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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/33UG/LSC/2017/0080**
Property	:	26 Defiant Road, Norwich NR6 6HH
Applicant	:	Mrs Maria Wormall
Representative	:	Mr & Mrs Wormall
Respondent	:	Officers Village Management Company Ltd
Representative	:	K Whitehand (director)
Type of Application	:	for determination of reasonability and payability of service charges for the accounting years 2015–16 and 2017–18
Tribunal Members	:	G K Sinclair, R Thomas MRICS & C Gowman BSc MCIEH MCMI
Date and venue of Hearing	:	Monday 20th November 2017 at The Old Bakery 115 Queens Road, Norwich NR1 3PL
Date of this decision	:	10th January 2018

DECISION

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1. The issues in dispute for each of the two years in question (and there is a year in between, 2016–17, in respect of which no challenge has been brought simply because accounts for that year have yet to be produced) are the reasonableness and payability of the service charges demanded by the landlord company, which is lessee-owned.

2. For the reasons which follow the tribunal determines that the demands raised are not payable in their present form, and that certain items claimed are excessive or not properly recoverable as service charge items.

3. In saying this the tribunal recognises that the landlord company is or should be lessee-controlled and lacks funds other than those which can be raised by it from its members or by charging third parties for the right to use company property other than the residential blocks concerned.

Background

4. In the early 2000s Fifers Lane, a secondary traffic route north of the Norwich outer ring road and south of Norwich Airport, was upgraded and some major residential development took place on the north side of it, on land formerly part of the RAF station that had largely been turned over to civil aviation and light industrial use. As might be guessed from the street names (Marauder Road and Defiant Road) and the name of the respondent company, the parts of the new development with which this application is concerned had been used either for or in connection with RAF officers' accommodation, but all of the residential accommodation is new.

5. The applicant is lessee of a two-bedroom flat in a purpose-built block of four flats. The respondent company has responsibility for 14 flats within a total of three separate blocks, two on Defiant Road and one on Marauder Road. Two of the blocks comprise four two-bedroom flats and the third contains six flats.

6. The original developer was a company called J S Bloor (Sudbury) Ltd, and in the leases which it created for all relevant properties it set out, in paragraph (E) of the preamble, its future intentions :

> So as to preserve and procure the proper and efficient management of the Block the Developer has entered into an agreement with CPM Securities limited ("CPM") to purchase the freehold interest in the Block and the adjacent Courtyard land within 30 working days of the completion of the grant of the last lease of a flat on the Estate. CPM has granted an Option in favour of the Company of which each of the owners of the flats in the Block shall be a Member for it to purchase the freehold of the Block and the adjacent Courtyard land from CPM if the majority of its members resolve to do so.

7. By a transfer dated 5th July 2005 the applicant company purchased, although not from CPM but from the developer directly, the freehold interest in each of the above residential blocks and adjoining courtyard land. Since then it has therefore been not only the management company responsible for the maintenance of each block but also the landlord.

8. As part of the deal, and perhaps as a means by which the developer could dispose of extraneous parcels of land, the respondent transferee was also required to purchase (seemingly at no additional cost) two open car park areas on Marauder Road which serve other residential properties entirely; some if not most of them freehold houses. It appears that each property wanting to use the car park pays an annual sum to the respondent, although the precise legal basis for this was not clarified either from documents in the bundle or from Mr Whitehand's evidence at the hearing. This may provide an annual income of £150 per user or £3 150 in total, which subsidises the service charge account for the three blocks.

9. Since before the date of that transfer the respondent company, incorporated as a company limited by guarantee on 11th July 2003 and of which all lessees are members, has been managed by Mr Whitehand and he and, until very recently, his wife have been the sole directors. She recently resigned, with the result that he has been left entirely on his own to manage the company. To assist him with day-to-day management issues and the collection of service charges he has, as director, engaged the services of Duke Street Lettings Ltd (a local lettings management company) and the firm of Murrells, accountants used by DSL.

Relevant lease provisions

10. The copy lease in the hearing bundle is dated 31st October 2003. It concerns what was then Plot 49 Officers Retreat Fifers Lane Norwich. The lessee is named as Kevin Richard Whitehand, so this is evidently his lease and not the applicant's. As no point was taken on this the tribunal assumes that in all material respects the leases are the same.

11. In the Particulars the expressions "flat", "block", "parking space", and "buildings" are defined. The term granted is 125 years from 1st June 2003, with a ground rent escalating every 25 years. The rent payment date is 1st June in each year, the estate is defined as being the land now or formerly comprised in the title number NK288206, and the common parts are said to be the main structure of the buildings, the external areas, conduits, entrance hall/stairway coloured green on the plan, the courtyard other than the flat and parking space and the corresponding parts of the other lettable parts of the buildings as more particularly described in Part I of the First Schedule.

12. By clause 1.5 the maintenance year is described as every twelve monthly period ending on the 31st May, the whole or any part of which falls within the term. By clause 1.6 :

> The service charge contribution means one-sixth of the total and initial estimated sum of seven hundred and forty seven pounds per annum. The contribution will be one-sixth for flat numbers 62–67 (as there are six flats) and one-quarter for plots 49 to 52 (as there are four flats) (sic)

13. This would appear to refer to only two blocks of flats; not three.

14. By clause 3.2 the lessee covenants in respect of every maintenance year to pay the service charge to the company on the payment date, and by 3.3 pay the company a due proportion of any maintenance adjustment pursuant to paragraph 3 of Part II of the Fourth Schedule. By clause 4.1 the company covenants that it will during the term carry out the repairs and provide the services specified in the Fifth Schedule provided that the lessee shall have paid the service charge and any adjustment due, etc.

15. The purposes for which the service charge is to be applied appear in the Fifth Schedule, including at paragraph 6 the payment of all costs and expenses incurred by the company in the running and management of the block, the collection of the rents and service charges in respect of the flat and the other flats, and in the enforcement of the covenants and conditions and regulations contained in the leases granted of the flat and the other flats in the block, etc. The computation of the annual maintenance charge is provided for in Part II of the Fourth Schedule. Paragraph 2(ii) makes provision for a reserve fund in respect of non-annual items of expenditure. Paragraph 2(iii) also allows for a reasonable sum to remunerate the company for its administrative and management expenses in respect of the block (including a profit element).

Material statutory provisions

16. The tribunal's powers to determine whether an amount by way of service charge is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

17. Insofar as major works are concerned, ie those in respect of which any tenant is liable to make a contribution towards the service charge in excess of £250, then section 20 provides that the relevant contributions of tenants are limited to that amount unless the consultation requirements have either been complied with in relation to the works or dispensed with by (or on appeal from) the tribunal. The consultation requirements, in the instant case, are those appearing in Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003[1] (as amended).

18. Two further provisions, concerning demands for payment of service charge, have been put in issue or are relevant to this case. First, by section 47 of the Landlord and Tenant Act 1987, where any written demand is given to a tenant of premises for rent or other sums payable under the lease (which expression would include a demand for payment of service charge), the demand must contain the name and address of the landlord. This is not always so straightforward.

19. Section 60(1) of the 1987 Act contains a definition of "landlord" applicable to section 47 as meaning "the immediate landlord"; there is no statutory extension of the expression "landlord" to include any person with the right to enforce the

[1] SI 2003/1987

payment of a service charge (as there is in section 30 of the 1985 Act). If, however – as is often the case where under a tri-partite lease involving lessor, lessee and management company the obligation to provide services and to issue demands for service charge is placed on the management company – then the sanction in section 47(2) has no application, because the sums in issue are not payable to the landlord and the demand for their payment is therefore not a "demand" for the purpose of section 47.[2] In this case, however, the management company has also become the landlord by purchase of the freehold estate from the developer.

20. Secondly, since 1st October 2007 section 21B of the 1985 Act provides that a demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges. The content of that summary is prescribed by the Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007.[3] The document must contain the prescribed heading and text and must be legible in a typewritten or printed form of at least 10 point.[4]

Inspection and hearing

21. The tribunal inspected all three blocks and associated courtyards plus one of the car parks at 10:00 on the morning of the hearing. At the time the weather was cold and damp. The three blocks are L-shaped and of brick construction, with the ground floor rendered to give a stucco effect. The first block inspected was that with six flats, a ground floor entrance lobby with an external door at each end (one closest to the courtyard parking area), and a carpeted stairwell. Flats are situate on each side of the lobby/stairwell on all floors. Externally, a small block of four garages were to be found at one side of the courtyard. Who used these was not clear. The lessees of the block, the tribunal was told, parked in the open in the courtyard. Surrounding the courtyard and block was some fencing and an expanse of soft landscaping, but most of the latter was said to be public land and the maintenance responsibility of Norwich City Council. That left only a few areas of grass and shrubs requiring attention from the landlord's contractor. As the tribunal's inspection took place in late autumn the growing season was over and the grounds looked reasonably well kept for the time of year.

22. The other two blocks differ, in that each has only four flats and the ground floor is largely open to the rear and used as covered parking spaces for those occupying the flats. In these buildings the stairwell runs across one half of the face of the block, instead of in line with the entrance lobby and the front and rear exits.

23. In each case some external brickwork showed signs of salt efflorescence and/or some dark discolouration from water stains or mould. Some sloping concrete window ledges were particularly affected. This could be cleaned, but had not.

24. For the sake of completeness the tribunal took a brief look, when passing, at one of the car parking areas which share no direct connection with the three blocks

2 See *Pendra Loweth Management Ltd v Mr & Mrs North* [2015] UKUT 0091 (LC), [2015] L&TR 30, per Martin Rodger QC, Deputy President

3 SI 2007/1257

4 *Op cit*, reg 3

other than the same ownership. Each was surfaced with tarmacadam and was in reasonable condition. How these two car parking areas were managed and paid for by the respondent company was explored, but not very satisfactorily, at the hearing later.

25. Present at the hearing were Mr & Mrs Wormall and Mr Whitehand. Observing were Mr & Mrs Palmann. Neither side was professionally represented. The bundle produced for the hearing comprised 137 pages, including a copy of the lease and the company's memorandum and articles of association. It was the latter, and not the lease, which required the company to call an AGM every year. The tribunal therefore explained that the management of the company itself was not a matter within its jurisdiction; just the manner in which the company managed the residential property under the service charge provisions in the lease.

26. The bundle contained no statements as such, merely what were intended as statements of case by each party for each year in dispute. Unhelpfully, neither set of documents was signed by nor identified which party was producing it, and in section g of the bundle (2015–16) the respondent's document came first, whereas in section h (2017–18) it came after that from the applicant. Each section also contained a few documents including invoices, spreadsheets prepared by the applicant, a budget, annual service charge statements from other developments in Norwich showing much lower costs, and some correspondence.

27. The main points challenged were :
    a. The company's failure to serve the required summary of tenants' rights and obligations concerning service charges with the invoices
    b. Managerial and "secretarial" costs
    c. Gardening and cleaning (both of which were contracted out to a Mrs M Cawdron – whose invoices are basic in the extreme, don't identify the addressee, and when queried resulted in a significant price reduction), and
    d. The lack of any breakdown of actual expenditure or budget forecast.

28. On the first, technical point concerning invoicing Mr Whitehand said that he left all invoicing and the running of the company to Duke Street Lettings and/or its accountants, Murrells. When the invoicing point was raised DSL changed its software and the invoices were re-issued properly, complying with section 47 and being accompanied by the correct summary.

29. The secretarial fees were explained by Mr Whitehand as the cost of his time as a director in trying to look into the correspondence with JS Bloor (Sudbury) Ltd about the title, and especially concerning the separate car parking areas which had nothing to do with the flats. Rather than employ an expensive solicitor he did it himself, devoting 35 hours to the task. He had qualified as a solicitor – but specialising in criminal law rather than real property – and had not practised for 15 years. As well as this role he was a director of a property company, dealing with commercial properties and development.

30. There were still issues concerning the transfer of the land in 2005. He stated that he had bought the freehold personally, for £14 000, and then gifted it to the company. The TP1, Land Registry documents and plan (unhelpfully not in colour) and completion statement and invoice from his conveyancing solicitors

(Lawrence Wood) were in section j of the bundle. The invoice is addressed to Mr K R Whitehand, Officers Village Management Company Limited, at 3 Gerald Close, Norwich. This is both his home address and the registered office of the company. This suggests that the invoice is addressed to him not in a personal capacity but as an officer of the company. To gift the freehold to a company controlled by 13 other lessees seems remarkably generous, but no point was taken on this.

31. Asked about how the purchase price was calculated, he said that it was calculated by JS Bloor at £1 000 per flat, with 125 year leases. No separate advice was taken as to the potential cost if acquired instead under Part I of the 1987 Act.

32. Mrs Cawdron was simply a contractor. She sent her invoices to DSL, which then passed them to him for payment by company cheque. DSL seemingly was not involved in negotiating contracts or paying bills. It did, however, handle day-to-day complaints about bin areas, alarms going off, and with the accounts.

33. When an AGM was called in March 2017 at the insistence of three lessees (but attended by most) it was agreed to put the cleaning and gardening work out to tender to three contractors. A specification was produced, although it was not in the bundle and had not been seen by the applicant. It seems that Mrs Cawdron was the lowest bidder. Asked by the tribunal what he knew of the consultation requirements for long term agreements under section 20 of the 1985 Act, Mr Whitehand confessed complete ignorance. When explained to him, he said that the contract was for an initial two months, and thereafter rolled on from month to month. From the spreadsheet at page 93 created by Mr Wormall from invoices and bank statements produced by the company it could be seen that the amounts charged each month for cleaning and gardening were consistent throughout the year.

34. For gardening this is surprising, as the amount of work required will clearly differ in summer from that in winter. This was confirmed by Mr Whitehand, who said that in summer 2017 gardeners were there weekly for two months of high growth. However, he could not explain how or why Mr Wormall had on two occasions seen a man in a van marked *RPS Maintenance Services* attending the property. Initially assuming that he was there to attend to a maintenance issue inside the building, Mr Wormall was surprised to be told that he was there to do gardening. On the second occasion the same van was present when the hedge was being dealt with. Did Mrs Cawdron have the authority (or a sufficient profit margin) to sub-contract the work?

35. The tribunal asked Mr Whitehand how the service charges were calculated, as the lease states that the costs are referrable to each specific block. These costs looked like they were calculated globally, but with limited disclosure it was difficult to say what was going on. He assumed that DSL simply followed on from the way its predecessor, Robert Wells, had done the accounts, and that he had just carried on from how they were prepared originally. In the budget at page 107 he could give no explanation for what "sundry charges" were for. Apart from insurance and utility bills all the figures were round numbers. Accountancy was charged at £400 and the fee for DSL as managing agent was recorded as £2 100. He did not know if the lease allowed for a reserve account (it does), but if there was a

surplus it was retained as a matter of practice anyway.

36. No proper service charge accounts were seen, but Mr Wormall had managed to produce at page 118 a schedule covering the period 2010 to 2016. This came from the annual report and accounts filed by the respondent at Companies House. It showed that company accounts were produced, recording much the same sort of cost items as shown in the budget. This showed an apparent failure to separate the service charge costs (income does not appear in the schedule) from the company's own assets and liabilities. There was no evidence, either from the budget or the filed accounts (at least from the information shown at page 107), of any ring-fenced reserve account being kept.

Discussion and findings

37. It is an all too common feature of lessee-controlled management companies that the task of running the company is left to an individual or a small group, with the involvement of the rest of the members being limited to complaining every time they are asked to pay money. There is a temptation therefore to do it all on the cheap, "saving money" by not taking professional advice or simply outsourcing the actual management to a firm of managing agents with procedures in place to handle another block (or three) at marginal additional cost.

38. As the hearing progressed it became clearer and clearer to Mr Whitehand that he is way out of his depth, and the tribunal hopes that it also became clear to the applicant (and to other lessees who may find and read this decision) that making findings against the company may also penalise them as well, as the price of its insolvency could be the sale of the freehold reversions (especially if the ground rent increases were not deleted from the leases by variation following purchase in 2005) to a commercial investor which would certainly impose upon them a managing agent and a regime for charging substantial administration fees for consents to assign, etc. Some serious negotiation will be required, plus a sorting out of past and future accounting and awarding of contracts. Costs will go up if this and the other blocks and car parking areas are to be managed properly, and if any debts arising from the tribunal's findings are to be covered.

39. Having considered the documents in the hearing bundle and heard the parties' observations, evidence and submissions the tribunal determines as follows :

a. The past service charge demands have not complied with the obligation to serve the prescribed summary of tenants's rights and obligations
b. Demands served have not complied with sections 47 & 48 of the 1987 Act (but they have since been re-served)
c. However, they are still invalid as the service charge has been calculated on an estate-wide basis instead of per block, as required by the lease
d. DSL as managing agent has done very little to earn its fee, as the demands issued by it were wrong in law, and all payments are made by the director and not the managing agent. This would be a standard management task
e. The choice of the gardening and cleaning contractor has been left to the director, not DSL. There has until the AGM been no periodic testing of the market, and a lack of knowledge of the section 20 consultation procedures (the consequences of which may accidentally have been avoided by the alleged short-term nature of the contract). The contractor has apparently sub-contracted some or all of the gardening work (presumably at a profit

but without the knowledge of DSL or the company). When challenged, the price dropped dramatically, yet the amount of work has remained the same or better

f. The service charge accounts do not seem to have been kept separate from the company's own funds (which latter should include the income from those freeholders using the car parking areas to access the main estate roads).

40. The secretarial fee is not a service charge item. It is a company cost concerning its estate, and in particular two parcels of land which have no connection with any of the three blocks or their running costs. This management cost may be deducted from the company's own funds (subject to the views of members in AGM), but not from the service charge account relating to any of the blocks.

41. DSL's managing agent's fee would be reasonable if it were doing the usual tasks to a reasonable standard. As it has issued unlawful service charge demands and done little to monitor the work undertaken by contractors and/or its cost, other than arrange insurance, the tribunal is prepared to allow a global figure (covering all three blocks, divided between them appropriately) of £1 260 per year.

42. On the subject of insurance, the figure of £1 659 quoted on page 107 is very low for 14 flats in three blocks. No insurance documents have been seen, and the tribunal wonders just what is the extent of the cover provided.

43. Mrs Cawdron's invoicing for gardening and cleaning is a fixed sum per month, akin to an annual rather than a monthly contract. Although re-tendering was recent Mr Whitehand could not remember who else had quoted or what the bid specification said. Invoicing at pages 94 and 95 is amateurish, with no addressee named. There has been no obvious external cleaning undertaken at the premises.

44. As for the cleaning contract, there is too little information to judge just what is a reasonable rate, as the applicant did not seek alternative quotes or evidence from a professional property manager. However, as Mrs Cawdron has been able to reduce the cost by 25% and gardening by 33% such amounts should be allowed as the maximum for the earlier year. The tribunal simply does not have enough information or competitive quotes to assess a proper figure (and is mindful that the lessee-run company will be out of pocket as a result of this finding) but this should be the task of a professional managing agent to sort out.

45. Having determined that the company cannot simply lump the costs together for all three blocks and divide the total equally between all 14 flats, a further mystery arises from the service charge demand on page 103 : just where does the 5.306123% share of the £15 250 budget figure come from? An equal one fourteenth share would be 7.142857%. This fraction is invalid.

46. Finally, the tribunal is not impressed with an accountant which cannot or will not produce proper service charge accounts in accordance with the 1985 Act and which are entirely separate from the freeholder and management company's own company accounts. As no proper accounts have been prepared (or used to calculate any end of year adjustment required) the accountant deserves no fee at all. The entire £400 per year is disallowed.

47. The net result is that the service charge demands already made are hopelessly wrong, as they have been calculated globally rather than per block. In addition, some of the amounts claimed are unreasonable or have been disallowed entirely. Nothing is therefore presently recoverable for either of the years in question.

48. It will be necessary for the company to rethink the way ahead. Mr Whitehand is the sole remaining director, and the tribunal could well understand if he were to resign in despair. Instead he needs the concerted support of new directors willing to assist him in or take over the tasks of reworking the service charges and the running of the company. Fresh accountants will be needed, and perhaps a new managing agent. The skills required of a letting agent are very different from those needed for the management of residential blocks – especially, as here, where there is the added complication of managing third party rights (yet to be clarified) over two entirely separate freehold parking areas. The management of those areas affects the company's own funds and declarable assets and profits. It does not affect the service charge account, save to the extent that the members may vote to distribute accumulated profits either to a service charge reserve fund or by a discount to the service charge recoverable for a particular year.

Dated 10th January 2018

Graham Sinclair

Graham Sinclair
Tribunal Judge