11392

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	BIR/OOCN/LIS/2014/0053
Property	:	Flat 108, Viva, 10 Commercial St., Birmingham, B1 1RR
Applicant	:	Lucy Wilson
Respondents	:	1 Buttonbrisk Limited 2 Viva Management Company (Birmingham) Limited
Representative	:	Brethertons LLP, Solicitors
Type of Application:		Application to determine liability to pay service charges under s.27A of the Landlord & Tenant Act 1985 and under s.20C to determine whether the Respondent's costs can be omitted from the service charge.
Tribunal Members	:	I.D. Humphries B.Sc. (Est.Man.) FRICS Judge D.R. Salter
Type of Determination	:	The case was determined by written Representations on 16th October 2015 following receipt of Further Submissions in response to points raised by the Tribunal.
Date of Decision	:	18th January 2016

DECISION

Introduction

1 The Applicant holds a lease of the Property, a purpose built two bedroom flat, for a term of 150 years from 1st January 2006 at a ground rent of £275 p.a. rising every 25 years for which a premium was paid of £228,000. In addition to rent, the Applicant is required to pay service charges and applied to the Tribunal to determine whether four items in the service charge account were payable under the terms of the lease. The Tribunal is not asked to determine whether the amounts charged are reasonable in this application, purely whether they are chargeable as a matter of construction of the relevant provisions of the lease. The First Respondent is the Freeholder and made no submissions.

Items in Dispute

2 The disputed costs relate to:

1 the cost of employing a Caretaker;
2 legal fees;
3 bank charges;
4 the cost of work relating to a car park gate.

3 The items relate to 5 previous service charge years that have been billed and 2 later years for which there are budgeted costs:

Year End	Description	Cost £
31.12.09	Caretaker	216.99
	Legal Fees and Bank Charges	10.16
31.12.10	Caretaker	235.87
	Legal Fees and Bank Charges	26.50
31.12.11	Caretaker	216.35
	Legal Fees and Bank Charges	8.15
31.12.12	Caretaker	209.99
	Legal Fees and Bank Charges	3.78
31.12.13	Caretaker	213.17
	Legal Fees and Bank Charges	37.24
31.12.14 (est.)	Caretaker	217.63
	Legal Fees and Bank Charges	6.26
	Work to the Access Gate	41.81
31.12.15 (est.)	Caretaker	217.63
	Legal Fees and Bank Charges	5.80
Total in Dispute		£ 1,667.33

Facts Found

3 The Tribunal inspected the exterior of the development on 16th June 2015. It is a modern development of 146 flats and some commercial units in Birmingham city centre on five floors. There is vehicular access from Commercial St. and Blucher St. leading into a central courtyard where there is ground level parking and access to further parking at basement level. The development was built around 2006 and appears to be built to a high specification with high value flats.

Relevant Law

4 The Tribunal's powers derive from statute.

5 Section 27A(1) of the Landlord & Tenant Act 1985 (the Act) provides that an application may be made to a Leasehold Valuation Tribunal (LVT), now the First-tier Tribunal in the Property Chamber (Residential Property), for determination of whether a service charge is payable and, if so, the person by whom it is payable, to whom, the amount, the date payable and manner of payment. The subsection applies whether or not payment has been made.

6 Section 18 of the Act defines a 'service charge' as an amount payable by a tenant of a dwelling as part of or in addition to rent which is payable directly or indirectly for services, repairs, maintenance, improvements, insurance or the landlord's cost of management, the whole or part of which varies according to the relevant cost.

7 Section 19 of the Act provides that relevant costs shall be taken into account in determining the 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 carrying out of works, only if the works are of a reasonable standard and in either case the amount payable is limited accordingly.

8 These are the statutory criteria for the Tribunal's jurisdiction but it is also bound to take account of case law for interpretation of the standards to be applied.

Lease

9 The lease is dated 20th December 2007. It is a tripartite lease between Buttonbrisk Ltd. (Landlord and first Respondent), Lucy Wilson (Tenant and Applicant) and Viva Management Company (Birmingham) Ltd. (Management Company and second Respondent), whereby a lease of the Property was granted to Lucy Wilson for a term of 150 years from 1st January 2006.

10 In addition to rent, the Applicant is required to pay a service charge specified at 0.96725% of the Maintenance Expenses incurred by the Second Respondent.

11 The Maintenance Expenses include the items set out in Schedule 5 which relate to the Maintained Property as defined in Schedule 1.

Submissions and Tribunal Determinations

12 The parties' submissions on the issues in dispute and the Tribunal's Determinations on each are set out below.

1 The cost of employing a Caretaker

13 Applicant
The Applicant makes two points.

14 The first point is that there is no specific clause in the lease permitting the employment of a caretaker and that the Respondent was relying for authority for this appointment on the sweeper clause in the lease which the Tribunal presumed to be a reference to Schedule 5 paragraph 23. The Applicant had taken advice from other parties, including the Leasehold Advisory Service (LAS) and legal professionals, although no supporting evidence was submitted, and she had been advised that sweeper clauses were only intended to cover minor, miscellaneous items of expenditure that had not been envisaged

when the lease was prepared. They were not intended to cover more permanent long term services such as employment of a caretaker. If the cost were allowable under the sweeper clause there would be uncertainty as to the terms of engagement, since part time cover may expand into full time employment which could require accommodation on site and which would increase the service charge for the tenants.

15 The Applicant also commented 'I am aware that the commercial code urges caution in using sweeper clauses, making the point that they are not intended to provide for the recovery of costs for something that was omitted from the lease.'

16 Further, it was submitted that there must be clear unambiguous terms for the employment of a caretaker and that there was potential for action under the Unfair Terms in Consumer Contracts (Amendments Regulations 2001 SI 2001/1186) if the Respondent 'is using sweeper clauses to recover costs for services that were never contemplated at the time the leaseholder made their purchasing decision.'

17 The second point was that the provision of a caretaker appeared to be a long term agreement with no end date, for which no consultation had been carried out with the tenants under s.20 of the Act.

18 Second Respondent
The Second Respondent referred to clause 5 of the Lease requiring the Management Company to comply with the obligations in Schedule 9, which included the provision of those services set out in Schedule 5.

19 The Respondent stated that Schedule 5 paragraph15 provides for 'Engaging such persons or sub-contractors as may be necessary to carry out the Management Company's obligations under this Schedule', and submitted that this paragraph might be interpreted to include the appointment of a caretaker. It was contended that this paragraph was indistinguishable from a similarly worded covenant in *Hupfield v Bourne* (1974) 28 P & CR which enabled the landlord in that case 'to employ such persons as shall be reasonably necessary for the due performance of ... his ... covenants ... and for the proper management of the block', and which had been so construed by the court as to cover the engagement of a caretaker.

20 The Respondent also placed reliance on clause 6.2.1.2 which refers to liability between the parties to the lease for the acts etc. of 'a concierge caretaker porter ... or any person acting under such concierge caretaker porter staff or servant' and which it was submitted was evidence, within the lease, that the employment of a caretaker might be contemplated.

21 Further, the Respondent relied on Schedule 5 paragraph 23, which was a sweeper clause, enabling the Management Company to recover 'all other expenses (if any) incurred ... in and about the maintenance and proper and convenient management and running of the Development'.

22 Finally, the Respondent submitted that the Management Company was required to provide the services listed in Schedule 5 and employing a caretaker was a prudent way of discharging aspects of that liability.

23 Replying to the Applicant's second point, the Respondent provided copies of the caretaker's contract of employment for the years 2013, 2014 and 2015 showing that each contract was for a limited term of a year. As a consequence, it was submitted they were not long term contracts within the meaning of the Act and, accordingly, did not require tenant consultation under section 20 of the Act.

24 Tribunal Decision
As a finding of fact, there is no specific reference to the recovery of 'the cost of employing a caretaker ' in Schedule 5 of the lease.

25 The courts have indicated that, generally, where a landlord seeks to recover costs from a tenant there must be clear unequivocal provisions allowing him to do so (*Gilje v Charlgrove Securities Ltd.*[2001] EWCA Civ 1777). More specifically, H.H. Judge Rich Q.C. in the later case of *Earl Cadogan v 27/29 Sloane Gardens Ltd.* [2006] L & TR 18 reviewed the authorities relating to caretaker costs and identified the following five points pertaining to the construction of 'caretaker' service charge provisions:

- it is for the landlord to show that a reasonable tenant would perceive that the underlease [lease] obliged him to make the payment sought.

- such conclusion must emerge clearly and plainly from the words used.

- thus if the words used could reasonably be read as providing for some other circumstance, the landlord will fail to discharge the onus upon him.

- this does not however permit the rejection of the natural meaning of the words in their context on the basis of some other fanciful meaning or purpose, and the context may justify a "liberal" meaning.

- if consideration of the clause leaves an ambiguity then the ambiguity will be resolved against the landlord as "proferror".

26 Further, in *Morris v Blackpool* [2014] EWCA Civ 1384; [2015] HLR 2, the Court of Appeal acknowledged that the absence of reference in a lease to a particular service was not necessarily fatal to the recovery of costs incurred in relation to the provision of that service.

27 Drawing on the guidance offered by these authorities, it is clear to the Tribunal that the lease required the Management Company to provide the services listed in Schedule 5 and that, in particular, the references in clause 6.2.1.2 to a 'caretaker' and in Schedule 5 paragraph 15 to employment of such persons as may be necessary to carry out the Management Company's obligations are sufficiently wide to include either the provision

of services by ad hoc staff employed by the Company's direct staff operating from elsewhere, or the provision of an on-site caretaker who may be a sub-contractor.

28 The Tribunal also noted that the Applicant acknowledged that an individual had been employed on-site when she acquired the tenancy of her flat, but at the time she assumed that that person was there to deal with snagging issues relating to the construction of the Property.

29 Further, reading the lease as a whole and bearing in mind the size of the development with 146 flats and some commercial units, the Tribunal finds that a reasonable interpretation of the lease envisages that the Respondent may wish to employ an on-site caretaker to assist in the discharge of its liabilities and that this can be accommodated by Schedule 5 paragraph 15.

30 However, whilst the employment of a caretaker, as a matter of interpretation of the lease, may be regarded as a legitimate service, no submissions were made to the Tribunal on the cost of providing such a service. As a consequence, an application under s.19 of the Act at a later date is not precluded if the cost of that service is considered to be excessive.

31 On the second point, the Tribunal has reviewed the contracts relating to the employment of a caretaker at the Property. It finds that each of these contracts is a contract of employment for a period of twelve months. Consequently, it was not necessary for the Respondent to comply with the consultation provisions in section 20 of the Act in relation to these contracts.

2 Legal Fees

32 Applicant
The Applicant makes the point that there is no specific reference to recovery of 'legal fees' in the lease.

33 Respondent
The relevant fees related to solicitor's costs and disbursements for debt recovery and to professional advice. The latter concerned specific advice relating to responsibility for building defects of the Property.

34 The Management Company was required to comply with its obligations to manage the Property and it followed as a natural consequence that if it required legal advice in this respect, the costs so incurred should be recoverable from the tenants through the service charge. (See for example, *Plantation Wharf Management Co. Ltd. v Jackson* [2011] UKUT 488 (LC). These costs had been envisaged and were recoverable under Schedule 5 paragraph 15 which provides, as seen above, for 'Engaging such persons or sub-contractors as may be necessary to carry out the Management Company's obligations under this Schedule'.

35 Tribunal Decision
The Respondent has a duty to comply with its obligations under the lease and in so doing to provide services for the benefit of the tenants. It would be unreasonable to expect it to do so from its own resources. This cannot have been contemplated by the parties and the Tribunal finds that the recovery of legal fees, properly incurred, is within the scope of Schedule 5 paragraph 15.

36 However, this finding does not preclude an application under s.19 of the Act at a later date if the costs incurred are considered to be excessive.

3 Bank Charges

37 Applicant
The Applicant makes the point that there is no specific reference to recovery of 'bank charges' in the lease.

38 Respondent
The Respondent submits that the recovery of bank charges and is covered by the lease and relies on the following paragraphs of Schedule 5:

(13) Keeping proper records of all costs charges and expenses incurred in carrying out the obligations imposed by this Schedule and appointing a qualified accountant for the purpose of auditing the accounts in respect of the Maintenance Expenses and certifying their total amount for the period for which the account relates;

(17) Administering the Management Company itself and arranging for all necessary meetings to be held and complying with all relevant statutes regulations and orders and (if the Management Company thinks fit) employing a suitable person or firm to deal with these matters;

(20) Such sum as shall be considered necessary by the Management Company to provide a reserve fund or funds for items of future expenditure to be or expected to be incurred at any times in connection with the Maintained Property; and

(23) All other expenses (if any) incurred by the Management Company in and about the maintenance and proper and convenient management and running of the Development.

39 The Second Respondent said that the Applicant's contribution to the entire costs for the period was £16.20.

40 It submitted that it was contemplated that the reserves would be held in a bank account and that when the lease was granted in 2007, the need to hold funds in a separate bank account imposed by section 42 of the Landlord & Tenant Act 1987 must have been contemplated. It could not have been the parties' intention to 'provide a reserve fund' without also contemplating the incurrence of bank charges as an incidence of that facility.

41 Tribunal Decision
The Tribunal finds that Schedule 5 paragraphs 13 and 17 are too narrowly drawn to include bank charges, but the recovery of bank charges and interest is a necessary function of the proper management of the Property permissible under Schedule 5 paragraphs 20 and 23.

42 However, this finding does not preclude an application under s.19 of the Act at a later date if the costs incurred are considered to be excessive.

4 The cost of work to a car park gates

43 Applicant
The Applicant states that alterations were carried out to the entrance gates to the car park with a view to restricting access to those tenants with permits. This was neither general maintenance nor repair (which are permitted by the lease), but should be regarded as either an 'alteration' or an 'improvement' that was outside the scope of the service charge. Consequently, the cost incurred in making the alterations was irrecoverable through the service charge.

44 Respondent
The Respondent admitted that the gates had been altered, but stated that the alteration related purely to the opening mechanism and that the physical nature of the gate remained unchanged. This had been done to address a problem of unauthorised parking. It allowed the gates to be opened by tenants only on presentation of an electronic fob.

45 The Respondent placed reliance on Schedule 5 paragraph 7(2) which covers the provision, maintenance, renewing and adding to of 'any electronic security or door entry system in the Common Parts or Gardens and Grounds'.

46 The Respondent also relied on Schedule 5 paragraph 8 which permits 'the provision maintenance and renewal of any other equipment and the provision of any additional or alternative services for any of the matters covered by this Schedule ...'

47 In the Respondent's submission, the total cost of the works, which was £1,166.40 and incurred in 2013, was recoverable through the service charge.

48 Tribunal Decision
The Tribunal finds that the alteration related to the 'operation' of the gates. The physical state of the gates remained unchanged. Moreover, it determines that the expenditure incurred in making this change to the operation of the gates falls within either of the paragraphs relied upon by the Respondents i.e. it may be regarded as financing the provision of an 'additional service' under either Schedule 5 paragraph 7(2) or Schedule 5 paragraph 8 and, consequently, it is recoverable through the service charge.

49 However, this finding does not preclude an application under s.19 of the Act at a later date if the cost incurred is considered to be excessive.

Section 20C Application

50 The Applicant has applied for an Order under section 20C of the Act to prevent the Respondent adding the cost of defending the application to the service charge account.

51 The Tribunal finds all points in the Respondent's favour and, accordingly, the Applicant's application for a section 20C Order fails.

I.D. Humphries B.Sc. (Est.Man.), FRICS
Chairman

Appeal

If either party is dissatisfied with this decision an application may be made to this Tribunal for permission to appeal to the Upper Tribunal, Property Chamber (Residential Property). Any such application must be received within 28 days after the decision and accompanying reasons have been sent to the parties under Rule 52 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.