12873

First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/00KF/LSC/2018/0006**
Property	:	**Warrior House,** **42-82 Southchurch Road,** **Southend-on-Sea,** **SS1 2LZ**
Applicant **Represented by**	:	**Warrior House Residents Association** **Eleanor Fine – lay representative**
Respondent **Represented by**	:	**Sovereign Estates Ltd.** **Matthew McDermot of counsel (BTMK)**
Date of Applications	:	**5th April and 23rd May 2018**
Type of Application	:	**to determine reasonableness and payability of service charges**
The Tribunal	:	**Bruce Edgington (Lawyer Chair)** **Marina Krisko BSc (Est. Man.) FRICS** **Alison Flynn MA MRICS**
Date and place of hearing	:	**11th September 2018 at Southend Magistrates' Court, 80 Victoria Avenue, Southend-on-Sea SS2 6EU**

DECISION

1. The Tribunal determines that the applications partly succeed in that the leaseholder's individual service charge accounts must be credited with the overall sum of £14,292.78 as set out in the statement of Alex Bunney Dip Surv MRICS plus £2,750 being the amount paid to John Watt upon termination of his employment. The suggestion that any of these monies should be paid into the sinking fund is not agreed.

2. How much is credited to each leaseholder will depend on the proportion of service charges they were debited for each item making up the total.

3. In addition, there must be a recalculation of the proportion of the service charges paid to the head landlord by or on behalf of the under leaseholders for the years in question so that 32.79% is the amount paid with any

underpayment or overpayment being debited or credited from or to the leaseholders' service charge accounts accordingly.

4. The necessary calculations, debits and credits must be made by or on behalf of the landlord within 28 days of the receipt of this decision and, once the amended accounts have been notified to the leaseholders, they shall each make payment of any debit on their service charge account within 28 days thereafter.

5. Save for these matters, the Tribunal determines that the challenged amounts of service charges incurred with the various contractors, people and organisations named as Steve Fern, John Watt, Hugh Taylor, Dean Kirk, Lift Pro, S J Hare, Hydehead Management Co., Mells Roofing Contractor, G.P. Mason contractor, SSP Technologies, Taylor Chartered Surveyors, Powerlec, KG Architects, C&S&Sons, Motif Signs, Talk Talk Telephone, Livemore Contractors, Southend Laptops Contractor, PRM maintenance contractor, Fire Department contractors and Ketteridge Consultants are within the range of being reasonable and are payable based on the evidence before the Tribunal.

6. Orders are made pursuant to section 20C of the **Landlord and Tenant Act 1985** ("the 1985 Act") and paragraph 5A of Schedule 11 to the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") preventing the Respondent from being able to recover any costs of representation in these proceedings as part of any future service charge or administration charge.

Reasons

Introduction

7. This is an application by a residents' association representing 14 flat owners in the property. There are a total of 19 flats. Warrior House is a 3 storey building with a basement built in about 1960 of reinforced concrete frame with brick and block infill walls below a flat asphalt and felt roof. It was a department store until the mid 1980's when it was converted. The flats were created on the 2nd floor and the other parts of the building appear to have commercial use. This building is in central Southend with easy access to the main High Street and 2 railway stations with commuter trains to central London.

8. The Freehold of the building is owned by Palmlake Properties Ltd. ("Palmlake") which gave a 999 head lease of the reception on the ground floor plus access to the flats and the flats themselves on the 2nd floor in favour of the Respondent on the 28th November 1997. This head lease provides that the Respondent must pay 32.79% of the costs incurred by the freeholder in managing, insuring and maintaining the building. In other words everything the head landlord spends on insurance, keeping the structure, roof and foundations in repair, maintaining the common parts including the large area on the ground floor at the rear where the waste bins etc. are kept, paying for a caretaker, decorating the exterior and interior common parts etc.

9. The Applicant challenges a large number of service charges but has also included requests to make all sorts of orders and determinations as if they were expecting the Tribunal to carry out what can only be described as a public enquiry into the behaviour of the immediate landlord, the superior landlord and their various contractors. Suggestions are made as to how the Applicant considers that management of the building should be improved. The Applicant must understand that the only jurisdiction of this expert Tribunal is to determine the reasonableness and payability of particular service charges.

10. One other point which troubled the Tribunal was whether any of the service charges had been paid. Section 27A of the 1985 Act does say that mere payment does not necessarily mean admission or agreement of service charges but if there had been such admission or agreement at the time of any payment, then the Tribunal would have no jurisdiction. The matter has not been raised by the Respondent and the Tribunal will therefore assume that there has been no agreement or admission. It was accepted at the hearing that some long leaseholders have not paid all or part of their service charges.

11. Directions orders were made by the Tribunal on the 17th April, 2nd May and 29th May 2018 timetabling the case to a final hearing and a bundle of documents was duly lodged. Both parties have provided statements of case with exhibits.

The Leases

12. As has been said, the headlease, which has been seen by the Tribunal, is for 999 years. It recites the fact that the 19 sub-leases are being granted to the flat owners and, in clauses 3.4.1 and 4.4, the landlord promises, in consideration of the 32.79% contribution referred to above, to keep the building in repair and "*to keep clean and adequately lit during the hours of darkness the entrance lobby the lift stairs and fire exits of the building*" other than those in the demise. The covenant to maintain and repair etc. is linked to Schedule 4 of the under leases.

13. The Tribunal has seen a sample under lease of one of the flats although the first page is impossible to read. The First Schedule would indicate that it is Flat 15. It is for 199 years commencing on the 24th June 1986 with a ground rent of £30 per annum. The service charge clauses are 4(P)(i)-(iv) which say that the tenant must pay a 'fair proportion' of the costs and expenses referred to in the Fourth Schedule. There must be a certificate by auditors and payments on account shall be made on 1st January and 1st July in each year.

14. The service charge consists of the total cost of maintaining, decorating, insuring and repairing the building which are not the responsibility of any tenant. A sinking fund can be created. The end result of this is that the landlord and the head landlord have responsibilities to maintain and manage. The tenants have to pay 32.79% of what the head landlord spends and this plus what is spent by the Respondent are split between the long leaseholders in accordance with proportions which appear to be based on

square footage as appears on page 350 of the bundle prepared for the Tribunal.

The Law

15. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which vary 'according to the relevant costs'. Under section 27A, this Tribunal has the jurisdiction to determine whether service charges are reasonable or payable.

The Inspection

16. Two of the Tribunal members inspected the property in the presence of Mr. McDermot of counsel and the witnesses Bunny, Fine, O'Neill and Olatokun. The location and method of construction are described above. A large part of the ground floor and first floor appear to be occupied by the NHS and the remainder of those floors appear to be occupied by commercial tenants. The basement is said to be occupied by a nightclub although the Tribunal members were unable to confirm or see that.

17. The side elevation in Warrior Square East has the entrance to the flats and the large opening with a roller shutter. Comments were made in the papers that this is closed more often than not. It was said at the inspection that this is for security reasons. The shutter was open at the time of the inspection and leads into a very large area stretching the length of the building. Southend, as with many large conurbations, suffers from homeless people sleeping in sheltered areas and drug users. For what it is worth, the Tribunal can well understand why this shutter is closed most of the time.

18. The residents' entrance leads into a fairly large empty room and then into a space where the lifts are situated. There is also a staircase leading up to the second floor where there are large hallways containing the doors to the flats. At one end is a fire escape. Despite the complaints about the condition of these 'common' parts so far as the leaseholders are concerned, the Tribunal considered that they appeared to be reasonably well decorated and fully carpeted. Some stains were noted on the carpets but they did not seem to be unduly worn.

The Hearing

19. This hearing was attended by those who were at the inspection plus some observers on both sides. Mr. McDermot said that he represented Palmlake, which had taken an assignment back from the Respondent. It was pointed out to him by the Tribunal chair that although the beneficial ownership may have transferred to his client, the legal title did not transfer until registration at the Land Registry was complete, which had not yet happened. He understood that and was asked whether he was applying for his client to be a Respondent. He said that this was not necessary.

20. Before the hearing, a letter had been written to the Tribunal on the 28th August saying that the Respondent's interest in the building had been assigned (the assignee not being identified) and that a different firm of

solicitors would be representing the Respondent "*until registration and afterwards*". The letter then says "*that neither Sovereign Estates Limited nor this firm propose to be present at any forthcoming hearing*".

21. Ms. Fine represented the Applicant and made it quite clear from the outset that the main bone of contention between the Applicant and the Respondent had been the failure of the Respondent and Palmlake to respond to queries raised and the general lack of communication. Questions about the service charges kept being asked and answers were few and far between.

22. As all the management was now being undertaken by Sorrells and as Mr. Bunny, on their behalf, had prepared a detail statement setting out background and dealing as best he could with questions raised by Ms. Fine in her statements, the Tribunal chair felt that the best way of proceeding was to go through his statement. This was particularly important because the Applicant had not filed a statement in reply saying whether it had changed its attitude after considering Mr. Bunny's comments and, in particular, his admissions of overcharging on the part of both the Respondent and Palmlake.

23. As the process went on, it became clear that in fact the Applicant did, albeit reluctantly, accept much of Mr. Bunny's comments, particularly about things at present. There were some past decisions which he was unable to comment on because he was not around at the time and did not know the reasons.

24. This process took well over an hour and the Tribunal members felt that, at the end, the tension between the parties had reduced considerably. The Applicant remained firm that it still disagreed with many things that had been done but it did at least now understand why some things had been done. It also seemed to believe that Mr. Bunny did at least better understand their grievances and, within the confines of his instructions, would do what he could to deal with them.

25. It is not felt necessary to write down in this decision all the points made and responded to. The process also had the result that it became clear that the evidence relied upon mostly by the Applicant was its members' opinions about the cost of some items based upon 'gut instinct' rather than clear evidence based on alternative quotations or expertise.

Discussion

26. In **Schilling v Canary Riverside Development PTD Ltd.** LRX/26/2005; LRX/31/2005 & LRX/47/2005 His Honour Judge Rich QC had to consider upon whom lay the burden of proof. At paragraph 15 he stated :

"If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard

was unreasonable. In discharging that burden the observations of Wood J in the Yorkbrook4 case make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard."

27. Many of the 13 general comments made by the Applicant in its 'position statement' on how the Applicant thinks that management could be improved are largely irrelevant to the Tribunal's task. The only questions are whether the services provided have been reasonable and whether the charges themselves are reasonable and payable.

28. The Respondent, through Mr. Bunny, and because of this application, seems to now understand the strength of feeling amongst at least some of the long leaseholders. The same can now be said of Palmlake. However as the Tribunal chair said to the leaseholders present, the lease arrangements are very unusual and unpredictable because a large part of the head landlord's costs included liabilities which where nothing to do with the leaseholders and over which they have no control. It may be that the differing percentages of costs for different things was an attempt to be fairer to the leaseholders. Unfortunately they breach the contractual arrangements.

29. The areas where the Tribunal had sympathy for the long leaseholders included the need to have 2 associated companies manage the building and the 2nd floor and both charge a fee; what appeared to be a blatant disregard for the consultation provisions; the failure to look at and follow what was in the head lease about the percentage of service charges payable by the long leaseholders and the apparent failure to engage properly with the leaseholders.

30. As far as the cost of management is concerned, the Tribunal was not told how many of the commercial tenants have full repairing and insuring leases, which would be normal for commercial leases. Such leases obviously reduce the need to manage and the need for 2 managing agents which should be reflected in any management fee. Furthermore, the fact that there are no outside 'grounds' such as a garden, reduces the need for management.

31. The one item of 'service charge' where the Tribunal disagrees fundamentally with the Respondent is the inclusion of £2,750 paid to John Watt when he was replaced. The inference drawn from Mr. Bunny's description of what happened, on page 146 of the bundle, is that the process of dismissal was flawed and the legal advice referred to reflected that. As Ms. Fine said, there are correct processes of warnings etc. to be followed, which presumably did not happen.

32. The Tribunal agrees that in the real world, some employers are prepared to cut corners and pay compensation to avoid claims. However, that is a commercial decision by an employer and is not covered by the definition of a service charge as set out in section 18 of the 1985 Act.

33. As to matters generally, the Applicant's members may be disappointed that many of the points raised are not decided in their favour for the reasons stated. They may like to note that some of this is because of the delay in bringing this application. Trying to sort out the reasonableness of service charges incurred some years ago is always more difficult.

Conclusions

34. Taking all these matters into account and doing the best it can to work through the copious paperwork, the Tribunal concludes that whilst many of the comments and allegations made by the Applicant are, on the face of it, worthy of sympathy, the actual evidence produced is almost all the opinion of the leaseholders without any real evidence of unreasonableness or, put another way, of what each challenged cost should be if it is, in fact, unreasonable.

35. The Applicant's members may say that as this is an expert Tribunal, it should be able to make this sort of decision. If they do, then they misunderstand the nature of an expert Tribunal. The members of such a Tribunal simply apply their expertise to the evidence and then make decisions. They cannot create the evidence themselves. As is made clear in the **Schilling** case, it is up to the party alleging unreasonableness to start off the process by providing evidence of unreasonableness.

36. They should at least take comfort in the fact that they have achieved quite a bit by raising the issue of, for example, overcharging when there has been no consultation. They may also take comfort from the fact that there is now only one managing agent and it is hoped that there will be ongoing dialogue by, perhaps, having an annual meeting with Sorrells just before the budgets are prepared. This is likely to achieve more than constant badgering by individuals.

Costs

37. The Tribunal chair asked Mr. McDermot what his instructions were with regard to the application by the Applicant that its costs of representation should not form part of any future service charge or administration charge. He said that he considered that his client's costs were covered by the very general and all inclusive provisions of the 4th paragraph in the Fourth Schedule to the under lease allowing legal charges to be recovered "*in taking or defending proceedings...arising out of any Lease of any part of the Development*".

38. The fact of the matter is that this Respondent and, probably, Palmlake have demanded money from the long leaseholders to which they were not entitled because they did not consult on certain service charges incurred. They have failed to keep to the terms of the head lease by paying and demanding respectively, percentages of service charges in breach of its terms. The Tribunal is satisfied that these proceedings have brought these things to light.

39. Mr. McDermot represented that any claim for costs would not be a service charge or an administration charge. The Fourth Schedule of the under lease

is, of course, a list of those items which are service charges. Clause 3(C) of the lease, which is the other reference to costs, only comes into effect if the decision has been taken to forfeit and there was no mention of this in the papers or at the hearing.

40. The Tribunal has no hesitation in making the orders requested. If it had been tasked to assess any administration charges or contractual costs, it would have determined, on the basis of the evidence it has seen and heard, and, in particular the evidence of the Respondent, that it would not be reasonable for the long leaseholders to pay any of the costs incurred by the Respondent or Palmlake.

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Bruce Edgington
Regional Judge
13th September 2018

ANNEX - RIGHTS OF APPEAL

i. 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.

ii. 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.

iii. 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.

iv. 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.