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HM COURTS & TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

LANDLORD AND TENANT ACT 1985
SECTION 27A (1)
SECTION 20C

Property:	2, Struan Court, Grey Road, Altrincham WA14 4BU
Applicant:	Mr. & Mrs.T.N.Pattle
Respondent:	Struan Court Management Limited represented by The Guthrie Partnership ("the Agent")
Tribunal:	Mrs.C.Wood (Chairman) Mr.D.Pritchard
Lease of the Property:	Lease dated 9 December 1983 made between PLJ Investments Limited ("the Landlord")(1) and J.E. and C.C.A.I. Thomson (2) ("the Property Lease")
Lease of Common Parts:	Lease dated 26 July 1983 made between the Landlord (1) and Struan Court Management Limited ("the Management Company")(2) ("the Common Parts Lease")
Underlease of the Common Parts:	Lease dated 9 December 1983 and made between the same parties as the Property Lease ("the Common Parts Underlease")
Date of decision:	17 April 2012

DECISION

Background

1. The Applicant is the Tenant of the Property.

2. By an application dated 23 November 2011 the Applicant sought a determination under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") in respect of the reasonableness of, and their liability to pay, service charges for the service charge year 2011 – 2012 and thereafter.

3. Directions were issued to the parties dated 19 December 2011 pursuant to which the following written evidence has been submitted by the parties:

3.1 Respondent's Statement of Case and supporting documents as prepared by the Agent received under cover of letter dated 21 February 2012;

3.2 Applicant's Statement of Case and supporting documents received under cover of letter dated 23 January 2012.

Inspection

4. The Tribunal inspected Struan Court at or about 10.00 am on Monday 19 March 2012. In attendance during the inspection was the Applicant, Mr. Chris Naden of the Agent, Mrs.D.Lowe, the Tenant of Flat 6, and one of the Directors of the Respondent , and Mr.L.Alex, the Tenant of Flat 4 and proxy for Mrs.C.Darnell, the Tenant of Flat 1 and also a Director of the Respondent.

The Leases

5. The relevant provisions of the Property Lease for this purpose are as follows:

5.1 under clause 3, the Tenant agrees to observe and perform the terms of the Fourth Schedule to the Property Lease;

5.2 under clause 4, the Tenant agrees to observe and perform the terms of the Common Parts Underlease;

5.3 paragraph 9(1) of the Fourth Schedule requires the Tenant to insure "the demised premises" in the joint names of the Landlord and the Tenant;

5.4 "the demised premises" are defined in clause 1(3) as "...the property and premises described in the First Schedule together with all additions and improvements...and all fixtures of every kind...";

5.5 the First Schedule describes the demised premises as:
"1. All that flat or suite of rooms numbered or to be numbered two and situate on the Lower Ground Floor of the block of flats forming part of the Entire Property and lying between/above/ a horizontal plane following the line of the lower edge of the floor structure forming the floor of the said flat and another plane following the line of the lower edge of the floor structure of the floor of the flat or (as the case may be) of the attic immediately above the said flat ...
2. All that the lock-up garage...numbered 2....".

6. The relevant provision of the Common Parts Underlease for this purpose are as follows:

6.1 clause 2 provides that the annual service rent shall be paid in equal quarterly payments on the usual quarter days in each year;

6.2 clause 3(1) specifies the service rent for the year ended 31 December 1984; clause 3(2) provides that in respect of all subsequent years the Management Company shall serve notice, during the first quarter of the year, specifying the amount of the service rent for that year;

6.3 under clause 4(1), the Tenant covenants with the Management Company to pay the service rent;

6.4 under clause 5, the Management Company covenants with the Tenant as follows:

(i) clause 5(2): to perform its covenants as set out in the Common Parts Lease;

(ii) clause 5(3):to maintain the lift;

(iii) clause 5(4): to maintain the common parts;

(iv) clause 5(5): to light the passages and stairs;

(v) clause 5(6): to keep books of account;

(vi) clause 5(7): to take accounts: specifically, on 31 December in each year "to cause its auditors or accountants to prepare an account showing...the costs and expenses incurred...since...the date of the last preceding account...and containing an estimate as to the likely amount of such costs charges and expenses in the next ensuing year and the said auditors or accountants shall...certify the amount which...the Company should charge in respect of such ensuing year as the amount of the service rent in respect of the Tenant's premises...and also in respect of the other flats and garages and unless the said auditors or accountants shall consider that some other apportionment as between the lessees of the flats and garages is appropriate the amount so certified as the amount of the service rent shall be such as to secure equality of liability as between the lessees of the flats and garages...".

7. The relevant provisions of the Common Parts Lease are as follows:

7.1 the Fourth Schedule contains the Management Company's covenants with the Landlord, including, in particular, at paragraph 12, its obligation to insure "the demised premises" in the joint names of the Landlord and the Management Company against, under paragraph 12(1), "loss or damage by fire aircraft and other insurable risks as the Landlord may from time to time prescribe...", and, under paragraph 12(2), in respect of "the third party and property owners' liability risks... and also the lift...against the risk of breakdown and third party claims and all boilers and heating apparatus...against the risk of explosion...";

7.2 "the demised premises" are defined in the First Schedule as:
"1. All those pieces or parcels of land forming part of the Entire Property upon which no building or buildings shall at the date hereof have been erected being the forecourt access ways and gardens of the Entire Property...

2. All those front and rear entrance halls passages and staircases (other than any entrance hall passage or staircase situated within any of the flats) within the said block of flats forming part of the Entire Property
3. The foundations and the outer roof of the said block of flats
4. The lift shaft and all fixed and other machinery comprising or used in connection with the lift installed in the said block of flats
5. All other (if any) the part or parts of the Entire Property which after the granting of all the leases of the flats and garages...shall not be comprised in one or more of the said leases."

The Law

8. Section 18 of the Landlord and Tenant Act 1985 ("the 1985 Act") provides:

(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.

9. Section 19 provides that –

(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.

10. Section 27A provides that -

(1) an application may be made to a leasehold valuation 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 date at or by which it is payable, and
(d) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.
(3) .....
(4) No application under subsection (1)...may be made in respect of a matter which -
(a) has been agreed by the tenant.....
(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

11. In *Veena SA v Cheong* [2003] 1 EGLR 175, Mr. Peter Clarke comprehensively reviewed the authorities at page 182 letters E to L inclusive. He concluded that the word "reasonableness" should be read in its general sense and given a broad common sense meaning [letter K].

The hearing

12. Mrs.A.Pattle of the Applicant, Mr.C.Naden for the Agent and Mrs.D.Lowe as a Director of the Respondent attended the hearing.

13. In response to a question from the Tribunal, Mrs.Pattle confirmed that she wished the Tribunal only to consider the service rent for the year 2011/2012 and subsequent years as set out in the application.

14. In her submissions to the Tribunal, Mrs. Pattle said that her concerns were:
14.1 in relation to the increase in the service charge to £160 per month which she claimed was unreasonable;
14.2 in relation to the block and lift insurance.
14.3 In summary, Mrs.Pattle said that :
(i) the suggestion of an increase to £160 per month was based on unusual expenditure in previous years which, although it was said had resulted in a deficit, had, in her view, been adequately addressed by levying a surcharge;
(ii) there was no provision in the lease for the establishment of a reserve or sinking fund to which she was opposed;
(iii) no estimates had been provided for future years;
(iv) she was concerned that, at this level, the service charge was a "burden" on the Property which would cause problems if/when they wanted to sell;
(v) whether an equal apportionment of the service charge was right should be considered as Flats 1 and 2 are 1-bedroomed flats as opposed to the other flats in the block;
(vi) her proposal of an increase to £150 per month was not discussed at the directors' meeting, and nor was it put to the AGM at which the increase was agreed;

(vii) there was a history of damp/water penetration at the Property which had not been satisfactorily addressed by the Agent as managing agent for the Respondent;
(viii) they had decided to insure their flat this year because they believed that the poor claims' history of the block meant unreasonably high premiums were charged.

15. In response to these submissions, Mr.Naden contended that:
(i) after deficits in 2010 and 2011, it was the Agent's view that to leave the service rent at £135 per month would result in further deficits in the future which was thought to be unsatisfactory. As a result, the Agent met with three of the directors of the Respondent on 29 June 2011, and following that meeting, took 2 proposals to the AGM which was held on 26 July 2011 where it was resolved to increase the service rent to £160 per month. The budget which set out both proposals was sent out with the Notice of the AGM;
(ii) it was conceded that the block does have a poor claims' history but Mr.Naden confirmed that insurances were reviewed annually and that independent brokers are used to get comparative quotes;
(iii) the amount in the budget for "general repairs" is based on the Agent's knowledge and experience of managing the block since 2009. It is constantly in need of repair/improvement, and the roof is in poor condition. The figure of £3898 was not intended to produce a surplus at the end of the year.

16. In response to questions from the Tribunal:
(i) Mr. Naden acknowledged that, in the past, there had been a failure by the Agent to carry out a s20 consultation process where, on the information available to the Tribunal, it appeared that this may have been necessary. It was noted, however, that the Applicant had confirmed that she did not wish the Tribunal to look back at service rents charged before the 2011/12 service rent year;
(ii) he confirmed that all demands were accompanied by the requisite summary statement of tenant's rights and obligations;
(iii) he confirmed that there had been no discussion with the accountants concerning the apportionment of the service rent as between the lessees other than in equal shares;
(iv) he confirmed that the service rent year as operated was from 1 April – 31 March and he was not aware of any variation of the Leases to provide for this, having regard to clause 3 of the Property Lease;
(v) he confirmed that the management fees were based on the activities of the development, and the age and nature of the block. This was calculated as a gross figure for the development rather than a figure per unit.

Determination

17. The Tribunal must apply a three stage test to the application under section 27A:

(1) Are the service charges recoverable under the terms of the Lease? This depends on common principles of construction and interpretation of the lease.

(2) Are the service charges reasonably incurred and/or services of a reasonable standard under section 19 of the 1985 Act?

(3) Are there other statutory limitations on recoverability, for example consultation requirements of the 1985 Act as amended?

18. Accordingly, the Tribunal determined as follows:

18.1 that the insurances to be put in place by the Respondent are as set out in paragraphs 12(1) and (2) of the Fourth Schedule to the Common Parts Lease. To the extent that the insurances arranged by the Agent for the service charge year 2011/2012 provide cover greater than is required under the Common Parts Lease, the cost of that insurance is not chargeable as part of the service rent and the Applicant is not liable to pay their apportioned share of it accordingly. For the avoidance of doubt, the insurance which is in compliance with the terms of the Common Parts Lease is chargeable as service rent and the Applicant is liable to pay their apportioned share thereof. (In making this determination, the Tribunal noted that it appears that the Agent had routinely arranged insurance cover in these terms over the years with the apparent acquiescence of the Lessees including the Applicant.) ;

18.2 that, by operating a service rent year from 1 April to 31 March, the Agent is not compliant with the terms of the Property Lease which provides for a calendar year to be the service rent year;

18.3 there is insufficient information in the budget in relation to the item "General Repairs" but, if and to the extent, that this will, or is intended to, create a surplus and establish a reserve or sinking fund, there is no provision in the Leases to permit this, and any amount included as such is not chargeable as service rent;

18.4 in view of the Agent's failures to comply with their own Terms of Engagement (in particular, clauses 1.1(d) and (f) in respect of the failure to undertake a s20 consultation process where required, the failure to effect insurance cover in compliance with the terms of the Common Part Leases and the failure to advise the Respondent on the terms of the Leases and how they impact upon the administration of the service rent), the management fees are unreasonable and should be reduced by £50 per flat to £130 plus VAT;

18.5 that, in view of the determinations in paragraphs 18.1 – 18.4, the Applicant's application under section 20C is granted.

Catherine Wood
Chair
Dated 17 April 2012