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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/29UK/LIS/2013/0067**
Property	:	**Flat 2, Winterton Court, Market Square, Westerham, Kent, TN16 1AL ('the Flat')**
Applicant	:	**Mr J Toalster**
Representative	:	**In person (assisted by Mrs Harrison)**
Respondent	:	**Carmel Properties Limited**
Representative	:	**Mr Mahoney (Parker Arrenberg solicitors)**
Type of Application	:	**s27A – determination of service charge**
Tribunal Members	:	**Judge D Dovar** **Mr C C Harbridge FRICS**
Date and venue of Hearing	:	**10th September 2013** **Westerham Hall**
Date of Decision	:	**17th September 2013**

DECISION

Introduction

1. This is an application for the determination of the payability of service charges under s27A of the Landlord and Tenant Act 1985 ('the Act'). This matter started by way of county court proceedings brought by Mr Toalster for the repayment of service charge sums he maintained had been wrongly charged by Carmel. It was transferred to the Tribunal by District Judge Collins sitting in the Tunbridge Wells County Court by an order dated 4th February 2013.

The Property

2. The Tribunal inspected the Flat accompanied by the parties and their representatives.

3. Winterton Court ('the Building') is located in the centre of Westerham, being a three storey building comprising four ground floor retail units, above which are four self-contained residential flats. The Flat, being one of those four units, is on the second (top) floor, accessed by a ground floor communal entrance, and communal staircases and landing, which are shared by a first floor flat. At the rear of the Building is an enclosed yard.

4. The Building, which the Tribunal were advised was designed for its current uses, has external walls with brick elevations beneath a main pitched roof with a central gable which is clad in concrete tiles. The front roof pitch terminates at a lead capped stone parapet with an ornamental dental tooth cornice, behind which is a parapet gutter. The Tribunal were informed that the parapet gutter discharges, through an internal rain water pipe, to a down pipe on the rear elevation. Windows are of vertical sliding sash and side-hung casement design being of timber and galvanised metal construction respectively.

5. At the rear of the Building is a mono-pitched roof over the rear projection of the ground floor retail units, formed by interlocking concrete tiles.

The Lease

6. By a lease dated 6th May 1986, the Flat was demised for a term of 99 years from 25th September 1985.

7. By clause 1 (b) (ii) and Part 1 of the First Schedule the 'Demised Premises' are described as Flat 2, including 'the whole of the external walls bounding the flat and the doors and the door frames and windows and window frames including all glass fitted in such walls and the roof therefor and ...'. The plan attached to the lease only showed the layout of the first and second floors, but not the roof void. The parties were in agreement that the roof void had been demised.

8. Clause 3 contained the Tenant's covenants, which included

> "(3) (a) From time to time and at all times during the said term hereby granted well and substantially to repair uphold cleanse support maintain amend and keep and when necessary rebuild reconstruct resurface or replace all the demised premises and the structure thereof and each and every part thereof including the roof and exterior and main walls thereof and also the Landlord's fixtures and fittings ... and all walls roads paths yards drains sewers and appurtenances of or belonging to the demised premises ...' ...
>
> (6) To maintain in good and substantial repair order and condition the Landlord's fixtures and fitting in or upon the demised premises ...' ...
>
> (8) To pay and contribute a rateable or due proportion of the expense of repairing maintaining rebuilding cleansing and lighting all sewers drains pipes wires gutters watercourses party walls structures fences or other conveniences which shall belong to or be used for the demised premises ...'

9. In addition 3 (9) provides a mechanism for the Landlord to inspect the Flat, serve notice of any disrepair and if that is not carried out within a month, to enter and carry out the works at the expense of the Tenant.

The Statutory Provisions

10. Section 18 of the Landlord and Tenant Act 1985 defines service charges as those amounts payable by a tenant as part of or in addition to rent, which are payable directly, or indirectly for services, repairs, maintenance or insurance or the landlord's costs of management and the whole or part of which vary or may vary according to the relevant costs. Relevant costs are defined as the costs or estimated costs incurred or to be incurred by the landlord in connection with matters for which the service charge is payable.

11. Section 27A confers jurisdiction on the Tribunal to determine whether a service charge is payable and if so, (amongst other matters) the amount which is payable and the date at or by which it is payable. The determination can be made whether or not any payment has been made and also in respect of anticipated expenditure.

The Issues

12. Both parties contended that the lease for Flat 2 (and indeed all the leases in the Building) was far from satisfactory in its provision for the responsibility for works and service charges. Admirably the parties had managed to deal with the majority of the works to the Building through co-operation despite the inadequacies of the Lease. As the hearing progressed it became apparent that there were only a couple of issues that needed a determination in principle in order to resolve the matter between the parties. They were:

    a. Whether the cornice, parapet, gutters, drains and downpipe attached to the Flat were within that Flats demise and therefore whether payment for work to those items fell to be apportioned 100% to the Flat or 12.95% on a communal use basis;

b. Whether Carmel were entitled to charge a management fee for the work that they carried out.

13. The Tribunal had an initial concern as to whether this case involved service charges, within the definition of section 18 of the Landlord and Tenant Act 1985. The Lease was unusual in that it placed all of the repairing obligations on the tenant; this included external works to the roof and the exterior brickwork. However, the parties contended that they had an agreement that Carmel would carry out the works and then charge Mr Toalster and that these were service charges for the purposes of s27A of the 1985 Act. On that basis and the possibility that in some circumstances this arrangement could fall within clause 3 (9) (where the works or services benefitted more than just the Flat), the Tribunal were prepared to accept that these were service charges in order to resolve the dispute between the parties and bring an end to these proceedings.

Extent of the Demise

14. The Tribunal considers properly construing the Lease and the extent of the demise, all the parts in contention fall within the demise. It appears that the Lease intended to demise the entire strata subsisting from the First floor upwards. That includes not only the external walls, but also the windows and the roof and it follows, the parapet, the cornice and the rainwater goods attached to the building at that level. The Tribunal also considers that the parapet and cornice are both extensions of the exterior wall and therefore fall within the definition of 'exterior wall' found in Part 1 of the First Schedule. Further, the rainwater goods can be considered part of the roof system and therefore fall with the term 'roof' also found in the First Schedule.

15. The Tribunal therefore considers that as Mr Toalster has the repairing obligations for these parts, if the Landlord carries out works to them, then either under clause 3 (8) or by separate agreement, the Landlord would be entitled to attribute 100% of the cost of those works to Mr Toalster. For the avoidance of doubt, this would include clearing moss from the roof and clearing the guttering.

Recovery of a management fee

16. Carmel, through its director, Mr Neil, asserted that it was entitled to charge a management fee when the works fell outside the terms of the Lease. It conceded that the lease did not provide for a management fee to be levied. The Tribunal was not convinced that this was the case. Firstly, other than an agreement to pay the sums, the Tribunal could not see the basis for such a charge. Mr Neil at first seemed to say that there had been agreement, but he could not point to any document which recorded that agreement. He then suggested that it should be recoverable because Carmel were asked to carry out works and it must have been known that a management fee would be charged. The Tribunal did not consider that there was sufficient evidence of this to support a collateral agreement to pay any management fee.

17. The Tribunal did consider that a management fee could be levied under clause 3 (8) as long as this was an 'expense' of arranging for repairs etc under that clause. There was no general entitlement to a management fee. Further, this clause is limited to works or services which are of benefit to the more than just the Flat, as the clause states that it must relate to items that 'belong to or be used for the demised premises ... in common with the Building or part thereof'.

18. Therefore for the items which the parties had agreed to share the costs; (i.e. those which were charged at 12.95% to Mr Toalster) a management fee was potentially chargeable as they were items which were used by other parts of the Building than just the Flat. However, where the cost fell 100% to the Flat; such as the items identified above, no management charge was recoverable under the lease and in the absence of any agreement between the parties, none was payable.

19. The parties had been involved in Tribunal proceedings in the past. This was settled by way of compromise and included an agreement by Mr Toalster that the sums paid up to the end of 2009 were reasonable, due and payable. He sought to undo that agreement and claim back the management fees that were contained within those sums on the basis

that he had not realised the issue regarding the management fee at the time. The Tribunal could find no basis for undoing that agreement and therefore even if Carmel was not entitled to a management fee for those periods, if they were paid, Mr Toalster is not entitled to be repaid.

Quantum

20. Mr Toalster in both his statement of case and particular of claim provided a schedule setting out the specific points in dispute and the sums he was reclaiming. A copy of that schedule is annexed to this Determination at 'A'.

21. During the course of the hearing, the Tribunal gave an indication that its determination was to be in accordance with those set out above. During a short adjournment, the parties recalculated the charges on the basis of that indication and agreed the sums that had been overcharged. They provided the Tribunal with a sheet (annexed to this Determination at 'B') setting out what figures were to be repaid by Carmel to Mr Toalster. This refers to Mr Toalster's schedule at annex A.

22. On that basis, the Tribunal determines that for years in question Mr Toalster has overpaid service charges in the total sum of £125.68.

23. Mr Toalster made an application under section 20C of the 1985 Act for the reimbursement of his fees. Carmel did not consider that they were able to recover the fees of the proceedings under the terms of the lease and so did not oppose that application; they did oppose the reimbursement of the hearing fee. Mr Toalster had sought to go back on a prior agreement over sums payable for the years up to 2009 and had lost on the definition of the demise, this resulted in his recovering only £125 out of a claim for over £4,000. On that basis no order is made for reimbursement, but given Carmel's stance on the section 20C application the Tribunal will make an order under section 20C prohibiting Carmel from recovering the cost of these proceedings under the Lease.

Daniel Dovar

Chairman

17th September 2013

Appeals

1. 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.

2. 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.

3. 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 time or not to allow the application for permission to appeal to proceed.

4. 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.

'A'

PARTICULARS OF CLAIM

I am the leaseholder of Flat 2 Winterton Court, Market Square, Westerham, Kent TN16 1AL. The freeholder is Mr Chris O'Neil of Carmel Properties Ltd.

We are issuing this claim in the Northampton County Court, with the wish that this claim be heard in Tunbridge Wells County Court.

We have complied with the Practise Direction by supplying sufficient information to Carmel Properties by detailing invoice amounts, dates, percentages etc. We gave them a reasonable time frame to respond to our request for payment before issuing a claim. They did not request any documentation from us.

I believe there are serious discrepancies pertaining to invoices received from Carmel Properties Ltd. We have referred to our lease in order to verify the validity of charges made to us. Unfortunately, we have been unable to resolve issues arising between ourselves through negotiation and discussion. Hence, we feel we have no alternative but to resort to legal action. There are several issues;

Firstly, one issue relates to a management fee which has been added to invoices. There is no provision in the lease for a management fee.

Secondly, another issue relates to the apportionment of responsibility of the roof and gutters of the building, and to that end, the responsibility of maintenance and upkeep of these areas. Both parties fundamentally disagree on this issue which has led to a disagreement on invoices received from contractors where maintenance work has been carried out on these areas. We are responsible for 50% of the roof however it is unclear whether we are responsible for 100% of our half of the roof, or 50% of the entire roof. This needs clarification from a legal representative as this cannot be agreed between the parties. A propos the allocation of costs relating to gutters, our share is 12.95%. We have requested that Carmel Properties initiate a regular (6 monthly) rolling programme clearance for the whole roof of which we would pay 50% but they have not set up this procedure, despite our numerous requests. Our proportionate share of the building is 12.95% which is applicable to all necessary expenditure with the exception of the roof. However, Carmel Properties Ltd has allocated a higher percentage to us on occasions, thereby necessitating a refund.

Thirdly, there have been occasions when Carmel Properties have added vat to contractors' invoices who do not charge vat. They cannot add vat on their behalf.

We have reviewed all payments to Carmel Properties Ltd since 2007 and we believe we have been charged incorrectly for numerous items. The following is a list of payments that we believe we are owed money back from:

a) Sept 2007 **£1,250.59** interim payment for external redecoration – Carmel charged a management fee of 10% of this bill (£8,779.13 so a fee of £877.91 added on). We were rightly charged 12.95 % but this should have been of £8,779.13 not £9,657.04. Carmel charged us £1,250.59 but it should have been £1,136.90, therefore we are owed £113.69 back.

b) Oct 2007 **£983.00** interim payment for roof works from J Roostan – to repair masonry to parapet wall. We have paid this entire bill. We are responsible for 12.95% (£127.30) therefore we are owed back £855.70. This is because this is part of the fabric of the building. A parapet is defined as a wall like barrier at the edge of a roof, terrace, balcony or other structure. Where extending above a roof it may simply be a portion of an exterior wall that continues above the line of the roof surface.

c) March 2008 **£4,461.95** final payment for roof works – The first section of this bill shows a total of £7,810.00 of which we are responsible for 12.95% which Carmel correctly state is £1,011.40. The second section of this bill shows a total of £4,302.00 of which we are responsible for 50% (£2,151.00) but Carmel have charged the whole amount to us. Carmel charged a management fee of 10% (£531.34). As we had already paid £983.00 in October 2007, Carmel deducted this, but they deducted it after they added on a management fee! If a management fee was applicable, it should have been calculated after the £983.00 deduction. They have also added on vat incorrectly. Our total share should have been £1,011.40 plus £2,151.00 less £1,250.59 already paid in Sept 2007 therefore a total of £1,911.81. We believe we are owed back £2,550.14.

d) Nov 2008 **£193.88** fire risk assessment – Carmel charged us 50% of £300 instead of 12.95%. They also added a 10% management fee and also 17.5% vat. If Woodward Associates do not charge vat, they cannot add vat on to their bill. Therefore the amount should be 12.95% of £300 (£38.85). Therefore we believe we are owed back £155.03.

e) May 2010 **£172.50** Barratt Roofing – this was to clear metal wire, moss and debris from the gutters. We paid this wholly ourselves and Carmel reimbursed us this whole amount. However we are responsible for 12.95% of this, therefore we owe Carmel £22.34.

f) Oct 2010 **£235.00** Barratt Roofing – this was to clear the gutters. We paid this wholly ourselves and Carmel reimbursed us 50% in May 2011. However as we are only responsible for 12.95% of this (£30.43), we are owed a remaining balance of £87.07 back from you.

g) Oct 2010 **£1,012.14** communal redecoration and re-carpeting – the cost of this was £1,566.18. Carmel charged a management fee of £156.62 and vat of 17.5%. Again, the management fee and the vat should not have been added. Carmel calculated our share at 50% but according to our lease, this should have been split 3 ways with Flat 1 and the shop below. Therefore our share should have been £522.06. As we paid £1,012.14, we are owed back £490.08.

h) Dec 2010 **£58.16** communal front door repairs – again a 10% management fee and 17.5% vat has been added to this invoice, and we have also been incorrectly charged 50%. This should have been split 3 ways. As the actual invoice was for £90.00 we are responsible for one third of this which is £30.00. We paid £58.16 and therefore we are owed back £28.16.

'A'

i) Mar 2011 **£79.75** communal front door repairs – again a 10% management fee and 17.5% vat has been added to this invoice, and we have also been incorrectly charge 50%. This should have been split 3 ways. As the actual invoice was for £145.00 we are responsible for one third of this which is £48.33. We paid £79.75 therefore we are owed back £31.42. However Carmel have since given us a credit note of £13.96 to reimburse us the vat that they incorrectly charged.

j) June 2011 **£248.14** roof and gutter cleaning – the cost of this was £218.42. Carmel have added on 20% vat incorrectly so the total Carmel charged was £262.10. We paid this less £13.96 credit note. However we should not have been charged the vat therefore £43.68 is owed back to us. I would also like clarification of the percentage Carmel charged us of this bill. We assume they charged us 50% instead of 12.95% and therefore we may be owed further money back on this point. I did ask Carmel for clarification on this point in my letter dated 25th April 2012, but they did not respond to this point in their following letters.

k) Oct 2011 **£180.00** gutter clearance - we paid Barratt Roofing £180.00 directly for clearance of pigeon debris and moss from the gutters. We are only responsible for 12.95% and we requested reimbursement of 87.05% being £156.69 of which Carmel have not paid.

l) Dec 2011 **£120.00** gutter clearance - we paid Barratt Roofing £120.00 directly for clearance of pigeon debris and moss from the gutters. We are only responsible for 12.95% and we requested reimbursement of 87.05% being £104.46 of which Carmel have not paid.

To summarise, we are pursuing the amount of approximately £4,593.78 from Carmel Properties Ltd.

Statement of Truth
I believe that the facts stated in these particulars of claim are true.

Mr John Toalster
Leaseholder

'B'

Carmel Prpoerties Ltd

Schedule of Items agreed for refund

			Total
Item	G	Inv CA502	92.01
Item	H	Inv CA5515	5.29
Item	I	Inv CA500	8.52
Itrm	J	Inv CA526	19.86
Total Including VAT			125.68

All other items A to F no amendment made to invoices

Signed J Toalster

Signed C J O'Neill