FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**BIR/00GF/LIS/2018/0040**
Property	:	**55 Willow Bank, Telford, TF4 3SG**
Applicant	:	**Fiona Wragge-Morley**
Representative	:	**None**
Respondents	:	**Tapestart Ltd (1)** **Countrywide Residential Lettings Ltd t/a HLM Property Management (2)**
Representatives	:	**James McCarry of the Compton Group Litigation Team (1)** **None (2)**
Type of Application	:	**Application for a determination of liability to pay and reasonableness of service charges under section 27A of the Landlord and Tenant Act 1985 ("the Act")**
Tribunal Member	:	**Judge C Goodall**
Date of Decision	:	**25 February 2019**

PRELIMINARY DECISION

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Background

1. This is an application for a determination of the payability of charges relating to electrical repairs and health and safety reports which the Applicant says she has been charged in the service charge years 2015/16 (£1,080.92 in dispute), 2017/19 (£3,659.06 in dispute) and 2018/19 (£380.00 in dispute), in respect of her property at 55 Willow Bank, Telford ("the Property") which is part of a development in Telford called the Tyringhams. I refer to the amounts challenged as the Disputed Charges.

2. The lease under which the Property is held is dated 18 July 2017 and is made between Tapestart and the Applicant. This is described as a "surrender and regrant" of an original lease dated 20 October 1995. It is made "upon the same terms and subject to the same covenants conditions and provisions in all respects as those contained in the Original Lease". It expires in the year 2147.

3. The original lease (referred to in this determination as "the Lease") was made between the lessor, Hurstvale Limited, and the lessee, C N Culley. It was for a term of 99 years from 21 March 1990. The property demised is identified in the Second Schedule to the Lease as 55 Willow Bank, and car parking space number 87.

4. As this is a preliminary decision, the tribunal has not inspected the Property and has not received full information explaining how many units of accommodation are contained at the Tyringhams, and which units are managed together or separately. For the purposes of this preliminary decision, reference to "the Development" is to mean a reference to whichever residential units are together currently sharing the costs of management and maintenance.

5. The Disputed Charges were claimed from the Applicant by various demands made by the second respondent, HLM Property Management ("HLM"), which is a property management company claiming to be appointed as agent to manage the Development. The demands the tribunal has seen have all been on HLM headed notepaper with a clear claim that HLM were acting as agents for the freeholder and first respondent, Tapestart Ltd ("Tapestart").

6. However, Tapestart responded to the application by denying that it was responsible for the management of the Tyringhams, and specifically denying the agency of HLM as its manager.

7. The tribunal therefore directed, on 6 November 2018, that HLM should be added as a second respondent to these proceedings, and that the tribunal should consider, as a preliminary issue, to whom the disputed service charges are payable (if at all), using its powers under Rule 6(3)(g) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules").

8. This is the tribunal's determination of the preliminary issue. It has been determined without a hearing, based on the written representations of HLM, dated 21 November 2018; Tapestart dated, 4 December 2018; and the Applicant dated 3 January 2019, and subsequent letters dated 20, 22 and 23 January 2019 from respectively the Applicant, Tapestart, and HLM.

The positions of the parties

Tapestart

9. Tapestart purchased the freehold of the land at the Development, which includes the Property, on 4 October 2013 from Mr Harold Loadsby. It is adamant that it has never managed the flats at the Development, nor has it ever appointed HLM as manager. It was however aware that HLM were purporting to manage the Development.

10. Tapestart acknowledge that it would have presumably been the intention of the parties when the leases were drawn up that there should be arrangements for the maintenance and management of the Development. This would be achieved through a management deed (defined in the leases at the Development as both a "Deed of Covenant" and a "Management Deed" and described in this determination as the "Deed of Covenant"). The draft terms of the Deed of Covenant were set out in the 7th schedule in the Lease. In it, a company called Sidelane Ltd was to be appointed by the then freeholder to manage the Development. Tapestart assert that the leases failed to achieve this purpose by failing to include a provision requiring it to appoint a manager for the Development.

11. There is no suggestion by Tapestart that any Deed of Covenant is in force in relation to the Property. They have not entered into any Management Deeds themselves since their acquisition of the freehold. In relation to the Deed of Covenant, they assert that "the 7th schedule is irrelevant, and the lessor is not bound by it anyway".

12. It is suggested by Tapestart that the lessees should arrange for the leases to be varied to allow appropriate management arrangements and the appointment of HLM as manager, and if that were the will of the lessees, Tapestart would not stand in the way of such an arrangement. As an alternative, Tapestart suggest that an RTM company should take over the management.

13. It is accepted by Tapestart that it was aware that HLM were acting as managers; indeed, it accepts that it received requests from HLM at various times to sign a management contract and/or to approve service charge budgets. But it asserts strongly that it has never appointed HLM as its agent or as manager and says that each request to confirm appointment or to confirm acceptability of any of the documents it was sent was firmly

declined on the basis that Tapestart were not willing to appoint a manager or take responsibility for management.

14. Mr McCarry, who acts for Tapestart, says that the first time he became aware that HLM had been asserting that they were agents for Tapestart was sometime during 2018. He says that he responded, when he became aware of this, by stating again that HML were not Tapestart's agent, and they should not have claimed that they were.

HLM

15. HLM's position is that they have managed the Development for "a number of years", and at all times they have held themselves out as agents of the freeholder. Historically, the former freeholder, Mr Harold Loadsby, had been the owner of the management company HLM Ltd which had been acquired by the Countrywide group (i.e. the owner of HLM in its current form) in 2008. It would seem (though this has not been expressly admitted) that HLM (or the people behind that management organisation) have been acting de facto as managers of the Development since some time before 2008.

16. HLM have not been involved in brokering or requiring any lessee to enter into any Management Deeds since Mr Loasby's ownership of the freehold ceased. Their understanding is that Sidelane Limited have not carried out any services or instructed any other agent to carry out services at the Development.

17. HLM state that "it was not considered that there was any difficulty in HLM's appointment as Managing Agent and we've continued to act on behalf of the freeholder since that time". They have not produced any contract under which they were appointed as agents by Tapestart. They have not argued that their involvement in the Development derives from the Lease at all.

18. HLM say they became aware of the sale of the freehold to Tapestart in 2016, since when they have been corresponding with Tapestart by sending budgets, accounts and invitations to meetings. No evidence has, however, been produced by HLM showing that they were appointed as managing agents by Tapestart. Their argument seems to be that having made Tapestart aware of their actions in managing the Development, some sort of implied agency, or agency derived from awareness followed by inaction must have arisen. This is best illustrated by HLM's statement in a letter dated 6 September 2018 in which they say "HLM have liaised with the 1st Respondent in respect of the Development, and not been disintructed in any of the communications."

19. As the de facto managers (whatever their authority to be so), HLM have been managing the Development, and have sought to charge the Applicant service charges which have included the Disputed Charges.

The Applicant

20. The Applicant has not taken issue with the position of the respondents as set out above, nor made any submissions on the correctness of the consequence of Tapestart's assertion that HLM were never its agents and that the leases do not oblige Tapestart to appoint a block manager. She has not signed any separate Management Deed under which she covenants to pay any service charge to HLM or Tapestart.

Discussion

21. The preliminary issue that I must answer is to whom the Disputed Charges are payable (if at all). I can in fact determine whether the Applicant has to pay the Disputed Charges to either of the Respondents quite simply, without needing to analyse and interpret the Lease.

22. Section 27A of the Landlord and Tenant Act 1995 gives the tribunal jurisdiction to determine whether a service charge is payable. Unless the person levying the service charge can establish a good basis in law for it to claim that the lessee must pay the service charge to it, it is difficult to conceive of circumstances in which that service charge would be "payable".

23. The legal basis upon which a service charge may normally be demanded is that it is due under the terms of a lease or some other contractual document. If there is no basis in the lease, or via some other contract between HLM and the Applicant, or via some other principle of law, for HLM to demand the service charge, there will be no legal right to claim it. If HLM believes it has some basis upon which to claim the service charge, they must explain that basis.

24. HLM have not claimed any entitlement under the Lease, nor have they offered any other legal basis upon which they might be entitled to payment of the Disputed Charges. They have only argued an entitlement based on agency, which requires that they establish that their principal is entitled to claim the service charge under the Lease and that they have been properly appointed the agent of that principal.

25. In this case, Tapestart denies that it has ever managed the Development, or provided services to it, or asked anyone else to do so. That means that it cannot have a basis for claiming payment of the Disputed Charges. The Applicant's case against Tapestart therefore turns out to be a non-issue. In so far as it might have appeared from the wording on the Disputed Charges that the sums were being claimed by Tapestart, that is agreed by them not to be the case. Payment of the Disputed Charges is not sought by Tapestart and so they are not payable to it.

26. In relation to HLM, in my view the evidence and submissions outlined above clearly establish that HLM were never appointed as Tapestart's agents, and they have failed to establish any other route by which they can legally claim an entitlement to be paid a service charge by the Applicant. When their original client sold his interest in the Development, his right (if it existed at all) to charge service charges ceased as he had no continuing interest in the Development and no practical basis upon which he could continue to manage, so from that date HLM cannot argue that their original principal is entitled to claim the Disputed Charges. I reject the suggestion that their appointment as agent has transferred to Tapestart as a result of their unilateral assertion that they are their agents; some positive action by Tapestart to appoint HLM would be required, which is absent on the evidence presented. Based on that evidence, I determine that HLM have failed to establish a legal basis upon which they can claim that the Applicant must pay the Disputed Charges to them.

Determination

27. I therefore determine, under section 27A of the Act, that:

    a. The Disputed Charges are not payable to Tapestart as they have never sought to claim them;

    b. The Disputed Charges are not payable to HLM as they have no contractual relationship with the Applicant on which they can base an entitlement to levy service charges, they have not established any other basis upon which they may be entitled to levy invoices, and they are not agents of any entity which would be entitled to levy those charges;

28. Whatever the merits of the arguments concerning the reasonableness or otherwise of the charges claimed in the Disputed Charges invoices, as HLM had no legal basis for claiming the sums charged, they are not payable by the Applicant. This determination therefore finally disposes of all issues in these proceedings.

Costs

29. In their written submission, Tapestart have indicated an intention to claim costs from HLM. If it wishes to pursue this application, a submission identifying under which part of Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 the application is pursued, setting out the grounds upon which costs are claimed, and identifying the amount of the costs claimed, must be provided to HLM and the tribunal within 28 days of this decision. The tribunal will thereupon issue further directions.

Appeal

30. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
First-tier Tribunal (Property Chamber)