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HM COURTS & TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL
OF THE
NORTHERN RENT ASSESSMENT PANEL

REASONED DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

Landlord and Tenant Act 1985 - Sections 27A and 20C

Property: Flat 25, Block 2B, The Waterfront, Gibbon Street, Openshaw, Manchester M11 4DB

Applicant: Ms.S.Pank

Respondent: Sportcity 4 Management Limited

Tribunal members: Mrs.C.Wood (Chairman)
Mr.D.Bailey

Date of decision: 7 June 2012

DECISION

Background

1. By an application dated 11 November 2011 ("the Application") the Applicant requested a determination pursuant to Section 27A of the Landlord and Tenant Act 1985 ("the Act") the payability of a service charge in respect of the service charge years 2007/8, 2008/9, 2009/10 and 2011/12.
2. In particular, the Tribunal was requested to determine in respect of each of the years identified in the Application:
 - 2.1 whether or not it was reasonable to ass the costs of defects repairs back to leaseholders rather than back to the developers?
 - 2.2 why were claims made on the building insurance which had the direct effect of damaging the claims history leading to unsustainable premiums?
 - 2.3 whether commission for insurance, "so far undisclosed", is reasonable?
3. Directions dated 16 December 2011 were issued to the parties pursuant to which the Applicant filed her Statement of Case dated 25 January 2012. The Respondent acting though its managing agents, Scanlans, requested an extension of time for filing its Statement of Case which was granted. The Respondent's Statement of Case was received under cover of the letter dated 14 March 2012.

Inspection

4. The Tribunal made an external inspection of the Premises and of the external and internal common parts on Friday 4 May 2012. The inspection was attended by Mr. Robert Dean for the Applicant, Mr. Paul Christopher and Mr. Ian McGuinness of Scanlans, Mrs. A. Hookvale, a director of the Respondent and Mr. Richard Thorogood of Trinity Estates (Property) Management Limited (former Managing Agents for the Respondent) ("Trinity").

The Lease

5. A copy of the lease dated 3 August 2005 made between Amec Developments Limited (1) Countryside Properties PLC ("Countryside") (2) the Respondent (3) and the Applicant (4) in respect of the Property ("the Lease") was contained in the Applicant's Statement of Case and marked "B".
6. Clause 1 of the Lease contains the following definitions:
 - 6.1 "Block" means "the land within the Estate edged green on the Plan together with the building erected thereon comprising in total 47 flats known as Plots 1 to 47 together with the parking accommodation" (referred to in this Decision as "Block B");
 - 6.2 "Services" means "the services to the Property set out or referred to in the Fifth Schedule and in the Sixth Schedule";
 - 6.3 "Proportion" means "A proportion based upon the percentage the aggregate square footage of the property bears to the aggregate square footages of each unit of accommodation within the Block or the Estate as the case may be capable of enjoying the benefit of the Services or any of them subject to variation in accordance with Clause 5.1.4";
 - 6.4 "Service Charge Year" means "1st July to 30th June or such other 12 month period which the landlord chooses from time to time";
 - 6.5 "Half-Yearly Dates" means "the first day of the Service Charge Year and the first day of the seventh month of the Service Charge Year being 1st July and 1st January at the date of this Lease".
7. Clause 4.3 of the Lease contains a covenant on the part of the Lessee "...in respect of every Service Charge Year to pay on demand the Proportion to the Lessor by two equal instalments in advance on the Half-Yearly Dates".
8. Clause 5.1 of the Lease contains a covenant by the Management Company to "carry out the works and provide the services specified in the Fifth Schedule and in the Sixth Schedule appropriate to the Property".
9. Purposes for which the Service Charge is to be applied as set out in the Fifth Schedule include the decoration and repair of structure and maintenance of grounds (paras. 1 – 3), decoration and repair of common parts (paras. 4 and 5), and insurance (para.12).

10. Paragraph 12 provides as follows:
“ To keep the Block and the buildings associated therewith...insured against loss or damage by fire lightning explosion earthquake storm flood escape of water riot civil commotion subsidence heave or landslip and such other risks as the Management Company shall think fit...”.

The Law

11. Section 18 of the Landlord and Tenant Act 1985 (“the 1985 Act”) provides:
- (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.
 - (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
 - (3) For this purpose –
 - (a) “costs” includes overheads, and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.
12. Section 19 provides that –
- (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.
13. Section 27A provides that -
- (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 date at or by which it is payable, and
 - (d) the manner in which it is payable.
 - (2) Subsection (1) applies whether or not any payment has been made.
 - (3)
 - (4) No application under subsection (1)...may be made in respect of a matter which -
 - (a) has been agreed by the tenant.....

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

14. In *Veena SA v Cheong* [2003] 1 EGLR 175, Mr. Peter Clarke comprehensively reviewed the authorities at page 182 letters E to L inclusive. He concluded that the word "reasonableness" should be read in its general sense and given a broad common sense meaning [letter K].

The Hearing

15. In his submissions, Mr. Dean for the Applicant with reference to the Applicant's Statement of Case made the following points:
- 15.1 with regard to the insurance, he said that there was one policy for both Block A and Block B;
- 15.2 the premium was apportioned between the two Blocks;
- 15.3 he referred to two examples of similar developments where the insurance premium was stated to be lower than for the Blocks, namely, a block in the immediate vicinity with a similar canalside location where he said that the current annual premium is £30,000; and a City Centre/Deansgate development of 84 apartments where he said that the current annual premium is £20,000. No written evidence of these comparative premiums had been included in the documents submitted to the Tribunal by the Applicant;
- 15.4 he explained that he had been unable to obtain a quote for Block B as brokers would not quote without a full claims' history. (The claims' history provided by the Respondent covered the period from 14 December 2005 to 11 January 2010. It was suggested that there had been no claims since July 2010.);
- 15.5 that payments by way of commission, whether paid by a managing agent or any other, still falls to be assessed by the Tribunal.
16. Mr. Thorogood made the following submissions:
- 16.1 the Development had been handed over to Trinity on 10 October 2005. In the first few years, there were a number of small claims in Block B, including 5 water damage claims. In addition, there had been 4 apartment to apartment leaks, whilst the boiler incident which had resulted in one of the two most significant claims had occurred in a flat in Block A. Also the claim for £31964 in June 2007 was in Block A;
- 16.2 the leak in the roof could have been attributable to storm damage as much as to any building defect;
- 16.3 there are 102 apartments in total and whilst 9 separate incidents have been attributed to boilers was not convinced that this indicated a manufacturing defect with the boilers. In any event, the position had not been helped by the subsequent insolvency of the boiler manufacturer;
- 16.4 he confirmed that the two Blocks were insured as a single block policy in the belief that this offered "economies of scale";
- 16.5 with regard to the Service Charge Proportion, he said that Trinity had charged the premium to both Blocks with an adjustment between 1- bedroomed, 2- bedroomed and 2 large bedroomed apartments;
- 16.6 with regard to the commission payments, he confirmed that OAMPS was a broker with no connection to Trinity. PKN was a group outside the Trinity Group but there were common shareholders. It acted as an Intermediary arranging

- insurance for Trinity through, in this case, OAMPS. PKN employed their own staff who manage the insurance policies;
- 16.7 the Estate was re-valued when Trinity took it over at £8.77m, and then in February 2008 at £12.61m, and then again in February 2009 at £13.449m, and it was explained that this would account for some of the increase in the insurance premium. It has not been re-valued by Scanlans;
- 16.8 the appointment of caretaker has seen a reduction in the number of malicious damage claims, whilst there has also been an improvement in the surrounding area and in the quality of the tenants in the Blocks.
17. Mr. Dean then requested the Tribunal to make determinations as follows:
- 17.1 that the Summary Statement of Rights and Obligations which accompanies the invoices for service charge issued by Scanlans is not in the form as required by the Service Charges (Summary of Rights and Obligations and Transitional Provision) (England) Regulations 2007 ("the Regulations"); and,
- 17.2 that it was appropriate for the Tribunal to grant the Applicant's application under section 20C of the Act;
- 17.3 for reimbursement of the application and hearing fees paid by the Applicant.
18. Whilst the issue referred to in 17.1 had not been raised previously by the Applicant, the Respondent acting through Scanlans confirmed that it was agreeable to the Tribunal considering this matter in its determination.
19. In his concluding submissions, Mr. Thorogood said as follows:
- 19.1 with regard to the alleged building defects, within the first 2 years of Trinity's management, Countryside were asked, and did attend to some defects. However, in the circumstances of the development as a whole, Trinity regarded the defects' claims and related costs as minimal;
- 19.2 in their view, the increases in the insurance premiums were attributable, in part due to the revaluation from c£8m to c£13m during the relevant period, the number of claims and the reasons for those claims which were, in the main, other than related to the boiler and included vandalism, roof leaks, problem with the soil stacks, and apartment to apartment leaks;
- 19.3 he disputed the claim that problems with 9 boilers out of a total of 102 over 7 years indicated poor workmanship. Nonetheless, the matter was referred to insurers and efforts continue to recover costs from the developer and/or relevant sub-contractors.

The Tribunal's Determination

20. The Tribunal must apply a three stage test to the application under section 27A:
- (1) Are the service charges recoverable under the terms of the Lease? This depends on common principles of construction and interpretation of the lease.
- (2) Are the service charges reasonably incurred and/or services of a reasonable standard under section 19 of the 1985 Act?
- (3) Are there other statutory limitations on recoverability, for example consultation requirements of the 1985 Act as amended?

21. The Tribunal determines as follows:
- 21.1 that the commission paid to OAMPS in the following years:
- (a) 2007/8: £926.00
 - (b) 2008/9: £2073.00;
 - (c) 2009/10: £7515.00;
- and the brokerage commission paid by Scanlans to its insurance brokers which are averaging 15% of the premium are reasonable;
- 21.2 what were referred to as the administration fees paid in the following years:
- (a) to Stewart Andrew, in 2007/8: £6590.00;
 - (b) to PKN, in 2008/9: £6182.00;
 - (c) to PKN, in 2009/10: £8957.00;
- were regarded by the Tribunal as commission retained by the Respondent but the benefit of which should have been passed onto the leaseholders. In reaching this determination, the Tribunal had regard, in particular, to:
- (i) the lack of any evidence of Stewart Andrew/PKN being involved in any claims handling;
 - (ii) even had there been such evidence, the Tribunal considered that the number of claims over the relevant period (52 claims over 5 years) would not have justified "fees" at this level;
 - (iii) the evidence that claims' handling was carried out by Trinity and recompensed within their management fees;
- 21.3 that, having regard to the failure of the Respondent to comply with paragraph 12 of the Fifth Schedule of the Lease and, in the absence of any evidence that either Trinity or Scanlans had sought quotes from insurers/brokers of insuring the Blocks separately, the insurance premium should be apportioned between Block A and Block B as follows:
- (a) February 2009/February 2010: 60/40;
 - (b) February 2010/March 2011: 60/40;
 - (c) April 2011/December 2012: 55/45;
 - (d) January 2012/December 2012: 55/45 ;
- 21.4 that the Summary Statement of Rights and Obligations was in accordance with the Regulations;
- 21.5 that, having regard to all of the circumstances, it was just and equitable to grant the Applicant's application under section 20C of the Act;
- 21.6 not to make an order for reimbursement under paragraph 9 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003.
- 22 Although not part of its decision, the Tribunal recommends that the Respondent and its managing agents ensure that it is compliant with the terms of the Lease in calculating the Proportion of the Service Charge payable by the Applicant .

Catherine Wood

Catherine Wood
Chairman
Dated 7 June 2012