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

Case reference : **LON/OOAJ/LSC/2013/0733**

Property : **Flat 45, Greystoke Court, Hangar Lane, London W5 1EN ("the flat")**

Applicant : **Raymond Anderson Green**

Representatives : **Mills Chody LLP, Solicitors**

Respondent: : **Seyed Mahmoud Mostafavi**

Type of application : **Liability to pay service charges**

Tribunal Judge : **Angus Andrew**

Date and venue of hearing : **5 February 2014
10 Alfred Place, London WC1E 7LR**

Date of decision : **7 February 2014**

DECISION

Decision

1. Mr Mostafavi is liable to pay a service charge of £2,646.54 to Mr Green in respect of the service charge year 2008/09.
2. I decline to order Mr Mostafavi to pay any of Mr Green's cost incurred in the proceedings before this tribunal.
3. The case is remitted to the County Court to determine the amount of any unpaid ground rent, statutory interest and any costs incurred in the litigation.

The application and hearing

4. Mr Green issued proceedings in the Northampton County Court to recover unpaid service charges of £2,884.54. In addition Mr Green claimed costs and statutory interest. The case was transferred to the Central London County Court and on 11 October 2013 District Judge Wicks transferred it to this tribunal "*for the determination of the dispute between the parties*". Directions were issued at a pre-trial review on 21 November 2013 and the case was listed for a hearing on 5 February 2014.
5. At the hearing Mr Green was represented by Mr Philips a barrister instructed by Mills Chody LLP Solicitors. Mr Mostafavi appeared in person. I heard evidence from Ms D Ahmad of David Adams Surveyors Ltd. Ms Ahmad gave evidence on behalf of Mr Green. Mr Mostafavi also gave evidence on his own behalf.

Background

6. Mr Mostafavi told me that he has owned the flat since about 1990 although it seems it was not always registered in his sole name. He holds the flat under a lease for a term of 125 years from 25 December 1982 but for reasons that will become apparent the lease provisions are not material to my decision. Mr Green has owned the freehold reversion in Greystoke Court since 1989.
7. Mr Green appointed managing agents to manage Greystoke Court, which is a sizeable block of flats. In 2004 the managing agents were Lancaster Brown Ltd. Ms Ahmad who gave evidence before me was an employee of Lancaster Brown Ltd and was responsible for the management of Greystoke Court. In June 2006 Trust Property Management Ltd ("Trust") purchased the business of Lancaster Brown Ltd and became the new managing agents. Ms Ahmad was employed by Trust after the takeover and she continued to manage the Greystoke Court until August 2007 when she left that company for pastures new. Mrs Ahmad set up her own business under the name of David Adams Surveyors Ltd ("DASL") of which she is

the sole principal. In October 2008 Mr Green transferred the management responsibilities from Trust to DASL so that Ms Ahmad again became responsible for the management of Greystoke Court.

8. In Mr Green's statement of case he accepts that: *"The handover was incomplete and the entire set of documents relating to Greystoke Court was not passed to DASL. To this day, both the applicants and DASL have been unable to recover the entirety of the files from Trust"*.
9. In her frank evidence Ms Ahmad said that the performance of Trust prior to the handover had been unacceptable. Records including bank statements for the period from March 2008 to the handover date had never been passed to the DASL. There were also unresolved issues with the accountants who I was told had prepared inaccurate closing accounts.
10. Nevertheless Trust did prepare and handover to DASL a closing statement in respect of each flat. The statement in respect of the flat was addressed to a Mr Richard who appears to at that time to have had an interest in the flat notwithstanding that it was owned by Mr Mostafavi. The statement in respect of the flat records all demands, payments and resulting balances on the service charge account since 1 October 2005. The statement shows that there were no outstanding service charges at the end of 2007: that is the demanded service charges had been paid in full. However the statement records an outstanding balance of £2,746.54 of which £100 relates to ground rent for the year 2008/09. The balance of £2,646.54 relates to the service charge for 2008/09 that on the basis of the statement was outstanding at the date of the handover by Trust to DASL.

Issues in dispute

11. At the start of the hearing the parties agreed that the only disputed service charge was the £2,646.54 originally demanded by Trust in respect of the service charge year 2008/09. Ms Ahmad accepted that Mr Mostafavi had paid all the other service charges demanded from him. Mr Mostafavi did not dispute the reasonableness of the service charge costs incurred for 2008/09 and neither did he dispute that he was liable to pay the service charge under the terms of his lease. Put simply his case was that he had paid the disputed service charge to Trust and that his statement had not been credited with that payment.
12. Prior to the hearing Mr Phillips on behalf of Mr Green submitted a statement of costs suitable for summary assessment. In total Mr Green claims costs of £5,568. That sum includes £1,250 in respect of DASL's fees. It does nevertheless appear to be an extraordinary figure having regard not only to the sum in dispute but to the nature of this dispute. The statement does not explain when the work was completed and it is not clear if it includes work undertaken in respect of the court litigation. As the statement includes court fees of £358 (in contrast to the £195 paid in tribunal fees) it is logical to conclude that the statement includes costs

incurred in respect of both the court litigation and the proceedings before this tribunal.

13. In answer to my questions Mr Philips said that costs were claimed pursuant to rule 13 of the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rule 2003. The relevant provisions in that rule provide that:

“The Tribunal may make an order in respect of costs only if a person has acted unreasonably in bringing, defending or conducting proceedings in ... a leasehold case”.

This is a leasehold case.

Reasons for my decisions

That the disputed service charges are payable by Mr Mostafavi

14. Mr Mostafavi said that he had paid the 2008/09 service charges by cheque to Trust and he assumed that the money had been misallocated and possibly credited to the account of another flat. He pointed out that this had happened in 2004 when the property was managed by Lancaster Brown Ltd. However he accepted that when the mistake was drawn to Ms Ahmad’s attention it was immediately rectified and the payment credited to his account.
15. Given the failure of Trust to provide DASL with a full set of documents on handing over the management responsibilities in October 2008 it is possible, as Ms Ahmad acknowledged, that Mr Mostafavi had indeed paid the disputed service charge. Nevertheless having resumed responsibility for managing Greystoke Court Ms Ahmad demanded the disputed service charge from Mr Mostafavi. When he claimed to have paid it to Trust she requested evidence of the payment either by production of a bank statement or cheque stub. She went out of her way to resolve the dispute amicably. Pending a resolution she credited Mr Mostafavi’s account with the disputed service charge with the narrative: *“In dispute leaseholder paid Trust Property Mang evidence requested in May 10”*. By invitation she went to Mr Mostafavi’s house in attempt to resolve the issue. However despite her many requests Mr Mostafavi provided neither a copy bank statement nor a cheque stub or indeed any evidence that would confirm payment of the disputed service charge.
16. Mr Green gave Mr Mostafavi more than four years to produce some evidence that the disputed service charges had been paid to Trust before he finally issued proceedings for their recovery in the County Court. As observed the Court proceedings were transferred to this Tribunal and a pre-trial review as held on 21 November 2013. On the basis of the directions in the hearing bundle it seems that Mr Mostafavi failed to attend

the pre-trial review although Mr Green's solicitor and Mrs Ahmad did attend. The directions are precise. They identified the correct issue. Mr Green was directed to provide a statement of case by 4 December 2013, which he did. Mr Mostafavi was directed to file a response by 18 December 2013. The issue having been correctly identified he was directed to attach to his response "*copies of all bank statements, cheque stubs or other proof of sums said to have been paid and when*".

17. Notwithstanding a reminder from the tribunal Mr Mostafavi failed to comply with those directions. At the date of the hearing and more than 4 years after he was first requested to provide evidence of payment Mr Mostafavi has still not provided any evidence to substantiate his claim that he paid the disputed service charge to Trust.
18. The Upper Tribunal has observed on many occasions that a sifting burden of proof applies in service charge cases (for example see: *Schilling v Canary Riverside LRX26/2005*). When DSL produced the closing statement from Trust and demanded the disputed service charge, as it undoubtedly did, the burden of proof passed to Mr Mostafavi. It is a burden that could easily have been discharged. Mr Mostafavi is an accountant and told me he has a number of investment properties. He could provide no satisfactory explanation for his apparent inability over a period of more than 4 years to produce a bank statement, cheque stub or other evidence of payment. In short he failed to discharge the burden of proof that was upon his solders.
19. For each and all of the above reasons I find as a fact that Mr Mostafavi did not pay the disputed service charges to Trust. Consequently it follows that those service charges remain due and payable to Mr Green.

Not to award cost

20. Rule 13 does not and was not intended to give this tribunal full cost shifting powers. It can only make a cost order "*if a person has acted unreasonably in bringing, defending or conducting proceedings*". The test is similar to that which would justify an award of costs on an indemnity basis in a cost shifting jurisdiction. The root cause of the issue between the parties was the failure of Trust to deliver a complete set of documents to DSAL on the handover of the management responsibilities: a failure that has not been rectified more than five years later and for which no coherent explanation appears to have been offered. Had they been handed over Mrs Ahmad would have been able to establish the position without having to ask Mr. Mostafavi for proof of payment. Mr Green may be dissatisfied with Trust but they were his agents and he must accept responsibility for their failure. If this had been a cost shifting jurisdiction I would not have awarded costs on an indemnity basis and consequently it would not be appropriate to order costs under rule 13.

21. Given the total amount of the claim (£3,191.54) it seems unlikely that Mr Green would recover his costs in the court litigation. It would therefore appear perverse if he were to recover his costs in what is generally regarded as a no cost jurisdiction.
22. Having regard to all the circumstances of this case I do not consider that it could be said that Mr Mostafavi has acted unreasonably in defending these proceedings. He appears to have held a genuine belief that he had paid the disputed service charge and he was entitled to have the issue decided by the tribunal.
23. Consequently and for each of the above reasons I decline to order Mr Mostafavi to pay Mr Green's costs.
24. I have not jurisdiction in respect of ground rent, statutory interest or the litigation costs and it is appropriate to remit the case to the County Court to consider those issues.

Name: Mr A Andrew

Date: 7 February 2014