FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/21UD/LIS/2020/0100**
Property	**:**	**Flats 1 & 5, 42 George Street Hastings, East Sussex TN34**
Applicant	**:**	**Allenfare Limited**
Representative	**:**	**Mike De Souza**
Respondent	**:**	**Roger Ayrton**
Type of Application	**:**	**Transferred from County Court, s.27A**
Tribunal Members	**:**	**Judge D Dovar**
Date and venue of Hearing	**:**	**4th December 2020, Remote CVP**
Date of Decision	**:**	**8th December 2020**

DECISION

Introduction

1. This claim for unpaid services charges was issued in the County Court on 20th July 2020 and on 1st September 2020 the matter was transferred to this Tribunal.

2. On 27th October 2020, the Tribunal gave directions, which included a direction that the Tribunal Judge hearing the transferred application should also sit as a County Court Judge to determine all matters in issue.

3. An electronic bundle was circulated prior to the hearing containing the parties' submissions and supporting documentation. Both parties attended the remote hearing and made oral submissions. This determination deals with the aspects relating to the Tribunal's jurisdiction. A separate County Court Order will accompany this decision to deal with all matters.

Background

4. 42 St George Street is a mixed use building. The ground floor contains a retail unit and the upper floors residential flats.

5. The Respondent owns two of those flats, Flat 1 and the Top Floor Flat, and pays a contribution to the costs of the administration and maintenance of the building. There have now been three previous proceedings between the parties which is unfortunate; particularly given the relatively modest sums in dispute and the fact that this is a lessee owned freehold, with the result that any shortfall from recovery through

the service charge appears to be payable by the lessees in their capacity as freeholder.

6. Despite the lessees constituting the owners of the freehold, they have utilised a corporate vehicle, the Applicant, to deal with service charge matters and to bring proceedings. The Applicant is not a party to the leases in question, but no issue was taken on this point. It had been appointed and authorised by the lessors to demand and collect payments.

7. At the outset of the hearing the issue in dispute was identified and agreed as whether or not the relevant apportionment was either:

    a. as per the fixed percentage set out at Clause 4 and Schedule 4 of the leases: being 8% for Flat 1 and 17% for the Top Floor Flat; or

    b. was a 'proper proportion' as per clause 3 (1) (b).

8. Neither party contended the costs were not recoverable; they just different on the percentage payable.

Lease Terms

9. The Tribunal was provided with a copy of the leases for both flats. They are in materially the same terms, save for the fixed percentage as outlined above. The material terms of Flat 1 are:

10. Clause 3 (1) (b) provides for the lessee

    "... in the event of any rates taxes assessment charges impositions and outgoings being assessed charged or imposed in respect of [the]

Building of which the flat forms part to pay the proper proportion of such … outgoings attributable to the Flat"

11. By Clause 4 (1) the lessee covenant to keep the Flat in good and tenantable repair and

"Contribute and pay an eight per cent share of the costs expenses outgoings and matters mentioned in the Fourth Schedule hereto"

12. The Fourth Schedule has a sub-heading "*Costs expenses outgoings and matters towards which the Lessee must contribute an 8 per cent share*". It goes on to list specific items falling within those costs headings which include: the expense of maintaining repairing redecorating and renewing the main structure of the Building; the gas and water pipes drains and electric cables and wires; and at paragraph 1 (3) "*the passageway courtyard landings and staircases serving the Building*". It also includes the cost of insurance against third party risks and for management fees in certain circumstances.

13. The Tribunal was informed by Mr de Souza that the retail premises was subject to a lease in similar terms to the residential leases. This included service charge provisions similar to those set out in clause 4 and the Fourth Schedule, save that paragraph 1 (3), referred to above, had been omitted. Further that under that lease the contribution was 33% of costs.

Basis of charging

14. Mr de Souza for the Applicant explained that there were three charging mechanisms:

    a. the first was ground rent as defined by the lease;

    b. the second, service charges which only applied to the residential leaseholders and were recharged on a relative area basis;

    c. the third, maintenance fees which were applied to all the units in the building and to which the specified percentage in each lease was used to apportion the costs.

15. In that regard and in particular in relation to the service charges, he relied on clause 3 (1) (b) as the basis for the apportionment of the costs amongst the residential leaseholders. He considered that 'outgoings' in that clause covered outgoings in relation to the costs of maintenance of the common parts by reference to the words 'Building of which the Flat forms part' and that the Applicant was therefore entitled to levy 'a proper proportion' of those costs that were attributable to the flat. He said he had simply adopted the approach taken by the Respondent when he was the director of the Applicant company in apportioning the costs based on the relative area of the residential flats.

16. He explained that the particular charges in question were on account charges based on the anticipated expenditure which he had derived from the total actual service charges for the previous year. The account he provided showed that these were costs of cleaning the common parts, maintaining the fire alarm and fire extinguishers; all of which solely

benefited the residential lease holders. It also included electricity for the common parts which again he said solely benefited the residential leaseholders.

17. He contended that these items were not chargeable in accordance with clause 4 and the Fourth Schedule as that Schedule only related to items that the whole Building had to contribute to. He did not consider that the retail premises had to contribute to these items and that therefore if they had to be recovered under the Fourth Schedule, there would therefore be a shortfall in recovery in the amount of 33% of the costs. This arose because the fixed percentages in the leases only aggregated to 100% if the retail premises was included. If it was not included then there would be a shortfall of 33%.

Respondent's objection

18. The Respondent disputed that these costs were recoverable under clause 3. He said that clause was directed at taxes and similar impositions. He contended that the costs were recoverable under the Fourth Schedule and that accordingly he should only have been charged the costs in accordance with the fixed percentages under his two leases and not the greater amount arrived at on the basis of relative area.

19. He contended that the retail premises was also liable to pay under the Fourth schedule for these items. However he acknowledged that the benefit derived by the retail premises from these items would be less and he said in the past, when he had been the director of the Applicant company, he had allowed a 10% discount to the retail premises for these

costs. However, he was unable to say on what basis that 10% shortfall had then been apportioned amongst the residential leaseholders.

20. The impression was that it was probably apportioned on the basis of area as the Applicants had put forward. It was interesting to note that despite now standing on the strict terms of the leases and their fixed percentages, the Respondent candidly accepted that in the past, when he had been in control of setting the service charges, he had departed from those fixed percentages himself.

Apportionment

21. Unfortunately, the Tribunal cannot agree that the charges in question are recoverable under clause 3 (1) (b). That is intended to deal with matters such as taxes or levies charged to the Lessor in respect of the Building and it enables the Lessor to recover the same from the Lessees. It is not an additional service charge provision. Indeed it would be odd if it were, given that the lease specifically deals with service charge items in the Fourth Schedule. To find otherwise would be to construe the leases as unnecessarily splitting the service charge mechanism.

22. The service charge provision, is contained in the Fourth Schedule. They mirror the Lessor's obligations at clause 5 (3), which are relatively narrow. Whether or not the Fourth Schedule actually included the costs claimed was not contended for by the Respondent. His case was that they did fall within that Schedule and therefore the fixed percentages were payable, which is what he had paid.

23. Whilst the Tribunal has doubts as to whether all or some of the items claimed fall within this Schedule, it is not necessary for it to determine that.

24. Despite that, the following general observations are made.

25. Whilst the costs of cleaning could fall within the obligation to maintain the passageway, landing and staircases serving the building, it is a little harder to see where the cost of the fire alarm or extinguisher would sit.

26. Further, although a copy of the retail lease had not been provided, it did appear from what the Mr de Souza had said that it did not have to contribute to these costs in any event. It also appeared that in removing that sub paragraph from the Fourth Schedule of the retail lease, the draftsman of the leases for the whole Building had overlooked the fact that the service charge percentages for those costs would not aggregate to 100%, but that there would be a shortfall. In which case, if that is correct, and the leaseholders are unable to agree amongst themselves how to deal with this, then an application under the Landlord and Tenant Act 1987 may resolve that issue.

Conclusion

27. Reluctantly, the Tribunal considers that the Respondent is correct and the fixed percentage under the Fourth Schedule of his leases fixes his share of the relevant costs.

28. Given that that is the sum he has paid already, there is no further sum owing and the Tribunal determines that the sums paid by the Respondent are the total of the sums payable.

29. This is an unfortunate result for a number of reasons. Firstly, the Respondent, when he had dealt with the service charges, had also varied the fixed percentages. Secondly, the difficulty arises out of what appears to be defects in drafting the leases. Thirdly, the sums in dispute are small and should be capable of resolution without recourse to the Tribunal, however as noted during the hearing, any informal arrangement will only work if all the leaseholders agree and where, as here, one leaseholder objects, the strict terms of the lease need to be adhered to (even when it is defective). Finally, if there is a shortfall, which will be the result of this decision, the leaseholders will end up having to cover that shortfall as they constitute the ultimate paying party as freeholder.

Judge D Dovar

Appeals

A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.