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HM COURTS & TRIBUNALS SERVICE
LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/00HG/LIS/2013/0014

Re: Flats 34, 36, 38, 40, 42, 44, 46, 48 and 50 Buckfast Close, Plymouth, Devon PL2 2HD

Applicant	Devon Residential Limited
Respondent	Mr P Cross – Flat 34 Mr P Marshall – Flat 36 Mr I Cole – Flat 38 Miss A Piper – Flat 40 Mr R Troup – Flat 42 Mr B Swabey – Flat 44 Mr & Mrs Trewin – Flat 46 Mrs R Holifield – Flat 48 Westlea Housing Association – Flat 50
Date of Application	6 February 2013
Date of Inspection	10 May 2013
Date of Hearing	10 May 2013
Venue	Plymouth Magistrates Court
Representing the parties	For the Applicant: Mr B Tisdall, Fursdon Knapper, Solicitors The Respondents in person: Mr Cole, Mr Troup, Mrs Holifield, Mr Swabey
Also attending	Mr D Gerrard, Freehold Management Services Limited, managing agent for the Applicant Mr K Poole: freeholder Mrs Cole Mrs Troup Miss Cross on behalf of Mr Cross Mr M Christie – observing

Members of the Leasehold Valuation Tribunal:

M J Greenleaves	Lawyer Chairman
T N Shobrook BSc FRICS	Valuer Member
M C Woodrow MRICS	Valuer Member

Date of Tribunal's 7 June 2013

Decision:

Decision

1) The Tribunal determines in accordance with the provisions of Section 27A (the Section) of the Landlord and Tenant Act 1985 (the Act) that for the accounting years 2011 and 2012, the following sums are reasonable and payable sums (to the extent shown) for service charges payable to Devon Residential Limited (the Applicant) for those years in respect of Buckfast Close (the Property), each Flat being liable to pay 1/10:
   a) each of the items of service charge shown at page 101 of the trial bundle in respect of services dated from 12 July 2011 to 3 August 2012 inclusive, totalling £3,745.49;
   b) management fees at the rate of £180 per flat per year for the period 1 July 2011 to 31 December 2012;
   c) insurance premium and related expenses in respect of insurance for the calendar year 2012 as shown on invoice dated 13 December 2011 of Bluefin Insurance Services Ltd at page 154 in the trial bundle totalling £1,324.01
2) The Tribunal further determines under Part 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 that none of the administration charges are payable to the Applicant by any of the Respondents.
3) Section 20C Order. The Tribunal makes an order that all or any of the costs incurred or to be incurred by the Applicant in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondents.

Reasons

Introduction & Preliminary

4) Service charges. This was an application made by Devon Residential Limited (the Applicant) in respect of a number of charges for the years 2011 and 2012. The application was made under Section 27A (the Section) of the Landlord and Tenant Act 1985 (the Act) for a determination whether service charges claimed by the Applicant for the above years are reasonable.
5) In the statement of Mr Tisdall dated 5 March 2013 in support of the application at paragraph 12 of that statement, the Applicant also sought determination of administration charges under Part 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 in respect of legal costs. The Respondents confirmed that they wished to have those determined as well, notwithstanding there was no formal application by the Applicant in that respect. On Mr Tisdall undertaking to file a formal application by 15 May 2013, the Tribunal decided to determine those charges as well. The application was subsequently filed with a covering letter from Fursdon Knapper dated 14 May 2013.
6) The Applicant accepted that Mr Hodgson, Flat 52, had discharged all his liabilities prior to commencement of these proceedings so withdrew its case against him.
7) Mrs Holifield applied for an order under Section 20C of the Act.

8) It is understood that each of the leases of the flats is in common form so far as material to these proceedings and the Tribunal referred to the lease of apartment 4 when granted on 18 May 2006 (page 18 – 34 in the bundle).

Inspection

9) On 10 May 2013 the Tribunal inspected the Property in the presence of Mr Poole, Mr Gerrard, Mr Tisdall Mr & Mrs Cole, Mrs Troup and Mrs Holifield; Mr Christie observing,

10) The Property comprises a modern 4 storey block of 10 Flats, 3 on each of the 1st 3 floors and a penthouse on the top floor with parking area and bin store. It is constructed of concrete block, largely clad in wood, under a concrete tiled roof. The building appears to be in need of some repair and maintenance.

11) To the rear of the building are 3 small gardens let with the ground floor Flats.

12) The Tribunal inspected the internal common parts comprising the entrance way and staircase and a meter services cupboard. Construction of the Property having been completed in about 2006, the internal parts of the Property appear to be in reasonable condition for their age and character.

13) To the west is a car parking area, the spaces being let with individual Flats. Access is via a security gate which is currently broken. There is also a bin enclosure. The car parking area appears to be in need of some repair and maintenance. It also appears to be contaminated by Japanese Knotweed. Reference is made to the Environmental Protection Act 1990 and Section 14(2) of the Wildlife and Countryside Act 1981.

Hearing, Representations & Consideration

14) A hearing was held the same day attended by those referred to above. The Tribunal had already received a substantial bundle from the Applicant. Immediately before the hearing the Tribunal received a bundle from Mrs Holifield in which she disputed the charge of £79.70 for solicitors fees and also applied for an order under Section 20C of the Act.

15) Mr Tisdall explained the background to the case which was that Mr Poole had built the Property in 2006 and had then run the management himself. However service charge demands and other aspects had been "somewhat haphazard" and it was readily admitted that there had been a problem. He had therefore brought in Freehold Management Services Ltd (FMS) to manage the Property from 1 July 2011. The charges for determination by the Tribunal related to the period after that date, it having been decided not to pursue charges prior to that date in view of the difficulties with management.

16) Service charges totalling £3745.49 on page 101 of the bundle.

a) All of these charges were supported by invoices within the bundle. The Respondents accepted that all work covered by these invoices had being carried out and they did not dispute the sums charged.

b) Having inspected the Property and using its own knowledge and experience, the Tribunal also considered each of these charges to be reasonable and determined them accordingly.

17) Management fees.

a) Mr Gerrard explained that FMS is not registered for VAT and accordingly he had not needed to produce invoices. In the light of his experience in managing other properties, he considered £200 per flat per year was a reasonable charge taking into account the nature and extent of the Property, the administration involved and setting up the management files, taking instructions, inspecting and so on. He was aware of the RICS Service Charge Residential Management Code 2nd edition (the Code) and believed that he complied with it in relation to this Property.

b) It appears that proper management of the Property has been hampered for want of some lessees not paying service charges to which the Tribunal refers separately below.

c) The Tribunal noted that the trial bundle submitted on behalf of the Applicant did not contain any proper service charge accounts, but simply some management accounts submitted to the lessees which in some respects might assist lessees in understanding to what they were being asked to contribute. There had never, until 3 May 2013, been any sufficient service charge accounts such as the Code expects. In particular, the Tribunal noted from paragraph 2.4 of the Code that an annual fee should normally include the following:

"e) produce annual spending estimates to calculate service charges and reserves, as well as administering the funds.

f) produce and circulate service charge accounts and supply information to tenants..., liaising with and providing information to accountants where required.

g) administer building and other insurance if instructed and authorised...

k) visit the property to check its condition and deal with minor repairs to the buildings, plant, fixtures and fittings....."

d) It was clear to the Tribunal that no proper estimates or budgets had been prepared by FMS; proper service charge accounts had not been produced; the freeholder dealt with insurance, so FMS did not need to do so and the external condition of the Property and evidence of Japanese Knotweed demonstrated a shortfall of management.

e) The Tribunal would accept that if all the work expected by the Code were being carried out, £200 per flat per year for management fees would be reasonable. However, taking into account the above, the Tribunal decided that £180 per year per flat was reasonable.

18) Insurance

a) At page 154 of the bundle is an invoice from insurance brokers showing a premium for 2012 of £1178.31, policy fee of £25, administration fee of £50 and premium tax of £70.70, a total of £1324.01. The policy schedule at page 155 shows an annual premium for this year of £1249.01. The difference between the two figures is the policy fee and administration fee totalling £75.

b) The Respondents consider they should not have to pay more than shown on the policy schedule.

c) The Tribunal did not consider that the additional sums of £75 are unreasonable for the work involved, in addition to any commission. It is important to recognise that what is reasonable is not necessarily a calculable figure but it has a range. Divided between 10

flats, the total charged on the invoice amounts to just over £132 per flat which, in the knowledge and experience of the Tribunal, is certainly reasonable.

19) Administration charges.

a) As noted above, the Applicant filed a formal application for such charges dated 14 May 2013. It was accompanied by a letter from its solicitors dated 14 May 2013 which is referred to below.

b) The Applicant says that these administration charges were reasonably incurred and are of reasonable sums on the basis that service charges properly demanded had not been paid; this had necessitated incurring legal fees to take steps towards serving a section 146 notice, which is itself a step preparatory to taking forfeiture proceedings in respect of a lease. As such the charges are payable under the Second Schedule, Part 1 of the lease, subparagraph (12).

c) Mrs Holifield contested the full amount charged to her on the basis that she had not received the letter resulting from the work done: the letter had evidently been sent to her Flat but the managing agent had known of her actual address and had been corresponding with her at her actual address for a long time. Accordingly she says that the letter was misdirected and she should not have to pay. Mr Tisdall submitted that his firm had sent the letter out to Mrs Holifield in accordance with instructions and that the administration charge was therefore payable.

d) The Tribunal noted the above and further submissions from Mr Tisdall, including in the letter of 14 May 2013, as to which the Tribunal notes in particular:

(1) "our client's mitigation in oral evidence that he was not able to afford to pay the administration costs of an accountant or send out estimates before employing FMS to recover Service charges, as there were simply no funds on account from the leaseholders"

(2) "Given that this application is made following the hearing, we have not provided detailed supporting evidence, or a statement, as this was dealt with at the hearing."

e) The Tribunal does not understand the indication that the application is made following the hearing. While the *formal* application is filed afterwards, the application was dealt with at the parties' request at the hearing and plainly Mr Tisdall's statement available at the hearing was intended to support it. It is not open to the Applicant to make further submissions about it after the hearing and the Tribunal does not take them into account in coming to its decision.

f) The Tribunal found, as to the calculation of the invoices:

i) due to an administrative error on the part of FMS, the letter to Mrs Holifield had been misdirected; she had not received it and it was unreasonable that she should pay any part of its cost, whether or not that cost was actually in itself reasonable;

ii) There are 6 invoices, of slightly differing amounts of either £79.90 or £79.92. Each invoice indicates total time spent of 36 minutes and an hourly rate, applying to Mr Tisdall, of £111 per hour. In addition VAT would be chargeable. Mr Tisdall told the Tribunal that the time taken included attendance on his client but that attendance also related to other matters as well. For substantially the same work in respect of

each of the administration charges, the Tribunal finds it difficult to accept that 36 minutes would have been spent on each individually. That would total just over 3½ hours work. The Tribunal found that for the preliminary work and 6 letters a reasonable time spent would not exceed 2 hours. To include VAT, an overall charge for 6 letters would therefore be £266.40. That equals £44.40 per flat which the Tribunal considers would reasonably include minor disbursements, if any. Accordingly, in relation to Flats 38, 42, 44 and 46, a reasonable charge would be £44.40 each.

iii) However, the question also arose whether, in each case there had been an actual breach of covenant. Under Part 1 Second Schedule to the lease, subparagraph (3) (a), the lessee is required to pay quarterly in advance "such sum as the company shall *reasonably estimate* (Tribunal's emphasis) to be the likely amount of the lessee's contribution for that year".

iv) The question arises whether the company has made any reasonable estimate to trigger that payment in advance. Mr Tisdall accepted that there had been no advance estimates.

v) Subparagraph (3) (b) of that schedule provides, in terms, for a lessee to pay the amount by which a certified contribution (certified in accordance with the Fifth Schedule) exceeds the payments on account. Mr Tisdall accepted that there were no certified accounts or contributions at the relevant time.

vi) The Tribunal was satisfied that, for want of certification, no payment was due under subclause (3)(b) of the Fifth Schedule and to that extent the administration charges were not payable.

g) The Tribunal found, as to payability of service charges:

i) Taking page 185 of the bundle as an example, there are what are called management accounts and that page is dated 11 April 2012. For 2012, it includes "anticipated" figures and overall, those management accounts would, in the Tribunal's view, be of some assistance to a lessee in ascertaining the basis on which he/she was being asked to make a contribution. The Tribunal's view is that subclause (3)(a) is intended not only to provide for advance quarterly payments on account but in its reference to "*reasonably estimate*", is intended to require the Company to give the lessee information to justify the payments on account requested to be reasonable. Mr Tisdall for the Applicant accepts that there is no reasonable estimate in the papers. On page 185, 2012 items, except possibly management fees, are estimated but the Tribunal particularly considers "communal electrical" anticipated at £300 per annum as against an actual charge for the 12 months ending 26 July 2012 totalling £171.49 is not reasonable; also there is no indication as to the purpose of the sinking fund or on what basis a contribution of £500 per flat is proposed and whether it is therefore reasonable or unreasonable.

ii) The Tribunal has no evidence to show that the anticipated figures in this account are in fact reasonable. Advance payments only being due on a reasonable estimate, the Tribunal concluded that they were not payable under subclause (3) (a) either.

iii) It follows that as the service charges were not payable, there was no basis on which to pursue the lessees for non-payment and therefore the legal fees are not payable.

20) Section 20C order.

a) Mrs Holifield seeks an order that any costs that the Applicant may incur or has incurred in relation to these Tribunal proceedings shall not be recoverable by way of service charge by the Applicant.

b) Mr Tisdall indicated that the Applicant's costs in the matter might be in the region of £4,000-£5,000.

c) The Tribunal is satisfied that these proceedings arose finally because of factual non-payment as referred to above. However, in considering the question of recoverability of the Applicant's costs, the Tribunal takes into account the underlying causes for these proceedings. The Tribunal is satisfied that management prior to July 2011 was "somewhat haphazard" to use the Applicant's solicitor's phrase; since then management has fallen short of that required, albeit that it is better than previously and that on the documentation, the information provided to the lessees by FMS is not satisfactory or as required by the lease; that the consequences which flow from all that history are non-payment. There is no evidence before the Tribunal that before commencing these proceedings, the Applicant took any reasonable steps to resolve issues, but had it done so it is likely that the issues in the proceedings would have been very substantially settled. As it is, the Applicant has chosen to take these proceedings and apparently incurred very substantial costs which, in the Tribunal's view, it is difficult to justify on all the facts of the case. The Tribunal decided that the costs had been incurred unreasonably and it would not be appropriate for the Applicant to be able to recover those costs by way of service charge. It accordingly made the order.

The Tribunal made its decisions accordingly.

[Signed] MJ Greenleaves
Chairman of the Tribunal
appointed by the Lord Chancellor