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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AT/LSC/2017/0375**
Property	:	**255 Chiswick Village, London, W4 3DR**
Applicant	:	**Mr JFR Southey**
Representative	:	**Mr Williams**
Respondent	:	**Chiswick Village Residents Ltd**
Representative	:	**Ms C Cherriman**
Type of Application	:	**S27A Landlord Tenant Act 1985- Liability to pay service charges**
Tribunal Members	:	**Judge Evis Samupfnda** **Mr Richard Shaw FRICS**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**19 February 2018**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the sum of £269.01 is payable by the Applicant in respect of the disputed service charges for the service charge years ending in March 2014-2017.

(2) The tribunal makes the determinations as set out under the various headings in this Decision

(3) The Applicant did not make an application under s20C at the hearing but reserved the right to do so upon receipt of this Decision.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to whether the Respondent is able to recover from the Applicant as part of the service charges the costs it has incurred relating to:-

(i) Opposing a planning application for the development of penthouse flats in the sum of £64,962,04. The Applicant's proportion is £233.99

(ii) Corporate Expenditure by the Respondent's Company in the sum of £7,605.65. The Applicant's proportion is £27.39

(iii) Construction of Staff Accommodation in the sum of £64,685.30. The Applicant's proportion is £232.99

2. A Case Management Conference was held on 7 November 2017 at which the issues were identified and directions for the future conduct of the application were made.

The hearing

3. The hearing of the application took place on 16 January 2018. The Applicant, Mr Southey, leaseholder of Flat 255 attended. Mr Williams, a solicitor from Clark Wilmott represented him. Ms Cherriman, a Managing Agent from Michael Richards & Co managing agents appeared on behalf of the Respondent. Mr Weaver, Chairman of the Board of Directors of the Respondent accompanied her.

4. Mr Williams indicated that an application pursuant to s20C of the Act may be made by the Applicant by way of written representations depending on the outcome of these proceedings.

The background

5. The parties provided the background information as follows. Chiswick Village is a 1930's development comprising 280 self-contained flats all sold on long leases. The Landlord is Chiswick Village Residents Ltd (CVRL) which is owned by the leaseholders, acquired the freehold of the block in 1997. At the same time, Solo Estates Ltd acquired overriding leases of 45 or so flats with short leases along with some of the common areas suitable for redevelopment e.g. roof space, garages and parking spaces. Solo Estates Ltd has since transferred its interest to Dandy Properties Ltd. (DPL) A Mr C Tett owns both of these companies. CVRL has a share capital of 280 shares and each head lessee owns one share. There are under lessees who pay service charge but do not own a share. The managing agent for CVRL is Michael Richards & Company appointed by CVRL since 2016.

6. The Applicant's Flat 255 is subject to a 999-year lease commencing on 1st January 1996 at a peppercorn ground rent and the Applicant's percentage share of the service charge is 0.3602%.

7. The tribunal did not inspect the Building before the hearing as neither party requested it and the tribunal did not consider that one was necessary given the nature of the dispute.

The Applicant's Lease

8. The Lessee's covenants to pay Maintenance Charge Contribution are contained in Clause 4 and the Lessor's covenants are contained in Clause 6. Part 11 to the Fourth Schedule contains the expenses incurred by the Lessor that are to be reimbursed by the Maintenance Contribution. The Respondent's position is that the costs and expenses in dispute are recoverable under Clause 4, 7 and 8 of Part 11 to the Fourth Schedule.

9. Clause 4 provides that the Lessor to be reimbursed the expenses incurred in "effecting insurance against the liability of the Lessor to third parties and against such other risks and in such amount as the Lessor shall think fit (but not against the liability of individual tenants as occupiers of the flats in the Building.)

10. Clause 7 provides the Lessor to be reimbursed "all legal and other costs incurred by the Lessor including those relating to the recovery of Maintenance Contribution and other sums due from the Lessee (a) in the running and management of the Building and in the enforcement of the covenants conditions and regulations contained in the leases granted of the flats in the Building including the auditing of the accounts of the Maintenance Year and (b) in making such applications and representations and taking such action as the Lessor shall reasonably think necessary in respect of any notice or order or proposal for a notice or order served under any statute or order regulation or bye-law on the Lessee or any under-lessee of the Demised Premises or

on any tenant or under-lessee of any other of the flats in the Building or on the Lessor in respect of the Lessor's Property or at all or any of the flats therein."

11. Clause 8 provides the Lessor to be reimbursed "all costs incurred by the Lessor (not hereinbefore specifically referred to) relating or incidental to the general administration and management of the Lessor's Property including any interest paid on any money borrowed by the Lessor to defray any expenses incurred by it."

The Roof Space Lease.

12. The relevant provision relied upon by the Applicant is contained within the definitions under paragraph (N) which defines "Development Works" means any work to the Demised Premises or any part thereof carried out by the Lessee within the Perpetuity Period for the construction of a flat or flats at the Demised Premises" and Clause 3(11).

13. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows

Costs incurred in opposing the planning application.

14. The roof space above the property is now owned by Dandy Properties Ltd (DPL), which is controlled by a Mr C Tett. DPL planned to build 15 penthouse flats above the property and 11 flats on near-by land, which it also owned. A planning application was submitted. CVRL opposed the application for a number of reasons as set out in the Respondent's Statement of Case and in so doing incurred the cost now in dispute. The Applicant contends that the sum is not recoverable under the terms of the lease whereas the Respondent contends that it is recoverable under Clause 7(b) and 8 of the Applicant's lease. The Applicant's contention was based on 3 key elements; (i) Clause 7b requires that a notice or order is served under any statute or order or on any regulation or bye-law on the Lessee or on the Lessor in respect of the Lessor's Property or any of the flats therein. The Respondent in this case has not identified such a notice and in the absence of a notice, this provision cannot apply. (ii) A planning application notice is not a notice within the meaning of Clause 7 because it is a general notice and not a notice that has been served on the Lessee to respond. Anyone can respond to a planning application including any of the leaseholders either individually or collectively. In the circumstances, it was not necessary or reasonable for the Lessor to take action. (iii) The notice in question must be served in respect of the Lessor's Property. In this instance, the planning application notice is in respect of the roof space that is not part of the Lessor's Property. DPL, the owner of the Roof Space has a 999 year lease that grants permission for the development of the flats.

DPL also owns the car park space where the proposal was to build 11 flats.

15. Mr Weaver provided the background information leading up to the Board of Directors' decision to oppose the application. The Board canvassed the views of leaseholders via a questionnaire and once it had sufficient support, the decision was taken to seek advice on the proposed development as they had concerns regarding the possible impact that the penthouse flats would have on the Building. Mr Weaver said that the developer was not forthcoming with information and therefore opposing the application was the only means by which it was considered possible to obtain information and "get their voices heard and to preserve their asset for the benefit of shareholders." Ms Cherriman initially relied on Clause 7(b) and then submitted that costs were recoverable under Clause 8 as "general administration and management."

The tribunal's decision and reasons

16. In determining this issue, the tribunal considered whether the clauses relied upon by the parties were sufficiently clear to demonstrate an intention by the parties to the lease that the clauses permit recovery of the cost incurred by the Lessor in opposing the planning of the development. The tribunal did not limit its consideration to these clauses in particular but also considered the lease as a whole and took account of the circumstances that existed at the time of granting the lease for the roof space. The tribunal also considered the natural and ordinary meaning of "a notice" when read in light of the lease. The tribunal was not satisfied that a planning notice was a notice falling within the meaning of Clause 7b because the ordinary meaning of a planning notice is that it is a general notice the purpose of which is to inform anyone about proposed developments in the locality. It is therefore not a notice that is served "**on the**" Lessee as specified by the Clause 7b. Therefore in the absence of the Lessor having identified a notice, the tribunal concluded that the cost was not recoverable under Clause 7b.

17. The previous Board of Directors granted the lease to the roof space. Taken as a whole, the lease to the roof space appears to have anticipated structural work being carried out with permission as per the Lessee's covenants clause 3 (11) which provides under sub heading -Not to alter "at any time during the said term without licence in writing of the Lessor (which shall not be unreasonably withheld) first obtained to make any structural alterations in or additions to the plan elevation or appearance of the Demised Premises...." and Paragraph (N) anticipated the development of flats in the roof space as it specifically refers to the construction of flats. In the circumstances, this suggests to the tribunal that it was futile for the Board to object to the proposed development of flats on the roof space.

18. The Respondent's Board of Directors instructed Lichfields to assist them in registering their objections and the tribunal was told that the Board drew up a 50 page report of detailed questions about the Building for their surveyors to make enquiries about. The Tribunal considered that it was reasonable for the Lessor, as the owner of the Building to express an interest in any development that may affect the Building. As such, the Lessor had, in our view, an understandable desire to be informed about the details of a development on top of its Building. We were told that the Board canvassed and received the support of the majority of leaseholders who responded to the questionnaire though we were not provided with documentary evidence this was not disputed. There was no reason to disbelieve Mr Weaver when he said that DPL failed to engage in meaningful consultation with the Board and failed to provide details about the development. In the circumstances the tribunal was satisfied that the cost was recoverable under Clause 8 as the cost was incurred for purposes "relating or incidental to the general administration and management of the Lessor's Property." The tribunal considered that these words though general were sufficiently clear to demonstrate an intention to include this expenditure within the scope of the service charge. The structure of the Building remained vested in the Lessor and the provision of the service charge enabled the Lessor to fund an action considered necessary by the majority of the leaseholders who voted. In this case, it could be argued that it was necessary for the Lessor to take some action for the common good to ensure that the proposed development did not have an adverse impact on the Building. The tribunal is satisfied that the cost incurred in responding to the planning application for the development of the roof space is therefore recoverable through the service charge under Clause 8.

19. However, the tribunal was not satisfied that the amount claimed was reasonable. We were provided with supporting invoices in respect of the advice and assistance sought in registering objections for the roof space development. It appears to us that in circumstances where the the Lessor granted the lease for the roof space with the anticipation of "construction of a flat or flats at the demised Premises" as set out by Paragraph N, it cannot in our view be reasonable for the Lessor to now turn around and expend what could be regarded as a considerable sum of money objecting to the construction of what was in fact anticipated. The invoices submitted show "advice-proposed roof development" appearing in each service charge year which suggests an element of repetition. The tribunal accepted that the Lessor was entitled to make observations but in our view, had such a course been adopted, it was unlikely to have resulted in the Lessor incurring this considerable sum now claimed. Having examined the supporting invoices, which provide no detailed information of the work carried out, the tribunal adopted a broad-brush approach and concluded that the sum of £10,000 is reasonable and payable and the Applicant is liable to contribute towards this cost as apportioned by the Applicant's lease.

20. The tribunal concluded that the sum claimed in respect opposing the development to the car park space was not recoverable through the service charge as the car park space is not part of the Lessor's Property.

Corporate Expenditure- Amount claimed £7,605.65

21. Mr Williams on behalf of the Applicant contended that the expenses incurred by the Company are not legitimate company expenses that can be recoverable through the service charge. He made specific reference to Directors and Officers' insurance. Ms Cherriman submitted that the insurance, the cost of AGMs and the costs incurred by the Company in obtaining legal advice on Company Law were legitimate service charge expenses under the Fourth Schedule Part 11, paragraph 4 and 8.

The tribunal's decision and reasons

22. The tribunal determines that the cost of the Directors and Officers' insurance is not recoverable through the service charge under Clause 4. The cost was not incurred in connection with "affecting insurance against the liability of the Lessor but rather was incurred for the purposes of insuring the Directors and Officers of the Respondent Company. Although the Company is the vehicle by which the Freehold is owned, in our view the Directors and Officers are a separate legal entity to the Lessor within the meaning of Clause 4. The tribunal was not satisfied that the Company's other expenditure was recoverable under Clause 8 Part 11 of the Fourth Schedule. The Company is subject to separate Company Law regulations. None of the disputed costs of the Company are service charges or relevant costs within the meaning of section 18 of the 1985 Act. S18 defines "service charge" 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, improvement or insurance or the landlord's costs of management.." The tribunal was informed that the Company has an income of £150 per annum outside of the service charge. Shortage of income, does not entitle the Lessor to recover its Company expenditure through the service charge.

Construction of Staff accommodation

23. Mr Williams conceded that the costs for constructing office space for staff were recoverable under the lease. The cost incurred was challenged on the basis that it had not been reasonably incurred because there was a proviso for office space as part of the planning process for the pent house flats. It was therefore argued that the cost of building staff accommodation was unnecessarily and unreasonably incurred. Ms Cherriman agreed that there was a promise of staff accommodation within the planning application submitted by DPL and a space marked garage was intended for office space. However, there were no details or consultations as to what the space would contain.

CVRL considered that the space provided was not sufficient for their staff needs. Ms Cherriman said that up until 2014, DPL rented to CVRL a garage that was used for staff accommodation. On 17 September 2014, DPL served notice on CVRL to give vacant possession by 17 October 2014. In the interim CVRL used a Portcabin. CVRL applied for planning permission in October 2015 and once this was approved in March 2016 proceeded to build a permanent staff office on site. She added that the promise of staff accommodation by DPL did not mean that such accommodation would materialise particularly in light of the fact that DPL had previously served notice on CVRL, DPL did not apply for planning consent until the end of 2014 and DPL did not get planning consent for its development until August 2015. In the meantime CVRL had an obligation to provide suitable staff accommodation

The tribunal's decision and reasons.

24. There was no dispute between the parties that the cost of building staff accommodation is recoverable through the service charge. What is in dispute is whether the cost incurred was reasonable in the circumstances where the planning application process for building the pent house flats contained a provision of a space marked out garage intended for staff accommodation. The tribunal was not given any more information about this space by either party as neither party had been furnished with details from DPL. Therefore, the tribunal could not assess the suitability of what was to be provided. In addition, there were no guarantees as to when or if indeed the staff accommodation would be forthcoming as promised by DPL and more over without details whether the proposed accommodation would be suitable. The tribunal accepted that CVRL was under a duty to provide suitable staff accommodation. The tribunal was also informed that the Local Planning Authority told CVRL that the interim portacabin was in breach of planning provisions. Therefore in the absence of assurances from DPL, the tribunal considered that it was reasonable for the Lessor to incur costs by building a purpose built permanent alternative building in order to house its staff. There was no dispute as to whether the amount was unreasonable.

Application under s.20C and refund of fees

25. At the end of the hearing, the tribunal acceded to Mr Williams' application for permission for the parties to submit written representations as to whether an order under s20C of the Act should be made depending on the outcome of these proceedings.

Name: Judge Evis Samupfonda **Date:** 19 February 2018

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

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

(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.

Section 19

(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 provisions 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.

Section 27A

(1) 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.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.