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FIRST - TIER **TRIBUNAL**
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)
EASTERN REGIONAL OFFICE

Leasehold Valuation Tribunal
Case no. CAM/12UE/LSC/2013/0019

Case Reference	:	**CAM/12UE/LSC/2013/0019**
Property	:	**5-8 Station Approach, Somersham, Huntingdon, Cambs PE28 3JD**
Applicants	:	**No 5: Linda Fisher** **No 6: Victoria Stephen** **No 7: Nicola Phelan** **No 8: Samantha Hayley Johnson** **Represented by Mr Ian Johnson**
Respondent	:	**Moreland Estate Management Ltd** **Ground Rent Trading Ltd** **Represented by Mr Laurence Freilich – Director**
Date of Application	:	**12 February 2013 (Nos 6-7-8)** **28 February 2013 (No 5)**
Type of Application	:	**Section 27A Landlord & Tenant Act 1985 Determination of reasonableness and payability of service charges**
Tribunal	:	**Judge G M Jones** **Mr R Thomas MRICS** **Mr P A Tunley**
Date and venue of Hearing	:	**19th June 2013** **Huntingdon Marriott Hotel** **Huntingdon PE29 6FL**

DECISION

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ORDER

UPON Hearing the Applicants by their agent Ian Johnson
AND the Respondent not appearing nor represented

AND pursuant to the Directions Order dated 21st June 2013

1. The Applicants have permission to amend their Applications to challenge the management fees for the years 2008 to 2012 inclusive on the ground only that management services were not provided to a reasonable standard.

2. The sums included in the service charge accounts for 2009 to 2012 inclusive for common parts cleaning and gardening were reasonably incurred and are payable by the Applicants.

3. The sums included in the service charge accounts for 2008 to 2012 inclusive for insurance costs exceeded a fair and reasonable proportion of the total insurance premiums as defined in the Applicants' leases and to the extent shown in Table 1 annexed hereto were not reasonably incurred and are not payable by the Applicants.

4. The management charges included in the service charge accounts for 2008 to 2012 inclusive were reasonably incurred only as to 85% thereof and the balances (i.e. 15% thereof) were not reasonably incurred and are not payable by the Applicants.

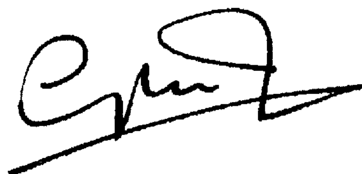
5. The parties have permission to apply to the Tribunal within two calendar months from the date of this Order for a determination of the revised service charge account balances between the Applicants or any of them and the Respondent as determined in accordance with the provisions of this Order. Any such application must be accompanied by a statement of the revised balances and supporting calculations and documentation to show such balances were reached.

6. In the event an application is made pursuant to paragraph 5 hereof the Tribunal Clerk will refer the file to the Judge for Directions.

7. The Respondent shall not be entitled to include in any service charge account for 5-8 Station Approach any costs incurred in or in relation to this Application, the Tribunal considering it just so to order.

8. The Respondent shall reimburse to the Applicants through their agent Ian Johnson the Application fee of £100 and the Hearing fee of £150 the Tribunal considering it just so to order.

Judge G M Jones
Chairman
28th August 2013



REASONS

0. BACKGROUND

The Property

0.1 The subject property comprises four leasehold flats, part of a small estate together with 11 freehold 2 and 3 bedroom terraced houses built by Hazelmere Homes in 2007. Hazelmere sold their freehold interest to Ground Rent Trading Ltd ("GRT") shortly before going into receivership. GRT appointed Moreland Estate Management Ltd ("MEM") as managing agent on 25th September 2008. Both companies are registered at the same address; Mr Laurence Freilich is a director of both. The Tribunal is aware that Mr Freilich is an experienced manager of leasehold estates.

0.2 Upon inspection the Tribunal found that Station Approach is adjacent to the former railway station and next to an industrial area. The building containing the four leasehold flats is rectangular and is rendered with a pitched tiled roof. Windows are double glazed uPVC units and rainwater goods are also in uPVC. The building, which is in sound structural condition, has a secure communal entrance with an entry phone system. The flats are all self-contained one bedroom flats of reasonable size with kitchen and bathroom fittings of reasonable quality. Flat 7 is currently on the market and expected to fetch £110,000. There is a modest communal garden at the rear of the flats; ground floor flats have access to this by French windows. The attention of the Tribunal was drawn to the dirty condition of the windowsills at first floor level which, the tenants submit, is indicative of a lack of proper window cleaning.

0.3 The houses are of brick and tile construction, with small unfenced garden areas to the front and fenced gardens to the rear. The estate as a whole is fenced. There are significant landscaped areas which appear to be well maintained. At the rear is a communal car park with security lighting. Overall, the estate appears to be well cared for.

The Lease

0.4 The sample lease (for Flat 8, though described as Flat 4) dated 16 November 2007 is for a term of 125 Years and shows that the demise includes the windows and window frames but excludes the structure and common parts of the building. The landlord is responsible for the maintenance of the structure, common parts and communal areas of the estate and is also responsible for the provision of communal TV aerials and for external window cleaning. Each tenant is liable to contribute by way of additional rent ¼ of the costs of maintenance of the building comprising the four flats and its own communal garden and 1/15 of the costs or maintaining the estate as a whole. The landlord also covenants to insure the building and the tenant agrees to reimburse the landlord a fair and reasonable proportion of the insurance premiums.

1. THE DISPUTE

1.1 These Applications were brought in the Leasehold Valuation Tribunal, whose jurisdiction and judicial personnel were transferred to the First Tier Tribunal (Property Chamber) on 1st July 2013. Accordingly, this Decision is issued by the First Tier Tribunal (Property Chamber).

1.2 The Applications by the four leaseholders were all made in February 2013. The

Tribunal (Mr G M Jones) made a Directions Order dated 22nd March 2013. Nothing appears to have been heard from MEM from that date until the day of the hearing and the landlord did not comply with any of the directions. Enquiries suggest that the usual steps were taken to notify MEM and GRT of the Directions Order and the date and time of the hearing and to ensure that the Respondent was served with a copy of the hearing bundle.

1.3 Somewhat unusually, the hearing venue was not arranged until 17th June 2013 because of uncertainty about whether the Applicants would file the hearing bundle, in default of which, under the terms of the Directions Order, a hearing would have taken place at the Regional Office without an inspection. The Tribunal Clerk sent the parties faxes and e-mails notifying them of the hearing venue. In fact, it was not essential for them to know the venue, since they could find that out by attending the inspection. The fax to the Respondent was sent at 1830 hours on 17th June and thus was probably not seen at the Respondent's office until the morning of 18th June.

1.4 At the hearing the Applicants sought permission to amend their Applications to challenge the level of the management fees charged by MEM on the grounds that, in circumstances where the services had been inadequately provided, those charges were unreasonable. Clearly, if that were permitted, the Respondent would be entitled to an opportunity to be heard, not only on the substantive issue, but also on the question whether permission should be granted for the amendment. We shall return to this point later.

1.5 The Respondent was not represented at the hearing. However, that day MEM sent a letter to the Regional Office referring to the hard copy of the fax sent on 17th June, which reached MEM on the morning of 19th June. MEM wanted to appeal whatever decision was made and have the hearing re-listed. Fortunately, the Tribunal had not reached a final decision, which made it possible to consider this request without the need for an appeal. It also resolved the question whether the Respondent could be given a fair opportunity to be heard on the issue of management fees.

1.5 Accordingly, the Chairman issued a further Directions Order dated 21st June 2013 with a view to giving the Respondent an opportunity to be heard. This opportunity was made conditional upon compliance by the Respondent with the directions timetable. The Respondent did not comply. A party who chooses not to be heard cannot complain of the outcome. Accordingly, the Tribunal gives the Applicants permission to challenge the management fees on the ground only of poor service and is now able to proceed to determine the Applications without a further hearing.

2. THE ISSUES

2.1 The tenants challenge the buildings insurance premiums for 2008-2013 inclusive and the common parts cleaning and gardening charges for 2009-2013 inclusive. The Applicant's differences with GRT and MEM go back to January 2009, when a challenge was first mounted by all the leaseholders to the quality of the services provided and the amount of the insurance premiums. The complaint about the insurance premiums was that the building was grossly over-insured.

2.2 However, the leaseholders do not appear to have achieved any measure of success in

their complaints until 2012, when the sum insured, originally set at £1m in 2008-9 and increase in line with inflation over the following three years, was reduced to £425,000. This led to a reduction in premium from £2,070 in 2011-12 to £869 in 2012-13. This followed a valuation obtained by Mr Johnson (Samantha's father) on behalf of the tenants from Richard Baker FRICS.

2.3 The leaseholders were also very unhappy to discover from a letter dated 14th June 2012 from MEM that MEM had been running a deficit on the service charge account in every year since 2008, as a result of which each of them had been under-charged by £1,312.45. They seek a determination as to whether recovery of this sum is barred by the "18 month rule" i.e. under section 20B of the Landlord & Tenant Act 1985.

3. THE HEARING AND THE EVIDENCE

3.1 Since the Respondent has elected not to be heard, there is no need to recite the evidence. This does not mean that the Tribunal accepts everything the Applicants say without question. The conclusion to these Reasons sets out the Tribunal's findings of fact and shows how the Tribunal reached those findings. Where a factual conclusion is stated without reference to its source, that conclusion was reached on the oral and documentary evidence before the Tribunal. In this particular case, almost every such conclusion was derived from documentary evidence and from submissions based on Mr Johnson's written submissions in the hearing bundle.

3.2 At this stage we mention only one issue. The Tribunal heard from the leaseholders and accepts that Flats 5-6-7 were initially purchased for £114,995 each and Flat 8 (the last to be sold) for £122,995. This means that the total realised by Hazelmere for the building containing the flats was £467,980. It seems reasonable to assume that the building costs must have been significantly less than that.

4. THE LAW

Service and Administrative Charges

4.1 Under section 18 of the Landlord & Tenant Act 1985 (as amended) service charges are amounts payable by the tenant of a dwelling, directly or indirectly, for services, repairs, maintenance, improvement, insurance or the landlord's costs of management. Under section 19 relevant costs are to be taken into account only to the extent that they are reasonably incurred and, 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. Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable.

4.2 Under section 27A the Tribunal has jurisdiction to determine whether a service charge is payable and, if so, the amount which is payable; also whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for those costs and, if so, the amount which would be payable.

4.3 In deciding whether costs were reasonably incurred the Tribunal should consider whether the landlord's actions were appropriate and properly effected in accordance

with the requirements of the lease and the 1985 Act, bearing in mind RICS Codes. If work is over-extensive or extravagant, the excess costs cannot be recovered. Recovery may in any event be restricted where the works fell below a reasonable standard.

4.4 The Service Charges (Summary of Rights and Obligations) Regulations 2007, made under section 21B of the 1985 Act and taking effect from October 2007, require a landlord serving a demand for service charges to accompany that demand with a statutory notice informing the tenant of his rights. If this is not done, the tenant is entitled to withhold the service charge payments so demanded. However, Regulation 2 makes it clear that this does not apply where the landlord is a local authority. The Tribunal standard forms of directions may include reference to these Regulations. However, any such direction given in a case where the landlord is a local authority is unlawful and need not be complied with.

Notification within 18 months

4.5 Furthermore, under section 20B(1), if any relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment is served on the tenant then, unless subsection (2) applies, the tenant shall not be liable to contribute to those costs. Subsection (2) provides that subsection (1) shall not apply if within that period of 18 months, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required to contribute to them through the service charge.

Information for tenants

4.6 Section 21B(1) of the Landlord & Tenant Act 1985 provides that a demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges. The summary must be in statutory form, in accordance with the requirements of the Service Charges (Summary of Rights and Obligations and Transitional Provisions) (England) Regulations 2007, which came into force on 1 October 2007. Section 21B(3) provides that a tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand. By section 21B(4), where a tenant withholds a service charge under section 21B any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

4.7 The RICS Service Charge Residential Management Code (2nd Edition) approved by the Secretary of State under the terms of section 87 of the Leasehold Reform Housing & Urban Development Act 1993 sets out good practice for landlords' agents and managers of residential blocks. Part 10 of The RICS Code deals with "Accounting for Service Charges", which advises that accounts should reflect all expenditure in respect of the relevant accounting period, whether paid or accrued and should indicate clearly all the income in respect of the accounting period, whether received or receivable. Copies of such accounts should be made available to all those contributing to them. Service charge funds for each property should be identifiable and either placed in a separate bank account or in a single client/trust account. Where interest is received this belongs to the fund collectively; it should be shown as a credit in the service charge accounts and retained in the fund and used to defray service charge expenditure.

4.8 All chartered surveyors and others engaged by way of business in residential property

management should be familiar with the provisions of this Code, to which the Tribunal is required to have regard.

Insurance and Insurance Commissions

4.9 Under section 30A of the Landlord & Tenant Act 1985 and the Schedule to the Act, landlords must supply to tenants who contribute to insurance costs a summary of the policy and must also, if the tenant makes a request in writing, permit the tenant to inspect any relevant policy or associated documents and to take copies.

4.10 In ***Williams –v- Southwark LBC*** (2001) 33 HLR 22 (ChD), Lightman J held that an insurance commission payable to a manager is, in effect, a discount on the cost of insurance, which should be passed on to tenants. However, unless the arrangement of insurance is a service included in the management fees under the terms of the management agreement (as the RICS Code recommends), the manager is entitled to make a reasonable charge for arranging insurance. In that case, the Council as manager handled local claims and it was conceded that, in those circumstances, an allowance of 20% made by the insurers was a reasonable fee. However, this type of allowance can be made only where services are performed by the landlord or managing agent for the insurer; also, the amount must be reasonable in all the circumstances.

Costs generally

4.11 The Tribunal has no general power to award inter-party costs, though a general power now exists under Rule 13(1) of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 to make costs orders in cases where costs are wasted or a party has acted unreasonably. In general, if the terms of the lease so permit, the landlord is able to recover legal and other costs (eg the fees of expert witnesses) associated with an application to the Tribunal from the tenants through the service charge provisions i.e. he is entitled to recover a contribution to such costs not only from the defaulting tenant but from all tenants.

4.12 However, under section 20C of the 1985 Act the Tribunal has power, if to do so would be just and equitable in the circumstances of the case, to prevent the landlord from adding to the service charge any costs of the application. The Lands Tribunal in Tenants of ***Langford Court –v- Doren Ltd*** in 2001 said that the Tribunal should use section 20C to avoid injustice. In addition, under Rule 13(2) of the 2013 Rules the Tribunal may order a party to reimburse the Applicant in respect of application and hearing fees. This power is likely to be exercised in cases where the applicant is substantially successful, unless he has been guilty of unreasonable conduct in connection with the application, e.g. where he has unreasonably rejected a proposal for mediation or a fair and proper offer of compromise.

5. DISCUSSION AND CONCLUSIONS

Insurance premiums

5.1 It is clear that the building was grossly over-insured. It cannot possibly have cost £1m to reinstate when the flats were sold for a total of £467,980 close to the peak of the market, a price including the site value; nor was the building ever worth £1m.

5.2 No competent management company ought to have made that mistake in 2008. MEM must have had copies of the leases and could see how much the flats were worth. Their

assertion that they simply followed the practice of Hazelmere, who arranged the initial insurance, is no excuse; they had a duty to exercise their own judgment. Moreover, the attention of MEM was brought to the over-valuation in January 2009. This raises the question whether the over-valuation was deliberate. It is a well-known fact that ground rent landlords sometimes enhance their profits by taking commissions from insurers. While their duty in law is to treat such commissions, unless paid in respect of real and valuable services, as discounts to be passed on to tenants, not all landlords do so. A larger commission is often paid if the premiums are over-generous for the cover supplied, which is really a fraud on the tenants. A larger commission is also paid if the building is over-insured.

5.3 Standard Tribunal directions in cases where insurance premiums are challenged require the landlord to disclose any insurance commissions received, as did the Order of 22nd March 2013 in this case. However, the Respondent did not comply with the directions, either according to the original timetable or in accordance with the revised timetable under the Order of 21st June 2013. So it remains unclear whether the Respondent received any insurance commissions. Perhaps that is why the Respondent has chosen not to be heard. However, it would be unwise to speculate.

5.4 It is, however, clear that the Applicants are liable under the terms of the lease to pay only a fair and reasonable proportion of the insurance premiums, not necessarily 25% each. Of course, the landlord must insure the estate generally (apart from the freehold houses); £100 appears to have been allowed for this aspect of the insurance. It is difficult to tell, without further information from the insurers, how the total premium is made up. However, the allowance of £100 seems not unreasonable, if perhaps on the low side. So the Tribunal proceeds on the basis that, for each of the relevant years, an allowance of £100 should be deducted from the insurance costs and that this should be passed on to the freeholders.

5.5 It was clearly accepted for 2012-13 that the property should be insured for £425,000. The figure for earlier years cannot necessarily be discounted by any general inflationary measure because of the serious recession in the property market which started in 2008. Accordingly doing the best we can, the Tribunal assesses the buildings declared value for previous years also at £425,000. There is some confusion about the actual amounts charged each year to leaseholders, which do not tally with the premiums shown on the policy documents. It seems likely that the insurance premiums have been apportioned across each calendar year. It is difficult to be sure, not least because there is no figure available for 2009-10 premium. Nevertheless, the Tribunal proceeds on that basis. It also seems clear that the figure for 2008 covers only part of the year.

5.6 The Tribunal has made an attempt at assessing the insurance premium for 2009-10 by taking the buildings declared value at midway between the figures for 2008-9 and 2010-11 and the percentage premium midway between the figures for the same two years. However, this is only for checking purposes, as we have worked from the figures in the service charge accounts. Doing the best we can to reach a reasonable figure, the Tribunal has simply scaled down the sums charged to leaseholders and freeholders each year to reflect a buildings declared value of £425,000 and then deducted £100 to reach the figure properly chargeable to leaseholders.

5.7 The result is shown in Table 1.

5-8 STATION APPROACH, SOMERSHAM
Analysis of insurance costs

Period	Premium paid £	Sum insured £	%	Period	S/C for Insurance	Source	Revised S/C all	Deduct re houses	Revised S/C	Each flat
24/08/08 - 23/08/09	1,718.86	1,000,000	0.172	2008	938.35	S/C acc	398.80	50.00	348.80	87.20
24/08/09 - 23/08/10	1,871.72	1,022,800	0.183	2009	1,878.05	S/C acc	780.38	100.00	680.38	170.09
24/08/10 - 23/08/11	2,029.60	1,045,600	0.194	2010	1,751.54	S/C acc	711.94	100.00	611.94	152.99
24/08/11 - 23/08/12	2,116.85	1,063,375	0.199	2011	2,064.48	S/C acc	825.11	100.00	725.11	181.28
24/08/12 - 23/08/13	869.00	425,000	0.204	2012	2,152.00	Applicn	869.00	100.00	769.00	192.25
				2013						

For 2009-10 an estimate has been made (see Reasons) of the sum insured & premium paid
For 2008 see Reasons for analysis

GMJ 23/08/13

5.8 The Tribunal makes no finding as regards the rights of the leaseholders to be given credit for any relevant insurance commissions. That issue is not before us because the Respondent has not complied with the Directions Orders.

LTA1985 section 20B

5.9 It was not suggested by Mr Johnson that the leaseholders did not receive annually copies of the service charge accounts contained in the hearing bundle. In those circumstances, they clearly had notice of the charges being incurred by the landlord and cannot now complain of having to pay them. This fortunately may not be much of an issue for them because of the substantial reductions ordered by the Tribunal in the insurance charges.

Window Cleaning

5.10 Complaint is made of the lack of window cleaning. However, it is not clear that the leaseholders were charged for the work that was not carried out. Window cleaning was supposed to be done by the general cleaning contractors, whose charges do not seem unreasonable even if no windows were cleaned. But MEM say in correspondence that the cleaners were not paid for cleaning windows until window cleaning commenced in August 2011, since when a quarterly regime has been established. The leaseholders point to the dirty windowsills at first floor level and suggest that the cleaning is still not being done or not properly done. However, cleaning may have been done when the leaseholders were at work; the windows did not seem particularly dirty at the time of inspection. It is not necessarily the job of a window cleaner to clean windowsills. The Tribunal is not satisfied that there has been any over-charge in this respect. However, it is clear that it is the responsibility of the landlord to clean the outside of the windows.

Management fees

5.11 In the judgment of the Tribunal the management fees are set at a reasonable level on the basis that the management duties have been and are being performed to a reasonable standard. In most respects the condition of the estate suggests a reasonable level of management. However, there have been clear and serious failings in relation to insurance premiums and a general unwillingness on the part of the managing agents to engage with the leaseholder's concerns. The Tribunal is inclined to make small deduction for years 2008-12 inclusive on those grounds; accordingly the Tribunal reduces management charges for each of those years by 15%.

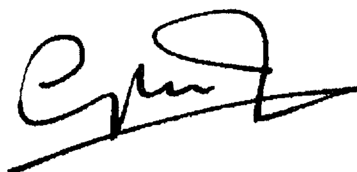
5.12 We leave it to the parties to agree the revised figures for service charges and the balances for each Applicant. If (as seems possible) the Respondent will not agree figures, the Applicants must submit their calculations and final figures to the Tribunal within two months from publication of this Decision and the Tribunal will give directions for an assessment. Once the figures have been recalculated, the Applicants will, in any event, be liable to pay only the recalculated figures.

Costs

5.13 This Tribunal takes the view that it has a wide discretion to exercise its powers under section 20C in order to avoid injustice to tenants. In many cases, it would be unjust if a successful tenant applicant were obliged to contribute to the legal costs of the unsuccessful landlord or, irrespective of the outcome, if the tenant were obliged to contribute to costs incurred unnecessarily or wastefully. In many cases, it would be equally unjust were non-party tenants obliged to bear any part of the landlord's costs.

5.14 However, in some cases, the landlord's conduct of his defence may be a reasonable exercise of management powers even if he loses. The landlord may have made an offer the tenant ought to have accepted. In such cases, it might be reasonable for the tenants generally to bear those costs. In other cases, for example where the non-party tenants supported the unsuccessful landlord, it might be reasonable for the non-party tenants to contribute to the landlord's costs. A wide variety of circumstances may occur and the section permits the Tribunal to make appropriate orders on the facts of each case.

5.15 The Tribunal has no hesitation saying that this is an appropriate case for a section 20C order, even though it is far from clear that the Respondent and MEM have incurred any costs in connection with the application. Overall, the Applicants have achieved a good degree of success in the Application and it would also be appropriate to order the Respondent to reimburse the Application fee of £100 and the hearing fee of £150.



Geraint Jones
Chairman
28th August 2013