12292

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/21UD/LSC/2016/0126
Property	:	Lorimer Court, 33-35 West Hill Road, St Leonards on Sea, East Sussex TN38 0NA
Applicants	:	Worldsection Ltd
Representative	:	Mr David J Earwaker Dawson, Harden & Tanton
Respondents	:	Braer Developments (Flat 1) Miss D Arnold (Flat 2) Miss S Andrews (Flat 3) Mr S Payne (Flat 4) Mr N Steuart-Pownall (Flat 5) Mr W Ormsby (Flat 6) Mr P Lander (Flat 7) Miss S Taylor (Flat 8)
Representative	:	In person
Type of Application	:	Determination of service charges: Section 27A Landlord and Tenant Act 1985
Tribunal Member	:	Mr B H R Simms FRICS Chairman sitting alone.
Hearing	:	Inspection & documents only
Date of decision	:	20 June 2017

DECISION

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THE APPLICATION & BACKGROUND

1. The application dated 13 December 2016 seeks a determination under section 27A of the Landlord and Tenant Act 1985 ("the Act") of the lessees' liability to pay service charge demands which include an additional contribution to the reserve fund for years 2016/17 and 2017/18. The Applicant is the managing agent on behalf of the Freeholder Worldsection Ltd. The Respondents, are the eight long lessees in the block.

2. The Application seeks the Tribunals determination whether the demand for reserve fund contributions for major works made in September 2016 and to be made in March 2017 are reasonable.

3. The work is estimated to cost in the order of £70,000 increasing to, in the region of, £80,000 to include fees and, in summary, will consist of:

   - Erecting scaffolding
   - Maintenance and general repair of the roof and chimneys
   - Maintenance and general repair of the rendering, gutters and woodwork to all elevations
   - Extensive rendering repairs to all elevations to include stitching and bonding cracks and re-rendering substantial loose areas of rendering to the rear elevation.
   - Complete external redecoration to woodwork, and to previously painted metalwork, UPVC and rendering.

4. In addition the Application seeks confirmation that the cost of the proposed work is reasonable and the Applicant requests in its Representations a determination that the proposed fee structure is reasonable.

5. Directions for conduct of the case were issued dated 04 January 2017 advising the parties that the application would be determined on the papers without a hearing in accordance with rule 13 of the Tribunal Procedure Rules 2013[1] ("the Rules") unless a party objects. The Directions identified the demand for a reserve fund contribution as being the subject of the Application. No objection to a paper consideration was received within the time limit so the Tribunal proceeded to consider the case based on an inspection and the documents submitted.

6. Further Directions were issued dated 26 May 2017 requesting additional documents which were received and circulated to the parties. The Tribunal gave the Lessees an opportunity to comment on these additional documents, no representations were received.

[1] Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 (SI 2013/1169)

SUMMARY OF DECISION

7. The separate demand for a contribution to the reserve fund for the year 26 March 2016 to 25 March 2017 at £33,000 per half year apportioned to each Respondent is not reasonable or payable.

8. As the Tribunal has limited information it is not appropriate for it to determine whether the cost or extent of the proposed work which has yet to be undertaken is reasonable. For the same reason the Tribunal does not determine the amount of any contribution to the reserve fund in other years.

9. The Tribunal does not determine any other issues raised during the course of these proceedings which might be the subject of another application.

LEASE

10. The Tribunal had before it a copy of the lease for Flat 6 at Lorimer Court and was told that this is a specimen lease and it is to be assumed, without evidence to the contrary, that the leases for the other 7 long leasehold flats are in a similar form. The lease is dated 12 December 1984 and grants a term of 99 years from 29 September 1983.

11. The relevant provisions in the lease may be summarised as follows:

12. The lessee is to pay a Maintenance Charge in proportion of the gross annual value of the flat in proportion to the GAV of the whole. [This proportion has been reduced to percentage for each flat which is not in dispute]. The Charge is based on four items set out in paragraphs 1. (a) to (d) of the Sixth Schedule; (a) expenses incurred by the lessor in performing the lessor's covenants of repair of the Building, common parts, roadways & footpaths and boundaries; external redecoration; cleaning; and insurance of the Building; (b) fees and disbursements paid to the managing agent; (c) the costs, including the costs of an auditor, of ascertainment of the Charge and keeping books of account; and (d) a contribution fixed annually to provide a reserve fund.

13. The internal redecoration of the flat and the repair of the front door, windows and window frames shall be the Tenant's responsibility but the external redecoration thereof remains with the Landlord [paragraphs 3 & 4 Fifth Schedule].

14. Payment of the Maintenance Charge is made firstly by two equal on-account payments on 29 September and 25 March in each year based on such sum as the Landlord has estimated as being the likely amount for the year in question stated to end on 25 March. Secondly a balance, if any, based upon the actual expenditure made in the preceding year on service of an Auditor's Certificate.

INSPECTION

15. The Tribunal chairman inspected the exterior of the property on Friday 12 May 2017 in company with Mr Earwaker representing The Applicant and Mr Bowles of Meridian Surveyors who had prepared the survey and Schedule of Work.

16. The property comprises a detached Victorian building on the South side of the road previously comprising a pair of semi-detached properties subsequently, in 1982/3, converted into eight self-contained flats. The building occupies an elevated position above a steeply sloping site with a South elevation exposed to the sea. The building is probably built of brick and block with plain cement rendered North and side elevations and rendering with a pebble-dash finish to the South.

17. The building is in need of redecoration and many patches of rendering have lost key and are deteriorating with larger areas needing attention particularly on the South and West elevations.

REPRESENTATIONS AND EVIDENCE

18. Mr Earwaker of managing agents Dawson, Harden & Tanton (DHT) prepared a detailed statement of case accompanied with a bundle of documents providing evidence in support. At the Tribunal's request he provided additional copy documents.

19. The relevant covenants in the lease were outlined, as summarised at paragraphs 12 to 15 above.

20. The building was decorated in 2010 at a cost of about £16,000. Responsibility for management changed hands following the dissolution of an RTM company and DHT took over. The planned external redecoration was postponed in order to enable an increased sum to accrue in the reserve fund to help defer the cost and at that time there was about £16,000 in the fund to cover the cost.

21. Complaints were being received from Lessees regarding damp ingress on the rear elevation so a report was commissioned from Meridian Surveyors (Meridian) and included with a Schedule of Works now forming the basis of the proposed repairs. This report examined the dampness in Flats 1, 2, 3 and 8, where access was available and concluded that there were a variety of causes: defective seals around doors and windows; penetrating dampness through the walls; failed damp-proof-course; defective rendering and roof leaks, amongst others.

22. Meridian drew up a schedule of work and believed that the majority of the damp issues would be remedied by the proposed external repairs and redecoration. In addition they report that the lessees had agreed that the exterior [presumably the rendering] should be painted in a grey colour.

23. Meridian assumed that repair of windows and frames is the responsibility of the Lessees and hasn't included any repairs to these.

24. In January 2016 the Section 20[2] procedure was initiated by service of Notice of Intention and the procedure then followed including tendering for the work. Several lessees made comments on the proposed work at that time.

[2] Section 20 Landlord and Tenant Act 1985 as amended

25. In order to raise funds for the work demands were sent to the Lessees dated 30 August 2016 requesting a half year service charge for the period 29/09/2016 to 24/03/2017 and in addition a reserve fund contribution stated to be for the same period. Mr Earwaker states that the lease does not specify whether the amount of the reserve fund which is to be fixed annually should be set in September or March.

26. The Lessees were directed to respond with comments and some earlier correspondence was included in the documents bundle.

27. Mr Ormsby (flat 6) wrote on 08 August 2016, apparently on behalf of a 'Residence [sic] Association, following a meeting of a majority of the leaseholders. A meeting between leaseholders and freeholder/agent was promulgated. It was stated that there was agreement that the major works should take place at some point but suggested that, either the works were delayed until the sinking fund had sufficient funds, or that the works proceed with the freeholder funding the work but with a repayment plan spread over the next five years, or that the jobs are staggered to reduce the impact of the costs in a single year. The suggested meeting would discuss a) the cost of the work, b) the alteration of the work from minor to major without forewarning or complying with regulations and c) the surveyors' and management costs collectively forming 25% of the final quote. It was felt that the lessees should have received 12 months' notice of any substantial increase in costs.

28. Mr Earwaker responded [letter 30 August to Mr Lander] but a meeting was not convenient. He explained the process that had been undertaken to reach that point and considered that the works are well overdue. In addition he explained that there would be a re-tendering process and mentioned that there would be a substantial increase in the reserve fund. In this reply he anticipated the cost of the works would be at least £70,000 increased to £80,000 to include fees. After deducting the existing reserve of £14,000 this will leave £66,000 to be collected in two half yearly tranches of £33,000. The reserve fund contribution for future years is to be reduced to £4,000 to allow for a build-up of funds for the next redecoration in 2022.

29. In his representations Mr Earwaker considers that the lease does not provide for a twelve month notice although he agrees that it must be fixed annually. Any delay in undertaking the work cannot be allowed due to the rapid deterioration of the building. Mr Earwaker accepts that the substantial increase in the reserve is a shock to the tenants but the Landlord has to comply with its repairing covenants.

30. Further correspondence ensued between Mr Earwaker and Mr Ormsby and also Miss Andrews (flat 30) regarding the cost of the proposed works but also several items included in the general Maintenance Charge which are not the subject of this application.

31. In response to the Tribunal's Directions Mr Ormsby [presumably on his own behalf and not the 'Residence Association'] wrote on 14 February 2017 that he opposes the Application on the grounds that such a dramatic increase in the sinking fund contribution is unreasonable. He quotes [source unclear] that one of the purposes of a sinking fund is "*...to even out the annual charges, avoiding large*

one off bills, and to assist with leaseholders' budgeting". He suggests that the cost is spread-out over several years. No other responses have been received.

LAW AND JURISDICTION

32. The tribunal has power under section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when a service charge is payable.

33. By section 19 of the Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard. Where a service charge is payable before the costs are incurred, the amount demanded must be reasonable.

34. Under section 20C of the Act a tenant may apply for an order that all or any of the costs incurred by a landlord in connection with proceedings before a tribunal, are not to be regarded as relevant costs to be taken into account when determining the amount of any service charge payable.

CONSIDERATION

35. The application had initially limited its request to the reasonableness of the reserve fund contribution of £33,000 to be split between the lessees. This is the figure referred to in Judge Morrison's Directions. From the documents submitted it transpires that this figure is for a half year the total additional reserve fund contribution being £66,000 for a full year.

36. Other issues have been raised during the course of correspondence between the parties and raised in the Applicants Representations. These additional matters include: various items in the general service charge; the cost of the major work; the extent of the work; the amount of fees to be added; compliance with S.20; painting the rendering grey; the future reserve fund contribution; etc. All these additional matters could be determined by the Tribunal but they are not identified as issues to be determined in this Application so they are not decided here. They might be the subject of a separate S.27A or S.20ZA or other application to the Tribunal at another time.

37. The Tribunal found the Applicant's Statement of Case difficult to follow. Mr Earwaker failed to explain succinctly the issues to be decided or his interpretation of the law or the lease in support of his case. The Tribunal has done the best it can to cover all the matters raised in the Statement and the documents in the bundle.

38. Firstly the Tribunal considered the terms of the lease. The Applicant on a regular basis has included in the usual demand for ground rent and service charge an additional demand for a reserve fund contribution, which has been substantially increased for 2016/17. From the additional documents supplied it would seem that this is the usual practice of DHT.

39. The reserve fund contribution is provided for in paragraph 1(d) of the Sixth Schedule of the lease, as one of the items recoverable by way of the Maintenance Charge and not as a separate charge to the lessees. It follows that the arrangements for calculating the amount of reserve fund contribution, to be included in the Maintenance Charge, must follow the rules set out in the lease for the on-account payments [paragraph 2(a) sixth schedule]. This is *"...the sum conclusively estimated by the landlords as being the likely Maintenance Charge for the year in question..."*. The only guidance given for the estimate of the reserve is that it is to provide for *"...anticipated and accruing expenditure in respect of the compliance by the Landlords with their said covenant[s]"*. This is expected to mean the covenants mentioned in paragraphs 2, 3, 4, and 5 of the Fourth Schedule.

40. There is no provision in the lease for making a separate charge to the lessees for a contribution to the reserve fund.

41. Secondly when consulting the lease the Tribunal considered whether the Applicant has complied with the procedure for calculating the amount of the reserve contribution. Mr Earwaker is unclear how or when this should be done but as the reserve is part of the Maintenance Charge it is clear to the Tribunal that it should be calculated at the same time and in the same way. That is done by the Landlord making an estimate of the amount of the likely Maintenance Charge for the year in question. In order for the estimate to be available to allow a calculation of the on-account Maintenance Charge it will have to be made before September of the year in question and preferably before the year in question starts. It has been DHT's usual practice to issue service charge budgets to the lessees each year, as in evidence supplied with the additional documents. The date these are issued is unclear [the printouts bear the date 06 June 2017, being the date they were copied for the Tribunal]. Nothing has been included in these budgets for a contribution to reserve but it would seem appropriate that an estimate should have been made for this in the estimate.

42. Turning now to the amount of the reserve fund contribution. Mr Ormsby quotes the general principle that the fund is set aside to even out the annual charges, avoiding large one off bills, and to assist with leaseholders' budgeting. This is a good general approach.

43. It was always intended to redecorate the exterior and there may have been sufficient funds in the reserve fund to cover the cost of this. However DHT decided, without consultation, to include additional work beyond that shown in the S.20 Notice including extensive rendering repairs and other additional matters. It is debatable whether the S.20 procedure has now been satisfied with regard to this additional work but this is a question for a different application. The Lessees, either individually or via the ad-hoc Residents Association were shocked at the cost of the proposed work and the proposed contribution to reserves. The lessees made various suggestions to stagger the timing of the work and other arrangements to reduce the impact of the cost but these were rejected by DHT.

44. It was suggested that the Landlord might like to fund the work and recover the cost over a period of time. It is the Landlord's obligation to repair the building in accordance with the lease covenants whether or not there are funds in reserve.

45. There is no provision in the lease for the Landlord to collect monies in advance to fund expenditure, other than by way of the estimate of costs to fix the on-account Maintenance Charge, which includes a contribution to the reserve fund. The Landlord's agent has attempted to overcome this defect in the lease by making an additional charge for a contribution to the reserve fund after the amount of the Maintenance Charge had been fixed.

DETERMINATION

46. There is no provision in the lease for the collection of a separate contribution to the reserve fund so this charge for the year 26 March 2016 to 25 March 2017 is not reasonable or payable.

47. It is not appropriate for the Tribunal to determine whether the proposed cost or extent of the work is reasonable as this should be the subject of a S.20 consultation.

48. The Tribunal has not been provided with sufficient information to determine the amount of any contribution to the reserve fund in future years as this will need to be included in the Landlord's estimate of on-account Maintenance Charge for the relevant years.

49. The Tribunal makes no Determination in respect of any other issues raised during the course of proceedings which might be the subject of another application.

Dated: 20 June 2017

Mr B H R Simms FRICS (Chairman)

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.