



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

Case Reference : CHI/00MR/LIS/2015/0048

Property : Apartment 5, Goodman Court,
22 Hampshire Terrace, Southsea PO1 2QF

Applicant : Paul Edward Longmore

Representative : Dack Property Management

Respondent : Mark Anthony Pickering

Representative : Mr C. Brookes, Counsel
Instructed by Glanvilles, solicitors

Type of Application : Liability to pay service charges

Tribunal Member(s) : Judge D Agnew
Mr P D Turner-Powell FRICS

Date and venue of hearing : 16th December 2015 at the Tribunal's
offices, Chichester

Date of Decision : 5th January 2016

DETERMINATION

Background

1. The Applicant is the Landlord of the property known as Apartment 5, Goodman Court, 22, Hampshire Terrace, Southsea, Hampshire PO1 2QF (“the Property”). The Respondent is the current long lessee of the Property. The lease is dated 21st December 2002, is made between Apprex Limited (1) and Ian Brison(2) and is for a term of 125 years from 5th December 2002.
2. On or about the 23rd January 2015 the Applicant issued proceedings against the Respondent under Claim number B19YJ140 in Portsmouth County Court claiming arrears of ground rent, arrears of service charges, an administration charge, legal costs and interest totalling £6,102.75. On 20th July 2015 District Judge Veysey in the County Court at Portsmouth transferred the following issues to the Tribunal to determine, namely:
 - a the proportion of the service charge payable by the defendant pursuant to clause 8(7)(a)(ii) of the lease for the period between 1st December 2013 and 30th November 2015
 - b the reasonableness of the charges invoiced in relation to minor and major works dated 31st January 2012, 28th May 2012 and 20th November 2014
 - c whether the Claimant has followed correct procedures pursuant to the terms of the lease when claiming service charges

The jurisdiction to determine such matters is conferred on the Tribunal by section 27A of the Landlord and Tenant Act 1985.
3. Directions were issued by the Tribunal and the case came before the Tribunal for determination on 16th December 2015.

Inspection

4. The Tribunal inspected the Property immediately prior to the hearing. Those present at the Inspection were the Respondent and Mr Paul Elson of Dack Property Management, the Applicant’s Managing Agents.
5. 22 Hampshire Terrace is a converted block of 9 flats in a terrace of mixed offices and residential properties. Two flats (numbered 20 and 21 Hampshire Terrace) have their own front doors and do not share a communal hallway or staircase. The other 7 flats are served by a common front entrance, hallway and staircase. The block comprises a basement and four storeys above fronting onto Hampshire Terrace, which is a busy main road in Southsea, and Ravelin Park. The rear of the property is accessed via a service road. The exterior walls are

cement or concrete rendered. There is a soft wood external staircase leading from the rear of the entrance hallway down to the rear access road and also down to the rear patio doors of the two flats which have their own front entrances. At the foot of the staircase there is also positioned the water and sewage pumps serving the block.

The matters in dispute

6. The items disputed by the Respondent were as follows:-

a) a service charge for sewage pump failure 31st January 2012 in the sum of £130.49. It was conceded by Mr Dack on behalf of the Applicant during the course of the hearing that this had been demanded more than 18 months after the charge was incurred and that therefore the Applicant did not pursue this item.

b) a service charge levy for external decoration dated 28th May 2012 in the sum of £377.97. The Respondent asserted that this had not been properly demanded in accordance with the lease and was not, therefore, owing

c) an administration charge of £30 for chasing arrears dated 9th October 2012. Mr Dack conceded this on behalf of the Applicant.

d) a service charge levy for external decoration and repairs dated 20th November 2014 in the sum of £2301.52. The Respondent claimed that this was not owing as the correct procedure as laid down in the lease had not been complied with.

e) service charges dated 1st December 2013 and 1st December 2014 in the sum of £622.19 and £1138.41 respectively. Again this was challenged by the Respondent on the basis that the correct procedure as laid down in the lease had not been followed and the charges were therefore not owed as claimed in the court proceedings.

f) all service charges were challenged on the basis that certain items had been charged to the Respondent on the basis of a one-seventh contribution whereas the Respondent considered that all service charge items should be apportioned on a one-ninth basis.

7. The Tribunal made clear at the outset that it had no jurisdiction to deal with the ground rent claimed in the County Court proceedings. Although the Tribunal would have jurisdiction to determine the legal costs and interest claimed as administration charges the Tribunal would not be dealing with these as these matters had not been transferred to it by the Court and in any event they were more appropriately dealt with by the Court. Neither party was expecting the Tribunal to determine those matters.

The hearing

8. Mr Peter Simon Dack of Dack Property Management appeared on behalf of the Applicant and Mr Chris Brookes appeared on behalf of Mr Pickering who also attended to observe the proceedings as did Mr Elson of Dack Property Management who had attended at the Inspection.
9. Mr Dack objected to the fact that he had been handed a skeleton argument by Mr Brookes only a few minutes before the hearing and that this was unacceptable. It contained legal submissions which he as a Chartered Surveyor and not a lawyer could not be expected to deal with. The Tribunal adjourned for a period to allow Mr Dack to have a proper read through the skeleton argument and that if he was of a mind to seek an adjournment of the case after he had done so he could make the application and the Tribunal would make a decision. On his return Mr Dack agreed that there were certain matters that he could deal with such as how the service charges had been apportioned and the reason for the apportionments made, and also as to the mechanisms that had been used to charge the various service charges but he was unable to respond to the legal points being made.
10. The Tribunal considered that Mr Dack had been placed in an awkward position by the solicitors who were on record as acting for the Applicant in the County Court proceedings and who had also been consulted concerning the Tribunal proceedings because they should have appreciated that the Respondent's case rested largely upon legal arguments that Mr Dack as a surveyor was not appropriately qualified to respond to. The Tribunal therefore suggested a compromise solution, namely that the Tribunal would make an interim determination of the facts (i.e. what the apportionment of the service charges was and whether this was reasonable and how the service charges and levies had been made and whether these conformed with the lease). These were all matters that Mr Dack was comfortable in addressing. The Tribunal would not go on to make a final determination as to the legal consequences of its findings of fact but would then invite the parties to make their legal submissions in writing based on the interim determination. This would give the Applicant's solicitors the opportunity of presenting their legal arguments as to the legal consequences of the Tribunal's interim determination should they so wish. Alternatively, the Tribunal's interim determination might be sufficient to enable the case to be determined by agreement. Both parties expressed their agreement to this course of action.

The lease

11. The relevant clauses of the lease are as follows:-

- a) by clause 4(1)(ii) the lessee is required to pay on demand by way of further rent a sum "equal to a fair proportion to be determined by the Landlord's Surveyor of the amount which the Landlord expends yearly in effecting the insurances described in sub-clause 7(2) and
- (iii) on demand by way of further rent the service charge.....specifies in sub-clause 8(7).

b) by clause 5(5) the Property is defined as “..... the apartment.....forming part of the Building...”

c) by clause 8(7)(a)(i) under the heading “Service Charge”, “the Expenditure” is stated to mean “all expenses and outgoings incurred by the Landlord in the matters described in paragraph (e) of this sub-clause and includes (A) not only expenses disbursed but a reasonable sum by way of provision for future expenditure on such of those matters as call for intermittent expenditure and (B) a reasonable sum by way of provision for depreciation on capital costs of machinery and equipment

d) by clause 8(7)(a)(ii) the “Tenant’s Proportion” of the service charge is stated to mean “the proportion fairly attributable to the Property such proportion to be determined by the Landlord’s Surveyor taking into account the respective floor areas of (a) the Property and (b) other premises benefitting by the provision of the service in question”.

e) by clause 8(7)(b) it is provided that “On each of the usual quarter days throughout the term the Tenant shall pay to the Landlord by way of basic service charge a sum at the yearly rate of Five hundred pounds (£500) or at such other yearly rate as the Landlord’s Surveyor may from time to time notify in writing to the Tenant in accordance with the provisions of paragraph (d).”

f) clause 6(7)(c) contains the usual provision for an account to be taken of the service charge for the year as soon as is reasonably practicable after the year end and for a balancing charge to be made if the amount paid on account does not cover the expenditure. If there is a surplus this is credited against the following year’s basic service charge.

g) by clause 8(7)(d) “The Landlord may at any time after the first Account Year give to the Tenant notice in writing of its desire to increase the basic service charge to such a sum (not exceeding the Tenant’s Proportion of the Expenditure as shown by the last annual statement of Expenditure) as the Landlord shall specify in the notice and from the first instalment of the basic service charge falling due after the giving of the notice the sum so specified shall be payable as the basic service charge in lieu of the sum which was previously so payable”.

h) by clause 8(7)(f) it is provided that “Each annual statement of Expenditure shall be certified by the Landlord’s Surveyor and a duly certified copy of such statement shall be evidence for the purposes of this Lease of the matters covered by such statement.....”

The Respondent’s case

12. The Respondent’s counsel first made submissions on the fairness of the apportionment of the service charges made by the Applicant’s

Managing Agent. It is clear from Mr Dack's evidence that the varied items of expenditure have firstly been divided into those which apply to the flats having use of the communal entrance, hallway and staircase and those that do not (i.e. Apartments numbered 20 and 21). A further adjustment has then been made to reflect the different floor areas of the flats. Thus, for items affecting all the flats, such as buildings insurance, the Respondent was being asked to pay 11.82% of the total cost, whereas for items affecting only the seven flats having use of the communal areas, such as cleaning of those areas, the Respondent's proportion was 16.48%. Mr Brookes submitted that whilst he could not argue that it would be wrong if the cost of maintaining the communal facilities were divided equally between the seven flats it was wrong, he maintained, to do a further adjustment for floor area of the different flats. It did not follow that simply because one flat was larger than another that it should have to bear a greater proportion of the cleaning costs. The same applied to those costs which had been attributed to all nine flats. The management fee or the cost of maintaining the sewage pumps, for example, would be the same for a larger flat as for a smaller flat. Those items of expenditure should be apportioned equally between all ten flats. With regard to repairs, Mr Brookes said that there does not seem to have been a distinction between those repairs that benefit all flats and those which only benefit some. He accepted that it might be reasonable to adjust the buildings insurance cost to take account of floor area as one would expect to pay a higher premium for a larger property.

13. With regard to the two levies for external decoration costs, the first for £377.97 and the second for £2301.52, these had not been demanded in accordance with the lease. They had been demanded part way through the service charge year and the lease makes no provision for this. Nor did these amounts appear on the annual service charge statements for £2012 and 2013. They had not been properly charged as a cost incurred. Further, the demands made for these levies had not followed the mechanism for increasing the basic service charge. He submitted that a demand for payment cannot be construed as "a notice in writing of the landlord's desire to increase the basic service charge" and it does not state what the new basic charge is to be. Finally, the increase in the basic service charge is restricted by clause 8(7)(d) to the Tenant's proportion as shown on the previous annual statement and there is no evidence that this would have been the case in this instance. Until these amounts are demanded in accordance with the lease, Mr Brookes submitted, they are not payable.
14. With regard to the two annual service charge demands made on 1st December 2013 for the service charge year 2013/14 in the sum of £622.91 and on 1st December 2014 for the service charge year 2014/15 in the sum of £1138.41 Mr Brookes' challenge was that the statements of expenditure were defective in that they did not strictly comply with the requirements of the lease and he sought a finding, if the Tribunal finds that the service charges are recoverable, that the statements of expenditure were not served until after the issue of proceedings which

is important on the question of interest and costs which the County Court is to determine.

15. As to whether the statements of expenditure had complied with the lease requirements Mr Brookes submitted that they were deficient because they do not contain any reference to the individual Tenant's proportion of the total expenditure. He said that each annual statement is required to be certified by the Landlord's Surveyor and they are not.

The Applicant's response

16. With regard to the apportionment of the service charges Mr Dack confirmed Mr Brookes' understanding as to how the apportionment had been carried out. Mr Dack believed he was complying with the lease in only allocating the costs of maintaining the communal parts to the seven flats served by the common entrance way and then to adjust all charges in accordance with floor area. There were several ways in which service charges may be apportioned in leases; they may simply be divided by the number of properties irrespective of any other factor, they may be apportioned according to floor area or they may be apportioned according to rateable value, those with the higher rateable value paying a greater proportion. He had relatively recently taken over the management of this Building. He had checked how the apportionment had been carried out previously, confirmed that it had been calculated correctly and what he believed was in accordance with the lease and simply continued in the same way. If he was not bound by the terms of the lease he might have considered that a different apportionment might be fairer but he had to take into account the floor area in order to comply with the lease.
17. With regard to the two levies for exterior decoration, Mr Dack conceded that there was no provision for making a charge part way through the year but he said that the figures had been included in the 2013 accounts.
18. With regard to the annual service charge demands Mr Dack said that a statement of expenditure and application for payment were sent together to the Tenants in January of each year. These two documents taken together comply with clause 8(7)(c) as the statement of expenditure sets out the total amounts spent on the various types of expenditure and the application for payment sets out what the Tenant is required to pay. It does not specifically state the proportion in percentage terms but this can be worked out from the two documents. Every year a budget of expenditure for the forthcoming year is circulated to the Tenants for their comment and consideration. He had never received a response from the Respondent. The implication was that Mr Dack considered the issue of a budget was sufficient notification to the Tenants of a requirement for an increase in the basic service charge.

19. With regard to the requirement for the annual statement of expenditure to be certified by the Landlord's surveyor, Mr Dack said that the formal annual accounts are certified by him as is evident from the documents contained within the hearing bundle. However, this is a separate document from the statement of expenditure which is sent out to the Tenants after the year end. Clause 8(7)(f) does not require a certified copy of the statement of expenditure to be sent to the Tenant. It is not clear that the "annual statement of expenditure" referred to in clause 8(7)(f) has to be the same document as is referred to in clause 8(7)(c).

The Tribunal's Interim Determination

20. Where a lease provides for a Tenant to pay a service charge based on an apportionment carried out by the Landlord's surveyor is rendered void by section 27A(6)(a) of the Landlord and Tenant Act 1985 and may be challenged by the Tenant and a fair apportionment may be determined by this Tribunal. That position was affirmed by the Upper Tribunal in *Gater v Wellington Real Estate Limited* [2014] UKUT 0561. A copy of that decision was given to the parties' representatives prior to the hearing and the Applicant did not seek to challenge the Tribunal's jurisdiction to determine a fair proportion in the instant case.
21. The Tribunal has considered carefully the representations made by the Respondent's counsel in respect of the apportionment but, has concluded that the way in which the service charges have been apportioned by Mr Dack is a fair apportionment bearing in mind the lease provisions. Whilst the Tribunal accepts that the Landlord's surveyor is not bound to adjust the apportionment according to floor area the lease does require the surveyor to "take into account" the floor areas of the apartments in the Building in determining the apportionment.
22. The Tribunal bears in mind Mr Dack's point that leases contain different methods of apportionment. No method is guaranteed to be totally fair in all circumstances. For example, where service charges are divided equally between all lessees those living on the ground floor might well (and often do) complain that they have to contribute to lift repairs from which they do not directly benefit. If scaffolding is necessary in order to attend to some repair to the exterior of a building which only affects one flat, should those on the lower floors have to contribute to the cost? Should the owners of lower apartments have to contribute to the cost of lighting and cleaning the higher floors? A line has to be drawn somewhere and a balance has to be struck between trying to be scrupulously fair and apportioning every item of expenditure to the nth degree on the one hand and providing a relatively straightforward and easily understood method of apportionment on the other.
23. Further, the Tribunal did not consider it intrinsically unfair that a larger property should bear a greater proportion of the cost of most

- outgoings than a smaller unit. A larger apartment will be able to accommodate more people than a smaller one and so generate more traffic in the common parts. Also, it may be argued that as a larger unit is likely to be more valuable than a smaller unit, it is only right and proper that it should pay a higher amount. This is the same principle upon which Council Tax is based.
24. The Respondent is not paying the highest proportion of the costs of the all lessees in the building. If the costs were to be re-apportioned on a different basis there is no guarantee that the Respondent would in fact be any better off.
 25. For all the foregoing reasons the Tribunal considers that on balance the apportionment that has always hitherto been applied and applied by Mr Dack is fair and it will not interfere with those apportionments.
 26. With regard to the two levies for external decoration and repair of £377.97 and £2301.52 the Tribunal finds that these have not been demanded in accordance with the lease. There is no provision to allow a special levy to be made during the course of a service charge year. Neither can the levies be regarded as notice of an increase in the basic service charge of £500. It is not stated to be such and it does not specify what the new basic service charge will be. It is not clear that even if it were such a notice that it would not have exceeded the Tenant's Proportion of the Expenditure as shown on the last annual statement of Expenditure. Even if these figures do appear in the 2013 formal accounts (which is not entirely clear that they do as the figures do not seem to tally) there has never been a demand for a balancing charge for 2012 or 2013 in accordance with clause 8(7)(c) of the lease.
 27. With regard to the two annual service charge demands for the periods 2013/14 and 2014/15 in the sums of £622.91 and £1138.41 we find that these were demands for payment on account because they were demanded on 1st December 2012 for 2013/14 and on 1st December 2014 for 2014/15. Only the basic service charge of £500 is therefore payable unless this has been increased by notice under clause 8(7)(c) of the lease (which we find has not been done in compliance with that clause) or there was a balancing demand for 2013/14, which there was not. There can have been no balancing charge demanded for 2014/15 as that service charge year had not ended by the time proceedings had commenced in the County Court. Had it been necessary for the Tribunal to have ruled on the Respondent's arguments as to compliance with the lease in other respects we would have found that the Statements of Service Charges and Applications for payment when read together would have been sufficient to comply with clause 8(7)(c) of the lease but that in order to comply with clause 8(7)(f) there is required to be only one document which sets out the annual expenditure and that this document is certified by the Landlord's Surveyor. It does not need to be audited by an accountant under that clause of the lease but it does need to be "delivered" to the Tenants.

28. This is as far as the Tribunal can take matters by way of this interim determination. It will now be a matter for the parties to consider their respective positions in the light of these findings and to take further advice thereon if thought necessary. The Tribunal would urge the parties to endeavour to settle matters if at all possible in order to avoid further costs being incurred. It is possible that any shortcomings in the implementation of the mechanism for demanding service charges may be rectified. On the other hand it was not argued by the Respondent that the service charge amounts were unreasonable and that therefore it could well be that he will end up having to pay the same amount as demanded already (less the two items conceded by the Applicant) in any event. It may be that costs are going to be the main bone of contention going forward but failure to settle will only increase the amount at stake as far as costs are concerned.

29. If the parties are unable to settle they must send their further submissions on the legal effect of the interim determination findings and as to the amount, if anything, that the Respondent owed as at the date of the issue of the County Court proceedings so that they reach the Tribunal office by 4pm on Friday 5th February 2016. If the parties do reach an agreement the Tribunal can endorse its consent to a consent order before sending the file back to the County Court. The time for appealing this interim determination will not begin to run until after a final determination is made.

Dated the 5th January 2016
Judge D. Agnew (Chairman)