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MAN/00CG/LSC/2012/0029

HER MAJESTY'S COURTS AND TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

LANDLORD & TENANT ACT 1985 SECTIONS 19, 20C & 27A.

Property : 8 Flats at Telegraph House. Sheffield S1 2AN

Applicants: Jeanna Gater and 7 other tenants.

Respondent: Wellington Real Estate Ltd.

Tribunal:
L. Bottomley.
J Platt.
M J Simpson.

4th March 2013.

Decision

1. **None of the items challenged are unreasonably incurred within the terms of Landlord & Tenant Act 1985. The service charges demanded for the years ending 31st March 2011 and 2012 are payable.**

2. **The Landlords' declared intention not to treat their costs of this application as relevant costs for service charge purposes is confirmed by a S20C Order in those terms**

Application.

By an application lodged with the Tribunal on 25th March 2012, Mr Gater, on behalf of his daughter, Jeanna Gater (flat 2) and seven other tenants, asked the Tribunal to determine liability for payment of service charges for Telegraph House for the years to 31 March 2011 and 2012.

The application relates to the 8 flats on the 3rd and 4th floors of Telegraph House. Those flats were developed by Ian White and Telegraph House (Sheffield) Management Company Ltd. ('THMC') and let on long leases to the tenant applicants. Most of those leases were completed in late 2005 and were created out of Mr White's leasehold interest in those 2 floors, which he had held from Wellington Real Estate Limited ('WRE') since 27th August 2004.

The ground, first and second floor were occupied by commercial tenants of WRE.

An LVT, comprised of the same members, had previously dealt with most, if not all, of the issues raised in this application, for the years 2006 -2010 inclusive, by a Determination of 13th December 2010.

Preliminary directions (attached) were given on the 22 October 2012. Further Directions (attached) were given on 4th February 2013.

The Law.
We attach a schedule setting out the relevant statutory provisions.

The Leases.

The Head lease is dated 27th August 2004 and made between Wellington Real Estate Company Limited and Ian White. It is a demise of the third and fourth floors of Telegraph House for 150 years from 27th August 2004 at a peppercorn rent. The tenant covenants to also pay the Insurance Rent and the Service Charge.

The Insurance obligations of WRE are set out in Clause 5(2) of the Lease. (Full reinstatement value of the Building and plant and machinery).

By Clause 4 (2) the tenant is to pay 'a proportionate part' of the premiums 'to be determined by Landlord's Surveyor'.

'The Building' is the whole of Telegraph House, the lower floors of which are occupied by Wellington's commercial and retail tenants.

The Service Charge is, likewise, to be a 'fair proportion' 'to be determined by the Landlord's Surveyor' of the cost of the landlord providing the Services.

The Services are those set out in Part 2 of the Third Schedule to the Headlease. The tenant has specified cleaning and decorating and repairing obligations in respect of the demised premises ie. The 3rd and 4th floors now converted into the 8 flats.

Mr. White assigned his interest in the Head Lease to THMC.

THMC went into liquidation and the Head Lease was assigned by the Liquidators to LCP Commercial Limited on 19th January 2011.LCP and WRE are closely associated companies. To all intents and purposes, in respect of this application, they are staffed by the same personnel.

The Residential Leases are all in identical form save for the specified percentage (which is not in issue) of their Insurance Rent, Maintenance Rent and Service Charge obligations.

They are all between Ian White (before assignment of the Head Lease to THMC) and each respective Applicant, for a term expiring 6 days before the Head lease expires, and reserving a yearly ground rent of, initially, £100.

The Insurance Rent is the stated specified percentage of the Insurance Rent payable to WRE under the Head Lease by Mr. White, or his successor. (now LPC)

The Maintenance Rent is the stated specified percentage of the Service Charge payable to WRE under the Head Lease by Mr. White, or his successor.(now LPC)

The Service Charge in the residential leases is the stated specified percentage of the 'Costs' set out in the Sixth Schedule of each lease. Those are the costs reasonably incurred in respect of the services in Part 2 of that Schedule.

No issue was raised as to payabilty under the terms of the Leases. The issue is mainly one of reasonableness (particularly with regard to apportionment of cost between the applicant residential tenants and the respondents' retail and office tenants), coupled with the documentation and timing of demands and service charge accounts.

The hearing.

This was held at Sheffield Magistrates Court on Monday 4th March 2013 and attended by Mr Gater and his daughter (Flat 2), Mr Marcer (Flat 4).Mr Goodwin (Flat 7) and Mr Player (Flat 8) as applicants, and Ms Shepherd, solicitor for the Respondents assisted by Messrs Preston, Davies, Coleman and Chamberlain.

Having previously identified the specific areas of dispute the tribunal invited the parties to deal with them on an item by item basis.

It soon became apparent that the lack of effective communication between the parties had stifled the extensive amount of goodwill that each had towards the other. The hearing was therefore, and with the consent of all parties including the professional representative of the respondent, conducted in a conversational rather than adversarial manner. We fervently hope that that has paved the way for a level of communication and understanding of each parties' position that may make future reference to the Tribunal less likely.

The conversation and determination

1. Section 20B timings of Demands.

   Mr Gater questioned the reasons for the delay in including expenditure in the service chare demands and in particular the implementation of the Tribunal's last determination in respect of the year ended 31 March 2010. He asked for an indication of the usual procedure adopted by WRE. He queried whether any of the timings breached S20B.

   Mr Preston explained that it had not been possible to finalise the outcome of the last decision of the Tribunal until the application for leave to appeal, lodged by Mr Gater and in respect of which he obtained a significant extension of time, was finalised. In any event, as a matter of fact, none of the demands were for expenditure more than 18 months old or which had been notified within the preceding 18 months.

   Mr Coleman explained that the budget for any year was put together in the months running up to March. Demands were made on the basis of that budget and then adjusted at the year end to take account of the actual, as opposed to budgeted, figures. All as required by the Third Schedule to the Head Lease.

   Determination: There has been no breach of the requirements of S20B.

2. Certification by Accountant.

   Mr Gater did not press this matter. WRE are aware of the provisions, which are not yet statutorily implemented, but are recommended best practice. Any audit would have to be external to WRE/LPC and would have cost implications.

   Determination. None required..

3. Categorisation of expenses.(Apportionment).

   This was the most important issue and the kernel of the applicants' case.

   The 36.53% contribution to the cost of common parts shared by the applicants 2 floors and the office tenants, and the 19.07% contribution to the 'Building' costs (which includes the roof), has led to a significantly higher than expected (by the applicant tenants at least) annual service charge costs.

   Some of the underlying costs are questioned rather than vehemently challenged, but it is the basis of apportionment that is the crux of their complaint.

   Mr Gater avers that the provisions in the Head Lease, particularly paragraph 1.5 of Part 1 of the Third Schedule, are open to interpretation and that WRE and/or its surveyor have not sufficiently taken into account, in addition to floor area, "other reasonable factors in making the determination" *(of the tenant's share).*

The identically constituted Tribunal dealt with this on the last occasion. We quoted the relevant passage at the hearing on 4th march so at to afford the parties an opportunity to comment.

"It is perfectly feasible for more than one method of apportionment to be reasonable. A floor area apportionment is not unreasonable, nor does it make the charges thereby payable into unreasonably incurred service charges. The benefit of precision is a major factor. Footfall and usage are less easily measured and more likely to be challenged. We note that the apportionment of liability as between the applicants themselves in respect of their individual flats appears to have been accepted, at the time of purchase and subsequently, as not unreasonable. That appears to be a floor area apportionment. The apportionments in issue do not appear to have been aired as a significant challenge until the service charges increased substantially from those anticipated at the time of purchase of the flats. At that time the apportionment would have been known if prudent enquiry had been made of the Head Lessee as part of the Flat purchasers' (or their solicitors) pre purchase consideration of the terms of the Head Lease.

We therefore do not find the apportionments adopted by WRE and passed on to the applicants by White/THMC to be unreasonable."

Neither Mr Gater nor any of the applicants attending the hearing, nor any of the written representations previously made gave us any scope for arriving at a different decision on this occasion.

Determination. The apportionment of service charge costs on the basis if floor area is not an unreasonable basis upon which the landlord or its surveyor determines the Tenant's Share of the Head Lease service charges.

4. Electricity costs.

The applicants were concerned to be reassured that they were not paying a contribution to electricity used solely by the commercial tenants.
Messrs. Preston and Chamberlain confirmed that each commercial tenant was separately metered for the exclusive use. Since the last reference to the Tribunal the metering of the residential common parts and the shared common parts had been changed. Each floor of the residential area had its own meter , 100% of which is charged to the applicants.
A third 'landlords' meter metered the usage to the shared common parts, to which the residential tenants contributed 36.53%.

Determination. The electricity usage is correctly metered and there is no evidence of other tenants' usage being wrongly and unreasonably attributed to the applicants' service charge costs.

5. Electric upgrade/Concrete repair work/Fire proofing works.

These are principally works in the basement, for which the applicants are obliged to make a contribution but to which they do not have ready access.

It is now accepted that these works, and the cost of them, were not unreasonably incurred. They were, from the applicants' point of view, unexpected costs. They say that the work should have been dealt with by the developers at the time of the residential development. That is a frequently expressed and sympathetically understood position, but it does not render unreasonable the work carried out by WRE to preserve the building and respond to the need for upgrades.

Inclusion of an area such as the basement within the definition of those areas for which the applicants have a proportionate liability is not dependent upon them having uninhibited access to that area. If the intimated exclusive use of part of the basement by Bell & Buxton for storage purpose is formalised there will need to be a reappraisal of the basement's costs. WRE have indicated an intention to consider bringing any rental into account as an offset to the service charge. That is one method. The effect on the 36.53% floor area calculation may also require consideration either as well as, or instead of that method.

Determination. The basement works have not been unreasonably incurred.

6. General repairs.

Apart from Mr. Gator's now unsustainable complaint that WRE should somehow take account of the fact that the building and development by White was not as Mr Gator expected it to be at the time of his daughter's purchase over 7 years ago, there is no issue as to the cost of general repairs. There is an issue arising from the mis-match of the Head Lease with the actual position re the toilets. They are defined as part of the common parts. The applicants have no use for them but have a right to do so and are liable for a proportionate (As defined -36.53%) part of the cost. That is quite clear in the Lease. The Landlords are negotiating with a view to Bell & Buxton taking over exclusive use and modifying the leases accordingly. Until that is done the position is as currently stated in the Head Lease, to which the applicants became bound when they signed their individual under leases.

Determination. The general repairs and the cost of them have not been unreasonably incurred. The mis-match between the applicants clear contractual liabilities and the reality of the situation is beyond our jurisdiction in this application, save to say that we would encourage a speedy resolution of the problem along the lines being currently pursued by the Landlord.

7. Roof repairs.

This is a high cost item and the applicants concerns are exacerbated by the fact that for several years no solution has been found to the severe leaks into one flat, which is currently unoccupiable .

Mr Gater asked for an analysis to determine whether in any one year the expenditure amounted to an amount which required a contribution of more than £250 from any tenant, notwithstanding the fact that the roofing work had been piecemeal and not treated as 'major works'. Both parties and the Tribunal addressed the issue as to

whether the recent ruling in *Goddard v Francis [2012]EWHC 3650 (Ch)* impacted on this issue.

Mr Chamberlain provided a detailed and helpful analysis of the works on the roof over the past 3 years. The roof comprised several different levels. The roof and all its levels were regarded as one item to which the applicants were to contribute 19.07%. There was no distinct differentiation as to which bit of which roof level covered which particular tenants' demise, whether retail, office or residential. Some of the levels had been over covered with a 15 years guarantee, following thermal imaging investigations. A detailed inspection of the Clock Tower had taken place and some work done on a tank and pipes. An abseil inspection of the stonework had revealed no obvious cause. Investigations were now continuing through the ceiling of the affected flat.

The cost analysis revealed that the year on year costs, even including the cost of the investigative work, did not attain a sum that required consultation under S20.

Determination. Notwithstanding that Mr Gater and the tenants understandably find the need for this work to be unexpected having regard to them having purchased what they regarded as 'new' flats within the last decade, the work is none the less essential. It has been reasonably and incrementally programmed. The costs are not unreasonable.

Analysing the cost to the applicants in the light of Goddard v Francis does not give rise to a S20 limit or the need for the respondent to apply for dispensation.

8. Fire prevention works.

These were incurred following a fire inspection report, which recommended, on Health & safety grounds that an upgrade was essential. This was accepted by the Applicants in the light of the respondent's explanation.

9. Professional Fees.

To the extent that this was a request for clarification of the cost of the Thermal Imaging of the roof we have dealt with it above.

To the extent that it challenges the fee paid by WRE to Lambert Smith Hampton, for day to day management and call centre provisions it is otiose. The cost is in fact borne by WRE out of the 10% management fee charged by WRE. The accountancy is somewhat convoluted and a little confusing.

To the extent that the challenge is to £7500 charged on account of the management of the specification and tendering etc of the proposed external painting we do not have sufficient information to say that that is unreasonable, but it is a project of major work upon which we are told a S20 consultation is underway. The reasonableness of the management costs will need to be considered by the parties in the light of the overall scheme.

10. Management Fee.

In the light of the clarification provide in respect of Professional fees above, the inclusive 10% charged by WRE was not further challenged.

11. Cleaning.

This issue starkly illustrates the applicants concerns, and equally illustrates, having regard to the terms of the Lease, the limited room for manoeuvre even given what we find to be the apparent goodwill of WRE and LCP.
The cleaning is done by Mr Trigg. Everyone his happy with him. He has done it for years. He charges £10 per hour and works 22 hours per week. 2 hours of that is spent cleaning the common parts that are otherwise exclusive to the residential tenants. They are charged for it via WRE/LCP. It is not challenged.
The remaining 20 hours are spread out so that he is present at some time on 6 days of the week to deal with the common parts to which the applicants contribute 36.53%. That produces a cost to each applicant of approximately (depending on precise share according to the floor area of each flat) £580 pa. A large sum. However it is not said that a six day attendance is necessarily unreasonable for the office premises. It may be possible to reduce it a bit, but Mr Trigg may then find it uneconomical. If the work is put out to tender to one of the large commercial office cleaning companies it will almost certainly cost more for fewer hours.
In short the cost is reasonable. The level of work is not unreasonable. The apportionment, we have decided, is not unreasonable. The applicants are paying a price for electing to live above city centre commercial premises with which they, with their different perceptions and differing needs share extensive common parts.

Costs and S 20C application.

The respondents indicated an intention not to treat the costs that they had incurred in these proceedings as relevant costs and therefore not to claim them in future service charges. The significance of a S20 Order was explained to the unrepresented applicants and Mr Gater. Although these proceedings had led to some concessions from the respondents, before the outstanding issues were put to the Tribunal to be determined, we would, without the concession from the respondents, have been less than certain that we could have found such an order to be just and equitable, bearing in mind that some of the issues of principle have been the subject of a previous determination. In the circumstances we did not hear full representations. We set out the foregoing in response to a request from Mr. Gater to do so. For the sake of clarity we make the S20C Order on this occasion

Martin J Simpson.
Chairman.

DIRECTIONS SCHEDULE

Directions.

It is recorded that:

The Tribunal has reminded itself of the Determination of 13th December 2010 which dealt with the Services Charges for years ending 31/3/06 to 31/3/10

The Respondent has produced a reconciliation statement showing the adjustments made to those years in the light of the Tribunals decision (Revised 2009 to £15926.12 and 2010 to £15140.55).

This Application relates to ye 31/3 2011 and ye 31/3 2012.

The Respondent has produced, for ye 31/3/11, a Service Charge Account (showing a claim of £20120.57) together with an item by item analysis.

The Respondent has produced, for ye 31/3/12, a Service Charge *Budget.* Previous experience suggests that by now the *actual* account and analysis may be available.

It is Ordered that:-

1. The Respondent shall, by 5th November 2012 serve on Mr Gater and file with the Tribunal a copy of the up to date Service Charge Accounts and Analysis for which they contend for both years in issue.

2. If the Actual (as opposed to budget) Service Charge Account and analysis to 31/3 12 are now available, the Respondent shall serve a copy upon Mr Gater and the Tribunal by 5th November 2012.

3. By 9th December both Parties shall provide the Tribunal office with details of their non availability for a Hearing between 18th February and 28th March 2013.

4. Mr Gater shall by 9th December 2012, serve on the Respondent and the Tribunal
4.1. A list of those items on the Service Charge Accounts and analysis which are challenged.
4.2. If so advised, a brief narrative statement setting out any generic issues (e.g. Apportionment, Statutory consultation etc)

5. By 14th January 2013 the Respondent shall serve upon Mr Gater
5.1. Copies of the invoices supporting any items challenged by Mr Gater.
5.2. If so advised, a narrative statement in response to any generic issues raised by Mr Gater.

6. By 28th January 2013 Mr Gater shall confirm to the Respondent and the Tribunal a definitive list of challenged items to be determined by the Tribunal, whereupon the Tribunal will give further Directions for the preparation of Bundles and fix a date for the Hearing within the window referred to in paragraph 3. Above.

Martin J Simpson.
Chairman

22 October 2012.

Directions.

4th February 2013.

It is recorded that:

The parties have substantially complied with the Directions of 22 October 2012.

The documents supplied on 28th January2013 by the Applicants, pursuant to paragraph of those Directions identifies the following issues.

12. Section 20B timings of Demands.
13. Certification by Accountant.
14. Categorisation of expenses.(Apportionment)
15. Electricity costs.
16. Electric upgrade.
17. Concrete repair work.
18. Fire proofing works.
19. General repairs.
20. Roof repairs.
21. Fire prevention works.
22. Professional Fees.
23. Management Fee.
24. Cleaning.

It is Ordered that:-

1. The Respondents prepare and file (in triplicate for the Tribunal and with a copy to Mr Gater) by 18th February 2013 hard copy Hearing bundles to include, but not necessarily limited to:-
   1.1. A copy of the Application.
   1.2. A specimen copy of the Lease or Leases under which the Respondents claims the Service Charge is payable.
   1.3. The documentation and representations generated by the parties' compliance with the Directions of 22 October 2012.
   1.4.Sufficient documentation to enable the Tribunal to address the above recited issues.
   1.5.Any documentation which Mr.Gator reasonably requires to be included.

2. The application will be heard at 10.00am on Monday 4th march 2013 at Sheffield Magistrates Court. Castle Street, Sheffield. S3 8LU.

3. The parties should be prepared to accommodate an inspection of the premises during that day if required by the Tribunal (who have previously inspected the property).

4TH February 2013
M. J. Simpson.
Chairman.

STATUTORY PROVISIONS SCHEDULE

Landlord & Tenant Act 1985

19 Limitation of service charges: reasonableness

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—

(a) only to the extent that they are reasonably incurred, and

(b) 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.

(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.

20 Limitation of service charges: consultation requirements

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—

(a) complied with in relation to the works or agreement, or

(b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or

(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which

may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

20B **Limitation of service charges: time limit on making demands**

(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 tenant, 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.

20C Limitation of service charges: costs of proceedings

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a Residential Property Tribunal or Leasehold Valuation Tribunal, or the Lands Tribunal, or in connection with arbitration 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 tenant or any other person or persons specified in the application.

27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service 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.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.