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HM COURTS & TRIBUNALS SERVICE
LEASEHOLD VALUATION TRIBUNAL

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| **Property** | : | **703 Beetham Plaza<br>25 The Strand<br>Liverpool<br>L2 0XJ** |
| **Applicant** | : | **K M (Property Management) North West Limited** |
| **Respondents** | : | **Mr B J N Hearn & Mrs L M Hearn** |
| **Case number** | : | **MAN/00BY/LIS/2012/0004** |
| **Date of Application** | : | **16 February 2012** |
| **Type of Application** | : | **Application for a determination of liability to pay and reasonableness of service charges** |
| **The Tribunal** | : | **P J Mulvenna LLB DMA (chairman)<br>I James, Dip Surv, MRICS<br>C Roberts** |
| **Date of decision** | : | **22 June 2012** |

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**ORDER**

That the service charges demanded by the Applicant in respect of the Property for the years ended 31 March 2009, 31 March 2010 and 31 March 2011 are reasonable and payable by the Respondents.

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**INTRODUCTION**

1. The Applicant lodged a claim in the County Court seeking the payment from the Respondents of specified charges for services in respect of the Property. At a case management conference held on 21 July 2011 at Liverpool County Court the matter was transferred to the Leasehold Valuation Tribunal.

2. By an application dated 16 February 2012, the Applicant applied for the determination of the reasonableness and recoverability of the service charges sought to be recovered from the Respondents for the years ended 31 March 2009, 31 March 2010 and 31 March 2011.

3. The Applicant is the landlord of the Property which is held by the Respondents (as the tenants) for a term from 12 March 1999 to 10 March 2149 under a lease dated 4 December 2000 and made between (1) Beetham Plaza Limited and (2) Stephen Beetham ('the Lease'). The Applicant's interest is a leasehold interest for a term of 150 years from and including 12 March 1999 granted by a Lease dated 12 March 1999 and made between (1) Liverpool City Council and (2) Beetham Plaza Limited ('the Head Lease').

## THE PROPERTY

4. The Property is the penthouse apartment, together with two car parking spaces, in a purpose built development comprising 45 self-contained apartments, together with commercial units ('the Development'). The residential element of the Development has a common entrance area with two lifts (only one of which serves all floors) and stairs to the accommodation on the upper floors. The Development overlooks the River Mersey estuary and is situated within reasonable walking distance of Liverpool city centre.

## THE INSPECTION

5. The Tribunal inspected the common parts of the Development externally and internally on the morning of 22 June 2012. The Applicant was represented by Ms J Adie, Mr L MacDonald of counsel instructed by J B Leitch, solicitors, and Mr J Massey. The first Respondent was present and was accompanied by Mr W Abbot, chairman of Beetham Plaza residents' association. The Tribunal found the Development to be maintained to a reasonable standard.

## PROCEEDINGS

6. Directions were issued by Mrs E Thornton-Firkin, procedural chairman, on 20 March 2012 and subsequently amended at the Applicant's request. The parties had complied with the Directions, although the Respondents had done so after the due date. The Applicant raised no objection to the Respondents' late compliance and the Tribunal determined that it would be just and reasonable to admit the documentation served by the Respondents.

7. The substantive hearing of the application was held on 22 June 2012 at Cunard Building, Pier Head, Liverpool. At the substantive hearing, the same persons mentioned in paragraph 5 above represented the parties.

## PRELIMINARY ISSUE

8. The Respondents made an application that the Tribunal proceed on the basis of making an interim decision solely on the question of liability to pay the service charges in issue and determining the question of quantum at a subsequent hearing. The application was resisted by the Applicant.

9. The reason for making the application arose from discussions which were currently taking place between the first Respondent and others with representatives of Liverpool City Council ('the Council') on matters connected with the use by the Council of a pay and display car park within the Development; the maintenance and use of Goree Piazza (a pedestrian square fronting the common entrance to the Development) the Bucket Fountain (an ornamental, architectural feature on Goree Piazza); and the provision and maintenance of external lighting at the Development (referred to by the Respondents as 'downlighting' and by the Applicant as 'uplighting'). It was hoped that the discussions would result in the Council making a payment, either by way of compensation for breaches of the Head Lease or to acknowledge the public benefit derived from expenditure borne solely by the residents of the Development. The first Respondent submitted that this would have a significant impact on the financial circumstances against which the service charges for the years in issue were calculated and would give rise to an application for the Application to be amended to include the service charges for previous years.

10. The Tribunal decided to refuse the Respondent's application on two bases. First, the issues had been referred to the Tribunal by the County Court and had been set forth in an application made by the Applicant. The Tribunal considered that it had a duty to consider the matters so put before it and that it was not open to the Respondents unilaterally to seek to amend the Application. Secondly, the reason for the Respondent's application was not guaranteed to bring about the result hoped for and, even if it did, there could be no certainty as to timescales within which the issue of quantum might be revisited by the Tribunal. In this respect, the Tribunal were conscious that the proceedings in the County Court were issued on 20 April 2011. There has already been significant delay in bring the matter to resolution and an indeterminable further delay based on the uncertain outcome of discussions with a third party would be unjust and unreasonable. There is a public interest in having matters referred to Tribunals dealt with timeously and it is also in the parties' interests that disputes are adjudicated upon with the minimum of delay.

11. The Tribunal then considered all relevant matters material to the substantive issues for determination.

## THE LAW

12. The material statutory provisions in this case are as follows.

### (i) The Landlord and Tenant Act 1985

Section 18(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' include 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.

Section 19(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.
(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A (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... (c) the amount which is payable'.

Section 27A (3) provides that an application may also be made 'if costs were incurred.'

**(ii) The Commonhold and Leasehold Reform Act, Schedule 11, Paragraph 5** provides for applications to be made to a leasehold valuation tribunal for a determination whether an administration 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.

13. The Administration Charges (Summary of Rights and Obligations) (England) Regulations 2007 provide -

'1(2) These Regulations apply where, on or after 1st October 2007, a demand for payment of an administration charge is served in relation to a dwelling in England.
2. The summary of rights and obligations which must accompany a demand for the payment of an administration charge must be legible in a typewritten or printed form of at least 10 point, and must contain [the information prescribed by the Regulations].'

**THE LEASE**

14. The Lease contains provisions (in Schedule 3) for the contribution by the tenants to the costs, charges, etc. incurred by the landlord of the provision of the services specified in the Lease. Schedule 4 to the Lease contains a covenant by the tenants to pay the service charge. The Respondents have not challenged the provisions of the Lease nor their applicability to the services provided, or to the costs sought to be recovered, by the Applicant.

**THE EVIDENCE AND THE TRIBUNAL'S CONCLUSIONS WITH REASONS**

15. At the hearing, the Tribunal heard oral submissions from Mr MacDonald on behalf of the Applicant and from the first Respondent. The Tribunal also had before them the documentary evidence and submissions provided by the parties.

16. The Tribunal have considered the issues on the whole of the written evidence and the oral and written submissions now before them, have had regard to their own inspection and, applying their own expertise and experience, have reached the following conclusions on the issues before them.

17. The Applicant provided details of the service charges which had been levied, supported by relevant documentation and explanations for expenditure having been incurred.

18. The Respondents did not challenge the reasonableness of the services provided nor of the charges made for the services but challenged the reasonableness and payability of the service charges demanded on four bases: (i) an alleged failure to comply with The Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007; (ii) the impact of recovery from the Council of monies in respect of the matters referred to in paragraph 9 above; (iii)

the right of set off in respect of sums claimed to be due to the Respondents; and (iv) the fairness and reasonableness of the apportionment of expenditure as between occupiers of the Development. The Tribunal has considered these issues and finds as follows.

19. There is evidence before the Tribunal that there was compliance with the prescribed requirements of The Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007, although there was a lack of clarity as to whether or not there had been compliance at all times. The first Respondent said that he had not been prejudiced by any non-compliance and accepted that the question was not material to the issues before the Tribunal. The Tribunal determined that there was compliance but accepted that the question had no material bearing on the substantive issues for determination.

20. The question of sums recoverable from the Council has two aspects: (i) the use by the Council of a pay and display car park within the Development and (ii) the maintenance and use of Goree Piazza and the Bucket Fountain and the provision and maintenance of external lighting at the Development.

21. On the first aspect, it is common ground that the Council used the pay and display car park for several years on days and during hours not specified in the Head Lease. It is also common ground that the Council, by so using the pay and display car park, obtained additional income. The Respondents also say that the additional (and unauthorised) use added to the maintenance and other costs. The Respondents' case is that the Council should account for the additional income (or at least some of it) to compensate for the breach of the terms of the Head Lease and/or to contribute to the additional costs incurred. The Applicant says that the Head Lease has specific terms for contribution by the Council to maintenance and other costs incurred in connection with the pay and display car park and that the Head Lease has no mechanism for the recovery of compensation for breach. The Tribunal has only seen extracts from the Head Lease. It is plain that there are provisions for contributions by the Council to maintenance and other costs in respect of specified areas within the car park. There is no evidence that the Council have not paid their requisite share of the costs incurred. The levels of contribution (21% for the provision and maintenance of plant, lighting, fixtures, fittings and equipment and associated inspections, certifications, etc.; and 62% for other costs) are fair and reasonable. The Tribunal accepts that here is no specific provision in the Head Lease relating to compensation for breach.

22. On the second aspect, the Respondents say that Goree Piazza is, effectively, being used as a public area and that the Bucket Fountain is a popular feature which attracts many visitors. As a result, the area is used by the general public and thus requires more maintenance than might otherwise be the case. Moreover, Goree Piazza is the car park roof and the more intensive use adds to problems of water ingress and the consequentiual need to incur expenditure on remedial works. In respect of the external lighting, the Respondents say that the provision is to enhance the appearance of the building to satisfy the Council's requirements and that the residents get no benefit, although they bear the cost. The Respondents say that it is unfair to burden the residents with these costs which should borne by the Council. The Applicant says that this has been the position since the acquisition of their interest and nothing has changed. There is no basis upon which to require payment from the Council. The Tribunal has not seen the whole of the Head Lease and cannot comment on any obligations on the Applicant in relation to Gorre Piazza, the Bucket

Fountain or the external lighting. It is clear, however, from the extracts of the Head Lease produced to the Tribunal that all of these features were included in the demise. In the absence of evidence to the contrary, it is reasonable to conclude that such inclusion implies an obligation to maintain or, at least, not to cause or suffer deterioration. The Tribunal does not entirely accept the Applicant's submission that there has been no material change since the Head Lease was granted. The demolition of the walkway across The Strand and the formal closure of the public right of way across Goree Piazza were both significant and material. The effect of the change, however, was to discontinue the use of Goree Piazza as a public thoroughfare and to reduce the public use. Since then, the Applicant has erected a sign to say that the piazza is private land but authorising access so as to prevent the acquisition of prescriptive rights.

23. Having regard to all of these factors, the Tribunal can find no merit in the Respondents' argument in respect of additional contributions being made by the Council to the cost of the services provided by the Applicant under the terms of the Lease and recovered by way of service charge. The Tribunal notes that the Respondents and others are discussing these issues with the Council. On the evidence before the Tribunal, there is no basis upon which the payment of a contribution by the Council might be enforced. It is possible that the Council might make a contributory payment on a voluntary basis or that further evidence might come to light which would support the Respondents' case. These are speculative, however, and cannot reasonably be taken into account by the Tribunal in assessing the position as it stands today. If, in the fullness of time, the Council does make a payment, the Tribunal would, in the absence of other evidence, expect it to be paid into the service charge fund and for consequential adjustments to be made. It is open to any of the parties to make further applications to the Leasehold Valuation Tribunal should there be any material change in the circumstances arising from the discussions with the Council.

24. The issue of set off has two elements: (i) a dispute in relation to remedial works to the exterior fascia arising from water ingress; and (ii) the impact of a successful outcome of the discussions with the Council referred to above. The Lease contains a covenant by the Respondents, at paragraph 1.1 of Schedule 4, 'To pay the Rent and the Service Charge on the days and in the manner aforesaid without any deductions whatsoever and not to exercise or seek to exercise any right or claim to withhold any claim to withhold rent or any right or claim to legal or equitable set off'. This would exclude the Respondents present claim, but, in any event, the Tribunal has insufficient evidence upon which to make findings of fact on the first element and has already found that there is no merit in the second element. The Tribunal, accordingly, finds that there is no merit in the Respondents' argument as to set off.

25. The Respondents' argument in relation to the apportionment of the service charges is predicated on their view that it is unreasonable to use square footage as a basis of apportionment when some of the services are patently provided to all occupiers on an equal basis, irrespective of the size or nature of their individual holdings. The Tribunal can see some merit in this argument but, having considered the whole of the evidence, accepts the Applicant's submission that there are practical difficulties in adopting an apportionment based on degree of benefit. It would be unreasonable to apportion some service costs on such basis but not others. There would need to be an extensive exercise to determine anticipated, notional degrees of benefit at the start of each year and actual benefit at the end of the year. This would undoubtedly add to the overall costs of management and would not be in the interests of the occupiers

generally. The Tribunal does not find merit in this particular argument, but would suggest that the Applicant explore the possibility of separate electricity and water metering for the residential and the commercial tenants, thus providing a more equitable basis for apportionment of these costs. In reaching their conclusions on the question of apportionment, the Tribunal has relied on their own expertise and judgement in assessing the evidence and has not been influenced by the expert report provided by the Applicant – the expert was not present at the hearing and his evidence was not tested by cross-examination.

26. The Tribunal would add that, even if merit had been found in the Respondents' apportionment argument, it would not necessarily have resulted in their favoured approach supplanting the existing arrangement. The Tribunal's task is to examine the reasonableness of the service charges and it is possible for more than one approach to be reasonable. The Tribunal have, therefore, notwithstanding their findings that there is no merit in the Respondents' arguments, considered that question in relation to the service charges in issue.

27. In the proceedings before the Tribunal, the Respondents have produced no evidence to suggest that the service charges are unreasonable. In particular, no evidence has been produced of comparable service charges for comparable works and services at comparable properties which would suggest that the service charges are inherently unreasonable. The Respondents have raised no sustainable issues as to value for money in relation to any of the individual costs recharged. The Tribunal are aware from their own experience and knowledge that the service charges are not substantially different from those of other, similar developments in the immediate area or in the wider area of the Residential Property Tribunal's Northern Region. The Tribunal also observes that the first Respondent expressly confirmed that there was no issue with the standard or costs of the services provided and the Tribunal's own inspection revealed that the Development was maintained to a reasonable standard.

28. The Tribunal find that the service charges generally for the years 31 March 2009, 31 March 2010 and 31 March 2011 are reasonable and that the Respondent is liable for payment of the sums demanded in each of those years.

## COSTS

29. The Tribunal has power to award costs under paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 which provides:

'(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where—

(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or

(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—

(a) £500, or

(b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.'

30. The Tribunal did not consider that any of the prescribed circumstances arose in this particular case and concluded that it would not be appropriate to award costs to either party.

31. Regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003 provides:

'(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.
(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).'

32. The Tribunal has reviewed all the evidence in this case and has determined that it would not be appropriate to make an order for reimbursement in the circumstances of this case.

33. The Tribunal has considered whether or not an order should be made under section 20C of the Landlord and Tenant Act 1985 that the costs incurred, or to be incurred, by the Applicant in connection with the proceedings before the Tribunal should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenants. The Tribunal has no evidence that the Applicant has acted unreasonably in any respect and has decided that it would not be reasonable or proportionate to make an order.

Signed.....
P J Mulvenna, Chairman

4 July 2012