidence that no prejudice has been suffered it seems to us to be an unreasonable burden on the unrepresented Respondent to have to demonstrate that he has suffered prejudice without the benefit of any information as to what his options were.

45. Therefore, in our view the Respondent's contribution to the second uplift should be capped at £250.00, this being the statutory limit in circumstances where the consultation requirements have not been complied with and no dispensation is given. The Respondent's share of the second uplift comprises 25% of the aggregate of £921.05 + £831.20, which equals £438.06. Of that sum, therefore, only £250.00 is payable.

Other charges

46. In relation to the repair and maintenance charges for the year ending 24th December 2011, it has not been argued that the Applicant failed to consult properly to the extent necessary. There is also no evidence, or even complaint, that the works were sub-standard or that the charges were unreasonably incurred or unreasonable in amount. Similarly, in relation to the charges for the work to the chimney for the year ending 24th December 2014 (Respondent's share £105.00), there is no complaint that the work was sub-standard or that the charges were unreasonably incurred or unreasonable in amount. Copy invoices for these works are in the hearing bundle. Therefore, these charges are all payable in full.

47. Regarding the health and safety charges of £113.00 for the year ending 24th December 2013, the Applicant has provided a helpful breakdown and relevant copy invoices together with a plausible explanation as to the reason for and the amount of these costs, and the Respondent has not made any effective challenge. Therefore, these charges are also payable in full.

Cost Applications

48. At the end of the hearing the Respondent made an application for a section 20C order, this being an order that the Applicant may not include in the service charge either all or part its costs incurred in connection with these proceedings.

49. In response, Miss Gray for the Applicant said that it was accepted by the Applicant that it had no contractual right to put any of those costs through the service charge and therefore the Applicant would not be doing so. Nevertheless, the Applicant wanted to oppose the making of a section 20C order as it did not wish to be subject to the negative implications associated with having a section 20C order made against it.

50. The Applicant has been successful on many of the issues, particularly the big money issues. In addition, the Respondent has not paid any service charges for a considerable period of time and the Applicant was justified in bringing a claim in order to establish which service charges are properly payable. Therefore, there is no basis for making a section 20C order and accordingly we decline to make such an order.

51. No other cost applications were made.

Name: Judge P Korn **Date:** 22nd May 2017

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

APPENDIX

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.