FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00MS/LSC/2021/0023
Property	:	Various flats at Sirocco, 33 Channel Way, Southampton, Hampshire SO14 3JE
Applicant	:	Janette R Urinovsky (Flat 60) and those listed on the attached appendix
Representative	:	Eduardo Luis Urinovsky
Respondent	:	Zonemeadow Ltd
Representative	:	Mr Allison, counsel, instructed by J B Leitch Solicitors
Recognised Tenant's Association	:	AQARA
Type of Application	:	Service Charges- S27a landlord and Tenant Act 1985
Tribunal Members	:	Judge D Whitney Mr C Davies FRICS Mr P Gammon MBE
Date of Hearing	:	4th May 2022
Date of Determination	:	30th May 2022

DETERMINATION

Background

1. The Applicant leaseholders seek a determination of their liability to pay and the reasonableness relating to a "special contribution" service charge that have been requested by Zonemeadow Ltd from the leaseholders in respect of the professional fees of Thomason Consulting Civil & Structural Engineers ("Thomason"). Thomason were appointed to specify works required to remedy fire safety defects identified following the Grenfell fire tragedy.

2. The Applicant seeks a determination as to whether the freeholder/landlord has acted unreasonably to:

   a) request a special contribution from the leaseholders under the service charges,

   b) appoint Thomason's without a due competitive tender process,

   c) agree to pay Thomason a fee of 10% of the contract value and

   d) seek to appoint a contractor for a £4m re cladding contract based on only 2 tender returns.

3. The Applicant Lessees have appointed Mr E L Urinovsky to act for them and all correspondence will be conducted through him.

4. Various sets of directions were issued which it seems were substantially complied with and the Tribunal had an electronic hearing bundle. References in [ ] are to pages within that bundle.

The Law

5. The relevant law is set out in the annex attached to this decision.

The Hearing

6. The hearing took place at Havant Justice Centre. Mr Urinvosky attended by video link and represented his wife and the 25 other leaseholders who collectively owned leasehold interests in 34 flats. Mr Allison of counsel attended in person together with Ms Leggate of RMG, the Respondent's managing agents. The Residents Association did not take any part in the proceedings.

7. The Tribunal did not inspect. Neither party requested an inspection. The Tribunal had viewed the property using Google.

8. The parties agreed the 4 matters set out in paragraph 2 above were those to be determined by the Tribunal.

9. Mr Allison looked to introduce copies of the Thomason fee proposal dated 28th August 2020 and copies of the 2 demands for payment sent to Mrs Urinovsky being the lead leaseholder. Mr Allison arranged to send copies to Mr Urinvosky. Upon conclusion of Mr Urinvosky presenting his case the Tribunal adjourned so he could review these documents and confirm whether he agreed the Tribunal could consider the same. Upon resumption Mr Urinovsky did not object to the Tribunal having sight of these documents which he agreed may be helpful in resolving the issues. The Tribunal agreed to the late submission of these documents and considered the same.

10. Mr Allison explained the current position was that the application to the Building Safety Fund (BSF) had passed due diligence. All of the work save for works to the brickwork had been accepted as covered by the BSF. An assessment pursuant to PAS9980 was being undertaken and it may be that the brickwork remedial work will not be required if all other work is undertaken. This assessment is due by the end of May.

11. At that point he explained the cost of the work will be re-tendered.

12. Mr Urinvosky presented the case for the Applicants. He explained the "Special Contribution" had been paid under protest. The leaseholders were concerned that the Respondent had not made an application to the Government for pre tender funding. He suggested if they had done so there would have been no need to request any payment from leaseholders.

13. Mr Urinovsky explained he was himself an engineer and would expect value for money. He submitted the Respondents had not properly explored other avenues which may be available to provide funds for them. He explained that the leaseholders were advised that if they did not pay the contributions the application to the BSF was in jeopardy as Thomasons would not release their report which was required for the application for funds.

14. Mr Urinovsky conceded that if the BSF had approved the funding on the basis of only two tenders [527] as set out in Thomason's Tender Appraisal report dated January 2021 then this would not be a concern for the leaseholders. He accepted if the funds were to be met by the BSF the leaseholders no longer took an issue on the basis the tender report was based only upon two tenders being received.

15. In his submission he remained unsatisfied as to how Thomason's were chosen and appointed. He suggested it would have been possible to appoint an engineer on a fixed cost basis rather than a percentage basis. He did not accept that the pool of engineers available to undertake such work was limited and he relied upon the

letters [114 and 155] from HRP Partnership Limited and Hoare Lee. He confirmed he had previously been employed by Hoare Lee. Further he had not asked either company to provide an alternative quote.

16. Mr Urinvosky again conceded if the BSF was happy to pay Thomasons fees calculated on a percentage of the total price for the works then this is no longer a point of contention for the leaseholders.

17. Mr Urinvosky stated that in his opinion such consultants fees are not recoverable as an advance payment under the lease. He suggested the works being undertaken are not repairs but required due to Government directives. In his opinion the leaseholders should not have to pay and that it was necessary to pursue this application since until a funding agreement with BSF is completed the leaseholders are at risk of being liable to pay for all such works.

18. Mr Allison had no questions for Mr Urinovsky.

19. Mr Allsion presented the case for the Respondent.

20. He took the Tribunal to the sample lease [51]. It was agreed all the leases were in similar form. The leases allowed for a Special Contribution [56] which is defined as:

> "Special Contribution" means any amount which the Company shall reasonably consider necessary for any of the purposes set out in the Fifth Schedule for which no provision has been made within the Service Charge and for which no reserve provision has been made under the Fourth Schedule, part 3, paragraph 2(ii)

21. Mr Allison submitted that no provision had been made in the budget for the 2020 service charge year. The BSF was launched within the year 2020 and required submissions originally by December 2020 although this date subsequently changed. He submitted under clauses 3.2 and 3.4 [57] of the lease the tenants covenanted to pay the Special Contribution.

22. Part 1 of The Fourth Schedule sets out the service charge proportions payable by the leaseholders [73]. Part 3 sets out the mechanism for calculating the annual maintenance provision [73 and 74]. The Fifth Schedule sets out the purposes for which the service charge may be applied [75]. In particular Mr Allison relied upon clause 1(c) of the Fifth Schedule which states:

> "To keep the interior and exterior walls and ceilings and floors of the Building and the whole of the structure roof foundations and main drains boundary walls and fences of the Building (but excluding such parts thereof as are included within the Flat by virtue of the definition contained in Part 1 of the First Schedule and the

corresponding parts of all other units in the Building) in good repair and condition"

23. Mr Allison suggested this clause goes beyond just repair but refers to condition and in his submission the Building was not in good condition. Whilst the parties thought the Building met the relevant Building regulations when constructed the finding of the professionals was that it did not. In his submission a tenant would expect to live in a safe flat and building. He submits this clause allows consultants to be appointed and the costs recovered. He further relied on clauses 5 (a) and (b) of the Fifth Schedule which covered payment of costs incurred in management.

24. Finally he submitted if there is any doubt clause 13 of the Fifth Schedule being a sweeper clause would allow recovery. He submitted the current works fall squarely within such a clause since as a bare minimum the Respondent must act to keep the Building safe and can recover such costs from the leaseholders.

25. Mr Allison referred to the EWS1 [202] which classed the building as B2. As a result the Respondent has to take action. Whilst the BSF has been approved the funding agreement has not been finalised although a draft was within the bundle [606]. The agreement requires the Respondent to bill the leaseholders and then credit back in due course.

26. Further Mr Allison submitted it was a requirement of the funding agreement that his client explored and tried to pursue any remedies which may exist against third parties such as the original developer Wilson Bowden. No information has been provided within the bundle regarding steps being taken as that may prejudice any action.

27. Mr Allison explained Thomasons were known to RMG. They were known as an expert in this field and at the time the works started there was a very limited pool of consultant engineers prepared to undertake this type of work. He suggests the fee is reasonable for the work it includes being design, quantity surveying, contract administration etc. By the fee being tied to the work undertaken and the costs of the same there is no "creep" which can occur when you have fixed fees for particular tasks.

28. Mr Allison explained the pre-funding being offered was not on terms which were acceptable to the Respondent. This was a common position and hence partly why the scheme had evolved over time.

29. In relation to the costs applications made Mr Allison suggested that no order is required under paragraph 5A of schedule 11 of the Commonhold and Leasehold Reform Act 2002. In his submission there are no administration fees which can be charged to the leaseholders.

30. Turning to the question of an Order pursuant to Section 20C of the Landlord and tenant Act 1985 he would oppose such an order. In his submission the issues are important given they involve remediation works and he would submit it is not just and equitable to make an order only affecting those leaseholders who are a party to the application.

31. In reply Mr Urinovsky stated that he had spent a lot of time. In his view each party should bear their own costs and the Respondent should not be able to recover their costs as a service charge item.

32. Both sides confirmed they had nothing further to add.

Determination

33. The Tribunal thanks both parties for their helpful and measured submissions. We have taken account of all documents within the bundle and the submissions made.

34. It is clear that this is an important issue given the very high cost of the works. The tender costs initially obtained give costs of about £3.5 million to £4.8 million excluding VAT and fees. Plainly such works are going to be very expensive and leaseholders are understandably concerned.

35. We remind ourselves that the issues for us to determine are those set out in paragraph 2 above. What we are determining are matters relating to the employment of Thomason's by the Respondent as specialist consulting engineers.

36. The first point is whether or not the demands fall within the definition of a Special Contribution. We were provided with the two invoices for Mrs Urinovsky. The first is dated 26th January 2021 and was for £942.81 and said to be "Cladding Special Contribution". The second is dated 10th March 2021 in the sum of £349.20 for "Cladding charge". Each had attached a covering letter which referred to funds being required to satisfy Thomasson's fees.

37. We prefer the submissions of Mr Allison as to the interpretation of the lease.

38. We are satisfied that the when the budget for the year was finalised the need for such costs may not have been anticipated. In our judgment such sums as may be assessed as being required may then be demanded as a "Special Contribution". The lease allows for charges to be raised throughout the service charge year for unexpected (or costs not budgeted for) expenditure which is what has happened in this case. Each demand is to cover certain costs incurred in employing Thomasons. We are satisfied that Thomasons were undertaking works as provided for within the Fifth Schedule.

We accept Mr Allison's submission that the fire safety works fall within clause 1(c) of the Fifth Schedule given it is accepted by all parties fire remediation works are required as evidenced by the B2 rating given under the EWS1. We accept to keep the Building in good condition requires such works to be undertaken. Further even if we are wrong we find that Clause 13 of the Fifth Schedule [513] does allow recovery of the costs of employing Thomasons. To do so is in our determination necessary to maintain the individual units and is in the general interest of the leaseholders. Thomasons were required to be employed so that a valid BSF application could be made. It now appears such application has been successful and the costs incurred and future costs are likely to be paid by BSF.

39. We take judicial knowledge of the fact that initially BSF applications were required to be lodged within short timeframes. This necessitated the Respondent appointing a consultant quickly to ensure a valid application could be made. On balance we accept the submission of the Respondent that it was appropriate for them to contract with a consulting engineer known to them. We accept the pool of consulting engineers available at the time of their first appointment prepared to accept such work was limited. We are satisfied that it was reasonable to appoint Thomasons without any tender process being undertaken.

40. Turning to the fee we note the BSF appear to have accepted that Thomason's fee structure is reasonable. Whilst Mr Urinovsky relies on two letters from other consulting engineers neither actually provides a quote for this work. Whilst both refer to typically providing fixed price quotes neither actually confirms they could undertake this work or at what level of fee. We also note that it may be said Hoare Lee are not independent, Mr Urinovsky having been employed by this firm.

41. The Respondents also refer to a fee proposal received from Day Associates [674-675]. This was for a different project for RMG (the Respondent's managing agent) but refers to percentage fees.

42. We are satisfied on all the evidence that a percentage fee of 10% for the work being undertaken by Thomason's is reasonable. This takes account of the fact that the scope of the work is very fluid and changing and we are satisfied that in the circumstances of this case provides a reasonable fee for the works undertaken and remaining to be undertaken. We are satisfied it was reasonable for the Respondent to have agreed this structure at the start of the project given the number of items which may have (and in fact have) changed as the project has progressed. This has ensured continuity of approach in that Thomason are overseeing the whole project.

43. We turn finally to the question of the number of replies to the tender exercise. Mr Urinvovsky accepts this may be reasonable now the BSF has accepted this. We do not need to determine this given it seems

before a contract is entered into a further tender exercise will be entered into reflecting the final scope of works which hopefully will be determined once the PAS 9980 has been undertaken.

44. Whilst the tender report is based on two contractors providing tenders [527] in fact 8 firms were approached to tender. In our judgment it is clear Thomason looked to undertake a comprehensive tender programme and the responses (or lack of) reflect the difficulties that surround such remediation work and the ability to find consultants and contractors who during 2020 and early 2021 were prepared to undertake such roles and contracts.

45. In conclusion we find that the demands issued by the Respondent for special contributions to leaseholders are reasonable and that they are liable to pay the same.

46. This leaves the question of the costs of this application. We accept that it was reasonable for the leaseholders to bring this application. The costs being considered are substantial. Throughout the course of this application the goalposts have changed and we were pleased to learn that it looks as though this block will recover some funds from the BSF. We further accept that the Respondent is considering what if any action it may take against Wilson Bowden and accept that it may prejudice such matters if they had said more. We note it is a requirement of the funding agreement that the Respondents do explore such issues.

47. We accept that it would appear there are no administration charges and so it would not be appropriate to make an order pursuant to paragraph 5A of the Commonhold and Leasehold Reform Act 2002.

48. Turning to Section 20C such orders are always at the Tribunals discretion. In this case we take a step back to look at the issues. An application was probably inevitable given the issues. No criticism may be laid at the leaseholders for bringing the application. Equally the Respondent's have in our judgment responded comprehensively explaining how they have acted and why. Looking at matters in the round we are satisfied that no order should be made.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk

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.

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