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H.M. COURTS & TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL

Sections 19, 27A and 20C of the Landlord and Tenant Act 1985 (as amended)
("the Act")

Case Number:	CHI/43UM/LIS/2012/0020
Property:	3 Guildford Road, Woking, Surrey GU22 7PX
Date of application:	16 January 2012
Applicant:	First Commercial Ventures Ltd (leaseholder)
Respondent:	Xafinity SIPP Services Ltd (freeholder)
Appearances for Applicants:	Mr Robin Smith, director of Applicant
Appearances for Respondent:	Mr Christopher Haigh, beneficial owner of freehold property Mr Barrie Morse, witness
Date of hearing	23 July 2012
Tribunal:	Ms E Morrison LLB JD (Lawyer Chairman) Miss C D Barton BSc MRICS (Valuer Member) Mr J S McAllister FRICS (Valuer Member)
Date of the Tribunal's Decision:	31 July 2012

The Applications

1. The Applicant leaseholder originally applied under section 27A (and 19) of the Act for a determination of its liability to pay service charges for service charge years 2006-12. The Respondent was the freeholder of the block until 27 June 2012. In the course of the hearing, the applications in respect of 2007 and 2012 were withdrawn.

2. The Tribunal also had before it an application under s 20C of the Act that the Respondent's costs of these proceedings should not be recoverable through future service charges.
3. The Tribunal may also consider, pursuant to regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, whether one party should be required to reimburse the Tribunal fees incurred by another party in these proceedings.

Summary of Decision

4. The service charges recoverable by the Respondent are as follows:

Year	£
2006	697.00
2008	1063.85
2009	1642.41
2010	701.95
2011	730.81

5. An order is made under section 20C of the Act, but no order is made for reimbursement of the Applicant's fees.

The Inspection

6. The Tribunal inspected the subject property on the morning of the hearing, when the parties' representatives were also in attendance.
7. The building is of non basement type and comprises four storeys. It is mid terraced, being part of a long parade of similar terraced property facing Guildford Road - part of the one way traffic system in a secondary shopping area of Woking - but within walking distance of the town centre and railway station. Parking is afforded in metered bays to the front. There is rear access to the ground floor accommodation from a slip road off Victoria Road. At ground floor level there is a Pizza Hut takeaway outlet and also a separate doorway accessible straight off the pavement leading to a shared hallway and stairs up to 3 self contained flats which are arranged on each of the 3 floors above.
8. The building is substantial, having probably been built in the early years of the twentieth century and is a mixture of brick, tile hanging, painted render and pebble dashed wall finishes with a relatively complex roof structure. The main section of roof is pitched with a large gable to the front and is covered in clay tiles. It incorporates a dormer window at the rear of painted timber framed type under a shallow monopitch tiled roof and also a long and steeply pitched tile covered 'catslide' section of roof to the left side of the rear elevation. There are old metal framed single glazed roof lights fitted high up in the main roof slope to the rear giving light to the second and top floor landings. Gutters and downpipes are fitted to the front and rear. At the front there is a small flat metal covered roof projection

over the bay window and there are further flat and felt covered roofs to the projecting ground floor areas at the rear.

9. There are two substantial chimney stacks. Both are of brick and render construction and are shared with the premises adjoining on the Northern side of the property. One is built astride the main ridge to the roof and serves the main part of the property. The other, to the rear, is tall and serves the Pizza Hut section of the property. A large metal extractor fan also serving Pizza Hut protrudes through the catslide roof just behind the chimney stack.
10. Windows comprise a mixture of painted timber, single glazed sliding sash types and replacement uPVC framed sealed unit double glazed types. These have been fitted into painted outer timber frames. There are soil and vent and waste pipes attached to the rear wall of the building discharging to mains drainage at the rear.
11. There is a fire alarm system for the flats with a control panel fitted in the ground floor hallway. The communal areas are carpeted and walls are colour washed. The Tribunal was informed that mains electricity, water and drainage were connected to the premises.

The Lease

12. The lease is dated 23 November 1998 and is for a term of 125 years from 29 September 1998 at a yearly ground rent of £50 for the first 25 years and rising thereafter. The demised premises are described in the First Schedule as comprising "part of the first, second and third floors of the building and the entrance lobby as shown edged red" on the lease plan".
13. Other relevant provisions in the lease may be summarised as follows:
 - (a) The lessee is required to pay such proportion of the service charge for the building as the lessor's surveyor shall calculate and determine;
 - (b) The service charge year starts on 1 January and on account payments may be required on 1 January and 1 July of each year;
 - (c) The amount which may be recovered through the service charge is described in clause 5.3 as being the costs of the heads of expenditure in the 6th Schedule but reduced by any sum properly recoverable from the lessee/occupier of the ground floor of the building;
 - (d) The 6th Schedule lists the costs incurred under clause 6 (lessor's covenants), the costs of the lessor's surveyor in determining and calculating the service charge and preparing accounts, and "any other expenditure incurred by the Lessor in respect of or incidental to the performance and exercise by the Lessor of the obligations and powers imposed or conferred under the provisions of this Lease or any other lease of any part of the Development";
 - (e) Under clause 6.1 the lessor covenants to maintain, repair etc. the building "but excluding therefrom those parts which are not the subject of this lease";
 - (f) Under clause 6.2. the lessor covenants to repaint and decorate the exterior of the building;

- (g) By clause 9.1. the demised premises are further defined to “include all windows” and clause 3.2.1. is the lessee’s covenant to repair the demised premises;
- (h) Under clause 4.6 the lessee covenants to “use the Demised Premises as offices or for residential purposes...”.

The Law

14. The relevant parts of the provisions in the Act are as follows:

18. Meaning of “service charge” and “relevant costs”.

(1) In the following provisions of this Act “service charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent—

- (a) which is payable, directly or indirectly, for services, repairs, maintenance improvements or insurance or the landlord’s costs of management, and*
- (b) the whole or part of which varies or may vary according to the relevant costs.*

19. 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 provision 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.*

20 Limitation of service charges: consultation requirements

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—

- (a) complied with in relation to the works or agreement, or*
- (b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.*

(2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

- (a) an amount prescribed by, or determined in accordance with, the regulations, and*
- (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.*

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.

By Regulation 5 of the Services Charges (Consultation etc) (England) Regulations 2003, the appropriate amount for qualifying works is an amount which results in the relevant contribution of any tenant being more than £250.

20C. 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, residential property tribunal or leasehold valuation tribunal, or the Upper 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.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

27A. 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.*

(2) Subsection (1) applies whether or not any payment has been made.

Representation and Evidence at the Hearing

15. The Applicant's case was presented by its director Robin Smith. The Respondent's case was presented by Christopher Haigh, the beneficial owner of the freehold property, the legal title of which was held in the name of the trustee of Mr Haigh's self-invested pension scheme. Evidence was given in support of the Respondent's case by Barrie Morse, the Respondent's surveyor. Each party had submitted written statements of case with documentation in support.

Service Charge Year 2006

16. Mr Smith disputed the management fees of £282.00 inc. VAT for the building, of which £141 had been charged to the Applicant. He relied on the service charge account which indicated the only head of service charge expenditure in that year was the insurance premium of £1244.45 for the building. Mr Haigh argued the fee was reasonable: there would have been at least one site inspection during the year by Mr Morse (who then worked next door) and a meeting between Mr Haigh and Mr Morse to consider if any work was required to the building and to set a budget. Mr Morse said his charging rate (as an employee of Wilkins Surveyors at the time) was £100 - £110 per hour plus VAT. No records of work done or invoices were produced. The Tribunal was told Wilkins is no longer trading and its records are unavailable. Mr Morse accepted that there was no written management agreement in place during this year (or any subsequent year) but he claimed to be aware of the RICS Service Charge Residential Management Code.

Determination:

17. There was no evidence before the Tribunal that any chargeable work was done other than sending out the insurance invoice. The lease does not specifically provide for the payment of management fees other than the costs of the lessor's surveyor specifically referred to in 6th schedule para. 2. The 'sweeping up' clause in para. 3 of that schedule would cover the cost of invoicing for insurance, but cannot extend to other general management work which is in any event unproven. Under section 19 of the Act, service charges must be reasonable. The Tribunal finds that a reasonable charge for sending out two invoices (one to each leaseholder in the building) would be £50 inc. VAT. One half of this sum is payable by the Applicant. Accordingly the total service charge payable by the Applicant for 2006 is £697 (£672 insurance and £25 surveyor's fee).

Service Charge Year 2007

18. After hearing the Respondent's submissions, Mr Smith withdrew his objection to the service charge for this year and accordingly the Tribunal makes no determination.

Service Charge Year 2008

19. Mr Smith disputed the management fees in the total sum of £1690, of which the Applicant was being asked to pay 50%. The records revealed that the budgeted sum was £940, and an invoice had been submitted just two months into the year on 4 March 2008 for exactly this amount which described the work as 'fees in relation to service charges, budget reconciliation and work in connection with blocked drains affecting Pizza Hut'. The additional charges (no invoices produced) were £250 for 'inspection and reporting on drains overflow' and £500 for 'internal water damage, inspection, reporting and monitoring'.
20. Mr Smith said he knew nothing about the drains but accepted there had been a water leak affecting the top floor flat and he had paid a plumber to do remedial

work after receiving a report from Mr Morse about the problem. He believed all the sums were arbitrary.

21. Mr Morse explained he had been called in by the tenant of the top flat regarding the water leak and he had inspected, reported to Mr Smith and liaised with the plumber. With regard to the drains, there had been an ongoing problem where effluent had built up in the inspection chambers, which it transpired was due to items flushed down from the Applicant's flats. A local builder had done some 'rodding'.
22. Mr Morse said he had also carried out some measurements and on 8 February 2008 he wrote to Mr Smith regarding new apportionment percentages of various service charge elements.

Determination:

23. Any work carried out by Mr Morse in relation to the water problem in the top flat is not chargeable, as it was the Applicant's responsibility and is simply not a head of service charge expenditure recoverable under the lease. If Mr Morse carried out work for the Applicant in this regard it may be recoverable quite independently of the service charge, but that is not for the Tribunal to determine. With respect to the drains, there is no record of the work done or time spent by Mr Morse, and the service charge account for this year records no expenditure whatsoever on maintenance or repairs, to the drains or otherwise. There are no records of work carried out by Mr Morse. The Tribunal accepts that Mr Morse carried out some measurements. However the sparse evidence simply cannot support the fees demanded. Using its own knowledge and experience and doing the best it can with the evidence, the Tribunal determines that a reasonable fee would be 5 hours @ £100 ph + VAT = £587.50, of which the Applicant is liable for one half. Accordingly the total service charge payable by the Applicant for 2006 is £1063.85 (£770.10 insurance and £293.75 surveyor's fee).

Service Charge Year 2009

24. In this year works were carried out to the roof areas and rear windows as one project. Mr Smith disputed liability to pay 70% of roof repair works at £5610.85 and liability to pay 50% of rear window repairs at £1123.63. He accepted there had been meetings to discuss the works before they started but no agreement had ever been reached on the Applicant's liability. He did not dispute the overall cost, the need for the work, or the standard of the work done, but he disputed the proportion that the Applicant should pay. In addition to the above figures, there was a charge of £2259.75 for Preliminaries which was not disputed. The total project cost being charged to the Applicant was therefore £8994.23.
25. With respect to the roof works element, Mr Smith thought the Applicant's share of the total cost should be 35%, This was on the basis that about 30% of the roof work was on the roof area (including the rear catslide roof on which is a chimney stack and extraction fan) that was not over the Applicant's demise but only over Pizza Hut. That work should therefore be paid for by Pizza Hut alone. The remaining 70% of the work was to roof areas over the main structure which benefitted both the Applicant and Pizza Hut and should therefore be borne equally between them.

26. With respect to the window repairs, Mr Smith said although 5 of the 7 windows pertained to the Applicant's demise, the 3 principal windows were uPVC framed with outer painted timber frames of minimal size. The other two windows (bathrooms) comprised small sliding timber sash types with painted timber frames. The remaining 2 windows were larger sliding timber sash frames and were part of Pizza Hut's demise. Overall Mr Smith suggested that an apportionment of 45% instead of 50% would be reasonable.
27. Mr Morse said that detailed calculations had been done to come up with a fair apportionment on the roof work. The roof configuration was not simple. There was a large tiled gable to the front and a further covering over the dormer roof to the rear. The top section of the catslide roof covered bathrooms at top and second floor level. More work was done on the main roof than the catslide roof, where it was mostly just replacing some tiles. He accepted that the work had included renewing the rendering to the chimney stack. There was no priced specification available showing how the various elements of the work had been individually priced.
28. As to the windows, considerable repair had been required to the 3rd floor dormer and supporting timber frame and there were isolated sections of wet rot to the frames at first and second floor level. The rear windows belonging to the Applicant's demise were those most exposed to the weather and needed the most work. They had been repaired and redecorated. Mr Haigh argued that apportioning 50% of the cost to the Applicant, who had 5 out of the 7 windows, was skewed in the Applicant's favour.
29. The Respondent conceded there had been no formal consultation under section 20 of the Act. This issue was considered during submissions for 2007 (before objection was withdrawn by the Applicant). Mr Haigh's position was that he had been advised by solicitors in 2005 that this was a commercial lease to which section 20 had no application or relevance.

Determination:

30. With regard to the roof work the Tribunal does not accept that either the Applicant's proposed proportion of 35% or the Respondent's proposed proportion of 70% is reasonable. The roof over the main building gives protection to all 4 floors of accommodation beneath, of which the Applicant's demise comprises 3 floors. This would prima facie support a 75% proportion for the Applicant in respect of that roof area. However the vast majority of the catslide roof is outside the Applicant's demise and under clause 6.1 of the lease the cost of that work cannot form part of the service charge. The precise extent of work carried out on each element is unknown but it is clear that there was substantial work on the rear chimney stack serving Pizza Hut, and for this reason the Respondent's proposal is also rejected. Insufficient evidence was provided to permit the Tribunal to make detailed calculations. Accordingly, doing the best it can, and using a common-sense approach having regard to the physical attributes and area of the roofs, the Tribunal determines that a reasonable apportionment of the total cost of the roof work would be 50% to the Applicant, namely £4007.75.

31. With regard to the rear windows, both Applicant and Respondent have failed to take cognisance that under the lease the repair (as opposed to the redecoration) of the windows to the Applicant's demise is the Applicant's responsibility. This work does not fall within the Respondent's repairing obligation. If the repair is in fact carried out by the Respondent with the agreement of the Applicant, the cost may be recoverable, but not as part of the service charge. However the repainting and redecoration of the building is the lessor's responsibility under clause 6.2 and the cost of this is recoverable through the service charge. Again the Tribunal had no breakdown of cost for the window works, and again doing the best it can and utilising its own knowledge and experience, the Tribunal determines that a reasonable charge for the repainting and redecoration element of the work to the Applicant's rear windows is £500.00.
32. There remains the question of whether section 20 of the Act applies to limit the total sum recoverable in respect of the works to £250.00 (barring any future successful application for dispensation under section 20ZA). Under section 18 'service charge' means an amount payable by a tenant of a dwelling. If the Applicant is a 'tenant of a dwelling', the provisions of sections 18-30 of the Act will apply; otherwise they will not. Mr Haigh said that Mr Smith had never contested his solicitors' assertion in 2005 that this was a 'commercial lease' to which section 20 had no application. He said that when the lease was granted, the demise was used as offices and had not yet been converted into flats.
33. 'Dwelling' means a building or part of a building occupied or intended to be occupied as a separate dwelling: section 38 of the Act. In *Oakfern Properties Ltd v Ruddy* [2006] EWCA Civ 1389 (applying the earlier county court decision of *Heron Maple House Ltd v Central Estates Ltd* [2004] L & TR 17), the Court of Appeal held that section 18 had to be given the meaning that, on its face, it bore. It meant 'tenant of a dwelling' and not 'tenant of a dwelling and nothing else'. Furthermore section 38 did not require the tenant to be in occupation of the dwelling. In *Oakfern* the leaseholder had a lease of all the flats in the building. The freeholder argued that a mesne landlord should not be able to take advantage of the service charge provisions of the Act. However this argument was rejected: the leaseholder was held to be a 'tenant of a dwelling' to which the relevant provisions did apply.
34. Applying this authority, the Tribunal determines that formal section 20 consultation should have taken place with respect to the works carried out in 2009. The use of the demised premises at the date of the lease is irrelevant; what matters is their use at the date of the works. As no such consultation took place, the amount recoverable from the Applicant is limited to £250. Accordingly the total service charge payable by the Applicant for 2009 is £1642.41 (£666.91 insurance, repair works £250 and £725.50 surveyor's fee).

Service Charge Year 2010

35. Mr Smith disputed the management fee of £350, of which the Applicant's share was £175. The only work done in respect of the Applicant's demise was sending out the insurance demand. He should not have to pay for random visits by Mr Morse or work which only relates to the Pizza Hut demise.

36. Mr Haigh's case was that Mr Morse had spent time 'managing the property' and dealing with him over non-payment of invoices by the Applicant. Mr Morse confirmed that he visited about once every 3 months, 'having a quick look' when he visited another nearby property in which he had an interest. He didn't record these visits. No supporting invoice was produced. His charging rate was 'probably £100 per hour plus VAT'.

Determination

37. The only substantiated work for which a charge may be made is in respect of the insurance invoice, for which a reasonable fee is £25 inc VAT. Accordingly the total service charge payable by the Applicant for 2010 is £701.95 (£676.95 insurance, and £25 surveyor's fee).

Service Charge Year 2011

38. Again Mr Smith challenged the management fee this year of £648, of which the Applicant's share was £324. He was aware of no work carried out other than invoicing for the insurance premium.
39. Mr Haigh's case was that this charge included Mr Morse's time in carrying out a number of site visits (by now he no longer worked next door), corresponding with Pizza Hut over their shop front, overseeing repairs to Pizza Hut's flat roof, corresponding with the Applicant regarding arrears and meeting with Mr Haigh. Mr Morse had also examined an asbestos survey report commissioned by Pizza Hut which he said included an inspection of 'a small snippet' of the Applicant's common parts' although no asbestos was found. Mr Morse accepted Mr Smith had not been informed about the asbestos report. No copy of the report was shown to the Tribunal. No invoice was produced to support Mr Morse's charges.

Determination

40. Again, the only substantiated work in relation to the Applicant's demise for which a charge may be made is in respect of the insurance invoice, for which a reasonable fee is £25 inc. VAT. There is no evidence whatsoever that the asbestos report was commissioned in respect of the Applicant's demise or that it benefitted it in any way. Accordingly the total service charge payable by the Applicant for 2011 is £730.81 (£705.81 insurance, and £25 surveyor's fee).

Service Charge Year 2012

41. Upon Mr Haigh confirming that the Respondent, who sold the freehold on 27 June 2012, would not be raising any service charge demands relating to 2012, the Applicant withdrew his objection to the anticipated charges and accordingly the Tribunal makes no determination.

Section 20C Application/Reimbursement of Fees

42. In deciding whether to make an order under section 20C a Tribunal must consider what is just and equitable in the circumstances. The circumstances include the conduct of the parties and the outcome of the proceedings. Mr Smith requested reimbursement of the Applicant's tribunal fees on the basis that if successful, after many previous attempts to resolve matters, it would be unfair for the Applicant to bear the burden of the fees. Mr Haigh objected, saying many of the matters raised by Mr Smith had been dealt with, but then raised by him again, and others had been raised only in these proceedings, years after the event. Mr Haigh had incurred substantial legal costs consulting solicitors; Mr Smith had not used solicitors.
43. The Applicant has been the successful party in these proceedings and it was entirely appropriate for this application to have been made. If the Respondent's costs were recovered through the service charge this would in effect be penalising the Applicant for his success. For those reasons the Tribunal finds that it is just and equitable for an order to be made that the Respondent's costs of these proceedings (if otherwise recoverable under the lease through the service charge) are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant.
44. However, the Tribunal does not order any reimbursement of fees. Although the outcome of this application has been in the Applicant's favour, there has been a continuing and long-term failure on both sides to focus on the actual terms of the lease and the applicable legal provisions. Both sides have contributed to the current situation by failing to identify the correct issues and deal with these in a timely manner. In effect therefore, each side will bear its own costs.

Chairman



E Morrison LLB JD

Dated: 31 July 2012