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Leasehold Valuation Tribunal

Case Reference	:	**CAM/00JA/LSC/2012/0142**
Property	:	**Flats 1 and 3, The Apex, 2 Oundle Road, Peterborough PE2 8AT**
Applicants	:	**PC Benveniste** **HA Pusey** **Represented by Martin Paine (Circle Residential Management)**
Respondent	:	**Daniel John Ricorda** **Nedzmedin Isenovic** **In person**
Date of Application	:	**5 November 2012**
Type of Application	:	**Determination of payability of service charges (section 27A, Landlord and Tenant Act 1985)**
Tribunal	:	**Francis Davey (chair)** **Neil Martindale FRICS (valuer)** **David Reeve MVO (lay)**
Date and venue of Hearing	:	**20 February 2013** **Hotel Ramada, Thorpe Meadows, Peterborough PE3 6GA** **17 May 2013 (further paper consideration)**

DECISION

1. The sum of £1249.88 is payable by each of the Respondents to the Applicants in two equal instalments of £624.94 on 31 December 2011 and 30 June 2012.

to each Respondent. The total service charge estimate was £41,250 for the year. One thirty-third of £41,250 is exactly £1,250.

10. The service charge demands are for two payments of £624.94 for the dates 31 December 2011 and 30 June 2012. Both demands had a summary of rights and obligations (in accordance with section 21) attached.

Inspection

11. We inspected the property. The right-hand lift (facing the lifts) was not working. We found the common parts were not in a very good state with graffiti in many places, particularly in the rear stair well. There was signs of drug use. Some walls had cobwebs on them and many of the floors were not particularly clean.

12. The electronic vehicle barrier had been taken away for repair work.

Hearing

Section 20 notices

13. At the start of the hearing, we asked Mr Paine if we should be concerned that there were no notices under section 20, particularly as a result of the decision of the High Court in *Phillips v Francis*.

14. Mr Paine argued that section 20 notices were not applicable in the case of an interim service charge. They would only be necessary just before the landlord's decision to carry out works.

15. Given that this was a point raised by the tribunal, rather than appearing in the pleadings, we thought that it was unfair to expect the parties to properly argue the point without having been given time to think about it. We therefore ordered that the parties make written submissions no later than 13th March 2013, serving their submissions on the other parties. Our consideration of that point follows at the end of these reasons.

Mr Paine's submissions

16. Mr Paine, on behalf of the Applicants, argued that our approach should be to consider what would be a reasonable charge for the budget items proposed from the point of view of the date on which the charges were estimated. There should be no question of hindsight – for example by taking into account what happened after that date.

17. He submitted that although there was no provision for balancing charges in the lease, clause 10 of the Eighth Schedule did permit the landlord to accumulate a reserve fund. He accepted that in deciding the reasonableness of an advance service charge a tribunal could take into account the size of any reserve fund.

18. We expressed our concern that, if we took into account the size of the reserve fund, we might be taken to endorse all that had happened in

the past. There were a number of earlier statements of account which included items, such as interest on a debit, that seemed to us unlikely to be chargeable. We asked Mr Paine what approach we should take without detailed evidence on the past history of the fund.

19. Mr Paine appeared to accept that we should proceed on the basis that the reserve fund stood at zero on the relevant date.

20. He told us that the individual costs headings in the estimate were intended for "guidance" only. Really it was the whole sum of the budget that was relevant. If one heading under spent the money would be "transferred" to other costs headings.

21. On the particular items of expenditure, he told us:

Barrier Maintenance

22. There has been a history of the electronically operated barrier being damaged or broken. In some cases due to criminal activity in which the police have been involved. The figure of £1,000 included anticipated repair costs.

Building Repairs

23. The figure of £2,340 was a provisional figure for reactive maintenance. The building was not in the best condition. There was graffiti on the walls. He knew for a fact that some of it was recent. He had arranged for a contractor to attend the site to deal with graffiti within the last couple of weeks and since the contractor attended. Yesterday more graffiti had appeared.

24. The security door had been damaged a number of times by being jammed opened and subsequently repaired.

Cleaning

25. There had been a caretaker charging £250 a month. At the time the maintenance budget had been drawn up there had been a plan to engage new cleaners. New cleaners had been recently engaged and charged £500 per month.

26. Mr Paine did not know if there was a separate budget head for refuse, but agreed that refuse might be the responsibility of the council.

Electricity

27. The electricity bill covers lifts, lighting (internal and external) and the security barrier to the car park. Historically electricity was billed by the utility company based on an estimate of consumption. The actual bill in the financial period in question was £7,600, but Mr Paine believed this reflected a period of under charging in the past.

Building Insurance

28. Mr Paine told us that insurance costs were "tested in the market place", but was unable to produce any evidence in support. The hearing bundle included a certificate of insurance from Aviva Insurance Limited covering 4 June 2012 to 3 June 2013 at a total cost of £11,029.99. The Applicants have used Aviva for only 2 years. Mr Paine could not recall which company was used before that.

29. Mr Paine said that the costs may seem high, but that the problematic nature of the building made the premiums higher. This was due to a higher than normal proportion of non owner occupiers.

Lift Maintenance

30. The actual expenditure for the financial period in question was £7,664 in contrast to the estimated expenditure of £6,000. Mr Ricorda interjected that he had rarely seen the lift working.

Water Rates

31. When the Apex consisted of commercial premises, there was a single water meter for the whole block. That continues to be the case. Mr Paine described this as a "historical problem" that created an inherently unfair situation. The Applicants had investigated putting in individual water meters.

32. Mr Paine argued that the Applicants were entitled to recover water charges for the whole block under a combination of three provisions of the leases.

33. Paragraph (3) of the Eighth Schedule to the leases which includes service charges recoverable by the landlord:

    "All rates charges assessments and other outgoings (if any) payable by the Lessors in respect of the Common Parts"

34. Paragraph 4 (in Part I) of the Sixth Schedule to the leases requires the Lessor:

    "TO pay and discharge any rates (including water rates) taxes duties assessments charges impositions and outgoings assessed charged and imposed upon the Property as distinct from any assessment made in respect of the any Flat or the Demised Premises"

35. Those costs are recoverable under paragraph (1) of the Eighth Schedule which includes in the services charges:

    "The costs incurred by the Lessors in complying with their obligations in Part I of the Sixth Schedule"

Year End Accounting

36. The Lessor is required to keep "proper books of account of all charges costs and expenses incurred by it in carrying out its covenants and obligations under this Clause" by paragraph 5 of Part I of the Sixth Schedule – the costs of compliance being recoverable as a service charge pursuant to paragraph (1) of the Eighth Schedule quoted above.

Management Fee

37. Mr Paine said that the management fee was a fixed fee, based on £193 per flat per annum plus VAT.

Mr Ricorda's Submissions

38. In his submissions, Mr Ricorda accepted that the proper role of the tribunal was to consider what a proper estimate for expenditure would be looking forward. He accepted that put him in some difficulty as he could not look to past failures but only into the future.

39. He thought that the overall service charge for the Apex was on the high side compared with similar blocks in the area.

40. On the barrier he said there had been real problems in the past. There had been no barrier for a few years. The barrier at the property was a new one. There was some disagreement as to how long the barrier had been missing: Mr Ricorda thought 18 months to 2 years, Mr Isenovic 3-4 months, Mr Paine thought 2 months. None were able to back up their recollections.

41. Mr Ricorda said there had never been (in his recollection) any internal painting. He had not seen any recent reduction in the level of graffiti. He had not noticed the contractor (mentioned by Mr Paine) coming to remove graffiti, or noticed the results of the removal.

42. Of the cleaning, Mr Ricorda said that, as far as he knew, the new cleaning contractors had first come on the day of the tribunal's inspection. Prior to that he had never met anyone who appeared to be a cleaner or seen any evidence of cleaning, cleaning equipment or materials.

43. Mr Ricorda thought the building insurance was a little high, but again was unable to provide any evidence as to comparable rates.

44. On the lift maintenance, again he thought the sum requested was a little high. He also thought it would not be a sensible sum to be spending if the lift did not work for long periods of time. He said that in his roughly 8 years of occupancy, the right-hand side lift rarely worked.

45. He said that the block did not seem to be managed very well. He said there was no evidence of how much managing was done for the fee or how the management fees were calculated.

46. The lack of any detail, supporting evidence or explanation for the service charges was a general theme of complaint by Mr Ricorda.

47. Mr Isenovic relied on Mr Ricorda's submissions.

48. In reply, Mr Paine said that Mr Ricorda's evidence was full of "vagaries and inaccuracies".

49. First, the new cleaner had visited on occasions before today. For example approximately a month ago. On each visit the cleaners would clean the common parts.

50. Mr Paine was specifically asked if that meant that they cleaned the whole of the building on each visit – as opposed to cleaning part of the building on a rotating basis for instance. Mr Paine assured us that the whole building was cleaned on each visit and that the new cleaners had visited "over" four times prior to our inspection.

51. He said that a local agent was employed to inspect the property. He did not know when the last inspection took place – possibly in mid January 2013.

52. Second, Mr Paine disputed that the lift was out of action for the periods claimed by Mr Ricorda. This was, he said, the 3rd occasion in over 2 years when the lift was out of order and only the 1st occasion when the right hand lift was not operable. He said the problem was due to criminal damage to the lift.

53. Given that this was a direct point of contradiction, we asked Mr Paine how he knew. At first he said from "his own knowledge" but conceded that was not strictly correct. His information came from maintenance reports which he had not brought to the hearing and so was unable to supply to us.

Written submissions

54. We then explored a date for written submissions on the section 20 point to be given to us (and the other parties) by the parties. All parties agreed that 13th March 2013 would be adequate. We indicated that we would make an order to that effect.

55. On Mr Ricorda's application, we extended that time to 4.00pm on 2nd April 2013. Both parties supplied the tribunal with written submissions on that day.

56. By a letter dated 2nd April 2013, Mr Paine, on behalf of the Applicants, complained that the Respondents' submissions on this point were faxed and time stamped at 16:37 on 2nd April 2013 and were not fully received until after 5pm.

57. Mr Paine asked that we consider the Respondents' submissions "inadmissible" because:

    a) they were late (albeit by a small amount);

b) their subject matter was not the narrow question – do we need to consider the effect of section 20 notices for advance service charges – that we had asked, but on other issues to do with service charges.

58. Only evidence is "admissible" or "inadmissible". It makes no sense to ask that submissions be treated as "inadmissible" but we could decide to disregard submissions made by a party if they have been made late.

59. On the one hand, the Applicants suffer no obvious prejudice as a result of the late submission. There was no provision for a reply to be made and, in any event, Mr Paine was able to read them on 2nd April 2013 as evidenced by his letter of reply on the same date.

60. On the other hand, Mr Ricorda had already asked, and been given, an extension of time. Mr Ricorda's application for more time had been made without any real explanation.

61. He had accepted that 13 March 2013 was an acceptable deadline at the hearing. Why then did he need more time? No proper explanation of any change of circumstance was given. Nor was any explanation given to us as to why the submissions were sent late to the Applicants.

62. We felt that it was important that the parties understand that our orders should be obeyed. If more time is needed then a full explanation should be given.

63. Furthermore, the written submissions are wholly irrelevant to the question we had to decide on section 20.

64. For that reason, we disregard the Respondents' additional written submissions.

Conclusions

65. The parties appear to accept that, where estimated service charges are to be paid in advance with no credit given for past overpayments, the role of the LVT on an application under section 27A(1) is to consider what sums would be payable at the date on which the service charges were estimated. Reasonableness, under section 19, was to be considered at that date.

66. An LVT would be able to consider the state of the property at the time the estimations were made, but events after that date would not normally be relevant unless they were evidence of the state of affairs before the estimation date.

67. We think that is right.

68. One difficulty with both leases was the failure properly to define the term "Maintenance Year". In our view, we can imply a term that the Maintenance Year starts on 1st January in each calendar year.

69. The fact that the estimated charges are due on 30 June and 31 December in each year suggests that the parties to the original lease had in mind a Maintenance Year that was co-terminus with a calendar year. They simply failed to record that understanding in paragraph 9 of the First Schedule.

70. We are satisfied that each of the items in the service charge estimates are properly recoverable under the lease. Indeed Mr Ricorda and Mr Isenovic do not deny this.

71. All that remains for us to do is to consider whether those sums are reasonable having regard to the state of the Apex at the date on which the estimates were made.

72. Regrettably, there is very little concrete evidence before us to assist us in making a decision on reasonableness.

73. If, in future, the Respondents wish to challenge service charge demands on the basis that the sums are too high they would be well advised to produce concrete evidence, such as alternative quotations, examples of insurance of other properties (which we could be invited to view if necessary) and so on. On its own a feeling that charges are "a little high" is just not enough.

74. Having said that, the Applicants have produced very little by way of evidence either. For example, although "market testing" of insurance is alleged, no evidence was supplied to back it up.

75. The difference in evidence – over cleaning and lift maintenance – between Mr Ricorda and Mr Paine does not, in our view, need to be resolved in order for us to make a decision on reasonableness. We note that Mr Ricorda's evidence is an impression only.

76. For example he did not see evidence of cleaning, but cannot say for certain that cleaning contractors did not attend. Mr Paine is not able to contradict that impression. Although he may have reason to believe a contractor did attend on at least 4 occasions, he has no direct knowledge of what that contractor did.

77. As our inspections indicated, it is unlikely that a thorough clean of all floors and staircases of the Apex did take place as recently as suggested by Mr Paine. For example some very old cobwebs were present in the rear stairwell that had clearly not seen a cleaner's brush for some months.

78. In our view, even if we were to find that the cleaning was not being done properly, that could not affect our decision on what was a reasonable sum to estimate for projected cleaning expenditure in October 2012 before the existing contractors were employed.

79. We also take into account the fact that a prudent landlord will allow slightly higher sums for estimated expenditure than they might hope for, especially if there is no reserve fund.

80. Taking all these points into account and using our expert knowledge, we find that the sums estimated are reasonable and therefore are payable.

81. On the section 20 point, in his written submissions, Mr Paine argued that section 20(3) refers to "*costs incurred on carrying out the works*" as opposed to section 18(2) which refers to "*costs or estimated costs incurred or to be incurred*".

82. In other words section 20 deals with actual rather than estimated costs.

83. For that reason we think he is right to say that no section 20 notice (or 20ZA dispensation) is required in order to avoid a cap on estimated expenditure payable under provisions such as those in the instant case.

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Francis Davey
2nd June 2013