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HM COURTS &TRIBUNALS SERVICE
LEASEHOLD VALUATION TRIBUNAL

Case Number: CHI/40UB/LIS/2012/0058

Re: 21A Christchurch Street West, Frome, Somerset, BA11 1EG

Between:

Anchorgrove Ltd ("the Applicant" or "Lessor")

And

Richard Candy ("the Respondent" or "Lessee")

Tribunal Members: Professor DN Clarke, MA, LL.M., Lawyer Chairman
Mr JB Tarling, MCMI, Lawyer member
Mr MJ Ayres, FRICS, Valuer member

Appearances:
For the Applicant:
Ms Jenny Parker and Mr Michael Wilson, Directors of the Applicant Company

For the Respondent:
Mr Jeremy Towler, Solicitor. The Respondent and his father, Mr John Candy, were also present.

In the matter of application under Section 27A of the Landlord and Tenant Act 1925 [Liability to pay service charges etc]

DECISION AND STATEMENT OF REASONS

Preliminary

1. This is an application by the Lessor under section 27A of the Landlord and Tenant Act 1985 for a determination of the liability of the Lessee to pay service charges in respect of the property known as 21A Christchurch Street West, Frome, Somerset, BA11 1EG ("the Property") for the two periods 1 March 2010 to 31 August 2011 and from 1 September 2011 to 31 August 2012.

2. The application was made on 5 June 2012 and Directions were given on 18 June 2012. The Tribunal was pleased to observe that both parties complied fully with the Directions so given.

3. Prior to the hearing in Frome on 30 August 2012, the Tribunal inspected the Property.

The physical features

4. The Property is a maisonette on the first and second floors of a Grade II listed building ("the Building") on a corner plot comprising 20 and 21 Christchurch Street West and number 1 South Parade.

5. The Building is not easy to describe without the benefit of a detailed plan. However, the salient points are that there are no common parts and no front or rear gardens. The whole building is owned by the Applicant. On the ground floor are three shops, let on business leases, though at the time of our inspection the shop at 1 South Parade was vacant. Two properties have been let on long leases; one is the Property the subject of this application; the other is a smaller maisonette known as 20A Christchurch Street West. The two maisonettes share a ground floor entrance direct from the road leading to a staircase to the first floor. We were told the entrance way is demised to the leaseholders of 20A and that the Respondent has rights of access and shares any costs. But that access is not covered by the service charge provisions. The residential accommodation above 1 South Parade is let by the Applicant on an assured shorthold tenancy.

6. One feature of the Building that is relevant to the issues we have to determine is that there is a small totally enclosed courtyard. This is only accessed with difficulty from a door in the toilet of the shop at 1 South Parade. It is small and the smallness in emphasised by the walls rising to three stories on each side. On three sides are parts of the Building, with the fourth being the adjoining property on South Parade. The Property extends on the first and second floor levels on two sides of the courtyard. For the residents of the Building, the courtyard is of little use except to give light to windows; but for pigeons it was described to us as a pigeon heaven. The Courtyard area abounds with ledges, niches and gutters and the shelter from the wind and the lack of human activity meant that it became a roost for a flock of some 40 pigeons.

The Lease and Service Charge Provisions

7. By a lease ("the Lease") dated 11 November 1994 the Property was demised by the Applicant to Colin Jack Gibbs for a term of 999 years from 1 July 1994 at a rent of one peppercorn plus an Insurance rent; the service charge was also reserved as rent. The Lease was assigned to the Respondent in October 2007 and he is the registered proprietor.

8. The service charge provisions of the Lease are in the First and Third Schedules. The First Schedule sets out the services the landlord is required to provide and they include what is usual in such leases, namely maintenance and repair, decoration when the landlord deems necessary but not more often than every three years, and include keeping proper books of account. There is specific provision to set aside such sums as the landlord reasonably requires to meet future costs as the landlord reasonably expects to incur.

9. The service charge percentage is 28%. We were told that for the smaller maisonette, 20A, it is 14%. Therefore the Applicant bears the balance namely, 58%.

10. A key fact is that no service charge was levied between 1994 and February 2010. The reason for this was that, between 1994 and 2007, the Applicant and the two leaseholders agreed to operate, instead of the service charge, what was termed before us as a self repairing agreement. Indeed, it was said that the service charge arrangements were only put in the lease to cover the eventuality that the self repairing arrangement broke down. So until 2007, each leaseholder repaired the roof and external structure of their flat and the Applicant did the same for the remainder of the property.

Origins of the Service Charge dispute

11. In the statement of case, the Applicant contended that in October 2007 the Respondent, when he purchased, agreed to continue the self repairing agreement. There was no written evidence to support this contention. Equally, the Respondent firmly stated that he had not agreed to do this. It was not necessary for the Tribunal to determine which party was correct. Suffice to say that the Applicant decided in July 2011, at the latest, and after advice, that the self repairing agreement had to be abandoned and the service charge provisions brought into effect. The company considered that they were only entitled to go back 18 months so have sought to operate those provisions only from March 2010. The Respondent does not seek to contend that the Applicant is not entitled to do this but does challenge the expenditure sought to be recovered.

12. There are a number of reasons why there was two and a half years between the Respondent's purchase and the activation of the service charge provisions. Whether or not the Respondent initially agreed to the self repairing arrangement or not, there are other matters in dispute between the parties and it seems that until negotiations broke down completely, it was hoped to have a complete resolution of all issues. Those other issues in dispute are beyond the jurisdiction of the Tribunal but do impact on the parties' approaches to the service charge. Thus there is a dispute whether a roof void is included in the demise of the Property; the Respondent contends that a piece of guttering caused dampness to the Property and may wish to claim that it impacted on his letting of the property; and there was what appeared to the Tribunal to be dry rot in the floor of the kitchen area of the Property which the Respondent contended was the result of a leak in the external walls but the Applicant considered was caused over a longer term by a leak from a water tank internally.

13. However, the main area of dispute concerned alterations internally to the Property. The Respondent had sought planning permission (which was granted) to convert the Property into two flats and, it seems, commenced works before getting the Applicant's binding approval. Whatever the details (and the Tribunal did not need to know them) the fact is that on our inspection, the Property seems currently uninhabitable, with the kitchen ripped out, the bathroom not in use and walls removed and replacements barely begun. Apparently, the work stopped some time ago and has not been resumed.

14. By a letter of 9 November 2010, the Respondent's solicitor formally required the Applicant to repair the roof of the Property in accordance with the landlord's obligations under the terms of the Lease. It seems that the need to repair the roof was recognised earlier than 2010. The Applicant served a notice under section 20 of the Landlord and Tenant Act 1985 in September 2011 to repair that roof and the works were underway at the date of the hearing. No objection was made by the Respondent to the validity of such notice which appeared to the Tribunal to meet the statutory requirements. The Applicant contends, and the Respondent denies, that it was the need to repair the roof of the Property that led to the Respondent rejecting the self repairing agreement. Though there was a point when the Respondent sought to suggest (late) that an alternative contractor should be sought, at the hearing the Respondent, through his solicitor, conceded that he was obliged to pay 28% of the works of repair that are underway and covered by the September 2011 s20 notice.

15. From the Applicant's point of view, it became necessary to seek the Tribunal's determination on the service charges levied in the two accounting periods 1 March 2010 to 31 August 2011 and 1 September 2011 to 31 August 2012. For the period from July 2011 to June 2012, the Applicant sent detailed, and to the Tribunal clear and helpful, letters and notices to the Respondent (though their clarity was not accepted by the Respondent). We refer to the various issues and contentions raised in the hearing below but the regrettable fact is that the Respondent chose not to reply in writing to any of the matters raised relating to the service charge, either directly or through his solicitor nor was anything disputed, paid or offered by way of service charge payment, notwithstanding the fact that performance of the landlord's obligations in the Lease is conditional upon payment of the service charge. The excuses offered at the hearing, that the Respondent did not trust the directors of the Applicant or that it was unclear whether to reply direct or to the Applicant's solicitors, seem lame in the extreme.

The service charge issues

16. There were four issues which the Tribunal had to address as presented by the statements of case. Two aspects were settled by agreement or concession at the hearing. Those issues are:

1. The reasonableness of the service charge levied in the period March 2010 to August 2011;
2. The reasonableness and timing of the service charge levied on 24 June 2012 in respect of the twelve months to 31 August 2012;
3. The validity and reasonableness of the request for sinking fund payments made in September 2011 for the same period;
4. The appropriate rate of interest for any service charges found by the Tribunal to be properly payable.

We will deal with each issue in turn.

Service charges for the period 1 March 2010 to 31 August 2011

17. We determine that a service charge is payable from March 2010. The Applicant faced difficulties in getting a service charge underway given that none had been payable before because the Lease provided for a provisional sum payable equal to that for the previous financial year. We consider it was entitled to seek recovery for the previous 18 months in July 2011 and it was also sensible to set out the annual expenditure for that period. Since the Lease also provided for financial years to 31 August, it was also right to make the first period one of 18 months to that date. The Respondent made no serious objection to the principle and conceded something was payable.

18. The service charge account requested payment of £706.58. Subject to a wider submission made by the Respondent, see below, no objection was taken to £250 of this as it related to nearly £6,000 worth of external decorating but only £250 was recoverable as no s20 notice had been served; nor were there concerns raised at 28% of £195 for some minor roof repairs. But the Respondent did take objection to the series of charges totalling over £1,350 for work to deal with the pigeons. These related to materials and for the directors personal labour in clearing and removing liquid pigeon faeces on three occasions on a three monthly basis; and on the last occasion installing professional anti-pigeon spikes and netting. The objection was that the charge for their own labour at £120 per day was unjustified and that it should have been done professionally. There was also an objection that it had brought down a piece of guttering. This latter seemed to the Tribunal to be improbable

and it was more likely to have been because of heavy snow (as the Applicant contended). The Respondent offered no expert or other evidence on the issue.

19. The Tribunal gave this issue anxious consideration. It would have certainly have been very reasonable for a professional firm to have been employed whatever the cost; no-one could expect the landlord's directors to do such a hazardous task themselves. But the Tribunal decided that there was nothing to prevent self help and making a reasonable charge for the work done. The Respondent had offered no evidence to show that the charge was unreasonable and the Tribunal considered a professional charge would almost certainly have been higher. The installation of spikes and netting had been largely successful and had solved a serious health hazard. We therefore determine that the charges were reasonable, were not excessive and that the Applicant was entitled to make a reasonable charge for its own labour. The total service charge levied of £706.58 before interest was reasonable.

20. However, the Respondent raised a number of related objections to contend that, at least, no charge was payable at present because due process had not been followed. Firstly, the Respondent contended proper books of account had not been kept, that the demand produced did not show income received, had not been produced in the correct way and it had not been certified as the Lease requires. The Tribunal rejects these contentions. The lease only requires an account showing annual expenditure and this had been supplied; and certification is not essential, but rather the Lease seeks to make the expenditure statement conclusive evidence once so certified. The Applicant indicated that there were full books of account and was willing to supply copies on request but no request had been made. The Tribunal considered that essential requirements of the Lease in relation to the service charge process have been satisfied.

21. The Respondent further contended that he was not required to pay 'until a system is in place to collect payments from all occupants of the Building'. This reflected the fact that the Applicant was not seeking a service charge from the lessees of Flat 20A (14%) and had not put into any account payments for its own 58%. The Applicant explained that just before the dispute arose in 2009/10, Mr and Mrs Kovacs, the Lessees of 20A, had under the self repairing agreement, repaired the roof over their own flat. The directors of the Applicant considered it unfair that they should now pay towards the cost of repair to the roof of Flat 21A. So they did not intend to levy a charge for that expenditure. The Tribunal consider that the Applicant has a separate contract with each lessee. If it chooses, especially for good reason, to waive certain service charges then it is free to do so. Moreover, the Tribunal can see no reason why the Applicant, where it has to contribute itself, must put the sums into a management account. Neither the general law, nor the Lease, requires this to be done. Even were we to be wrong on that point, that fact would not absolve the Respondent from meeting his own service charge obligations.

22. For all these reasons, we determine that the service charge levied of £706.58p was properly levied in accordance with the Lease and is reasonable.

Service charges for the period 1 September 2011 to 31 August 2012

23. Under the terms of the lease, the service charge may be a provisional sum equal to that payable the previous 12 months; but it may also be calculated on what the annual expenditure is likely to be.

The Applicant chose not to ask for a provisional sum but waited until the section 20 notice served and the roof works were ready to commence, and, on 24 June 2012, the last quarter day of the period, properly served the service charge estimate that solely related to the roof works. The Applicant is not seeking a service charge contribution in respect of any other matter. We consider this approach was valid; serving towards the end of the financial year merely absolved the Respondent from paying sums earlier.

24. The Respondent conceded in his statement of case, and through his solicitor at the hearing, that he accepted the contractor chosen, who submitted the lower tender, and he was willing to pay his 28% share. Since we find the process acceptable, we determine formally that the Respondent is obliged to pay the charge demanded on 24 June 2012.

Sinking Fund for 2011-12

25. Having decided to revert to the provisions of the Lease, the Applicant, sensibly in the view of the Tribunal, began to operate the reserve or sinking fund provisions in the Lease. The request for sinking fund payments was made by a letter dated 1 September 2011 for the twelve month accounting period commencing that day. The Lease, in clause 7 of the First Schedule, permits the setting aside of such sums as the landlord reasonably requires to meet future costs of repair, maintenance and renewal.

26. The Respondent did not challenge the validity of the letter or notice and accepted that the Respondent should pay what was reasonable (though, again, the Tribunal notes that no payments have been made nor any offer made prior to the hearing). What is challenged is the reasonableness of the request for 28% of the reserve fund set at £2,500 for the year, namely £175 payable, in accordance with the Lease, on the usual quarter days. Once again, the Respondent proffered no evidence but merely suggested that £75 per quarter would be more reasonable.

27. The Tribunal is clearly of the view that the sum requested was eminently reasonable. The notice set out the need to provide for redecoration every five years (the Lease permits as often as every three years) and the plans to undertake this in 2015. With the aid of photographs, the Applicant also set out the need for remoulding cornicing and fitting lead flashings in the future. They set out, with the aid of current estimates, the likely cost, conservatively estimated of £10,000 and their plan to use the reserve fund to build up this sum over four years. The leaseholder of Flat 20A was asked to pay 14% and has done so. We find that the Applicant has scrupulously followed the suggestion in paragraph 9(2) of the Service Charge Residential Management Code of taking the expected future cost and dividing by the number of years expected to pass before the work is done.

28. Once again, the defence of last resort was for the Respondent to argue that the Applicant should put in its 58% share (before he had to pay anything). It may do so; but there is no rule or requirement in the Lease that it should do so. We can understand the Respondent's concern should the Applicant go into liquidation but provided the bank account into which these sums are paid is a trust or client account, the leaseholders are protected. We therefore determine that the Respondent was liable to pay the service charge reserve fund payments quarterly at the rate of £175 on the usual quarter days in 2011-12.

The appropriate rate of interest on overdue payments

29. The Lease defines the appropriate interest rate as 4% per year above the base lending rate of the National Westminster Bank plc. Base lending rate is now known as base rate and has been at 0.5% since 2009. The parties agreed at the hearing that the appropriate rate of interest to be applied was therefore 4.5%. The Lease provides for interest to be charged 14 days after the payment is due. The calculation below is done on that basis.

Determination

30. For the above reasons, the Tribunal determines under section 27A of the Landlord and Tenant Act 1985 that the following service charges payments are now due as at 31 August 2012 from the Respondent Richard Candy to the Applicant Anchorgrove Ltd as follows:

For the Accounting Period 1 March 2010 to 31 August 2011:
The sum of £706.58 plus interest for 351 days at £30.58 making a total of **£737.16**

For the Accounting Period 1 September 2010 to 31 August 2012:
The sum of £2,520 plus interest for 53 days at £16.47 making a total of **£2568.47**

In respect of the reserve fund for the Accounting Period 1 September 2010 to 31 August 2012
The sum of £175 plus interest for 322 days namely £6.95, total £181.95
The sum of £175 plus interest for 235 days namely £5.07, total £180.07
The sum of £175 plus interest for 146 days namely £3.15, total £178.15
The sum of £175 plus interest for 53 days namely £1.14, total £176.14
Making a total of **£716.31**

Making a grand total of **£ 4042.79**

31. The sum of £4,042.79 is the amount due on 31 August 2012; for every further day until payment interest will accrue at the daily rate of about 50p (49.84p to two decimal points) (and while base rate remains at 05%).

Professor David Clarke
Tribunal Chairman
4 September 2012