10846

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00BN/LSC/2014/0102**
Property	:	**15-17 Piccadilly, Manchester, M1 1IT**
Applicant	:	**Various (see Annex)**
Applicant's Representative	:	**Mr Gray - Flat 9**
Respondent	:	**The Guinness Partnership**
Respondents Representative	:	**Ms X Dania – solicitor, Trowers & Hamlins. LLP**
Type of Application	:	**Section 27 A (1) of the Landlord & Tenant Act 1985**
Tribunal Members	:	**Mr M J Simpson (Judge)** **Ms S Kendall**
Date of Determination	:	**03 April 2015**

DETERMINATION

Annex:

Leaseholder	Property
Mary Frances O'Reilly	Flat 2 15-17 Piccadilly M1 1LT
Fatima Warsani	Flat 3 15-17 Piccadilly M1 1LT
Marilyn Cole	Flat 5 15-17 Piccadilly M1 1LT
Gary Taylor	Flat 5 15-17 Piccadilly M1 1LT
Lesley-Ann Turner	Flat 6 15-17 Piccadilly M1 1LT
Jonathan Neale	Flat 7 15-17 Piccadilly M1 1LT
Michael Cavagin	Flat 8 15-17 Piccadilly M1 1LT
Adam Gray	Flat 9 15-17 Piccadilly M1 1LT
Rob Jackson	Flat 10 15-17 Piccadilly M1 1LT
Simon Harris	Flat 11 15-17 Piccadilly M1 1LT
Rob Brady	Flat 14 15-17 Piccadilly M1 1LT
Stephen Oliver	Flat 15 15-17 Piccadilly M1 1LT
Emma Sarath	Flat 16 15-17 Piccadilly M1 1LT
Scott Taylor	Flat 17 15-17 Piccadilly M1 1LT
Wesley Jones	Flat 18 15-17 Piccadilly M1 1LT

Determination:

1. **The service charges should be reduced overall and cumulatively by £11299.22. That is £5697.60 as a result of our determination (Door, Roof, Miscellaneous – 2011/12, and S20 costs) and £5601.62 as a result of concessions by Guinness (Scheme survey, Rubbish disposal, Lightening protection, Legionella, Miscellaneous- 13/14 and Tender Report-13/14)**

2. **The costs of these proceedings shall not be regarded as relevant costs to be taken into account in determining the amount of service charge payable by the applicants**

The application.

This is an application by Mr Gray lodged on behalf of himself and 14 other members of the 15 Piccadilly Residents Association. It was lodged on 15 August 2014 and requested determination of the reasonableness of service charges from the year 2001 to date (effectively the whole of the period since conversion of the building into flats.)

Directions were given on 16 October 2014 and 9 January 2015 with which the parties have complied, albeit not within the timescale set out.

The applicant's are shared ownership long leaseholders. The landlords (Guinness) are social housing providers.

By a lease of 11 December 1998 Guinness took a long lease of five floors of a seven story grade 2 listed building from the Yorkshire building society (a copy of that lease is exhibited to the statement of Ann Faulkner dated 19 March 2015). The ground and first floors are retained for commercial use by the building society.

Guinness has let each of the flats, the subject of this application. A specimen lease has been provided. No point is taken as to any service charges being out with the provisions of the lease. The relevant provisions of the lease are set out in the Schedule attached to this determination. The landlord's duty is to supply the services to the common parts and to maintain the fabric of the building, including the roof.

The head lease provides for the building society to insure the whole building and for Guinness to pay two thirds of the cost thereof. The building society is obliged to reimburse Guinness one third of the cost of maintaining the roof.

Documentation.

The tribunal considered two lever arch files of Scott schedules, the most comprehensive being the applicant's reply pack served on 2 March 2015. We also had the benefit of a detailed statement and exhibits from Ann Faulkner (project director, Guinness), dated 19 March 2015; A skeleton argument from Miss Dania (solicitor for Guinness) and a schedule by way of précis of the items challenged. This last document was the one most used to inform the hearing and our deliberations.

Inspection.

The tribunal inspected the property on Thursday 25 March 2015, and found it to be a grade II listed building comprising 6 floors and basement, the upper 4 of which having been converted, to a moderate standard, into 18 self-contained flats. The ground floor and first floor are retained as office and retail premises.

The entrance was controlled by a door entry system leading to a lobby with lift and staircase accessing the corridors serving the flats. Bins stores are placed on each floor. The block was in the city centre overlooking Piccadilly Gardens and backing on to a restaurant and other commercial premises with a narrow rear access road. At the time of our inspection, the entrance door was working satisfactorily, and the lift call system tested and promptly answered by Chubb.

Some of the corridor lighting was not working satisfactorily (defective motion sensors and bulkhead head lighting).
From flat 17 we viewed some of the rear of the building and the roof where there had been (and still was sign of) sapling growth.
There were signs of water ingress and an extensive damage and carpet stain on the upper floor, apparently from defective roofing. There was a staining and damage to the plasterwork adjoining the fire door emergency exit to the Bella Pasta roof.

The Applicant's case.

Apart from a challenge to a few specific items, as being of excessive cost or unnecessarily incurred, the applicants do not challenge that the works, for which service charges are sought, have in fact been carried out and carry out at a cost, when viewed in isolation, which is not excessive.

Their case is that, because of poor management (for which they pay a discreet sum in the service charge), many jobs have not been done properly, in the sense that the managers and contractors had not got to the bottom of the problem, The work had to be repeated and, for example in the case of the front door, repeated over and over again.

They say this produces an excessive overall service charge, when compared with, for example, the service charge at the Turner Street development, which is nearby and said by the applicants to be, to some extent, a comparable property. The services have become more and more expensive and are now, taken overall, at an unreasonable amount. The most recent annual charge being £227.30 pcm per flat. £49101.99 pa in total for the service charges.

The applicants' challenges, Guinness's response and Applicants' answer to that response are fully set out in the Scott schedules.

The applicant's issues are coloured by the fact that Guinness is not only the landlord providing and managing the services and levying the service charge, but it was also the entity that carried out the development. The applicants feel that the extent to which some of the service charge costs related to the cost of rectifying defects of construction or design in the original development should be absorbed and paid for by Guinness and not recovered as part of the service charge.

The respondents case.

In factual terms, they had done no more and no less than is required under the terms of the lease. They have responded, in recent years via a callout system, to the tenants' requirements for work to be carried out. There have been problems, with the lift the roof and the door, in particular, but they have responded as and when required and charged a reasonable amount for their contractors doing so. The management charges (at around £250 per flats per annum) are reasonably incurred and in fact slightly less than the management charges at Turner Street-cited by the applicants.

In legal terms, Miss Dania avers that the applicants have produced little factual or financial evidence (as opposed to mere challenge) to support their case. They have not put forward alternative figures and the onus is on them, as applicants, to do so. The tribunal is not therefore able to found jurisdiction on the way the applicants put their case (even making allowance for the fact that the applicants are litigants in person).

The hearing.

This was attended by Messrs Gray, Taylor and Brady of the applicants and Ms. Dania (solicitor representing the Respondents) and Ms.Faulkner, Darling and Leach of the respondents.

Despite some of the most significant evidence and documentation having been served only a few days before the hearing, all the parties wished to proceed, and no adjournment was sought. It was accepted that the tribunal should concentrate its deliberations, and the parties their representations, on the years 2006-2007 onwards.

This was because firstly there was a paucity of documentation for any earlier years: the significant increases in service charge, overall, were less evident in earlier years than in later years: it was less likely that there would be a limitation points to be taken with regard to the more recent years, rather than the early years; but the main reason for concentrating on the later years is because the applicant accepts that the earlier years are relevant to this case because of the work that was actually carried out in those early years (rather than the cost of reasonableness of it). That worked led to the applicant's to seek a conclusion that the repetition of some of that work carried out in later years was unnecessary and therefore unreasonable, or that it arose from a failure to properly manage. The challenge therefore is not to the earlier years, per se, but more to the later years in the light of works carried out, or faults identified, in the early years.

It was agreed with the parties to the tribunal will utilise the precis schedule provided by Miss Dania, and Mr Gray would address each item, either year by year or cumulatively, with Guinness replying at each stage. The precis schedule helpfully shows the cumulative cost year upon year, of the same and various elements in the schedule.

It was recognised that it will be difficult to translate any deduction that the tribunal might determine should be made to the cumulative total into the amount of service charge retrospectively in any particular year.

Further, the way in which the parties had presented the evidence meant that whilst the tribunal could indicate what amount, if any, it regarded as unreasonable (and had jurisdiction to do so) in respect of the service charges that are highlighted to be challenged by the applicants, the tribunal did not have the information in a format which enabled it to say how much, for each year or even cumulatively, the amount of reasonable service charge payable would be. That would involve an arithmetical exercise requiring the deduction of any disallowed item from the overall claim, which arithmetical activity the parties agreed to undertake post determination.

The parties also agreed that the precise year by year in effect of any determination was not required. The cumulative effect was the determination that was sought. Adjustments to the service charge account would then be made by the landlord as appropriate. Whether the tribunal's findings would require some adjustment to challenge items or not, it is clear that there will be some adjustments to be undertaken in the light of the items, on the day of the hearing, conceded by Guinness.

Deliberations and determination.

We reconvened on Friday 3 April to consider the determination. In the interim both parties had filed, by email, further representations which the tribunal did not consider as they were post the hearing and each side had not had a chance to comment or make representations.

The applicants cannot resist service charges only on the basis of perceived failure by the landlords at the development stage 15 years ago. The tribunal does not have jurisdiction to find that service charges are unreasonably incurred only on that basis. Such matters would have to have been dealt with as a civil claim arising from the contract to purchase each flat.

The tribunal is not deprived of jurisdiction merely because the applicant does not suggest a specific amount of expenditure as an alternative to the expenditure challenged. The tribunal's determination must nonetheless be based on evidence. Whilst it is not open to the tribunal to a utilise a "finger in the air" approach, and whilst some instances of the absence of evidence will defeat the applicants challenge, the tribunal does have jurisdiction to deal with the reasonableness of the charge as being repetitive and/or arising from management failures and/or as a result of concessions by the landlord.

The tribunal may also use its own skill and experience, so long as those occasions, on which that occurs, are declared to the parties and the nature and extent of our experience is specified, so that the parties have an opportunity to consider it and challenge it, if appropriate. We did use our own skill and knowledge on several occasions, but on each occasion, during the hearing, made it clear to what extent were doing so, and gave the parties an opportunity to comment. It was not necessary to adjourn the application at any stage, to enable that process to be followed.

We analysed each item challenged on a year by year and cumulative basis, as requested by the parties.

The Door.

The applicant contended for no more than £500 pa and as little as £200 pa if the door had been replaced, as maybe should have been done when it became clear that repairs were not working and were unnecessarily repetitive. The cost of total replacement would have been several thousand pounds. £10266 over 8 years is excessive. The applicant conceded the Fire Brigade damage and replacement of the Door entry panel.

Guinness say that the applicants have not produced tangible evidence to support their case, and that Guinness had no choice but to respond and have done so at reasonable cost.

We find that from the evidence in the Scott Schedules it is apparent that some of the more recent work has been repetitive. In 2013/14 there were 8 calls to the door, some of which are clearly illustrative of the problem of which the Applicants complain. We therefore disallow the 4 invoices MED 3,4.8 &9 totalling £1015

The Lift.

Mr Gray contends for not more than £2000 pa over the 8 years in question. - £16000, as against the actual charge of £18352.13.

The charges and frequency of work appear to us to be within the bounds of reasonableness and to have therefore been reasonably incurred. It is apparent that the lift may have been not of the best quality from the outset, but Guinness are still obliged to maintain it and the tenants are obliged to pay the reasonable costs of doing so. We ask rhetorically, what was Guinness to do? The lift is essential for the upper floors. There is no cogent evidence to suggest that the work was defective. It may be that a decision will need to be made to replace the lift with a superior model so that the substantial investment required may be recouped by lower maintenance fees in the future. That consideration does not however render unreasonable the way in which Guinness have responded to service call outs and incurred service charge costs.
We understand that it is likely that the tenants took the quality of the lift at face value when they first bought their flats, but we do not see that we have the jurisdiction to resolve issues arising from sale /purchase terms and condition, in a service charge case 15 years later.
We accept Guinness's explanation that the charges for 2007/8 include the cost of the BT land line and the cost of Chubb for answering emergency calls and monitoring. They appear not to have been charged in later years. This may be an omission on the part of Guinness. If it is, it is too late to reclaim anything that is more than 18 months old.

Lighting.

The £21739 over 8 years is for 16 bulkhead lights, 45 emergency lights and the motion sensor corridor lights on 8 corridors. The cost seems to be large, but Guinness's explanation set out in the Scott Schedule is rational.
We are not able, on the evidence before us to say that the cost in any year or the cumulative cost is unreasonably incurred.

Roof.

Mr Gray contends for not more than £16000 over the 8 years in question, as against the £19954. 60 claimed and charged.
The roof has to be maintained. It is a difficult roof because of layout and especially because of access problems. Guinness has not performed well in that regard.
Notwithstanding the evidential problems for the applicants we find that their suggested figure is justified and that any charges over and above that figure are unreasonably incurred.
We so say because it is apparent that the sapling removal was delayed for almost 4 years. It is not credible to suggest that that delay would not have had an adverse impact on water tightness. It appears not to have been effectively removed and is re-growing. There has been a surfeit of consultancy works and surveys. Whilst it is difficult to be arithmetically precise we question the reasonableness of some or all of the cost in 2012/13 (even with such

contribution as was obtained from the Yorkshire Building Society) on works, surveys, consultancy and additional surveys. For example the documents at Roof 3,4 & 5 for that year following on from the £2400 survey, £2160 consultancy and £3776.25 works
That analysis coupled with the inadequate treatment of the sapling and the defects appetent on our inspection satisfies us that we have evidence to accept Mr Gray's figures. We therefore disallow the cumulative sum of £3954.60 Further, the contribution from YBS is only explicit in respect of the £3776.25 for 2012/13. It may have been obtained for other works and the net amount claimed. The representatives of Guinness agreed, at the hearing, to check and adjust as necessary. Any such adjustment should be a further reduction beyond the £3954.60.

Leaks to YBS.

These leaks had to be addressed. To the extent that they may have arisen from a defect in design 15 years ago - although there is no evidence that that is the case – we are unable to rectify the matter by a determination of this type. It may be that some of the problem was caused by tenant misuse – but again there is little cogent evidence - and certainly not enough to enable Guinness to recover from the specific tenant, so as to prevent the cost being a service charge item. The largest flood was severe and caused closure of the Building society branch for a short period. Guinness had no choice but to deal with the matter in the way they did.

Pest control.

This is essential work. There is no evidence to suggest that it should not be carried out or that the cost is beyond the band of reasonableness within which such expense would be place, The frequency of the visits is reasonable (approx every 2-3 months)

Fire Alarm.

Guinness have no choice but to promptly address such a significant health and safety issue. In some cases it was a fault on the system. In other cases a fault was caused by tenant activity within a flat or flats and on another occasion, malicious damage. The costs are repetitive because there were repetitive issues, but there is no cogent evidence of inadequate or over costly contractors' work.

Insurance.

This was accepted by the applicants as not being outside the reasonable range of cost. The tribunal, at the hearing, indicated the intention to use its own experience with the range of premiums for central Manchester Listed building conversions, and would not have found the premium to be unreasonable even if the applicants challenge had been maintained.

2006/7
Guinness conceded the Scheme survey costs of £464.12 and the parties compromised the item for rubbish disposal with £350 chargeable i.e £355 disallowed

2007/8
The issue of lift costs and monitoring charges has been dealt with above.

2008/9
The £86.25 for lightning protection was conceded by Guinness. The challenge to miscellaneous expenses was not pursued.

2009/10
The signage for this year is not unreasonable.

2010/11
Miscellaneous electrical is misdescribed and related to a cupboard in the bin rooms to box off the electric installations and is not unreasonable

2011/12
As the only water supply is from the mains and no water is stored on site, we do not regard the Legionella survey costs as reasonably incurred. Disallow £604.25
The carpet cleaning is not unreasonable. We appreciate that some of the particular work, where there was a risk of continued water ingress, may have been otiose, but generally occasional carpet cleaning is not unreasonable.
There is no evidence from Guinness as to the miscellaneous items of £288 – disallow.
The challenge to electrical works (£454.56) is not pursued.

2012/13
The challenges to the wheelie bin charge and Fire risk assessment are not pursued.

2013/14
The Tender report (£600) and Miscellaneous (£492) are conceded by Guinness.
We do not regard the claim for S20 Dispensation costs as reasonable. It has not been acted upon. It, as it turns out, was premature. There was no Order within the S20 proceedings themselves for the tenants to pay any costs. Often, even where an application is opposed, unsuccessfully, by tenants it is not unheard of for the landlord to still finance and pay for the tenants' consideration of such an application.
The challenge to the work to the Dry Riser is not pursued.

Cumulative effect.

The service charges should be reduced overall by £11299.22. That is £5697.60 as a result of our determination (Door, Roof, Miscellaneous – 2011/12, and S20 costs) and £5601.62 as a result of concessions by Guinness (Scheme survey, Rubbish disposal, Lightening protection, Legionella, Miscellaneous-13/14 and Tender Report-13/14)

S20C/ Management Charge.

The management charge at, on average over the 8 years, about £250 per flat per annum is not unreasonable, especially for a block of this type, and one with only 18 units. This again is a matter about which we indicated, at the hearing, we would use our own experience, without demur from the parties. The amount is also less than that charged for the allegedly comparable development at Taylor Street. We are not particularly influenced by that, because we do not regard it as a particularly good comparable, being a considerably less problematic building than 15 Piccadilly.
Our consideration of and determinations in, this case have highlighted some significant management failures in the past and we regard our determination of deductions and the concessions made by Guinness as going a long way to address those issues. We cannot therefore say that there should also be a reduction in the management charge.
We do however determine that it would not be just and equitable for the costs of these proceedings to be recoverable against the tenants as relevant cost in any future or current service charge claim. The applicants have secured significant findings in their favour; they have achieved significant and proper concessions from Guinness and the making of a S20C order is just and equitable in the light of the observations that we have made about past management.
What we were told at the hearing about Mediation having been canvassed does not change our view. We are aware that the post hearing emails, which we have not opened, address that issue, but it is not determinative. We hope and expect that with new management personnel in place it will be possible for some of the significant issues that are looming on the horizon will be so addressed.

SCHEDULE

1 Provisions of the lease

1.1 The lease provides for the recovery of the following by the Landlord:

"7.(1) IN this Clause the following expressions have the following meanings:

7.(1)(a) "Account Year" means a twelve month period ending on 30th June

7.(1)(b) "Specified Proportion" means a one 1/18 or such other sum as is a fair and reasonable proportion (to be determined from time to time by the Landlord in its absolute discretion subject only to the limitation that the total of all the proportions specified for the Units shall not exceed one hundred percent) of the Service Provision hereinafter defined

7.(1)(c) "The Service Provision" means the sum computed in accordance with Clauses 7(3), 7(4) and 7(5)

7.(1)(d) "The Service Charge" means the Specified Proportion of the Service Provision

7.(2) The Tenant HEREBY COVENANTS with the Landlord to pay the Service Charge in advance in instalments on the first day of each month throughout the Term

7.(3) The Service Provision shall consist in each Account Year of a sum comprising:

7.(3)(a) the expenditure estimated by the Landlord as likely to be incurred in the Account Year by the Landlord upon the matters specified in Clause 7.(4) together with

7.(3)(b) an appropriate amount as:

(i) a capital reserve for or towards such matters specified in Clause 7(4) as are likely to give rise to expenditure after such Account Year being matters which are likely to arise either only once during the then unexpired term of this Lease or on a less than regular basis including (without prejudice to the generality of the foregoing) such matters as future major works maintenance and replacements (the said amount to be computed in such a manner as to ensure as far as is reasonably foreseeable that the Service Provision shall not fluctuate unduly from year to year)

(ii) a cyclical reserve for or towards such matter specified in Clause 7(4) as will give rise to expenditure after such Account Year being matters which will arise on a regular basis including (without prejudice to the generality of the foregoing) such matters as the decoration of the communal areas and the exterior of the building and associated works (the said amount to be computed in such a manner as to ensure as far as is reasonably foreseeable that the Service Provision shall not fluctuate unduly from year to year)

but

7.(3)(c) reduced by any unexpended reserve already made pursuant to clause 7.(3)(b) in respect of any such expenditure as aforesaid

7.(4) The relevant expenditure to be included in the Service Provision shall compromise all expenditure reasonably incurred by the Landlord in connection with the repair management and maintenance of and provision of services for the Building and shall include (without prejudice to the generality of the foregoing):-

7.(4)(a) the costs of and incidental to the performance of the Landlords' covenants contained in Clauses 5(2), 5(3) and 5(4) of the lease of each of the Units

7.(4)(b) the costs of and incidental to compliance by the Landlord with every notice regulation or order of any competent local or other authority in respect of the Building or any part thereof

7.(4)(c) all reasonable fees charges and expenses payable to any solicitor accountant valuer architect or other person whom the Landlord may from time to time reasonably employ in connection with the management or maintenance of the Building including the collection of rent (but not including fees charges or expenses in connection with the effecting of any letting or sale of any premises) including the cost of preparation of the account of the Service Charge and if any such work shall be undertaken by an employee of the Landlord then a reasonable allowance for the Landlord for such work

7.(4)(d) any rates taxes duties assessments charges impositions and outgoings whatsoever whether parliamentary parochial local or of any other description assessed charged imposed or payable on or in respect of the whole of the Building or the whole or any part of the Common Parts

7.(4)(e) the cost of:-

(i) maintaining proper security in the Common Parts

(ii) the provision of caretaking services and facilities and equipment required in connection therewith

7.(4)(f) all other reasonable expenditure incurred and properly attributable to the maintenance and management of the Building and safeguarding the rights appertaining thereto (whether specifically mentioned in this Lease or not)

7.(5) As soon as practicable after the end of each Account Year the Landlord shall determine and certify the amount by which the estimate referred to in Clause 7(3)(a) shall have exceeded or fallen short of the actual expenditure in the Account Year and shall supply the Tenant with a copy of the certificate and the Tenant shall be allowed or as the case may be shall pay forthwith upon receipt of the certificate the Specified Proportion of the excess or the deficiency

7.(6) The Landlord will for the period that any Unit in the Building is not let on terms making the Tenant liable to pay a Service Charge corresponding to the Service Charge payable under this Lease provide in respect of all such premises a sum equal to the total that would be payable by the tenants thereof as aforesaid by way of contribution to the reserve referred to in Clause 7(3)(b) and the said reserve shall be calculated accordingly"

2 **Relevant Legislation**

2.1 Landlord and Tenant Act 1985

2.1.1 **Section 18** - meaning of "service charge" and "relevant costs".

(1) In the following provisions of this Act "service charge" means the 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 pay 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.

2.2 **Section 19** - Limitation of service charges: reasonableness

(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.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise."