10208

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AG/LSC/2014/0144**
Property	:	**Flats 4 & 6 Black Bull Court, 18 Hatton Wall, EC1N 8JH**
Applicant	:	**Mrs Victoria McLaurin**
Respondent	:	**Diamondpool Limited**
Representatives	:	**Mr R Fry (Fry & Co Property Management) for Diamondpool**
Type of Application	:	**Service Charges**
Tribunal	:	**Mr M Martynski (Tribunal Judge)** **Mrs S Redmond BSc (Econ) MRICS**
Date and venue of Hearing	:	**2 July 2014,** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**23 July 2014**

DECISION

DECISION SUMMARY

1. The Service Charges challenged by the Applicant for the service charge years 2006-7 to 2012/13 are reasonable and payable.

2. No order is made pursuant to section 20C Landlord and Tenant Act 1985 ('the Act').

3. No order is made regarding repayment to the Applicant of the fees (£440.00) she has paid to the tribunal to make this application.

BACKGROUND

4. The Building was built for the Respondent Diamondpool Limited by Galliard Plc in 2005/6.

5. The Building consists of 10 residential flats. There is a tunnel through the Building allowing pedestrian and vehicular access from the street through to the courtyard at the rear of the Building. The front door to the ground floor flat is situated within the tunnel. At the street end of the tunnel is an electrically operated gate which opens to allow vehicular access and within that gate is a smaller pedestrian gate.

6. The freehold of the Building was held by Diamondpool up until March 2014 when it was sold to Boultbee (Hatton Wall) Limited. The Service Charges in this application concern only those incurred by Diamondpool Limited prior to its sale of the freehold interest.

7. The Applicant is the original leaseholder in respect of both flats 4 & 6. The only lease that we have seen is that for flat 6 which is dated 16 November 2006 and which is for a period of 999 years from 1 January 2005.

THE ISSUES AND THE TRIBUNAL'S DECISIONS

Sinking Fund

8. The Applicant has been unhappy with the level of the Sinking Fund for many years. As a result of complaints made some years ago by the Applicant, funds collected for the reserve were returned to leaseholders as there was an overprovision.

9. We started off looking at this issue by considering the current position with regard to the reserves. According to Mr Fry, the Managing Agent for the Building the Sinking Fund currently holds £3662.

10. There is also a surplus on the general Service Charge account because, if the payments on account demanded and paid by leaseholders during the year exceed actual expenditure for that year, that surplus is not returned nor is it credited to leaseholders' accounts – it is accrued as a

general surplus. The budget for the Service Charge year is set with regard to this surplus. As at the date of the hearing, the surplus in the account amounted to £3,551.

11. The current budget for the Sinking Fund is just £1,000 per annum for the entire building. This provision is set to cover the following anticipated expenditure:

- Carpet renewal in the common parts every 4/5 years (estimated £3,500 in 2016)
- Lift repairs (£2,500 in 5 year's time)
- External refurbishment (£5,000 in 3 year's time)
- Internal redecoration (every 3/5 years – done in 2013 at a cost of £2,940)

12. Mr Fry said that, if the leaseholders agreed, he would dispense with the Sinking Fund and just demand the sums needed for the above works when they were due.

13. It was the Applicant's case that the Building needs minimal expenditure. The internal common parts carpet could last much longer than budgeted for. The exterior of the building was brick with brushed steel window frames. Generally the Building has been recently built and needs minimum repair.

Decision

14. In our view the provision for the Sinking Fund is reasonable. We say this for the following reasons.

15. First, it is simply good management practice for there to be a Sinking Fund. The creation of such a fund is recommended (where allowed by the terms of the lease) by the Service Charge Residential Management Code[1].

16. We accept that the Building was recently built; whilst it should not require major expenditure on repair or decoration, we consider that it is good practice to allow a provision for some repair and decoration. Buildings often require unexpected maintenance and repair no matter how new.

17. A provision of £1000 per year is around £100 per flat and is, in our view, as low as it could reasonably be.

[1] 2nd Edition, produced by the Royal Institute of Chartered Surveyors and approved by the Secretary of State pursuant to s.87 Leasehold Reform, Housing and Urban Development Act 1993

Fire panel

18. In May 2008 the Applicant via its Managing Agents commissioned a Fire Risk Assessment. That assessment stated that the Building required a Fire Alarm and Detection System. That recommendation was give a priority of 3. This category of priority was described in the report as:

> Risk to health and safety is "substantial, or worse" and/or represents a serious contravention of legislation. Urgent action required.

19. The Building was not provided with a fire alarm when originally built. It had smoke detectors in the common parts and a smoke vent allowing smoke to escape from those common parts.

20. The Applicant only acted upon the recommendation in the Fire Risk Assessment in July 2013 when the statutory consultation process was started with leaseholders regarding the work. Mr Fry was candid in admitting that there was no good reason for the delay in implementing the recommendations of the fire safety report.

21. The Applicant's issue with the work was this; if the Building was only built in 2005/6, why was it built without a fire detection system, the absence of which was described in 2008 as being a 'substantial or worse risk to health and safety'? In those circumstances, argued the Applicant, the installation of the system after the Building was built at the expense of the leaseholders was unreasonable.

22. We asked Mr Fry if he could justify the installation of the Fire Panel or its omission when the Building was originally built. All Mr Fry was able to do was to point to the fact that provisions of the Regulatory Reform (Fire Safety) Order 2005 had not come into force until later in 2006 after the Building had been built. Mr Fry commented that, if at the time of building the Fire Panel had been required, the Building would never have been passed by the Building Control department at the local authority.

23. Mr Fry was unable to point to any particular part of the Regulatory Reform (Fire Safety) Order 2005 that was relevant to the matter. We were provided with a summary of that Order which appeared to be in very general terms. There was no specific obligation in that Order for a Fire Panel. Mr Fry was not able to tell us what legislation was in force prior to the Order of 2005.

24. It is probably the case, argued Mr Fry, that fire safety expert's opinions and generally accepted standards change from time to time and that at the time of the Assessment carried out in 2008, bearing in mind the provisions of the Order of 2005 and developing best practice, the company carrying out the Assessment considered that a Fire Panel was now necessary in a Building of this nature.

Decision

25. In considering this issue, a useful starting place is with the Assessment. The Applicant, as is common practice, engages fire safety experts to carry out an Assessment. There is no suggestion that the company carrying out the Assessment is not competent or that their findings are not sound. It must be the case therefore that as from the date of the Assessment, and in accordance its recommendations, it was reasonable for the Applicant to incur the expenditure to install a Fire Panel.

26. The limitation placed on Service Charges in section 19(1) of the Act is that they are only payable to the extent that;

    (a) they are reasonably incurred, and
    (b) any work to which charges relate is of a reasonable standard

    No question was raised as to the standard of the work in question.

27. If then, following the analysis set out above, it was reasonable to install the fire panel, the costs of installation were reasonably incurred. That, so far as section 19 is concerned, is an end of the matter.

28. However, on an application such as this made pursuant to section 27a of the Act, the question that a tribunal has to answer concerns the payability of a Service Charge. The relevant parts of section 27a provide as follows:-

    > 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 amount which is payable,
    > (d) the date at or by which it is payable, and
    > (e) the manner in which it is payable.

    The Upper Tribunal has pointed out that in determining whether a charge is 'payable' a tribunal has the jurisdiction to consider any issue if determination of that issue is essential to determining whether a service charge is payable[2].

29. The Applicant's case must therefore be that the sums in question are not payable because of the Applicant's failure to install a suitable fire alarm system in the first place.

30. However, if the Respondent has established that the costs in question were reasonably incurred, which for the reasons given above it has, the onus of showing that those costs are not otherwise payable must fall on the Applicant.

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[2]Canary Riverside Pte v Schilling (LRX/65/2005)

31. The Applicant has failed to demonstrate that the Applicant was obliged to or should have installed a fire alarm system (other than the smoke detectors that were installed) when the Building was originally constructed.

32. It is with some regret therefore that we come to the conclusion that the costs of the Fire Panel are reasonable and payable.

Buildings insurance premiums

33. The relevant premiums paid for the Building are as follows:-

Year	*Amount*
2007	£4864.50
2008	£2763.47
2009	£3248.60
2010	£3411.03
2011	£3560.60
2012	£3852.46
2013	£4044.60

34. The Applicant produced various evidence to support her contention that these premiums were unreasonable. That evidence was as follows:-

(a) a summary of Service Charge expenditure for (according to the Applicant) a similar building at Clare Lane, N1 for the year ending 31.12.13 showing a buildings insurance premium of £2,499.49
(b) A draft budget from pbm managing agents for the Building showing a buildings insurance premium of £2,100.00
(c) A letter from Canonbury Management with a draft budget for the Building showing a buildings insurance premium of £2,000.00
(d) A draft budget from Haus Block Management managing agents for the Building showing a buildings insurance premium of £2,920.00 (including terrorism – see notes to the quote)
(e) A quotation from CHU Residentsline for the insurance on the Building of £2102.93
(f) A quotation from Deacon insurance broker for the insurance on the Building of £1,808.28

35. Mr Fry for the Applicant stated that the buildings insurance for the Building was obtained under a block policy. That block policy covered buildings managed by Fry & Co where the buildings themselves were owned by several different freeholders. Mr Fry claimed that a block policy meant that there was better claims handling. He said that the insurance was obtained by Blue Fin brokers who he said were one of the top ten brokers in the UK. Mr Fry added that he invited the Applicant to suggest insurers to approach for an alternative quote but she did not

come back to him with any proposal. Mr Fry gave some details of the commission that was obtained on the insurance by the brokers and by his company for this insurance.

Decision

36. We were not persuaded by the evidence of the premium for the block at Clare Court provided by the Applicant. That evidence was simply a list of estimated expenditure. There was no evidence of the *actual* premium paid. There was no independent evidence of the nature of the building and its claims history.

37. As to the evidence from the various managing agents, we are unable to give this any real weight. It is of course in the interest of managing agents, when giving expenditure estimates for buildings that they may be asked to manage, to keep those estimates to the bare minimum. There is no evidence that these agents actually surveyed the market in respect of the Building or that their estimates are based on actual quotes from insurers.

38. As to the quotes from CHU Residentsline and Deacon, the Applicant told us that neither broker was sent a copy of the insurance schedule for the Building in respect of the Building's current or previous policies of insurance. It is not possible to see clearly from these quotes a point by point comparison with the current insurance for the Building. For example, the quote from Deacon does not give any detail on the excess(es) payable.

39. The quote from CHU states that it is '*subject to satisfactory completion of the enclosed proposal form and questionnaire.....*' no doubt these would seek further details regarding the Building and its claims history.

40. On balance, we are not convinced that the Applicant has provided evidence of a sufficient quality to show that much lower premiums could be reasonably obtained for the Building.

41. To be of a reasonable evidential value, a quote for buildings insurance should take account of the schedule for the insurance challenged and should take account of the building's claims history so that a tribunal can be sure that the quote is based on a policy similar to that obtained by the landlord. A sufficient number of different such quotes need to be obtained to demonstrate a range of premiums that are available in the market place.

42. Again we reach this conclusion with some reluctance. From our knowledge and experience, the premiums that have been incurred for the Building appear to be high. On the evidence available to us however, we are not able to conclude that they are unreasonably high.

Additional management fee

43. The Applicant objected to an additional management fee of £500 charged by Fry & Co.

44. Mr Fry explained that his firm charged an additional fee when organising non-routine works. The fee is calculated on the basis of 2.5% of the costs of the works being carried out with a minimum charge of £500. This fee was charged in respect of the Fire Panel and redecoration works and the minimum charge applied.

45. The Applicant pointed to the Respondent's replies to her challenges raised in the proceedings where it stated that Fry & Co's fees were all inclusive.

46. Mr Fry explained that this 'all inclusive' referred to work in respect of general service charges, not non-routine works.

Decision

47. In our experience, it is common practice for management companies to charge additional fees in respect of organising works to a building and it is common for that fee to be related to the cost of those works. In this case we consider the fee to be reasonable. However, for the sake of transparency, it might be better for Fry & Co make it clear in future what they mean when they say that their basic management fee is 'all inclusive'.

Tunnel

48. In a letter dated 23 December 2012, the Applicant was told by Fry & Co that she was not responsible for any works carried out to the tunnel in the Building. Mr Fry accepted that this information had been given but it was incorrect and the employee who wrote the letter had no authority to make that assertion.

49. The terms of the lease appear to be reasonably clear on this matter. The common parts are defined as those available for general use by all leaseholders[3]. This would appear to include the tunnel to which all leaseholders have access (the communal refuse bin had been stationed there for some time). The landlord is obliged to maintain and repair any common part[4] and the leaseholders are accordingly obliged to contribute to the expense of this by way of the Service Charge[5].

50. The Applicant relied upon clause 9 (j) of her lease, the relevant parts of that clause read:-

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[3]Clause 1, page 2 of the lease
[4]Clauses 2 and 6 of the Sixth Schedule of the lease
[5]Fourth Schedule to the lease

> If any damage occurs.....to any of the Common Parts of the block....for which the Landlord is obliged or required to contribute towards the repair (and which is not covered by any insurance then in existence and/or which the Landlord is not entitled to recover from a third party) the costs charges and expenses reasonably incurred by the Landlord in connection therewith shall be deemed to be an expense incurred by the Landlord in respect of which the Tenant shall be liable to make an appropriate contribution.....

51. The Applicant was of the opinion that there were all sorts of people who had access to and who were using the tunnel. Mr Fry stated that this was not correct. Access to the tunnel was limited to the residents of the Building and to a very limited number of persons who had fobs to operate the gates giving access to the tunnel from the street.

52. The Applicant objected to three items in particular relating to work carried out in the tunnel. The first invoice for these items is for the sum of £150 for fixing a damaged cover to a stack pipe. The pipe in question feeds a water tap to provide water for cleaning the area and was said by Mr Fry to be damaged by the communal bin being knocked against it.

53. The second item is for £1,450 and is for removing and re-siting bicycle stands (available for use by all leaseholders) and for decorations. Half of this cost was charged to the Service Charge, the other half was apportioned to the commercial users.

54. The third invoice is for £220 and is to fix the damaged wall behind where the bin was stored and to inspect the pipe referred to above.

Decision

55. It is not clear to us what third party could be identified as responsible for the damage to the pipe and wall and then pursued in respect of the costs of that damage pursuant to the clause (9(j)) relied upon by the Applicant.

56. Further, none of the costs described above appeared to us to be unreasonable. The way in which the costs were apportioned appeared to be reasonable and sensible. The damage to the wall and to the water pipe is properly payable by the leaseholders rather than split between them and the commercial users.

Accountancy and audit fees

57. The relevant fees over the years are as follows:-:-

Year	*Amount*
2007	Audit £763.75; Accounts £282.00
2008	Audit £787.75; Accounts £276.00
2009	Audit £804.87; Accounts £00.00
2010	Audit £822.01; Accounts £00.00
2011	Audit £924.00; Accounts £360.00
2012	Audit £960.00; Accounts £420.00

2013	Audit £876.00; Accounts £420.00

58. The Applicant produced evidence to support her contention that these costs were unreasonable. That evidence was as follows:-

(a) a summary of the Service Charge expenditure for the building at Clare Lane, N1 (referred to previously) for the year ending 31.12.13 showing nil for independent account's fees
(b) a draft budget from pbm managing agents for the Building showing a figure of £780 for Risks Assessments and Audits
(c) a letter from Canonbury Management with a draft budget for the Building showing a figure of £200 for Annual Accounts
(d) a draft budget from Haus Block Management managing agents with a draft budget for the Building showing a figure of £450 for Annual Accounts

59. The Applicant pointed out that there were only around 42 invoices per year for the Building.

60. The accounts for the Building, given that there are more than four flats require certification. Accordingly it is reasonable for an accountant to be used to certify the accounts (section 21(6) of the Act and the Service Charge Residential Management Code).

61. Mr Fry stated that the accountants used were ones in Pimlico close to his offices. He said that most accounts firms would not find it worthwhile doing the work for anything less than £1,000.

62. So far as his firm's costs for the accounts were concerned, they had to provide to the accountants, the bank accounts, the demands from leaseholders, the budget and the invoices for the various disbursements.

Decision

63. As to the Applicant's evidence, as set out in our comments in relation to buildings insurance, we are not convinced at how accurate managing agents' draft budgets are when they are pitching for work. Those managing agents do not appear to take account of the fact that the accounts of a building of this size need to be audited. Clearly the figure of zero for Clare Lane cannot be correct.

64. We are however uncomfortable about the total costs of accountancy, running for the past three years at around £1,300 for this building where there are so few heads and types of expenditure. We consider these costs to be very high but we are not convinced from the Applicant's very limited evidence that the costs are unreasonably high. If the costs continue at this level in future, the Applicant, with better evidence, may be able to persuade a tribunal that costs of accountancy are too high.

Costs

65. Given that we have found entirely against the Applicant, it would not be right to make any order pursuant to section 20C Landlord and Tenant Act 1985 preventing the Respondent from placing the costs of this application on to the service charge (if that were indeed possible given that the Respondent no longer owns an interest in the Building).

66. Further it would not be right to make any order that the Respondent makes any payment to the Applicant in respect of the fees paid by her to this tribunal in making her application.

Mark Martynski, Tribunal Judge
23 July 2014