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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/22UG/LSC/2016/0001**
Property	:	**Westwood Lodge, Inglis Road, Colchester CO3 3HP**
Applicant	:	**Westwood (Colchester) RTM Co Ltd**
Representative	:	**Mr Paul Gathercole Director**
Respondent	:	**Gateway Property Holdings Limited**
Representative	:	**Mr Ben Day-Marr MIRPM Gateway Property Management**
Type of Application	:	**Section 27A Landlord and Tenant Act 1985 – determination of service charges payable**
Tribunal Members	:	**Judge John Hewitt** **Mr Stephen Moll FRICS** **Mr John Francis QPM**
Date and venue of Hearing	:	**12 April 2016** **Colchester Magistrates Court**
Date of Decision	:	**11 May 2016**

DECISION

Decisions of the tribunal

1. The tribunal determines that:

   1.1 The service charges demanded by the respondent and the service charges payable by the lessees were as follows:

Year	Demanded	Payable
2010	£9,743.00	£9,743.00
2011	£11,838.00	£11,316.00
2012	£10,871.00	£10,252.00
2013	£11679.00	£10,833.00
2014	£15,985.80	£13,874.00

   As shown in detail on Appendix A attached to this decision.

   1.2 As a matter of arithmetic the difference between the total of the sums demanded and the total of the sums found to be payable is £4,098.80.

   1.3 If the surplus year on year had been credited to the reserve fund the amount of the reserve fund held by respondent at the date when the applicant acquired the right to manage would have been £4,098.80 greater than it actually was assuming that all lessees had paid to the respondent the sums demanded of them.

2. The reasons for our decisions are set out below.

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing file provided to us for use at the hearing.

Procedural background

3. The subject development, Westwood Lodge, constructed in 2007, comprises nine self-contained flats. All of the flats were sold off on long leases between October 2007 and July 2008.

   The respondent was registered at Land Registry as proprietor of the freehold interest on 6 August 2008 and thus became the landlord.

4. On 11 December 2014 the applicant (the RTM company) acquired the right to manage.

5. By a decision dated 23 November 2015 in Case reference CAM/22UG/LUS/2015/0001 in which the RTM company was substituted as applicant, a tribunal determined that at that time the uncommitted service charges to be handed over to the RTM company was £1,641.00. In that decision the tribunal made the point that some of the challenges made were as to the reasonableness of some service charge expenditure alleged to have been incurred and the decision

pointed out that the challenge on these was governed by section 27A Landlord and Tenant Act 1985 (the Act) – see paragraphs 20-21 [243].

6. By an application form dated 4 January 2016 [2] the RTM company made an application pursuant to section 27A of the Act to challenge some of the service charges alleged to have been incurred over the years 2010 to 2014. The application form was prepared by Mr Paul Gathercole, a director of the RTM company. Evidently Mr Gathercole is also an accountant.

   The expenditure challenged is highlighted in yellow on Appendix A.

7. Directions were given on 21 January 2016 [17].

8. In the application form the respondent was incorrectly named as Gateway Property Management Limited. By order the tribunal later changed that so that the correct name of the landlord, Gateway Property Holdings Limited, was substituted as respondent [233].

9. Gateway Property Management Limited, as the former managing agents and as the representative of the respondent, filed a statement of case in answer. It is dated 17 February 2016 [22]. It was signed by Mr Ben Day-Marr who says he is Director of Operations.

10. Mr Gathercole filed a reply. It is dated 28 February 2016 [30].

11. Neither party had prepared for the hearing particularly well. Neither party provided any statements of witnesses of fact, although direction (3) said that they must do so by 5pm 3 March 2016.

Inspection and hearing

12. On the morning of 12 April 2016 the tribunal had the benefit of an inspection of the development, both externally and of the common parts. Present were Mr Gathercole for the applicant and Mr Day-Marr (and a colleague) for the respondent.

13. A number of physical features were brought to our attention. The development comprises eight 2-bedroom flats and one 3-bedroom flat, all of which are of a good size. Four flats have their own individual front doors at ground-floor level and five flats are accessed via a communal front entrance door which leads to modest common parts hallway, stairway and landing areas.

    There is no lift.

    There are small front and rear garden areas, laid mostly to lawn.

    Electronically controlled gates give access to a number of parking spaces which have been demised, or at least exclusive use rights granted.

14. The hearing got underway at 11:10. We can take the challenges by issue because where they span several years the basic arguments were the same.

Cleaning of communal areas, gardening and maintenance and window cleaning

15. The gist of the challenge was that the RTM company retained the services of the contractor previously engaged by the respondent but at a lower cost.

16. Neither party put into evidence the written contract placed with the contractor and neither seemed very clear as to exactly what work was carried out and when. To some extent this is not wholly surprising because window cleaning is weather dependent and gardening is both weather dependent and seasonal. The respondent had appended to its statement of case copies of supporting invoices submitted by the contractor. Mr Gathercole relied upon one sample invoice dated 12 May 2015 [232].

17. In the course of oral exchanges between Mr Gathercole and Mr Day-Marr it became apparent that originally the contractor made fortnightly visits to carry out it work whereas under the RTM company that has been cut down to monthly visits, but of the same duration.

18. There was no reliable evidence before us from which we could properly conclude that the sums incurred by the respondent were not reasonable in amount and thus we reject the challenge made to this expenditure.

Buildings insurance and insurance valuation

19. In broad terms the annual cost incurred by the respondent was about £2,000. In the final year the cost increased to about £3,300 due to the effect of accrual and pre-payment accounting. That effect was not disputed by Mr Gathercole.

20. The gist of the case for the RTM company was that when it effected insurance in June 2015 it was able to achieve a premium of £1,022.10 with an insurer named Covea. A copy of the policy was not provided to us. The only evidence submitted was a letter from brokers, St Giles [231]. Mr Gathercole argued this demonstrated that the costs of insurance incurred by the respondent in each of the four prior years in question was unreasonable in amount. He did not offer what would have been reasonable amounts.

21. The gist of the case for the respondent was that from what little information had been provided by the RTM company it was plain that the insurance it had effected was not like for like. For example, the Building Sum Insured was said to be £1,174,529 whereas when the

respondent effected a renewal of the policy with AXA in July 2014 the Building Sum Insured was £1,585,615. There was also a question as to the status of Covea and whether it was an insurance company of repute.

22. Further Mr Day-Marr submitted that the respondent's brokers went out to competitive tender for provision of portfolio buildings insurance across its estate. He said that whilst the premiums achieved were competitive that type of insurance tends to be more expensive than a landlord might achieve on a one off basis but that it has been held that it is not unreasonable for a landlord with a large portfolio to insure on that basis.

23. We accept and prefer the submissions of Mr Day-Marr which strike a chord with the experience of the members of the tribunal. We also accept his submission that it is not unreasonable for a landlord with a substantial portfolio to insure on a portfolio basis.

24. In the absence of any compelling evidence that the cost of insurance incurred by the respondent was unreasonable in amount, we reject the challenges to this expenditure.

25. Mr Day-Marr conceded that it was unreasonable to incur the cost of £300 for an insurance revaluation at a time when the policy had been renewed and when it was known that the RTM company was to or might acquire to the right to manage. Had Mr Day-Marr not made this concession we would have found that it was unreasonable to incur that expenditure in those circumstances.

Health & Safety and Fire Risk Assessment

26. This was invoiced on 15 May 2014 [148] and was carried out by a company associated with the respondent.

27. Mr Gathercole complained that they had repeatedly asked to see a copy of the report but it had never been provided – despite paragraph 22 of the decision dated 23 November 2015.

28. Mr Day-Marr submitted that it was good practice for such a report to be carried out every year. He accepted that an annual report was not a statutory requirement; but he argued it was recommended practice.

29. We were not persuaded that it was reasonable to incur that expense at all let, alone at that level. With a small, modern and unsophisticated development, such as the subject development, an annual inspection is not reasonably required, especially when no changes or building works have been undertaken. The more so when, as here, according to Mr Day-Marr, experienced property managers visit the development four times per year.

30. Whilst we can accept that an initial report might be reasonably expensive, because the surveyor has to start with a blank report form, subsequent checks will be less involved and should be undertaken at a

lower cost, because the surveyor will have the previous report to work with. Similarly, a property manager who visits the development can take the most recent report with him or her and make use of it whilst carrying out a general routine inspection. Property managers are required to take a realistic and pragmatic approach taking full account of the size, age and type of each development.

31. Mr Day-Marr acknowledged that this expense had been incurred at a time when it was known that the RTM company may acquire the right to manage. He said that surveyor's diary is posted some while in advance and it would be administratively inconvenient to make changes to his planned site visits or to make cancellations. Further, Mr Day-Marr submitted that the report was more for the benefit of the respondent than anyone else.

32. We were not satisfied on the evidence or submissions put before us that this expenditure was reasonably incurred or reasonable in amount. We therefore find that it is not payable.

Handover fee

33. A point about this was raised in direction (1) which required the RTM company to clarify its position by 5pm 4 February 2016. Mr Day-Marr submitted that the RTM company had not done so with the consequence that it was not an issue the RTM company could pursue.

34. Mr Gathercole did not dispute that the RTM company had omitted to follow up the point or clarify its position.

35. We accept and prefer Mr Day-Marr's submission and we reject the challenge to this expenditure because the specific and express direction had not been complied with and the RTM company had not clearly explained the basis of its challenge.

Management fees

36. Mr Gathercole said that having acquired the right to manage the RTM company had engaged the services of a local managing agent, Boydens, at an annual cost of £1,404 inclusive of VAT. This equates to a unit cost of £156.

37. Mr Gathercole did not put into evidence the contract entered into with Boydens; he had only put in the cover page [229] which shows it is dated 12 December 2014 and Appendix 1 [230] which mentions the fee of £1,170 + VAT. This is unsatisfactory. There is no information or evidence about the nature and extent of the services to be provided under the contract.

38. Equally, Mr Day-Marr had failed to put into evidence the written agreement (if any) between the respondent and its managing agent. Mr Day-Marr accepted that it was good estate management practice for the supply of goods and services to be put to periodic competitive tender. Mr Day-Marr said that the respondent had not put management

services out to competitive tender because its managing agent was an associated company which made this unnecessary. Mr Day-Marr was not able explain to us the logic behind that submission. Further, Mr Day-Marr submitted that the unit fees 'agreed' between the respondent and its managing agent were reasonable and competitive. No evidence to support that submission was provided. No convincing or satisfactory explanation was given for the substantial increases year on year at a time when general inflation has been modest.

39. We set out below the unit fees claimed by the respondent and the unit fees we consider to be reasonable and which we find are payable:

Year	Claimed	Payable
2010	£235	£235
2011	£300	£242
2012	£318	£250
2013	£354	£260
2104	£364	£268

40. We bear in mind that the development is relatively modest and unsophisticated so that it is not particularly labour intensive. The one contractor provides most of the monthly services so that invoice processing is limited. Only modest repairs and renewals have been undertaken. In the experience of the members of the tribunal the unit fees claimed are uncompetitive and way above what we routinely see in and around Colchester in the course of our work. In part this is demonstrated by what Boydens have agreed for the first year of its management for the RTM company. We should however record that in our experience we find Boyden's unit fee to be a particularly low figure. This might be explained by the provision of a limited range of services or it might be an attractive figure offered in a bid to win new business. We do not know because no evidence was provided to us by the RTM company to show what Boyden's had agreed to do for the fee agreed.

41. We also take into account that the respondent's managing agent charges separately for postage and bank charges, expenses which many reputable managing agents regard as overheads covered by and within an annual unit fee. These expenses have not been expressly challenged by the RTM company but we find that we have to have some regard to them when considering the unit fees claimed for management.

42. Taken overall we find that the sums claimed are unreasonable in amount. We find that it was not reasonable of the respondent to have incurred any fee greater than that which we have set out in the 'Payable' table as above. We have started with the respondent's fee of £235 in 2010 and made modest increases to allow for inflation and other material factors. Having carried out this exercise and we have stood back and drawn on our experience of the competitive market for the supply of management services in and around Colchester and we find that the figures we had arrived at chime with that general experience.

Major works

43. These related to a proposed project concerning external redecorations which was the subject of a section 20 consultation exercise. The total costs claimed were £2,424.60 [96] made up as follows:

01.01.2014	Specification of works	£960.00
07.07.2014	Balance of surveyor's fee	£656.40
07.07.2014	Gateway admin fee	£808.20

The respondent has already allowed a credit of £1,082.40. Evidently that was made up as to:

Balance of surveyor's fee	£656.40
Part of Gateway's admin fee	£426.00

So, the balance in dispute was £1,341.80.

44. Neither party really addressed this issue well or properly in their respective statements of case and the respondent did not give full disclosure of the documents relating to the section 20 process.

45. During the course of oral exchanges between Mr Gathercole and Mr Day-Marr some information appears to have emerged.

Quoting from documents in his file Mr Day-Marr said that:

On 1 July 2013 a specification for the proposed works was drawn up. That was put out to competitive tender and in July/August 2013 two bids were received.

A notice of intention to carry out works was dated 18 October 2013.

For some reason the project did not proceed, possibly due to insufficient funds being available.

An in-house tender report was prepared on 28 March 2014 and as a result a review of the bid by one of the contractors was undertaken.

A second stage section 20 notice dated 6 May 2014 was given the lessees. Mr Gathercole said that he did not receive that notice but he also said that in May 2014 he requested a copy of the priced specification but it was not sent to him. Mr Day-Marr denied that any such request had been received by his office.

A further review of the bids was undertaken in August 2014 but at about that time the respondent learned of the claim to acquire the right to manage so the project became abortive.

46. The gist of the case for the respondent is that these balance claimed is in effect fees for an abortive project.

47. The gist of the case for the RTM company is that there is great suspicion as to whether the fees claimed were ever incurred at all and that Mr Gathercole had requested a copy of the priced specification but it had not been sent to him.

48. There was no dispute that the proposed works were required. Mr Gathercole said that they were carried out in 2015 but that the RTM had to start again and had incurred costs on the specification which could have been avoided if he had been provided with a copy of the priced specification he had requested.

49. The evidence of both parties was very poor on this issue. Doing the best we can with it, it seems not to be in dispute that major works were required, that an initial notice of intention was given in October 2013. We find that by May 2014 Mr Gathercole was aware that a priced specification was around because we accept his evidence that he requested a copy of it.

50. From this we conclude, on the balance of probabilities, that a specification of works had been prepared, had been put out to tender, bids had been received, were the subject of a tender report and that a second stage section 20 notice was given. It may well have been this notice which prompted Mr Gathercole to ask for a copy of a priced specification.

51. Thus we find that a deal of work had been properly carried out and that fees had been reasonably incurred in connection with it. The lessees are liable to contribute to those fees.

52. Mr Gathercole implied that if the priced specification had been made available to the RTM company it would have incurred less fees or expenses than it did when it had the works carried out in 2015. That may be right but no evidence to support that was provided. Whilst we can see that a specification might have been of some assistance as a starting point as regards the nature and extent of works which were required in July 2013 when it was drawn up, we rather doubt that a priced specification of July/August 2013 vintage would be of much assistance in connection with a contract under consideration or to be placed in 2015. The RTM company would have been required to conduct its own section 20 consultation process when it decided to proceed with the works.

53. Doing the best we can with the very imperfect materials before us we find that a reasonable fee for the abortive work on this project would not be greater than £1,000. We thus find that this sum is payable by the lessees.

The way forward

54. The application before us was to determine the amount payable in respect of the service charges in dispute. We have done that. What practical value the determination may now have is not entirely clear to us. The applicant is the RTM company and the service charges in question were/are payable by the lessees to the respondent. Mr Gathercole was not entirely clear what the lessees might be able to do with our determination. Mr Day-Marr was adamant that the respondent would not make any refunds to the lessees and he threatened to claim damages from them pursuant to section 136 Housing Act 1980 if they did so but it appears that section of that Act has been repealed.

55. The service charge regime set out in the leases provides for a balancing debit to be paid by the lessee on demand and for a balancing credit to be allowed to the lessee. Mr Day-Marr explained that by agreement or acquiescence with the lessees that accounting process did not take place. Instead any balances were debited/credited to the reserve fund as the case may be. In most of the years in question there were balancing credits paid into the reserve fund.

56. If adjustments to the service charges payable as determined by this tribunal are credited to the reserve fund the outcome of that is that as at the date when the RTM company acquired the right to manage the amount of the reserve fund would have been greater by a total of £4,098.80. That would have had an effect on the amount of the uncommitted service charges to be handed over by the respondent to the RTM company.

57. Beyond making the above observation there is nothing more that we can say.

John Hewitt
Judge John Hewitt
11 May 2016

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 Tribunal 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 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.

4. 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.

Expense	2010		2011		2012		2013		2014		Total
	Claimed by R	Allowed Tribunal	Claimed by R	Allowed Tribunal	Claimed by R	Allowed Tribunal	Restated by R	Allowed Tribunal	Claimed by R	Allowed Tribunal	Repayment Due
Common parts maintenance											
Cleaning of communal areas	£ 450.00	£ 450.00	£ 416.00	£ 416.00	£ 673.00	£ 673.00	£ 2,816.00	£ 2,816.00	£ 2,966.00	£ 2,966.00	
Gardening & maintenance	£ 2,853.00	£ 2,853.00	£ 2,860.00	£ 2,860.00	£ 3,214.00	£ 3,214.00	£ 523.00	£ 523.00	£ 991.00	£ 991.00	
Window cleaning	£ 623.00	£ 623.00	£ 740.00	£ 740.00	£ 572.00	£ 572.00	£ 201.00	£ 201.00	£ 733.00	£ 733.00	
Electrcity	£ 383.00	£ 383.00	£ 332.00	£ 332.00	£ 250.00	£ 250.00	£ 343.00	£ 343.00	£ 267.00	£ 267.00	
Repairs & renewals	£ 929.00	£ 929.00	£ 700.00	£ 700.00	£ -	£ -	£ 1,194.00	£ 1,194.00	£ 1,055.00	£ 1,055.00	
Water			£ 337.00	£ 337.00	£ 92.00	£ 92.00	£ 82.00	£ 82.00	£ 61.00	£ 61.00	
Insurance											
Buildings	£ 1,849.00	£ 1,849.00	£ 1,941.00	£ 1,941.00	£ 1,991.00	£ 1,991.00	£ 2,042.00	£ 2,042.00	£ 3,315.00	£ 3,315.00	
Insurance valuation			£ 700.00	£ 700.00					£ 300.00	£ -	
Other expenses											
Management fee	£ 2,115.00	£ 2,115.00	£ 2,700.00	£ 2,178.00	£ 2,869.00	£ 2,250.00	£ 3,186.00	£ 2,340.00	£ 3,282.00	£ 2,412.00	
Accountancy	£ 451.00	£ 451.00	£ 451.00	£ 451.00	£ 563.00	£ 563.00	£ 593.00	£ 593.00	£ 606.00	£ 606.00	
Bank charges	£ 90.00	£ 90.00	£ 89.00	£ 89.00	£ 93.00	£ 93.00	£ 54.00	£ 54.00	£ 54.00	£ 54.00	
H&S and fire risk	£ -	£ -	£ 572.00	£ 572.00	£ 500.00	£ 500.00	£ 600.00	£ 600.00	£ 600.00	£ -	
Postage	£ -	£ -	£ -	£ -	£ 54.00	£ 54.00	£ 45.00	£ 45.00	£ 54.00	£ 54.00	
Handover fee	£ -	£ -	£ -	£ -	£ -	£ -	£ -	£ -	£ 360.00	£ 360.00	
Major Works											
Administration charges (bal)									£ 1,341.80	£ 1,000.00	
Summary											
Total claimed by R	£ 9,743.00	£ 9,743.00	£ 11,838.00	£ 11,316.00	£ 10,871.00	£ 10,252.00	£ 11,679.00	£ 10,833.00	£ 15,985.80	£ 13,874.00	
Total allowed by tribunal	£ 9,743.00		£ 11,316.00		£ 10,252.00		£ 10,833.00		£ 13,874.00		
Surplus to be accounted for	**£ -**		**£ 522.00**		**£ 619.00**		**£ 846.00**		**£ 2,111.80**		**£ 4,098.80**
Items challenged by A											