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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BJ/LSC/2017/00482 and 485,**
Property	**:**	**Flats 712 and 811Falcon Wharf, 34 Lombard Road London SW11 3RF**
Applicant	**:**	**HML Hawksworth Ltd**
Representative	**:**	**Ms L Kreamer of Counsel**
Respondent	**:**	**Ms G Parfitt (flat 811) Ms C Green (flat 712)**
Representative	**:**	**Mr C Stephens, Lay Representative**
Type of Application	**:**	**S27A and s20C Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Judge F J Silverman Dip Fr LLM Mr C Gowman BSc MCIEH Mr L Packer**
Date and venue of Hearing	**:**	**10 Alfred Place, London WC1E 7LR 5-7 November 2018**
Date of Decision	**:**	**16 November 2018**

DECISION

1. **The Tribunal determines that the Applicant is limited to charging £100 per contract per year for each of the two contracts governing the supply of concierge services as result of the Applicant's failure to consult under s20 Landlord and Tenant Act 1985. The Tribunal makes no determination as to whether the charge would otherwise have been reasonable.**
2. **The Tribunal determines that the consultation requirements of s20 Landlord and Tenant Act 1985 do not apply to the Applicant's fees for managing the property and that it finds the actual fees charged for management by the Applicant to be reasonable.**
3. **The Tribunal records that the parties had reached agreement over the arrears of ground rent and that it was not therefore required to make an order in respect of that matter.**
4. **The Tribunal makes an order under s20C limited to £5,000.**

REASONS

1 The Applicant is the management company relating to the property known as the Falcon Wharf, 34 Lombard Road London SW11 3RF ('the property') and the Respondents are the tenants and leaseholders of the flats as designated against their respective names on the front sheet of this document.

2 The Applicant issued proceedings against each Respondent in the County Court claiming arrears of ground rent and service charges. The two cases were transferred to the Tribunal by orders made by the County Court on 10 November 2017 (Ms Green) and 8 December 2017 (Ms Parfitt). The transfer orders included issues relating to the ground rent. The years in question are 2016-18 inclusive.

3 Directions were issued by the Tribunal on 15 January 2018, 25 April 2018 and 31 July 2018 and the two cases were conjoined and ordered to be heard together.

4 The hearing took place before a Tribunal sitting in London on 5-7 November 2018 at which Ms Kreamer of Counsel represented the Applicant and Mr Stephens spoke on behalf of the Respondents.

5 Seven lever arch files of documents were presented for the Tribunal's consideration. Page numbers in the bundles are referred to below.

6 The Tribunal was told by the parties that all issues relating to outstanding ground rent had been settled. The Tribunal was not therefore required to consider that issue and makes no order in respect of it.

7 The Tribunal inspected the exterior and common parts of the property in the presence of the parties and their representatives. The property comprises a 16 storey building situate on the south bank of the Thames at Battersea and is made up of four towers linked by a glass atrium. Except for a concierge desk inside the residential entrance to one tower, the ground to fourth floors of the building are subject to a commercial lease and are currently used as an hotel

and restaurant. The basement of the building comprises a stacking garage/parking area used by both the hotel and individual leaseholders. Floors five to 16 contain residential units some of which have private balconies. A number of rooftop terraces, some of which are shared with the hotel, provide outside space for the residents and hotel guests. Extensive alterations have recently been made to the property, including the creation of seven penthouse units. This work entailed the re-siting of the residents' rooftop terraces. Although the major part of these works had been completed it was clear on inspection that some work was still in progress. In particular, the drainage and surfaces of the roof terraces needed attention as did the safety railings surrounding them and the surface of one roof top terrace fitted with artificial grass was plainly unsatisfactory. The interior of the lift in Core 3 tower showed wear and tear from allegedly having carried builders' materials to the sites on the upper floors. Interior fire doors appeared not to be functioning correctly and one door giving access to a roof terrace did not close properly. Two emergency lights on the staircase in tower 3 were broken. Four large glass panels on the atrium roof were in a damaged condition. Those matters apart, the interior of the building was in a reasonable state of cleanliness and repair. The exterior of the building also appeared to be in a reasonable state of repair although it was noted that a few panels of metal cladding needed attention. At ground level there did not appear or be any demarcation between the public access areas and those reserved for residents, nor any physical boundary between the property and the riverside path used by the public. External planters, some containing bedraggled or deceased plants were in a neglected condition.

8 The first issue which the Tribunal as asked to consider concerned the provision of round-the-clock concierge services for the leaseholders. The Respondents contended that the employment of the concierge(s) was subject to the consultation provisions contained in s20 Landlord and Tenant Act 1985 ('the Act'). It was common ground that the concierge(s) was an employee and that the contract was a long term agreement within the definition contained in the Act. It was also agreed that no consultation has taken place. The Applicant maintained that a contract of employment was exempt from the consultation provisions by virtue of Regulation 3(1) of the Service Charges (Consultation Requirements) Regulations 2003 which specifically excludes contracts of employment from the consultation provisions. However, in the present case the main contract entered into 'by or on behalf of the landlord' relating to the supply of concierge services is not a contract of employment but a contract for services made between HML Concierge Services Ltd and the Applicant. The head concierge, Mr Stevens, is employed by HML Concierge Services Ltd (page 790), a separate and distinct legal entity, and the Applicant pays HML Concierge Services Ltd an agency fee for Mr Stevens's services (page 1321). There is no direct link between these two separate contracts. Further, additional concierge services, to cover periods when Mr Stevens is not working are provided by Hotel Rafayel Limited who invoice the Applicant for those services and charge VAT on their invoices.

9 No consultation had taken place on this contract either. It is the Tribunal's view that both of these contracts fall within the scope of the requirement to consult under s20ZA of the Act and as a consequence of the admitted non-consultation, in both cases the Tribunal is constrained to allow the Applicant to charge only £100 per contract per year as each Respondent's

relevant contribution to this service. Therefore for each of the service charge years 2016-2018 (3 years total) each of the Respondents is only liable to pay £200 in respect of the supply of concierge services (total £600).

10 In these circumstances the Tribunal did not consider it necessary to explore the reasonableness of the Respondents' alternative quotations for the salary of a concierge but did note that the examples supplied by the Respondents cited only the employee's salary and did not take into account the employer's additional payments such as contributions to national insurance and pension.

11 The second issue before the Tribunal also concerned the consultation provisions of s20 of the Act. The Respondents contended that the fees charged by the Applicant in its capacity as Manager of the building were subject to s20 and that no consultation has taken place. The Applicant submitted that because the Applicant was itself a party to the lease no qualifying agreement existed on which consultation could have taken place. In support of their argument the Applicant cited the case of BDW Trading Ltd v South Anglia Housing Ltd [2013] EWHC 2169 Ch (page AB/5).

12 The leases in this case are tri-partite contracts to which the Applicant is a party and under which the Applicant enters a direct covenant to manage the building and in return is permitted to charge a fee for the supply of its services. In such a case there is no separate agreement on which consultation could take place and accordingly the Tribunal finds that the requirements of s20 of the Act are otiose.

13 Although the reasonableness of the Applicant's management charges had not been specifically identified in the Tribunal's Directions, the Tribunal noted, and the Applicant accepted, that the Respondents had raised the matter in its Statement of Case, and the Applicant had picked up the matter in its response. The Tribunal therefore heard evidence from both Respondents and from Mr Hughes on behalf of the Applicant as to the standard of the services provided.

14 The Tribunal observed from its inspection visit and evidence at the hearing that there were instances in which the Applicant had been more reactive than proactive in dealing with problems. A significant number of the Respondents' complaints arose from issues surrounding the recent construction of additional apartments at the property, where the Respondents had complaints about dirt and noise emanating from the works. It notes the Applicant's argument that the building works and the re-siting of the rooftop terraces were under the control of the freeholder and the Applicant had no control over the freeholder's workmen. However, handling of the impact of the building works on the property and its tenants was a management issue, and the Tribunal considers that some of the problems experienced by the leaseholders would have been avoided if the Applicant had increased supervision of the building during the period of the construction works (albeit that the service charge fees to the leaseholders would have been increased if such additional supervision had been put in place).

15 Further, the Respondents complained that the freeholder was using electricity from the property for his building works. For the Applicant, Mr Hughes accepted that this was the case. He said that he had acted to halt the practice. He believed that it had stopped, although he could not positively assure the Tribunal this was so. He had also taken no action to make a refund

to the leaseholders for the electricity used. Mr Hughes undertook that the Applicant would now make the appropriate refund, and give leaseholders an explanation of the basis for the amount.

16 Finally and most importantly, the Tribunal saw a number of fire doors on its inspection which were not properly functioning (Mr Hughes said eight). Whilst Mr Hughes said that remedial work on them was planned as part of other work, the Tribunal considered that any matter relating to non-functioning fire doors required urgent action.

17 Although the Tribunal found some material shortcomings by the Applicant, the issue before it was not the quality of management or otherwise, but the reasonableness of the amount of charge demanded for the service provided. Notwithstanding the shortcomings, management had taken place, including provision of insurance and day to day upkeep of the property. Also, the charge for management was a fixed sum of £50,000 in 2016, the last year of audited accounts, which meant management charges of £285.43 for Miss Parfitt and £239.83 for Miss Green. These amounts are relatively modest compared with typical charges for properties of similar type and location, and cannot be said to be unreasonable, taking all in all. The Tribunal therefore makes no adjustment. .

18 Similarly, the Applicant, as Manager of the residential part of the building, had no control over the freeholder or its employees who owned and used the commercial parts of the building and complaints arising out of use of those parts of the premises (such as noise from late night functions) cannot fall within the Applicant's remit.

19 Issue three concerned the reasonableness of the apportionment of the insurance premiums for the building. The Respondents agreed that they were liable to pay the respective proportions as set out in their leases and that they had been charged the appropriate proportions in the invoices sent to them by the Applicant. This matter was conceded by the Respondents and is not further discussed in this document.

20 Issue four was a similar complaint relating to the fair apportionment of the service charges amongst the tenants bearing in mind that seven new penthouses had recently been added to the total number of units receiving the benefit of the Manager's services. This matter was conceded by the Respondents. For the Applicant, Mr Hughes gave a commitment to re-assess the service charge contributions once the building works had been completed, confirming the undertaking given in his witness statement, para 15.

21 The final issue raised by the Respondents related to VAT and this matter was also conceded by them and is not further discussed in this document except to record that service charges are expressly noted as an exempt supply under that HMRC's VAT notice 742 (AB/2) .

22 The Respondents made an application for an order under s20C of the Act which was opposed by the Applicant who said that the Respondents' behaviour had been unreasonable. According to the Applicant, the Respondents had deliberately and wrongly withheld their service charges, and out of the five issues before the Tribunal had conceded three during the course of the hearing. Although the Tribunal considers that the Respondents were misguided in their approach to a number of the issues of which they complained they had nevertheless achieved a successful outcome to the major

issue in their case, relating to the lack of consultation and non-compliance with s20 of the Act with respect to the supply of concierge services. Since this is a significant issue and one which the Tribunal considers the Applicant should itself have conceded, it is prepared to make a partial order under s20C, limited to £5,000.

23 The Law

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 20ZA

(2) In section 20 and this section –
'qualifying works' means works on a building or any other premises, ad 'qualifying long term agreement' means (subject to sub-section (3)) and agreement entered into, by or on behalf of the landlord or a superior landlord , for a term of more than twelve months.

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.

Judge F J Silverman as Chairman
Date 16 November 2018

Note:
Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking