|  |  |  |
| --- | --- | --- |
|  |  | **FIRST-TIER TRIBUNAL**  **PROPERTY CHAMBER (RESIDENTIAL PROPERTY)** |
| **Case reference** | **:** | **CHI/45UG/LSC/2023/0093** |
| **Property** | **:** | **The Priory, Syresham Gardens, Haywards Heath, West Sussex RH16 3XB** |
| **Applicant** | **:** | **Mr B McNamara** |
| **Representative** | **:** | **In person** |
| **Respondent** | **:** | **The Priory HH Limited** |
| **Representative** | **:** | **Fountayne Managing Limited (Mr S Stern), but no representation at the hearing** |
| **Type of application** | **:** | **For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985; costs orders** |
| **Tribunal members** | **:** | **Mr C Norman FRICS**  **Valuer Chairman**  **Mrs J Coupe FRICS, Regional Surveyor**  **Ms J Dalal** |
| **Date of Hearing** | **:** | **13 August 2024** |
| **Date of Decision** | **:** | **11 November 2024** |

|  |
| --- |
| **DECISION** |

**Decisions of the Tribunal**

1. The Tribunal makes the determinations as set out under the various headings in this Decision and the annexed Scott Schedule.
2. The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 (“the 1985 Act”) so that none of the landlord’s costs of the tribunal proceedings may be passed to the lessees through any service charge.
3. The Tribunal makes an order under Para 5A of Sch 11 Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) that the landlord may not recover litigation costs via administration charges against the Applicants.
4. The Tribunal orders that the Applicants’ hearing and application fee be reimbursed by the Respondent within 28 days of this decision.

**Reasons**

**The Application and Directions**

1. On 3 July 2023 the Applicant sought a determination as to the reasonableness and payability of service charges for the past years:

2020, 2021, 2022

and

the then future year 2023.

1. The total value in dispute was stated as being £5,377.38 (later re-stated as £4832.74 per paragraph 8, further directions of 24 April 2024). The Applicant also applied for orders under section 20C of the 1985 Act and Para 5A Sch 11 of the 2002 Act.
2. By directions of 10 November 2023 the tribunal ordered the matter to be determined on the papers by use of a Scott Schedule, without a hearing or inspection. By further directions of 2 April 2024 a hearing was ordered. Following a bundle review, further directions were given on 24 April 2024. Para 12 stated: *“The Applicant shall consider the extent to which items are challenged and the amount of charge he accepts as reasonable for any given item that is found to be payable. The figure shall be added to the Scott Schedule. The Applicant shall highlight those figures that he accepts and is content for the Tribunal to apply, assuming anything is found payable. The Applicant shall provide un- highlighted those figures which are suggestions but which the Applicant does not firmly accept.”*

A lengthy Scott Schedule was received, highlighted as set out above.

**The Hearing**

1. The hearing took place at the Tribunal Hearing Centre Brighton on 13 August 2024. The Applicant appeared in person and called witnesses. The Respondent did not appear and was not represented. The Tribunal received a bundle of 660 pages.

**No inspection**

1. The Tribunal did not carry out an inspection as there was photographic evidence in the bundle and it would not have been proportionate.

**The Applicant’s Case**

1. The Priory, Haywards Heath is a grade II listed building, which from 2019 was subject to redevelopment. There are 55 flats. The Applicant purchased flat 29 on 3 February 2020. This is on the second storey of a three-storey block. The Respondent instructed Fountayne Managing Ltd as managing agent. On 22 November 2022 Fountayne Managing Ltd was expelled from the Property Redress Scheme (“PRS”). They were reinstated on 13 June 2023. During that period they were not entitled to operate as managing agents.
2. The lessees exercised their Right to Manage with effect from 31 October 2023. There was no evidence that work was carried out in compliance with Covid restrictions. Invoices were not conclusive evidence that work was carried out. The Respondent admitted that utility companies had not been paid on time. Building work was incomplete. The managing agent and Respondent have both admitted that building insurance was not paid in 2023. There is no evidence of a Fire Risk Assessment (“FRA”) having been completed. The agents have sent estimated and actual accounts for 2020, 2021, 2022 and estimated accounts for 2023 [441-461][[1]](#footnote-1). There is no evidence of a sinking fund. The accounts have not been verified by an independent accountant and their legitimacy is challenged.
3. The Applicant challenges the apportionment of costs at 2.18% for Flat 29. There should be an equal apportionment per property (1.812%).
4. The Applicant was entitled to withhold payment of services charges and administration charges for late payment should be disallowed by the tribunal.
5. The Applicant provided a witness statement and gave evidence, confirming his position as set out above. He also confirmed to the Tribunal that the property comprised a variety of flat sizes from studios to three bedroomed.
6. Mr McNamara called Ms Helen Ash, Mr Giles Panton and Mr Paul Fergusson as witnesses. All had served witness statements. Ms Ash owned and let out flats 32 and 40. Her evidence was that cleaning and gardening was not being carried out. She followed up complaints from her tenants. Mr Panton is the lessee of flat 44. His evidence was that he had been living at the property since December 2021 and had never seen a gardener or window cleaner. The property was a mess. When he arrived, the property was still under construction which was not completed until January 2023. There was no garden on the Chapel side until mid-2023. There was no cleaning on the Chapel side for eight months after he moved in. Mr Ferguson is the lessee of Flat 31. His evidence was that communal cleaning was minimal with biweekly vacuum cleaning in his block. There was a rota signing sheet, but work was superficial. In late summer 2020 the courtyard garden was completed. Unfinished sections of the Priory still required gardens to be constructed. Residents’ service charges were then used to pay for these gardening costs. Thereafter there was only sporadic gardening. The gardening charges were excessive. Fountayne failed to provide evidence of visits. There was evidence of rodent infestation caused by poor construction of the development. Window cleaning was sporadic and carried out without notice, leading to water ingress via open windows. As to general maintenance there was an unfinished small car park and a lack of recycling bins. There was no sinking fund provision.

**The Respondent’s Case**

1. The Respondent was represented by Fountayne Managing Limited (“Fountayne”) its agents. Fountayne provided a position statement on 1 November 2023 but did not provide a further statement of case save for completion of Scott schedule entries. The Respondent’s position was that the Applicant’s complaint to the PRS was struck out because the property manager had provided proof of expenditure. The Applicant had not provided any alternative quotes in the Scott Schedule. The Respondents had changed the contractors historically to improve standards of service.

**The Lease**

1. The application provided a copy of his lease which was not fully dated, (dated only 2019) but nothing turns on that in these proceedings. The lease grants a term of 125 years from 1 January 2019. The grant includes a car parking space. The lease provides that the service charge will be a fair and reasonable proportion determined by the landlord of the Service Costs [29]. The service charge year runs from 1 January to 31 December. By clause 5 the tenant covenants to perform the tenant covenants. By clause 6 the landlord covenants to perform the landlord covenants. By Schedule 4 paragraph 2 the tenant covenants to pay estimated service charges on account subject to balancing charges and credits. The services to be provided by the landlord are listed in Part 1 of Schedule 7. The Service Costs are costs listed in Part 2 of Schedule 7.
2. The Applicant also covenanted to pay the insurance rent under Schedule 4 paragraph 3.1. The insurance rent is defined [27] as a fair and reasonable proportion determined by the landlord of the cost of any premiums that the landlord expends after any discount or commission is allowed or paid to the landlord and any fees and other expenses of the landlord reasonably incurs in effecting and maintaining insurance of the building.
3. Part 1 of Schedule 7 defines “The services”. These may be summarised as including cleaning maintaining decorating repairing and replacing the retained parts and car parking space, providing heating and lighting to the internal areas of common parts, cleaning floor coverings of the common parts, and cleaning the outside of the windows of the building. Service costs are then defined in Part 2 of the seventh schedule. These may be summarised as the costs of providing the Services, the supply of electricity water and gas to the retained parts, provision of a reserve fund for future expenditure, the fees of employing managing agents, accountants and any other person reasonably retained in connection with the provision of services.

**Findings**

1. The Tribunal found that each of the witnesses were credible, and it is unnecessary to address their evidence in detail. The Tribunal finds that the standard of property management has been poor.
2. The detailed findings of the Tribunal are recorded for the most part on the appended Scott schedule supplemented, where appropriate, below.

**Apportionment**

1. The jurisdiction of the Tribunal to intervene in service charge apportionments was considered by the Upper Tribunal Lands Chamber in Dr Lellis Francis Braganza v The Riverside Group Limited [2023] UKUT 243 (LC). There the Tribunal said:

“45.  …the FTT’s only task when a leaseholder challenges a discretionary apportionment made by a landlord or its surveyor will be to consider whether the apportionment was “rational”, in the sense that it was made in good faith and not arbitrarily or capriciously, and was arrived at taking into consideration all relevant matters and disregarding irrelevant matters. Unless for one of those reasons the decision was not one which any reasonable landlord could make, the FTT must apply it, and may not substitute an alternative apportionment of its own.”

1. In the present case the Applicant in answer to the question posed by the Tribunal stated that there was a range of differing property sizes within the building ranging from studio to three-bedroom (see above). His position was based on an equal apportionment of 54 flats. No expert evidence was called on his behalf to further justify his case. In the absence of such evidence, as the flats are of unequal size, there is no basis upon which the Tribunal could find that the apportionment adopted by the landlord is arbitrary or capricious. Accordingly this part of his application fails.

**Expulsion of Fountayne Managing Limited from the Property Redress Scheme (“PRS”)**

1. The submission was that Fountayne was not entitled to operate during its period of expulsion. That is not a matter for which the Tribunal has jurisdiction to determine. The status of the managing agent within the PRS scheme does not affect the jurisdiction of the Tribunal to make its findings under the 1985 and 2002 Acts.

**Orders under section 20C of the 1985 Act and paragraph 5A schedule 11 of the 2002 Act.**

1. The Applicant has been partially successful, and it was clear to the Tribunal that this success would not have been achieved without the application being made. The Respondent was late in compliance with important directions to complete the Scott Schedule.
2. Having regard to those matters the Tribunal orders that no part of the landlords’ costs in connection with these proceedings are to be regarded as relevant costs in determining the amount of any service charge payable.
3. It further orders that the Applicant’s liability to pay any administration charge in respect of litigation costs in connection with these proceedings is extinguished.

**Reimbursement of Application and Hearing Fees**

1. The Applicant seeks an order that the Respondent reimburse his application and hearing fees. The Tribunal found that the application and hearing was necessary for the Applicant to achieve the partial success he has. Therefore the Tribunal Orders that such fees of £300 be reimbursed by the Respondent within 28 days of the date of this decision.

**Application for a Wasted Costs Order under Rule 13 [[2]](#footnote-2)**

1. In his bundle at [654] the Applicant applied for a wasted costs order against the Respondent’s representative. Although the grounds are set out in the application, before making any such order, the Tribunal will seek representations from the Respondent's representative. As the Respondent was not represented at the hearing, the Tribunal directs the Applicant to re-state his grounds with a schedule of costs, in a written submission to the Tribunal by 26 November 2024, which must be copied to the Respondent's representative. The Respondent's representative may send a reply to the Applicant by 10 December 2024, copying in the Tribunal. The Tribunal will then further consider the application.

|  |  |  |  |
| --- | --- | --- | --- |
|  |  |  |  |

**Rights of appeal**

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

1. Square brackets denote bundle page references [↑](#footnote-ref-1)
2. The Tribunal Procedure (First tier Tribunal) (Property Chamber) Rules 2013 [↑](#footnote-ref-2)