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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/OOEU/LSC/2013/0128**
Property	:	**95 Butts Green, Kingswood, Warrington. WA5 7XT**
Applicant	:	**Lisa Stankus and James Houlden**
Representatives	:	**Mr Lee Burkitt**
Respondent	:	**Butts Green (Kingswood) Management Co Limited**
Representative	:	**Mr Richard Gray (Counsel)**
Type of Application	:	**Application under section 27A (and 19) of the Landlord and Tenant Act 1985 and section 20C**
Tribunal Members	:	**Mr G. C. Freeman** **Mr I James MRICS** **Mr L Bottomley**
Date and venue of Hearing	:	**26 February 2014 at First Tier Tribunal (Property Chamber) (Residential Property) 5 New York Street, Manchester. M1 4JB**
Date of Decision	:	**11 March 2014**

DECISION

DECISION

No service charge is payable by the Applicants until the Respondent complies with clause 4(b) of the Eighth Schedule of the Lease.

Subject to the above the proportion of 4.0021% attributable to the Property in respect if the Butts Green Estate Charge is unreasonable. The proportion is to be re-calculated to take into account all properties within the Development. Either of the parties have leave to apply to the Tribunal further to determine the proportion payable within six months of the date of this decision.

Subject to the above the reasonable service charge payable is not to include any provision for a Sinking Fund or insurance premiums for Directors and employees insurance cover.

No part of the Respondent's costs incurred in connection with the Application are to be included in the service charge payable by the Applicants for the period which is the subject of the application

Background

1. This is an application by Lisa Stankus and James Houlden ("the Applicants") dated 10th August 2013 for a declaration whether the service charges for 95 Butts Green, Kingswood, Warrington WA5 7XT ("the Property") are reasonable and payable by them. The Property is a house within a development of flats and houses constructed by Bellway Homes Limited in the early part of this century, near exit 8 of the M62 in Kingswood, Warrington. The Respondent is the management company named in the lease of the Property. The application originally covered the service charge years 2009 to 2012 inclusive. However, when it was pointed out that the Applicants did not own the Property until sometime during 2011, the Applicants amended their application to cover the years 2011 and 2012.

2. The development ("the Development") of which the Property forms part consists of 96 houses and 40 apartments, with ancillary car parking spaces, garages, gardens, bin stores and bicycle stores, all of which were constructed in several phases and in several blocks as well as individual houses. The car parking spaces and garages are each allocated to a particular property except for a number of visitors' parking spaces. Some of the apartments are constructed on two floors within the blocks. Some houses are completely self-contained in that they do not share any common parts such as a roof, gutters and downspouts. Other houses are contained within the envelope of the blocks and do have the benefit of a common roof, gutters etc. The Property is within one such block. Each house has its own separate ground level entrance as do some apartments. There is a door entry system to those apartments which share a common entrance.

The Lease

3. The Applicants produced a copy of the lease of the Property ("the Lease"). It is dated 11th October 2004 and is made between The Commission for The New Towns of the first part, Bellway Homes Limited of the second part, the Respondent of the third part and the lessee, Christopher John Clarke, of the fourth part. It demises the Property for the term of 999 years from 1st January 2003 and reserves an escalating ground rent; initially one hundred and twenty five pounds for the first fifty years. The service charge year runs from 1st January to 31st December.

4. For the purposes of this decision it is necessary to consider the relevant provisions of the lease. The following definitions are set out in clause 1:-

1.4. "Communal Areas" means gardens forecourts perimeter boundary walls and areas of open space within the Estate (other than the gardens of any of the Other Dwellings)

1.7 "The Estate" means the land comprised in the Title above mentioned [CH509804] *known as Butts Court Kingswood including (for the avoidance of doubt) the accessways car parking spaces and communal areas*

1.26 "The Service Charge" means a reasonable proportion attributable to the Property of the total costs charges and expenses incurred by the Management Company in performing its obligations set out in the Eighth Schedule . . ."

5. Part II of the First Schedule defines the Reserved Property as *"ALL THOSE the boundary walls fences hedges (including party structures) forecourts paths drives and entrances gates and outbuildings forming part of the Estate (including by definition the Communal Areas)"*

6. Clause 1 of the Fifth Schedule provides for a payment in advance on 1st January in each year on account of service charge for the forthcoming year. The amount is to be estimated by the Respondent as being required *to "enable the provision of the Services during that year"*. The "Services" are defined as the Management Company's covenants for the benefit of the Property (the heading to the Eighth Schedule).

7. In addition to the above payment, the lessee is required by clause 1 of the Fifth Schedule to pay on demand any shortfall in the amount paid for the previous calendar year. This presupposes that the amounts actually expended by the Respondent during the previous calendar year are made available to each lessee. This point is covered by Clause 4(b) of the Eighth Schedule which provides that accounts prepared in accordance with that Schedule are to be *"prepared and audited by a competent chartered accountant who shall certify firstly the total amount of such costs and expenses (including the fees for such preparation and audit of the said accounts) . . . and secondly the proportionate part due from the Lessee to the Management Company pursuant to clause 1 of the Fifth Schedule and such certificates shall be final and binding upon the parties hereto"*

8. Finally, and for completeness, clause 5 of the Eighth Schedule provides that within one month of the date of such certificate the Respondent is to serve on the lessee notice in writing stating the total and proportionate amounts specified, and if payment is not made within 21 days interest is payable on the said sum.

9. The services which the Respondent is obliged to provide by virtue of the Eighth Schedule are set out in clauses 1 and 2(a) (b) and (c). Broadly, clause 1 covers repair of the Reserved Property. Tautologously, clauses 2(a) covers the maintenance of those parts of the Reserved Property laid out as amenity grounds; clause 2(b) covers those parts of the Reserved Property laid out as roads drives footwalks etc.; and clause 2(c) covers boundary walls, fences, hedges and gates.

The Management Scheme

10. Having considered the relevant provisions in the Lease, it may be helpful to set out the scheme of management and how the service charge for the apartments and some of the houses is calculated in practice. The reference to "some of the houses" is deliberate. On behalf of the Respondent, Mr Gray stated at the hearing that there are some semi-detached houses on the north easterly and easterly side of the Development the owners of which are not liable to contribute service charge; firstly because apparently there are no provisions in the leases of those properties imposing a liability to pay, and secondly because they share no "communal" facilities. These houses will be referred to in this decision as the "non-contributing houses".

11. It was not disputed that the Respondent is a company limited by shares. It was accepted that each flat and house owner paying service charges is a shareholder in the Respondent. The Directors of the Respondent are the nominees of Bellway Homes Limited. The Respondent has delegated day to day management to Mainstay Residential Limited ("Mainstay").The Secretary is a corporate subsidiary of Mainstay. Mr Gray stated at the hearing that Mainstay had made efforts to recruit additional directors who were owners but this had not met with success.

12. According to the documents produced by the Respondent, Mainstay produce a budget service charge each year and apportion this to each flat or house owner by way of a "Payment Request" sent to each owner.

13. The proportion payable by each property in accordance with the Lease is to be "a reasonable proportion". Because of the different sizes of the houses and apartments, and the presence of garages and car park spaces, in order to be fair to the owner of each house or apartment, the Respondent has decided to apportion the service charge in proportion to the size of the property according to its floor area, or, in the case of car park spaces and garages, to their area.

14. Thus the Service Charge budgets and accounts prepared by Mainstay on behalf of the Respondent are divided into five parts, namely, the "All Apartment Service Charge", the "Apartment and House Estate Service Charge", the "Estate Service Charge", the "Internal Apartment Service Charge", and the "Car Park

Service Charge". Mr Gray stated and it was accepted by the Applicants that the only parts of the service charge payable by the Applicants were the "Apartment and House Estate Service Charge" and the "Estate Service Charge".

15. Mr Gray stated at the hearing (and the Applicants did not demur) that the Respondent considered the reasonable proportion payable by the Applicants towards the Apartment and House Estate Service Charge was 2.31% and the like figure for the Estate Service Charge was 4.0021%.

Inspection and Hearing

16. The Tribunal inspected the common parts of the Development on the morning of the Hearing in the presence of Ms Stankus, Mr Lee Burkitt of Revolution Property Management Ltd, her litigation friend, Mr Richard Gray, Counsel for the Respondent, Mr A Croft of Mainstay and Mr Sweeney, Counsel's pupil.

17. The Property is as described in paragraphs 1 and 2 above. The Tribunal were shown a circular grassed area on the westerly part of the Development on which there was located public art (the "Open Space"). Ms Stankus stated that its maintenance was contentious because she understood not all property owners contributed to its upkeep (see paragraph 10 above).

18. A hearing was held at the First Tier Tribunal (Property Chamber) (Residential Property) 5 New York Street, Manchester. M1 4JB on 26th February 2014 at 11.30 am. The parties who attended the inspection also attended the hearing. Both parties provided bundles of documents as directed by the Tribunal on 4th October 2013. The Tribunal considered these carefully.

The Law

19. The relevant law is set out in Appendix One of this decision.

The Applicants' Case

20. On behalf of the Applicants, Mr Burkitt stated that as a result of discussions and the Respondent's responses to a number of questions raised by the Applicants, they were now satisfied on a number of issues raised in the original application. The following issues remained outstanding:-

    1. The Applicants were unable to find in the Lease any basis for the creation and charging of a reserve or sinking fund contribution, shown in the accounts as "Statement of Special Funds".

    2. The management fees of Mainstay are charged against various service charge accounts. The Applicants now accept that these are fair and reasonable with the exception of the Car Park Service Charge which they consider is excessive.

    3. The Company Secretarial fees charged by Mainstay are excessive. In support, the Applicants produced a letter from Mr Burkitt's company,

Revolution Property Management Ltd, stating that they would charge £200 plus VAT per year for all secretarial services.

4. The Directors and Officers Insurance is inappropriate and excessive.

5. All properties within the Estate should be obliged to contribute to the maintenance and upkeep of the Open Space. That being the case, it was unreasonable for the Applicants to have to bear a greater proportion of the cost of this.

The Respondent's Case

21. On behalf of the Respondent Mr Gray stated the Respondent relied on the relevant provisions of the Lease, as noted above. In response to a question from the Tribunal asking for a copy of the statement in relation to the Property prepared in accordance with clause 4(b) of the Eighth Schedule (paragraph 7 above), Mr Gray referred the Tribunal to the Service Charge Financial Statements for both years in question at pages 147 to 174 inclusive of the Bundle marked "Respondent's Further Comments Direction 4"; a spreadsheet included at page 211 of the same bundle which related solely to the Property and a spreadsheet showing every property's service charge proportion and contribution which was included at Tab 8 within the Bundle marked "Respondent's Statement of Case Direction 2". Mr Gray stated that the Financial Statements were available for inspection on Mainstay's website and copies were provided on request to owners. He suggested that the relevant "Request for Payment" which showed a brought forward figure for the previous year's service charge was sufficient to comply with the Respondent's obligations under the Lease in this regard.

22. Mr Gray conceded that there was no provision in the Lease for the charging of a reserve fund contribution described as a "Special Fund" above. The Respondent acknowledges that the service charges for the relevant years would be re-calculated to take this into account.

23. Mr Gray pointed out that as the Applicants are not asked to pay towards the Car Park Service Charge, their application that the service charge was unreasonable in this respect was irrelevant because it did not affect the amount payable in respect of the Property.

24. Mr Gray submitted that the Company Secretarial fees were not excessive given the work involved in managing a large estate in which every owner paying a service charge was a shareholder.

25. Mr Gray conceded that Directors and Officers insurance was inappropriate and in fact had not been paid although it had been charged for in the relevant budgets. It was agreed that the service charge be re-calculated to take this into account.

26. Mr Gray stated that it was reasonable for the Respondent not to charge the non-contributing houses for the upkeep of the Open Space for two reasons:

a) The leases of the non-contributing houses do not contain provisions for charging a service charge. No copy of a lease of the non-contributing houses was produced to the Tribunal.

b) In the alternative the Respondent considered that the non-contributing houses did not share the benefit of the open space and if a charge was payable, it was reasonable to allocate a nil rate of service charge for this head of charge.

The Tribunal's Findings

General Findings

27. From its inspection of the Development the Tribunal found it to be reasonably well managed. The common areas were tidy and well kept.

28. The Tribunal has to apply a three stage test to the matter referred to it under section 27A:-

    28.1 Are the service charges recoverable under the terms of the Lease? This depends on common principles of construction, and interpretation of the Lease.

    28.2 Are the service charges reasonably incurred and/or for services of a reasonable standard under section 19 of the Act?

    28.3 Are there other statutory limitations on recoverability, for example consultation requirements of the Landlord and Tenant Act 1985 as amended?

29. The Tribunal considered that a responsible management company should prepare service charge accounts in an open and transparent manner. For example, once a year a management company should make available, a statement of service charge payments that they individually owe and have individually made, together with a calculation of how those apportionments are arrived at. Demands for money should be clear and be easily understandable by owners.

30. The Tribunal found that the basis of apportioning the service charge, namely on the area occupied by each property, and was generally fair and reasonable.

Detailed Findings

Sinking fund

31. The Tribunal agree with the parties' contention that no sinking fund is chargeable under the Lease. The service charge is to be re-stated to take this into account.

Car Park service charge

32. The Tribunal agree with the Respondent's contention that this is not relevant to the service charge for the Property.

Company Secretarial fees

33. In response to a question from the Tribunal, Mr Burkitt conceded that the sum of £200 quoted by his company would be payable only if his company were instructed to perform the management functions of Mainstay also. On this basis, the Tribunal felt they were unable to compare the quotation provided by Mr Burkitt's company on a like for like basis. In the absence of any further evidence the Tribunal concluded the amount charged by Mainstay is not excessive and is reasonable.

Directors and Officers insurance

34. This is unreasonable as conceded by the Respondent.

The Open Space

35. The Tribunal considered the form of the Lease in order to discover the liability for the maintenance of the Open Space. The Respondent's obligations include, by clause 2 of the Eighth Schedule, the maintenance of those parts of the Reserved Property as are laid out as amenity grounds. As can have seen from paragraph 5 above the Reserved Property is defined as "those parts of the Estate as are more particularly described in part II of the First Schedule". The Reserved Property includes the Communal Areas which mean gardens forecourts perimeter boundary walls and areas of open space within the Estate (other than the gardens of any of the Other Dwellings) (see paragraph 4 above).

36. "The Estate" is defined by reference to the filed plan of Title Number CH509894. No copy of this plan was produced to the Tribunal. However, it was agreed by the parties that this plan included the "Open Space". Thus there is an obligation on the Respondent to maintain the Open Space, with a corresponding liability on the Applicants to contribute to its upkeep by way of Service Charge.

37. The Tribunal did not accept the Respondent's arguments set out in paragraph 26 that they were entitled not to make a charge because either there were no provisions for the payment of service charge in the leases of the non-contributing houses or that the Respondent could charge a nil rate for the cost of the upkeep of the Open Space because the non-contributing houses did not enjoy the Open Space.

38. The Tribunal noted from clause 4 of Part 1 of the Seventh Schedule of the Lease that the Landlord (Bellway Homes Limited) covenanted with the Respondent and the lessee that it would impose in the leases of the Other Dwellings, covenants in terms similar to those contained in the Lease. The definition of Other Dwellings in the Lease means *"the Dwellings forming part of the Estate and benefitting from the use of the Communal Areas"*. The Tribunal found as a fact that the non-contributing houses are Other Dwellings being Dwellings which form part of the Estate and benefit from the communal areas. The covenant to impose similar obligations on the Other Dwellings is therefore intended to create a management scheme for all the property within the Estate

to the intent that all properties should contribute to the maintenance of the communal areas within it.

39. Consequently the Tribunal decided that the Applicant's proportion of the Estate Service Charge was unreasonable because it did not take into account the contribution which should be made by the non-contributing houses to the communal areas. The proportion of the Estate Service Charge payable in respect of the Property should be re-calculated accordingly. The parties are given leave to apply to the Tribunal within six months of the date of this decision to apply for the above proportion to be fixed by way of a supplement to this decision.

Compliance with the Lease

40. The Tribunal then considered paragraph 28.1 above.

41. The spreadsheet produced by the Respondent as part of their bundle was sufficiently small as to almost require reading with the aid of a magnifying glass. No statement showing the calculation of the proportions payable under the different service charge heads by the owners was produced with service charge demands.

42. The Tribunal decided that the Respondent has failed to comply with clause 4(b) of the Lease by not providing the Applicants with a certificate from a competent chartered accountant firstly the total amount of the costs and expenses for each period and secondly the proportionate part due from the Applicants. Until the Respondent complies with this clause no service charge shall be payable by the Applicants for the periods in question.

43. Subject to the above, the Respondent provided a calculation of the amount payable by the Applicants taking into account the deductions for the Sinking Fund contribution and Directors and Officers insurance. The Respondent calculated the service charge for 2011 should be £577.49 and for 2012 should be £573.17.

The Application under section 20C of the 1985 Act

44. Some leases allow a landlord to recover costs incurred in connection with proceedings before the First-tier Tribunal (Lands Chamber) as part of the service charge. The Applicant has made an application under s20C of the Act to disallow the costs incurred by the Management Company of the application in calculating service charge payable for the Property, subject, of course, to such costs being properly recoverable under the provisions of the Lease.

45. The Applicants argued that they had made every effort to ascertain answers to their queries before issuing the application. Mr Gray argued on behalf of the Respondent that the application was heavy handed, and, given the Applicants' intractable attitude to the Respondents' co-operation, inevitable. There was no application for a refund of the application or hearing fees.

46. The Tribunal considered that the Respondents had not provided responses to the Applicants with sufficient time or detail to enable the Applicants to consider the matter properly. They decided to make an order appropriately.

The Schedule

The Law

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.

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.

Section 27A provides that

(1) an application may be made to the appropriate 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.

No guidance is given in the 1985 Act as to the meaning of the words "reasonably incurred". Some assistance can be found in the authorities and decisions of the Courts and the Lands Tribunal.

In *Veena v S A 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].

Section 20C provides that

(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 or the First-tier Tribunal (Property Chamber) 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

(2) The application shall be made-

(a) in the case of court proceedings to the court before which the proceedings are taking place, or, if the application is made after the proceedings are concluded, to the county court

(b) in the case of proceedings before a First-tier Tribunal (Property Chamber) to the Tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded to any First-tier Tribunal (Property Chamber)

(c) ....

(d)....

(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.