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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/26UE/LSC/2016/0063**
Property	:	**19 Hawkesley Court, Watford Road, Herts WD7 8HH**
Applicant	:	**Hawkesley Court Management Company Limited**
Representatives	:	**Mr Phillip Ashton & Mr Phillip Newman Directors**
Respondent	:	**Miss Valery Collins**
Representative	:	**Miss Valery Collins In Person**
Type of Application	:	**Section 27A Landlord and Tenant Act 1985 – determination of service charges payable**
Tribunal Members	:	**Judge John Hewitt** **Ms Marina Krisko BSc (ESTMAN) FRICS** **Mr John Francis QPM**
Date and venue of Hearing	:	**8 December 2016** **Watford Employment Tribunal**
Date of Decision	:	**28 December 2016**

DECISION

Decisions of the tribunal

1. The tribunal determines that:

   1.1 As that the date of the hearing the arrears of service charges payable by the respondent to the applicant is £4,796.53 shown as made up in paragraphs 19-22 below;

   1.2 No order shall be made on the respondent's application for an order pursuant to section 20C Landlord and Tenant Act 1985 (the Act); and

   1.3 The applicant's application that the respondent reimburse it with the fees of £300 paid to the tribunal is refused.

2. The reasons for our decisions are set out below.

Procedural background

3. The applicant made an application pursuant to section 27A of the Act. It is dated 30 August 2016. The applicant sought a determination as to the service charges payable by the respondent (Miss Collins), who is the long lessee of flat 19. In issue were the service charges payable for the years 2014 and 2015 and the balance on the cash account now payable by Miss Collins

4. Directions were given on 8 September 2016.

5. The application came on for hearing before us on 8 December 2016. Earlier that day we had the benefit of an inspection of the development known as Hawkesley Court. Mr Ashton and Mr Newman who are directors of the applicant were present as was Miss Collins who took us around the development and its grounds and who drew our attention to a number of physical features.

6. At the hearing itself, Mr Ashton presented the case for the applicant, assisted by Mr Newman. Miss Collins presented her case.

The lease and the service charge regime

7. At this point it is convenient to summarise the material provisions of the lease of flat 19.

8. The copy provided to us is not dated but it appears it was granted by Banner Homes Limited to Miss Collins in or about 2004.

   Schedule 1 provides that the demised premises include; the internal plaster of the external load bearing walls, the doors and door frames, the windows and window frames fitted into such walls, the plaster tiles or other coverings of the ceilings and the floor boards or other surfaces of the floors of the demised premises. There is expressly excluded any parts of the Property lying above the said surfaces of the ceilings or below the said floors.

Schedule 2, paragraph 5.1 grants the lessee the right to:

"use the facilities (if any) in the Communal Areas and Facilities the benefit or use of which is common to the Demised Premises and any adjacent ... properties subject to the Lessee not causing any inconvenience or annoyance to other persons entitled to the like right and complying with such rules as the Lessor may make from time to time prescribe"

The Communal Areas and Facilities are defined as:

"the following areas and facilities within the Estate

(i) All hard landscaped areas
(ii) All Estate boundaries of whatsoever nature
(iii) ...
(iv) All gardens lawns flower beds shrubs and trees and other soft landscaped parts of the Estate not separately demised
(v) The Garden and Grounds
(vi) ...
(vii) The Estate Road
(viii) TV and satellite signal distribution system
(ix) Any other facility ... which is designed or intended for the common use of the lessees ..."

Schedule 4 Part I sets out covenants on the part of the lessee and includes:

"3. To pay to the Lessor all costs charges and expenses ... which may be incurred by the Lessor in contemplation of or incidental to the preparation and service of a Notice under Section 146 and 147 of the Law of Property Act 1925 ... "

Schedule 4 Part II sets out further covenants on the part of the lessee as regards the service charge. In short; the accounting year is the calendar year; the landlord is to prepare a budget for each year; the lessee is to pay the full estimated amount on 1 January in each year; and after the end of each year an accountant's certificate is to be given as to the amount of the actual liability and any shortfall, or balancing debit is to be paid by the lessee forthwith.

Schedule 6 Part II sets out covenants on the part of the landlord as regards the service charge. In short; the budget is to provide for the whole of the expenditure estimated to be incurred in the forthcoming year plus an appropriate amount as a reserve towards matters mentioned in Schedule 7; at the end of each year auditors are to determine the actual expenditure and whether there is any balancing debit or credit. A balancing debit is payable to the landlord on demand; and a balancing credit is added to the reserve fund.

Schedule 7 Part 1 sets out covenants on the part of the landlord. Included is a covenant to keep in good repair and decoration the main structure of the Buildings including the roof and foundations thereof and the gutters rainwater and soil pipes and other facilities of the Buildings. Expressly excluded are any parts of the Building included in the demised premises. The landlord is entitled to recover by way of service charge expenditure incurred on the matters set out in Schedule 7 Part 1. Paragraph 19 provides:

> *"19. To pay all legal and other proper costs incurred by the Lessor:*
>
> *19.1 in the running and management of the Estate;*
>
> *19.2 in the enforcement of the covenants on the part of the Lessee and of the Lessees and/or owners of other parts of the Estate and the conditions and regulations contained in this Lease and the leases granted of the other demised parts of the Estate insofar as the costs of enforcement are not recovered from the Lessee in breach and*
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> *19.3 in making such applications and representations ... in respect of any notice ... served under any statute ... in respect of the Estate or all or any parts thereof"*

9. The applicant acquired the freehold interest from Banner Homes. The members of the applicant are the owners of the leases of the 18 apartments which comprise the development.

10. Following the acquisition of the freehold the directors decided to adopt a slightly different approach to the service charge regime. Instead of the whole of the estimated liability being demanded in full on 1 January, one half is demanded on that date and the other half is demanded on 1 July in each year. Further, in the spring of each year a meeting of shareholders is convened and the service charge budget and expenditure to date is reviewed. If it is considered that a shortfall may arise a supplemental demand is raised. In the paperwork this is entitled 'Backdated service charge'. This arrangement has never been formally documented and Miss Collins tells us that she has never agreed to it.

The general background

11. Before dealing with the specific service charge issues we have jurisdiction to determine it may be helpful to set the scene and context.

12. Hawkesley Court is a prestigious development of two low level blocks comprising 18 large apartments with the benefit of underground parking facilities.

From what we could see most, if not all apartments, have the benefit of a large private terrace or balcony.

The blocks stand in substantial landscaped grounds kept in immaculate order. On our inspection of the block in which Miss Collin's flat is located we were able to see that the common parts were spacious and laid out, kept and decorated to a very high standard.

Hawkesley Court can properly be described as a luxury development.

We observe that the lease records that Miss Collins paid a premium of £545,000 when she acquired her lease.

13. Unfortunately, Miss Collins has fallen out with the applicant's directors. Miss Collins has several grievances. In brief, Miss Collins' apartment is on the second (top) floor and part of it lies beneath a flat roof. In 2008 and 2010 water ingress into her apartment occurred but seems to have been dealt with by Banner Homes under a NHBC obligation.

14. In January 2014, a further ingress occurred. Banner Homes were again called in. Evidently, they said the cause of the problem was failure on the part of the applicant to keep the gutters/drains on the flat roof clear of leaves and debris. The managing agents arranged for remedial works to be undertaken but before work started Mr Ashton countermanded that instruction. In the event Miss Collins called Banner Homes back and they carried out some work to solve the problem, but as a gesture of good will to Miss Collins. This whole episode started on 10 January and was resolved by 25 February 2014. The water ingress caused some damage to a rug and some internal redecoration was required. The damage to the rug cost £300 to put right. Miss Collins is aggrieved that her offer to resolve her claim at £300 was rejected by the applicant. Miss Collins now wishes to claim damages of £10,000 to cover lack of maintenance to the flat roof above her apartment, stress and the loss of an opportunity to sell her apartment at a time when the market was buoyant.

15. Miss Collins suffers osteoporosis in her joints and suffers a disability. Miss Collins would like to be able to sit in the gardens. Miss Collins finds it difficult to carry a folding chair and to pass through several doors to get from her flat and/or her car parking space and storage cupboard to and from the grounds. She would like to have permission to place a garden bench in the grounds on a permanent basis. This has been refused. Evidently some lessees with ground floor apartments/terraces wish to protect their privacy and prefer not to be at risk of being overlooked. Miss Collins considers that this refusal is unreasonable and prevents her having full enjoyment of the grounds and she seeks a reduction of £500 per year in her service charge liability to reflect this.

16. Miss Collins also complains that she has been treated unfairly because other lessees have been granted permission to place potted plants and planters in the grounds close to their terraces, but she has been refused permission to place a bench in the grounds.

17. Miss Collins further complains that she finds the automatic door closers fitted to some of the doors are very fierce and heavy and she has difficulty opening them. Her requests for them to be adjusted have fallen on deaf ears.

18. Miss Collins told us of examples where she felt she was not treated fairly and with courtesy and respect.

The service charges claimed

19.

Date	Description	Debit	Credit	Balance
18.12.13	On a/c 01.01.14 – 30.06.14	£1,375.00		£1,375.00
06.05.14	Payment		£875.00	£ 500.00
25.06.14	Backdated S/C 01.01.14 – 30.06.14	£100.00		£ 600.00
25.06.14	On a/c 01.07.14 – 31.12.14	£1,475.00		£2,075.00
25.06.14	Water rates	£23.80		£2,098.80
25.06.14	Payment		£1,000.00	£1,098.80
16.12.14	Down lights	£89.95		£1,188.75
16.12.14	On a/c 01.01.15 – 30.06.15	£1,475.00		£2,663.75
21.07.15	Backdated S/C 01.01.15 – 30.06.15	£125.00		£2,788.75
21.07.15	On a/c 01.07.15 – 31.12.15	£1,600.00		£4,388.75
21.07.15	Water rates	£22.73		£4,411.48
21.07.15	Payment		£500.00	£3,911.48
10.12.15	On a/c 01.01.16 – 30.06.16	£1,725.00		£5,636.48
08.01.16	Payment		£1000.00	£4,636.48
?	On a/c 01.07.16 – 31.12.16	£1,725.00		£6,361.48
?	Water rates	£23.77		£6,385.25
?	Payment		£1,273.77	£5,111.48

20. We decided that those items highlighted in yellow are not payable by Miss Collins on the basis that the lease does not oblige her to pay them. We have already made reference to the 'Backdated service charge'. Strictly the lease only provides for one payment on account. There is no objection to the landlord demanding that one payment by two equal instalments. What the lease does not provide for is a revised estimate or a supplementary demand. If at year-end there is a balancing debit that

is payable in full upon demand. Whilst we find that the two 'Backdated service charge' demands are not payable as at the date demanded, the reality, of course, is that if those sums are not paid during the course of the year, the year-end balancing debit is likely to be correspondingly greater.

21. As to the debit of £89.95 in respect of down lights, it appears that Miss Collins arranged for a contractor on site carrying out works for the applicant to do some work on the lights in her flat. They did so, billed the applicant who, in turn, re-charged the expense to Miss Collins. We were not given any details of the work carried out, save that Miss Collins considered the amount claimed to be outrageous. It was agreed that this was a private issue as between the applicant, the contractor and Miss Collins and was not in any way concerned with the service charge account. We have no jurisdiction to determine the rights or wrongs of the rival claims but as it is not a service charge item we have removed it from the service charges claimed by the applicant.

22. In consequence the net amount of service charges due on the account, as presented to us, is £4,796.53, subject only to any challenges Miss Collins wished to make in respect of the actual expenditure in the years 2014 and 2015.

23. The only challenge Miss Collins wished to make was in respect of:

2014	Gardens and irrigation	£8,170.45
2015	Upkeep of gardens and surrounding areas	£7,890.52

24. In both cases Miss Collins considered that the amount spent was far, far too much and that she should only contribute to 50% of such expenditure.

25. The gist of Miss Collins case was that gardeners attend weekly which is too much, the irrigation system is on constantly and water is wasted, the gardens have not been allowed to mature and plants and trees are dug up and replaced far too frequently, less can be spent on the gardens and yet the same style and quality can be maintained and that her balcony does not overlook the gardens and she is not able sit in and enjoy the gardens so that she should not have to pay as much as others.

26. The gist of the case for the applicant was that gardeners are employed, supervised and monitored. A couple of directors have a keen interest in the gardens and keep a close eye on how they are maintained. Generally, it is a green garden but there are some beds, troughs and planters to give some colour. Weekly visits are entirely necessary but they are of a short duration. The grounds are kept in immaculate condition because the development is a quality, prestigious and luxury development and the lessees purchased their flats as a lifestyle choice and expect high standards to be maintained. No other lessee has complained about the expenditure on grounds maintenance.

27. The question for the tribunal is whether the expenditure incurred was unreasonable in amount. Context is all important and what might be unreasonable in a modest low value development may well be eminently reasonable in a much more upmarket development.

28. We bear in mind that Hawkesley Court is a prestige development owned and run by the lessees themselves. The directors inevitably must have some leeway in the nature and extent of services to be provided and the level of quality to be achieved. That does not give them a blank cheque but it does entitle them to go towards the higher end of the bracket or range of what is reasonable.

29. Taking these matters into account, noting that no other lessee has complained about the cost of grounds maintenance, and having had the benefit of seeing the development for ourselves, we conclude that the expenditure concerned was reasonable in amount. Accordingly, we find that no adjustments should be made to actual expenditure incurred in the years 2014 and 2015.

Miss Collins several claims

30. We mentioned above that Miss Collins believes that she has damages claims against the applicant based on breach of covenant to keep the building in repair and properly maintained.

31. In limited circumstances this tribunal is entitled to exercise a discretion to assume jurisdiction to determine modest counterclaims where they go to the amount of service charges payable by a lessee to the landlord.

32. In this case we decided not assume that jurisdiction. The claims made are substantial and may turn on technical or expert evidence which was not presented to us. Further, the damages claimed include damages for stress and personal injury. There was no medical evidence put before us and such matters are outside the scope of the expertise of this tribunal. Finally, the claim included damages arising from an alleged abortive sale of Miss Collins lease and no evidence about the circumstances of that prospective transaction was put before us.

33. For these reasons we concluded that we were not well placed to consider and determine Miss Collins various claims and that if Miss Collins wishes to pursue them the most appropriate and convenient forum is the county court.

Section 20C

34. Miss Collins made an application for an order pursuant to section 20C of the Act. In support Miss Collins said that she had attempted to resolve matters by negotiation, had made an offer in respect of the rug and had been rebuffed. The applicant had failed to respond to her approaches and had treated her unfairly. Miss Collins has paid her own costs and expenses in taking advice and she considered that it would be

unjust if she was obliged to contribute to the costs incurred by the applicant.

35. Mr Ashton opposed the application. He said that the applicant had incurred costs with solicitors of £2,581.80 and other stationery and copying expenses amounting to about £110.00. Solicitors had been dis-instructed in an effort to save costs, but the consequence was that directors had to commit personal time to pursue the matter.

36. Mr Newman expressed the view that he had been given advice to the effect that a provision in the lease might enable the landlord to recover all or some of its costs from Miss Collins direct on the footing that the applicant sought a determination of service charges payable. When the arrears ran above £5,000 the directors considered that they had to take steps to recover them. Also, Miss Collins had made threats of High Court proceedings and directors felt the need to try and sort things out.

37. The lease is equivocal as to whether costs of proceedings such as these are recoverable through the service charge. Paragraph 19.2 of Schedule 7 suggests that they might be, at least to the extent that such costs are not recovered in full from a lessee in default.

38. Given that neither party was legally represented we did not consider it appropriate for us to make a definitive determination on the proper construction of the lease on this point. Instead, we asked ourselves the question; assuming that the lease does give the landlord a contractual right to pass such costs through the service charge, would it be just and equitable to deprive the landlord of that contractual right?

The answer we arrived at was that it would not. The arrears claimed were substantial it was not unreasonable that the applicant sought a determination of what was due. The applicant is a lessee owned and run company. Whilst the applicant may not have succeeded on all of its claims, its failures were relatively modest. We cannot fault the applicant to deprive it of whatever contractual rights it may have.

39. Accordingly, we decline to make an order under section 20C.

Reimbursement of fees £300

40. Mr Ashton made an application that we require Miss Collins to reimburse the applicant £300 fees paid to the tribunal.

41. The rival contentions put to us were much the same as those concerning the section 20c application.

42. We decided not to require reimbursement. The applicant had made claims to sums to which it was not entitled. The applicant asserts that the lease provides ways in which it can recover costs and fees connected with proceedings, and we find that it is fair and just the applicant relies on the contractual rights it claims to have.

Rule 13(1)(b) costs

43. The applicant had made a written application for a costs order pursuant to rule 13(1)(b).

44. Following discussion about that application and the adverse conduct of Miss Collins in the course of these proceedings relied upon (as opposed to conduct pre-proceedings) Mr Ashton decided to withdraw the application.

Concluding comments

45. This case demonstrates the unfortunate consequences that can arise where neighbours fall out. One thing leads to another and matters escalate out of proportion.

46. It is not for us to rule upon the rights and wrongs of matters or whether slights or rudeness are real or simply perceived or imagined.

47. We would urge the parties to try and find a way to repair the discontent that has arisen. Service charges should be paid promptly and not used as a tool or bargaining chip concerning unrelated matters.

48. On our inspection we found that some of the doors controlled by closer mechanisms were heavy to open. That would be more difficult to a person carrying shopping or other items and yet more difficult to a person with a disability. Adjustments would be quite easy to achieve.

49. We also found the grounds to be extensive and consider that with a little imagination and goodwill it ought not be too difficult to find a way to enable all lessees to enjoy them in a sensitive and appropriate way. Those lessees with ground floor terraces leading onto the garden clearly have easy and direct access to the grounds and can move garden furniture quite easily. That is not the case for lessees who do not have such ready access but they also have the full right to enjoy the gardens, and given the amount of money spent on the gardens it is not unreasonable they should have the opportunity to do so. We suggest that directors have a responsibility to find ways to enable them to do so.

Judge John Hewitt
28 December 2016

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.