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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AW/LSC/2018/0249**
Property	:	**Warwick Mansions, Cromwell Crescent, London SW5 9QR**
Applicant	:	**Termhouse (Warwick Mansions) Management Limited**
Representative	:	**Mr Jack Dillon, Counsel, instructed by SA Law of St Albans Herts**
Respondent	:	**Various Lessees see attached Schedule**
Representative	:	**Mr O Dykes, Solicitor, DMB Law, Sevenoaks**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a future service charge under section 27A (3) Landlord and Tenant Act 1985**
Tribunal members	:	**Mr Charles Norman FRICS (Valuer Chairman)** **Mr M Cairns MCIEH**
Date and venue of hearing	:	**10 Alfred Place, London WC1E 7LR 27 September 2018**
Date of Decision	:	**27 September 2018**
Date of Reasons	:	**15 October 2018**

REASONS

Background

1. The Applicant sought a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to whether the sum of £90,154.86 would be payable by the Respondents in respect of major works namely the replacement of the electrical systems within the subject property (Warwick Mansions London SW5) by 3L Electrical Limited as specified in a statement of estimates dated 3 October 2017. [supplemental bundle[1], page 33]. This application related to the service charge year 2018-19.

2. Following a hearing on 27 September 2018 the Tribunal determined the application in favour of the Applicant and issued a written Decision on the same day, with reasons to follow. These are those Reasons.

3. The relevant legal provisions are set out in the Appendix to these Reasons.

The hearing

4. The Applicant was represented by Mr Jack Dillon, Counsel and the Respondents by Mr O Dykes, Solicitor. Mr Dykes represented three Respondents: Otto and Susan Snel (flat 21) and Mike O'Connor (flat 23). In addition, Mr Dykes referred to a letter from P. A. Crittenden and G.P. Walters of flat 24 for whom he was not acting. Those latter two Respondents considered that the works should go ahead but that UKPN should be placed on notice that the Applicant would seek the costs of the works from UKPN if liability were established. The Tribunal was informed that the majority of Respondents had not disputed the service charges. Therefore, in these Reasons, reference to "Respondents" is a reference only to those who were in dispute.

5. Immediately prior to the hearing the Applicants handed up further documents, namely a clip of 37 additional documents (the "supplemental bundle") and Counsel's skeleton argument. The start of the hearing was delayed while the Tribunal considered these documents.

6. Prior to the start of the hearing the Tribunal discussed procedural issues with the advocates in relation to (i) the supplemental bundle and (ii) the status of evidence from Pearce & Associates, Building Services Consultants, which the Tribunal considered to be expert evidence and for which permission had not been sought.

7. In relation to (i) the Tribunal and advocates agreed that a one-hour adjournment should be granted which the Tribunal considered would give Mr

[1] Reference to the Supplemental bundle refers to the clip of 37 documents handed up by Mr Dillon at the start of the hearing (see below).

Dykes sufficient time to consider the supplemental bundle, not all of which was new.

8. In relation to (ii) the Tribunal noted that the Applicant's statement of case at Para 18 [22][2] included references an expression of professional opinion by Mr Richard Pearce, who is a member of the Chartered Institute of Building Services Engineers. In addition, a 4-page letter from Mr Pearce dated 7 June 2018 was in the bundle and included his professional opinions. The Tribunal considered that application should have been made to lead this as expert evidence in accordance with rule 19 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the rules"). However, Mr. Dykes stated that the evidence was not contested and that he did not require to cross-examine Mr. Pearce. Mr. Dillon's position was that following the Respondents' Statement of Case, there was no longer an issue in relation to this evidence and that permission from the Tribunal was not therefore required.

9. The Tribunal disagrees with Mr. Dillon. The report of 7 June 2018 formed part of the Applicant's case prior to the hearing and was included in the hearing bundle. There was no suggestion prior to the hearing that any part of the statement of case was no longer operable. This was not stated by the Applicant in its Reply to the Respondents' Statement of Case.

10. However, as the evidence was not contested, the Tribunal exercises its jurisdiction under rules 6 and 19 to admit Mr Pearce's evidence. This arises from the unusual circumstances in this case and does not set a precedent. In any event the Applicant was entitled to refer to earlier correspondence from Pearce & Associates which arose in the course of the section 20 consultation, prior to the commencement of the proceedings. This supports the same opinion.

11. Prior to the initial adjournment, the Tribunal handed down a recent decision of the Upper Tribunal *Avon Estates v Leaseholders of Flats 1-15 and Others* [2018] UKUT 0092(LC) (Mr Martin Rodger QC, Deputy President) which dismissed an appeal against a decision of this Tribunal (C Norman FRICS and A Harris FRICS). The case concerned the payability of future service charges where a third party might have liability to contribute.

The Property

12. The property which is the subject of this application is an Edwardian mansion block of 45 flats in Earl's Court. The property has three separate entrances. Photographs of parts of the building were provided in the hearing bundle. Neither party requested an inspection and the Tribunal did not consider that one was necessary.

13. The Applicant is the "Manager" in a tripartite lease in which it is also defined as the lessor in common with the reversioner. The Manager has covenanted to

2 Square brackets refer to page numbers in the hearing bundle

provide services including repairs and the tenant to contribute towards their costs by way of a variable service charge. Each of the long leaseholders own a share in the Manager. The specific provisions of the lease and will be referred to below, where appropriate.

14. It was common ground that major electrical works were required urgently to the property.

The Issues

15. The first issue was whether the amount otherwise payable by the Respondents should be reduced or extinguished as a result of anticipated works to be carried out by UKPN whom the Respondents asserted were liable to carry them out.

16. The second issue was whether the amount claimed was reasonable. During the hearing, Mr Dykes informed the Tribunal that the reasonableness of the quantum itself was no longer disputed by his clients.

17. The proposed works had been subject to a section 20 consultation against which no complaint had been made in proceedings. On 3 October 2017 a statement of estimates under the consultation regulations was sent to the lessees proposing that 3L Electrical Limited carry out the work at a cost of £90,154.88. This was the lowest quotation.

The Applicant's Case

18. The Applicants asserted that it was necessary to carry out major electrical works to the building for the following reasons: many of the external mineral insulated copper cables (MICC) had suffered corrosion, replacement of a single MICC cable was impracticable, an electrical fire had taken place, there had been numerous power failures, the electrical system was unsafe, there had been numerous electrical outages and there was a large amount of redundant electrical plant.

19. The proposed work would include new electrical incoming supplies from UKPN, one to each part of the property; there would be new replacement main distribution boards in each of three blocks and new lateral electrical supplies from the three distribution boards to the electrical meters in the dependent flats.

20. In a letter dated 19 of September 2017, Pearce & Associates advised that the switchgear and associated wiring should be carried out in one operation as all this work forms the essential circuit to ensure that the electrical supply to each flat is made available. It is essential to ensure that each electrical circuit is changed over in minimum time and all parts of the circuit are compatible.

21. In the supplemental bundle, the Applicants relied on a letter dated 13 July 2016 addressed to 3L Electrical Limited in which UKPN's Principal Solicitor roundly rejected any responsibility for, or ownership of, the relevant apparatus and cabling.

22. The Applicants also relied on a determination by the Gas and Electricity Markets Authority ("the Markets Authority") (RBA/TR/A/DET/5) dated 12 August 2010 as cited by UKPN in its July 2016 letter. This was a Reference under section 23 of the Electricity Act 1989. It concerned a dispute between the City of Westminster, London Borough of Camden, London Borough of Islington and EDF Energy Networks. The dispute concerned the responsibility for replacement of rising and lateral cabling and related equipment in blocks of flats. The Markets Authority found that there was no evidence that EDF had originally installed the equipment and that they had no responsibility to maintain it as it did not form part of the distribution system for which EDF had responsibility under the Act. Stickers on equipment were held not to be proof of ownership.

23. The Applicants then referred to the covenants in the lease which oblige them to carry out this work. The lease covenants were not disputed by the Respondents and the Tribunal can therefore deal with this briefly.

24. Clause 6 (a) (ii) is a covenant by the Managers to maintain and keep in good and substantial repair and condition all .... electric cables and wires as may ...be enjoyed or used in common with the owners or tenants of other flats. By clause 6(n) the Managers also covenant to do or cause to be done all such works installations acts matters and things in the absolute discretion of the Lessors and the Managers as may be considered necessary or advisable for the proper maintenance safety amenity...of the Building.

25. By covenant (F) on page 4 of the lease [102] the lessees covenant to permit the Manager at all reasonable times to enter the flats to execute repairs.

26. By clause 4 [106] the lessee covenants to pay the Managers a specified percentage of the reasonable costs and expenses of the Managers in complying with their obligations under Clause 6. Clause 4 also provides for payments of service charge on account.

The Respondents' case

27. In their statement of case the Respondents did not dispute the necessity for the proposed works nor that the works "need to be carried out sooner rather than later." However, they asserted that all the proposed works were the responsibility of one or more electricity companies. If the electrical apparatus was owned by an electricity company the lease could not affect that. The lease could not confer on either party rights which they had no power to grant.

28. The Respondents claimed that, as a result of section 14, Electricity Act 1947, all assets of previously private electricity companies were transferred by operation of law to the London Electricity Board. Following privatisation in 1989, by section 65 of the Electricity Act 1989 relevant assets were transferred to UK Power networks (UKPN).

29. The Respondents also referred to a statement in the letter from Pearson & Associates dated 7 June 2018. This stated that the main distribution boards should be sealed by UKPN to prevent unauthorised interference. The Applicants had not put forward grounds or evidence for declining to attempt to call upon UKPN to carry out the necessary works (although this was addressed at the hearing, see above).

30. Mr Otto Snel tendered a short witness statement. He referred to his experience of re-wiring his flat in the 1980s when an LEB electrician was required to attend to connect the external supply to the fuseboard. LEB did not charge for this. In addition, Mr Snel referred to stickers on the electrical intake room which were marked "London Electricity Board" and warned that it was an offence to interfere with the apparatus. Mr Snel's evidence was accepted by the Applicant and he was not cross-examined.

The Law

31. As the work is prospective, the determination relates to service charges to be paid on account under the lease. Therefore, section 19(2) of the Act applies which provides as follows:

> "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."

32. In *Avon Estates* the Upper Tribunal held at paragraph 51 that

> "whether an amount is reasonable as a payment in advance is not generally to be determined by the application of rigid rules, but must be assessed in the light of the specific facts of the particular case.... It is not inconsistent with the Tribunal's decision in *Knapper*

for the likelihood of a particular event occurring during the period covered by an advance payment to be taken into account in determining the reasonableness of the amount of the payment."

33. In paragraph 57 of its decision, the Upper Tribunal made clear that relevant factors included the likelihood of a payment from a third party and its timing. The Tribunal considers that the carrying out of work is equivalent to receipt of payment.

Findings

34. The Tribunal found that the Manager was responsible for carrying out the works under the leases. The electricity companies were not party to the leases.

35. It was common ground that the works are required urgently and (by the close of the hearing) that the cost of the works was reasonable.

36. The Tribunal found that there is no prospect of UKPN agreeing to carry out any part of the electrical works in the foreseeable future. To the contrary, UKPN have roundly rejected any such claim. It is not the function of the Tribunal to determine the merits of UKPN's position, but the Tribunal does observe that the Markets Authority's Decision cited by UKPN is factually close to the position in the present case. Proceedings have not been issued against UKPN by the Respondents.

37. For the above reasons the Tribunal found that no part of the on account service charges in respect of proposed works were unreasonable. Accordingly, the Tribunal found that the on account charges claimed were payable.

Name: C Norman FRICS **Date:** 15 October 2018

ANNEX - RIGHTS OF APPEAL

- The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.

- If a party wishes to appeal against 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.

- 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.

- 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.

- 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.

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

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 the appropriate 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 the appropriate 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) the appropriate 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.]

Section 20B

(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.

Section 20C

(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 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.

(2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property Tribunal, to that Tribunal;
- (b) in the case of proceedings before a residential property Tribunal, to the Tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property Tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the Tribunal;
- (d) in the case of arbitration proceedings, to the arbitral Tribunal or, if the application is made after the proceedings are concluded, to a county court.

(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.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
  (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
  (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
  (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
  (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
  (a) specified in his lease, nor
  (b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate Tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate Tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).