10362

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00BN/LSC/2014/0022**
Property	:	**Flat 5, 27 Sackville Street, Manchester M1 3LZ**
Applicant	:	**Baa Bar Limited**
Respondent	:	**Mr Dominic Carden**

Case Reference	:	**MAN/00BN/LSC/2014/0046**
Property	:	**Flat 7, 27 Sackville Street, Manchester M1 3LZ**
Applicant	:	**Lauren Addison**
Represented by	:	**Cynthia Addison**
Respondent	:	**Baa Bar Limited**

Type of Applications		**Sections 27A (and 19) of the Landlord and Tenant Act 1985 and s20C**
Tribunal Members	:	**K M Southby (Judge)** **D Bailey (Expert Valuer Member)**
Date of Decision	:	**26 September 2014**

DECISION and REASONS

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DECISION

1. **The amount apportioned under the Major Works Invoice is reasonable and payable by the Tenants under the service charge.**

2. **With the exception of Insurance, the service charge for 2012-13 is reasonable and reasonably apportioned and therefore payable by the Tenants under the service charge account.**

3. **The sum applied to the service charge account in respect of insurance for the years 2012-13 and 2013-14 is not payable.**

4. **The costs in respect of this application are not to be added to the service charge account.**

BACKGROUND

1. This hearing combined two applications which were heard together. The first application was made to the County Court by the Freeholder, Baa Bar Limited against the Tenant of Flat 5, Mr Carden, on 4 November 2013, for non payment of Service Charge under the lease. This application was transferred from the County Court to the Tribunal on 6 February for determination of the liability to pay service charges under s27A (and 19) of the Landlord and Tenant Act 1985.

2. The second application was made by Lauren Addison, Tenant of Flat 7, against the Freeholder, for determination of liability to pay and reasonableness of service charges under s27A of the Landlord and Tenant Act 1985.

3. Both cases also include an application under s20C that costs of the application should not be added to the service charge account.

THE PROPERTY

4. The Property is a converted industrial building over five floors. Commercial premises run by the Freeholder occupy the lower two floors, with the exception of the communal entrance to the apartments which occupies a small section of the second level. Residential apartments comprise the upper three floors, with flats 7&8 on the top floor, 4,5,and 6 on the floor below, and 1, 2 & 3 on the floor below that. No comprehensive plans were made available to the Tribunal and the Tribunal were not able to inspect the commercial premises, so the precise floor areas of the respective areas of the building are not clear. In particular it was suggested at the inspection that part of the second level was not commercial but in fact part of one of the apartments. The Tribunal was unable to verify this.

5. Upon inspection the Tribunal found the apartments were accessed through a communal entrance to the side of the building, with a large communal spiral staircase to each floor. Mrs Cynthia Addison, representing the Tenant of Flat 7, and Mr Hitchin from the management company on behalf of the Landlord were in

attendance at the inspection. The Tribunal was shown the interior of Flat 7, and evidence of water ingress.

THE ISSUES

6. It was agreed by the parties that the only issues for consideration by the Tribunal were:
    a. Re Flat 5 – Apportionment of Major Works
    b. Re Flat 5 – Reasonableness of Service Charges for 2012-13
    c. Re Flat 7 – Insurance

LAW

7. Section 27A(1) of the 1985 Act provides:

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

8. The Tribunal is "the appropriate tribunal" for these purposes, and it has jurisdiction to make a determination under section 27A of the 1985 Act whether or not any payment has been made.

9. The meaning of the expression "service charge" is set out in section 18(1) of the 1985 Act. It 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.*

10. In making any determination under section 27A, the Tribunal must have regard to section 19 of the 1985 Act, subsection (1) of which provides:

> *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.

11. "Relevant costs" are defined for these purposes by section 18(2) of the 1985 Act as:

> *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.*

THE LEASE

12. The Lease is the same in both cases, being a 125 year term from 1st January 1996. However Mr Carden holds his property by an underlease dated 23rd January 1997 with Riverside Housing Association Limited which is on different terms.

13. Under the Lease the leaseholders covenant with the Freeholder at clause 3(f) to *"contribute a reasonable proportionate part of the total premium to be determined by the surveyor of the Lessor which the Lessor shall from time to time pay by way of a premium for keeping the building insured against loss or damage and third party insurance in accordance with the covenant on its behalf hereinafter contained such proportion to be paid on the quarter day immediately preceding the outlay by the Lessor the due proportion being assessed as under sub clause (e) hereof and bearing interest thereon in the same manner as under Clause 7 hereof;"*

14. Clause 3(e) requires the Leaseholders to *"contribute and pay to the Lessors on demand a proper proportion to be determined by the Surveyor to the Lessor of all charges and expenses from time to time incurred in performing and carrying out the obligations and each of them under Part V of the said First Schedule in connection with the Building..."*

15. Part V of the First Schedule sets out the Lessors obligations which include at paragraph 3 *"Keep insured in the name of the Lessor at all times throughout the term hereby granted the demised premises and the Building of which they form part against loss or damage by fire and other usual comprehensive risks including third party insurance demolition costs and professional fees in some insurance office of repute in the full reinstatement cost thereof..."*

THE HEARING

16. At the hearing Mr Barnes of Counsel appeared on behalf of Baa bar Ltd, with Mr Hitchin from the Management Company also appearing on behalf of the Freeholder. Mrs Addison appeared on behalf of her daughter Miss Addison from flat 7 and Mr Carden of flat 5 appeared in person.

17. The Tribunal had the benefit of oral representations and written submissions from all parties.

APPORTIONMENT OF MAJOR WORKS

18. The original application was for non payment of service charges in respect of an invoice for major works to the roof. The figures in the service charge statements presented by Mr Hitchin were not disputed.

19. The Tribunal heard representations from Mr Carden in respect of the disputed invoice. The invoice is addressed to Mr Carden dated 29 April 2013 is in the sum of £2942.15 and is described as 'Major Works – Roof Repairs'.

20. Mr Carden's initial argument was that the roof repairs did not fall under the scope of the service charge.

21. Mr Barnes on behalf of Baa Bar Ltd argued that the roof works formed part of an overriding responsibility for the Landlord to maintain the building as a whole, including specifically at paragraph 1 of Part V of the Lease an obligation to "Maintain the foundations main structural walls common parts roofs and all other parts of the Building not demised to the Lessees of the flats"

22. The Tribunal accepts that roof repairs form part of the Landlord's obligations under the lease at paragraph 1 of Part V and in turn that it is the Tenant's obligation to pay for a reasonable proportion of those costs under clause 3(e) as set out above.

23. Mr Carden's subsequent argument was that the manner of apportioning these costs was both unfair and in conflict with the lease. Mr Carden submits that the Service Charge in respect of the major works has been apportioned 17.44% to the Commercial Unit, and 10.32% to each of the 8 Flats.

24. It is accepted by all parties that the Commercial Unit operated by the Freeholder occupies approximately 40% of the floor area of the building.

25. Mr Carden argues that a more reasonable apportionment would be based upon floor area. He presented the Tribunal with his floor area estimates which were accepted by all parties as being broadly accurate. These were as follows:

    Floor 1 20%: Commercial Unit Baa Bar
    Floor 2 20%: Commercial Unit Baa Bar
    Floor 3 20%: 2x 1 Bed Flats, 1x 2 Bed Flats (6% and 8% respectively)
    Floor 4 20%: 2x 1 Bed Flats, 1x 2 Bed Flats (6% and 8% respectively)
    Floor 5 20%: 2x 2 Bed Flats (10% each)

26. Mr Carden also cites RICS Guidelines, suggesting that where appropriate costs should be allocated to separate schedules and the costs apportioned to those who benefit from those services. The outcome being that occupiers may therefore pay different percentage apportionments under different schedules.

27. It was agreed by all parties that the Lease and the underlease are silent on the percentage apportionment to be applied. The relevant clause regarding apportionment being clause 3(e) as set out above.

28. Mr Hitchin relies in part upon Clause 7(1)(c) of the underlease, which states *"The Service Charge means a proportion of the Service Provision as determined by the Landlord from time to time."* This in his view enables the Freeholder to set the proportion as it chooses.

29. The Tribunal disagrees with this analysis, as the Freeholder is not a party to the underlease. The Landlord referred to in the underlease is not the Superior Landlord, Baa Bar Ltd, but Riverside Housing Association, and no evidence has been provided that they have at any stage set a service charge proportion in respect of Mr Carden. The Tribunal therefore does not rely upon the clause in the underlease referred to by Mr Hitchin, but instead looks to the clauses in the Lease set out above.

30. Mr Hitchin went on to argue that there is no specified proportion but that the Landlord, in this case Baa Bar Ltd has the right to set that apportionment as long as it is fair and reasonable. Mr Hitchin argues that an apportionment between apartments on square footage is unreasonable as all apartments have access and use of the same communal area and therefore an equal split between the apartments is a fairer way of splitting the charges.

31. The Tribunal notes that the sum invoiced to Mr Carden actually works out at 7.85% of the total invoice of £37,200. When multiplied up by the 8 flats this represents 62.8% of the roof costs being borne by the apartments, and 38.2% of the costs being borne by the commercial unit. In the absence of detailed plans the Tribunal is unable to say whether or not this percentage split in fact represents the true floor area division of the building but the Tribunal is satisfied that this is a close approximation. The Tribunal also agrees that apportionment can reasonably be allocated equally to each apartment rather than split by floor area, as each flat has the same access to the communal area. The Tribunal therefore concludes that the apportionment of the Major Works was reasonable and is therefore payable as part of the Service Charge.

32. Mr Carden also raised an issue with the level of contingency included in the quotation for major roof works, suggesting that it was excessive. The Tribunal had the benefit of examining the original proposed fixed price contract for £36,000 plus VAT, which included the provision of a contingency of £16,000 which was set out in the schedule of works attached to the original quotation. Mr Carden's concern was not with the quality of the works, or the price of those works, but that the level of contingency is higher than average. The Tribunal notes however that having quoted a fixed price contract of £36,000 plus VAT the final sum charged was less, being only £31,000 plus VAT. Correspondence from the contractor provided to the Tribunal explained the nature of the issues with the roof which were found once the works commenced and the reasons for the modification. The Tribunal concludes that the sum invoiced, and the level of contingency within it were both reasonable.

33. The Tribunal therefore concludes that the sums outstanding in respect of the major works invoice are therefore payable as part of the service charge.

REASONABLENESS OF SERVICE CHARGE 2012-13

34. Mr Carden's defence to the county court claim also argues that the monthly service charge in general is unreasonable and disproportionate however at the hearing Mr Carden explained that he had an additional issue with the lack of consultation.

35. The Tribunal's jurisdiction upon transfer of a matter from the County Court is constrained by virtue of paragraph 3 of schedule 12 of the Commonhold and Leashold Reform Act 2002, to only dealing with those matters contained within the pleadings. Accordingly Mr Carden's subsequent written representations as to the inadequacy of consultation in respect of charges in the service charge year 2012-2013 are outside the scope of the Tribunal's jurisdiction on this occasion and would need to be the subject of a separate application to the Tribunal.

36. The Tribunal however can consider the reasonableness of the service charge itself, and the reasonableness of its apportionment, both of these being issues within the pleadings.

37. The Tribunal was provided with details of the invoices making up the service charge. No evidence was submitted to suggest that the work had not been carried out. No alternative quotations for work were provided. The Tribunal considered the evidence from all parties – in particular evidence from both Mr Hitchin, Mr Carden and Mrs Addison in respect of cleaning. The Tribunal heard that cleaning of the front entrance was carried out 4 times per year, however it was accepted by Mr Hitchin that those occurrences in the year may not always have been evenly spread. Mr Hitchin informed the Tribunal that it was the intention of the managing agents to reduce the weekly cleaning of the stairwell to fortnightly in order to clean the external entrance more frequently. In respect of cleaning and all other elements of the service charge the Tribunal concluded that the works were reasonable and reasonably incurred, and therefore that the service charge as a whole was therefore payable, with the exception of the findings in respect of Insurance below.

38. The Tribunal also found that the service charge was reasonably proportioned evenly between the apartments, each apartment having equal benefit and amenity from the services provided irrespective of floor area. The Tribunal notes that the commercial unit does not benefit from these services, and does not contribute to them (save for a small charge in respect of management and accountancy fees), with the exception of Insurance which is addressed below.

INSURANCE FOR YEARS 2012-13 and 2013-14

39. The Tribunal heard from Mrs Addison in respect of the insurance policy. Mrs Addison gave the Tribunal details of the previous insurance arrangements which

included an excess of £100. The current insurance provision has an excess of £5000 which Mrs Addison argued was from a practical perspective virtually useless, as when they had come to make a claim following the damage from water ingress the excess was so high as to make claiming under the policy impractical. Mrs Addison drew the Tribunal's attention to the commercial elements of the policy including Deterioration of Stock, Goods in transit, Loss of Licence. Mrs Addison drew the Tribunal's attention to the relevant clause in the lease, being paragraph 3 of Part V of The First Schedule. This states that the Lessor will '*keep insured in the name of the Lessor at all times throughout the term hereby granted the demised premises and the Building of which they form part against loss or damage by fire and other usual comprehensive risks including third party insurance demolition costs and professional fees...*

Mrs Addison argued that there were significant elements of the policy for which they were paying which did not amount to 'usual comprehensive risks'.

40. Mr Hitchin for the management agents pointed out that the Building is a mixed use property, the policy is a group policy covering a number of other premises, none of which have residential use, and that the placing of insurance is through a broker to endeavour to get best price. Mr Hitchin however conceded that the nature of the policy and the extent of the excess was unusual for tenants of residential property.

41. The Tribunal observed that in the 2012-13 service charge accounts there is an entry in the residential page of the accounts for insurance, but no entry for insurance in the commercial page, suggesting that the commercial units are not contributing for the insurance from which they are benefitting.

42. The Tribunal accept the Tenant's argument that the charge for insurance added to the service charge account is not reasonable, because of the current form of the insurance. The element of the tenant's service charge in respect of insurance for the service charge year 2012-13 and 2012 -14 is therefore not payable by the tenant and is to be refunded to the Tenant through the service charge account if it has been already paid.

COSTS

43. The Tribunal received an application from both Tenants that the costs of the application should not be added to the Service charge account. The Tribunal received written representations on the point and concluded that in the circumstances it was reasonable for the Tenants to bring the matters to the Tribunal, not least because of the lack of clarity on the face of the papers in respect of apportionment and the nature of the insurance provision. Accordingly the Tribunal makes an order under s20C that the costs of the proceedings shall not be added to the service charge account.