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HM COURTS AND TRIBUNALS SERVICE
LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/19UH/LSC/2013/0038

DECISION AND REASONS

Application : Section 27A of the Landlord and Tenant Act 1985 as amended (“the 1985 Act”)

Applicant/Landlord : Magna Housing Association Limited

Respondent/Leaseholder : Miss Joanne Fitzgerald

Building : 1, 3, 5, and 7 Princess Road, Bridport, Dorset, DT6 5AX

Flat 7 : the flat numbered 7 in the Building

Date of Application : 9 April 2013

Date of Directions : 12 April 2013

Date of Hearing : 24 June 2013

Venue : Haddon House Hotel, West Bay, Bridport, Dorset, DT6 4EL

Appearances for Applicant/Landlord : Mr G Shepherd of LPC Law

Also in attendance : Ms D Woolfe and Ms E Ford of Magna Housing Association Limited

Appearances for Respondent/Leaseholder: none

Members of the Tribunal : Mr P R Boardman MA LLB (Chairman), and Mr K M Lyons FRICS

Date of Tribunal’s Reasons : 26 June 2013

Introduction

1. This application by the Applicant/Landlord is for the Tribunal to determine the payability of the following items under a lease dated 7 May 1990 and made between West Dorset District Council (1) and Jonathan Devereaux and Shirley Devereaux (2) :
 - a. year 2008/2009 :

- ground rent £0.83 a month
 - adjustment £0.49 a month
 - management fee £1.25 a month
 - buildings insurance £3.33 a month
 - sinking fund external £8.33 a month
- b. year 2009/2010 :
- ground rent £0.83 a month
 - adjustment -£0.27 a month
 - management fee £2.58 a month
 - buildings insurance £3.52 a month
 - sinking fund external £17.21 a month
- c. year 2010/2011 :
- ground rent £0.83 a month
 - adjustment £0.19 a month
 - management fee £2.58 a month
 - buildings insurance £1.91 a month
 - sinking fund external £17.21 a month
- d. year 2011/2012 :
- ground rent £0.83 a month
 - adjustment -£1.78 a month
 - management fee £3.03 a month
 - buildings insurance £2.25 a month
 - sinking fund external £17.21 a month
 - sinking fund communal £3.00 a month
- e. year 2012/2013 :
- ground rent £0.83 a month
 - adjustment £0.12 a month
 - management fee £3.03 a month
 - buildings insurance £2.61 a month
 - sinking fund external £17.21 a month
 - sinking fund communal £3.00 a month
- f. year 2013/2014 :
- ground rent £0.83 a month
 - adjustment £0.15 a month
 - management fee £3.63 a month
 - buildings insurance £2.10 a month
 - sinking fund external £17.21 a month
 - sinking fund communal £7.00 a month

2. The Applicant/Landlord's case, as set out in a statement by Ms Woolfe dated 2 May 2013, was as follows
 - a. the Applicant/Landlord was the freeholder of the Building following a large scale voluntary transfer from West Dorset District Council on 27 May 1993
 - b. on 6 January 2000 the lease of Flat 7 was assigned to the Respondent/Leaseholder
 - c. the material provisions of the lease were clauses 2(1), 2(4) and 2(21) and the sixth and seventh schedules, which required the Respondent/Leaseholder to pay ground rent and service charges
 - d. the Applicant/Landlord was attaching a bundle of documents, including copies of estimated service charges, demands for payment, and statements showing actual service charges and adjustments, for each year in question
 - e. all invoices were sent with a "summary of tenants' rights and obligations", and an "administration charges – summary of tenants' rights and obligations", in accordance with the sample attached
 - f. on 10 February 2010 the Applicant/Landlord obtained a judgement in default of defence against the Respondent/Leaseholder in the Yeovil County Court in claim number 0YE00025 for £577.31 made up as shown on a schedule [not before the Tribunal]
 - g. the management fee was charged at 15%
 - h. the Applicant/Landlord used a broker to secure the best price across all the Applicant/Landlord's insurable risks; the service was tendered every 3 years, the last 3-year period having started in April 2012; the total value of the Applicant/Landlord's insurance cover was in excess of EU tendering limits, so the Applicant/Landlord tendered in accordance with the OJ Procedure; the annual cost of insurance was minimal, amounting to £28.80 in the 2011/2012 financial year, which was very competitive
 - i. the sinking fund was to build a reserve for items of external works such as redecoration or re-roofing works; the contribution was calculated by the planned maintenance section of the Applicant/Landlord's technical services department by reference to likely expenditure during a 5-year period, and then checked by the finance department
3. The Tribunal's directions included a direction that the Respondent/Leaseholder should, within 21 days of the receipt of the Applicant/Landlord's statement of case and bundle of documents, send to the Tribunal and the Applicant/Landlord a statement replying to the matters raised by the Applicant/Landlord. However, the Tribunal has not received any correspondence or documents from the Respondent/Leaseholder

The lease

4. For the purposes of these proceedings the material parts of the lease are as follows :

Clause 2: [Tenant's covenants]

(4) to bear a reasonable part of the costs of carrying out repairs to the demised premises not amounting to the making good of structural defects falling within the paragraph numbered 18 of the Sixth Schedule of the [Housing Act 1985]

- (5) to keep the interior of the demised premises including the decorations thereof and all fixtures and fittings therein in good repair and condition including the windows and the glass therein and the doors therein and in such good and substantial repair and condition to deliver up the same to the Landlord on the expiry of this Lease
- (21) To pay to the Landlord annually the Tenant's expenses without any deduction subject to and upon the following terms and conditions :
- (a) the Landlord's expenses shall be the expenses calculated in accordance with the Sixth Schedule hereto
 - (b) the Tenant's expenses shall be that proportion of the Landlord's expenses apportioned as being attributable to the demised premises

Sixth Schedule
Landlord's Expenses

The Landlord's expenses shall be the aggregate of :

- (1) *The actual cost certified by the Landlord's Treasurer of the repairs and of providing the services specified in the Seventh Schedule hereto (including all professional fees incurred in connection therewith)*
- (2) *Such sum (if any) as (after making allowance for any reserves in hand) may be estimated by the said Treasurer (who shall act as an expert and not as an arbitrator) to be required to provide a reserve to meet part or all of the future cost of such repairs and services as the Treasurer anticipates will or may arise thereafter during the next following five years of the term hereby granted and*
- (3) *The fees and costs incurred in the general management of the Landlord's property and the building including the costs of any managing agents employed by the Landlord and also the cost incurred in respect of the Treasurer's certificate and of accounts kept and audits made for the purpose thereof*

Seventh Schedule
Part I

- (1) *The covenants by the Landlord set forth in paragraph 14 of Part III of Schedule 6 of the [Housing Act 1985] are incorporated herein*
- (2) *To insure and keep insured the demised premises and the building and Landlord's fixtures therein against loss or damage by fire and such other risks (including third-party claims) as the landlord shall deem desirable or expedient with an insurance office of repute including architects and other professional fees reasonably incurred on the occurrence or the anticipated occurrence of any risk insured against and subject to the Tenant being entitled to inspect the relevant policy of insurance during normal working hours*

Part II

Repairing maintaining and decorating the demised premises and the building but excluding any matters covered by the Tenant's covenants contained in Clause 2 of this lease and by providing the services of any further for the reasonable comfort security safety and convenience of the Tenant or the tenants owners or occupiers of other flats of the building including the provision of any equipment fixtures or apparatus in connection therewith

Documents

5. The documents before the Tribunal are :
 - a. the application
 - b. the Applicant/Landlord's bundle, pages 1 to 164; references in these reasons to page numbers are to page numbers in that bundle
 - c. a summary of the insurance cover for the Building, produced by Mr Shepherd at the hearing

Inspection

6. The Tribunal inspected the Building on the morning of the hearing on 24 June 2013. Also present were Mr Shepherd, Ms Woolfe and Ms Ford. Miss Fitzgerald did not attend, and there was no reply to the front door. The Tribunal was satisfied that written notice of the time and date of the inspection had been sent to Miss Fitzgerald, addressed to her at Flat 7, and that there was no explanation for her non-attendance, and the Tribunal decided to proceed with the inspection in her absence
7. The Building was a 2-storey block of 4 flats, built in about the 1960s, with brick elevations under a pitched roof. Flat 7 was on the ground floor on the right-hand side, looking from the road. The front door was on the right-hand elevation, and accessed via a path, steps and porch. A flat roof, apparently of concrete slab construction, lay over the front door and outbuildings to the side. There were two 4-pot, brick-built, square chimneys, each about 2 feet high. The pointing to the brickwork of the Building, including the chimneys, appeared to be good

Procedural matters at the hearing

8. Miss Fitzgerald did not attend the hearing. The Tribunal was satisfied that written notice of the time, date and venue of the hearing had been sent to Miss Fitzgerald, addressed to her at Flat 7, and that there was no explanation for her non-attendance, and the Tribunal accordingly decided to proceed with the hearing in her absence
9. It became apparent at various stages during the hearing that material documents, such as the insurance policy for the Building, had not been included in the Applicant/Landlord's bundle, and that Mr Shepherd needed to take instructions on the availability of those documents and on various questions raised by the Tribunal in relation to the issues, such as the service charge proportion payable by the Respondent/Leaseholder, the insurance for the Building, and the

sinking fund contributions claimed. In the interests of justice, the Tribunal accordingly adjourned the hearing for short periods on two separate occasions to enable Mr Shepherd to do so

The issues

10. At the hearing, Mr Shepherd's submissions, and the Tribunal's decision, in respect of each issue, were as follows

Ground rent

11. In answer to a question from the Tribunal, Mr Shepherd accepted that the Tribunal had no jurisdiction to make a determination about the ground rent claimed

The impact on the Tribunal's jurisdiction of the county court judgment dated 10 February 2010

12. Mr Shepherd submitted that this was a default judgment, not a determination on the merits of the claim, and that therefore the provisions of section 27A(4)(c) of the 1985 Act did not prevent the Tribunal having jurisdiction in relation to the matters for which judgment had been obtained. Mr Shepherd said that the schedule referred to in the particulars of claim showing the breakdown of the sum for which judgment had been obtained was not available, but that in any event the Applicant/Landlord wished to have a determination from the Tribunal about the payability of all the service charges in issue before the Tribunal, including those included in the county court judgment

13. After a short adjournment to consider the matter, the Tribunal indicated its findings that :

- a. the Tribunal was satisfied that the judgment dated 10 February 2010 was a judgment obtained in default of defence
- b. the judgment was accordingly not a "determination" about a "matter" for the purposes of section 27A(4)(c) of the 1985 Act, because it was simply an administrative decision about whether the Respondent/Leaseholder had filed a defence within the court time limits for so doing, and was not a determination about any part of the substance of the claim
- c. in making that finding the Tribunal was aware of a decision of the Upper Tribunal to the contrary [in the case of 9 Hadlow House (LRX/77/2010)]; however, the Tribunal did not regard itself as bound by that decision because the Upper Tribunal's decision :
 - had been made in the context of an application on the papers for permission to appeal to the Upper Tribunal, without a hearing and without the benefit of detailed oral argument in that respect by either party
 - was an unpublished decision
- d. in those circumstances the Tribunal would consider each item of service charge in issue in this case, including any items which might have been the subject of the county court judgment

The service charge proportion payable by the Respondent/Leaseholder

14. Mr Shepherd said, on instructions, that this was one quarter of the expenses relating to the Building
15. The Tribunal's findings
16. The Tribunal accepts Mr Shepherd's submission in that respect, and finds that the service charge proportion payable by the Respondent/Leaseholder is one quarter of the expenses relating to the Building

Buildings insurance

17. Mr Shepherd said that insurance of the Building was under a block policy, and he produced the summary of the insurance cover. However, he did not have a policy schedule, or endorsement, confirming that the Building was covered under the policy, or stating the sum for which the Building was insured. However, he submitted that the Applicant/Landlord's evidence before the Tribunal was that the Applicant/Landlord had indeed insured the Building each year in accordance with the Applicant/Landlord's covenant to do so in the lease. He also submitted that the premiums claimed from the Respondent/Leaseholder each year by way of service charge were very reasonable indeed, particularly as they had reduced following a change of brokers and a review in 2009
18. The Tribunal's findings
19. Having considered all the circumstances in the round, the Tribunal finds that :
 - a. the Tribunal is satisfied that the Applicant/Landlord has insured the Building for each year in question accordance with the Applicant/Landlord's covenant to do so in the lease
 - b. the premium for each year in question is reasonable
 - c. the premium for each year in question is payable by the Respondent/Leaseholder by way of service charge

Sinking fund contributions

20. Mr Shepherd referred the Tribunal to the following statements of the respective balances in hand for each year in question : :
 - a. (page 56) :
 - communal sinking funds re GN1338 Princess Road :
 - balance on 1 April 2008 0.00
 - balance on 31 March 2009 0.00
 - note : *the balances shown are in respect of all the combined contributions less expenses of the residents within the scheme; they are not your individual*

share of the balance

- leaseholder external works re 7 Princess Road :
 - balance on 1 April 2008 1372.56
 - income 99.96
 - expenditure 0.00
 - net interest 28.12
 - balance on 31 March 2009 : 1500.64
 - note : *the balance is the amount of money that is currently available to the individual leaseholder to set against future external works liabilities*
- b. (page 93) :
 - communal sinking funds re GN1338 Princess Road :
 - balance on 1 April 2009 : 0.00
 - balance on 31 March 2010 : 0.00
 - note : *the balances shown are in respect of all the combined contributions less expenses of the residents within the scheme; they are not your individual share of the balance*
 - leaseholder external works re 7 Princess Road :
 - balance on 1 April 2009 : 1500.64
 - income 206.52
 - expenditure 0.00
 - net interest 0.61
 - balance on 31 March 2010 : 1707.77
 - note : *the balance is the amount of money that is currently available to the individual leaseholder to set against future external works liabilities*
- c. (page 120) :
 - communal sinking funds re GN1338 Princess Road :
 - balance on 1 April 2010 : TV aerial 672.81
 - net interest 0.78
 - balance on 31 March 2011 673.59
 - note : *the balances shown are in respect of all the combined contributions less expenses of the residents within the scheme; they are not your individual share of the balance*
 - leaseholder sinking funds re 7 Princess Road :
 - external works
 - balance on 1 April 2010 1707.77
 - income 206.52
 - expenditure 0.00
 - net interest 0.68
 - balance on 31 March 2011 1914.97
 - communal areas
 - balance on 1 April 2010 0.00
 - income 0.00

- expenditure -166.38
 - net interest 0.00
 - balance on 31 March 2011 -166.38
 - note : *the balance is the amount of money that is currently available to the individual leaseholder to set against future external works liabilities*
- d. (page 139) :
 - communal sinking funds re GN1338 Princess Road :
 - balance on 1 April 2011 : TV aerial 1074.13
 - net interest 3.38
 - balance on 31 March 2012 1077.51
 - note : *the balances shown are in respect of all the combined contributions less expenses of the residents within the scheme; they are not your individual share of the balance*
 - leaseholder sinking funds re 7 Princess Road :
 - external works
 - balance on 1 April 2011 1914.97
 - income 206.52
 - expenditure 0.00
 - net interest 5.78
 - balance on 31 March 2012 2127.27
 - communal areas
 - balance on 1 April 2011 -166.38
 - income 36.00
 - expenditure 0.00
 - net interest 0.00
 - balance on 31 March 2012 -130.38
 - note : *the balance is the amount of money that is currently available to the individual leaseholder to set against future external works liabilities*

21. In answer to questions from the Tribunal, Mr Shepherd said that

- a. the equivalent document for 2012/2013 had not yet been produced
- b. the figures shown as “income’ were the figures claimed in the service charge demands, and were therefore only notional figures in the Respondent/Leaseholder’s case, because she had not been making the payments referred to; however, Mr Shepherd very fairly and properly conceded that, in light of the notes at the foot of each document, the balances shown nevertheless had to be regarded as “reserves in hand” for the purposes of paragraph (2) of the sixth schedule to the lease
- c. in relation to “communal sinking funds re GN1338 Princess Road”, these items related to all 49 properties owned by the Applicant/Landlord in Princess Road; however, there was no TV aerial at Flat 7, and, having considered the terms of the lease, Mr Shepherd very fairly and properly conceded on behalf of the Applicant/Landlord that nothing was payable by the Respondent/Leaseholder by way of service charge in relation to this item
- d. in relation to “leaseholder external works re 7 Princess Road” and “leaseholder sinking

funds re 7 Princess Road”, Mr Shepherd did not have details of the figure of -166.38 shown at pages 120 and 139; he conceded that the fact that it was a minus figure appeared to indicate that it was an item of expenditure, but that no equivalent sum appeared as an item of expenditure on the service charge demands or statements for the years in question, and that the Tribunal could not take it into account when determining the payability of the sinking fund contributions claimed by the Applicant/Landlord

22. In relation to the 5-year period referred to in paragraph (2) of the sixth schedule to the lease, Mr Shepherd referred the Tribunal to the document at page 164, a copy of which is attached to these reasons as an Appendix
23. Ms Ford said that this document had been prepared in 2009, and a new edition would be prepared shortly. Each column showed planned expenditure for successive periods of 5 years, so that the first column showed expected expenditure from 2009 to 2014, and the penultimate column showed expected expenditure in years 26 to 30. The total of £21550 represented all planned expenditure during the 30 years from 2009. It showed expected costs for the whole Building, so that the Respondent/Leaseholder’s share of the expected costs was one quarter
24. Mr Shepherd said there were no figures available to show how the sums claimed from the Respondent/Leaseholder each month in this respect had been calculated, but it appeared from calculations carried out by Mr Shepherd during the hearing that the sums claimed represented £21550, probably plus VAT, divided by 30 years, then divided by 4 flats, and then divided by 12 months
25. In answer to questions from the Tribunal, Mr Shepherd very fairly and properly conceded that :
 - a. paragraph (2) of the sixth schedule to the lease allowed sinking funds contributions to be claimed from the Respondent/Leaseholder by way of service charge only in relation to the future costs of repairs and services which might arise in the next 5 years, whereas it appeared that the contributions actually claimed were in relation to the likely costs over the 30 year period referred to in the document at page 164
 - b. the only repair item shown in the document at page 164 as likely in the first five years from the date of that document, namely 2009 to 2014, was “repoint/re-render chimney” (£1276), whereas there was no evidence during the Tribunal’s inspection that any pointing was necessary
 - c. the only repair item shown in the document at page 164 as likely in the next five years, namely 2014 to 2019, was “flat roofs other” (£516), whereas there was no evidence during the Tribunal’s inspection that any work to the flat roof, being apparently just a concrete slab with no felt, would be necessary during that period
 - d. in any event, the total of those two sums was £1792, and, even if VAT were added, the Respondent/Leaseholder’s one quarter share would be less than each of the reserve fund balances shown on the documents at pages 56, 93, 120 and 139
 - e. the reference in paragraph (2) of the sixth schedule to the lease to the Applicant/Landlord’s treasurer acting as an expert did not prevent the Tribunal determining whether the figures ascertained by the treasurer were reasonable

26. The Tribunal's findings

27. The Tribunal finds that :

- a. the effect of paragraph (2) of the sixth schedule to the lease is to permit the Applicant/Landlord to include in the service charges payable by the Respondent/Leaseholder each year estimated sums required, after allowing for any reserves in hand, to meet the future cost of such repairs and services as the Applicant/Landlord expected to arise during the next 5 years
- b. the only evidence before the Tribunal about the costs and services which the Applicant/Landlord has expected during the next 5 years is the document at page 164
- c. that document, produced in 2009, shows only 2 items of expected expenditure on the Building during the period 2009 to 2019, namely "repoint/re-render chimney" (£1276), and "flat roofs other" (£516)
- d. there was no evidence during the Tribunal's inspection of the Building that either of those items could reasonably be regarded as being necessary then or during the next 5 years after the date of the Tribunal's inspection
- e. in any event, the total expected cost of those 2 items was £1792, and, even if VAT were to be added, the Respondent/Leaseholder's one-quarter share of that sum would be less than the reserves in hand each year, according to the documents at pages 56, 93, 120 and 139, in relation to which :
 - the Tribunal has taken account of the statement of account at pages 160 to 163, showing arrears in payments by the Respondent/Leaseholder going back to 1 April 2005, and of Mr Shepherd's submission that the figures shown as "income" in the documents at pages 56, 93, 120 and 139 were the figures claimed in the service charge demands, and were therefore only notional figures in the Respondent/Leaseholder's case, because she had not been making the payments referred to
 - however, the Tribunal has also taken account of, and accepts, Mr Shepherd's concession that, in light of the notes at the foot of each of the documents at pages 56, 93, 120 and 139, the balances shown nevertheless have to be regarded as "reserves in hand" for the purposes of paragraph (2) of the sixth schedule to the lease
- f. on the evidence before the Tribunal, it was accordingly not reasonable for the Applicant/Landlord to include any sinking fund contributions in the service charges payable by the Respondent/Leaseholder for the years in question
- g. the sinking fund contributions claimed are accordingly not payable by way of service charge for any of the years in question

Management fees

28. In answer to questions from the Tribunal, Mr Shepherd said that the management fees claimed had been calculated at 15% of the sinking fund contributions claimed for each year in question, rather than on a "per flat" basis as recommended by the RICS. However, they were very reasonable sums

29. The Tribunal's findings

30. The Tribunal has found that no sinking fund contributions were payable for any of the years in question. It therefore follows that the management fee, being calculated only by multiplying the amount of the sinking fund contributions by 15%, is not payable for any of the years in question either

Annual adjustments

31. The Tribunal finds that the Applicant/Landlord will need to recalculate the annual adjustments for each of the years in question to take account of the Tribunal's findings in these reasons

Dated 26 June 2013



.....
P R Boardman
(Chairman)

A Member of the Tribunal
appointed by the Lord Chancellor

HM COURTS AND TRIBUNALS SERVICE
LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/19UH/LSC/2013/0038

APPENDIX

Application : Section 27A of the Landlord and Tenant Act 1985 as amended (“the 1985 Act”)

Applicant/Landlord : Magna Housing Association Limited

Respondent/Leaseholder : Miss Joanne Fitzgerald

Flat 7 Princess Road, Bridport, Dorset, DT6 5AX

Block - Walls - Pointed Brickwork	£0	£0	£0	£0	£0	£300	£300
Block - Boundary/Retaining walls (all types) - Brickwork/Blockwork	£0	£0	£0	£0	£0	£200	£200
Block - Roofs							
Block - Pitched Roofs - Concrete Tiles	£0	£0	£8,400	£0	£0	£0	£8,400
Block - Flat Roofs - Other	£0	£516	£0	£0	£0	£0	£516
Block - Chimneys and flashings - Repoint/re-render chimney	£1,276	£0	£0	£0	£0	£0	£1,276
Block - Rainwater Goods - Finlock	£0	£0	£0	£0	£1,672	£0	£1,672
Block - Fascia/soffit/bargeboards - None (open or finlock)	£0	£0	£0	£0	£0	£0	£0
Block - Walls - Pointed Brickwork	£0	£0	£0	£6,930	£0	£0	£6,930
Block - Fences	£0	£0	£0	£0	£0	£1,216	£1,216
Block - Paths / Patios / Hardstandings - Concrete	£0	£0	£0	£0	£0	£1,040	£1,040
Block - Boundary/Retaining walls (all types) - Brickwork/Blockwork	£0	£0	£0	£0	£0	£0	£0
Subtotal							
	£1,276	£516	£8,400	£6,930	£1,672	£2,756	£21,550

The figures quoted and works required are only to be used as a guide. Any works carried out are subject to validation and can be changed at any time. The charges are to be reviewed once every five years and do not include annual inflation.