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LEASEHOLD VALUATION TRIBUNAL

Sections 19, 27A and 20C of the Landlord and Tenant Act 1985 (as amended)
("the Act")

Case Number:	CHI/21UF/LSC/2012/0144
Property:	Flats 2,6,10 & 16 Versailles West Quay Newhaven East Sussex BN9 9GE
Applicant:	Richbusy Limited
Respondent:	West Register Limited
Appearances for Applicant:	Sue Massingham
Appearances for Respondent:	Colin Mitchell
Date of hearing	15th April 2013
Tribunal:	Mr R Wilson LLB (Lawyer Chairman) Mr R Wilkey FRICS (Surveyor Member) Mr T Sennett MA MCIEH (Professional Member)
Date of the Tribunal's Decision:	3rd May 2013

The Applications

1. The Applicant leaseholder applied under S.27A (and 19) of the Act for a determination of its liability to pay service charges in respect of its flats for service charge years 2008, 2009, 2010 & 2011. The Respondent is the freeholder of the block.
2. The Tribunal also had before it an application under S.20C of the Act that the Respondent's costs of these proceedings should not be recoverable through future service charges.

Summary of Decision

3. The annual service charges recoverable from the Applicant are as stated in the annual accounts for the property for 2008 - 2010 save in respect of the challenged items of expenditure identified below for which the Tribunal makes the following determination:

Work	2008 (£)	2009	2010
Communal cleaning	Conceded Nil	Nil	Nil
Communal electricity	Nil	Nil	Nil
Garden maintenance	Nil	Nil	Nil
Lift maintenance	Nil	Agreed	Conceded Nil
Lift phone	N/A	N/A	Nil
Entryphone system	N/A	N/A	Conceded Nil
Smoke extractor costs	N/A	N/A	Conceded Nil
General repairs	N/A	Nil	Nil
Communal aerial	N/A	N/A	Nil
Professional fees	N/A	N/A	Conceded Nil
Management	N/A	Nil	Nil
Insurance	Nil	Nil	Nil

The proportion recoverable from the Applicant is the service charge percentage as specified in each flat lease owned by it and the payability of these amounts is subject to the service of a compliant service charge demand with full credit being given to the Applicant for all amounts paid by way of service charge to date.

4. An order is made under S.20C of the Act.

The Lease

5. The Tribunal had before it a copy of the lease for Flat 6 and was told that leases for all the other flats were in similar form. The lease is for a term of 125 years at a yearly ground rent of £250 for the first 25 years and rising thereafter.

(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 purposes—

(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.

19. Limitation of service charges: reasonableness.

(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.

20B. Limitation of service charges: time limit on making demands.

(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.

20C. Limitation of service charges: costs of proceedings.

(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 leasehold valuation 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.

(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.

27A. Liability to pay service charges: jurisdiction

(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 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 a leasehold valuation 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 ...

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

Background

10. The block was constructed in 2007 by developers Oakdeane Homes Plc. Before construction had been completed, however, Oakdeane got into financial difficulties and sometime in 2009 they had gone into liquidation. The freehold was subsequently acquired by the Respondent who appointed Qube Management to manage this property plus a significant number of others, which the bank had repossessed in default. Qube was responsible for managing the property between 2009 and 2011.
11. It is common ground between the parties that Qube did not perform their management obligations in a satisfactory manner and in 2012 the Respondent dismissed Qube and appointed in their stead the current managing agents Messrs Lambert Smith Hampton.
12. The Tribunal was told that despite all efforts neither Qube nor the accountants responsible for the preparation of the annual service charge accounts, had been prepared to hand over to the new managing agents any invoices or receipts in respect of the expenditure featuring in the annual accounts and this was still the position some 18 months after hand over.
13. The application was issued in July 2012 and a pre-trial review was held on the 21st November 2012. At the pre-trial review the Applicant raised concerns that not all of the annual service charge accounts had been prepared and that those that had been prepared were not reliable and that the Applicant required sight of the underlying invoices together with evidence of payment of the various amounts featuring in the accounts.
14. The Tribunal accordingly issued directions providing for accounts to be delivered to the Applicant together with the supporting invoices and evidence of payment, together with a running account for each flat showing all credits and debits applied. Following delivery of this documentation the Applicant was directed to file a statement of case identifying the contested items and for the Respondent to file a reply in respect of the challenged items of expenditure.
15. The Respondent has failed to comply with these directions in that it has not filed any supporting documentation nor accounts for 2011. There is a suggestion that the accounts for 2010 are not complete and because of the Respondent's failure to comply

with the directions the Applicant has not been able to fully define the scope of its challenge.

The Applicant's Case

16. As originally framed the Applicant complained that it had not been supplied with any accounts of service charge expenditure, balances held, or details of any reserve fund. Its application referred to requests for information but nothing had been supplied in response to these requests. Accordingly the Applicant did not know how the money it had paid on account had been spent, or the state of its individual accounts with the Respondent.
17. Having now received expenditure figures for the first 3 years in question, the Applicant was concerned that the accounts were historic as they had been delivered well after the yearend; for the accounting year ending 31st December 2008 the accounts were signed off on 9th December 2009, for the accounting year ending 31st December 2009 the sign off date was 2nd February 2011, and for 2010 the sign off date was 8th November 2012. In addition there were no supporting invoices covering the specific items of expenditure. In at least one case, namely electricity, it appeared that a large charge had been debited to the service charge account which had never been paid following the liquidation of the Respondent's predecessor in title. The lack of any supporting invoices or receipts caused the Applicant to query the reliability of the accounts as regards the recorded expenditure. The managing agents had furnished no adequate explanations as to why the supporting documentation had not been provided and without the supporting documentation the Applicant challenged a significant element of recorded expenditure in each year. In short they put the Respondent to strict proof in respect of each challenged item.
18. A general concern was that in 2008 and 2009 the service charge accounts wrongly included expenditure incurred by Oakdeane in constructing the block and which should have been paid in full by Oakdeane and not passed down to the tenants by way of service charge.
19. With respect to insurance, no policy or evidence of expenditure had ever been produced. In respect of management fees there had been no effective management at all. The gardening charges in 2008/2009 and 2010 were far too high bearing in mind the garden consisted of a small area of grass. The communal electricity was far too high, nearly £3,000 in 2008 and £2,000 in 2009.
20. Some other specific items of expenditure were questioned such as general repairs where the figures for each year had been almost identical which to the Applicant suggested that the figures were at best just an estimate. Professional fees, and lift maintenance and telephone costs were also challenged.
21. There were no expenditure figures yet available for 2011 and by agreement this year was not considered by the Tribunal leaving the Applicant free to challenge this year when the Respondent produces an annual account for 2011.

The Respondent's Case

22. It was accepted that no supporting invoices had been supplied and that the quality of the accounts was in the words of Mr Mitchell "less than we would hope them to be." As Mr Mitchell had not seen any invoices supporting the expenditure he was not able to provide evidence as to payment and his submissions were understandably confined to the reasonableness of the amounts set out in the accounts. He accepted that some of the development costs had, more than likely been wrongly attributed to the service

charge account and he further accepted that no insurance policy could be found or any evidence that insurance cover had been purchased and paid for. He also admitted that the communal electricity and gardening charges seemed very high particularly so in 2008 and 2009 and during the course of the hearing he accepted the charges for the lift maintenance, door entry phone and professional fees incurred in 2010 could not be supported by any documentary evidence and he conceded these items.

23. With respect to lift maintenance in 2008, the figures charged were in line with what Mr Mitchell would expect and were in his submission reasonable. With regard to the insurance for all of the years, whilst he could not provide documentary evidence that insurance was in place, the amounts charged for insurance as specified in the accounts were in line with what he would expect for a building of this kind. The same applied for the management fees charged in each year. In 2010 the amounts charged for electricity, cleaning, gardening, and general repairs were modest and well within the parameters of reasonableness. Electricity charges did fluctuate considerably from year to year because of the volatility of the market.

The Determination

24. After hearing the parties opening submissions the Tribunal ordered a short adjournment so that it could consider where the onus of proof should lie bearing in mind the Applicant had put the Respondent to strict proof with regard to expenditure. Normally the Tribunal would accept certified accounts as constituting satisfactory evidence that work has been done and properly billed and the sums claimed were due and owing. However in this case the Applicant had given evidence establishing a prima facie case that the accounts were not reliable. Firstly that the service charge account had included electricity which had not been paid due to the liquidation of Oakdeane and secondly by the Respondent admitting that the 2008 account included expenditure which should have been paid for in its entirety by the freeholder. In these circumstances the Tribunal formed the view that the Applicant had raised its challenge with sufficient supporting material for its argument to have merit and accordingly it was for the Respondent to meet the allegations and prove on the balance of probabilities, that the work had been done, paid for and properly billed. In short it fell on the Respondent to counter the Applicant's challenge, which it could have done at the hearing by producing invoices, vouchers or other evidence of payment supporting each item of expenditure in the accounts. This was something that the Respondent had been directed to do in the Tribunal's Directions of the 21st November 2012.
25. The Tribunal then reconvened the hearing and advised the parties of its conclusions on the burden of proof as stated above. The challenged items for each year were then identified following which the parties were given the opportunity to present their evidence and legal submissions.
26. Mr Mitchell was not able to provide any probative evidence that the service charge accounts were reliable and that the amounts claimed had indeed been spent on the building. When asked by the Tribunal what attempts had been made to secure the accounting records, Mr Mitchell was only able to point to a single telephone enquiry that he had had with a supplier and no receipts had been forthcoming. He did not explain what attempts had been made to secure the records from the previous accountants and appeared to have made little effort to comply with the directions of the Tribunal with regard to disclosure.
27. Having regard to the directions that were issued following the pre-trial review of the application the Respondent should have been in no doubt whatsoever that the integrity and accuracy and completeness of the records would be a key issue for determination together with evidence of payment. The pre-trial review had taken place in November 2012 which meant that the Respondent had had nearly five months to obtain the

payment documentation yet the Respondent adduced no evidence in support of the accounts. There are no invoices to support any of the expenditure for 2009 or 2010 and the accounts for 2011 have still not been prepared. There are no witness statements from the accountants who prepared the accounts explaining on what basis the accounts had been prepared and there is not even a witness statement supporting the delivery of the work and services and the reasonableness of the sums claimed.

28. In these circumstances the Tribunal has reached the conclusion that the accounts are not to be relied upon and the Respondent has comprehensively failed to satisfy the Tribunal that the challenged sums are properly due and owing. For these reasons the Tribunal determines that the Applicant's challenge in respect of each of the contested items of expenditure is accepted with the result no sums are payable in respect of these items. A number of the challenged items were conceded by the Respondent during the course of the hearing with the result that no sums are payable in respect of these conceded items.
29. Having regard to the above finding it is not necessary for the Tribunal to record or determine the parties' submissions as to the reasonableness of the sums claimed. However, the Tribunal records the finding that even if payment evidence had been forthcoming in respect of management then it would still not uphold any management fees in 2008 - 2010 on the grounds that on the evidence before it there had been no overall beneficial management of the building.
30. Having regard to the late delivery of the accounts it is surprising that the Applicant did not argue that much of the expenditure is no longer recoverable because of the application of S.20B of the Act. However, as the Applicant did not plead this point it does not fall to the Tribunal to make a determination on it.
30. Accordingly for the reasons set out above the Tribunal determines that the service charge recoverable by the Respondent for the years 2008-2010 is as identified in paragraph 3 above.

Section 20C Application

31. This application was not opposed by the Respondent and the Tribunal determines that because of the Respondent's failure to comply with the Directions of the Tribunal, it is just and equitable for an order to be made that the Respondent's costs of these 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 Applicant.

Signed
Chairman

Robert TA Wilson solicitor LLB

Dated: 3rd May 2013