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First-tier Tribunal
Property Chamber
(Residential Property)

Case Reference	:	**CAM/38UC/LSC/2016/0064**
Properties (in Oxford)	:	**Evenlode Tower, Blackbird Leys, OX4 6JA** **Foresters Tower, Wood Farm Road, OX3 8PZ** **Hockmore Tower, Pound Way, OX4 3YG** **Plowman Tower, Westland Drive, OX3 9QZ** **Windrush Tower, Knights Road, OX4 6HX**
Applicant	:	**Oxford City Council**
Respondents	:	**the leaseholders of the 54 flats set out in the Application**
Date of Application	:	**7th September 2016**
Type of Application	:	**to determine reasonableness and payability of service charges and administration charges**
Tribunal	:	**Bruce Edgington (lawyer chair)** **David Brown FRICS**

DECISION

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1. The original application for the Tribunal to consider the reasonableness and payability of demands made for monies on account of service charges in or about the month of July 2016 is hereby varied so that the Tribunal's task is now to consider the reasonableness and payability of the amounts set out in an agreement in writing dated 19th March 2018 between the Applicant (1) and Oxford Towerblock Leaseholders Association ("OTLA")(2). In particular, whether such amounts are reasonable and payable by long leaseholders who are not members of OTLA.

2. It is the determination of the Tribunal that the demands made by the Applicant are reasonable as follows:

	£
Evenlode Tower	3,690.60 per flat
Foresters Tower	2,642.77 per flat
Hockmore Tower	3,994.67 per flat
Plowman Tower	2,640.85 per flat and
Windrush Tower	3,857.21 per flat

Such sums will become payable as soon as a notice compliant with section 21B of the **Landlord and Tenant Act 1985** ("the 1985 Act") is served subject, of course, to any agreement that payments can be made over a period of time.

3. With regard to the various orders of the Tribunal requested by Stefan Piechnik at pages 392, 393 and 394 in the bundle provided for the Tribunal, these are determined as follows:

   (a) The application to dismiss the Applicant's case is refused
   (b) The application to extend any limitation period is refused
   (c) The application to remove items of claim is refused
   (d) The application to compel the Applicant to retract any press release is refused as being outside the Tribunal's jurisdiction
   (e) The application for the cost of the leasehold officer to be reimbursed as alleged overpaid management costs is refused as being outside the Tribunal's jurisdiction
   (f) The application for an order that the Applicant be debarred from appealing against the Tribunal's orders is refused as it would be unlawful
   (g) The previous order under section 20C of the 1985 Act and the previous refusal of an order for the Applicant to pay Stefan Piechnik's costs and expenses are hereby confirmed and, for the avoidance of doubt, apply to this determination.

Reasons

Introduction

4. This has been a long running case following a decision by the Applicant to upgrade the 5 tower blocks in which 54 of the flats are the subject of 'right to buy' long leases. The plans were finalised and large demands for payments on account of service charges were sent to the long leaseholders. By way of example, the Tribunal saw one demand at the hearing on the 17th February 2017 for £53,581.12 to be paid by a long leaseholder in Hockmore Tower.

5. A great deal of local publicity, particularly following the terrible disaster at Grenfell, ensued and this application was made to determine whether the service charge demands then sent to the long leaseholders were reasonable and/or payable. Much work to the towers involved improving fire precautions and protection, and much of the publicity following Grenfell concentrated on who should pay for this sort of work.

6. There was a hearing on the 17th February 2017 when determinations were made in respect of certain legal issues raised by the two represented parties. There was then a hearing on the 12th, 13th and 14th September 2017 when the Tribunal made factual and legal determinations as set out in a Scott Schedule. These determinations said, in effect, that the demands were unreasonable and not payable. They set out what parts of the works to be undertaken in Plowman Tower were (a) improvements and therefore not payable under the terms of the 'right to buy' leases and (b) proper service charge items.

7. The aim of everyone at that hearing was to use the detailed reasons and decisions made by the Tribunal as a template so that they could be used as guidance for future negotiations in respect of Plowman Tower and the other tower blocks where the work to be undertaken was similar. The Applicant agreed to recalculate the demands to be sent out to the Respondents and in the event that the arithmetic was not agreed by any Respondent, anyone had liberty to apply to the Tribunal to resolve that issue.

8. The reason why only Plowman Tower was used for that hearing was because that was the only one of the five tower blocks where work had not really started and the members of the Tribunal were therefore able to inspect and see the state of the building.

9. It is important to record that most of the long leaseholders had been represented at the hearings by solicitors and counsel instructed by OTLA. They had instructed Mr. Moss, an experienced chartered surveyor who, with the Applicant's surveyor, Mr. Shaw, gave evidence on the first 2 days of the hearing. With everyone's agreement, they followed the modern method of going into the witness box together where they were cross examined by all parties and the Tribunal and discussed some answers together in everyone's hearing.

10. Both surveyors gave their evidence clearly and helpfully. It was obvious to the Tribunal that they respected their duties to the Tribunal as expert witnesses.

11. At that hearing, only Dr. Stefan Piechnik and Mr. Karol Biegus as non OTLA members, made any representations to the Tribunal. There were others present but it was not clear to the Tribunal whether they were simply attending as members of OTLA or were just observers.

12. It is clear that there were subsequent negotiations between the Applicant and OTLA and these produced an agreement between the Applicant and OTLA as to what the long leaseholder members of that organisation would pay for the service charges. The agreement was as set out in the decision above. It is not entirely clear whether these will be the final figures, but most of the amounts appear to have been agreed as final figures.

13. On the 10th May 2018, the Applicant made an application to reinstate the case so that the Tribunal's assistance could be obtained to finalise the figures which the Applicant could claim from the long leaseholders following the earlier determination. On the 7th May, Dr. Piechnik had made a similar application. The basis of the requested reinstatement is not, of course, the position anticipated by the original application because the Applicant is now claiming completely different figures to those in the original application. Hence the Tribunal has, of its own accord, varied the application so that this stage is covered. The Tribunal accepted the Applicant's application because it felt that it was fairer on Dr. Piechnik to ensure that the onus continued to be on the Applicant to conduct these proceedings.

14. Thus, the position faced by this Tribunal now is that most of the long leaseholders have reached agreement with the Applicant and the only long leaseholders who have not reached specific agreement are HM Estates Ltd. (23 and 49 Evenlode); Karol Biegus (79 Foresters); Miss. K Wright and Mr. T Khuja (94 and 99 Hockmore respectively); Mr. A Abdel-hadi (55 Windrush) and Mr. A Khuja and Dr Piechnik (8 and 57 Plowman respectively). For the avoidance of doubt, this decision applies to all of those long leaseholders.

15. In a directions order dated 17th May 2018, all Respondent long leaseholders were ordered to file and serve a statement in reply to the Applicant's evidence "*...setting out whether such Respondent agrees with the Applicant's position and, if not, exactly what is being challenged and why*". Only Dr. Piechnik has responded. His application is some 10 A4 pages of single spacing plus 95 pages of documents.

16. Following the directions order, he then filed a 14 page single spaced statement dated 19th June 2018 with 233 pages of documents. Finally, on the 13th July 2018, he filed a further 10 page single spaced statement with 374 additional pages of documents.

Preparation for this determination

17. In the Tribunal's directions order, it was noted that the Applicant had stated that it was content for the determination to be made following the Tribunal's consideration of written evidence and representations from any party. The Tribunal agreed and directed that it "*would be content to determine the issues on the basis of papers filed without an oral hearing on or after 27th July 2018. However, if any party wants an oral hearing, they must notify the Tribunal by 13th July 2018 and one will be arranged on a date and at a time to be notified with a time estimate of one day. Dates to avoid will be obtained.*"

18. In his final statement dated 13th July 2018 at page 664 in the bundle, Dr. Piechnik states "*...this Respondent believes that an oral hearing will be unnecessary*". He then goes on to say that if the Applicant adds a significant amount of argument or evidence, an "*oral hearing or other measures may be required*". He can be rest assured that the last evidence filed by the Applicant consisted of 2 short statements from Darowen Jones and Adnan Chaudhry, both dated 9th July 2018. They are referred to by Dr. Piechnik on page 655 of the bundle.

Dr. Piechnik's case

19. The statement dated 19th June appears to be the starting point as this was the statement served to comply with the Tribunal's direction to set out his position and say exactly what is being challenged and why.

20. In essence, much of Dr. Piechnik's case is that he has not been provided with a "*...written agreement between the expert surveyors, no underlying arithmetic supporting the base sums, nor any breakdowns of lift repair costs over the past years. The requested information is needed to make informed decisions and to substantiate an agreement on detailed cost of multiple elements*" (paragraph 2).

21. He continues by quoting from parts of the evidence and making assertions without producing his own expert evidence. He is extremely critical of the Applicant and its employees. He complains about certain press releases and accuses the Applicant of concealing information and evidence. He makes specific comments on several items. The Tribunal will do its best to summarise what is said. It has considered each and every point made by Dr. Piechnik but it is impractical to mention each one in this decision.

22. As to the item 'brick and concrete repair' he questions how an agreed sum of £4,385.58 is made up. He says "*I have concern that the Applicant does not provide any evidence that Mr. Moss agreed on merit, rather than as is explicitly stated on instruction from OTLA. As such, it is impossible that a sum, exact to a single penny can turn up without any evidence of any underlying calculations.*" He then talks about various figures quoted and ends by saying that all the figures are overheads and should be removed from the base calculations.

23. He then moves on to 'lift refurbishment' which is one of the items which the Tribunal determined should be a service charge. He highlights the difference between the provisional figure of £72,000 and the final figure of £89,158.18. He says that he has

offered £50,000 as a *"fair mid-way proposal aimed to avoid the cost of additional expert surveys"*. He says that the experts said that they did not have particular expertise relating to the costs of lift repairs and maintenance and, therefore, *"I cannot accept that Mr. Moss would have expressed binding opinion on something that he previously stated on record not to have expertise"*.

24. He then states that the problems with the lift were largely caused by repeated flood damage over the years and the leaseholders should therefore not have to pay for *"insurable factors and/or potential negligence and mismanagement"*. It is unfortunate that Dr. Piechnik saw fit not to cross examine the experts on this point at the hearing; he has not sought to introduce any evidence of his own and he appears to have 'side stepped' the Tribunal's finding that a lift system of this age which has started to break down regularly, is likely to be in need of renovation. It is noted that the cost of the works is higher than the provisional figure which was previously presented, but Dr. Piechnik has not produced any evidence to show that the figure agreed by the experts is unreasonable.

25. The last specific item of challenge relates to 'overheads'. At paragraphs 22 and 23 in his statement, Dr. Piechnik says that the claimed overheads are 30.25% for the main contractor's preliminaries, 2% design fees, .01% insurance, 9% builder's and the 15% Applicant's overheads which he says total 66.55%.

26. He then refers to paragraph 84 in the Tribunal's decision and says that this is far more than the 32% stated. With respect to him, the Tribunal said that in its experience, 32% was reasonable for overheads and profit only – not supervision, preliminaries, insurance, design fees etc.

The Law

27. The Tribunal set out the relevant law in its previous decision. However, it is just worth repeating the basic provisions in the 1985 Act. Any landlord of a long residential lease is bound by the provisions of the lease and sections 18-27A. A tenant only has to pay service charges if they have been or are to be reasonably incurred, and the services provided and the amount demanded are reasonable.

28. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'.

29. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. This Tribunal has jurisdiction to make a determination both as to a claim for a service charge incurred or as to whether a claim for a payment on account of a service charge before it is incurred is reasonable and, if so, whether it is payable.

30. At this stage of the proceedings, the Tribunal also reminds itself of the burden of proof. In **Schilling v Canary Riverside Development PTD Ltd** LRX/26/2005; LRX/31/2005 & LRX/47/2005 His Honour Judge Rich QC had to consider upon whom lay the burden of proof. At paragraph 15 he stated :

> *"If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the*

cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the Yorkbrook4 case make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard."

Conclusions

31. In this case, the Tribunal has had the benefit of noting that following the Tribunal's main determination, negotiations took place between the 2 expert witnesses who had given evidence to the Tribunal at the substantive hearing. Whilst neither the Tribunal nor Dr. Piechnik know exactly what was said during those negotiations, it is clear from the correspondence in the bundle that they were extensive.

32. A judicial determination, which is what this is, is not a scientific process. All a Judge or Tribunal can do is consider the evidence, the representations of the parties and then apply the law to the facts found.

33. In this case, the evidence and the representations of the parties make it clear that the 2 experts who gave evidence at the main hearing have discussed all of the relevant issues and have reached an agreement. Despite what Dr. Piechnik says and implies, the Tribunal simply does not accept that Mr. Moss, the chartered surveyor representing the OTLA members, would somehow compromise himself by agreeing something with which he was not professionally comfortable.

34. This includes making sure that he would speak to colleagues or make his own enquiries to make sure that he knew sufficient about the cost of lift renovations to enable him to negotiate on cost.

35. It is true that all the details considered by those experts are not known to the Tribunal or to Dr. Piechnik. That is the nature of any negotiation. The Applicant has done its best in the various statements and documents it has filed to reassure the Tribunal that the negotiation was lengthy, thorough, at arms' length and that the OTLA long leaseholders were properly and strongly represented.

36. Trying to suggest, at this late stage, that such negotiations should just be ignored and/or that the expert representing OTLA, as seen by the Tribunal when giving evidence lasting several hours, should not have done his best to ensure a fair and reasonable result for the long leaseholders he was representing is, of itself, unreasonable.

37. Dr. Piechnik seems to be of the view that the Tribunal should be undertaking some sort of public enquiry on an inquisitorial basis. With respect to him, that is not the Tribunal's function in an adversarial system. As has been said, all it can do is look at the evidence presented to it, consider representations made, apply the law and make a decision. Any party has had the opportunity to instruct its own expert to contribute to the process and provide additional evidence. Dr. Piechnik decided not to do this.

38. On the basis of the agreement reached between the Applicant and OTLA, the Tribunal considers that the burden of proof has now shifted to Dr. Piechnik (**Schilling**) and his arguments that the figures are wrong do not satisfy that burden.

39. The Tribunal finds in accordance with the decision as stated above. The reasons why the decisions have been made in respect of Dr. Piechnik's applications are self explanatory, particularly given the decision on the main issue.

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Bruce Edgington
Regional Judge
30th July 2018

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Bruce Edgington
Regional Judge
Amended this 16th August 2018 pursuant to rule 50 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 because of an accidental slip with a mis-spelt name and an accidental omission of a leaseholder in paragraph 14 of the decision

ANNEX - RIGHTS OF APPEAL

i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.