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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 - Section 27A
Landlord and Tenant Act 1985 – Section 20C

Properties: Flats 3 & 7, Lumb Close, Bramhall, Stockport SK7 2DB
Applicants: Mrs.J.Lowe (Flat 7) and Ms.S.Lowe (Flat 3)
Respondent: Fee Simple Investments Limited
Tribunal members: Mrs.C.Wood (Chair)
Mr.D.Pritchard
Date of decision: 1 December 2012

DECISION

Background

1. By an application dated 2 March 2011 (received 22 March 2012), (" the Application") the Applicants seek a determination of the reasonableness of the service charges in respect of the Properties for the years 2003/04, 2004/05, 2005/06, 2006/07, 2007/08, 2008/09, 2009/10, 2010/11 and 2011/12.
2. Directions dated 26 July 2012 were issued pursuant to which:
 - 2.1 a letter dated 31 July 2012 (together with documents referred to therein) ("the Applicants' Statement") was received from Mrs. Lowe on behalf of the Applicants on 3 August 2012;
 - 2.2 following the grant of an extension of the period for filing, under cover of a letter dated 7 September 2012, the Respondent's statement of case ("the Respondent's Statement") was received;
 - 2.3 outside the filing periods (as confirmed to the parties in the Tribunal's letter dated 23 August 2012) further documents were received from the Respondent under cover of a letter dated 13 September 2012 and a witness statement of Ms.N.J.Evans dated 21 November 2012, received on 22 November 2012;
 - 2.4 comments on the Respondent's Statement by the Applicants were received on or about 19 September 2012;
 - 2.5 a hearing was arranged for Friday 23 November 2012 following an external inspection of the Properties at 10am on the same day.

Inspection

3. The Tribunal made an external inspection of the Properties and of the external common parts on 23 November 2012. Neither party attended the inspection.
4. The Properties comprise 2 of 8 flats in 2 blocks of 4 flats each in Lumb Close. There are a further 2 blocks of 4 flats in Darwin Grove. The external common parts comprise car parking areas and some grassed areas to the front and rear of the blocks. There are no internal common parts. The garages have been demised to leaseholders and/or retained by the Respondent and do not form part of the external common parts.

The Leases

5. The Tribunal was provided with a copy of an undated lease made between New Century Investments Limited (1) and Mr.R.Marino and Miss S. Lowe (2) in respect of Flat 3, (" Flat 3 Lease") and a copy of a lease dated 8 December 1978 made between Philip J.Davies (Investments) Ltd.(1) and J.E.Baker (2) in respect of Flat 7, ("Flat 7 Lease"). (The Flat 3 Lease and the Flat 7 Lease shall be together referred to as "the Leases").
6. Although the Leases are not in identical form, the terms of the Leases are similar.
7. Under clause 4(ii) of the Flat 3 Lease, the Lessee covenants with the Lessor to "[C]ontribute and pay a fair and proper proportion of the costs, expenses, outgoings and matters mentioned in the Fifth Schedule hereto".
8. The matters referred to in the Fifth Schedule are as follows:
 - 8.1 the expenses of maintaining, repairing, redecorating and renewing the main structure...of the particular building forming part of the Estate of which the flat forms part (paragraph 1);
 - 8.2 the expenses of maintaining, repairing and renewing the gas and water pipes, drains and electric cables...used by the Lessee in common with the Lessees of the other flats (paragraph 2);
 - 8.3 the costs of cleaning and lighting the passages, landings, staircases...used by the Lessee in common...(paragraph 3);
 - 8.4 the costs of keeping the forecourts, ways and other parts of the Estate shown on the plan annexed hereto...in good condition (paragraph 4);
 - 8.5 the cost of decorating the exterior of the Estate (paragraph 5);
 - 8.6 all rates, taxes and outgoings...payable in respect of the forecourts, ways and other parts of the Estate (paragraph 6);
 - 8.7 the cost of insurance against third party risks in respect of the Estate (paragraph 7);
 - 8.8 an addition of fifteen per cent shall be made to the costs, expenses, outgoings and matters referred to in the preceding paragraphs of this Schedule for administration expenses when any repairs decorations or renewals are carried out by the Lessor it shall be entitled to charge as the expenses or costs thereof its normal and reasonable charges (including profit) in respect of such work.
 - 8.9 For this purpose of the Fifth Schedule, "Estate" is defined as "...all that parcel of land abutting on Lumb Close and Darwin Grove...comprised in titles numbered GM132856 and GM132596 and all those flats erected thereon numbered 1 to 8 (inclusive) Lumb Close and 2 to 19 (inclusive) Darwin Grove..." but excluding the garages erected thereon.

9. Under clause 4(ii) of the Flat 7 Lease, the Lessee covenants with the Lessors to "[C]ontribute and pay an equal or proportional part of the costs expenses outgoings and matters mentioned in the Sixth Schedule hereto".
10. The Sixth Schedule of the Flat 7 Lease contains the same heads of costs and expenses as the Fifth Schedule to the Flat 3 Lease.
11. For the purpose of the Sixth Schedule, "the Mansion" is defined as "...all that parcel of land abutting on Lumb Close and Darwin Grove...comprised in Toitle Number GM132856 and also all those flats erected thereon number 1 to 8 (inclusive) Lumb Close and 12 to 19 (inclusive) Darwin Grove..." but excluding the garages erected thereon.

The Law

12. 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.
13. 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.
14. 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.

15. 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

16. The Applicants attended the hearing in person. The Respondent was represented by Mr.M.Adcock of Adcocks, Solicitors for the Respondent. Mr.Adcock is also a director of the Respondent.
17. A preliminary point raised by the Respondent on page 7 of the Respondent's Statement and reiterated at the hearing suggested that the effect of the Applicants' failure to request documents from the Respondent under section 22 of the 1985 Act was to limit the Tribunal's jurisdiction to service charge for any period after the service charge year 2009/10.
18. The Applicants made the following submissions:
 - 18.1 there was a lack of understanding on the part of the Applicants as to the basis upon which the Respondent was charging for the items in the accounts, and despite repeated telephone calls to the Respondent's agent, they never felt that they had been given an adequate explanation;
 - 18.2 many of the items in respect of which charges appear to have been made were matters which the Applicants and other residents sorted out for themselves eg external lighting, external maintenance. Other services were provided by third parties eg the Council do some of the gardening;
 - 18.3 conversely, some of the items which they believed the Respondent was responsible for had not been done eg the tarmacing of the parking areas.
19. Both parties confirmed that, under clauses 4(ii) of each of the Leases, the "fair and proper proportion"/"equal or proportional part" of the relevant costs had been determined as 1/16th.
20. Mr.Adcock made the following submissions (which were common to each of the years in which they appeared in the accounts):
 - 20.1 in respect of audit fees: as it is a statutory requirement for the accounts to be certified by an independent accountant, it would be inequitable not to allow a landlord to recover the cost of compliance from the tenants. Mr. Adcock referred to a decision which he believed had been made by the Lands Tribunal which was authority for the proposition that, where a landlord had expended monies in order to comply with a statutory obligation, it was entitled to recover those monies from tenants who had benefitted. However, he was unable to provide the Tribunal with the case reference at the hearing and was therefore granted 7 days from the date of the hearing to provide a copy to the Tribunal;
 - 20.2 in respect of management fees: paragraph 8 of the Fifth Schedule of the Flat 3 Lease and paragraph 7 of the Sixth Schedule of the Flat 7 Lease refer to " an addition of fifteen per cent...for administration expenses...". Mr.Adcock opined that the remainder of the paragraphs entitled the landlord to charge its "normal and reasonable charges (including profit)" where it carried out the works itself;
 - 20.3 none of the expenses which had been charged related to a "particular building", and it was appropriate therefore to divide them between the 16 units in each case;

- 20.4 Mr.Adcock accepted that there was no provision in the Lease for establishing a reserve fund. However, the amounts in the fund were negligible in the latest year for which accounts are available;
- 20.5 in respect of bank charges: again, as there is a statutory requirement to retain funds in a separate account, the costs of doing so should be recoverable from the tenants.
21. In respect of the following specific items, the following submissions were made:
- 21.1 with regard to the drain works, Mr.Adcock said that emergency action had to be taken as there was raw sewage flowing from the drain, and this had precluded any prior consultation. In view of the costs incurred, there was no statutory requirement to consult in any event. Further, the Respondent believed that the drain in question served all of the Estate/Mansion;
- 21.2 with regard to tree works, the Applicants accepted that it was the Respondent's responsibility under the Leases to carry out such works. However, difficulties in contacting the Respondent to get such work done in the past had led, in the submission of the Applicants, to residents sorting out such matters on their own and at their own cost. Mr.Adcock confirmed that the legal costs in the 2007/08 accounts related to advice to establish whether or not the trees were protected;
- 21.3 Mr.Adcock confirmed that the management company, L.C. & D.G.Management Co. Ltd had been struck off. Both parties confirmed that there had been problems historically with establishing an effective management company, although optimism was expressed that with the Respondent's recent appointment of Thomson & Moulton as local managing agents, the situation may improve;
- 21.4 Ms.S.Lowe confirmed that, in the past, she had received 2 documents with the demand for payment of the service charge, and it was suggested that one of these was a Summary Statement of Rights and Obligations;
- 21.5 the Applicants confirmed that they were not refusing to pay the service charge, but that they wanted to know what they were paying for.

The Tribunal's Conclusions

22. 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?
23. With regard to the preliminary point regarding the Tribunal's jurisdiction, the Tribunal determines that it has jurisdiction in respect of all the service charge years in the Application. Its jurisdiction is established under section 27A of the 1985 Act, and, in this context, in particular s27A(4). The Tribunal is satisfied that none of the circumstances set out in sub-clauses (a)-(d) pertain to the Application.
24. It was noted that, as at 30 November 2012, the Respondent had not provided the Tribunal with the details of the case reference to which Mr.Adcock had referred in his submissions.
25. With regard to the service charges, the Tribunal determines as follows:

- 25.1 that, as there is no provision within the Leases entitling the Respondent to recover as service charge costs and expenses incurred as audit fees, accountancy charges, legal fees and bank charges, these are disallowed accordingly;
- 25.2 likewise, there is no provision in the Leases for a management fee of a minimum charge of £500 as appears in the accounts for the years 2009/10 and 2010/11. The only entitlement is to a fee of 15% of costs and expenses incurred in accordance with the Fifth and Sixth Schedules to the Leases;
- 25.3 the charges for insurance, drain repairs, and tree pruning are reasonable and allowed accordingly;
- 25.4 in view of the determinations above, the management fees for each of the years are as follows:
- (i) 2004/05: £98.57
 - (ii) 2005/06: £267.85
 - (iii) 2006/07: £171.38
 - (iv) 2007/08: £186.98
 - (v) 2008/09: £111.08
 - (vi) 2009/10: £114.38
 - (vii) 2010/11: £115.35
26. In view of the determinations set out in paragraph 25, the Tribunal determine that it is just and equitable to grant the Applicants' application under section 20C of the 1985 Act to the intent that none of the Respondent's costs incurred in connection with the Application and the proceedings before the Tribunal should be charged as service charge.
27. In reaching its determinations, the Tribunal was not unsympathetic to the Respondent's argument as set out in the Respondent's statement and summarized in paragraph 20.1 of this Decision but concluded that the appropriate remedy for a landlord in this situation was to seek a variation of the lease in question, either by agreement with the tenants or, where this proves to be impossible, by application to the Tribunal under section 35 of the Landlord and Tenant Act 1987.

Catherine Wood
Chair
Dated 1 December 2012