

- d. Dack Property Management Fee: £587.50.
 - e. "Storm" Damage to roof repairs: £1530.97.
 - f. Dack fee re light/smoke administration/Supervision: £146.87.
 - g. Emergency lights/smoke detectors: £1439.40.
3. The Tribunal determines that the Respondent is not entitled to withhold payment of all or any service charges in respect of the year in question, Section 21A of the Landlord and Tenant Act 1985 not yet being in force.
 4. The Tribunal makes no order under Section 20C of the Landlord and Tenant Act 1985

Reasons

Introduction

5. The Applicant had commenced proceedings in the County Court, for non-payment of service charges by the Respondent. Those proceedings had been transferred to the Newport County Court and, the Respondent having filed a defence, on 6 October, 2009 the Newport County Court stayed the proceedings pending an application by either party to the Leasehold Valuation Tribunal.
6. On 18 November, 2009 the Applicant accordingly applied to the Tribunal under Section 27A of the Landlord and Tenant Act 1985 (the Act) for a determination that all of the service charges set out in the service charge account for the year ended 24 December 2008 were reasonable.
7. The Respondent filed a statement of case indicating that only certain items in that account were in dispute. In the course of the hearing, the parties agreed the service charge sums for Southern Electric of £147.93 and Southern Water of £748.09. Accordingly the items in dispute for determination by the Tribunal were as follows:
 - a. Buildings insurance £955.04;
 - b. Freeholder management charges £1095.82;
 - c. Freeholder administration charges £100;
 - d. Dack Property Management Fee £587.50;
 - e. Storm damage to roof repairs £2070.00;
 - f. Dack fee re light/smoke administration/Supervision £146.87
 - g. Emergency lights/smoke detectors £1439.40.
8. The Respondent also contended that none of the service charges were payable as the Applicant had failed to provide a certificate from a qualified person in accordance with Section 21A of the Landlord and Tenant Act 1985.
9. Shortly before the end of the hearing, the Respondent also applied for an order under Section 20C of the Landlord and Tenant Act 1985.

Inspection

10. The Tribunal inspected 26 George Street, Ryde (the property) in the presence of Mr Christie and Mr Dack. The inspection was of the external parts of the building of the

property so far as visible and the internal entrance hall and stairway to 3 of the flats. It was not possible to inspect the roof.

11. The property is semi-detached, comprising Flat 1 in the basement and flats 2,3 and 4 on the 1st, 2nd and 3rd floors. Access to the basement Flat 1 is only by means of the external passageway to the north of the property. In respect of the visible parts of the property, it appears to be in rather poor condition for its age and character, and the entrance hall and stairway being in need of new carpeting and decoration throughout. We noted the installation of the emergency lighting and fire alarm systems in the common parts. We did not have access to any of the flats.

Hearing & Representations

12. A hearing was held the same day, those attending being noted above. In addition to submissions from Mr Dack and Mr Crofts, evidence was given by Mr Christie and the Respondent.

13. So far as relevant to our consideration and decision we note the evidence and submissions below.

14. Buildings Insurance.

- a. The Applicant has a block policy which includes the property. The Applicant apportions a premium of £955.04 to insurance of the property but has not tested the insurance market for some years. The Applicant contends that the premium doesn't have to be the most competitive; that its insurance includes properties which are HMOs (as is this property); that the Applicant receives a commission of about 20% on the premium; that it does not know whether the quotation obtained by the Respondent is on a like-for-like basis. The Respondent produced a quotation dated 2 February, 2010 from Allianz for a total premium of £517.80.
- b. We had no evidence from the Applicants as to how the apportionment of the premium charged was calculated. We also noted that the Applicant had not tested the market for some time and we took into account also the quotation obtained by the Respondent. There is a considerable disparity between the premium claimed by the Applicant and the quotation obtained by the Respondent. We were not satisfied that the Applicant had provided evidence that the premium charged for the year in question was reasonable, but on the other hand we were not certain that the Respondent's quotation was on a like-for-like basis. We considered on the balance of the evidence that a reasonable premium would be £700 and we found accordingly.

15. Freeholder management charges.

- a. In the course of the hearing it transpired that the sum claimed of £1095.82 related solely to interest charges made by the Applicant for paying service charge items in advance of recovering the relevant charges from the lessees. The interest charged by the Applicant is up to 20% of the sum paid. The Applicant has not incurred interest in making the payments but contends that it could have earned interest if the money had been available to invest elsewhere rather than paying charges in respect of the property. The Applicant was unable to direct us to any provision in the lease specifically referring to interest charges being recoverable under service charges but it was felt reasonable to do so.

- b. Service charges are, as a matter of law, payable only to the extent that they are provided for in the relevant lease. We concur that interest charges whether incurred by a freeholder or levied by a freeholder are not specifically provided for in the lease. In terms, clause 2 of the lease provides for a lessee to pay one quarter of the sums actually expended or liabilities incurred by the lessor in connection with the matters thereafter mentioned and in particular (but without limiting the generality of the foregoing) including:
- i. costs of and incidental to compliance by the lessor with its covenants set out in clause 6 (those covenants provide for property insurance, maintenance repair redecoration or renewal of the main structure and other common facilities, periodic external decoration, enforcement of covenants by other lessees and compliance with the provisions of an Underlease (the terms of which we do not know and were not put in issue in the hearing));
 - ii. costs of dealing with any local authority or other notice;
 - iii. fees charges expenses and commissions payable to the Solicitor accountants surveyor valuer architect or agent employed by the lessor in connection with main tenants and management of the building including preparation of accounts;
 - iv. the cost of liability insurance;
 - v. wages and related expenses payable by the lessor as an employer;
 - vi. the cost of carrying out works and services of any kind which the lessor may consider desirable for the purpose of maintaining or improving the services in all for the building;
 - vii. the cost of employing managing agents;
 - viii. the costs of supply water to the building.
- c. Service charges are payable as to an initial estimated contribution of £100 per annum by equal half yearly instalments in advance and any balance after calculation of expenses and outgoings for the previous year. We were told that in practice the Applicant has not collected the advance contributions. These provisions as to when service charges are payable are bound to mean that the lessor has to finance service charge items before he is entitled to receive anything more than a fairly nominal contribution towards them. The Applicant effectively says as a result he is entitled to be paid some remuneration for making his payments in advance of recovering from lessees. However, there is no provision in the lease which enables him to do so and we entirely accept the Respondent's contention that both parties are bound by the lease terms, even if that is detrimental to the lessor's interests. We do not need to make any decision as to the reasonableness of the rate of interest on the Applicant's charges because in the absence of any provision in the lease enabling him to charge for his payments in advance, he is not entitled to any charge at all. We accordingly reduced this item to nil.

16. Freeholders Administration Charges.

- a. We were told that these relate to the fact that the Applicant arranges the insurance and the managing agent does not. We deal with the managing agents charges below, but for the purposes of these administration charges we accept that if they were not taken by the Applicant and the insurance arrangements were made by the managing agent, the managing agents fees might be higher.
- b. However, there is no provision whatever in the lease enabling the Applicant to make a charge for dealing with the insurance and in the absence of any such provision, it is not recoverable as service charge. Our decision on this point is not affected by questions of commission on the policy. We accordingly reduced this item to nil.

17. Dack Property Management Fee.

- a. The Applicant submits that the charge is reasonable and is in line with such fees charged by other agents in the area. The Respondent says that it is excessive for the property and that the agent is also charging a project management fee.
- b. Using our own knowledge and experience, as we are entitled to do, we entirely accept the Applicant's submissions. It is not excessive. We would also mention that the RICS Management Code approved by the Secretary of State applicable to the year in question provides for a basic management fee and additionally fees for other works which are generally known as "major works". We accordingly found that the fee charged to be reasonable.

18. Storm damage to roof repairs.

- a. There had been water ingress into the property. Mr Dack considered this resulted from a problem with the roof. To inspect the roof closely would have required erection of scaffolding around the property at considerable expense. He had therefore arranged for builders to inspect the roof using binoculars from a suitable roof nearby but on the opposite side of the road. This had resulted in the estimates, the lower of which was from KC Oatley Builders for £1370. Their estimate is headed "storm damage to roof" and provides for erection of scaffolding, stripping out slates on both sides of damaged lead valley, removing lead and repairing as specifically stated. Our copy of that estimate has the word "storm" deleted, but that word appears in subsequent documents. For the purposes of compliance with consultation procedures, a total cost to lessees, including Dack Property Management fee, provided for a total anticipated cost of works of £1530.97. However, it subsequently transpired that further works were needed to the roof and these are referred to in KC Oatley Builders' invoice of 8 July, 2008. The additional work shown in that invoice was very similar to the work originally identified and the cost of that additional work on £700, the invoice totalling £2070.
- b. The Respondent says:
 - i. because there is evidence on the documents that the work related to storm damage, an insurance claim should have been made thereby reducing the amount chargeable to service charge;

- ii. that there should have been further consultation in accordance with the Act in respect of the additional cost and that because there was no additional consultation, the costs over and above those the subject of the original consultation should not be chargeable to service charge;
 - iii. complete re-roofing could have been carried out for about £4000.
- c. Mr Dack told us that the reference to "storm" was incorrect; that the problem was simply the condition of the roof and could not be related to any storm damage so that an insurance claim could not be made. Mr Dack wished to produce photographs in support of the Applicant's case. The Respondent objected for want of advance notice and the Tribunal accepted that submission.
- d. We found that the costs totalling £1530.97 covered by the consultation procedure were reasonable for the work done. We were satisfied that there was nothing in the nature of the work as described which might have been attributable to storm damage and the use of the word "storm" was inappropriate so that in the absence of any cogent evidence to the contrary, an insurance claim would not have been successful. However, when the builders were able to erect scaffolding and start the original anticipated work, it must have been apparent that the additional work would also be required. The additional work could not be regarded as a minor addition to that originally anticipated and the Applicant, through their agents, ought to have considered and carried out either further consultation procedure or, to avoid delay, make an application to the Tribunal for dispensation under Section 20ZA of the Landlord and Tenant Act 1985. The Applicant did not do so. Because of the work and its cost as originally anticipated were both substantially greater, we could not accept that the additional cost was covered by the original consultation procedure. As the original costs the subject of the consultation procedure totalled £1530.97 (albeit that a small part of that related to Dack Management Fees) the total amount recoverable in respect of this head of service charge is limited to that figure of £1530.97.
- e. Dack fee re light/smoke administration/supervision. We refer first to our comments at paragraph 17 above. In relation to this work the Respondent says that no administration or supervision should have been required when competent tradesmen are appointed to carry out the work. We do not accept that. Inevitably work has to be carried out by a managing agent in terms of initial inspection, arranging for estimates, considering them and advising the Applicant before instructing tradesmen to carry out the work. It is then entirely appropriate for the agent to supervise in terms of ensuring the quality of the work and safeguarding the property. The fee charged is entirely reasonable.

19. Emergency lights/ smoke detectors.

- a. This work was carried out and charged over the service charge years 2007 and 2008 and the sum in question, £1439.40, is the remaining part of the costs incurred, the Respondent having accepted that the balance, although not exactly one half, was paid in the accounting year 2007.

- b. The Respondent's case is that the work done does not comply with current regulations and the local authority want the system extended and/or modified. As a result, the overall cost of providing a complete system has been increased.
- c. Mr Dack told us that he had considered that it was important to replace the existing non-functional system as quickly as possible for the benefit of occupiers. He was concerned there would be considerable delay trying to get agreement from the lessees to connect their flats internally to the system and the cost of so doing. The work that he had had carried out complied with the minimum standards but he had since had notice of additional works being required by the local authority as the property is classified as an HMO.
- d. We had no evidence that the original installation did not comply with the regulations applicable at the time, while accepting that further work may now be required because of the property's classification. We have little doubt that if the Applicant had delayed in carrying out the work which was done by reason of trying to get agreement from the lessees for work in their flats to connect up to the common system, there would have been undue delay which might have severely affected the timely installation of the necessary system. We bear in mind that connection and installation work in the flats would not be covered by service charge and would therefore not be recoverable by the Applicant as such. It follows from that that the Applicant would have to have ensured in advance that contributions from each lessee for work in their respective flats were paid and this would cause inevitable delay. We therefore accepted that the work done was appropriate and that the charge made to service charge is reasonable.
- e. Section 21A of the Landlord and Tenant Act 1985. This Section was inserted into the 1985 Act by Section 152 of the Commonhold and Leasehold Reform Act 2002. With other provisions it is intended to replace Section 21 of the 1985 Act. However, neither Section 21A nor the "new" Section 21 has yet been brought into force so that the original Section 21 of the 1985 Act still applies. The Respondent's case in this respect therefore fails.

20. Section 20C.

- a. The Respondent's application for an order under this Section was made almost at the last moment in the hearing. For that reason the Applicant objected to it. In considering whether to accept the application, the Tribunal also took into account her objection to the production of photographs by the Applicant in relation to the roof. Production of those photographs was late as indeed was the Respondent's application under Section 20C. The Tribunal did not consider it would be fair therefore to allow this application to be made and therefore made no Order.
- b. As a result, it could be that in the next service charge accounts to be issued by the Applicant there may be a reference to the Applicant's costs of these present Tribunal proceedings. It would be open to the Respondent to make an application to the Tribunal at that time for a determination as to their recoverability under service charge. A future Tribunal will make its own determination on that issue based on the terms of the lease and nothing we say can fetter that Tribunal's determination on the matter. On that basis

however it may be helpful if we now indicate that in our opinion there is nothing in this lease enabling the Applicant to recover those costs under service charge, for similar reasons to those we have set out at paragraph 15 above.

21. The Tribunal made its decisions accordingly.

[Signed] M J Greenleaves

Chairman

A member of the Tribunal
appointed by the Lord Chancellor