9587

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AW/LSC/2013/0580**
Property	:	**69 Cadogan Square, London SW1X 0DY**
Applicant	:	**Nearfine Limited**
Representative	:	**Helen Ryman, Property Manager**
Respondent	:	**Truman Holdings Ltd.** **Kleinwort Benson (Guernsey) Ltd.** **Monanthes Shipping Co.** **Ms Berezovskia** **Mandia Investments Co. Ltd.**
Representative	:	**Not applicable**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Judge F Dickie** **Ms Marina Krisko FRICS**
Date and venue of Hearing	:	**11 December 2013** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**17 January 2014**

DECISION

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Decisions of the tribunal

(1) The estimated cost of £72,415.00 including VAT is reasonable and would be payable.

(2) Expenditure on the first year's servicing agreement (£1100) within the contract price is reasonable (but ongoing servicing costs would have to be market tested).

(3) Total management and professional fees of up to 20% are reasonable and would be payable (plus VAT).

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Respondents in respect of proposed works to upgrade the lift to the subject premises at an amended estimated cost of £72,415 including VAT plus surveyor's fees of 10% plus VAT and management fees at 15%, total £91,605.23. The cost of the works being substantial, and there being no consensus to pay from the leaseholders (who are not all obligated in their leases to pay service charges on account), the Applicant has decided to seek the tribunal's determination that if these costs were incurred they would be reasonable and payable under s.27(A)(3) of the Act. The relevant legal provisions are set out in the Appendix to this decision.

2. The tribunal issued directions after an oral case management hearing scheduled to take place on 17 September 2013 which no-one attended. Those directions included permission to the parties to rely on expert evidence and required the service of any report by 14 November 2013.

3. The property which is the subject of this application is a Victorian red brick Grade II listed building comprising five flats let on long leases plus a caretaker's flat in the basement. The Applicant holds the head lease and the Respondents are the five long leaseholders. Flat 4 is held on an old lease, and the other four leases have been extended in similar, but not identical terms. The tribunal did not consider it necessary or appropriate to carry out an inspection.

4. The Respondents with extended leases have covenanted by Clause 20 to pay "... by way of further rent the Service Charge payable in accordance with the Fourth Schedule hereto...". the Fourth Schedule of the lease for Flat 3 provides for the payment of a Service Charge (the terms of the other extended leases being similar but not identical) for "inspecting servicing maintaining repairing amending overhauling renewing replacing and insuring the lift and its associated equipment which serves the Building...." the Service Charge is payable in "a fair and

proper proportion attributable to the Demised Premises of the cost of each of the service in relation to the Building and its appurtenance set out in the Schedule".

5. The Respondent with an unextended lease has covenanted by Clause 2(3) ".... to pay to the Lessor on demand a sum equal to 2/11ths of the cost and expense incurred by the Lessor in the performance of its covenants contained in the Head Lease under which the Lessor holds the Building and/or under Clause 3 hereof including (and without prejudice to the generality of the foregoing) the preparation of specifications and schedules in connection therewith and the fees charged and expenses of any expert consulted by it in connection therewith together with an annual management charge equal to fifteen per centum of the amount payable by the Lessees as aforesaid..." Clause 3(3)(c) further provides "That (subject to contribution and payments as hereinbefore provided) the Lessor will maintain repair decorate and renew the main entrance passages landings staircases and lift (if any) of the Building so enjoyed or used by the Lessee in common as aforesaid..."

The hearing

6. Ms Ryman appeared on behalf of the Applicant at the hearing. There was no appearance on behalf of any Respondents. Contracts having been exchanged for the sale of Flat 4, the purchaser of that flat has consented in writing to the application. Whilst Ms Ryman said that the leaseholders of Flats 3 and 5 had expressed to her their support for the application, they had not explicitly communicated this to the tribunal. The leaseholders of Flats 1 and 2 objected to the application and submitted a written statement of case in compliance with the tribunal's directions. They produced no expert evidence before the hearing.

7. The lift equipment is over 50 years old. Whilst modern safety standards do not apply to pre-existing installations, the landlord wishes to provide a lift offering modern standards for safety and reducing ongoing maintenance costs. Statutory consultation notices were served and seen by the tribunal. Only Flat 1 responded, requesting a copy of the estimates. As at the date of the hearing there was no dispute as to the landlord's compliance with the consultation requirements. The landlord intends to instruct the lowest priced contractor.

8. Ms Ryman was concerned that when the lift next breaks down major works will be required, it would be out of action for an extended period, and the common parts decorations now due would be disturbed.

9. Upon the advice of the insurer, in 2006 the landlord had obtained an expert report on the lift condition from W Jennings & Associates, and this was produced to the tribunal. This recommended major lift refurbishment. No such work was carried out, and as a preliminary

step to the works now contemplated to take place before planned communal redecoration, the Applicant's surveyor instructed Lift Specialists Ltd. to prepare a detailed quotation, based on which he drew up a more detailed specification of works to send out to tender. Three tenders were obtained.

10. The objecting Respondents argued that the lift was in good repair and could be maintained. However, the tribunal considers that the weight of expert evidence does not support their view. The tribunal observes that the Jennings report concluded "This lift is in excess of 40 years told and all equipment therein is now obsolete. Spare parts are exceedingly difficult to obtain. We therefore suggest due to its condition and obsolescence, the serviceable life of this lift is now coming to an end and a major refurbishment is required". The cost of the works recommended by Jennings was estimated to be £65,000 plus £10,000 for moving the lift plant to the roof space (work not now proposed as not considered practicable by Lift Specialists Ltd.).

11. An email from Lift Specialists Ltd. dated 18 July 2013 was produced in support of its recommended work and quotation, and itemised the numerous defects and hazards presented by the current installation. That company quoted an option of £1100 for 12 months servicing following completion.

12. The objecting leaseholders principal argument is that the proposed works were unnecessary and unreasonable. They consider that the expert reports indicate that the lifts are in good repair and they observe that leaseholders have not complained of breakdowns. Ms Ryman explained that there was little fault reporting for the lift because it is very rarely used, owing both to its condition and because Flats 4 and 5 are rarely occupied at present.

13. From correspondence latterly produced to the tribunal, it appears that after the hearing had taken place the objecting Respondents arranged for an inspection of the lift by another contractor (Crown Lifts). They have raised concerns about the caretaker's lack of cooperation in refusing access to the lift room. Whilst it is not clear that these Respondents gave notice to Nearfine Ltd. of their proposal for access, any dispute about the matter is by now of little relevance since the tribunal directions made clear the parties must comply, and gave a deadline of 14 November 2013 for exchange of expert evidence.

14. In their written submissions dated 17 October 2013 prepared for the hearing the objecting Respondents said they "would like to reserve the right to get an engineer's report as to the necessity of replacing the lift". They referred to previous difficulties in accessing communal plant for professional inspection, but insufficient particulars were provided, no postponement of the hearing requested, and no varied directions of the tribunal sought. The objecting Respondents were not present or

represented at the hearing, and they suggest there would be no prejudice in the tribunal now considering their quotation. New evidence cannot be submitted after the hearing and it is certainly not reasonable in the circumstances of this case to list a further hearing so that this late expert evidence can be tested. There would indeed be prejudice – including delay in commencing the works subsequent internal decorations, and the cost and inconvenience to the Applicant (and the tribunal could consider an order for wasted costs against the Respondents), as well as an adverse impact on tribunal resources.

15. In any event, the tribunal has considered the content of the quotation dated 17 December 2013, which it finds to be lacking in important details. It refers to the clients "request" and "requirements", but there is no indication of what instruction was given to Crown Lifts, no comment upon the much wider scope of the landlord's proposed works which the Respondents seek to discredit, and no conclusive opinion that the more limited works suggested are appropriate. Since there was no access to the lift room, the quotation is not comprehensive. The Respondents suggested they might seek a direction from the tribunal regarding access to the lift room, but chose not to do so at the appropriate time and did not attend the hearing to explain their case.

16. The Respondents have not produced sufficient and timely expert evidence to counter that relied on by the Applicant, which the tribunal finds does demonstrate that the refurbishment is reasonably necessary in the performance of the landlord's covenants in each of the leases, as set out above. The works have been competitively tendered and there is no persuasive evidence that the cost (which is fairly comparable to that estimated by Jennings in 2006) is unreasonable, except as set out in the following paragraph.

17. The landlord sought to charge its standard 15% management fee on the cost of the work, which Ms Ryman said was for its general management costs for overheads and running costs. This is the charge specified in the lease for Flat 4. The management fee payable is not specified in the leases for Flats 2 and 3, and there is no covenant in the lease for Flat 1 to pay any management charge. The professional and management fees were considered to be too high by the objecting leaseholders. The tribunal considers it reasonable for the landlord to instruct a surveyor to manage this contract, and this therefore leaves little for the landlord to do in terms of management in addition to the statutory consultation and billing. The overall cost of management and professional fees must be reasonable. On the evidence, the landlord's total proposed charge 25% is excessive in the view of the tribunal. A total of 20% is the maximum which can be justified in the circumstances.

Name: F Dickie **Date:** 17 January 2014

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

(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.

Section 19

(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.

Section 27A

(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,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or

(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]