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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00BP/LSC/2013/0103**
Property	:	**47 Ben Brierley Wharf, Failsworth, Manchester, M35 9QY**
Applicants	:	**Mr Richard Jones, Mr Lee Jones, Mr Ryan Jones and Ms Julie Jones**
Represented by	:	**Mr R Dean**
Respondent	:	**Canal View (Failsworth) Residents Association Limited**
Represented by	:	**Mr James Fieldsend of counsel**
Type of Application	:	**Application for a determination of liability to pay and reasonableness of service charges**
Tribunal Members	:	**P J Mulvenna LLB DMA (Chairman)** **Mrs A E Franks FRICS**
Date and venue of Hearing	:	**3 December 2013 at the Tribunal Office, 5 New York Street, Manchester**
Date of Decision	:	**3 December 2013**

DECISION

DECISION

That the service charges generally levied by the Respondent for the year ended 31 December 2012 are reasonable and payable by the Applicants.

DETERMINATION AND REASONS

INTRODUCTION

1. Mr Richard Jones, Mr Lee Jones, Mr Ryan Jones and Ms Julie Jones ('the Applicants') made an application to the Leasehold Valuation Tribunal on 20 June 2013 for the determination of the reasonableness and payability of the service charges for the year ended 31 December 2012 demanded by Canal View (Failsworth) Residents Association Limited ('the Respondent') in respect of 47 Ben Brierley Wharf, Failsworth, Manchester, M35 9QY ('the Property').

2. On 1 July 2013 the functions of leasehold valuation tribunals transferred to the First-tier Tribunal (Property Chamber) ('the Tribunal') and so this matter now falls to be determined by the Tribunal.

3. The Property is a self-contained, two-bedroom apartment on the third floor of a purpose-built block forming part of a development known as Canal View ('the Development'). It was constructed in or around 2006. The Development is accessed by a secure gateway which on the day of the inspection was inoperative because of vandalism. Externally, there are landscaped areas and car parking. The internal common areas include secure entrance halls, together with stairs and landings in each block giving access to all floors. The Development is situated in a predominantly residential area (although there are commercial and (possibly redundant) industrial premises nearby) overlooking the Rochdale Canal in an area signed as the 'Historic Failsworth Pole Area'. It has reasonable access to local facilities and amenities and to public transport.

4. The Applicants have a leasehold interest in the Property held under a Lease made between (1) Taylor Woodrow Limited (2) the Respondent and (3) the Applicants on 2 January 2007 for a term of 125 years from 1 January 2006 ('the Lease').

5. The Respondent is the managing agent for the Development.

THE INSPECTION

6. The Tribunal inspected the common parts of the Development externally and internally on the morning of 3 December 2013. The Applicant was represented by Mr R Jones. The Respondent was represented by Mr J

Fieldsend of counsel, together with Mr P Hitchen, the Respondent's Property Manager. The Tribunal found the Development to be maintained to a reasonable standard, although there were signs of inattention (for example, damaged window fittings and neglected decoration) which if not addressed, could lead to an unsatisfactory deterioration of the Development.

THE HEARING

7. Directions were issued by Mr L Bennett, sitting as a procedural chairman on 8 August 2013. The parties have complied with the Directions.

8. The substantive hearing of the application was held on 3 December 2013 at the Tribunal Office, 5 New York Street, Manchester. The Applicant was represented by Mr R Dean, Commercial Manager of Braemar Estates (Residential) Limited, the Applicants' advisers. The Respondent was represented by Mr Fieldsend, together with Mr Hitchen.

THE LEGISLATION

9. The material statutory provisions in this case are as follows.

(i) The Landlord and Tenant Act 1985 ('the 1985 Act).

Section 27A (1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to... (c) the amount which is payable'.

Section 27A (3) provides that an application may also be made 'if costs were incurred.'

Section 19(2) 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.

Section 20B (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenants, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred,
(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

(ii) The Commonhold and Leasehold Reform Act, Schedule 11, Paragraph 5 provides for applications to be made to the tribunal for a determination whether an administration charge is payable and, if it is, as to –

(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.

THE LEASE

10. The Tribunal had before it a copy of the Lease which has been read and construed as a whole. In reaching its conclusions and findings, the Tribunal has had particular regard to the following matters or provisions contained in the Lease, none of which were the subject of dispute or argument by or on behalf of the parties:

(a) The definition of 'The Lessee's Proportion', 'The Maintained Property', 'The Maintenance Expenses' and related expressions in Clause 1.

(b) Schedule One – The Maintained Property.

(c) Schedule Five – The Maintenance Expenses.

(d) Schedule Six – The Lessee's Proportion of the Maintenance Expenses.

(e) Schedules Seven, Eight and Nine - the parties' covenants.

THE EVIDENCE, SUBMISSIONS & THE TRIBUNAL'S CONCLUSIONS & REASONS

11. The Applicants have asked for a determination of the reasonableness of the service charges for the financial year ended 31 December 2012. The Tribunal had before them the service charge demand for that year which complied with The Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007.

12. The Tribunal heard oral submissions from Mr Dean on behalf of the Applicants, together with oral evidence from Mr Hitchen and oral submissions from Mr Fieldsend on behalf of the Respondent. The Tribunal also had before them the written evidence and submissions of the Applicants and the Respondent.

13. The Tribunal has considered the issues on the whole of the written and oral evidence and submissions now before them, has had regard to their

own inspection and, applying their own expertise and experience, has reached the following conclusions on the issues before them.

14. The Applicants challenged the service charges demanded for the year ended 31 December 2012 because they included a charge of £443.10 in respect of a deficit for the year ended 31 December 2009. The challenge was on the basis that, because the expenditure which gave rise to the deficit was incurred more than 18 months before the demand, there was no liability to pay the charge insofar as it related to the deficit by virtue of section 20B(1) of the 1985 Act.

15. The Respondent has resisted the claim on the basis that the Applicants were notified in writing that those costs had been incurred and that they would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge, thus satisfying the requirements of section 20B(2) of the 1985 Act.

16. The Tribunal observes that, in the application, it was accepted by the parties that there had been compliance with the Lease and there were no challenges to the reasonableness of the service charges or to the quality of, or need for, any of the works or services to which the charges related. At the inspection, however, Mr Ryan Jones raised the question of decoration which he suggested had not been undertaken. The Tribunal is aware of the decision in Birmingham City Council -v- Keddie & Hill [2012] UKUT 323 (LC) in which it was held that a leasehold valuation tribunal had no jurisdiction to determine issues not raised by the application. It was considered, however, that the question of decoration should be addressed so as to ensure that, if there were an arguable point of dispute, it might be determined, so far as possible, without the need for the initiation of further proceedings. Mr Hitchen gave evidence that the decoration works had not been undertaken because significant service charge arrears had given rise to cash flow problems as a result of which the works could not be funded. The funds which had been received for this purpose had, however, been earmarked accordingly. The Tribunal accepts Mr Hitchen's explanation and does not find that the circumstances have any bearing on the issue to be determined.

17. In the absence of any sustainable issues, objective or evidence-based challenges as to value for money in relation to any of the individual costs recharged in respect of the service charges demanded by the Respondent, the only question to be determined by the Tribunal is whether or not the Applicants have the benefit of section 20B(1) of the 1985 Act.

18. The Respondent has submitted that the requirements of section 20B(2) of the Act have been satisfied by the production to the Applicants of the final accounts for the year ended 31 December 2009 which were sent under cover of a letter dated 21 June 2010 in the following terms:

19. 'Please find enclosed the Service Charge Accounts for the period ended 31 December 2009 for your records.

20. Should a balancing charge or credit need to be applied to your account as a result of these, this will follow in due course.'

21. Mr Dean, on behalf of the Applicants, argued that the inclusion of the word 'should' in the second paragraph of the covering letter suggested that it was conditional: the letter did not state that the Applicants 'would subsequently be required under the terms of [their] lease to contribute to [the deficit] by the payment of a service charge' as required by the statutory provisions, but rather invited an inference that they might be required to contribute. He submitted that the Respondent had been aware of the amount to be demanded at the date the letter was sent and that it should have been mote explicit in form and content.

22. Mr Fieldsend produced a detailed skeleton argument which helpfully referred the Tribunal to a number of authorities in which consideration had been given to the meaning, purpose and application of section 20B of the 1985 Act.

23. The Tribunal has reviewed the authorities and finds the following particularly helpful in considering the approach to be adopted in the present case and the factors which are material to reaching a fair and just conclusion and determination.

24. In Brent London Borough Council -v-Shulem B Association Limited [2011] EWHC 1663 (Ch), Morgan J said:

25. 'It is clear that section 20B(1) was enacted for the benefit of the lessee but that the right conferred by section 20B(2) to stop time running was for the benefit of the lessee.' (paragraph 8)

26. '...my conclusion as to the interpretation of section 20B(2) is that the written notification must state a figure for the costs which have been incurred by the lessor. A notice which so states will be valid for the purpose of section 20B(2) even if the costs which the lessor subsequently puts forward in a service charge demand are in a lesser amount. Secondly, the notice for the purposes of subsection (2) must tell the lessee that the lessee will subsequently be required under the terms of his lease to contribute to those costs by the payment of a service charge. It is not necessary for the notice to tell the lessee what proportion of the cost will be passed on to the lessee or what the resulting service charge will be.' paragraph 65).

27. He said, in paragraphs 68 and 69, respectively, that 'I am also anxious not to adopt too strict or onerous an approach' and referred to 'adopting a non-technical approach.'

28. In Jean-Paul -v- The Mayor and Burgesses of the London Borough of Southwark [2011] UKUT 178 (LC), the President, G Bartlett QC, said:

29. 'For the purpose of determining whether the letters requesting payment or any of them constituted notification under section 20B(2) ...these should be read in context.' (paragraph 18).

30. 'My conclusion, therefore, is...that the letters constituted notifications for the purposes of section 20B(2) (paragraph 19).

31. In Daejan Investments Limited -v- Benson and others [2013] UKSC 14, Lord Neuberger of Abbotsbury PSC said:

32. 'It seems clear that sections 19 to 20ZA are directed towards ensuring that tenants of flats are not required (1) to pay for unnecessary services or services which are provided to a defective standard, and (ii) to pay more than they should for services which are necessary and are provided to an acceptable standard.' (paragraph 42).

33. It is clear from the foregoing that, for the purpose of section 20B(2) of the 1985 Act, notification may be contained in more than one document; and that the documents must be read and construed in context, not adopting a too strict or onerous, or technical approach. It 'must state a figure for the costs which have been incurred by the lessor... [but it] is not necessary for the notice to tell the lessee what proportion of the cost will be passed on to the lessee or what the resulting service charge will be.'

34. Having regard to these factors, and to the fact that the Applicants, as recipients of the documents, would, as lessees, be aware of the nature and meaning of the documentation and the requirements of the Lease, the Tribunal finds that the letter dated 21 June 2010 and the accounts enclosed therewith did, taken together, amount to notification for the purpose of section 20B(2). The accounts clearly show that additional expenditure had been incurred on generally budgeted items which had resulted in an overspend of £13,263. The covering letter indicated that 'Should a balancing charge or credit need to be applied to your account as a result of these, this will follow in due course.' The Tribunal accepts that the inclusion of the word 'should' was, as submitted by Mr Fieldsend, to distinguish between those recipients of the letter whose service charge accounts would be in credit and those whose accounts would not.

35. The Tribunal accepts the validity of Mr Dean's criticism of the latter. It could have been more explicit. It states in the first paragraph that the

accounts are sent 'for your records', it would have been clearer to have mentioned that it was for the purpose of section 20B(2) of the 1985 Act. The Respondent knew the level of contribution which would be required and did not expressly include it. Having reviewed the authorities, the criticisms, if they were to be accepted as negating the correspondence as satisfying section 20B(2), would have required the Tribunal to adopt too strict or onerous, or technical approach. In addition, it has been expressly held (in Shulem) that 'It is not necessary for the notice to tell the lessee what proportion of the cost will be passed on to the lessee or what the resulting service charge will be.'

36. The Tribunal has had regard to the purpose of the statutory provisions as adopted in Daejan: 'ensuring that tenants of flats are not required (1) to pay for unnecessary services or services which are provided to a defective standard, and (ii) to pay more than they should for services which are necessary and are provided to an acceptable standard.'

37. With this in mind, the Tribunal finds as a matter of fact, that the letter of 21 June 2010, together with the accounts, contained sufficient information to alert the Applicants to the fact that additional expenditure had been incurred and that they would be required to contribute to that expenditure by way of service charge. In line with the purpose of section 20B(2) of the 1985 Act, they were given notice of such expenditure at a time which was sufficiently proximate to the time the expenditure was incurred to enable them to query or challenge the expenditure or any part of it.

38. For all the above reasons, the Tribunal finds that the Applicants' liability in relation to the funding of the deficit incurred in the year ended 31 December 2009 was not limited or removed by section 20B(1) of the 1985 Act. A valid notice was served under section 20B(2) of the Act. The service charges levied by the Respondent for the year ended 31 December 2012 (which included the deficit) are, therefore, reasonable and payable by the Applicants.

COSTS

39. The Tribunal has power to award costs and/or reimburse fees under Rule 13 of The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 which provides, insofar as it is material to the present case:

'(1) The Tribunal may make an order in respect of costs only –

...(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in –

...(ii) a residential property case...

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or any part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.'

40. Neither party made an application for the award of costs, although there is still an opportunity to do so (see Rule 13(5)). The Tribunal has, however, considered the position on its own initiative and has determined that, on the basis of the evidence at the time of the Decision, there was no circumstance or particular in which either of the parties acted unreasonably. The Tribunal concluded that it would not be appropriate or proportionate to award costs to either party or to make an order for reimbursement of fees.

41. The Applicants requested that an order be made under section 20C of the Landlord and Tenant Act 1985 that the costs incurred, or to be incurred, by the Respondent in connection with the proceedings before the Tribunal should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenants. The Tribunal has no evidence that the Respondent has acted unreasonably in any respect and the Respondent has, in any event, succeeded before the Tribunal. It would not be reasonable or proportionate to make an order.