



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

Case Reference : **MAN/00CX/LSC/2019/0018**

Property : **18 Frizley Gardens, Frizinghall,
Bradford BD9 4LY**

Applicant : **Frizinghall Management Company Limited**
Representative : **Trethowans Solicitors**

Respondent : **Ms Zakiya Amani**
Representative : **Miles & Partners LLP**

Type of Application : **The determination of the payabilty and
reasonableness of service charges - section
27A Landlord and Tenant Act 1985**

Tribunal Members : **Judge T N Jackson**
Ms E Scull MRICS

**Date of inspection and
paper determination** : **24th July 2019**

Date of Decision : **16th August 2019**

DECISION

Decision

We determine that:

- a) The amount payable by the Respondent to the Applicant for service charge year 2017 is £385.
- b) The amount payable by the Respondent to the Applicant for service charge year 2018 is £960.
- c) An administration charge of £90 is payable by the Respondent to the Applicant
- d) We make no order under Section 20C of the Landlord and Tenant Act 1985.
- e) We make no order under Section 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.
- f) The matter be transferred back to the County Court for determination of the debt recovery proceedings.

Reasons for decision

Background

1. The Applicant is the residents' management company and freehold owner with the responsibility for the management and maintenance of the Estate known as Frizley Gardens, Frizinghall, Bradford in which there are 110 flats. One of the flats is for the estate's caretaker and the residents agreed at an AGM that the service charges would be paid for by the long leaseholders of the remaining 109 flats.
2. The Respondent is the leasehold owner of the Property under Title Number WYK352237 pursuant to a Lease dated 30th September 1985 granted for a term of 999 years from 30th September 1985 and made between Frizinghall Management Company Limited (1) and Bradford and Frizinghall Housing Society Limited (2). The Respondent became the leasehold owner of the Property on or around 18th July 2017 and became a member of the residents' management company from that time. By Deed of Covenant dated 12th May 2017 the Respondent covenanted with the Applicant to pay the rent and other monies reserved by the Lease dated 30th September 1985 and to observe and perform the Lessees covenants and the regulations and conditions in the said Lease.
3. The Respondent has failed to pay the Service charges for service charge years 2017 (part) and 2018 due and has accrued arrears of £1025 as at 11th September 2018. The Applicant commenced County Court proceedings to recover the debt. The Respondent filed a Counterclaim in which she asserted that the Applicant had failed to accept responsibility for and repair a leak

which had caused damage to the Property. She asserted that the Applicant had been slow in responding to her communications when trying to deal with the matter. The point of contention was whether dampness and specifically damage to the kitchen ceiling and walls within the Property arose from condensation (for which the Applicant would not be liable) or penetrating dampness which the Respondent asserts falls under the Applicant's repairing covenant.

4. On 7th February 2019 District Judge Cohen sitting at Edmonton County Court transferred the matter to the Tribunal.

Issue

5. This Tribunal has jurisdiction under section 27A of the Landlord and Tenant Act 1985 ('the 1985 Act') to determine the payability and reasonableness of service and administration charges but not rent, County Court costs or statutory interest.

Inspection

6. We inspected the Property on 24th July 2019 in the presence of Mr D Harper on behalf of the Applicant, and the Respondent. Neither party had requested a hearing and we therefore determined the matter on the basis of the written submissions provided by each party.
7. The Property comprised a ground floor flat accessed directly from the exterior, there being no internal common parts. The flat has 3 external walls & is situated close to a steep bank to the rear of the property. As a result of the position, natural light is limited. The accommodation consisted of 2 bedrooms, an internal bathroom with no natural light or ventilation, and living room open to the kitchen. There was double glazing throughout although no central heating. It was noted that the Respondent has now ducted the bathroom ventilation to the exterior and has also installed a non -mechanical vent in the rear kitchen wall in an attempt to resolve the condensation issues in the Property. At the time of the inspection there was efflorescence to the ceiling of the kitchen, (where the balcony above is located) and the rear walls of the kitchen. This efflorescence is in the same location as the damp, the cause of which is still in dispute, as evidenced by the photographs submitted with the Respondent's bundle.

Submissions

8. The majority of each party's written Statement of Case relates to the set off claim. At the inspection the Respondent repeatedly stated that she did not dispute the obligation under the Lease to pay service charges-the issue related solely to the responsibility for the 'leak' and the potential set off.

Payability

9. The Applicant submits that the service and administrative charges are payable under Clauses 4 (iii) and 4 (iv)(e) of the Lease respectively.

10. A copy of the 2017 Table of Incurred and Expected Expenditure was provided to the Respondent prior to her purchase of the Property. The Respondent was required to pay £154 for the period 1st August 2017 to 30th September 2017 and £231 for the period 1st October 2017 to 21st December 2017, totaling £385 for service charge year 2017.
11. In 2018, the Table of Incurred and Expected Expenditure agreed by the long leaseholders at the residents' management company AGM resulted in an annual service charge for 2018, for each long leaseholder, including the Respondent, of £960.
12. By letter dated 20th December 2017, the managing agent enclosed the service charge invoice for the service charge year 2018 with payment due in 14 days. The invoice refers to the facility to pay monthly in the sum of £80 or quarterly in the sum of £240, both with effect from 1st January 2018.
13. The letter dated 20th December 2017 included a summary of the tenant's rights and obligations regarding service charges
14. On 11th September 2018, the managing agent sent an invoice dated 11th September 2018 to the Respondent detailing service charge arrears from 1st August 2017 to 31st (sic) September 2018 which, after taking into account one payment of £80, totaled £1025. The invoice also included an administration fee of £90. The invoice dated 1st September 2018 included a summary of the tenant's rights and obligations regarding service charges
15. The Respondent asserts that the items of expenditure under 'Repairs and Maintenance' and 'Management, Professional and Administration' are not payable under the Lease. She asserts that due to a breach by the Applicant of the Landlord's repairing covenant, she is able to set off the 'damages' arising from such a breach and that the service charges are therefore not payable. The Respondent has particularized the damages in her Counterclaim to the County Court Proceedings as £1350 to represent 3 months loss of rent for the months of March, April and May 2018; £480 to represent 'grievance'- train tickets, loss of earnings, time, pain and suffering; £329 to represent council tax paid when the Property was vacant and £325 representing the cost of the repair she had carried out. The 'damages' Counterclaim totals £2484.

Reasonableness

Service charges

16. The Applicant has produced copies of the Statements of Expenditure for years ending 2017 and 2018 identifying each element that contributes to the total Service Charge. The Applicant submits that the service charges, having been known and approved by the long leaseholders and incurred in the management, maintenance and insuring of the Estate in the financial years 2017 and 2018 are reasonably and properly incurred and were of a reasonable standard.

17. The Respondent says that expenditure under the service charge items of 'Repairs and Maintenance' and 'Management, Professional and Administration' have not been reasonably incurred. She has not suggested an alternative figure as to what she considers to be reasonable and why. Within the submission, the Respondent has referred to delay by the managing agent in dealing with the matter of the alleged leak. The Respondent asserts that the repair work done by Trebor builders (at a cost of £2590) did not address in any material way the source of the leak and that the costs were not reasonably incurred. In relation to all other items of expenditure of the Service Charge, the Respondent has written 'set off'. It is not clear whether the Respondent's dispute refers to service charge year 2017 or 2018. We have taken it that the Respondent's dispute relates to each year.
18. The Applicant says that works carried out by Trebor Builders (invoice 17/2335 dated 12th November 2017 totaling £1285 and invoice 18/2341 dated 7th April 2018 totaling £2390) relate to works carried out across the whole Estate rather than the Property specifically. Itemised repairs and maintenance specific to the Property were charged at £190 (work to copings, provision of new boot, foam filling and sealing any cavities or holes in the vicinity, clearing of hopper head, replacement of gutter and broken roof tile on lean to roof) and £160 (installation of industrial dehumidifier for 3 days to dry out kitchen and associated repairs to plaster, sealing area with stain block and blocking off 3 air bricks on window wall).
19. The Applicant has provided a chronology of the responses by the Applicant and its' agents to the Respondent's contact and says that it has been diligent and attentive to the Respondent throughout. Works that were carried out by Trebor builders were undertaken as part of the Applicant's usual maintenance at the Estate and/or without any liability on the Applicant's part, by way of assistance to the Respondent in managing the condensation in her Property.

Administration charge

20. The Applicant charged £90 as an administration fee on the invoice dated 11th September 2018. The Respondent has not disputed the administration fee.

Section 20 C Landlord and Tenant Act 1985

21. The Respondent applies for an order to prevent the Applicant from recharging, through the service charge, its' legal costs associated with proceedings in the Tribunal.
22. The Applicant resists the Respondent's application and states that it is entitled to legal costs pursuant to clause 3 (15) of the Lease and that such costs are recoverable as a service charge. The Applicant states that the Respondent has not made out a defence to the payability of the service charges.

Paragraph 5A Schedule 11 Commonhold and Leasehold Reform Act 2002 ('the 2002 Act').

23. The Respondent applies for an order extinguishing her liability to pay an administration charge in respect of litigation costs incurred by the Applicant in connection with proceedings before the Tribunal. The Applicant resists the application for the same reasons as stated in paragraph 22 above.

Deliberations

Payability

Service charges

24. The Respondent has not disputed the Lease provisions allowing service charges to be charged and we therefore have not recited in full the relevant Clauses. We have had regard to Clauses 4 (ii), (iii) (iv), (v) and 5 of the Lease. We find that service charges are payable under the provisions of the Lease.
25. We have considered the Respondent's submission regarding set off and that the service charges are not therefore payable. We have considered *Continental Property Ventures Inc v White [2007] L & TR 4* and accept that as a matter of principle we have jurisdiction to determine claims for damages for breach of covenant in so far as they constitute a defence to a service charge in respect of which our jurisdiction under section 27A of the 1985 Act has been invoked. We also accept the principle that such a claim for damages may extend to matters such as loss of amenity or loss of health arising from such a breach. We note HHR Rich's comment as to the desirability of Tribunal's exercising restraint in the exercise of its extended jurisdiction given to it by the 2002 Act.
26. We note the Respondent's submission that, having regard to the amounts at issue, it would not be proportionate to transfer the proceedings to the County Court to determine the Counterclaim, the case having already been transferred from the County Court to the Tribunal.
27. In this case we determine not to exercise our discretion to consider damages for breach of covenant as an equitable set off. The key issue as to the cause of the damp/'leak' in the Property remains unresolved. The day before the inspection we were advised by the Applicant's representative that the Property had been inspected on 19th July 2019 and that the condition report was imminent. The Applicant's representative requested that we delayed our determination to allow it to make representations to us once the report was received with the Respondent's representative being able to make observations within a time period thereafter. It does not appear that the report has been requested jointly by the parties. It is not unreasonable to assume that the Respondent, upon receipt of such a report initiated by the Applicant, may also wish to engage an expert to carry out a condition survey to address the key issue.

28. Further, the amount of 'set off' at £2484 exceeds the total service charges potentially payable for service charge years 2017 and 2018 namely £1345. We do not have jurisdiction to order a Landlord to pay to a tenant any balance remaining after the deduction from payable service charges of any set off amount.
29. We consider that in the circumstances of this case and having regard to the above, the issue of the alleged breach of the Landlord's repairing covenant and any damages arising therefrom are better determined under Court Procedures.

Administration charge

30. Clauses 4(iv), 4(v) and 5 of the Lease set out the expenses that can be recovered by the Landlord as service and administration charges. The Respondent has not disputed the Lease provisions allowing administration charges to be charged. We find that administration charges are payable under the Lease.

Reasonableness

Service charges

31. In relation to expenditure under the item 'Management, Professional and Administration' we have noted the chronology of events and correspondence provided by both the Applicant and the Respondent which, when combined, cover the period 23rd June 2017 to 31st May 2018. We do not consider there to have been any undue delay on the part of the Applicant or its' agent in responding to the Respondent's concerns regarding the damp/ 'leak' at the Property, although we accept that the Respondent was not satisfied with the Applicant's opinion as to the cause of the damp/ 'leak'. The cause is not a matter before us and is a matter for the County Court to determine. We therefore do not make any reduction to the amounts charged under this item. The amounts charged to the Respondent in service charge years 2017 and 2018 under this item of expenditure are £13.62 and £16.50 of a monthly service charge of £77 and £80 respectively. There is limited evidence in the Respondent's submissions regarding any other concerns regarding management of the Estate. Having inspected the Estate we do not consider the expenditure under this item to be unreasonable. We determine that expenditure under the item 'Management, Professional and Administration' to have been reasonably incurred and reasonable in amount in both service charge years 2018 and 2018.
32. In relation to expenditure under the item 'Repairs and Maintenance', the repair work by Trebor Builders relating specifically to the Property total £190 and £160 in service charge years 2017 and 2018 respectively. Having regard to the description of the alleged problem of a 'leak', the investigations carried out by the Applicant's agents, the description of the works done, and specifically the amounts incurred which were low, we find the works to have been reasonably incurred and to be reasonable in amount. We appreciate that the Respondent considers that the works did not remedy the problem but that does not necessarily mean that the work that has been done is unreasonable.

We consider the works carried out to be appropriate in attempting to remedy a problem for which the actual cause had not been determined and where there was a fundamental disagreement as to the cause of and responsibility for the problem. In the absence of a condition survey or investigative report having been commissioned by either party to determine the cause, we consider the works to have been appropriate. We do not make any deduction under this item of expenditure for works in relation to the Property. The Respondent has not asserted that any other expenditure under this heading was unreasonably incurred or unreasonable in amount. The amounts charged to the Respondent under this item of expenditure in service charge years 2017 and 2018 are £18.03 and £24.60 per month of the Respondent's monthly service charge of £77 and £80 respectively. Having inspected the Estate, we determine that the expenditure under this item to be reasonably incurred and reasonable in amount.

33. In the absence of any submission or evidence from the Respondent regarding other items of expenditure being unreasonable (as opposed to being subject to set off), we determine that the Respondent's service charges of £385 and £960 for service charge years 2017 and 2018 relate to expenditure which has been reasonably incurred and is reasonable in amount.

Administration charge

34. The Respondent has not disputed the amount of the administration charge nor suggested an alternative amount. We find £90 to be reasonably incurred and reasonable in amount.

Section 20C 1985 Act application

35. By Clause 3 (15) of the Lease the Respondent covenants to:

'pay all costs and expenses (including legal costs and fees payable to the Lessor's surveyor) incurred by the lessors in or in contemplation of any proceedings under section 146 and 147 of the Law of property Act 1925 in respect of the premises notwithstanding forfeiture is avoided otherwise than by relief granted by the Court...'

We find that legal costs of proceedings regarding the payability and reasonableness of service charges are covered under Clause 3 (15) above and can be recovered as a service charge.

36. We then considered whether it was just and equitable to make an order to prevent the Applicant from recharging its' legal costs associated with the proceedings in the Tribunal through the service charge.
37. The matter was transferred to this Tribunal from the County Court as a step in the debt recovery process rather than either of the parties initiating proceedings before the Tribunal. It is regrettable that the County Court Order was not clearer in explaining to the parties the purpose of the transfer and the limit of the Tribunal's jurisdiction,(namely the determination of the payability and reasonableness of service charges) as it appears that the parties

considered that the Tribunal would deal with the matter in its entirety and have drafted their submissions on that basis.

38. The proceedings before us have been necessary as a result of the failure by the Respondent to pay the service charges, (although we accept that this is due to the dispute regarding responsibility for the 'leak'). We do not consider it to be just and equitable to make an order under section 20C as, with the exception of the matters relating to the 'leak' and set off, the Respondent has not disputed the payability and reasonableness of the service charges.
39. The majority of both parties' written submissions relate to the issue of responsibility for the 'leak' rather than the payability and reasonableness of the service charges. Those written submissions will no doubt reappear before the County Court in substantially the same format and with the same content once the matter is transferred back. The Applicant should therefore be clear and transparent in any future service charge for legal costs, which of those costs relate to legal costs before this Tribunal and which (if any), relate to those before the County Court. Care should be taken to ensure that the Respondent is not charged legal costs twice for what is substantially the same legal work. If legal costs are subsequently charged as a service charge, the Respondent may wish to make an application to the Tribunal for a determination if she considers them to be unreasonable.

Paragraph 5 of Schedule 11 CLARA 2002 application

40. For the same reasons as detailed in paragraph 38 above, we do not consider it to be just and equitable to make an order extinguishing the Respondent's liability to pay an administration charge in respect of litigation costs incurred by the Applicant in connection with the proceedings before this Tribunal.

Appeal

41. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

Judge T N Jackson
16th August 2019