

9473



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference CHI/OOMR/LSC/2013/0011

Property Flats 5, 13, 14, 26, 29, 33, 34, 35, 36, 37, 39
1 Nancy Road
Portsmouth,
PO1 5DF

Applicant Atlantis Holdings Limited

**Applicant's
Representatives** Wendy Lamb & Adam Carmichael (1st Day of
hearing)
Wendy Lamb & Angela Jennings (2nd Day)

Respondents Mrs R. Ross, Ms T. Robson,
Mr R. Bennetta, Mr Hynes,
Messrs S. Gabriel & Goodwin

**Respondents'
Representative** Mr K. Ross

**Type of
Application** S20C & S27A of the Landlord & Tenant Act
1985 (as amended) ("the Act")

**Tribunal
Members** Judge RTA Wilson (Chairman)
Mr P Turner-Powell FRICS (Surveyor Member)
Mr R Dumont (Lay Member)

**Date and Venue
of
Hearing** 20th May & 20th September 2013
Chichester Tribunal Office

Date of Decision 1st October 2013

DECISION

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Decision

1. The Tribunal determines that a reasonable annual budget for the Property for the year ending 31st December 2012 is £48,000 rising to £57,400 for the year ending 31st December 2013.
2. The balancing charges demanded of each Respondent for the period 24th November 2011 to 31st December 2011 are not payable.
3. The amounts payable by the Respondents (if any) as a result of this decision will only become due when validly demanded.
4. The Tribunal makes an order under S.20C of the Act so that the Applicant's costs in relation to these proceedings shall not be recoverable as service charge.

Reasons

Introduction

5. By an application dated the 24th December 2012 the Applicant applied to the Tribunal to determine the actual service charges payable by the Respondents for the period 24th November 2011 to 31st December 2011 and the estimated charges for the years ending 31st December 2012 and 2013.

Inspection

6. The Tribunal inspected the Property on the morning of the first day of the hearing in the company of Ms Lamb and Mr Carmichael both representing the Applicant. The property is a modern mixed commercial and residential development, built in 2003 over 5 floors at the front and 3 floors at the rear above the car park. The building is of brick construction with a composite decorative slate facade at the front, under a slate roof. The ground floor contains a row of 6 retail units, let to 3 tenants, with the upper parts comprising 42 residential flats. The residential units are divided into 4 x 1 bedroom flats and 38 x 2 bedroom flats. The first floor, above the commercial shops, has 13 flats, the 2nd floor has 13 flats, the 3rd floor has 8 flats and there are a further 8 flats on the top floor. Access to the flats is via a communal external walkway at the rear of the building at each level, approached by stairways and lift. There are 24 car parking spaces situated at the rear within the courtyard enclosure with a further 6 spaces and the bin store outside at the rear.
7. The Tribunal found the common parts to be untidy. Ms. Lamb informed the Tribunal that lighting had been improved and the overflowing gutters had been cleared. The lift had been repaired, but was not in use as it was not fully safe. The fire alarm had been repaired following decommissioning by the Fire Service, though it needed renewal. The outside door locks were operated by a 'fob' system, but the Door entry system only worked in some flats and it was in need of renewal. Overall the Tribunal found the common parts to be in a deteriorated condition with little sign of historic, or ongoing maintenance.

Hearing & Representations

9. The hearing of the case extended to two days. The Applicant had legal representation on the first day of the hearing but on the second day their lawyers did not attend and instead the Applicant was represented by two of its employees, Angela Jennings the senior property manager and her assistant Wendy Lamb. The Respondents were all represented by Mr K Ross a former freeholder of the Property. So far as relevant to our consideration and decision, we noted and took into account the case papers and the evidence and submissions, which we summarise as far as necessary below.

The law.

10. The Tribunal has power under Aof the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The Tribunal can decide by whom, to whom, how much and when a service charge is payable. However, no application may be made in respect of a matter which has been admitted or agreed by a tenant.
11. By S.19 of the Act service charges are only payable to the extent that they have been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard. Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.
12. Under S.20C of the Act a tenant may apply for an order that all or any of the costs incurred in connection with proceedings before a leasehold valuation Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

The Lease.

13. The Tribunal had before it a sample lease of Plot 26 dated the 30th May 2003 and was told that the leases of all other flats in the building were in similar terms at least in so far as the service charge mechanism was concerned. So far as material to the issues in this case there are provisions contained within the leases which may be summarised as follows:-
 - a. The Respondents are liable to pay a service charge calculated in accordance with the provisions of the Fourth Schedule to the extent of 1/48th part of the total expenditure on the building incurred by the Applicant in carrying out its obligations as landlord as set out in clause 5 of the lease.
 - b. There is provision for the Respondents to pay advance service charge on account of anticipated expenditure on the 1st January and the 1st July in

each year based on annual budgets. The lease enables the Applicant to build up a reserve fund.

- c. At the end of each 12 month Accounting Period (which in this case is the 31st December) the Applicant is to prepare certified service charge accounts and copies of these accounts are to be served on the leaseholders with a statement showing the final sum payable by them having regard to the payments paid on account during that same accounting period. In the event of the money expended by the Applicant exceeding the payment made by a lessee on account, the balance is payable within 14 days of a demand being made for that balance.

Analysis and consideration of the evidence

14. On the first day of the hearing, which took place on the 20th May 2013, the Tribunal questioned its ability to determine actual service charges in respect of an accounting period of only a little over a month. The lease defined an Accounting Period as 12 months and actual service charges could only be ascertained at the end of each accounting period. The Respondents contended that there had been a failure by the Applicant and its predecessors to prepare balancing accounts and that credits, due to them in respect of over payments, had not been given. It was clear that the Applicant's agent had not come prepared to address these points and, at the Applicant's request, the Tribunal granted an adjournment to enable the Applicant to file legal submissions and further evidence to address these issues.
15. The second day's hearing thus took place on the 20th September 2013. By this time, however, the Applicant had not filed any additional evidence or legal submissions during the adjournment, all that had been filed was an unsigned statement, which just repeated the submissions contained in the Applicant's original statement. Furthermore the Applicant had unhelpfully failed to brief a lawyer to attend the second day and the two employees who did attend were not legally trained and had only a limited understanding of the issues that had arisen at the first day of the hearing. The Tribunal therefore proceeded with its determination on the basis of the Applicant's written evidence filed by the first day of the hearing, also on the basis of the written submissions filed by the Respondents by the second day of the hearing and finally on the basis of the parties oral evidence at the hearing.

Actual Charges for 24th November 2011 to 31st December 2011

16. The Tribunal first considered the service charge provisions set out in the specimen lease. The lease provides for balancing payments to fall due only following preparation by the landlord of accounts covering a 12 month period and the submission to the leaseholders of a demand based on those accounts. Accordingly the preparation of those accounts is a condition precedent to the payment by the tenant of any balancing payment. No such accounts were before the Tribunal. The accounts in the Applicant's bundle covered a period of 38 days whereas the lease defines an Accounting Period as a period of 12 months. For these reasons the Tribunal determines that the balancing charges demanded of

each Respondent for the period 24th November 2011 to 31st December 2011 are not payable.

Estimated Figures for 2012 and 2013

17. Payments on account or estimated figures for service charge fall to be dealt with under S.19(2) of the Act. This legislation contemplates the payment of service charges on account and provides an express mechanism for challenging such payments on account. Essentially payments on account must be reasonable in amount and adjustments must be made in due course once actual figures are known.
18. In practice budgets are commonly made up of three elements. Firstly a carry forward figure representing funds standing to the credit of lessees, that is monies paid on account of service charge but not yet spent. Secondly a figure representing the landlord's reasonable estimate of what is to be spent in the forthcoming accounting period and thirdly an amount to be set aside as a reserve or sinking fund to pay for work of a non-regular nature.
19. It is a particular feature of this property that there has been a sustained and systematic failure by successive freeholders to prepare reliable annual balancing accounts. A previous Tribunal has found that no reliable annual accounts exist for any of the years from 2004 to 2010. It also appears that a previous freeholder applied the wrong percentages in calculating the leaseholders liability, resulting in excessive service charge demands. In these proceedings the Applicant was given a three month adjournment in order to address these issues but it has not done so. It is against this unsatisfactory background that the Tribunal has had to determine the 2012 and 2013 budgets.
20. The hearing bundle contained budgets of anticipated expenditure prepared by the Applicant amounting to £48,000 for 2012 and £65,200 for 2013. The Tribunal carried out a review of the proposed expenditure making up the budgets with the result that, taken in the round, the Tribunal is satisfied that all the proposed expenditure contained therein is capable of being charged as service charge and based on past expenditure the 2012 budget appears to be a reasonable estimate. The figure of £48,000 is therefore upheld. The Tribunal rejects the Respondents' challenges to the individual items making up the budget figures because, allegations of past overpayments aside, (which are not within the jurisdiction of this Tribunal), the challenges are predominantly based on not wishing to contribute to services that are not being provided. For example the Respondents suggest that no provision should be included for general repairs because the Applicant does not have a management plan for the building and that no provision should be included for the maintenance of the lift because the lift does not work. These are not sustainable or sensible objections and if the Tribunal accepted them, they would act as a disincentive to the upkeep of the building.
21. However, the Tribunal did have concerns about the 2013 budget which has risen to over £65,000 with this figure including a substantial provision for a reserve fund. The Tribunal is not persuaded that it is reasonable for the amount recoverable on account for 2013 should increase so substantially over that requested for 2012 without evidence of actual expenditure and no such evidence was available. Accordingly doing the best that it can with the evidence before it

the Tribunal allows an increase of 5% over the 2012 budget plus a figure of £7,000 in respect of water usage, which appears for the first time in this year and is not challenged by the Respondents. The budget for 2013 is thus set at £57,400.

Section 20 C Application

22. In deciding whether to make an order under S.20C a Tribunal must consider what is just and equitable in the circumstances. The circumstances include the conduct of the parties and the outcome of the proceedings. Mr Ross for the Respondents submitted that the Applicant had brought this case on itself by failing to produce annual accounts, and failing to give the Respondents credit for the over payments made by them. He told the Tribunal that the Applicant had recently begun County Court proceedings which covered the very same issues as were already before the Tribunal and he accused them of aggressive and oppressive conduct designed to extract service charges from lessees when service charge was not due. He pointed to substantial administration fees that the Applicant was seeking in respect of costs that had been incurred by them in the issuing of incorrect service charge demands. He also pointed to the adjournment the Applicant had requested and its subsequent failure to address the issues that had brought about the adjournment. The Applicant made no submissions on the S.20C application but accepted that their solicitors had issued County Court proceedings in error.
23. The Tribunal agrees with the Respondents that had the Applicant's behaviour been reasonable, this application may not have been necessary. The past history of the building is a matter of public record and it is a matter of regret that the Applicant has continued the previous bad practice of failing to administer the service charge as provided for in the leases. They also appear to have failed to undertake adequate due diligence prior to their acquisition to ascertain the state of the lessees individual statements of account. It is as if the Applicant simply wishes to ignore the past and start again without carrying out a robust reconciliation of the service charge account. This stance is at odds with the laws relating to the enforcement of covenants and has served to increase the Respondents understandable resistance to paying service charge demands. In these circumstances there is no reason why the Respondents should bear any of the Applicants costs in regard to this application. The Tribunal therefore determines it is just and equitable for an order to be made that to such extent as they may otherwise be recoverable, the Applicant's costs, if any, 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.

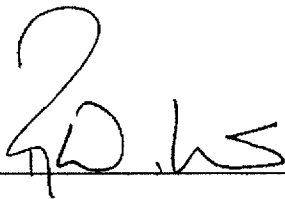
Concluding Comments

- 24 It is a feature of this Property that although yearly service charge demands have been made and some service charge paid, no balancing annual service charge accounts have been served on the leaseholders for over nine years. The Applicant must address this issue as without these documents the historic issues with regard to the collection of service charge are likely to continue. It is difficult to see how a claim to recover the actual costs incurred in 2012 and 2013 could be successful in the absence of certified accounts for the outstanding years. The

Tribunal gave the parties an opportunity to discuss these issues out of the room on the second day of the hearing but was told that the Applicant's representatives had no authority to negotiate a settlement with the Respondents. This was a missed opportunity.

- 25 The failure of successive freeholders to produce compliant annual accounts is a material breach of covenant with the consequences that the lessees cannot have confidence that they are only paying their share of what is actually being spent. It is this lack of certified end of year accounts, balancing actual expenditure against on account payments, that is at the heart of the long standing dispute between the parties and if the Applicant fails to rectify these breaches of covenant it leaves itself open to County Court proceedings being taken against it by the lessees. The costs of these proceedings could be considerable, the outcome uncertain and in the meantime it will become ever more difficult for the Applicant to discharge its repairing and management functions exposing them to yet more risk of court action.

Signed: _____



Judge RTA Wilson

Dated: 1st October 2013

Appeals

A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend the time limit, or not to allow the application for permission to appeal to proceed.

The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

If the First-tier Tribunal refuses permission to appeal, in accordance with section 11 of the Tribunals, Courts and Enforcement Act 2007, and Rule 21 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, the Applicant/Respondent may make a further application for permission to appeal to the Upper Tribunal (Lands Chamber). Such application must be made in writing and received by the Upper Tribunal (Lands Chamber) no later than 14 days after the date on which the First-tier Tribunal sent notice of this refusal to the party applying for permission.