FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case references	:	CAM/00MG/LSC/2023/0016
Property	:	Flats 2, 8 & 9 46 Newport Road, Woolstone, Milton Keynes MK15 0AA
Applicants	:	MacKenzie Investments Limited
Applicants' Representative	:	Dilwar Azad, of counsel
Respondents	:	Assethold Limited
Respondents' Representative	:	Martin Horne, of counsel
Type of application	:	Liability to pay service charges
Tribunal members	:	Mr Max Thorowgood and Ms Marina Krisko FRICS
Venue	:	CVP
Date of Decision	:	2 April 2024

DECISION

---

1. The application

1.1. In March 2022 the Applicant purchased the leases of Flats 2, 8 & 9 Silverstone House, 46 Newport Road, Woolstone, Milton Keynes from UK Housing Sites Limited.

© CROWN COPYRIGHT

1.2. The building was newly built and the Applicant was the grantee of a new lease in respect of each flat.

1.3. In the course of the enquiries made by its solicitors before contract, those solicitors asked, “We assume that service charges will be apportioned on completion in accordance with the budget provided but please confirm.” To which the freeholder’s solicitor replied, “Confirmed.”

1.4. Completion statements were then prepared, apparently on that basis, and the Applicant paid on completion what is described in those completion statements an amount in respect of, “Annual Service Charge in advance”.

1.5. Not altogether surprisingly therefore, the Applicant was somewhat bemused when it received, on 5th September 2022 from a company called Eagerstates Limited, what were described as ‘Accurate Service charge account[s] September 2021/2022’ which demanded payment of balancing charges for the year of account to ‘September 2022’ (the precise year end was not specified at this point). The demands were made in the name of the Respondent.

1.6. The Applicant reasonably sought explanations as to the basis for these demands from Eagerstates but did not receive any coherent answers. Rather, Eagerstates simply continued to assert that the sums claimed were payable and to demand that they be paid. The question seems to have become settled, in the Respondent’s mind at least, as a question of the amounts received by the Respondent from the developer, rather than a question of apportionment *per se*.

1.7. In the end, after Eagerstates refused to engage with the Applicant’s reasonably and mildly expressed enquiries, the Applicant felt that it had no choice but to issue this application for a determination of its liability to pay in order to head off the Respondent’s threatened proceedings.

2. <u>The Applicant’s case</u>

2.1. The Applicant puts its case in respect of each lease on two main bases:

2.1.1. That it cannot be liable in respect of service charges which relate to that part of the year of account during which it was not the lessee; and

2.1.2. That, in any event, the demands for payment which have been made were made on behalf of the wrong party, because the Respondent (in whose name the demands were made) was not then the registered proprietor of the freeholder title and as such the person entitled to demand payment under the leases and, furthermore, that they were not accompanied by the statement of rights and obligations required to be provided by virtue of s. 21B Landlord & Tenant Act 1985 so that, even if it is liable in principle to pay the balancing charge, no sums are yet payable.

2.2. Mr Horne argued for the Respondent that the Applicant had not properly pleaded the allegation that all the demands made by the Respondent had not been accompanied by the requisite statement. We do not accept that submission. We think paragraph 43 of the Applicant's Statement of Case makes it sufficiently clear that the question whether Respondent had provided the requisite statement of rights and obligations was in issue. We also think that the Respondent, which is a very experienced professional landlord: a) either knew or ought to have known that a demand for the payment of service charges is required to be accompanied by a s. 21B statement; b) ought to have appreciated that the question whether a s. 21B statement had been provided with the demands was in issue; and c) would have provided copies of the statements provided together with the demands had they been served when it filed copies of the demands with the Tribunal.

2.3. Mr Horne accepted that the Applicant had squarely raised the question of the lack of a summary of rights and obligations in respect of the administration charge of £120.00 which the Respondent had sought to levy in respect of its notice of claim in respect of the arrears.

2.4. The Respondent did not trouble itself to file and serve a Statement of Case or any witness evidence, but it did complete a Respondent's Scott Schedule and filed copies of the various demands for payment/statements of account which it had made. It is to be noted that none of these demands/statements of account included statements of the lessee's rights and obligations.

2.5. It follows from the Respondent's failure to rebut the Applicant's case that the following matters of fact are established by default:

2.5.1. That the transfer for the freehold title to the Respondent took place on 23rd December 2022; and

2.5.2. That no statement of rights and obligations compliant with the requirements of s. 21B was served together with the demands for payment.

3. The relevant terms of the leases

3.1. The relevant provisions as to the payment by the lessee of service charges are set out in the Seventh Schedule to the leases (which are identical) in the following terms:

> "The Interim Charge" means such sum to be paid on account of the Service Charge in respect of each Accounting Period as the Landlord (or its Managing Agents or Auditors) shall reasonably specify to be a fair estimate of the Service Charge that will be payable by Tenant PROVIDED THAT:-
>
> 1.4.1 In the event of it being necessary for the Landlord to undertake urgent work to the Building or the Common Parts involving major expenditure not covered by the Interim Charge the Landlord shall have the right forthwith to demand from the Tenant the Proportion of such expenditure whereupon the same shall immediately become due and payable and shall constitute part of the Interim Charge; and
>
> 1.4.2 The Landlord may revise such estimate in respect of an Accounting Period during that period if it shall be fair and reasonable to do so in the circumstances

> 2. The first payment on account of the Interim Charge (on account of the Service Charge for the accounting period during which this Lease is executed) shall be paid to the Landlord on the execution hereof and thereafter shall be paid to the Landlord in advance by two equal instalments on the 25 March and 29 September in each year
>
> …
>
> 4. If the Service Charge for any accounting period exceeds the total of the Interim Charge paid by the Tenant in respect of that accounting period and any surplus brought forward from the previous Accounting Period brought forward then the Tenant shall pay such excess to the Landlord within fourteen days after service upon the Tenant of the certificate referred to in the following paragraph."

3.2. It is thus clear, we think, that the sum paid by the Applicant upon completion as, 'service charge in advance', was the Interim Charge which was liable to be supplemented by a demand for the payment of a balancing charge at the end of the accounting period as appears from paragraph 4 of the Seventh Schedule.

3.3. It would appear that this may not have been properly explained to the Applicant's solicitors at the time of its purchase and a sense of the Applicant's consequent irritation and bewilderment is apparent in Mr Johnson's correspondence with Eagerstates. Nevertheless, objectively, the intention of the parties, as it is expressed in Schedule 7, is clear.

4. <u>Apportionment</u>

4.1. It is unfortunate in our view that neither party seems to have applied its mind either to the terms of the lease or to the enquiries before contract before the demands were issued and this application made. Had either one of them done so, it is probable we think that they would have arrived at the solution which emerged in the course of the hearing before us sooner.

4.2. That solution is the entirely conventional one which was the subject of the enquiry, namely, that the service charge for the year to 29th September 2022 should be apportioned between the period before the lease was granted and the period afterwards.

4.3. On that basis, and subject to the matters which we will discuss below, the parties agreed that the sums remaining due in respect of each flat were as follows:

4.3.1. Flat 2 - £1,196.59;

4.3.2. Flat 8 - £573.07; and

4.3.3. Flat 9 - £882.99.

Those are, the proportions of the total charge for 2021/22 payable under each lease, less the sums paid by the Applicant on account on completion.

5. Reasonableness

5.1. In the course of the hearing we raised with the Applicant the question whether it intended to challenge the reasonableness of any of the items of expenditure identified in the 'Accurate Service charge account' for September 2021/22. Mr Azad said that upon reflection the Applicant probably would want to challenge at least some of those items but that until now it had been hampered in its ability to do so by the Respondent's failure to respond to its requests for clarity as to the basis upon which it was said that it was liable to pay anything at all. For that reason, there had been no pleading of this issue and no evidence either.

5.2. In light of that lack of pleading and evidence, we did not consider it would be proper to allow the Applicant to launch upon a series of *ad hoc* challenges to particular items of expenditure without any warning being

given to the Respondent and that if it wished to make any such challenges it would have to do so by means of a fresh application.

5.3. Mr Horne said that it would not be appropriate to allow such an application to be made because it would be an abuse of the process. That may be, but it is not a matter in relation to which we can make a prospective ruling.

6. The demands

6.1. Turning then to the question of the validity or effectiveness of the demands for payment of the balancing charge, there are two points to consider:

6.1.1. Was the demand made on 6th September 2022 a valid demand ?

6.1.2. Does the failure of the Respondent to serve the required statement of rights and obligations with either that demand or any subsequent demand mean that no sums are payable ?

6.2. As we have recorded above, the demand made on 5th September 2022 in respect of the year of account ending on 28th September 2022 was made on behalf of the Respondent, Assethold Limited. Since the Respondent did not become the freeholder, even in equity, until 23rd December 2022 when the transfer was apparently completed, it seems to us that the demand made on 5th September 2022 cannot have been a valid demand. It was a demand made by a person who had no right at the time it was made to make it. The landlord under the leases was still UK Housing Sites Limited at that time. If anyone, therefore, it was the person entitled to demand payment of the service charge on 5th September 2022.

6.3. We leave open the question whether even after the completion of the transfer Assethold was entitled to make demands for payment because the date on which the transfer was registered and therefore became

effective at law is uncertain. We also doubt, incidentally, whether a demand for payment of a balancing payment could properly have been made before the end of the relevant year of account.

6.4. Leaving those points on one side, further demands for payments were subsequently made of the Applicant, again on behalf of Assethold, on 23rd February 2023 by which point the Respondent was, in equity at least, the Landlord under the lease. However, those demands were also not accompanied by the statements of rights and obligations required by s. 21B Landlord & Tenant Act 1985 to be served together with them. Nor were any of the subsequent demands. By reason of s. 21B(3), it is the effect of the Respondent's failure to serve the prescribed information that the Applicant is entitled to withhold payment of the sums demanded until such time as a statement is served. Therefore, the sums demanded were not payable as at the date of this application and they are still not payable.

7. Conclusions in relation to the substantive matters

7.1. Our conclusions are therefore as follows:

7.1.1. All other things being equal, the Applicant cannot be liable to pay service charges under its leases in respect of a period during which it was not the lessee of the flats. The amount of the service charges for the years 29th September 2021 to 28th September 2022, as finally determined, therefore fall to be apportioned as between the period before the grant to the Applicant of its leases and the period thereafter.

7.1.2. We have set out the amounts of those charges due on that basis above.

7.1.3. All other things are not equal in this case though for the following reasons:

7.1.3.1. It is at least doubtful whether any valid demands for payment have been made because the demands which have been made were made in the name of the Respondent at times when it was not the registered proprietor of the freehold reversion to the leases;

7.1.3.2. In any event, no demands have yet been made which have been accompanied by the requisite statement of rights and obligations. Therefore, by virtue of s. 21B(3) and §4 of Schedule 11 to Commonhold & Leasehold Reform Act 2002, none of the sums demanded are yet payable by the Applicant; and

7.1.3.3. It is at least possible that once the prescribed information is provided, the specific sums claimed will be subject to challenge on grounds of reasonableness.

7.2. We accordingly find that the sums in question on this application are not payable by the Applicant as at the date hereof.

8. Costs

8.1. The Applicant sought an order that the Respondent pay its costs of this application pursuant to r. 13(1)(b)(ii) or failing that the fees which it paid to issue this application. It also sought an order pursuant to s. 20C Landlord & Tenant Act 1985 preventing the Respondent from recovering its costs of defending these proceedings by way of service charge.

8.2. It is the Applicant's position that the Respondent has, at all times since it its agent levied its demand in September 2022, adopted a thoroughly

unconstructive approach to the resolution of this dispute. It has failed to provide information reasonably requested and has failed to engage meaningfully with Mr Johnson's reasonable requests for explanations of the basis for the demands made. It has simply demanded payment and when it wasn't made has threatened proceedings.

8.3. We agree with the Applicant's criticisms of the Respondent's conduct both before and after the application was issued. It has seemed throughout to be intent upon doing nothing more than the very barest minimum required of it and, as we have found so far as the service of a summary of rights and obligations is concerned, considerably less than that. That failure on the part of an experienced professional landlord and its agent is completely inexcusable, although it is unlikely that it contributed to any of the costs incurred by the Applicant in this case.

8.4. Where we part company from the Applicant is in relation to its conduct. As Mr Horne correctly submitted, in our view, the Applicant did become fixated upon its claim that it ought not to have been subject to any demand in respect of service charges for the year 2021/22 and it was that claim which was the primary driver for this application. That claim was correct but not for the reasons which the Applicant claimed and in our view it was the parties' refusal to engage with each other's cases which was the primary cause of this application.

8.5. Nevertheless, we do think that the bulk of the blame for the parties' intransigence lies with the Respondent which seems to have been determined to be as unhelpful as possible throughout the process and certainly forced the Applicant into making the application by threatening to sue for the arrears.

8.6. We therefore find that the Respondent should reimburse the fees paid to the Tribunal by the Applicant in the course of these proceedings. Those are the application fee of £100.00 and the hearing fee of £200.00.

8.7. As to the application pursuant to s. 20C, we cannot see any basis upon which it would be appropriate for the Respondent to recover its costs of these proceedings by way of either service charge or administration

charge and we order that it should not do so. Professional landlords and their agents must aspire to higher standards and should not expect any sympathy from the Tribunal should they fail to meet them.

APPENDIX 1- 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.