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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00CB/LSC/2017/0015**
Property	:	**Flat 4, 37, Devonshire Road, Prenton, Birkenhead CH43 4UP**
Applicant	:	**Ms D Devoy**
Respondent	:	**The Riverside Group Limited**
Represented by	:	**Trowers & Hamlins, Solicitors**
Type of Application	:	**Landlord and Tenant Act 1985, section 27A** **Landlord and Tenant Act 1985, section 20C**
Tribunal Members	:	**Judge C.Wood** **Ms.S.Latham**
Date of Hearing	:	**23 February 2018**
Date of Decision	:	**10 April 2018**

DECISION

Order

1. The Tribunal orders as follows:

    1.1 the contributions towards the cyclical repairs/decorations reserve fund and the expenditure on cyclical repairs/decorations respectively for the service charge years 2006/07, 2007/08,2008/09, 2014/15, 2015/16 and 2016/17 are reasonable;

    1.2 the management fees for each of the service charge years 2006/07, 2007/08, 2008/09, 2014/15, 2015/16 and 2016/17 are reduced by £250 in each year;

    1.3 the Applicant's liability to pay service charge is one-sixth of the total expenditure; and,

    1.4 it is just and equitable in the circumstances to grant the Applicant's s20C application.

The Application

2. By an application dated 9 March 2017, ("the Application"), the Applicant sought determinations from the Tribunal under section 27A of the Landlord and Tenant Act 1985, ("the 1985 Act"), in respect of service charge costs for the years 2006/07, 2007/08, 2008/09, 2014/15, 2015/16 and 2016/17.

3. The Applicant also made application for an order under section 20C of the 1985 Act.

4. Directions dated 24 March 2017 were issued pursuant to which the following documentation was received from the parties:

    4.1 Applicant's statement of fact (undated)

    4.2 Respondent's statement of case dated 25 August 2018, together with supporting documentation, including a Scott Schedule prepared by the Respondent

    4.3 Scott Schedule prepared by the Applicant together with response to Respondent's statement of case (undated)

    4.4 witness statement of Mr J Styles dated 7 February 2018

    4.5 witness statement of Mrs L A Woods dated 5 February 2018

5. A hearing was scheduled to take place on Friday 23 February 2018 at 11:30 following an inspection of the Property at 10:00 on the same date. The Applicant together with Mr.J.Styles and Mr.N.Cox on behalf of the Respondent together with the Respondent's representative, Mrs.L James of Trowers & Hamlins attended the inspection. The Property is one of six flats in a conversion of two adjoining 3-storey Georgian terraced properties, Nos. 35 and 37 Devonshire Road. The Property is on the 3rd floor. Whilst above the ground floor the flats extend over both properties, the ground floor flat is wholly within No.35, and has its own front and back entrance, accessed at the rear by a separate flight of steps/grassed area which then leads to the communal car park. The internal communal areas are carpeted and painted. The external communal areas include two flower beds along the frontage of each property, and the grassed areas and car parking to the rear.

The Law

6. Section 18 of the 1985 Act provides:

   (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.

7. Section 19 provides that –

   (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 provision 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.

8. Section 27A provides that:

(1) an application may be made to a leasehold valuation 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 date at or by which it is payable, and

(d) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) .....

(4) No application under subsection (1)...may be made in respect of a matter which –

(a) has been agreed by the tenant.....

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

9. In *Veena SA v Cheong* [2003] 1 EGLR 175, Mr. Peter Clarke comprehensively reviewed the authorities at page 182 letters E to L inclusive. He concluded that the word "reasonableness" should be read in its general sense and given a broad common sense meaning [letter K].

10. Section 20C of the 1985 Act provides as follows:

(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...the First-tier Tribunal...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) ...

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

The Hearing

11. The Applicant was accompanied at the hearing by her daughter, Miss Bradley. The Respondents' representatives at the inspection together with Mrs.L.Woods attended the hearing.

12. The Applicant's oral submissions are summarised as follows:

12.1 the Applicant's principal objection to the service charges is the significant increases to these charges since she bought the Property in 2005. At that point, it was suggested that the service charges would be £13 per month; they are now £56 per month;

12.2 this is particularly relevant in respect of the cyclical repairs' contributions;

12.3 in order to mitigate the impact of these increased charges, the leaseholders have agreed to a reduction in other services eg gardening, cleaning, window cleaning;

12.4 despite the increased charges, the only cyclical repairs/maintenance which has been undertaken is the painting of the internal communal areas and the painting of windows/doors externally. The carpet in the internal communal areas has not been changed in 12 years;

12.5 new costs have been introduced eg fire inspection charges in 2015; when originally introduced the Respondent was suggesting a monthly charge of £12.80 but this was reduced when the leaseholders persuaded them to reduce the number of visits to monthly rather than weekly visits;

12.6 the financial burden on the 5 leaseholders within No. 37 has been further increased by the Respondent's decision in 2007 (without consultation) to change the apportionment of the service charges at the request of the then-leaseholder of Flat No.1 who argued that they should not have any liability to contribute to the maintenance of the internal communal areas as they made no use of them. The Applicant referred to the decision in Solarbeta Management Co. Limited v Akindele [2014] UKUT 0416 (LC) as authority for the proposition that, even where a leaseholder did not benefit from a service eg a lift, this did not necessarily discharge them from a liability to contribute to the cost of its provision;

12.7 reference was made to the details of other properties within the local area included in the Applicant's Bundle (Tab 10). Of these various properties, the Applicant considered that the property at St.Aidan's Terrace was most similar to the Property. She had been advised by the estate agents that the current service charge was £45 per calendar month.

13. The Respondent's oral submissions are summarised as follows:

13.1 reference was made to the alleged insufficiency of the Applicant's pleadings despite the guidance issued to her at the Case Management Conference and in the Directions as to what was required which had caused the Respondent difficulty in identifying the issues in dispute. Further, the Applicant had not produced a Scott Schedule as directed; the items of expenditure in the Scott Schedule (pages 101-105 of the Respondent's Bundle) produced by the Respondent reflect the issues raised by the Applicant in her Statement of Case. The Respondent referred to the decision in Schilling v Canary Riverside Development PTD Limited LRX/26/2005 (pages 112-114 of the Respondent's Bundle) in support of their claim that the Respondent had failed to discharge the burden of proof upon her, (paragraphs 9,13 and 15);

13.2 without prejudice to this submission, in response to the Applicant's submissions, it was suggested that much of the information produced was irrelevant in the context of the Application eg the marketability of the Property, the statements made to the Applicant at the time of her purchase of the Property;

13.3 with regard to the Applicant's evidence regarding comparable service charges, it was suggested that the evidence was of limited use eg where the properties were for rent, the impact of section 11 Landlord and Tenant Act 1985 had not been taken into account; where properties were for sale, there was no breakdown of the figure and it was therefore not possible to say what services were being provided;

13.4 with regard to the Solarbeta case referred to by the Applicant, the Respondent reiterated the reasons for distinguishing it from the present case as set out in the Respondent's Statement of Case, (paragraph 3.13, page 95 of the Respondent's Bundle);

13.5 with regard to the question of apportionment, it was the Respondent's view that, notwithstanding the Tribunal's decision on the Respondent's section 35 Landlord and Tenant Act 1987 application not to vary the Applicant's lease, for service charge purposes, the two conflicting leases remained in place. It was noted that the lease which referred to "a fair proportion" was the version which had been registered at the Land Registry, and it was commented that registration had been effected by the Applicant's solicitors;

13.6 both Mr.Styles and Mrs.Woods answered questions from the Tribunal relating to the matters covered in their witness statements (pages 31-49 and pages 50-88 respectively of the Respondent's Bundle). It was confirmed that:

(i) as at June 2017, the balance on the sinking fund "on exit" established under clause 3.18 of the Lease was £12724.50, and the balance on the cyclical repairs' fund was £8166.19;

(ii) cyclical repairs/maintenance was carried out at 5 yearly intervals; maintenance would next be undertaken in 2020;

(iii) the expenditure on cyclical repairs/decorations set out in the Income and Expenditure Account for the year ending 30 June 2015 (page 258 of the Respondent's Bundle) is the net amount charged to the leaseholders having utilised funds standing to the cyclical repairs/decorations fund. The actual costs in 2015 (as set out in Mr.Styles' witness statement page 33 of the Respondent's Bundle) were: internal decoration: £1834.06; external decoration: £10,794.55. Mrs.Woods told the Tribunal that additional information was sent out with the Income and Expenditure Account from which leaseholders could see the actual cost, although this had not been included within the Respondent's Bundle;

(iv) apportionment is as set out in paragraphs 3.10 and 3.11 of the Respondent's Statement of Case (page 95 of the Respondent's Bundle) under the heading "Practical Apportionment".

Tribunal's Reasons

14. In reaching its determinations set out in paragraph 1 of this Order, the Tribunal took into account the following:

14.1 in the decision, Regent Management Limited v Mr.Thomas Jones [2010] UKUT 369 (LC), the right of the Tribunal to raise matters of its own volition, subject to giving parties' adequate opportunity to respond, was recognised. At paragraph 29, His Honour Judge Mole QC said, "...it is an honourable part of [the Tribunal's] function, given that part of the purpose of the legislation is to protect tenants from unreasonable charges and the tenants, who may not be experts, may have no more than a vague and unfocussed feeling that they have been charged too much." Notwithstanding the Applicant's lack of particularity in her pleadings in this case, the Tribunal was satisfied that the Respondent (who was legally represented) was sufficiently aware of the charges which were in dispute. The Tribunal considered that the main area of dispute as confirmed by the Applicant in her oral submissions was the cyclical repairs/decorations charges. It noted, however, that, in the Respondent's Statement of Case, a number of other charges are identified which it considered were the subject

of challenge, namely, the pathway, scaffolding, fire safety, aerials, admin (sic) fees, and management charges, (pages 97-98 of the Respondent's Bundle). The Tribunal notes in particular the Respondent's concession regarding scaffolding costs incurred in 2016, (paragraph 5.5, page 97), and the Respondent's explanation of the charging structure for its management fees;

14.2 the cyclical repairs/decorations charges 2006/07, 2007/08, 2008/09 and 2014/15, 2015/16 and 2016/17: the Tribunal was satisfied that, having regard to the actual expenditure in 2010 and 2015, the Respondent's submissions regarding the balance currently standing to the credit of the cyclical maintenance reserve account and that the next maintenance was due to be undertaken in 2020, the contributions/costs were reasonable. It was not within the Tribunal's jurisdiction to consider whether the Applicant had a claim against the Respondent /its agents for misrepresentation based on the alleged statements made at or about the time of her purchase of the Property regarding the level of service charge to be charged. However, it is satisfied that it is the duty of a responsible landlord/managing agent to ensure that, where the lease permits the accumulation of reserves, such contributions are sufficient to meet the anticipated expenditure, to notify leaseholders if they consider the contributions to be too low and to make adjustments accordingly;

14.3 with regard to the Applicant's evidence regarding the service charges payable at comparable properties, the Tribunal agreed with the Respondent's submissions that this was only a useful comparable where the property was for sale rather than for rent. Further, without information regarding what expenditure was included within the service charge, the Tribunal could not make any meaningful comparison: the evidence was disregarded accordingly;

14.4 as noted in paragraph 14.1 above, whilst the amount of the Respondent's managing fees was not raised by the Applicant in oral submissions, the issue had been raised previously by the Applicant and responded to in detail by the Respondent in its Statement of Case. Whilst noting the methodology for calculating the management fee, the Tribunal did not consider that it took sufficient account of the actual activity involved in the management of this development. The Tribunal noted that, in every year in dispute, the management fees were the second largest cost within the service charge after the cyclical repairs/decorations contributions/charge, and equalled about 20% of the total costs (after deduction of the management fee). The Tribunal considered that the management was restricted to supervision of contracts for cleaning, window cleaning and gardening services, as well since 2015, monthly and bi-annual fire inspections. The Tribunal accepted the Applicant's submission that, at the leaseholders' request in order to reduce the monthly

service charges, the cleaning, window cleaning and gardening services had been reduced and, to some extent at least, were carried out by the leaseholders themselves. It also noted that consultancy fees had been charged in both 2010 and 2015 in relation to the cyclical works. In the circumstances, the Tribunal determined that the management fees were unreasonable and should be reduced by £250 in each of the following years: 2006/7, 2007/8 and 2008/9, 2015/16 and 2016/17;

14.5 with regard to the apportionment of the service charge, the Tribunal is satisfied that the correct apportionment of the service charge as regards the Applicant is one-sixth of the relevant expenditure. There is no dispute that the lease signed by the Applicant, ("the Lease"), provides that the "Service Charge Specified Proportion of Service Charge" is one-sixth. The Tribunal has refused the Respondent's application to vary the Lease to accord with the copy signed by the Respondent. The Tribunal is satisfied that it is the Lease that forms the contract between the Applicant and the Respondent and that, in determining the apportionment, the Respondent is bound by the terms of the Lease. The Tribunal does not consider it to be of any relevance in this respect that the lease registered at the Land Registry provides for the service charge apportionment to be "a fair proportion" or that the Applicant's solicitors were responsible for its registration. The Respondent has not produced any evidence to show that the Applicant's solicitors were aware of the differences between this lease and the Lease and, even if they were so aware, that they had informed the Applicant of this;

14.6 the Tribunal considered that it was just and equitable in the circumstances to grant the Applicant's s20C application because, whilst the Tribunal had determined that the expenditure which the Applicant stated was her major concern was reasonable, it had also reduced the level of the management fees which were payable. Further the Tribunal determined that the Respondent had incorrectly apportioned the share of the service charge expenditure for which the Applicant is liable;

14.7 whilst the Tribunal understands that the Respondent had not produced to it all of the information provided to leaseholders, it was concerned at the possible confusion which may result from showing in the income and expenditure accounts the net expenditure on cyclical repairs/maintenance i.e. the balance after using monies standing to the credit of the reserve fund. It appeared to the Tribunal that this presented leaseholders who may wish to challenge the actual expenditure with a difficulty.

10 April 2018
Judge C Wood