12474

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/34UF/LSC/2017/0046**
Property	:	The Lightbox, Duke Street, Northampton NN1 3BA
Applicant	:	Lightbox One (Management) Limited
Representative	:	Martin Cranefield (company secretary)
Respondents	:	Lessees of the 18 flats set out in the Schedule to the application
Representatives	:	Rebecca Wade – in person [written reps] Terence Stinson - on behalf of respondents formerly represented by solicitors J Garrard & Allen Jonathan Julyan (landlord) – in person
Type of Application	:	for determination of reasonableness and payability of service charge on account for the year 2017/18 [LTA 1985, s.27A]
Tribunal Members	:	G K Sinclair, N Martindale FRICS & L Hart
Date and venue of Hearing	:	Monday 9th October 2017, at Northampton Combined Court
Date of this decision	:	1st November 2017

DECISION

---

1. The issue requiring determination by the tribunal is the reasonableness and payability of a demand for advance service charges issued by the applicant named management company on 28th March 2017, the most significant part of which is in respect of major works for which contracts have yet to be signed. For the reasons which follow the tribunal determines that :
   a. The amount demanded is a reasonable estimate of the likely contract sum for the work specified by chartered surveyors Pick Everard.
   b. Having been undertaken twice, and with limited response, consultation has been carried out sufficiently; alternatively, if required, the tribunal would grant dispensation from any further compliance without imposing any conditions.
   c. Having been demanded in accordance with the provisions of the lease that sum is payable.
   d. It is outwith the power of the tribunal to direct that the amount due shall be paid in instalments other than as directed by the lease; but precisely how the management company chooses to collect it – whether by staged payments, a partial call on funds, or otherwise – is a matter for it.
   e. This decision does not prejudge the outcome of any later dispute between the parties concerning the quality and extent of any work that may later be carried out in purported compliance with the specification.

Background

2. The Lightbox is a former industrial building towards the north of Northampton town. It's address is given as Duke Street, but vehicular access to a covered, ground floor car park is obtained from Craven Street behind. When converting the building for residential use the developer at some point decided to add two penthouse apartments, one of which sits directly on top of the main roof. That particular penthouse was acquired by the current freeholder, Mr Julyan, before he became the only long leaseholder who expressed any interest in purchasing the freehold reversion. The lease refers to a management company of which the leaseholders are all supposed to be shareholders. However, it proved difficult to persuade other leaseholders to assist in management as directors and after a while there was only one left : Mr Julyan himself.

3. Following prolonged leaks to the mainly timber structure of penthouse 2 and to other parts of the building, the refusal of insurers to accept a claim on the policy, and a report by surveyors Pick Everard on causation and the remedial work required a section 20 consultation exercise was commenced by the managing agents at the time, Galbraith Property Services, in September 2015. Despite having carried out the consultation the managing agents took insufficient steps to progress matters by issuing advanced service charge demands. Frustrated, the company (i.e. Mr Julyan) dismissed Galbraiths and brought management in-house. The company's solicitors, Dean Wilson LLP, were instructed to re-consult

due to fears that the original exercise may have been inadequate. On 23rd December 2016 the first stage consultation notices were reissued and representations were received from Ms Rebecca Wade, Mr Foulser, Mr Roberts (as trustee in bankruptcy of Mr Cainer), and Mr Stinson.

4. On 28th March 2017, the applicant company having gone out to tender but not received many positive responses, a budget was issued for the year 2017/18 together with a statement of estimates and a service charge demand in time for the 1st April date when service charges fall due for payment under the lease. In each case the amount sought was £12 999.48, a figure so far beyond normal expectations that the leaseholders finally reacted.

5. On 5th April 2017, presumably in an attempt to demonstrate to leaseholders that the sum demanded – although high – was a reasonable estimate and payable, the applicant company filed this application. Directions were issued on 24th April 2017, the applicant company filed its statement of case on 11th May and Ms Wade filed hers on 24th May. On the latter date solicitors J Garrard & Allen asked the applicant's solicitors for an extension of time in order to submit the statement of case on behalf of the respondent leaseholders as a body. The tribunal agreed to an extension of time, but not so as to affect the hearing date listed for 9th August.

6. Although on 23rd June 2017 a statement of case was filed and served on behalf of Mr Fernandes and others (dealing with some points on the validity of the section 20 consultation, and on liability and potential set off) the landlord, Mr Julyan, had by then applied to the tribunal to be joined as second applicant and on 30th June 2017 J Garrard & Allen wrote to the tribunal to inform it that arrangements had been made for the calling of an EGM of the management company, with the intention of appointing new directors and staying the proceedings. In the circumstances the respondents for whom the firm acted would take no further steps in the application.

7. On 9th July, by which time the applicant company had served an updated expert report from Pick Everard, the tribunal replied to the parties and informed them that as yet no application had been made to it seeking a stay of proceedings and also pointing out to Mr Julyan that in view of the pending EGM he might very well find himself in a conflict of interest with any new directors. He would not therefore be joined as co-applicant at present but, as an individual respondent, the tribunal could take into account his interests as landlord. Should the applicant company, under new control, seek to withdraw the application then at that stage the tribunal would give favourable consideration to substituting him as applicant in order that the reasonableness of the estimated demand and the proposed works could be considered.

8. On 22nd July 2017 the EGM was held and four new directors were appointed, viz Richard Denton, Ian Fernandes, Sam Fousler and Gary Kiernan. Mr Julyan was not removed as a director but now found himself heavily outnumbered. On 24th July Mr Stinson informed the tribunal of the appointment of the new directors, that counsel had been instructed to seek a stay of the proceedings, and of the directors' intention to withdraw the application. On the same day, however, lessee Amanda Elliott informed the tribunal that she supported the application and was considering serving a section 22 notice with a view to have the tribunal

appoint a manager. Two days later Mr Fernandes notified the tribunal that Dean Wilson LLP had refused to continue to act for the company, and specifically had refused act in connection with withdrawing the application, due to a conflict of interest. The company was seeking alternative legal advice.

9. On 31st July 2017 the tribunal wrote to the respondent's solicitors stating that no application had yet been made by the directors of the applicant company to withdraw. Mr Fernandes later asked the tribunal for an adjournment and an extension of time to get legal advice but this was refused, the tribunal stating that it would inspect the premises on the appointed hearing date of 9th August and then consider any application the parties wished to make.

Relevant lease provisions

10. The sample lease originally provided, for unit 1-1 on the first and second floors, is dated 2nd May 2002. The parties are Urban Resolve Ltd ("the landlord"), Urban Resolve (Management) Ltd ("the tenant") and Lightbox One (Management) Ltd ("the company") and the term granted is 999 years from 25th December 2001. As stated in clause 2.2 :

> The company has been incorporated to (inter alia) provide certain services to and for the tenants of the estate and otherwise manage the property.

11. As they are material to a query raised by Ms Wade in her written submissions it is worth recording at this stage the following definitions appearing in clause 1 :

1.1.1	"the building"	the building on the estate containing the demised premises
1.1.2	"the common parts"	all those parts of the estate enjoyed or used in common by the tenants of the parts of the estate to be let and not included in the leases to them including in particular all those parts of the estate for the maintenance repair redecoration and renewal of which the company is responsible under Schedule 4
1.1.4	"estate"	All land (excluding the property) and buildings of which the landlord is or was the registered proprietor under Title number NN29811
1.1.8	"property"	The property more particularly described in Schedule 5
1.1.11	"the tenant's proportion"	means such proportion as the landlord or company shall determine

The lease has a plan attached to it showing the ground, first and second floors of the building.

12. Amongst the rights reserved to the landlord and the company, their surveyors, agents and/or workmen by clause 3.3 and Schedule 2, paragraph 2, is the power of entry to the demised premises at all reasonable times on notice (save in the case of emergency) for the purpose of performing their respective covenants and obligations, making good any damage thereby caused.

13. The tenant's covenants with the landlord appear in clause 4, but those with the

landlord, the company and the tenants for the time being of the other parts of the estate that appear in clause 5 are rather more relevant. In particular, by clause 5.7.2 the tenant covenants to :

> Contribute and pay on demand the tenant's proportion of all costs charges and expenses from time to time incurred or to be incurred by the company in performing and carrying out the obligations and each of them under Schedule 4 as set out in the notice mentioned in paragraph 13 of Schedule 4 PROVIDED ALWAYS that if the landlord shall under the provisions of clause 7.4 perform or carry out or any of the obligations of the company the tenant shall contribute and pay to the landlord on demand the tenant's proportion of all costs charges and expenses as more particularly hereinbefore mentioned.

14. Payment is provided for by clause 5.7.3 :

> On 1 April each year the tenant shall pay to the company such sum in advance and on account of all costs charges and expenses incurred or to be incurred by the company in performing and carrying out the obligations and each of them under Schedule 4 as the company or the company's agent shall from time to time specify as a reasonable estimate of such costs charges and expenses and if no such sum is specified by 31 March in each year the tenant shall pay to the company the same amount as was payable in advance in respect of the preceding year.

15. The landlord's covenants appear in clause 6, but amongst the provisos in clause 7 the provision at 7.4 is worth setting out in full :

> If during the term hereby granted and whilst the landlord has a controlling interest in the company the company shall fail or neglect to perform and observe its obligations or any of them hereunder or shall go into liquidation the landlord shall undertake (or by action or otherwise compel the company to undertake) the obligations or any of them hereby agreed to be undertaken by the company and shall be entitled to recover from the tenant a due proportion of all monies costs charges and expenses incurred by the landlord in connection therewith.

16. By clause 8 the company covenants with the tenant to perform and observe the obligations set out in Schedule 4, but by clause 9 it covenants with the landlord as follows :

> The company covenants with the landlord to perform and observe the obligations set out in Schedule 4 and if the company fails to perform and observe them the landlord is authorised as the company's agent to perform and observe them and to recover from the tenant the due proportion of the costs charges and expenses so incurred by the landlord as agent for the company PROVIDED ALWAYS that the landlord may at any time serve a notice on the company specifying any want to repair or decoration which it deems reasonably necessary to be effected under the company's obligations set out in Schedule 4 and the company shall within two months after receiving such notice make good all defects and wants of repair or decorations to the satisfaction of the landlord or its surveyor or agent for the time being.

17. Amongst the costs charges and expenses in Schedule 4 which are recoverable as

part of the service charge to which the tenants must contribute is, at paragraph 1(a), the obligation to maintain repair redecorate and renew :

> The external walls and structure and in particular the main load bearing walls and foundations and gutters and rainwater pipes of the estate and any party walls and the boundary fences of the estate (if any) marked "T" on the plan numbered 1 and the balconies (if any) but so that the company shall only be liable to decorate the external walls.

The obligation to redecorate not less frequently than every three years is set out in greater detail in paragraph 6. By paragraph 9 it may, at its option, maintain a reserve fund.

18. In view of concerns raised by Ms Wade at the hearing on 9th August 2017 the tribunal directed that the landlord produce a copy of the lease for penthouse 2. This is dated 18th July 2003, with the parties named as Thomas Robert Brent as landlord, Wilby Homes Ltd as tenant, and Lightbox One (Management) Ltd as the company responsible for providing services to the tenants and managing the building and estate. Although the lease plan shows only the ground floor (to illustrate the allotted parking space) and the third floor or rooftop on which the penthouse is situate the terms of the lease itself, including all definitions, are essentially the same as in the sample already included in the hearing bundle.

Material statutory provisions

19. The tribunal's powers to determine whether an amount by way of service charge is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

20. Insofar as major works are concerned, ie those in respect of which any tenant is liable to make a contribution towards the service charge in excess of £250, then section 20 provides that the relevant contributions of tenants are limited to that amount unless the consultation requirements have either been complied with in relation to the works or dispensed with by (or on appeal from) the tribunal. The consultation requirements, in the instant case, are those appearing in Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003[1] (as amended).

Inspection and hearing

21. The tribunal inspected the exterior and common parts of the building and the interior and roof garden of penthouse 2 at 10:00 on the morning of Wednesday 9th August 2017, the date fixed for trial but which later turned into a directions hearing. The layout of the development can be seen from the lease plans.

22. The tribunal's attention was directed to corrosion and dripping water on the underside of the steel or cast iron columns and girders and concrete slab above

[1] SI 2003/1987

the covered car parking area that support the rear part of the upper floors of the building. At first floor level the various demised properties are accessed from a walkway which is exposed to the elements, with mesh decking laid on top of a bituminous waterproofing layer protecting the concrete slab. Defects in the waterproofing were pointed out. At second floor level the walkway is of steel or aluminium mesh construction bounded by a glazed barrier topped by a handrail, thus allowing water to drip straight through to the walkway (and anyone using it) immediately below.

23. So far as external decoration is concerned, the tribunal was shown where a unit accessed directly from Craven Street had been painted externally, as had the wall of the easternmost block to the rear. Other exterior surfaces other than those facing Duke Street, which in most cases are accessible only from high level scaffolding, comprise large vertical plywood panels that are stained or painted. Some are curling at the corners, suggesting an imperfect waterproof finish and that they have been loosened by the effects of penetrating moisture.

24. Finally the tribunal was led up the internal stairs and out on to the roof. Straight ahead lay the path to the entrance to penthouse 2, while up a flight of external steps to the left was its roof garden. The penthouse is of a timber frame construction which unfortunately rests on the flat roof. The large curved roof of the dwelling is supported by steel columns which are in turn supported by the structure below, but distortions in the timber frame have caused twisting and thus distortion of the frames to the sliding glass doors which occupy a large portion of the street-facing side of the main living room – making it difficult to open them. Distortion has also taken place inside, affecting internal door frames, the floor level, and cracking to walls. From the kitchen the tribunal was able to step out on to the balcony on the Duke Street side of the flat. The usable surface comprises decking supported by the membrane-covered roof. Again, this is defective and any maintenance requires lifting it entirely in order to gain access to the roof surface below. The timber structure, which was partly decayed, was observed to rest on the roof below. Mr Julyan said that he would like to avoid future problems by creating a low brick plinth on which the structure could rest, thus protecting it from water ponding on the surface of the flat roof.

25. The purpose of the inspection and hearing on 9th August was for the tribunal to assess the condition of the building for itself and to draw to the parties' attention the need for urgent repairs, the possibility of the landlord serving notice on the company to get on with the work and (should it fail or refuse to do so) to step in and carry out the work himself at the tenants' expense, and that wishing that the problem would simply go away would not assist in achieving a solution.

26. At that hearing the landlord attended in person, a large group of respondent tenants were represented by Mr Woodhead (a barrister instructed by J Garrard & Allen), the applicant company by Mr Richard Denton (a recently appointed director), and Ms Wade attended in person. Mr Woodhead suggested that the tribunal issue further directions for trial, allowing time for the applicant company and the respondents to jointly appoint a new surveyor to report on condition and necessary works, that the parties be able to file further evidence, and that the hearing be set down with a time estimate of two days. This timetable would allow the applicant company to obtain fresh legal representation. Ms Wade said that

she would be unable to take time off work and attend for a further two days. She asked for and was granted permission to make written submissions instead.

27. Directions were duly issued, but it soon became clear that neither the applicant company nor the represented tenants wished to incur the expense of any further report, as it was probably going to be little different from the updated report from Pick Everard on which the landlord intended to rely. Although the tribunal was told on 9th August that the new company directors had already made contact with an alternative firm of solicitors it later transpired that this went no further, and to compound the lack of legal input to this dispute J Garrard & Allen informed the tribunal that since the previous hearing its services had been dispensed with by the Fernandes respondents. By the time of the substantive hearing listed for 9th October 2017 no party was legally represented.

28. At the final hearing Mr Julyan appeared on his own behalf as landlord, but surprised the tribunal by stating that he remained a director of the applicant. It was represented not by any director but by its company secretary, Mr Cranefield (who had been appointed in January 2017, at a time when Mr Julyan was still the sole director). He informed the tribunal that one of the recently appointed directors, Mr Kiernan, had already resigned. The respondents who had formerly been represented by solicitors and counsel were now represented by Mr Stinson, a one-time director of the applicant company and a resident of the building who was anxious to see that its condition and appearance were quickly improved. Ms Wade had filed her written representations. Only three people attended what was supposed to be a two-day substantive hearing. It lasted barely two hours.

29. According to Mr Cranefield and Mr Stinson the various parties had reached the conclusion that work was required on this building and so there was no point in wasting money on a further surveyor's report and on lawyers. Mr Stinson said that his group accepted the Pick Everard report.

30. Mr Cranefield said that the applicant company wanted the tribunal to determine that the consultation procedure that had been undertaken was both fair and transparent, and whether the sum sought was reasonable, taking into account the interests of all parties and their responsibilities under the lease.

31. The tribunal was told that Mr Julyan and the other directors had sought further quotations for the work specified by Pick Everard, and it had been supplied at short notice with three documents. They were as follows :

Northants Decorating	external decorating	£24 970.00
A R Roofing Services Ltd	flat roof	£12 732.00
	composite decking	£18 814.12
C&C Home Improvements	roof and penthouse repairs	£36 900.00

32. It was noteworthy that the first two quotations are from entities which are small enough not to be required to register for and charge VAT. That from C&C is net of VAT but was expressed to remain valid only for 7 days; i.e. it expired on the date of the hearing. All three quotations were for separate parts of the specified works, so they were a package. The total cost, including VAT, was £100 796.12. However, this did not allow for any contingencies or for contract supervision. In discussion the parties readily accepted a contingency element of 10%, and that

a further amount was required for supervision. £120 000 was regarded by them as acceptable, and much lower than the original quotation from a national contractor upon which the advance service charge demands were issued. If one includes the company's suggested 10% administration fee for major works that total cost came to £208 351.00.

33. Ms Wade's written submissions made three main points :
    a. She believed that her lease predated the construction of the penthouse, so she wanted to know whether she was therefore liable to contribute towards the cost of its repair
    b. If liable, she queried whether work to the decking within the penthouse's demise was a legitimate service charge expense, as she had been told that repairs to the decking on her balcony were her personal responsibility
    c. She challenged the reasonableness of the sum demanded, given the delay and prejudice occasioned by the company's non-compliance with the lease by failing to carry out external decorations at the prescribed intervals.

Discussion and findings

34. As all those at the hearing seemed to recognise that the work was required and wanted it to be undertaken as quickly as possible, and concentrated instead on the amount that should be demanded, the tribunal shall address first the points made by Ms Wade.

35. First, whether or not her flat was let before the penthouse was built (and there was some doubt about that), the wording of the leases is the same. The company's obligation is to maintain repair redecorate and renew the external walls and structure and in particular the main load bearing walls and foundations and gutters and rainwater pipes of the estate. The "estate" comprises all land (excluding the demised premises) and buildings of which the landlord is or was the registered proprietor under Title number NN29811. The company's obligation is therefore to maintain all the common parts and in particular those mentioned above. The external walls of the penthouse are decaying due to their being in contact with standing water.

36. If Ms Wade's argument were correct then the developer of a large estate comprising a number of buildings built in phases could be in trouble if tenants of the first block to be constructed were held not to be liable to contribute to the maintenance costs of the sixth block which was not completed until several years later.

37. Secondly, the company's obligations concerning the wooden decking are to be found in Schedule 2, paragraph 2. Contractors need access beneath the decking to repair what currently is a bituminous surface to the various roofs. They are entitled to obtain such access provided they later make good. The work is to the roof, but if in lifting the decking (some of which may be rotten, or damaged in the course of its removal) it is rendered no longer useable then it must be replaced, and that is a service charge expense. This applies both to the first floor walkway and that surrounding the penthouse.

38. Thirdly, whatever misgivings the tribunal may have about service of notices by e-mail, or with too tight timetables, or about requiring any inspection of

documents to take place at Dean Wilson LLP's offices in Brighton (when the landlord lives on the premises), Ms Wade rightly draws the tribunal's attention to the case of *23 Dollis Avenue (1998) Ltd v Vedjani* [2], upon which the company (and certainly now the landlord) relies. In that case, perhaps surprisingly, HH Judge Behrens held, at [33] :

a. We agree with Mr Adams that the limitation in s 20 to the contribution payable by the tenant is referable to costs incurred by the landlord in carrying out the work rather than in respect of work to be carried out in the future. This is clear from the wording of ss 20(2) and 20(3).
b. In our view therefore there is no statutory limit to the amount that can be recovered by way of an on account demand under the lease other than under s 19(2). It is, in our view, not necessary that there should be a valid consultation process before a sum in excess of £250 can be recovered by way of a service charge in respect of intended works.
c. We agree with Mr Singh and the FTT that "reasonableness" in s 19(2) involves more than a mathematical exercise of looking at the costs of the estimates and the amount claimed. We were referred to two decisions of this Tribunal where it in effect held that the test of reasonableness in s 19(2) is the same as the test in s 19(1). [See *Southall Court (Residents) v Tiwari* [2011] UKUT 218(LC) paragraph 11 and *Carey Morgan v De Walden* [2013] UKUT 0134(LC) paragraphs 22, 33 and 35]. We agree with those decisions.
d. Under s 19(1)(a) this Tribunal has held that there is a two-stage test – (1) whether the decision making process was reasonable and (2) whether the sum to be charged is reasonable in the light of the evidence.

39. The tribunal has no hesitation in saying that the work – to various parts of the building, and not just to that enjoyed by the landlord personally – needs to be done, and done urgently.

40. In the determination of this tribunal the company carried out the consultation exercise twice : in 2015 and again at the very end of 2016. Whether or not perfect, it gave all the tenants plenty of notice of the nature of the proposed works and an opportunity to inspect the documents. Even if Dean Wilson LLP are based a long way away in Brighton the former managing agents, Galbraiths, are in Northampton. The fact that only Ms Wade responded to the first exercise, and herself and only a few others to the second, is not the company's fault.

41. The tenants were only really galvanised into action when they received a very large service charge demand at the end of March 2017. As the company can only demand an advance payment only once per year (and in default be limited to the sum demanded in the previous one) it was imperative that it did so before 1st April 2017.

42. If the tribunal determines that the sum demanded was reasonable, based as it was on one of the few comprehensive quotations received at the time, then the company can proceed, even if recent quotes are for a much lower total. If the tribunal does not so find then the company would have to wait until next spring before demanding the money – let alone pursuing non-payers to ensure that it

[2] [2016] UKUT 0365 (LC)

holds sufficient funds to commit to a contract.

43. Is the sum demanded on 28th March 2017 reasonable? In the tribunal's view it would be dangerous to assume that each of the elements of the package presented to it – reliant on each contractor fulfilling its distinct part of the project on time and without any alteration in price, and with no supervising surveyor, builder or architect yet identified – can be fulfilled for the prices quoted. Even if one adds an element for contingencies, crucial where one is opening up structural elements and hoping not to find signs of serious rot, the tribunal has no confidence in a figure of £120 000. If one contractor pulls out then the whole package is lost.

44. The tribunal therefore determines that it is safer to assume the worst, and rely on the all-embracing quotation obtained first by Galbraiths from a large contractor. But what if the job can be done much more cheaply? Will the tenants have been worried or placed in financial difficulties unnecessarily? Is there a solution?

45. In *Southend-on-Sea Borough Council v Skiggs*[3] HH Judge Huskinson held that the tribunal has no jurisdiction under section 27A to lay down a timetable for payment. That is governed by the provisions of the lease, with any flexibility being dependent entirely upon the landlord. In this case the company has issued a valid demand for all of the contract sum plus an element for administration and the normal incidentals. How the company may choose to recover that sum is a matter for it. It can arrange for payment by instalments, or perhaps even – rather like shares – make only a partial call on the whole sum. If the major works can be undertaken for less then it can issue credit notes, although it is doubtful now if the work can be started and completed before the demands for next year's service charge must be served.

46. The company, which lacks any assets against which to borrow – or any reserve fund, must however ensure that it holds sufficient to cover the contract sums to which it can only then commit itself.

47. The tribunal so determines.

Dated 1st November 2017

Graham Sinclair

Graham Sinclair
Tribunal Judge

[3] [2006] 2 EGLR 87 (Lands Tribunal)