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HM Courts & Tribunals Service

LEASEHOLD VALUATION TRIBUNAL

Application for a determination of liability to pay and reasonableness of service charges under sections 27A, 19 and 20C of the Landlord and Tenant Act 1985 ("the Act").

DECISION AND REASONS

Case Number:	CHI/00HE/LSC/2012/0033
Property:	Harbourside, Hannafore Road, West Looe, Cornwall, PL13 2DD
Applicants :	Barry Maloney and Jenny Carpenter and Pauline Hassall
Respondent :	Harbour Heights Management Limited
Date of Application:	23 February 2012
Date of Hearing:	17 September 2012
Appearances:	Barry Maloney, Jenny Carpenter and Pauline Hassall for Applicants
	Shane Kite for Respondents
In Attendance:	Other leaseholders
Tribunal Members:	Cindy A. Rai LLB (Solicitor) Chairman
	Robert Batho MA BSc LLB FRICS FCIArb (Chartered Surveyor)
	Timothy N. Shobrook BSc FRICS (Chartered Surveyor)
Date of Decision:	22 November 2012

Summary of Decision

1. It is determined that:-
   a. in relation to 2011/2012 the service charges estimated and demanded are reasonable based only on the very limited information both parties have made available.
   b. In relation to 2012/2013 no estimates or demands have been issued.
   c. In relation to 2010/2011 no evidence was offered at the Hearing by either party but the Respondent supplied the Tribunal and the Applicant with draft "service charge accounts" expressed to relate to 2010/2011 and 2011/2012 following the hearing. These did not

provide the Tribunal with any further information which clarified whether or not the amounts demanded were reasonable so the Tribunal is unable to make any determination.

2. The Tribunal has no jurisdiction which would enable it to make any further determinations on the basis of the information that has been disclosed to it.

3. Neither party addressed the application under section 20C of the Act at the hearing or in any detail within their written submissions but the Tribunal orders that any costs associated with the Respondent dealing with this application should not be added to and considered part of the service charges for the current service charge year.

Background

4. The Application was made by Barry Maloney. Directions were issued by the Tribunal on 5 March 2012 which proposed a pre-trial review hearing to enable the Tribunal to make appropriate further directions.

5. A hearing date of the 26 March 2012 was set but just prior to it the Respondent requested a postponement of the hearing. Barry Maloney objected to the proposed postponement and the pre-trial review hearing was held in Looe on the scheduled date without the Respondent.

6. Further Directions were issued on the 30 March 2012, ("Further Directions").

7. After the issue of the Further Directions, and in response to them, the Respondent sent a statement to the Tribunal dated 26 June 2012 but declined to produce any more information to the Tribunal.

8. Thereafter Jenny Carpenter and Pauline Hassall successfully applied to be joined as Applicants to the proceedings.

9. In compliance with the Further Directions Barry Maloney supplied a response to the Respondent's statement, received by the Tribunal on 25 July 2012. Some further information was sent by him by email to the Tribunal on the 10 September 2012.

10. On the day of the Hearing, but before it, the Tribunal Members inspected the exterior and common internal parts of the Property accompanied by Jenny Carpenter and Pauline Hassall. Mrs Carpenter also showed the Tribunal the interior of her apartment (Flat 12) and described the remedial work which had been carried out to her flat, which she told the Tribunal she jointly owned with her husband.

11. The Property comprises two linked blocks of six flats, the majority of which are understood to be held as "second homes". Only a limited number of flats are "owner occupied". It is situated at the top of a steep hill and reached from the road fronting it via a steep path and at the rear by a steep narrow road. The Tribunal were told that the Property had originally been constructed as an hotel but was converted into flats in or about 2006/2007.

12. It is apparent from the written evidence of the parties that even as the conversion works were being completed, (but presumably after the majority of the flats had been sold), dry rot was discovered. It appears that this was not dealt with promptly or appropriately and not eliminated so it spread into the fabric of the building. Eventually its existence became apparent to all the leaseholders.

13. The architect who certified the completion of the conversion works was perceived to have been negligent, and liability for such negligence appears to have been admitted, although the Tribunal has been given very limited information about this. It appears that a negligence claim was collectively made by or on behalf of all the leaseholders for damages against the Architect by the Respondent and that a settlement has either been reached or soon will be, ("the Damages Claim").

14. The level of insurance cover held by the architect apparently means that, notwithstanding that a conditional fee agreement was negotiated with the solicitors who represent the Respondent; it is anticipated that there will be a considerable shortfall between the actual cost of remedial works and the recoverable damages. This shortfall appears to have been inflated by associated legal costs not covered by the conditional fee agreement.

15. The scope of the necessary works and the way in which landlords costs will and should be divided between the leaseholders are further complicated by the fact that some works are the individual leaseholder's responsibility and other works affect the common parts of the Property which is a landlord responsibility. Furthermore some leaseholders have already carried out and paid for remedial works to their own flats.

16. Part of the Applicants' complaint is that the Respondent is only responsible for the maintenance of the communal parts of the Property and that it is not responsible for and cannot control the remedial works to individual flats which are or should be a leaseholder responsibility. [See comment on page 105 of Applicants' bundle].

17. The question as to whether or not the costs of all remedial works should be shared equally between all of the leaseholders has also been raised.

18. Following the conclusion of the Hearing the Tribunal requested further information from the Respondent and subsequently issued Further Directions dated 19 September 2012, (the "post Hearing Directions").

Hearing

Preliminary issues

19. Prior to commencement of the formal hearing, Mr Batho explained that he had visited the property on a previous occasion. Early in 2008 he had inspected Flat 4, owned by Mr Williams, to advise him on possible causes of the dry rot which was by then apparent in his flat, although in the event Mr Williams had followed alternative advice from that he had given. Mr Batho had subsequently been asked to quote for advising on the dry rot affecting the building as a whole, but that quotation had not resulted in his being appointed.

20. Mr Batho offered to withdraw if any party considered that this prior involvement raised any possible conflict of interest. No objection was raised, and Mr Batho accordingly remained as a member of the Tribunal.

21. Shane Kite, who spoke for the Respondent, stated that as service charge demands for the current year 2012/2013 had not been issued, no determination as to reasonableness could be made. He wondered if in fact the Applicant, who had referred only to 2012/2013 in his application, had intended to add the preceding year 2010/2011 in addition to 2011/2012. This was borne out by Barry Maloney's letter to the Tribunal in response to the

Further Directions in which he has sought to add additional years to the years referred to in the Application. The Tribunal agreed that the Applicant could ask for the determination to include the service charge year 2011/2011.

Applicants' case

22. At the inspection various defects relating to the common parts were pointed out to the Tribunal members, these being:-

    a. The electronic access gate system which was not operational and said not to have been operational for some time;

    b. The two lifts, (one in each block), neither of which was in working order;

    c. The fire safety system and the absence of regular maintenance of it;

    d. The grounds and common paved area which were untidy with weeds infiltrating some of the paved areas.

23. The Applicants told the Tribunal that the budget for 2011/2012 had only been produced to them in February 2012. That budget was discussed between the 12 leaseholders during a telephone conference call. Service charge demands for that year were eventually issued to them in May 2012. That service charge year ended on the 31 July 2012.

24. Initially the Applicants suggested that they, and indeed all those other leaseholders who were in attendance at the Hearing, had not received a revised budget for the service charge year 2011/2012. It eventually became clear that the copy budget within the Applicants' papers which had been produced to the Tribunal was the revised budget, (although the Applicants and some of the other leaseholders who were present had not realised that it was), and that the revisions to the original budget had been made following the telephone conference.

25. There was a dispute between the parties about the length of time during which the lifts had not worked. It was not disputed that the lack of repair was deliberate and was the result of concern, shared by all the leaseholders, that the repair costs might be wasted if the necessary remedial works relating to the inherent "dry rot" problem affected the structure surrounding the lift shafts. Neither party seemed to actually know if this was the case but there was a suggestion that it might or could be, although this was not backed up with evidence.

26. Fire safety is a concern. Since the managing agents resigned last year there has been no regular contract for the maintenance of the fire alarm system. The cleaner is supposed to carry out regular (weekly) tests and complete the "Log Booklet" but those leaseholders who are resident within the Property doubt that this is actually done. After the Hearing and in response to further information provided by the Respondent in compliance with the post Hearing Directions, Barry Maloney stated that no one resident at the Property could find a copy of the fire register. Furthermore the revised draft budget included no adequate allowance to fund regular checking and maintenance of the fire safety system.

27. Weed clearance of some external common areas has been carried out by individual leaseholders and Barry Maloney has painted some of the internal passageways to improve their appearance.

28. Following the resignation of the managing agents, management has been carried out on a voluntary basis by some of the leaseholders and it is expected that all will co-operate to make this arrangement workable.

29. The settlement of the Damages Claim is apparently imminent. It was accepted that little general maintenance work has been regularly carried out and that part of the reason is that any benefit from such works would probably be short term because of the imminent remediation work to eliminate the dry rot and the likely consequential disruption.

30. It is suggested that there has been no consultation about the solicitors' costs which have already been incurred and paid. [These costs appear to relate wholly and exclusively to the Damages Claim.]

31. Following a review of the revised budget for the year 2011/2012 at the Hearing the Applicants stated that estimates in relation to the are unreasonable:- following items

    a. Lift maintenance costs of £3,750;

    b. Costs for the cleaning of communal areas of £1,320;

    c. Legal costs which included Follet Stock solicitors' costs and the costs of a barrister which were not covered by the conditional fee agreement relating to the Damages Claim.

32. The total budget for the maintenance of the 12 flats was £15,545 or £1,295 per flat for that year.

33. When commenting and responding to the further information supplied by Respondent in compliance with the post Hearing Directions, the Applicants provided a summary of the legal costs incurred between 2009 and 2012.

Respondent's Case

34. Mr Kite said that the intention was to consult where appropriate on all of the works prior to any service charges collected on account of budgeted costs being spent. His intention is to budget for anticipated expenditure and contingencies and build up a reserve fund. He had set out three alternatives when the telephone conference call had taken place on 10 April 2011. [These are set out in the note of that meeting a copy of which is marked "A" in the Applicants' first case bundle.] That telephone call had been arranged and taken place after Barry Maloney had made a previous application to the Tribunal which was subsequently withdrawn prior to determination.

35. In response to questions about the accounts he was adamant that the previous years account had been properly "signed off". However it became clear that he had no understanding that company accounts and service charge accounts are not the same. It was eventually conceded that no service charge accounts have ever been produced for the service charge years the subject of the Application which could have either been certified or used as the basis for the subsequent years estimate. He blamed the resignation of the managing agents for the lack of information made available to the company accountants.

36. He said that following the resignation of the managing agents it was agreed by all the leaseholders that there would be a collective effort to manage the buildings, but he stressed that he was only a volunteer. He also suggested

that it was impossible to hold regular "face to face" meetings due to the majority of leaseholders living all over the country.

37. The settlement of the Damages Claim is imminent. He believes that each leaseholder should share equally all the remedial costs insofar as those costs will exceed what will be recovered by the Damages Claim. He suggests that in the past it had been accepted that these amounts should be a budgeted service charge cost.

38. He also mentioned that he, personally, has lent the service charge account money to ensure that there was a credit in the bank to deal with outgoings. This was shown in the draft accounts which he produced following the Hearing and in compliance with the post Hearing Directions.

The Law

39. Section 27 of the Act gives the Tribunal jurisdiction to determine issues in relation to service charges. In this case the only dispute appears to be in relation to the reasonableness of the service charges demanded and indeed the reasonableness of the budgets prepared prior to the demands being issued.

40. Extracts from section 27A of the Act are set out below

S27A Liability to pay service charges: jurisdiction
(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

41. Section 27A should be read in conjunction with section 19(1) of the 1985 Act which provides:-

S19 Limitation of service charges: reasonableness.
(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;
and the amount payable shall be limited accordingly.

42. An extract from Section 20C of the Act is set out below too.

S20C Limitation of service charges: costs of proceedings.
(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

Reasons for the Decision

43. The lease, a copy of which was produced to the Tribunal by Mr Maloney in support of the Application, relates to his flat, Flat 3 and is dated 24 April 2007, (the "Lease"). It was made between VJO Developments Limited and Finbarr Anthony Maloney and Eileen Anne Maloney. The Respondent

management company was also a party to the Lease and is referred to within it as the Management Company. It is assumed by the Tribunal, and it was never suggested otherwise by either party, that the leases of each of the twelve flats are in a broadly similar form.

44. The liability of the tenant to pay a service charge is not disputed by the Applicants. The Lease provides for a contribution of 8.333%, which is one twelfth of the relevant outgoings. It is assumed that each leaseholder is obliged to make an equal contribution towards service charges. The management company is required to estimate the tenant's contribution to the service charge at the beginning of each service charge year, which starts on the 1 July and ends on the 30 June. [Neither party suggests that this annual period has been changed.]

45. The Lease provides that:-

"As soon as practicable after the end of each relevant financial year the Management Company shall cause the amount of the Service Charge for such relevant financial year to be determined by the Accountant". [Clause 5(3)]

46. The following clause requires that the Accountant, (defined within the Lease as "an accountant appointed jointly by the Landlord and the Management Company and who shall be a member of a body of accountants established in the United Kingdom and for the time being recognised under the Companies Acts by the Secretary of State"), [Clause 1.10] shall prepare a written statement as soon it shall have determined the amount of the Service Charge for the relevant financial year, which shall be the "Accountant's Certificate" containing a summary of the amounts costs expenses taxation and outgoings incurred by the Management Company during the relevant financial year and specifying the amount of the Service Charge payable by the Tenant as aforesaid and in the Accountant's Certificate the Accountant shall certify

(A) that in his opinion the said summary represents a fair summary of the said costs expenses and outgoings and receipts (if any) and provisions and reserves set out in a way which shows how they are reflected in the Service Charge.

(B) that in his opinion the said summary is sufficiently supported by accounts receipts and other documents which have been produced to him.

(C) the amount of the Service Charge payable by the Tenant for the relevant financial year of the Management Company and how it has been calculated.

[Clause 5(4)]

47. Unfortunately the history of the management of the Property, by the managing agents who resigned last year, coupled with the stress of trying to cope with and manage the spread of dry rot and the damages claim appear to have tainted the Applicants' evaluation of management of the Property by the Respondent. Their management had been discredited by their use of a legal debt collection service to pursue leaseholders who had withheld payments of service charges attributable to potential costs of remedial works related to the dry rot infestation.

48. Whilst cogent reasons for the resignation of the previous managing agents were not disclosed to the Tribunal it has gained an impression, from the evidence submitted, that it was likely that it had been difficult for them to

manage the Property because the threat of major works undermined the value of general maintenance and repair work to the Property and the appetite of the leaseholders to pay for such works, as it was perceived that the benefit would be transient and the cost "wasted".

49. Nevertheless it is apparent that for whatever reason no service charge accounts had ever been produced until the Respondent, in response to the post Hearing Directions, produced draft service charge accounts for 2010/2011 and 2011/2012.

50. Following receipt of the draft service charge accounts the Applicants challenged the accuracy of a statement made in Mr Kite's letter which accompanied them. He had said that the three Applicants had not paid their service charge as demanded for 2011/12. The Applicants responded saying that two of the three had paid the amounts demanded and that Mr Maloney had offered a partial payment. A further rebuttal of both the accuracy and relevance of the Applicants response was subsequently received from Mr Kite.

51. The draft service charge accounts produced by the Respondent are not supported with copies of invoices verifying the expenditure and details of individual leaseholder's contributions, or bank statements confirming the amounts held in the Respondent's bank accounts. As these are "draft" accounts no certification as required by the provisions of the Lease could be undertaken. The draft accounts do not comply with the requirements set out within the Lease. Their production simply underlines the Respondent's limited understanding of the legal requirements regarding the proper administration of service charges.

52. As the draft service charge accounts do not provide any further useful information which assists the Tribunal with regard to the 2010/2011 service charges it cannot make any determination as to whether the service charges demanded during this period are reasonable.

53. The estimated budgeted expenditure for the service charge year 2011/2012 contains no estimated amount which the Tribunal finds unreasonable and the Tribunal also finds that the total annual contribution due from each leaseholder is reasonable. The Applicants offered no evidence as to why any of the budgeted amounts were excessive or unreasonable but expressed concerns about the budgeted contribution attributable to legal costs which had already been incurred.

54. It would be possible for the parties to agree to pay the service charges demanded and defer commissioning works and allocating expenditure until the Damages Claim has been finalised. However it is not reasonable for service charges to be collected in respect of properly estimated expenditure and subsequently allocated to different expenditure such as "uninsured losses" and solicitors' costs.

55. The Applicants' have suggested that this may have happened in preceding service charge years when monies collected on the basis of estimated costs for remedial works were used to defray costs of different works or services. The evidence supplied to the Tribunal does not enable it to determine conclusively whether or not this occurred.

56. It would have been prudent for the Respondents to have separated out from the general service charges a discrete fund attributable to the Damages Claim

thus ensuring, for the benefit of all leaseholders, that the relevant costs were "ring fenced". Had this been done there might have been more clarity as to both the total of those costs and the reasonableness of the amounts charged and paid which directly related to the Damages Claim.

57. It appears to the Tribunal that whilst there may be a genuine desire by the Respondent to manage the Property fairly and effectively, the settlement of the Damages Claim has absorbed all its energy.

58. The inadequacies in the performance of the previous managing agent and the lack of a proper accounting system with a record of service charge accounts for all preceding years have made it more difficult for the Respondent to manage the Property.

59. The perception that funds collected on account of service charges have been used instead to pay legal costs has contributed to the Applicants lack of confidence in the current management regime.

60. The Tribunal determines that the estimated amounts for the Service Charge Year 2011/2012 including sums allocated for lift repair and maintenance are reasonable if the sums are retained and allocated only for the works specified in the estimate and only after any necessary consultation occurring prior to such works being commissioned. Such sums cannot be absorbed into the general "Service Charge" pot and allocated to fund works unless the amount of such expenditure is below the consultation limit set out in the Act and the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Regulations").

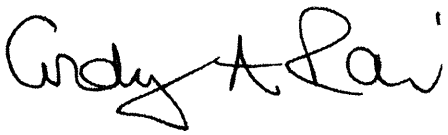
61. If that is not the case appropriate consultation must take place prior to any works being undertaken regardless of the fact that the funds have already been collected and retained within the Respondent's service charge bank account.

62. Insofar as there is a desire to allocate some of the service charge fund towards the shortfall in legal costs relating to the Damages Claim this should be subject to a separate agreement and consultation should have occurred in relation to the services to which these costs relate. The Tribunal cannot comment whether or not this happened because it has received no information enabling it to do so.

63. The Respondent has failed to produce copies of bank statements or copies of accounts or invoices relating to service charge expenditure or a proper statement setting out each leaseholder's contributions towards the service charges during the disputed years. It has not produced any evidence of compliance with the landlord obligations in the Lease with regard to the administration of the service charges.

64. Whilst neither party offered any submissions regarding the section 20C application the Tribunal makes an order than no costs incurred by the Respondent in relation to the hearing should be recovered as part of the service charges. This is because the Respondent has not complied with the Lease by producing certified service charge accounts. It may also have failed to comply with the Act it if has collected service charges on account and then used those moneys to pay for works without undertaking consultation with the Applicants and other leaseholders prior to the works or services being commissioned.

65. The Applicant has questioned whether the costs of remedial works should be borne equally between all leaseholders, presumably questioning whether the demised areas of each of the twelve flats within the Property are equally affected by dry rot. Any allocation of damages recovered between leaseholders should have been agreed at the outset of the Damages Claim. It is not an issue which is within the jurisdiction of this Tribunal to determine. Should such a question be the subject of a future application to the Leasehold Valuation Tribunal it is likely that a Tribunal would, in the absence of any other documented agreement rely upon the provisions of the Lease.



Cindy A. Rai LLB (Solicitor)

Chairman