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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER

(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00CG/LSC/2013/0097.**
Properties	:	**Flats 1,2,3,5,7 & 8 Telegraph Ho. Sheffield. S1 2EA**
Applicants	:	**Jeanna Gater and 5 other tenants.**
Respondent	:	**Wellington Real Estate Limited.**
Type of Application	:	**Landlord & tenant Act 1985 – Sections 27A & 20C.**
Tribunal members	:	**Mr L Bottomley. Mr J Platt. Mr M J Simpson**
Date of Determination	:	**10th February 2014**

The Application.

By an Application lodged on the 18th June 2013, the residential tenants sought a determination as to the reasonableness of the Service Charges in respect of Telegraph House for the year ended 31 March 2013 and the year ended 31 march 2014 and future years.

There have been 2 previous applications which the LVT (same Tribunal membership) has dealt with the reasonableness of the amount of the Service Charges. The specific issue in this Application relates to the apportionment of those Charges.

Directions.

Specific and focussed Directions were given on the 26th September 2013, a copy of which is attached hereto. The parties have complied with those Directions (with some time extensions being granted).

Written representations.

Mr Gater, on behalf of his tenant Daughter and the other applicants, served a statement dated 6th October 3013, clarifying his concerns. WRE responded to that statement and the application generally, with a very detailed statement dated 16 October 2013, including an analysis of floor areas and detailed arithmetical calculations showing how the apportionment is determined.

Mr Gater responded in his statement of 27th October 2013. It dealt with some matters that were outwith the issues identified by the Directions, and agreed upon at that time by the parties, but also raise questions relating to apportionment in respect, particularly, of the toilets on the first and second floors and the basement.

WRE replied in the statement dated 12 December 2013. It dealt with the issues that Mr Gater had raised and explained in quite specific terms how the floor areas were used as part of the apportionment calculation, and particularly addressed the issues of toilets and basement.

The total area of 'non shared parts' which was under the direct control of WRE is 28216 sq.ft. (Santander 9469;outdoor 6429;GT 969Bell & Buxton 6609;basement 4740). Additionally the residential floors (the 'White Lease'- see below) occupies 5532 sq.ft.

A total of 'non shared parts' of 33748 sq.ft.

WRE have created 6 categories of service costs so as to attribute those cost only to the appropriate tenant. (e.g. the retail tenants do not contribute to the lift which serves only the internal tenants).

The lease of the 3rd & 4th floor is liable, on WRE's apportionment for 19.07% of Schedule A (those cost attributable to the whole building) and 36.53% of Schedule B (Telegraph House internal tenants).

These amounts are calculated on the basis that the 'White lease' occupies 5532 sq.ft. out of a total of 29,008 in respect of Schedule A and 5532 sq.ft out of a total of 15,144 for Schedule B.

The total figures are the sum of the areas occupied by Santander, Outdoor, GT, B&B and the White Lease for Schedule A and the 1st & 2nd floor offices and the White Lease for Schedule B.

The basement area is not part of the computation.

Inspection.

This was attended as applicants by Mr Gater, Mr & Mrs Goodwin (re son's flat -7) and latterly Dr Nicoll and as respondents by Messrs Preston, Chamberlain, Davis & Burner.

Although we, as tribunal members, had previously inspected the premises and although the issues were concentrated on the 3 areas of concern to the applicants, (laundry, toilets, basement.) we took the opportunity to remind ourselves of the overall position.

The building is a listed building. We understand it was the former head office of the Sheffield Telegraph newspaper. In 2004 it was redeveloped. The ground floor accommodates 3 retail premises and the entrance door and hallway to the upper floors. The first and second floor were developed as offices and with the ground floor remained in the ownership of the Respondents or their predecessors, who let the retail/office space on commercial terms.

There is a large basement area under some of the retail units, which is accessed from the entrance hall via the plant room and service meters room.

The 3rd and 4th floors were let to a residential developer (White) on terms of the Lease of 27th August 2004. Each of the applicants bought a leasehold flat from White. They were the tenants of White who was the tenant of WRE. White became insolvent and eventually LCP Commercial(part of WRE group and to all intents and purposes WRE in another guise) acquired his leasehold interest so as to become both the commercial landlord of the non residential tenants and, in place of White, the landlord of the residential tenants.

There is no issue as to the apportionment as between each residential tenant. Those proportions are specified in each flat lease. The issue is the apportionment to the 'White Lease' of the service charge costs under the lease of 27th August 2004. Those cost once determined, are payable, in the proportions defined in each residential lease, by the residential tenants.

The Lease.

For such a potentially complex situation the lease of 27th August 2004 is remarkably brief in its provisions.

The 'Service Costs' means all costs reasonably and properly incurred in respect of the Building.

The 'Building' is simply Telegraph House as registered on the freehold title of WRE.

The tenants share means a due and fair proportion of the Service Cost (such proportion to be determined by the landlord or its surveyor (in each case acting reasonably) and taking into account the relevant floor areas within the building or other reasonable factors in making the determination.

There is no specific definition of 'common or shared parts'.

The issues.

The over arching issue is the determination by the landlord of a due and fair proportion.

There are 3 specific issues.

A small room off each laundry on 3rd and 4th floors is not currently useable. Mr Gater contends for that to be taken into account, by reducing the floor area of the 'White Lease', when considering the apportionment of the Building Service Costs.

The toilets on the first and second floor are part of the 'Building' but in practice are used by only the occupants of those floors. The area of the toilets (measured on the inspection and agreed at 188 sq. ft for both in total) should, Mr Gater contends, be added to the floor areas of the lessees of those floors.

The basement (4740sq.ft.), which is now used by the first floor tenant as storage, should, Mr Gater contends, be added to the overall floor area deemed to be let, so as to reduce the proportion of the overall let floor area attributable to the 'White Lease'.

The Hearing.

This was held immediately following the inspection, At Jury's Hotel Meetings Suite on 10th February and attended by all those who had attended the inspection.

Basement

Mr Gater pointed out that it was clear from the inspection that the basement was occupied by Bell & Buxton for files storage. If that 4740 sq.ft. was taken into account it would reduce the 'White Lease' proportion for Schedule A from 19.07% to 16% approx. The indication that had been previously given by WRE that they would attempt to negotiate a contribution (intimated at £5500pa) from B&B towards service costs had not come to fruition.

Mr Preston for WRE pointed out that the basement had never been regarded as common or shared parts. It was the exclusive province of WRE as part of their freehold. It had no realistic rental value and was unlettable. No costs were incurred in respect of the basement which found their way into the Service Costs schedule. The only expenditure in the basement had been structural work and fire protection for the building for which access was required to the basement but did not amount to expenditure on the basement per se.

WRE have allowed B&B to store files in the basement and continue to try to negotiate a contribution. There is no prospect of any tenant (B&B or others) taking a formal lease on terms that take on the contribution to service costs that would be attributable to 4740 sq.ft. as suggested by Mr. Gater.

WRE recognise that the situation is unresolved but its alternatives are to leave matters as they are, remove B&B's concession or try to obtain a contribution. WRE aver that they are reasonable in pursuing the latter course of action.

If B&B were to be allowed to store files it would involve WRE in £10,000 of expenditure on new doors, all of which will be borne by WRE as expenditure on a part of the building which they are prepared to regard as their own domain and not include it in any Schedule of Service Costs. Notwithstanding this and the fact that any contribution from B&B need not, strictly speaking, be brought into account , they were still willing to consider doing so.

WRE, whilst maintaining that the basement should not be brought into account at all, averred that if it was to be considered, it should be at a reduced square footage to take account of its almost nil letting value.

Mr Gater dismissed that suggestion as an inappropriate negotiating stance.

Toilets.

Whilst conceding that the toilets on the first and second floors are part of the building, the cost of which calls for a contribution from the 'White Lease', Mr Gater averred that the fact is that only the tenants of those floors use the toilets . They have keys. The White Lease occupiers do not and do not need keys even though offered, but not progressed, by WRE. The 188 sq.ft. should be added to the total Schedule B figure.

Mr Preston confirmed that the practical position had been addressed. Notwithstanding that the toilets were part of the building and, on WRE's analysis, within Schedule B. It was recognised that B&B were the principle users. In fact the toilets should also be available to the other tenants of the first floor (currently Santander) but they had their own facilities within their demise. That may not always be the case if all or part of the first or second floor was let to any other tenant.

The issue had been addressed by agreeing with B&B that the Service costs of the toilets would be isolated from the Schedule B Service costs and paid separately by B&B. This had been so for the years in question in this application and would be so for the future. This left a de minimis cost for water charges.

The actual area involved was also de minimis and in any event toilet facilities would not normally, according to RICS practice, be taken into account on a Net Internal Floor area measure.

Laundry.

This aspect was not pursued by either party with any vigour at the hearing.

Mr Gater contended for the area (actual area undetermined, but only a few sq.ft. on any basis) to be excluded from the square footage attributed to the 'White Lease'.

Mr Preston explained that it was originally intended by the developer for use as a store room but WRE had been advised to decommission it on health and safety and fire safety grounds.

Determination.

As was made clear by our valuer member with his questions and comments at the hearing, there is a plethora of decided cases which make it clear that a Tribunal should not seek to impose its own view of a reasonable process. The approach must be to determine, having regard to all relevant circumstances, if the approach of the landlord is not unreasonable. There is rarely only one reasonable view, but a range of reasonableness within which several views may be encompassed.

We do not find that the approach of the landlord is unreasonable in respect of any of the 3 areas of contention.

The requirement is for the landlord to act reasonably when taking into account the *relevant (our emphasis)* floor areas and *other reasonable factors (our emphasis).*

It has done so. Despite the simplicity of the wording of the Lease and the lack of formulaic guidance, it has devised a moderately complicated but basically fair way of attributing costs to the different classes of tenant. It has modified that stance in the light of earlier Tribunal decisions e.g. by creating 2 more Schedules to more accurately focus the distribution of costs.

It has not slavishly followed the Lease, but has addressed the issues arising from changes which were not necessarily envisaged by those drafting the original Lease, such as negotiating with B&B re the cost of the toilets.

It has shown a willingness, we accept so far un-concluded, to treat B&B favourably without disadvantage to others, including the applicants, in the expectation that some contribution can be forthcoming.

Basement.

This is patently in a different category to any other part of the property. It is probably un-lettable and unusable by anyone except such as B&B. It shares none of the benefits, such as heat, shared parts decoration, lift, property maintenance, decorating etc., of the rest of the building.

There are no expenses or costs claimed or incurred in respect of the basement, and it has no impact on the Service Costs.

WRE have indicated that any modification of the basement to further accommodate their concession to B&B will be at their expense. They would be perfectly within their rights to regard income from the basement, which otherwise incurs no cost, as exclusive to WRE

These are very much *other reasonable factors* that the landlord may take, and has taken, into account.

The tenants' share is not arithmetically defined. Square footage alone is not determinative. The apportionment is discretionary. Indeed, on a previous occasion, we have heard argument that, for example, the cost of the hallway should be determined by level of usage rather that square footage. We determined that whilst that would not be unreasonable, neither was the method at that time adopted by the landlord. We are not bound by any previous decision. We visit these issues afresh. It merely serves to illustrate the 'band of reasonableness' to which we have previously referred.

Given that it would produce an imbalanced calculation to include the whole of the basement in the apportionment calculation we can see no fairer (*i.e.reasonable, taking onto account floor areas and other reasonable factors)* way of dealing with the issue than that adopted by WRE. The way they have chosen is not unreasonable.

Toilets.

These are, until the terms of the Lease are varied, part of the Building. WRE could ignore the actual use and charge the full cost to the appropriate Schedule. They have not done so. They modified that approach and now isolate almost all of the costs so as to charge them to B&B.

It would be reasonable to include the toilets in the demise to B&B to reflect the reality of use. It is also reasonable for them to have adopted the method in current use, as an alternative.

We recognise that the apportionment calculation impacts on all the expenditure in the relevant Schedule and not only just on the Service Costs of the toilets, but, even if the toilets were so included in B&B demise, there would have to be a reservation to grant rights of shared use to other tenants, from time to time, of the first and second floors. WRE's surveyors have had regard to the RICS Code of Measuring Practice, the 6th Edition of which specifically excludes the floor area of toilets from Net Internal Floor Area calculations. Adopting the same code for consistency therefore would mean that re-allocating the toilet areas would have no effect on the service charge apportionments as currently adopted. The way in which WRE has addressed the issue of the de facto use of the toilet facilities by B&B is not unreasonable.

Laundry.

This is within the demise of the 3rd and 4th floors. It is part of the White Lease. The issue of its use is really a matter between the applicants as flat owners and WRE (or LCP) as their immediate landlord. It is patently part of the agreed measure of 5532 sq.ft. It cannot realistically be suggested that that small area should be surrendered to WRE as head landlord so as to reduce the 5532.

The very limited use, currently imposed by safety regulations, does not render unreasonable the landlord's use of the 5532 figure.

Costs.

We make no order for costs or application fees between the parties. We decline to make an Order under Section 20C. We do not find that it would be just to do so having regard to our findings, and to the fact that WRE made it clear that they did not regard themselves as bound by their stance, in previous applications, not to claim cost as part of the Service Costs.

That does not mean that they must claim costs. They can only claim them as part of the service costs if the Lease so permits. Any costs claimed and included in service costs are open to challenge so far as the reasonableness of those cost is concerned, by application in the usual way to the Tribunal for the relevant year of claim.