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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/00KF/LSC/2014/0017**
Property	:	**38A Sandown Avenue, Westcliff-on-Sea, Essex SS0 9YB**
Applicants	:	**Robert Wilson & Fiona Constantine**
Respondent	:	**Westleigh Properties Ltd.**
Date of Application	:	**30th January 2014**
Type of Application	:	**To determine reasonableness and payability of service charges (Ss. 19 and 27A Landlord and Tenant Act 1985 ("the Act"))**
The Tribunal	:	**Bruce Edgington (lawyer chair)** **Stephen Moll FRICS** **David Cox**
Date of and venue of hearing	:	**12th May 2014 at the Court House, 80 Victoria Avenue, Southend-on-Sea, Essex SS2 6EU**

DECISION

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1. Of the amounts claimed on behalf of the Respondent for service charges as set out in paragraph 3.2 of the statement of evidence of Nicola Warren dated 10th February 2014, the decision of the Tribunal is that the following amounts are reasonable and payable:-

Year	Amount claimed(£)	Reasonable and payable(£)
2009	653.00	546.00
2010	598.50	544.00
2011	564.50	504.50
2012	588.50	522.50
2013	628.00	538.00

It was said during the hearing that all monies had been paid up to September 2013. The Tribunal has no detailed account and the parties will therefore have to work out what monies are now due and to whom.

2. Although neither the application nor Nicola Warren's statement makes any mention of charges for late payment and arrears recovery charges, the documents suggest that some have been claimed. For the avoidance of doubt, the Tribunal does not consider them to be reasonable or payable because the lease makes no provision for such payments.

3. Tribunal makes an Order pursuant to Section 20C of the Act preventing the landlord from collecting its costs of representation before this Tribunal as part of any future service charge demand but it does not make an order that the Respondent should refund Tribunal fees to the Applicants.

Reasons

Introduction

4. The applicants are long lessees of one of 2 flats in the building known as 38 and 38A Sandown Avenue and the Respondent is the freehold reversioner. This application has been made and the application form itself simply challenges the reasonableness of the insurance premiums and management fees for the years in question.

5. As usual, pre-hearing directions were ordered by the Tribunal. This was on the 3rd February 2014. As the insurance premiums were being disputed, the first direction was to order the Respondent to file and serve a statement setting out (a) the claims record for the building, (b) the methods used by the Respondent to obtain competitive quotes for premiums and (c) "*full details of any commission or repayment or other benefit out of the insurance premium paid or given to the landlord, the landlord's agent or any associated individual or* company". The landlord was also ordered to file and serve a further statement, setting out its justification in principle and law for the service charge demands made with a single A4 sheet of paper setting out what service charges have been demanded, dates, what they relate to and what has been paid.

6. From documents supplied by the Respondent, it seems that the insurance premiums for its 'portfolio' insurance policy for the whole building have been:

2009	£672.00
2010	£668.00
2011	£589.00
2012	£625.00
2013	£656.00

Save for the year ending September 2009, for which details are not available, the insurance has been with AXA Insurance UK PLC throughout. Each flat pays half.

7. In the directions order referred to above, the Applicants were ordered to obtain competitive quotes from other insurers for the same level of insurance cover as the Respondent and for any changes to that cover which they wanted, but they failed to do so. They also say, in their statement to the Tribunal, that they accept the reasonableness of the premium for 2011 i.e. £589.00. They do not suggest that the insurance is for risks or values which they contest.

8. With regard to the claims for management fees, the Applicants' statement just asks a series of questions about the managing agents Gateway Property Management Ltd. ("Gateway"), for example 'why did Gateway do this?' or 'why did Gateway not do that?' In other words a series of questions which the Tribunal simply cannot answer.

9. Of significance, it seems that the Applicants are experienced landlords themselves. Dealing with the level of the management fee, they first say (on page 2) that "*as a comparison we have another property where we deal with a different Management company. This company provides the same services as Gateway but only charge £80...*". With regard to insurance premiums, they go on to say on the same page "*the insurance premiums, for most years, seem high compared to other flats that we own, probably £30-£40 more expensive*". At the hearing, Mr. Wilson said that the Applicants had 6 other properties and yet there was no evidence of what management fees (if any) were being charged for those other properties save for the £80 which the Tribunal does not consider to be the level of fee charged by professional managing agents in the open market for relatively small buildings such as this.

The Lease

10. What appear to be copies of both the lease and the counterpart lease are in the bundle. It is in fairly standard terms although the procedure for claiming service charges lacks any detail. It is dated 15th January 1988 and the term runs from the 29th September 1987 for 99 years with a ground rent of £60 per annum. The landlord is responsible for insuring the building and keeping the structure and common parts in repair. It is also responsible for decorating the exterior of the building "*at least once every three years*".

11. There are no formalities for collecting service charges and no ability to create a sinking fund or collect monies on account of charges. Even the ability to use a managing agent is not explicit although there is a general ability to recover "*all other expenses (if any) reasonable incurred by the Landlord in and about the maintenance and proper and convenient management of the building*". The Applicants have not challenged the right to recover management fees.

The Inspection

12. Members of the Tribunal inspected the property in the presence of Mr. Wilson. No-one from the Respondent turned up. However, the Tribunal

later learned that the person who was supposed to be there had problems with her car. At the hearing, no-one asked for the property to be re-inspected.

13. The property is the first floor flat in an end terraced house which has been converted into 2 flats, presumably in 1987. There is a small open porch with the front doors of the 2 flats leading off. The rear garden is split into 2 with the rear part allocated to the property. The building is of part rendered brick construction under a tiled roof with a large bay window at the front with a flat roof over. It was built in the early part of the 20th century.

14. The property is in a residential area, just about within walking distance of some shops and buses into Southend town centre. It was quite a bright spring morning with occasional light rain.

15. The building appeared to be in reasonable decorative order. Mr. Wilson said that the last time it had been decorated was in 2008 which, if correct, shows how important it is to have this sort of work undertaken well. All the windows except for an original small stained glass window to the side elevation and the first floor at the back were of uPVC.

The Law

16. Section 18 of the Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent which is payable for, amongst other things, insurance, and which varies 'according to the relevant costs'.

17. Section 19 states that relevant costs are payable 'only to the extent that they are reasonably incurred'.

18. A tenant may apply to a Leasehold Valuation Tribunal (now the First-tier Tribunal, Property Chamber) pursuant to Section 27A of the Act, for a determination as to whether a service charge is reasonable and, if it is, as to the amount which is payable.

19. Section 27A also states that a Tribunal has no jurisdiction where service charges have been agreed or admitted or they have been determined by a court or Tribunal. If a service charge has been paid, this does not necessarily mean that it is agreed or admitted but is merely a circumstance to be taken into account. In this case, whilst the service charges were more or less paid up to date, it was clear from the copy correspondence supplied that complaints were being made as far back as June 2010 about the amount of service charges.

20. Section 20C of the Act enables the Tribunal to make an order preventing a landlord from recovering its costs of representation before the Tribunal as part of any future service charge demand.

21. On the issue of whether a commission paid as part of a demand for insurance premiums is payable, the case of **Akorita v Marina Heights** [2011] UKUT 255 (LC); LRX/134/2009 is relevant. It decided that insurance commission paid to a managing agent was not recoverable as part of a service charge because it was a charge incurred not in providing insurance but in paying a commission to the agent.

The Hearing

22. The hearing was attended by Mr. Wilson. On behalf of the Respondent, there were Mr. Ben Day-Marr from Gateway and Mr. Amos from Lorica, insurance brokers. At the outset, Mr. Day-Marr apologised for the fact that the case worker was not present for the reasons stated. He had not read the papers in detail but did not request an adjournment.

23. The hearing was quite short. As the Tribunal explained to Mr. Wilson, it was difficult to assess the reasonableness of insurance premiums if there was no evidence by way of alternative quotations, which he had not supplied, despite the directions made. What he did say was that he now understood the reason for the higher than expected premiums now that he had read the explanation from the Respondent's broker. He felt that there were some (unspecified) risks being covered which he did not see why he should pay for. He had agreed the 2011 premium of £589.00 after he had managed to obtain a reduction by contacting the insurance broker.

24. As far as the management fees were concerned, he said that he did not see why he should have to pay monies over and above the fixed annual charge. He also considered that the £200 plus VAT was excessive. He tried to produce evidence of the £80 fee he had paid on one of his other properties but as this was very late the Tribunal declined to accept it. Again, it was pointed out to him that it was difficult to deal with this sort of complaint without evidence of comparable charges demanded from competitors.

Conclusions

25. 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."

26. As far as **insurance** is concerned, the Tribunal has found this to be a difficult question as the Applicants produced no comparable evidence. Using its knowledge and experience, it considers that the sums insured and declared values appeared to be about right. The premiums seemed rather high, but the Applicants had agreed the 2011 premium for the building at £589.00 and none of the premiums for the other years in question were more than £100 above than this figure.

27. One of the difficulties in this case is that the evidence supplied by the Respondent does not disclose what commissions were paid out of the premiums demanded and to whom they were paid. The directions order referred to above, of which the Respondent had full knowledge when it prepared its statements, said that full details of any commission must be disclosed and "***In the event that the Respondent fails to provide the information ordered...,the Tribunal may make an inference that a substantial commission has been paid***".

28. The insurance brokers are Lorica Insurance Brokers Ltd. They have provided a statement for the Tribunal in which they actually refer to the directions order. And yet they still refuse to give details of the commission earned. They simply say "*the commission we earn from the policy is representative of the service provided to our clients and the insurers AXA. These services include administering documentation, providing a claims team to assist and provide throughout a claim, provide reports and accounting data relating to the large portfolio that we manage. There are no payments made to either the freeholder or Managing Agents from the commission we earn in respect of the insurance for the property*".

29. Had the Applicants produced evidence of quotations from recognised insurers of repute which had been substantially lower than the premiums demanded, the Tribunal is likely to have made the inference referred to. However, the Tribunal can only determine issues of this nature on the evidence and in the absence of such evidence, the premiums will not be reduced.

30. Turning to the question of **management fees**, Gateway has been told many times now that if it charges a fixed fee, which is the method recommended by the Royal Institution of Chartered Surveyors, it should not be charging additional amounts for postage, bank charges or accountancy in simple cases such as this where no bank charges can be proved. Its representatives have said on many occasions in the past that they do comply with the RICS 'Service Charge Residential Management Code' which is very clear in saying what should be included in a fixed annual fee. Amongst other things it says that the following work should be included:-

- 'Produce annual spending estimates to calculate service charges and reserves, as well as administering the funds'
- 'Produce and circulate service charges accounts and supply information to tenants...'
- 'Collect service charges from tenants'
- 'Visit the property to check its condition and deal with minor repairs to buildings, plant, fixtures and fittings'
- 'Deal reasonably and as promptly as possible with enquiries from tenants...'
- Administer building and other insurance if instructed...'

31. When asked whether there was any record of when Gateway visited the property, Mr. Day-Marr said that he did not have that information. However, when discussing the abortive section 20 consultation commenced by letters dated 28th November 2012, a rather disturbing picture began to emerge. The letters state that the "intention" of the Respondent was "to carry out external and internal decorations and common fabric repairs".

32. When it was pointed out to Gateway by the Applicants that the outside did not need decoration and there were no internal common parts, there was no follow up. Mr. Day-Marr said that Gateway had several thousand properties to manage and often these letters were sent out without any inspection at all. If there was no reaction to the first letter, the surveyor would attend to prepare a specification and if no work was needed, they would simply report this and no specification would be prepared.

33. Thus, the impression given is that there are no regular inspections when work might be anticipated. That being the case virtually all of the RICS Code conditions referred to above are not being complied with because (a) separate charges are being claimed for preparing service charge accounts, (b) there appear to be no regular inspections, (c) there was no evidence of annual spending estimates and (d) the applicants were very critical of the timeliness and/or helpfulness of responses to complaints and queries raised by them. As to insurance, this is dealt with by the Respondent. Gateway cannot be criticised for this but their fee should take that factor into account.

34. The previous LVT decisions, produced by Gateway in this case to justify its position, relate to a period when they had taken over the management of a large number of properties from BLR in 2009. That company appeared to be inefficient and did not hand over important records. Gateway clearly had a great deal of work to do at that stage to try to put matters right. The management fees they charged were generally lower than in this case. As time has passed, the Tribunal has noted that ongoing management of individual properties has not been as active as was promised then. No regular schedule of inspections has ever been produced.

35. Furthermore, this Respondent landlord seems to always arrange its own insurance through its broker which means that save for referring tenants on to those brokers in the event of a claim, there is nothing for Gateway to do as far as insurance is concerned.

36. As this Tribunal has said in the past, £200 plus VAT per annum is within the range of reasonableness as compared with other managing agents who provide an efficient and comprehensive service. However, as far as Gateway is concerned, a reasonable annual charge for this property is slightly less than that to reflect the small amount of management which is actually needed and the fact that there is very little to do in connection with insurance. The 'one size fits all' policy Mr. Day-Marr referred to is not reasonable.

37. A reasonable management fee for this property is £175.00 per annum per flat plus VAT. Thus the amounts stated as being reasonable in the decision above are half the insurance premiums claimed plus inclusive management fees of £175 plus VAT per annum

38. As far as costs are concerned, the Tribunal has to decide whether it is just and equitable for an order to be made under Section 20C of the 1985 Act preventing the landlord from recovering its costs of representation through services charges. In fact the lease probably does not allow for this anyway. However, bearing in mind the result of the case and as a safeguard for the tenants, the Tribunal does consider it just and equitable to make such an order.

39. A late application was made for an order that the fees paid by the Applicants be refunded. The Tribunal does not consider that the Respondent has behaved so badly as to justify such an order.

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Bruce Edgington
Regional Judge
15th May 2014