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

Case Reference : **CAM/22UH/LSC/2016/0069**

Property : **Flat 4 Wentworth Court, 1, Albert Road,
Buckhurst Hill, Essex IG9 6EH**

Applicant : **Ms Sarah Cheeseman**

Representative : **Ms Sarah Cheeseman In Person**

Respondent : **Eden Developments Limited**

Representatives : **Mr Glucka Wijisuriya & Miss Hayley
Andrews**

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** : **6 December 2016
10 Alfred Place, London WC1E 7LR**

Date of Decision : **3 January 2017**

DECISION

Decisions of the tribunal

1. The tribunal determines that:

1.1 Adjustments shall be made to the Reserve Fund account as set out in paragraphs 13 and 15 below, that is to say, there shall be credited to the Reserve Fund

Lifts	£799.32
Pre-payments of lift service	£682.00
Sam Pinching payment	£735.00

1.2 No adjustments shall be made to the service charge account for the year 2014;

1.3 An adjustment of £600 shall be made to the service charge account for 2015 – see paragraph 35 below, so that the amount of the service charge for 2015 to which the applicant is to contribute is £17,819.97;

1.4 No adjustments shall be made to the budget for 2016; and

1.5 An order is hereby made by consent pursuant to section 20C of the Act that no costs incurred or to be incurred by the respondent in connection with these proceedings are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the applicant.

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

NB Later reference in this Decision to a number in square brackets ([]) is a reference to the section and page number of the hearing file provided to us for use at the hearing.

Procedural background

3. The applicant (Ms Cheeseman) is the long lessee of flat 4. On 30 September 2016 the tribunal received an application pursuant to section 27A of the Act. Ms Cheeseman also made a related application pursuant to section 20C of the Act.

Directions were given on 6 October 2016.

4. The hearing took place on 6 December 2016. Neither party requested an inspection and the tribunal decided that it did not consider it would not be of assistance to it to inspect the subject development.

5. At the hearing Ms Cheeseman presented her case. The respondent was represented by Mr Wijisuriya, a director and by an assistant, Ms Andrews.

Background

6. Wentworth Court is development of nine flats laid out in two blocks. Three flats have been sold off on long leases. The remaining six flats are let by the landlord on short term lets of typically six to twelve months' terms.
7. The lease of flat 4 was granted to Ms Cheeseman in November 2010. Ms Cheeseman had some issues with the landlord concerning service charges and in 2013 made an application to the tribunal pursuant to section 27A of the Act. On that occasion the tribunal made available to the parties its free mediation service. A successful mediation took place and a settlement agreement was signed by both parties. It is dated 3 February 2014. In essence the parties agreed, as regards service charges:
 1. The amount of the charges for 2011;
 2. That as regards 2012, no management charge would be made, the cost of insurance would be capped at £1,400, the accountancy charge would be capped at £500 (incl of VAT) and the costs of the lift company would be capped at £680;
 3. That as regards 2013, no management charge would be made, the costs of insurance would be capped at £1,400 and the costs of accountancy capped at £500; and
 4. That the landlord would appoint Mr Nigel Bone FRICS as managing agent to take over the management of the development and that one of his first tasks would be to review the arrangements for and costs of the lift maintenance and accountancy services.

It may be noted that Mr Bone is a local managing agent and his appointment was prompted by Ms Cheeseman who recommended him highly.

8. In the light of that settlement the 2013 application was withdrawn.
9. Mr Bone was duly appointed. Ms Cheeseman has been very critical of his performance and the costs and expenses he has incurred or authorised. Evidently Mr Bone's services have been terminated. It is understood that the respondent has agreed arrangements with Ms Cheeseman for her to take over day to day management of the development, we believe with effect from 1 January 2017. We were not told any of the details of those arrangements.

The lease

10. The lease is in fairly conventional modern form. There was little in contention.

The basic scheme is that the accounting period is the year 1 January to 31 December. There is provision for the payment of an interim charge being a payment on account. The interim charge is payable:

"...by equal payments in advance on the Twenty fourth day of June and the Twenty fifth day of December in each year..."

The provision goes on to say “... *and in case of default shall be recoverable from the tenant as rent in arrears.*”

There was some doubt or dispute at the hearing as to the proper construction of this provision.

Looking at the lease as a whole we find it is plain that the accounting year is the calendar year; a payment in advance and on account is to be paid by two equal instalments. The purpose of doing so is that the landlord shall be in funds to insure the development and to provide the services. Thus, the payment due on 25 December in each year is the first instalment for the following accounting commencing on 1 January and the payment due on 25 June is the second instalment for that period. If it were otherwise the landlord would not be in funds as the lease intends he shall be. It would also be something of a nonsense for an advance payment on account to be made on 25 December if the accounting period end is 31 December.

In our judgment the reference to “*in arrears*” towards the end of the provision is not a reference the date or dates for payment of instalments but applies to the consequences that are to ensue if the two instalments are not paid. In landlord and tenant law a landlord has greater powers to enforce payment of sums of money if that money is or is deemed to be ‘rent’. Thus, it is quite common in leases for sums of money to designated as ‘rent’ or ‘recoverable as if they are rent’ in order that the landlord shall have the benefit of those greater powers. In the subject lease the expression used is “... *recoverable from the tenant as rent in arrears.*” Which in an expression commonly adopted to characterise the sum payable as being akin to rent.

After the end of each accounting period the landlord or his agent is to issue a certificate of the actual expenditure and if there is a balancing debit, it is payable within 14 days of demand.

The lease does not appear to expressly provide for a reserve fund, but the landlord decided to create such a fund, which it seems to have termed a ‘sink fund’, and it seems the lessees did not object. There are some issues concerning the reserve fund which we shall address shortly.

The issues to be determined

11. At the commencement of the hearing we endeavoured to clarify the issues for us to determine. It was not easy but we did so eventually.

These were:

1. Some items on a cash account or reserve fund account prepared for the handover by the landlord to Mr Bone. This issue is termed ‘The Reserve Fund’.
2. There were no issues on the 2013 accounts.

3.	2014	Management	£1,980.00
		Insurance	£1,776.98
		Pest Control	£ 360.00
		Professional fees	£ 300.00
4.	2015	Accountancy	£ 900.00
		Insurance	£1,873.66
		Pest Control	£ 480.00
		Repairs/mtce	£7,187.91
5.	2016	The budget:	
		Insurance	£2,012.94
		Pest control	£ 480.00
		Repairs.mtce	£4,500.00

The Reserve Fund

12. As indicated the landlord decided to set up a reserve fund. It does not appear that a separate bank account was opened to hold the funds. We were told that the monies notionally held as the reserve fund were drawn upon for routine expenditure due to the arrears of service charges which had accrued. How this really can be with the landlord holding six of the flats is something of mystery to us, but there we are.
13. In connection with the handover to Mr Bone an account was drawn up. A copy is at [3/29]. It shows a balance as at 31 December 2013 of £4,181, followed by a number of debits to arrive at a net closing balance of £1,516.00

Ms Cheeseman took exception to several of the debits:

Lifts	£799.32
Pre-payments of lift service	£682.00
Sam Pinching payment	£735.00

Ms Cheeseman was able to demonstrate that the sums mentioned in connection with the lifts had been paid and debited in the accounts for prior years, and that the sum due to Mr Pinching was a rebate due to him as a result of the adjustments made following the mediation and that it was inappropriate that such repayment should be drawn from the reserve fund.

14. Despite having a large volume of accounting papers before us it turned out that some key materials concerning the reserve fund were not amongst them. Neither Mr Wijisuriya nor Ms Andrews was able to give any explanation for the apparent anomalies. Evidently the bookkeeper who had run the accounts was off sick due to having had a nervous breakdown and thus was not able to provide assistance.
15. Eventually, and largely to enable matters to move on, Mr Wijisuriya said he was prepared to concede, and he agreed that those three sums should be credited back to the reserve fund. Ms Cheeseman said that this was acceptable to her and that she had no other issues with the reserve fund.

Management 2014 £1,980

16. This related to the charges of Mr Bone in the first year of his appointment. Mr Bone had been appointed at the request of Ms Cheeseman who was evidently aware of what his charges would be for the year. On the footing that Ms Cheeseman approved both of Mr Bone and his charges the landlord incurred this expense.
17. Ms Cheeseman complained that the level of service provided by Mr Bone was appalling, that Mr Bone caused problems on site, delayed in making payments the cleaner, who was well liked, and who eventually resigned due to late payments, amongst other matters. In general Ms Cheeseman was wholly dissatisfied with Mr Bone and considered that day to day management of the development had gone from bad to worse. Ms Cheeseman said that complaints were made to the landlord but not a lot was done.
18. Mr Wijisuriya said that he thought the landlord was managing well but went along with Ms Cheeseman's request to appoint Mr Bone as a concession in the mediation. Having appointed him and agreed his fee it would be unfair to the landlord if it were now penalised because Mr Bone had turned out not to be as good as Ms Cheeseman had expected.
19. We prefer the submissions of the landlord on this point. We find it was not unreasonable for the landlord to have incurred the cost of £1,980.00 on management in 2014. Although Mr Bone may not have proved value for money we find that it would be unfair to penalise the landlord for that.

Insurance 2014 £1,776.96 2015 £1,873.66

20. In 2014 the landlord had negotiated a premium of £1,400.00 through a broker connected with Mr Wijisuriya's business partner.
21. Ms Cheeseman complained that the costs incurred for the insurance years 2014 and 2015 were too high. Evidently Mr Bone had not gone back the broker used previously but placed the business with a broker of his choosing, who had effected policies with the same insurer. Ms Cheeseman complained that terrorism cover had been included in 2015 and which was not necessary for a small block in Buckhurst Hill.
22. The obligation on the landlord, as set out in the lease, is "*... to insure... the Building and the Development ... against loss or damage by fire explosion storm tempest earthquake aircraft subsidence landslip heave and such other risks (if any) as the Landlord thinks fit in some Insurance Office of repute...*"
23. The lease provides some scope for the landlord to decide what risks are to be covered. In our experience many landlords have seen fit to include terrorism cover on small blocks well away from main cities. In these circumstances we find that it was not unreasonable that terrorism cover

was included in 2015. To include it was well within the range of actions of a landlord acting reasonably.

24. Mr Wijisuriya explained that when Mr Bone took over, he left it to him to manage the development as he saw fit and did not want to interfere or dictate to him what he should do. He considered that to do so would undermine the arrangement he came to with Ms Cheeseman to appoint Mr Bone. Thus, when it came to placing the insurance he did not insist that Mr Bone should use the landlord's broker and he was content that Mr Bone should approach his own broker. As long as the policy was place with a reputable insurer the landlord was content. Mr Wijisuriya also said the landlord had a preference for remaining with a tried and trusted insurer and preferred not to shop around looking for one-off deals. In his view it was essential that if a claim was to be made it should handled properly and responsibly by reputable insurer.
25. We note that the unit cost of insurance works out at 2014 £197.44 and 2015 £208.18. In our experience these sums are well within the range to be expected for the cost of insurance for a unit in a small modern block such as the subject development. The cost of insurance is a subject that features regularly in applications made to this tribunal and in the course of our work we frequently come across insurance arrangements and costs .
26. Given the background we find that it was not unreasonable for the landlord to have given Mr Bone a free hand. The costs incurred are within the range of what is reasonable. It might have been possible for the landlord's broker to have achieved a lower premium but that does not demonstrate the costs actually incurred was unreasonable in amount. We find that the costs incurred were reasonable in amount.

Pest control 2014 £360 2015 £480

27. Ms Cheeseman accepted that there was a pest infestation problem for a while and this was largely due to not having a regular cleaner because he left as he was not being paid by Mr Bone, but Ms Cheeseman complained that once the infestation was dealt with it was unnecessary to incur any further costs. There were also some related issues concerning the bin storage area.
28. Neither Mr Wijisuriya nor Ms Andrews was able to assist with this topic.
29. Evidently the development backs onto open land. In our experience there is invariably a risk of rodent or fox infestation and that sometimes it can take a while to control. It is not unreasonable to be cautious and to monitor a situation closely once an infestation has occurred. In these circumstances, we find it was not unreasonable for the landlord to have incurred the modest costs in issue.

Professional fees 2014 £300

30. These costs relate to a fire risk assessment which was carried out in November 2013. Ms Cheeseman complained that the report was obtained and recommendations were made, but they were not followed up.
31. We find that it was reasonable to incur the cost. It was not essential that all or any recommendations be followed up promptly. The report remains available and of value and when Ms Cheeseman takes over day to day management she will be able to adopt such of the recommendations as she thinks fit.

Accountancy 2015 £900

32. Ms Cheeseman made reference to the mediation agreement which capped the accountancy fees at £500 for the years 2012 and 2013.
33. The subject costs were those of the accountants introduced by Mr Bone. The invoice is at [5/13]. It makes reference to an 'Agreed fee £500' but also includes £250 for additional work involved in the hand over to Mr Bone. VAT is then added to both sums.
34. The explanation is perfectly understandable and we find the cost incurred was reasonable in amount.

Repairs and maintenance 2015 £7,187.91

35. Ms Cheeseman took exception to a cost of £600 which related to the supply and fitting of chimney cowl. Mr Wijisuriya readily accepted this was an item of expenditure which Mr Bone ought not to have put through the service charge as it was an expense for the landlord as the developer. Mr Wijisuriya said that each lessee would be credited with £66.66 to reflect this adjustment.
36. Ms Cheeseman had a general complaint about the costs of dealing with fly tipping, a problem which Ms Cheeseman tended to associate with the landlord's short term lets. Ms Cheeseman considered that the costs were too high and could have been lower if the gardener had undertaken the removal, as used to be the case with the previous gardener/cleaner.
37. There was no dispute that fly tipping was an issue and required to be addressed. We find the individual costs were not of themselves excessive. Other than the £600 adjustment mentioned above, we find the costs incurred under this head were reasonable in amount.

Budget 2016

Insurance	£2,012.94
Pest control	£ 480.00
Repairs/maintenance	£4,500.00

38. Given that the accounting period of 2016 was coming to a close so soon after the hearing, there was little merit in spending much time on the

reasonableness of the budget for 2016. The actual costs incurred will be known shortly and any challenges are best left to that time.

39. Given our findings above on insurance and pest control we find that the sums included in the budget are eminently reasonable.

Repair/maintenance is always difficult to predict because at the outset of the year the landlord will simply not know what works may be required to be carried out. The actual expenditure in prior years has fluctuated. The landlord was not able to adduce any evidence as to how the budget set by Mr Bone was arrived at. Drawing on our accumulated experience we find that a budget of £4,500 for the year was not unreasonable in amount having regard to the circumstances of the subject development.

Section 20C application

40. Ms Cheeseman had made an application pursuant to section 20C of the Act.
41. Mr Wijisuriya said that the landlord had not incurred any costs in connection with these proceedings which it was proposed to put through the service charge and for the sake of good order he was quite content that an order should be made by consent.
42. We have therefore made such an order.

Judge John Hewitt
3 January 2017

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.