12000

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BK/LSC/2016/0456**
Property	:	**Flats 1, 1A, 3-8, 10A, 11, 12, 14, 16, 16A, 14-15 Grosvenor Square, London W1K 6LD**
Applicant	:	**Various leaseholders of 14-15 Grosvenor Square, London W1K 6LD (as named in the application)**
Representative	:	**Jaffe Porter Crossick LLP**
Respondent	:	**15 Grosvenor Square (Tenants) Limited**
Representative	:	**Brian Harris & Co**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Judge Hargreaves** **Peter Roberts Dip.Arch, R.I.B.A**
Date and venue of hearing	:	**10 Alfred Place, London WC1E 7LR** **19th April 2016**
Date of decision	:	**16th March 2017**

DECISION

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1. The Respondent is not entitled to charge the Applicants sums in respect of legal fees and accountancy fees incurred in relation to the winding up or dissolution of the Respondent by way of service charges.

2. The Tribunal concludes that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Respondent may not pass any of its costs incurred in connection with the proceedings before the Tribunal through the service charge.

REASONS

1. The Tribunal has read and considered the lengthy statements of case filed by both parties. Both statements include arguments and submissions on the legal point in issue (including submissions on authorities) which is a matter of construction of the relevant lease. Both parties having opted for a paper decision, it is not intended to repeat their arguments at any length. Similarly, as the parties have set out the background of the current dispute at length, as well as each side's practical and financial submissions on the point in dispute, it is not intended to set those out in any detail either. As what is in issue is a question of construction, the practical ramifications will have to be resolved by other means: but those difficulties, if any, cannot in this case govern the correct approach to construction.

2. The issue to be resolved was analysed at paragraph 4 of the directions, attended by representatives of both parties, dated 12th January 2017. We are not concerned with costs other than those which would be incurred by the Respondent in dissolving itself/winding up, which the Respondent seeks to re-charge under the service charge provisions of the lease referred to below. These charges have not been crystallised or charged but the Tribunal can consider the recoverability pursuant to *s27A(3) LTA 1985*.

3. References are to either parties' bundle, prefixed by A or R as appropriate.

4. The Tribunal is concerned with the following provisions of an underlease dated 6th March 1981, between T.H.M. Developments Limited as Lessor and the Respondent as the Company (and a third party as Lessee) ("the lease"). After enfranchisement, the role of the Respondent is redundant. It claims to be facing substantial costs in respect of dissolving itself, which it wishes to re-charge to the Applicants under the service charge provisions of the lease. The relevant covenants are in clause 5(8) (A118) and paragraph 2(F)[1] of part B of the Fifth Schedule (A134).

5. Before turning to those provisions, it is clear from the Respondent's Memorandum and Articles of Association (A137) that the only business of the Respondent is the management of the property at 15 Grosvenor

[1] We describe this as para 2(F) for clarity as 2(D) is clearly a mistake

Square, with all the usual management and charging functions. That is not in issue.

6. Pursuant to clause 5(8) of the lease the Respondent covenanted *"To undertake the **management** of the Building (in which event the [Respondent] shall be entitled to be remunerated with all proper and reasonable fees charges and expenses payable or incurred in connection with such **management** and including the cost of computing and collecting the service charges) ..."* The cost of dissolving the Respondent is not a cost of computing and collecting the service charge or management. The word **management** is emphasised to stress that the costs recoverable are related to this function, and no other. Winding up when the management function has gone is not a function of management: it is *post* management. It has nothing to do with the building but everything to do with company law.

7. Clause 5(2) brings in the further detailed service charge provisions set out in the Fifth Schedule, and the more particular issue is whether the costs which the Respondent wishes to charge come within Part B paragraph 2(F) (A134). The schedule defines the costs which the Respondent can recover in respect of its outgoings. Nothing in paragraphs 2(A)(B)(C)(D)(E) is relevant, but they emphasise the management functions in respect of which costs are recoverable. Paragraph 2(F) enables the Company to recover (with the Tribunal's numbering inserted) *"..... expenses incurred by the Company including Managing Agents' fees and expenses attributable (i) to the general supervision and management and (ii) the proper upkeep and maintenance of the Building (iii) not otherwise specifically included in Clause 5 of the Lease or in this Schedule and (iv) in particular but without prejudice to the generality of the foregoing (v) the cost of undertaking the management themselves pursuant to Clause 5 of this Lease and (vi) the expenses in connection with refuse collection and disposal and porterage ... and (vii) the control or destruction of pests and vermin."*

8. With respect to the parties' detailed arguments, the construction issue is in our judgment straightforward. Points (i) and (ii) emphasise that recoverable costs are limited to those which relate to *practical* activities (*supervision ... management ... proper upkeep ... maintenance"*) which might have fallen outside the stated provisions of clause 5 of the lease but which would otherwise be readily characterised as within this type of activity, as point (iii) refers. But point (iv) also introduces (vi) and (vii) by reference to (i) and (ii), so the effect of the clause as a whole is to be construed against the Respondent's interpretation, as it cannot be argued that the costs in dispute come within (vi) and (vii) or (i) or (ii). It may be a "catch all" clause as argued by the Respondent, but it is still limited in its basic application.

9. Simply put, the lease fails to deal as a matter of construction with the charges which the Respondent seeks to recover. Arguments about purposive or restrictive approaches to construction do not assist because the meaning is plain and unambiguous.

10. As the charges are not recoverable, the Tribunal does not have to concern itself with the next question, which is whether the costs claimed would be reasonable (see eg A163 paragraphs 35-118, R6, paras 31-76).

11. As the dispute has been resolved in favour of the Applicant, in these circumstances it is just and equitable to make a *s20C* order.

Judge Hargreaves

Peter Roberts Dip. Arch., R.I.B.A

16th March 2017

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 20

(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) the appropriate 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.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the 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.

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.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
  (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
  (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
  (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
  (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or

(b) on particular evidence,
of any question which may be the subject matter of an application under sub-paragraph (1).

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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 Tribunal at the regional office which has been dealing with the case.

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.

If the application is not made within the 28 day time limit, such application must include a request for 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.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. 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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).