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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/00KG/LSC/2013/0134**
Property	:	**77-81a Clarence Road, Grays, Essex RM17 6RA**
Applicants	:	**Mrs. Ruheena Tasneem Shah (81A) Mr. Asif Malik (77) Mr. Vincent Placide (81) Mr. Ben Reilly (79) (represented by Godwin Mangse - solicitor)**
Respondent	:	**Westleigh Properties Ltd. (not appearing) Clarence Grays RTM Co. Ltd. (represented by Robert Brown of counsel (Brethertons))**
Date of Application	:	**19th October 2013**
Type of Application	:	**(1) To determine reasonableness and payability of service charges (Sections 18-27A Landlord and Tenant Act 1985 ("the 1985 Act") (2) To appoint Mr. Ben Day-Marr of Gateway Property Management Ltd. as manager for the property (Section 24 Landlord and Tenant Act 1987 ("the 1987 Act")).**
The Tribunal	:	**Bruce Edgington (lawyer chair) Stephen Moll FRICS John Francis QPM**
Date and venue of hearing	:	**28th April 2014 – Park Inn by Radisson, High Road, North Stifford, Grays, Essex RM16 5UE**

DECISION

UPON the Applicants having withdrawn their applications for the Tribunal to determine (a) the reasonableness and payability of service charges for the years 2009-2013 and (b) for the Appointment of a Manager

IT IS ORDERED that:-

1. The Tribunal consents to such withdrawals.

2. The Tribunal refuses to make an order pursuant to Section 20C of the **Landlord and Tenant Act 1985** ("the 1985 Act") preventing the 2nd Respondent Right to Manage Company ("RTM") from recovering its costs of representation before this Tribunal from the Applicants as part of any future service charge demand.

Reasons

Introduction

3. The first 3 Applicants lodged an application to challenge the reasonableness and payability of service charges for the years 2009, 2010, 2011, 2012 and 2013. Very little information was given about what was being challenged and why. The form does not separate the years but simply says that the service charges in issue are "*service charge relating to repairs and insurance*". As to the questions which the Applicants wanted the Tribunal to deal with, the form says "*Tribunal to decide the current demand for repairs to roof and Balustrade amounting to £2000.00 each leaseholder*". As to any further comments, the form says "*He has not refunded the amounts overcharged for insurance and repair works which were not carried out for all those years*".

4. At the same time an application was also lodged to appoint a new manager for the property. Again, very little information is given. The name of the proposed manager was not given and there was no copy notice under section 22 of the 1987 Act informing the Respondents of the allegations. The applications therefore had to be delayed pending receipt of this information. A copy notice under section 22 was filed but is dated 20th December 2013 and is only addressed to the landlord. The grounds for the application in the section 22 notice are not clear but include the unreasonableness of service charges which has to be remedied within 14 days.

5. The 4th Applicant then applied to be joined to the proceedings as an Applicant and this application was granted on the 7th February 2014.

6. A hearing bundle was lodged consisting of some 178 pages of Applicants' documents plus a bundle of Respondents' documents which are not numbered, despite the Tribunal's directions which clearly stated that all pages had to be numbered. Furthermore, at least one of the bundles for the members of the Tribunal had a significant number of missing pages.

7. As the members of the Tribunal looked through the papers submitted, it soon became clear that the long lessees of this relatively small development of 6 flats had become locked into what can only be described as a running battle over the way the block was being managed and the Applicants were obviously expecting the Tribunal to 'side' with them. At the hearing it became clear that a without

prejudice offer to settle this case had been made by the 2nd Respondent RTM and counsel was instructed to waive privilege and repeat the offer on an open basis. This offer effectively handed management of the property to the applicants.

8. Save for an argument about costs, this resolved matters. The 2nd Respondent wanted its costs paid by the Applicants but they were not quantified. Mr. Mangse, on behalf of the Applicants, wanted the case adjourned so that he could challenge the quantum of those costs. Eventually it was agreed that the Tribunal would adjudicate upon the application under section 20C of the 1985 Act and if, as a result, the 2nd Respondent was able to claim its costs, the assessment of those costs could form the basis of a future application. As this could have quite severe financial implications, it is necessary to consider the merits of the main applications in more detail than one would expect.

9. The factual history is that the 1980's purpose built block is owned by a well known local company which owns a number of properties in the Southend and south Essex area. It was managed by a company known as BLR Property Management. Gateway Property Management Ltd. ("Gateway") took over. On the 5th November 2008 Clarence Grays RTM Company Ltd. was formed to take over the management of the property. The instigators appeared to be Sharon Smith from 79A, the Applicants Ruheena Shah and Asif Malik together with a Mr. Palmer who was presumably then another leaseholder.

10. On or about the 1st October 2009, the Homes & Watson Partnership Ltd. ("H & W") was appointed as managing agent and they continued for some years. As the first year of challenge as far as the service charges are concerned is 2009, it seems that 1 or more of the Applicants soon became disenchanted with H & W. There does not seem to be any indication in the papers as to why.

11. There are allegations that in the following years there were technical deficiencies in the way the RTM company was managed and the way H & W were undertaking the practical task of dealing with the management of the property. There are serious allegations of misconduct on the part of both Ms. Smith and at least one of the Applicants which go as far as an allegation that false documents were filed at Companies House. The Applicants or some of them have attempted to take over the management by writing to H & W to sack them. There has been litigation between the RTM company and leaseholders to recover service charges.

12. The position with regard to the service charges was not at all clear from the papers. The Applicants' statements are not clear but, in essence, it is alleged that monies have been paid in advance for service charges but the actual service charges have not been as much as the estimates. Despite this, there has not been any refund. It is also alleged that amounts for repairs and maintenance have been collected which are more than the statutory limit, which the Tribunal takes to be an allegation that there should have been a consultation pursuant to section 20 of the 1985 Act.

13. The positions of the Applicants and the 2nd Respondent RTM company appear from the papers to be:-

Applicants

Insurance -	collected by H & W (£)	paid to insurance company (£)
	2010 - 2,000.00	530.30
	2011 - 2,300.00	1,618.41
	2012 – 1,800.00	1,125.00

There is then a mention of an 'undisclosed' claim for £1,289.60

Repairs and maintenance

collected by H & W (£)
2010 – 1,500.00
2011 – 1,080.00
2012 – 1,450.00
2013 – 3,145.00

The statement does not make it clear what else is being asserted save that H & W should not have been collecting because they were 'sacked' on 30th June 2012.

2nd Respondent RTM

Accountancy –	year	budget(£)	actual(£)
	2009	0	176.25
	2010	300.00	199.59
	2011	400.00	163.64
	2012	150.00	172.24
	2013	150.00	12.96
Insurance -	2009	1,975.09	1,975.09
	2010	2,000.00	1,772.52
	2011	2,300.00	1,090.91
	2012	1,800.00	1,316.25
	2013	1,200.00	1,916.25

14. There are then arguments about legal costs and some repairs undertaken by Mr. Placide which turned out to be inadequate and were not paid from the service charge funds. The Respondent sets out what has happened with the section 20 consultation commenced on the 26th March 2013 to do work to the roof etc. which culminated in demands for a total of £12,355 being sent out on the 26th September 2013. Presumably this has provoked these applications.

The Inspection

15. The members of the Tribunal inspected the property but it became clear that work had been done to the property after the section 20 consultation. The inspection therefore did not provide the members of the Tribunal with a great deal of assistance in resolving the dispute without ascertaining further information at the hearing – which in fact proved to be unnecessary.

The Lease

16. The Tribunal was shown a copy of what seems to be the lease of flat 81A. It is

dated 12th February 1988 and is for a term of 99 years from the 1st January 1988 with an increasing ground rent.

17. There are the usual covenants on the part of the landlord to maintain the common parts and structure of the property and to insure it and the leaseholder is liable to pay 16.7% of the total charges.

18. Of relevance to one issue in dispute is the service charge regime set out in the 7th Schedule which provides, in clause 4 (c), that at the end of a service charge year, a reconciliation shall be prepared and "*The Lessee shall be allowed or shall on demand pay as the case may be the Percentage of the Maintenance Adjustment...*". Thus there is clear authority in the lease for a landlord to keep back any surplus which can be used to create a sinking fund.

The Law

19. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'.

20. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. This Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable and, if so, whether it is payable. Section 27A of the 1985 Act says that an application to this Tribunal cannot be made where services charges are agreed or admitted.

21. Part II of the 1987 Act makes provision for a tenant or tenants of premises to which that part of the Act applies to apply to this Tribunal for the appointment of a manager. 'Premises' consist of the whole or part of a building if the building or part contains 2 of more flats, as this one does.

22. Section 22 of the 1987 Act says that before making this application, the Applicant must serve a notice on the landlord (or RTM in this case) explaining that it is proposed to make an application to this Tribunal for the appointment of a manager and stating the grounds upon which it proposes to rely. Specifically, the notice must "*specify the grounds on which the tribunal would be asked to make such an order*" and "*where those matters are capable of being remedied...within such reasonable period as is specified in the notice, to take such steps for the purpose of remedying them as are so specified*". It is possible for a Tribunal to waive this requirement in circumstances.

23. Section 24 of the 1987 Act says, of relevance to this application, that before making such an order, a Tribunal must be satisfied that there has been a breach of covenant on the part of the RTM and that it is "*just and convenient to make the order in all the circumstances of the case*". There is also a 'catch all' provision in subsection 24(2)(b) which provides that an order can be made "*where the tribunal is satisfied that other circumstances exist which makes it just and convenient for the order to be made*".

24. Section 20C of the **Landlord and Tenant Act 1985** ("the 1985 Act") enables a

Tribunal to make an order that the RTM's costs of representation before a Tribunal cannot be recovered from a tenant as part of a future service charge. This power must be exercised so as to make the decision 'just and equitable'.

The Hearing

25. The hearing was attended by the Applicants, counsel for the 2nd Respondent, solicitor for the Applicants, the proposed manager and various potential witnesses. The Tribunal chair pointed out to Mr. Mangse that on the basis of the evidence presented in the bundle he had some difficulty in the (a) the section 22 Notice was dated some 2 months after the application (b) there was little, if any, specific criticism of the individual service charges claimed save for the cost of proposed major works and (c) as the Applicants seemed to be up to date with their payments for service charges prior to the 2013 demand for the major works, it could be argued that they were agreed or admitted.

26. Mr.Brown, on behalf of the 2nd Respondent then revealed the offer and Mr. Mangse asked for time to take instructions which was granted. As is recorded above, agreement was then reached that the only matter for determination by this Tribunal at this hearing was the matter of the application under section 20C of the 1985 Act.

Conclusions

27. In *Schilling v Canary Riverside Development PTD Ltd* LRX/26/2005; LRX/31/2005 & LRX/47/2005 His Honour Judge Rich QC had to consider upon whom lay the burden of proof in contested service charge disputes. At paragraph 15 he stated :

> *"If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the Yorkbrook4 case make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard."*

28. It is clear that the Notice under section 22 of the 1987 Act was not served prior to making this application and it was accepted by Mr. Mangse that no grounds exist for the Tribunal to waive the requirement for such a notice because service was not reasonably practicable. A point was made that the notice was addressed to the landlord and should have been addressed to the 2nd Respondent RTM. As there was some evidence on the papers that a copy had been served on the RTM, the Tribunal did not see the need to investigate that submission any further in view of the lack of basic statutory compliance.

29. As to the service charges in dispute, the agreement reached by the parties – offered before the hearing by the 2nd Respondent – would enable the Applicants to dictate what they wanted to see as major works. Thus the only service charge

issue concerned the earlier 2009-2013 service charges. As no details had been set out particularizing how it was alleged that these were unreasonable – contrary to the Tribunal's directions order and the principle established in the *Schilling* case referred to above, the Applicants' case was unlikely to succeed, particularly in view of the payment of the majority of those earlier charges.

Costs

30. In view of these matters and the very detailed and legalistic way in which quite serious allegations were made by the Applicants about the behaviour of a director of the 2nd Respondent, the Tribunal determines that it was reasonable for the 2nd Respondent to be represented at the hearing and that is not just and/or equitable for an order to be made under section 20C of the 1985 Act.

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Bruce Edgington
Regional Judge
30th April 2014