



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

Case reference : LON/00AP/LSC/2018/0391

Property : Flat C, 143 Nelson Road, London N8
8RR

Applicant : 143 Nelson Road Ltd

Representative : Mr A Boyd

Respondents : Mr T Newcombe and Ms J Keenan

Type of application : For the determination of the
reasonableness and the liability to
pay a service charge

Tribunal members : Mr Simon Brilliant
Mrs E Flint FRICS

Venue and Date : 10 Alfred Place, London WC1E 7LR
13 February 2019

Date of decision : 20 February 2019

DECISION

The Tribunal determines that the Respondents (“the tenants”) pay the following service charges:

02 January 2016 – 01 January 2017 £516.51

02 January 2017 – 01 January 2018 £116.67

The Application

1. The landlord company seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 (“the Act”) as to the amount of service charges payable by the tenants in respect of the service charges over the period 02 January 2016 to 01 January 2018.

The Background

2. The tenants hold Flat C, 143 Nelson Road, London N8 8RR (“the flat”) under a lease dated 24 February 2015 (“the new lease”).

3. The flat is one of three in a converted Victorian House (“the house”). There is a flat on each of the three floors. The tenants’ flat is on the second floor.

4. The owners of the other two flats in the house (Mr Skovsende and Ms David of Flat A and Mr Virdi of Flat B) are the shareholders and directors of the landlord. They were already lessees of their respective flats at the time that the landlord acquired the freehold of the house in about 2008.

5. At this time, the lessees of Flat C were Mr Langford and Ms Dar. They assigned their lease to the tenants in 2015.

The Lease

6. The original lease of the flat is dated 19 March 1986 (“the old lease”). It contained a very rudimentary service charge provision.

7. By clause 2(4) the tenant covenanted to pay 50% of the amount which the landlord might (1) expend and (2) be reasonably required on account of expenditure on certain matters set out in sub-clauses (i) –(x). There was no machinery for collecting regular advance payments or for certification or for the balancing of credits and debits.

8. Following the landlord acquiring the freehold in 2008, it executed a deed of variation with Mr Langford and Ms Dar dated 9 November 2012 (“the deed of variation”). The 50% share was reduced to 33.33% to reflect the number of flats in the house.

9. A more sophisticated machinery for the collection of the service charge was inserted as clause 2(4)(b)¹ into the old lease. This provides for advanced service charges to be paid on 2 January and 2 June in each year. The estimated amount is to be certified by the managing agent by 30 November in the previous year. Provision is made for certification and the balancing of credits and debits.

10. But the new lease did not alter the items of expenditure the expense of which is recoverable through the service charge.

11. The service charge year is 02 January to 01 January.

12. The residue of the term of the lease was assigned to the tenants on 24 March 2016.

13. On 06 August 2018 the Tribunal determined that there is no power under the new lease for the landlord to raise monies for a sinking fund.

The amounts in dispute

14. The amounts in issue before us, which total £1,872.18, are as follows.

15. In the year 02 January 2016 to 01 January 2017:

Cleaning.	£90.00
Business bank fees.	£22.50
Insurance.	£269.68
Companies House admin fee.	£4.33
Electrical repair.	£30.00
Building management and accounting.	£100.00
Administration charges.	£300.00
Total	£816.51

¹This is a mistake as there is no clause 2(4)(a) in the old lease. This mistake is repeated later in the new clause

16. In the year 02 January 2017 to 01 January 2018:

Cleaning.	£60.00
Business bank fees.	£15.00
Building management and accounting.	£41.67
Solicitor's fees.	£477.00
Administration charges.	£435.00
Total	£1,028.67

17. Very sensibly, the tenants did not dispute any of the charges except for the two years' administration charges (totalling £735.00) and the solicitors' fees (£477.00). Accordingly, they admitted £633.18 was due, and challenged the remaining £1,212.00.

18. The amount admitted due can be broken down as to £516.51 for the year 2016/2017, and £116.67 for the year 2017/2018.

The reasons for the dispute

19. There are two reasons for this unfortunate dispute, neither of which is before us in these proceedings.

20. The first dispute relates to substantial works which the landlord would like to carry out to the front garden. The landlord says that the proposed costs of the works are properly payable through the service charge. The tenants deny this. This is for two reasons. First, the front garden does not form part of the common parts, but is within the demise of Flat A. Secondly, the proposed works are not works of repair but are improvements, and do not fall within any of the expenses which can be recouped through the service charge.

21. This dispute is not before us. The application notice refers to the items in dispute which are set out in paragraphs 15 and 16 above. The application notice makes no reference to the proposed costs of the works in the front garden.

22. Moreover, the Tribunal has no evidence (expert or otherwise) before it properly to come to any decision on this issue.

23. The second dispute relates to advance service charge monies paid by Mr Langford and Ms Dar prior to the sale of Flat C to the tenants. The tenants say that this is their money and should be used for the payment of those service charges which are

agreed above. The landlord says that these monies were a contribution by Mr Langford and Ms Dar to the amount which the landlord reasonably required on account of anticipated expenditure (this is different to a sinking fund which is not permitted under the lease). They are not the tenants' monies.

24. This contractual dispute relating to the state of accounts between the parties is not a matter for us, but one for the County Court to determine.

The disputed service charges

25. The solicitors' fees were incurred in advising on the two disputes, and in writing to the tenants about them.

26. The administration charges consist of the cost of Ms David, on behalf the landlord, spending time engaging with the tenants over the two disputes. A total of 49 hours' work is being claimed for, at the rate of £15 per hour.

27. The tenants submitted that we should grapple with these two disputes because they would determine whether the solicitors' fees and the administration charges have reasonably been incurred. For reasons which will become apparent, there is no need for us to do this. But it should be appreciated that just because the landlord might not succeed on these two issues, it does not follow that the costs of taking legal advice in respect of them (if recoverable under the lease) are unreasonably incurred.

The solicitors' fees

28. The first difficulty that the landlord faces is that the solicitors' fees have not been added to the service charge account and claimed as part of the service charge. If they had been claimed as part of the service charge, each flat would be responsible for 33.33% as its share.

29. In fact, payment of the solicitors' fees are only being demanded from the tenants.

30. So the real question is whether there is any provision in the lease which entitles the landlord to recoup solicitors' fees relating to the two disputes referred to above from any of the individual lessees.

31. The only clause which could possibly be relied upon is clause 2(9) of the old lease (the terms of which are incorporated into the new lease) which provides as follows:

to pay all expenses (including solicitors costs and surveyor's fees) incurred by the Lessor incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 notwithstanding that forfeiture may be avoided otherwise than by relief granted by the Court

32. Clearly, the expenses incurred by the solicitors in advising and taking action over the two disputes referred to above do not fall within this clause².

33. The landlord is therefore driven to say that the solicitors' fees are recoverable through the service charge. If so, of course, the tenants will only be liable for 33.33% and the lessees of Flats A and B must pay the difference.

34. The landlord relies upon the following two sub-clauses in clause 2(4) of the old lease (the terms of which are incorporated into the new lease) which provide the payment as follows:

(vi) any other expenditure by the Lessor in respect of the whole or any part of the Building and premises³

(viii) in complying with any of the covenants entered into by the Lessor or with any obligations imposed by operation of law which are not covered by the proceeding sub-clauses

35. In our judgment, neither of these clauses entitles the landlord to recoup the solicitors' fees through the service charge.

36. As far as clause 2(4)(vi) is concerned, Tanfield Service Charges includes the following passage in para 7-02:

Whilst there is no need to construe service charge clauses restrictively (Arnold v Britton [2015] UKSC 36) in order to recover legal costs through the service charge, "clear and unambiguous lease terms are required" (St Mary's Mansions Ltd v Limegate Investments Ltd [2002] EWCA Civ 1491 and Sella House Ltd v Mears (1989) 21 HLR 147. In Francis v Philips n[2014] EWCA Civ 1395 at [74], Sir Terence Etherton C said, "it is reasonable to expect, that if the parties to a lease intended that the lessor shall be entitled to receive payment from the tenant in addition to the rent, that obligation and its extent will be clearly spelled out in the lease". The court or tribunal should not therefore "bring within the general words of a service charge clause anything which does not clearly belong there" (per Rix LJ in McHale v Earl Cadogan [2010] EWCA Civ 14 at [17]).

37. Clause 2(4) (viii) refers to expenditure incurred by the landlord in complying with any of its obligations under the new lease. Whilst the landlord covenants in clause 4(iii) of the old lease (the terms of which are incorporated into the new lease) to enforce certain repairing covenants against individual lessees, there is no covenant given by the landlord to the individual lessees which relates to the two disputes referred to above.

² See Barrett v Robinson[2014] UKUT 322 [LC].

³ It is accepted that the remainder of this subclause is verbiage which makes no sense as there is no clause 2(5)(a).

The administration charges

38. Paragraph 28-29 which related to the solicitors' fees apply equally to the landlord's claim in respect of administration charges.

39. In attempting to recoup the administration charges through the service charge, the landlord relies upon the following sub-clause in clause 2(4) of the old lease (the terms of which are incorporated into the new lease) which provides for payment as follows:

(vii) in the appointment of surveyors and accountants and the payment of their proper fees in connection with the supervision of performance of the Lessor's covenants

40. Ms David is neither a surveyor or accountant nor acting as such. This sub-clause does not entitle the landlord to recoup any of the administration charges through the service charge.

Conclusion

41. We have set out the amount of service charges payable at the beginning of this decision. We hope very much that the parties are now able to put this unfortunate dispute between them and undertake the management of the house in the future without acrimony. There is no reason why, if all the parties agree, the service charge provisions cannot be varied by consent in all the leases so a more modern and sophisticated service charge, including provision for a sinking fund, can operate.

Simon Brilliant

20 February 2019

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.

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 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.
- (1) Regulations under subsection (2) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.