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

Case Reference : **LON/00AL/LSC/2016/0107**

Property : **43B Herbert Road, London SE18
3SZ**

Applicants : **SH Property Agents Limited**

Representative : **Mr S Harrison, Managing Director**

Respondent : **Peter Otto**

Representative : **No appearance**

Type of Application : **For the determination of the
liability to pay a service charge**

Tribunal Members : **Judge W Hansen (chairman)
Mr Mathews FRICS**

Date of hearing : **20 June 2016**

Date of this Decision : **27 June 2016**

DECISION

Decisions of the Tribunal

- (1) The Tribunal determines that, subject to the Applicant complying with section 21B(1) of the Landlord and Tenant Act 1985, the Respondent is liable to pay £423.50 by way of service charge for the year 2015 made up of £250.00 in respect of proposed qualifying works and £173.50 in respect of insurance;
- (2) The Tribunal refuses the Applicant's application under paragraph 13(1)(b) of the 2013 Tribunal Procedure Rules.
- (3) For the avoidance of doubt, nothing in this determination is intended to fetter the discretion of the county court in relation to county court interest or costs.

Introduction

1. This is an application by the Applicant, the freehold owner of 43 Herbert Road, London SE18 ("the Building"), against Mr Peter Otto, the tenant of Flat B ("the Flat"), for a determination of his liability to pay and the reasonableness of service charges allegedly due in respect of the service charge year for 2015. The relevant legal provisions of the Landlord and Tenant Act 1985 ("the 1985 Act") are set out in the Appendix to this decision.
2. The Applicant was represented by its Managing Director, Mr Stephen Harrison. Mr Otto did not appear. He sent a letter to the Tribunal dated 6 June 2016 in which he wrote: "*I cannot attend the hearing of the 20 June as I am due to be in hospital on that day*". He did not seek an adjournment and we therefore proceeded in his absence.
3. The claim was originally commenced in the County Court at Lambeth on 19 January 2016 and included a claim for ground rent in the sum of £150.00 and £1,673.50 in respect of service charges. On 18 February 2016 the claim was transferred to the Tribunal by DJ Zimmels. Following transfer there was a suggestion that this might be a suitable case for the pilot scheme currently being run in the Property Chamber

of the First Tier Tribunal whereby, in appropriate cases, tribunal judges may also sit as county court judges and thereby deal with all the issues in the case, including ground rent. However, it subsequently emerged that the ground rent had been paid and the case has therefore been treated as an ordinary section 27A application.

The Lease

4. The Building is divided into four flats, A-D. The parties to this application are the successors in title to the original parties to a lease dated 20 August 2002 (“the Lease”). The Lease is not well drafted. The original parties to the Lease were Sparvale Limited as landlord, Ronald Daley as tenant and Edendlupin Property Management Limited, referred as the Company. Under the terms of the Lease (the Fourth Schedule) it was originally the Company that took on the obligation to provide what were described as “*the Estate Services*” (to insure etc.) and “*the Building Services*” (to repair etc.) and the provisions for service charge (Clause 13.2) made it clear that the service charge was payable to the Company. However, we were told and accept that the Company has been wound up and has not been replaced. Further, by a deed of variation dated 29 October 2012, the Lease has been varied. The Lease was varied following a determination by this Tribunal dated 23 August 2012 pursuant to section 35 of the Landlord and Tenant Act 1987 to which we will refer in more detail below. We are satisfied that the effect of the Lease as varied is that the Applicant as landlord may perform the covenants entered into by the Company and if it does shall be entitled to recover from the lessees all monies which would have been payable to the Company had those obligations been fulfilled by the Company, including advance payments of service charge: see Clause 7.3 of Lease as varied by Clause 1 of Deed of Variation and Clause 13.

5. The Applicant’s claim is based on a demand dated 5 November 2015 in the following terms:

Flat B, 43 Herbert Road, London SE18 3Z

<i>Management Costs</i>	<i>£1,500</i>
<i>Insurance</i>	<i>£173.50</i>
<i>Invoice Total</i>	<i>£1,673.50</i>

6. Contrary to section 21B(1) of the 1985 Act, the demand does not contain the information prescribed by regulations made under section 21B(2) of that Act¹. Therefore nothing is payable until the Applicant complies with that requirement: s.21B(3). Nonetheless we proceed with our determination as this is a matter that can be cured retrospectively by the Applicant by serving a demand that complies with the law.
7. We turn then to deal with the two aspects of the demand.
8. The claim for £1,500 relates to proposed works to the Building as detailed in the Schedule of Works at page 26. In particular, we were told by Mr Harrison and accept that the roof is leaking causing damp in the Building and that a scaffold needs to be erected to examine the roof and prepare a specification for works to the roof. We were also told that the Applicant has no funds to enable it to erect a scaffold or undertake any other works. It is clear from the documentary evidence in the bundle (see e.g. pages 20-25, 28-32) and the evidence of Mr Harrison that the Building has been neglected for some time and is in urgent need of repair. We also refer to the previous decision of the Tribunal in connection with the application to vary where at §8 of that determination the Tribunal said this:

“43 Herbert Road is now out of repair. There is inadequate means of escape in case of fire, there is no electricity to the common parts and on inspection there was a large accumulation of paper in the cupboard beneath the stairs. There is no evidence of adequate insurance.”

¹ See para. 3 of Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations SI 2007/1257

9. However, we had some difficulty reconciling the demand for £1,500 with the schedule of works at page 26. The total cost of the works as per the schedule, albeit the schedule includes a number of PC sums, is £3,190 which, divided by 4, produces a figure of £797.50 per flat. However, we were referred to a letter dated 17 October 2015 (page 32) from the former tenant of Flat C, Mr Koulibaly, who had suggested a budget of £1,500 per flat for essential maintenance and repair. Mr Harrison told us that the figure of £1,500 was based on this, although he stood by the schedule at page 26 which he had prepared following a visit to the premises at the request of Mr Koulibaly. Mr Harrison said this in his statement at 11 (page 17): *“I attended and, at this time I was able to inspect the whole of the common parts and flat C. I then prepared a schedule of work as a minimum to be carried out and priced this schedule accordingly”*. We were troubled by the absence of any quotes or estimates and asked Mr Harrison about his expertise. He told us and we accept that he has a surveying degree and a public health inspector’s diploma and is a member of the Chartered Association of Building Engineers. Nonetheless, we approach the issue of quantum with caution, particularly as we are dealing with what is an application under s.27A(3). As the Upper Tribunal recently said at §82 in *Royal Borough of Kensington and Chelsea v Lessees of 1-124 Pond House* [2015] UKUT 395 (LC) in connection with such an application:

Section 27A(3) requires a Tribunal to make a specific determination of payability. Since a determination under section 27A(3) is made before works are carried out it cannot be determinative of the standard of the work when finally completed. However, precision as to the extent of the works, the duration of the works and the terms of the lease which support the obligation to carry out the work is still required to support a section 27A(3) determination.

10. On the information before us, and approaching the matter with caution, we are persuaded that at least £1,000 would be reasonably payable by the lessees to the Applicant by way of service charge in respect of the works to the Building proposed in the schedule at page 26. At this stage,

before any costs have actually been incurred, we are not prepared to go any further on the evidence before us although we anticipate the reality is that much more work is probably necessary and the ultimate cost is likely to be much greater. However, those are matters for another day.

11. Mr Otto raised two points by way of defence to this aspect of the claim. Firstly he relied on section 21B. We have dealt with this point above. Secondly, he relied on section 20 and the absence of consultation. Our finding above means that we do not need to consider the issue of consultation which Mr Otto raised by way of defence because he will not be required to pay more than the statutory maximum of £250.00, a quarter of £1,000, by way of service charge at this stage. This is the maximum payable in the absence of compliance with the consultation requirements in section 20 or dispensation being granted under s.20ZA. No points were taken by Mr Otto as to the terms of the Lease generally or the service charge provisions in particular (see pages 58-60).
12. As regards insurance, we are satisfied on the evidence provided that the property is now insured with NFU. The total premium was £694.05. Mr Otto's share is £173.50 which accords with the sum claimed in the demand. Insurance is not qualifying works and is not therefore subject to the consultation requirements. Accordingly, we determine that this sum is payable, again subject to compliance by the Applicant with section 21B.
13. As regards the Applicant's application for reimbursement of the hearing fee of £190.00, we refuse that application, given our overall findings.

Name: Judge W Hansen

Date: 27 June 2016

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

- (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
 - (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
 - (b) the whole or part of which varies or may vary according to the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose -
 - (a) "costs" includes overheads, and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
 - (a) only to the extent that they are reasonably incurred, and
 - (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 20

- (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—

- (a) complied with in relation to the works or agreement, or
 - (b) dispensed with in relation to the works or agreement by (or on appeal from) [the appropriate tribunal].
- (2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.
- (3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
- (4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
- (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
 - (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.
- (5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
- (a) an amount prescribed by, or determined in accordance with, the regulations, and
 - (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.
- (6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.
- (7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined

Section 21B

- (1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.

(2) The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.

(3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.

(4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to

-
- (a) the person by whom it is payable,
 - (b) the person to whom it is payable,
 - (c) the amount which is payable,
 - (d) the date at or by which it is payable, and
 - (e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -

- (a) the person by whom it would be payable,
- (b) the person to whom it would be payable,
- (c) the amount which would be payable,
- (d) the date at or by which it would be payable, and
- (e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -

- (a) has been agreed or admitted by the tenant,
- (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
- (c) has been the subject of determination by a court, or
- (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.