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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/42UE/LSC/2018/0008**
Court claim no	:	**D87YX547**
Property	:	97 Jubilee Crescent, Needham Market IP6 8AT
Applicant	:	Residential Management Group Ltd
Representative	:	Jonathan Wragg (counsel) instructed by PDCLaw
Respondent assisted by	:	Susan Jayne Varga (née Mather) – in person Dexter Smith
Type of Application	:	Determination of payability of service charges
Tribunal Members	:	G K Sinclair, R Thomas MRICS & C Gowman BSc MCIEH MCMI
Date and venue of Hearing	:	Friday 4th May 2018 at Cambridge County Court
Date of decision	:	22nd June 2018

DECISION

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1. By Order dated 10th January 2018 District Judge Mitchell, sitting in the County Court at Ipswich, transferred to this tribunal the determination of what service charges (if any) are due and payable by the defendant/respondent lessee to the claimant/applicant management company. At the hearing counsel appearing for the claimant agreed that as part of its task the tribunal should also consider those cost items which technically are administration charges (arrears fees, etc) rather than pure service charges.

2. For the reasons set out below the tribunal determines :

a. That no issue has been taken by the lessee about the reasonableness of the cost or quality of any of the work or services in respect of which the service charges were incurred

b. That the lessee accepted that she owed ground rent and service charges to the claimant, and the dispute was limited merely to an accounting exercise about what had or had not been paid, plus whether certain administration, reminder, legal or court fees should properly have been levied

c. That by April 2017 the lessee was £816.55 in arrear, but a £250 cheque that she had tendered and which the claimant had then returned to her (with a misleading comment that "there are no outstanding charges on your account") would significantly have reduced that, and not confused the amount of her indebtedness

d. The reminder fees of £25 (x 2) and £30 and, on balance, the legal fee (debt collector's fee) of £192 and administration fee of £160, all appearing in the table at Exhibit RMG3 on page 88 in the hearing bundle and collectively totalling £432, were reasonably incurred because requests that the lessee bring her account up to date were repeatedly ignored.

3. The question whether it is reasonable for the management company to recover its litigation costs under the lease (some of which appear in the last three rows of the above table) is a matter for the court to determine under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

4. The tribunal so reports to the court.

Background

5. The defendant/respondent purchased the long leasehold interest in the subject premises in 2013. Within a few years, due to her personal circumstances which the tribunal need not go into, she began to fall into arrears. She contacted the management company but regarded its approach as unhelpful. Towards the end of 2016 she wrote, setting out all the various cheques that she had sent and had been cashed, and the claimant replied stating that the sums had been applied by it to both the ground rent and service charge accounts as it saw fit (unless she had expressly stated to which account the funds should be applied). It was for this reason that a cheque for £250, intended for an account number which was for the ground rent, was returned on 4th January 2017 [page 44] on the basis that that account was up to date. What the letter did not say was that the service charge account was substantially in arrears at that time. Had she known she may well have asked for the cheque to be applied to the reduction of that indebtedness instead.

6. In September 2017, in an attempt to clarify exactly what she owed, the lessee asked an independent solicitor (whose identity was not revealed) to calculate from the information she provided what remained outstanding. That figure was assessed as £91.55, and the defendant/respondent made various attempts to send a cheque in that amount to the management company. On each occasion the cheque was returned, as it was accompanied by a note reading :

> Further to legal advice, please find attached a cheque to the value of £91.55 (outstanding arrears/miscalculation - 2016)

This may have been construed as a payment tendered in full and final settlement of the debt, which the management company was not prepared to accept.

7. County Court proceedings were issued, a brief Defence filed, and the case was transferred to Ipswich for directions. Following transfer to this tribunal of the issue of quantifying what service charges (if any) are due further directions were issued and each party filed a statement of case. The management company also filed and served a detailed witness statement by Charlotte Howlings, a senior property manager with personal knowledge of this case.

The lease

8. The lease in the instant case is a four part one, dated 26th September 2013 and made between (1) Taylor Wimpey Developments Ltd (landlord), (2) Residential Management Group Ltd (management company), (3) Susan Jayne Varga (buyer) and (4) Taylor Wimpey UK Ltd (developer). Granted for a term of 125 years, the initial ground rent is recorded as £250 per year, subject to review every ten years in accordance with clause 8. That clause refers to the rent being adjusted by reference to any percentage change in "the Index", but nowhere in the lease (either in the definitions clause or elsewhere) is the identity of such Index specified.

9. By clause 6 of the lease the management company and the buyer covenant with each other and with the landlord concerning the maintenance charge in the terms specified in Part I of the Sixth Schedule. Part I provides for the usual preparation of an estimate of that year's expenditure, the payment of advance service charge calculated in accordance with that estimate within 14 days of receipt of demand, the preparation of end of year accounts as soon as practicable after the year end, and the making of an adjustment to take into account any excess or deficiency in the actual management costs incurred.

10. Part II of the Schedule lists the various items of expenditure which, if incurred by the management company, may be recovered by it through the service charge. At paragraph 9.1 this includes the costs incurred by it in bringing or defending any legal proceedings, but then 9.2 goes on to say that :

> The tenant must pay to the management company the full amount of all costs fees charges disbursements and expenses including... those payable to counsel solicitors surveyors and bailiffs incurred by the management company in relation to :
>
> ...
>
> (c) the recovery or attempted recovery of rent or other sums due under this lease.

11. It seems odd to include paragraph 9.2 within the list of items recoverable from the body of lessees generally by way of service charge, as it seems particularly intended to impose a direct liability upon the individual lessee concerned with one or other of the matters covered by sub-paragraphs (a) to (c). This is already dealt with by the buyer's direct covenant at paragraph 11 of the Third Schedule.

12. By clause 3 the buyer covenants with the landlord and management company, and as a separate covenant with every other person who is the registered proprietor of any part of the development and the estate in the terms of the Third Schedule. In particular, by paragraph 1(a)(i), the buyer covenants to pay the maintenance charge and also, by 1(a)(ii), to pay interest on any sum remaining unpaid five working days after the same became due at 4% per annum above the

base rate of National Westminster Bank plc.

13. Clause 7.3 is a forfeiture provision whereby the landlord may re-enter if any sums payable shall at any time be in arrear or unpaid for 21 days after the same shall have become due, etc., but without prejudice to any rights of action or remedy of the landlord and the management company.

14. The lease therefore provides a range of penalties arising at different times : the right to interest after 5 working days, to sue after 14 days, and to forfeit 21 days after a sum becomes lawfully due.

15. Despite the lease being drafted as recently as 2013 it persists, in paragraph 4 of Part I of the Sixth Schedule, in declaring that any dispute or question arising between buyer and management company in relation to the provisions of that Schedule shall be settled by a chartered surveyor chosen by the parties and acting as an expert, not an arbitrator. Statutory provisions were superimposed on such contractual methods of dispute resolution many years ago, and they are declared void by section 27A(6) of the Landlord and Tenant Act 1985.

Relevant statutory provisions

16. Section 18 of the Landlord and Tenant Act 1985 defines the expression "service charge", for the tribunal's purposes, as :

> 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...

17. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :
    a. only to the extent that they are reasonably incurred, and
    b. where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.

18. The tribunal's powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

19. Section 158 of and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 make provision for administration charges. By paragraph 5 of the Schedule a party to the lease may apply to the tribunal for a determination whether an administration charge is payable, in terms very much akin to the tribunal's powers concerning service charges under section 27A of the Landlord and Tenant Act 1985.

20. In particular, paragraph 5A of Schedule 11 provides that :
    (1) A tenant of a dwelling in England may apply to the relevant court or

tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

The hearing

21. As the only issue was essentially an accounting one no inspection of the premises was required and, at short notice, the venue was switched from Needham Market to Cambridge County Court. This came as unwelcome news to Mr Wragg, who had stayed at the original venue and no doubt expected to start fully refreshed. Instead, he had to rely upon public transport to get to Cambridge, arriving at court just before noon instead of the appointed start time of 10:30.

22. As the tribunal had been alerted to the potential delay it informed the parties and urged them not to waste this additional time, speak to each other and attempt to narrow their arithmetical differences. It was to no avail.

23. Further unhelpful aspects were that :

a. Each party on the day before the hearing, and long after the deadline in the tribunal's directions order, sought to introduce further evidence (in the respondent's case a bundle of loose, unpaginated sheets in a plastic wallet); and

b. On the day the respondent arrived with a large working bundle of her own plus a sheaf of extra-large sheets of display paper which she may have wished to use as presentational aids, but had left her copy of the hearing bundle in the car. Despite the nearly 90 minute delay no attempt was made to go back to the car and fetch it.

24. The admission of additional evidence was refused, as was the use of documents pulled from Ms Mather's own file and presentational aids (the nature of which had not been disclosed).

25. The hearing began at 12:08 and concluded at 14:35. Mr Wragg took the tribunal through the documents exhibited to the claim and/or to Ms Howlings' statement, including running account tables, emails and correspondence between the parties beginning long before proceedings were issued. He sought to show how fees were not levied for some of the early reminder letters, that a £25 fee (later rising to £30) was fairly standard in the profession and reasonable, and that it was only following several attempts to get Ms Mather to settle the account that steps were taken to involve a debt collection agency and then lawyers.

26. Ms Mather, by contrast, sought to show (assisted by Mr Smith) that the company had been unreasonable in its approach, had confused matters by insisting upon two separate accounts altering the name of the required payee, and returning her £250 cheque with a note that there were no outstanding charges on the account, and then adopted a course of action which is not in accordance with the standard, more sympathetic and supportive approach adopted these days by debt collection agencies. (She spoke from the experience gained when a partner had been in debt). She challenged the reasonableness of the administration charges which, she argued, only made her debt unnecessarily worse. By the end of the hearing she was clearly in a very emotional state.

Discussion and findings

27. The tribunal is satisfied, from the documentary evidence provided, that from 2015 onwards – due initially perhaps to her querying increases in service charge, and then financial difficulties, Ms Mather began to fall into arrears with her payments. This she accepts.

28. Thereafter she attempted to make payment as and when she could but, with both ground rent and service charges falling into arrear, unless payment was expressed to be for a specific purpose the claimant applied the payment to whichever account it chose, sometimes splitting a payment between both. This caused her great confusion when presented with financial statements, as she could not see specific cheque payments being recorded against the service charge account. This led her to believe, wrongly as it turns out, that the management company had not taken her payments into account at all – and that she therefore owed less than alleged. This belief persisted, despite the claimant's solicitors writing to her on 1st December 2017 [page 328], setting out how each payment was accounted for.

29. The tribunal determines that, save for the £250 cheque returned to Ms Mather and those in the sum of £91.55 repeatedly tendered and rejected, all sums paid by her were properly taken into account when assessing the level of arrears. It does not accept Mr Smith's argument that she would have been in a better position if the company had accepted the cheques for £91.55 repeatedly tendered. These were each offered in full and final settlement of what she (or her unnamed solicitor, based perhaps on incomplete information) assessed was due and owing. They were repeated attempts to make one payment, not a thwarted attempt to make payment of a larger sum by instalments.

30. The tribunal determines that by early April 2017 the service charge account, but not that for ground rent, was £816.55 down. Payment of that amount remains due.

31. The next issue is Ms Mather's liability for and the reasonableness of the charges imposed for reminder letters, an internal admin fee for passing the claim to a debt collection agency, and its fee for taking it on. The tribunal accepts that fees were not imposed for some of the early letters (as they could have been), and that a fee of £25 for a reminder letter is not unreasonable when compared with charges imposed by others in the property management sector. A recent increase to £30 is also unremarkable. The reminder fees claimed total £80. A further fee for a reminder letter dated 4th April 2016 [page 250] was waived.

32. Was it justified for the management company also to add two fees for transferring the claim so quickly (per Ms Mather) to a debt collection agency? The first is a legal fee (also described in the table on page 88 as a debt collector's fee) of £192. The second is the company's own administration fee of £160 for preparing the claim documentation for transfer. The work done in justification of these fees was explained in detail in paragraph 15 of Ms Howlings' statement [page 133].

33. Mr Wragg referred the tribunal to the fact that both the reminder letter dated 4th April 2016 [page 250] and that on 1st November 2016 [page 252] mentioned the prospect of the debt being referred, without further request for payment, to a debt collection agency if the arrears remained unpaid for 7 days, although each letter

also mentioned that if the lessee wished to speak to the company to discuss a payment plan she could phone its customer contact centre.

34. On 20th April 2017 a final attempt was made [page 254], employing a similar letter. The lessee's response was a phone call to which Darren Alexander for the company replied by email dated 28th April 2017 [page 274], explaining in tabular form what it regarded as outstanding. Ms Mather again responded by letter dated 1st May 2017 [page 288], explaining possible causes of confusion, including her juggling of various cheque books for accounts in both her married and maiden names, but querying how the company had accounted for various past payments. This referred to a point already dealt with above, and did not progress the issue of payment. With some reluctance, therefore, the tribunal determines that the administration fees mentioned above are payable.

35. Each party has contributed to the financial confusion here. In Ms Mather's case this has been by writing cheques drawn on different accounts using different surnames, by naming as payee the company and not the account named on the demands, and by making erratic part-payments as and when she could. In the company's case it has not helped by returning the £250 cheque instead of telling her that while her ground rent account was up to date there were arrears on the service charge account, and asking whether the cheque could be applied to that instead. The legal basis for the repeated rejection of the cheques for £91.55 could have been explained to her.

36. Finally, this reluctance to accept money from Ms Mather was exemplified by the company's repeated refusal before the hearing to accept two cheques tendered for ground rent and service charges for the current (2018) financial year. At the end of the hearing Ms Howlings showed considerable reluctance to accept them when tendered, but eventually did. Was the landlord really planning to serve a section 146 notice and then issue forfeiture proceedings against her?

37. The tribunal trusts that, now the amount owed by her has been determined, the lessee will be able to rectify the current arrears.

38. That leaves only the question of the claimant management company's legal costs, contractually recoverable under paragraph 11 of the Third Schedule to the lease but, should the lessee make an application under Schedule 11 to the Commonhold and Leasehold Reform Act 2002, subject to determination by the court only after consideration of the factors in paragraph 5A as well as the usual principles applicable under the CPR.

Dated 22nd June 2018

Graham Sinclair

Graham Sinclair
Tribunal Judge