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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/OOME/LSC/2017/0035**
Property	:	**6 Dorchester Mansions, Cross Road, Sunningdale, Berkshire SL5 9SG**
Applicant	:	**Mr Adrian John Munn** **Mr Robert Lawson Gold**
Representative	:	**Themselves in person**
Respondent	:	**Trinity (Estates) Property Management Ltd**
Representative	:	**Miss Tara Taylor, In-house Solicitor** **Mrs Carol Lawes** **Mr Dan Channon**
Type of Application	:	**Application under Section 27A and 20C of the Landlord and Tenant Act 1985**
Tribunal Members	:	**Tribunal Judge Dutton** **Mrs M Wilcox BSc MRICS** **Mr O N Miller BSc**
Date and venue of Hearing	:	**De Vere Beaumont Estate Conference Centre, Old Windsor, on 17th July 2017**
Date of Decision	:	**10th August 2017**

DECISION

DECISION

1. **The Tribunal makes the various decisions in respect of the matters as set out below.**
2. **The Tribunal records that the Respondents would not be seeking to recover the cost of these proceedings through the service charge, but for the avoidance of doubt, it being just and equitable, the Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 (the Act).**
3. **The Tribunal determines that the Respondents shall reimburse the Applicants 50% of the fees paid in this matter, the total being £300, therefore a reimbursement of £150 is required within the next 28 days or alternatively it should be offset against any outstanding service charge liability.**

BACKGROUND

1. This is an application made by Mr Munn and Mr Gold, the leasehold owners of Flat 6, Dorchester Mansions, Cross Road, Sunningdale (the Property). In the original application, the Applicants sought to challenge a number of issues of service charges from 2008 onwards. However, as a result of concessions made by the Respondents and the Applicants, there remained only the following issues for determination, which were set out in a Scott Schedule included in bundle 1 and dated 15th May 2017. They were also referred to in a helpful skeleton argument prepared by the Respondent. We record firstly those matters that are no longer in issue:-

    - The issue on air conditioning in the year 2008/09 has been resolved and a refund of the charge made to the Applicants in the sum of £86.50 has now been made.
    - The costs of repair to a driveway pump have also been conceded by the Respondent and that is £84.90.
    - Matters relating to the repair of a TV aerial and the attendance by arboriculturalists is now no longer in issue.
    - Claims in respect of the collection of bad debts in the sum of £200 has fallen away, it being it seems more of an accounting error than anything else. The attempt to claim a bad debt write-off in the total sum of £5,354 exposing the Applicants to a claim of £382.43 has also been conceded.
    - On the question of communal cleaning, there were issues as to the sums involved, although not necessarily the standard of cleaning. The Applicants sought a confirmation that the figures in 2014/15 and 2015/16 were correct and that no additional sums would be added to those periods in later years. A confirmation was given by the Respondents that those two sums for those two years were correct and that there would be no extra charge and on this basis the Applicants conceded that they would not challenge the communal cleaning costs.
    - The money spent in relation to fire risk assessment is now no longer in issue.

2. This meant that we were required to make determinations on the following issues:-

- The attendance of Otis following flooding of the car park and lift.
- The cost of lift maintenance, in particular the installation of a new emergency call system.
- Landscape maintenance, in particular works associated to one tree left after other landscape works had taken place.
- The cost of maintenance of the pumps providing water to the individual properties.
- The cost of insurance for the Property.

3. Before we deal with the individual items, we should first record our inspection of the Property which occurred on the morning of the hearing.

4. The estate consists two three-storey purpose-built blocks in pleasant grounds with secure entrance. The block occupied by Mr Munn and Mr Gold lies to the left-hand side when looking at the Property from the road. The car park is reached by a curving, sloping drive edged by a tall retaining wall. Where the drive enters the garage is metal grating intended to presumably deal with water running down the driveway and adjacent to that area is a manhole cover over, we understand, a sump which assists in the removal of water from this area.

5. The garage area is extensive and well-lit and houses the pumps and cold water tanks for the individual flats within the building. We noted also the lift.

6. Having inspected the garage area, we had a tour of the gardens which are in good order and noted that there had been works to the extensive hedges surrounding same. An inspection of the common parts revealed that these were clean and in good condition and the lift at the time of our inspection appeared to be in working order. We noted also that the common parts had the benefit of automatic lighting and it appeared some form of smoke detection system.

7. Mr Munn asked us to look at the common parts of the adjoining building which he said were not as well kept mainly because Mr Gold, it seems, carried out some cleaning works himself. There was some evidence of slight staining to the walls immediately above the radiators in the other block's common parts, which may have been associated with their operation but otherwise they appeared to be in good condition.

8. Prior to the hearing, we were provided with two bundles of documents, the first containing the application with appendices, the directions and statements of case on behalf of the Applicants, together with the Scot Schedule and further appendices. We also had Mr Dan Channon's witness statement and a response thereto and the Respondent's statement of case. These were on double-sided copies running to some 129 pages. In the second bundle, which contained the Respondent's papers but included the lease and other documents relevant to the case, were invoices and other matters to support the Respondent's position and this bundle ran to some 314 pages.

9. We also received a skeleton argument on behalf of the Respondents with a copy of the case report from the Upper Tribunal of *Avon Estates (London) Limited v*

Sinclair Gardens Investments (Kensington Limited) [2013]UKUT264(LC). We will return to that on the question of insurance in due course. In addition, the Respondents on the insurance point, had prepared a schedule highlighting the differences between the various insurance proposals. We also had a copy from Trinity to Mr Munn and Mr Gold of a letter sent on 16th April 2015 which related to the tree works, again a matter that we will return to at the relevant time.

The Hearing

10. We turn then to the individual items in dispute and start with the costs associated with the flooding to the lift. There seems to be little need for us to repeat the chronology which is set out at page 93 of the first bundle. The Respondents have conceded most of the expenses associated with this issue. The one item that remains in dispute, however, as a result of this flooding, is the costs of attendance of Otis set out in an invoice at page 154 of the 2nd bundle in the sum of £347.23. The invoice indicates that this related to a site visit where there had been a problem *"with the hoistway pit equipment wiring oil leak."* The invoice goes on to say that the cost was chargeable as *"the cause of this problem was due to misuse which is not covered by your contract."* There is no indication as to what this misuse may be and one is left to ponder whether it related to the flooding. As we understand it, the costs associated with the removal of the water from the lift shaft are not in issue. Mr Munn indicated that there was no evidence to support the contention that the problems had been caused misuse. It was, he said, a natural conclusion to draw that the lift only went out of service after the rain and it was, therefore, that which caused the problem. It should not, therefore, be payable as a service charge.

11. The Respondents relied on their statement of case which was to be found at the beginning of the 2nd bundle and we note all that has been said. It is, however, noted by us that the bulk of the costs associated with this flooding have not been passed on as a service charge.

12. **Tribunal's decision.** Given that the bulk of the costs associated with the flooding, an event which is not denied, have been conceded by the Respondent, it seems strange that the Respondents should continue to press for the payment of the costs of Otis in attending the Property. Although we understand the Respondents attempted to obtain more information from Otis, given the length of time that this incident occurred, we can understand that there may be a problem in that regard. The Respondents did not raise any argument on limitation. It is in itself something of a grey area in respect of proceedings of this nature. In the absence of such an argument being advanced, we do not propose to make any findings in that regard. We do, however, consider that having conceded the other costs associated with the flooding not to do so in respect of the call out by Otis seems odd. There is no indication as to what the "misuse" might have been and we agree with Mr Munn that one is forced to the conclusion that this was as a result of the flooding. If the Respondents are not intending to push to recover the costs associated with the flooding, this seems to us to be a further expense associated with that difficulty and we therefore disallow it.

13. The next matter that we turn to relates to lift maintenance, or more particularly, the installation of a new emergency call system. The Applicants do not know why

the system had to be changed. It appears that the original lift maintenance contract was with Landmark who manufactured the lift. Subsequently the contract was removed from them to Otis. This occurred in 2009. It appears that when the Respondents changed to Otis they had to upgrade the remote emergency monitor. The move to Otis was as a result of tendering exercises undertaken at the time and in changing to Otis it was necessary to alter the emergency call system which would be recognised by Otis, and indeed we were told, by other companies, which was not the case with the original Landmark system. The Applicants complained that they were not aware that there had been such a switch.

14. **Tribunal decision** This is now going back some time and there is no challenge to the decision by Trinity to change the service provider at the time. We accept also the submissions made by Trinity that the change of contractor was reasonable and that the need to alter the call system was required. We were told that the new system enabled any person trapped to connect directly with the lift contractor's 24-hour service which would ensure the quickest possible repair and release time. Accordingly, we find that the costs associated with the lift repair in the sum of £810 are reasonable and are payable.

15. The next matter to deal with relates to the question of landscape maintenance. It appears that works were required to a number of trees and hedges following discussions with residents. A tree surgeon apparently carried out a survey and listed the items they felt that required attention which was set out in a letter which we saw to Mr Munn and Mr Gold dated 16th April 2015. This listed a number of lime trees, Cyprus trees and hedges to be reduced and/or removed. It also contained reference to a dead Cyprus tree to be removed to ground level. Three quotes were sought and the Tree Care Company instructed at a price of £3,240. None of this is in issue.

16. What is in issue is that it appears that one tree was left in situ. This result in an additional cost of £1,560 for the removal of this tree. In the Respondent's statement, they say that the tree was leaning and leaseholders at the development had expressed concerns that it might fall. A photograph of the tree was included in the bundle at page 213 and shows a rather unattractive specimen devoid of leaves to one side and appearing the lean away slightly from the boundary of the Property. This resulted in a cost of £1,300 plus VAT. This is evidenced by an invoice from Ottimo Property Services Limited dated 26th September 2016. It refers to cutting down the tree to make it safe. Two men and six hours each giving the charge of £1,300. It is noted that Ottimo trade from the same address as Trinity Estates.

17. For the Applicants, Mr Munn said that discussions had taken place with the original contractor. The Tree Care Company had indicated that they would remove the tree for around £250. There is no evidence to support such a "quote." Mr Munn accepted it was verbal only. The Respondents for their part said they did get a quote from Arcadian but that was £100 or so more. We were also told that the Tree Care Company provided the original survey and of course it was they who carried out the work. One would have assumed that having set out the trees to be dealt with this would have been within their remit if they had been so instructed to carry out the work. It seems that the state of the tree was brought to

the Respondent's attention after the Tree Care Company had completed the original works at the Property.

18. Mr Channon in his evidence to us said that he relied on the survey by the Tree Care Company. It does seem from the photograph that to have left this tree in situ was almost perverse. It does not appear from the photograph to be a particularly inspiring specimen.

19. **Tribunal Decision** We accept that if the original quote from the Tree Care Company did not include the removal of this tree, there would have been a further expense. The evidence of Mr Munn that they had quoted £250 is not supported. We do have the invoice from Ottimo showing this expense as having been incurred. With great reluctance, however, we accept that this is a cost which is due and owing. We do, however, think that in future Mr Channon needs to take a more proactive approach towards works of this nature and not just rely upon a tree survey if what is left produces the eyesore which is apparent in the photograph that we have in the bundle. We have little doubt that the costs associated with the removal of this tree at the same time as the other works were carried out would have been less than the one-off call which resulted in the invoice before us. In addition, the costs of the works also seem quite high. However, we have no evidence which would enable us to realistically challenge these expenses and there is no suggestion by the Applicants that this sum has not been paid. We therefore find that the amount shown on the Ottimo invoice of £1,560 is due and owing.

20. The next matter that we will deal with is the question of pump maintenance.

21. It appears from our inspection that each property has their own tank in the car park area and the water from that is pumped to the individual flats. Some suggestion was made that the fact that one pump did not work did not prevent water being conveyed to the flats in question. The issue in this case seemed to be the difference between the various invoices associated with this work that was set out at pages 217 onwards in the 2nd bundle. There are variations in the time spent, although the charging rates remain the same. We are somewhat surprised that the travel time should be charged at the same as the engineer's rates, which is £50 per hour, and the mileage costs are at 80p per mile. However, there is it seems to us, clear evidence that costs have been incurred and no evidence that there was any particular overcharging. It was suggested by the Applicants that the invoice at page 222 showing a figure of £1,380, set the benchmark for costs associated with this work. It has to be said that some of the invoices were less than that and some more. However, the works on each invoice are not necessarily the same. There was no comparable evidence provided by the Applicants as to whether the works could have been carried out at a lower price. There was no denial that the works had been done but rather that the time spent had been inflated. The Applicants indicated they would like to consider changes to the arrangements to see if costs could be reduced and the Respondents affirmed that they were willing to do so.

22. **Tribunal Decision** Our findings on this element are that the costs are reasonable and recoverable. There will inevitably be some variations in the invoices depending on the work that was done. Some evidenced two visits and

works associated with additional matters. The charging rates remain the same throughout. In those circumstances, we find the costs associated with pump maintenance are reasonable and payable.

23. The question of the accounts was also raised. The particular challenge by the Applicants was the accuracy of the balance sheets. Mr Munn, who is an accountant, indicated that there were clear errors as they did not show monies that he owed. He suggested that the accounts should be revisited and indeed offered to assist. The Respondents have confirmed that they will review the two years' balance sheets for 2015/16 and consider any changes that need to be made. This satisfied the Applicants.

24. The last issue we need to deal with is that of insurance. The main argument by the Respondents was that the market was not tested. They had obtained a number of alternative quotes and their view was that the insurance could be obtained for a much lower price. They referred us to the extensive document headed Trinity (Estates) Property Management Limited Property Portfolio Renewal dated 1st August 2015 prepared by Lockton. Within that document is a section headed Alternative Terms, which confirms that to ensure that the premiums quoted by AXA remained competitive, they had approached three others - Amlin, RSA and Zurich - whose premiums, albeit rounded to the nearest million pounds, were more expensive than those of AXA, which for the year 2015/16 had a total premium of £2,816,236. This rounding of the premiums Mr Munn thought was not evidence that the market had properly tested. The document at 279 also confirmed that Locktons had negotiated with AXA to offer renewal terms at the expiring premium rates which they considered remained competitive as a result of the previous approaches to Zurich, RSA and Amlin. The document also goes on the confirm that they will *"continue to review the current basis of premium allocation with Trinity."*

25. It is noted that there is an extensive property portfolio and this property forms part. As at 3rd June 2016 it appears that there have been 179 claims and the sums of £860,024 had apparently been expended.

26. The certificates of insurance for 2016 and 2017 were included and we noted the premiums payable and the cover provided. There had also been a reinstatement cost assessment as at 31st August 2015 putting a value on the properties of £6,674,000.

27. By contrast, at appendix C of the 1st bundle, the Respondents had obtained insurance quotes from Coveia, NIG, Ageas and Royal and Sun Alliance. The average of those quotes was £6,098. The lowest was Coveia at £4,642 and highest Royal and Sun Alliance at £7,565. There were certain conditions imposed, for example, a condition as to the nature of the tenancies if any, but we were told that these quotations obtained by the Applicants had been based on the AXA insurance schedules, including the claims history.

28. We understood from the Respondents that the cover had been placed with AXA since 2011 and that they had forwarded to their brokers Lockton details of the alternative quotes. Locktons had apparently told them that the cover they had through AXA was superior but somewhat strangely Trinity had not sought to

obtain written confirmation from Locktons to this fact or the reasons why such cover was superior.

29. We were given some assistance with the schedule prepared by Trinity setting out the alternative cover. We noted that there were certain differences, for example, the Coveia and Royal and Sun Alliance policies did not include terrorism cover and there were differing figures in respect of loss of rent, the existing AXA policy appearing to have no provision. The Coveia building value showed a lower figure although the declared values were pretty much the same. There were differences in excesses, in fact the Royal and Sun Alliance being superior in that regard to AXA.

30. Mr Munn sought to argue that the insurance for all years should be revisited by us by taking the percentage difference between the average premium now and applying that against the earlier years.

31. **Tribunal Decision** We have considered the arguments put to us. This is always a difficult area, the more so when the landlord has a large property portfolio and insures on a block policy. That is not in our finding a fault as it does ensure that cover is renewed annually rather than requiring individual insurance policies to be obtained.

32. The law relating to the assessment of insurance premiums is set out in a number of cases but helpfully included in the decision of Avon Estates referred to above at paragraph 30. This said as follows: *"The LVT was dealing with the evidence it had before it and properly directed itself to the relevant and correct law, setting out the principle that the landlord is not obliged to shop around to find the cheapest insurance. So long as the insurance is obtained in the market and at arm's length, then the premium is reasonably incurred. There is nothing to suggest that the insurance was arranged otherwise than in the normal course of business, and the Appellant did not seek to adduce evidence to support such a contention. The Appellant's complaint is that it might be possible to obtain a cheaper rate, but it is not for the landlord to establish (as had been expressly found in Berrycroft) that the insurance premium was the cheapest that could be found in order for the costs to have been reasonably incurred. The words "properly testing the market" used by Mr Francis in Forcelux in 2001 does not in any way detract from the decision of the Court of Appeal in Berrycroft and Havenridge that the landlord must prove either that the rate is representative of the market or that the contract was negotiated at arm's length and in the marketplace."*

33. In this case, it is clear to us that Locktons have undertaken the usual investigations as brokers and have advised Trinity that the cover they have with AXA at that time was the most appropriate. In those circumstances, we must find that the insurance premiums in dispute are reasonable and payable. We do not propose to apply some form of percentage reduction to the earlier years as there is no evidence to show that in those earlier years the proper testing of the market did not take place. In those circumstances, therefore, we reject any challenge to the insurance on the part of the Applicants.

34. We turn then to the question of the section 20C application. The Respondents indicated to us at the hearing that they would not be seeking to recover the costs of these proceedings. They had no objection to us making an order under section 20C and accordingly we do so considering it just and equitable in the circumstances, particularly having regard to the relevant success of the Applicants in a number of their challenges and the concessions made.

35. The only other issue related to a request by Mr Munn for reimbursement of the fees that they had paid which is £300. We have considered this. There has been success on both sides and it seems to us, therefore, reasonable to divide the costs of the fees equally between the parties. We therefore order the Respondents to pay to Applicants the sum of £150 within 28 days or to offset that against any outstanding service charge that there may be.

Andrew Dutton

Judge:

A A Dutton

Date: 10th August 2017

ANNEX – RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-Tier at the Regional Office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional Office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28-day time limit, such application must include a request to an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (ie give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
(a) "costs" includes overheads, and
(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(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 provisions 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.

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 -
(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 the appropriate 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.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20C

(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 court, residential property tribunal or the Upper 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.

(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to that tribunal;
(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
(c) in the case of proceedings before the Upper Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.