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**HM Courts
& Tribunals
Service**

**LEASEHOLD VALUATION TRIBUNAL
OF THE MIDLAND RENT ASSESSMENT PANEL**

Property: 39 Red Lion Close, Tividale, Oldbury, West Midlands, B69 1TP

Applicant: Mr C Wilkinson

Respondent: David Glass Trading As Cyril Freedman Ltd
145 – 157 St John Street
London
EC1V 4PY

Respondent's Agent: Trust Property Management
Trust House
PO Box 63020
London
NW9 1HF

Case Number: BIR/00CS/LSC/2012/0034 & BIR/00CS/LLC/2012/0007

Date of Application: 18th July 2012

Type of Application: Application under Section 27A (and 19) of the Landlord & Tenant Act 1985 for determination of the liability and reasonableness in respect of service charges and for an order under Section 20C.

The Tribunal: Mr G S Freckelton FRICS (Chairman)
Mr D Salter LLB Hons

Date of Inspection: 14th November 2012

The case was determined without an oral hearing.

DECISION

1. The Tribunal determine that the service charge payable in respect of the invoice dated 20th February 2012, as adjusted by the Respondent in its Statement of Case is the sum of £1,039.98.
2. The Tribunal determines that it will not be in the interest of justice to make an order under Section 20C preventing the Respondent from recovering its costs of these proceedings through the service charge.

THE APPLICATION AND THE DISPUTE

3. The Applicant is the Lessee of a flat, which forms part of a development of flats situated on Red Lion Close, Tividale, West Midlands.
4. On 18th July 2012, the Applicant submitted an application to the Midland Leasehold Valuation Tribunal, which was received on 19th July 2012.
5. The Application was for determination of a service charge demanded by the Respondent on 20th February 2012, which the Applicant submitted had been incorrectly assessed. The Applicant also subsequently submitted an application under Section 20C of the Landlord & Tenant Act 1985 (the Act) dated 20th September 2012.
6. The Tribunal issued Directions on 16th August 2012 following which various submissions were made by both the Applicant and Respondent.
7. In his submission the Applicant submitted:-
 - i) The invoice for £1,227.64 dated 20th February 2012 did not comply with the Applicant's lease in that the Landlord had invoiced him for a block of 4 flats, not as a total block of 32 flats.
 - ii) Included in the invoice is a charge of £2,000 for replacement windows whereas the other 3 flats of the 4 in his block have replaced their windows at their own expense and the Applicant therefore submitted it was unfair for them to pay towards the replacement of his windows. To support this the Applicant submitted a witness statement from Mr M A Hayler of 41 Red Lion Close, confirming that he and the other Leaseholders had replaced their own windows at their expense and that it was not fair that he should have to contribute towards the cost of the Applicants windows. Therefore he had not paid the invoice for £1,227.47 sent to him by the Landlords.
 - iii) In July 2012, the Applicant obtained 3 estimates for replacing the windows to his property and arranged for the work to be done at his expense at a cost of £1,045.
 - iv) That the correct proportions for service charge costs is a one thirty second share in accordance with Part II of the Third Schedule of the lease.
 - v) That he accepted he was liable for service charges but only a one thirty second share, which complied with the lease and not a one quarter share. He further submitted that the Landlord had written his own lease.

- vi) As the windows at the Applicant's property had been replaced by the Applicant, he submitted he should not be liable for the expenditure of £2,000.
8. In their submission the Respondent submitted: -
- i) In accordance with Part II of the Third Schedule of the Tenant's covenants of the lease, the Respondent was liable to pay a one quarter share of the repairs to his block.
 - ii) The proposed cost of £2,000 for replacing the windows was subsequently replaced with an amended figure of £750 (£625 plus VAT) to overhaul the timber windows only but that as the Applicant had now replaced the windows, this amount had also been deducted from the invoice.
 - iii) The Applicant was correct in stating that as there are 32 flats, the correct proportion for service charge costs is a one thirty second share. However this is only in respect of items within Part II of the Eighth Schedule such as gardening. Part II of the Third Schedule confirmed that the tenant should pay a one equal fourth part of the costs, expenses and outgoings and matters mentioned in the first part of the Eighth Schedule, which included the main structure, roof, gutters and rainwater pipes of the building and garage and decorating the exterior of the building.

THE LEASE

9. The property is held under a lease dated 3rd October 1974 for a term of 99 years with effect from 25th March 1974. The lease was between A & J Mucklow (Lands) Ltd and Mr Keith Shelley.
10. The Second Schedule of the lease defines the flat as "ALL THAT first floor Flat known as Flat Number 16 Castle View Estate, Regent Road, Tividale aforesaid shown for the purpose of identification only on the plan and thereon coloured brown and situated in the block of flats (hereinafter called "the Building") which is shown for the purposes of identification only edged red on the plan AND ALSO the Garage known as Garage Number 16 with the land forming the site thereof shown for the purpose of identification only on the plan and thereon coloured blue TOGETHER WITH:-
- (i) The foundations (if any) and the roofs (if any) floors, ceilings, walls, doors and windows enclosing the same save that where such floors, ceilings or walls also form the boundary of another flat only one half in depth of such floors ceilings or walls is included in the Flat and
 - (ii) The pipes wires ducts tanks and cisterns lying within and used solely in connection with the services of the Flat All Which demised premises form part of the Mansion."

11. Part 1 of the Eighth Schedule of the lease (Expenses of the Building) specifies the Lessor's expenses in respect of which the Lessee is to pay the Lessee's proportion, which comprises: -
- (i) Maintaining repairing redecorating and renewing: -
 - (a) the main structure roof gutters and rainwater pipes of the Building and garage (if any).
 - (b) the entrance passages landings and staircases of the Building to be enjoyed or used by the Lessee in common with all other persons having a like right.
 - (c) the water pipes drains and electric cables and wires in or under the Building to be enjoyed or used by the Lessee in common with the owners or Lessees of the other flats in the Building.
 - (d) the television aerial in and serving the Building.
 - (ii) Keeping reasonably lighted the passages landings, staircases and other parts of the Building to be enjoyed and used by the Lessee in common as aforesaid.
 - (iii) Decorating the exterior of the Building.
 - (iv) Ensuring the Building and Garage with the Prudential Assurance Company Limited or some other reputable insurance company nominated by the Lessor.
 - (v) The costs and charges of any Accountant employed by the Lessor for the purpose of auditing the Lessor's accounts in respect of the Lessor's Expenses and certifying the total amount thereof for the period to which such account relates.
12. Part II of the Eighth Schedule (Expenses of the Mansion) specifies the Lessor's expenses in respect of which the Lessee is to pay the Lessee's proportion, which comprises:-
- 1. All rates taxes duties charges assessments and outgoings assessed charged or payable or imposed on the Mansion or any part thereof except insofar as the same are the responsibility of the Lessee hereunder
 - 2. Trimming and cutting of lawns borders hedges and general horticultural matters relating to the garden plants hedges and trees growing therein
 - 3. Maintaining and repairing the paths driveways and garage forecourt
 - 4. The charges and expenses of abating a nuisance and of executing any works necessary to comply with any notice served by the Local Authority in connection with the Mansion insofar as the same is not the sole responsibility of or wholly attributable to the fault of any individual lessee of any flat comprised within the Mansion.

5. The costs charges and remuneration of the Lessor and any Agent or Agents employed by the Lessor to manage or administer the Mansion
13. Part II of the Third Schedule includes the following covenant by the Lessee with the Lessor: -
- Clause 2(1) "to contribute and pay one equal fourth part of the costs expenses and outgoings and matters mentioned in the First Part of the Eighth Schedule hereto and one equal thirty second part of those mentioned in the second part of the said Eighth Schedule together with Value Added Tax".
14. Clause 4 of the Sixth Schedule includes the following Lessor's covenant with the Lessee: -
- "Subject to payment by the Lessee of the Lessee's proportion of the Lessor's Expenses: -
- (i) To maintain repair redecorate and renew: -
- (a) The main structure, roof gutters and water pipes of the Building (if any) and"
- (vii) "So often as reasonably required to decorate the exterior of the Building and the Garage in such a manner as shall be agreed by a majority of the owners or lessees of the flats comprised in the Building or failing agreement in the manner in which the same was previously decorated or as near thereto as circumstances permit and in particular, to paint the exterior parts of the Building and the Garage usually painted with two coats of good paint at least once in every four years."
15. Included with the Respondent's submission was a copy of the lease dated 3rd October 1974 between A & J Mucklow (Lands) Ltd and Mr Keith Shelley. This lease was signed by Mr Shelley in the presence of a witness. In the Applicant's submission, he included a copy of the lease between A & J Mucklow (Lands) Ltd and Mr Keith Shelley but this was signed by John Lowbridge and Susan Yvonne Lowbridge.
16. In the copy of the lease provided by the Applicant, Clause 2 of Part II of the Third Schedule being the covenant by the Lessee with the Lessor stipulated: -
- "2.(i) To contribute and pay one equal half part of the costs expenses outgoings and matters mentioned in the First Part of the Eighth Schedule hereto and one equal 32nd part of those mentioned in the Second Part of the said Eighth Schedule together with Value Added Tax."

The same clause in the copy of the lease provided by the Respondent stated: -

"2(i) To contribute and pay one equal fourth part of the costs expenses outgoings and matters mentioned in the First Part of the Eighth Schedule hereto and one equal thirty second part of those mentioned in the Second Part of the said Eighth Schedule together with Value Added Tax."

There is therefore a discrepancy between the copy leases provided by the Applicant and Respondent. The Applicant also referred to an email from the Land Registry confirming that all leases for the various flats would be the same.

17. The Tribunal carefully considered the matter and on balance determined to accept the lease provided by the Respondent as it was a complete lease and signed by the original leaseholder. The Tribunal therefore determined that the contributions towards the service charges would be a one fourth part of the costs mentioned in the First Part of the Eighth Schedule and one thirty second part of those costs mentioned in the Second Part of the Eighth Schedule together with Value Added Tax. Indeed, if the Tribunal accepted the Applicant's submission this would result in the Applicant being responsible for a higher proportion of the costs (one half) rather than the proportion submitted by the Respondent (one fourth). As the flat is in a block of four the Tribunal also determined it would be inconsistent and incongruous for a one half share of the costs to be charged.

THE LEGAL FRAMEWORK

18. Under Section 27A of the Landlord & Tenant Act 1985, the Tribunal has jurisdiction to decide whether a service charge is payable and if it is, the Tribunal may also decide:-
- (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
19. Section 19 the 1985 Act provides that service charges must be reasonable for them to be payable.

"Relevant costs shall be taken into account in determining the amount of the 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 and the carrying out of works, only if the services or works are of a reasonable standard:

and the amount payable shall be limited accordingly."

20. A charge is only payable by the Lessee if the terms of the Lease permit the Lessor to charge for the specific service. The general rule is that service clauses in a lease are to be construed restrictively, and only those items clearly included in the Lease can be recovered as a charge (*Gilje v Charlgrove Securities* [2002] 1EGLR41).
21. If the Lease authorises the charges, they are only payable to the extent that they are reasonably incurred; and where they are incurred, only where the services for which they are incurred are of a reasonable standard.
22. The construction of the Lease is a matter of law, whilst the reasonableness of the service charge is a matter of fact. On the question of burden of proof, there is no presumption either way in deciding the reasonableness of a service charge. Essentially the Tribunal will decide reasonableness on the evidence presented to it (*Yorkbrook Investments Ltd v Batten* [1985] 2 EGLR 100).

THE PROPERTY INSPECTION AND THE TRIBUNAL'S DETERMINATION

23. The Tribunal inspected the property in the presence of Mr C Wilkinson (the Applicant) and Ms R Sekhon and Ms B Lomax (representatives on behalf of the Respondent). They found it to be a first floor flat in a purpose built block of 4 self-contained properties. The block of 4 flats was in a larger block of 16 flats. There were 2 blocks of 16 flats making a total of 32 flats overall.
24. The Tribunal inspected the interior of the flat and noted the replacement windows installed by the Applicant to the lounge, kitchen, bathroom and bedroom. The Tribunal also inspected the communal gardens to the front and rear and the garage blocks externally.
25. It was agreed by the Applicant and Respondent that there were a total of 32 flats in 2 blocks of 16 flats each.
26. The Tribunal noted that the amount demanded by the Respondent from the Applicant was the sum of £1,227.48 as detailed in the invoice dated 20th February 2012 from Trust Property Management to the Applicant. However, the Respondent's statement of case refers to the amount due being the sum of £1,039.98. Although the calculation for the sum of £1,227.48 was detailed by the Applicant, it was not clear how the sum of £1,039.98 had been calculated. The Tribunal therefore requested further details from the Respondent. Details were supplied by the Respondent by letter dated 20th November 2012 which was copied to the Applicant.
27. The Respondent submitted that the correct amount due £1,039.98 calculated as follows:-

Original invoice	£1,227.48
Less cost of timber window repairs (£750 divided by 4)	<u>£ 187.50</u>
Amount due	£1,039.98

28. The Applicant was invited to comment on the explanation provided by the Respondent and submitted a further submission dated 24th November 2012. In this the Applicant confirmed his submission that:-
- a) the original invoice for £1,227.64 did not comply with his lease.
 - b) he had been invoiced for a ¼ share rather than a 1/32nd which was the correct proportion.
 - c) the invoice included a charge of £2,000 for the replacement windows to the other three flats in his block and that it was unfair for them to be asked to pay towards the Applicant's windows.
 - d) he agreed he was liable to pay a Service Charge but only of the correct proportion.
 - e) the Landlord had written his own lease
29. Having obtained all the relevant information, the Tribunal determine that the Respondent was correct in its approach of invoicing one quarter of the share of works to the block of which the flat forms part plus a one thirty second share of the costs relating to the estate. The Tribunal therefore determine that the amount payable by the Applicant is the sum of £1,039.38.

SECTION 20C ORDER

30. The Applicant applied for an order under Section 20(C) of the 1985 Act preventing the Respondent from recovering its costs incurred in the Tribunal proceedings through the service charge.
31. The purpose of an application under Section 20C is to prevent a landlord from recovering his costs in Tribunal proceedings through the service charge. The guidance given in previous cases is to the effect that an order under Section 20C is to deprive the landlord of a property right and it should be exercised sparingly. (See for example, Veenasa v Chong; Lands Tribunal [2003]1 EGLR 175).
32. The Tribunal considers that it would not be in the interests of justice to make an order under Section 20C preventing the Respondent from recovering its costs of these proceedings through the service charge in this case. The Tribunal in reaching this decision had regard to the fact that the Applicant was unsuccessful in his application under section 27A (and section 19) of the 1985 Act. The Tribunal is satisfied that such costs are authorised under the terms of the lease provided they are reasonable.
33. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal, a party must apply, in writing, to this Tribunal for permission to appeal within 21 days of the date of issue of this Decision, which is given below, stating the grounds upon which reliance will be placed in the appeal.

Signed:



Graham Freckelton FRICS
Chairman
Midland Leasehold Valuation Tribunal

Date: 13 DEC 2012