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FIRST – TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/00MB/LSC/2014/0011**
Property	:	**10 Burghfield Mill, Reading, Berks RG30 3ST**
Claimant	:	**The Watergarden Management Company Ltd**
Defendant	:	**Mr Deryck Honey**
Date of transfer from the county court at Reading	:	**27 August 2013 (received by FTT 15 January 2014)**
Application	:	**Application to determine the reasonableness and payability of service charges and administration charges**
Tribunal Members	:	**Judge Reeder** **Sarah Redmond BSc (Econ) MRICS (valuer member)** **Ms Jacqueline A Hawkins (lay member)**
Date of inspection	:	**20 May 2014**
Date of hearing	:	**20 May 2014**
Date of Decision	:	**20 May 2014**

DECISION

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DECISION

The apportionment of relevant costs issue

1. The Tribunal rejects the defendant's contention that the apportionment of the relevant costs and resulting service charges across those liable to pay a contribution has been incorrectly approached in order to benefit the freehold owners of houses on the 'return' section of Dewe Lane and to the detriment of the leasehold owners of the flats in the Mill building.

The Mill Race & Mill Island issue

2. The Tribunal determines that the service charge demanded does not include any costs incurred in relation to the management of Mill Race or Mill Island. Accordingly, the defendant's contention that the service charges demanded in respect of grounds maintenance are unreasonable in that the Mill Race and Island areas of the grounds have were not being maintained at all or in a manner commensurate with the service charges demanded is of no effect.

The Dewe Lane houses issue

3. The Tribunal rejects the defendant's contention that the costs of grounds maintenance to the 'return' section of Dewe Lane adjacent to the large houses situated on that section of the grounds have been incorrectly included in the 'driveway area' of the grounds and so improperly increased the service charges demanded of the Mill building lessees.

The service charges determined to be reasonable &payable

4. Accordingly, the service charge demands in dispute comprising £638.54 for 2010 (page 218 in the bundle), £715.90 for 2011 (page 220) and £654.29 for 2012 (page 221) are determined to be reasonable and to be payable in full.

The further conduct of these proceedings

5. The Tribunal office will send the files received on transfer back to the county court sitting at Northampton, together with a copy of this Decision. The parties should discuss the further conduct of the claim (No. 3QT 33731) before that court and notify the court of the intended course of action.

REASONS

The proceedings in the county court

6. This matter commenced by claim (3QT 33731) issued on 11 March 2013 in the county court sitting at Northampton. Watergarden Management Ltd is the claimant and Mr Deryck Honey the defendant in those proceedings. The claim seeks to recover service charges for the accounting years 2009, 2010, 2011 and 2012. Mr Honey filed a Defence & Counterclaim in May 2013 disputing the charges claimed. A Reply & Defence to Counterclaim was filed in June 2013. On 27 August 2013 District Judge Darbyshire made an order to "transfer to the first tier tribunal property chamber" without stating what is to be determined by the Tribunal. For reasons unknown to the Tribunal it only received that transfer on 15 January 2014.

The proceedings before the Tribunal

7. On 20 February 2014 Regional Judge Edgington made an order on the papers setting out comprehensive case management directions with a timetable. He summarised the scope of the Tribunal's jurisdiction, being the payability and reasonableness of the service charges in dispute, and expressly noted that the issue of equitable set-off of legal fees incurred by the respondent raised on the counterclaim is not ordinarily

within the Tribunal's jurisdiction. Both parties accepted that position in subsequent correspondence and neither has sought to pursue the counterclaim and set-off arguments before the Tribunal.

The property & grounds

8. The respondent's property at 10 Burghfield Mill is a flat on the second floor of an attractive converted mill building. The building is located in extensive grounds. The grounds are entered from the public highway on Mill Road and into Dewe Lane which provides a long driveway through the grounds up to the Mill building and then continues and doubles back around a section of the Avon & Kennet Canal known as the Mill Race. A number of houses are located on this 'return' section of Dewe Lane. A large island is located in a stretch of the Avon & Kennet Canal directly behind the Mill building and is accessed by a bridge to the rear of that building. The rural location, size of the plot and winding nature of the Avon & Kennet Canal in this area combine to create very pleasant and extensive grounds which require maintenance.

The inspection by the Tribunal

9. The Tribunal inspected so much of those grounds as could be accessed with assistance from Mr Baker and Mr Calderbank (directors of the claimant, Watergarden Management Company Limited), Mr Honey (the defendant), Mr Last (solicitor for Mr Honey) and Mr Roberts (counsel for Mr Honey).

Attendance at the hearing

10. The hearing has been attended by Mr Baker and Mr Calderbank who spoke on behalf of the claimant, and by the defendant Mr Honey represented by his solicitor Mr Last and counsel Mr Roberts. The Tribunal has had the benefit of an indexed hearing bundle augmented by a volume of correspondence between the parties, a detailed witness statement from Mr Honey with documentary exhibits, and by a skeleton argument for Mr Honey prepared by his counsel Mr Roberts. These documents have been carefully considered.

The disputed accounting years & service charge issues

11. The parties confirmed at the hearing that the service charge demanded for the accounting year 2009 is now agreed. Accordingly, the Tribunal does not consider the charges for that year further. The parties also confirmed that the issues in dispute all relate to the grounds
maintenance and resulting charges for the accounting years and service charges invoices for 2010, 2011 and 2012. Those issues are -

The apportionment of relevant costs issue

- That the apportionment of the relevant costs and resulting service charges across those liable to pay a contribution has been incorrectly approached in order to benefit the freehold owners of houses on the 'return' section of Dewe Lane to the detriment of the leasehold owners of the flats in the Mill building.

The Mill Race & Mill Island issue

- That the service charges demanded in respect of grounds maintenance are unreasonable in that the Mill Race and Island areas of the grounds were not being maintained at all or not being maintained in a manner commensurate with the service charges demanded.

The Dewe Lane houses issue

- That the costs of grounds maintenance to the 'return' section of Dewe Lane adjacent to the large houses situated on that section of the grounds have been incorrectly included in the 'driveway area' of the grounds and so improperly increased the service charges demanded of the Mill building lessees.

12. The service charge demands in dispute comprise £638.54 for 2010 (page 219 in the bundle), £715.90 for 2011 (page 220) and £654.29 for 2011 (page 221).

The grounds management areas

13. Following that inspection and for the purposes of the hearing discussion of the grounds has divided the same into four discrete 'management' areas : the Dewe Lane driveway, the Mill building, the Island, and the Dewe Lane large houses section. During the hearing the Tribunal carefully analysed the provisions of the lease (Bundle pages 38-83) together with the copy hatched plans provided in the bundle (in particular pages 84, 85, 86, 87, 104) together with a useful full size original hatched plan helpfully produced during the hearing from Mr Last's files. The Tribunal and parties took some care and time to compare the estate management areas as dictated by the hatched plans annexed with the lease to the coloured areas defined in the grounds management specification (blue being the Mill Island and grass verge to the front and side of the Mill building ; red being the care park area ; yellow being the Dewe Lane grassed area ; green being the Dewe Lane main driveway and manicured area between the Mill streams and manicured area around the pump house and roundabout to the end of the Deew Lane return section).

The lease

14. The Tribunal considered the copy lease provided (Bundle pages 38-83) Clause 9 defines the estate expenditure, estate service charge, advance payment, and financial year.

15. The estate comprises 31 properties. The service charge contribution due from the defendant is described in clause 9 as comprising 1/31st part (it being accepted by all parties that the lease intends a 1/32nd part but in the event that 32nd property was never constructed) of the relevant costs relating to the management areas coloured yellow on Plans A & B, and 1/17th part of the remainder of management area described in clause 6(b) and hatched on Plans A & B in green and outside of the yellow as described on page 3 of the lease. Clause 6(b)&(c) permits the lessor and the management company at any time in their absolute discretion to mutually agree in writing to vary the land then forming part of the estate management area whether by excluding existing parts of the grounds or including additional parts of the grounds.

The procedures for managing the grounds & recharging the relevant costs

16. The claimant management company confirmed that the procedures for arranging relevant works and then recharging the same as service charges has been the same in the relevant years. The Tribunal therefore concentrated on 2011 to analyse this procedure and asked numerous detailed questions in order to do so. The Watergarden Management Company Ltd was incorporated by the developer Saxon Developments to manage the Burghfield Mill site. All 31 properties on the site are members of the management company. The directors, including Mr Baker and Mr Calderbank, are elected by the membership. An AGM is held each December. The service charges (the majority of which relate to the maintenance of the extensive grounds) are a standing item for discussion at each AGM. This is confirmed by several copies of meeting minutes and documents commencing on page 105 of the hearing bundle.

The law

17. The *Landlord & Tenant Act 1985* as amended by the *Commonhold & Leasehold Reform Act 2002* sets out the Tribunal's jurisdiction to determine liability to pay service charges. Section 27A(1) of 1985 Act provides as follows -

    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 is payable.

18. Section 18 sets out the meanings of 'service charge' and 'relevant costs'. Section 19 sets out that jurisdiction to limit service charges to those relevant costs which are reasonably incurred and to those which arise from works and services of a reasonable standard. Section 20C sets out the jurisdiction, where the tribunal considers that it is just and equitable to do so, to grant an order providing that all or any of the costs incurred by the landlord in connection with proceedings before this tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the lessee or any other person or persons specified in the application.

19. Part 1 of Schedule 11 to the *Commonhold & Leasehold Reform Act 2002* sets out the Tribunal's jurisdiction to determine the payability and reasonableness of administration charges. Section 5(1) of Part 1 to Schedule 11 provides -

    An application may be made to a leasehold valuation 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.

20. Section 1 provides a definition of 'administration charge'. Sections 2 & 3 provide that a variable administration charge is payable only to the extent that the charge specified in lease is reasonable, that the formula specified for determining the charge is reasonable, and that amount of the charge is reasonable.

The apportionment of relevant costs issue

21. Mr Honey contended that the apportionment of the relevant costs and resulting service charges across those liable to pay a contribution has been incorrectly approached in order to benefit the freehold owners of houses on the 'return' section of Dewe Lane to the detriment of the leasehold owners of the flats in the Mill building.

22. He argued that the apportionment is not arrived at by the correct application of the lease provisions but by an arbitrary division of the grounds to arrive at an arbitrary percentage based on the gardening contractors on assessment. He also points out that differing contractors arrived at differing percentages during the tender process and that argues that this proves the arbitrary and incorrect approach taken.

23. The Tribunal sought a detailed explanation of the way in which the apportionment of relevant costs is arrived at by Mr Baker and Mr Calderbank on behalf of Watergarden Management Ltd. This explanation is summarised below.

24. The grounds maintenance specification (Bundle page 187) is a single specification for works to the whole site comprising all of the management areas. All contractors tendered on the basis of this specification.

25. The apportionment of time spent on each management area is expressed as a percentage and arrived at by taking the average of the three time assessments by the three tendering gardening contractors, examples of which were provided in the hearing bundle, and expressed as a percentage as set out in documents such as that prepared for the EGM in December 2008 (Bundle page 118).

26. The 'green' area defined in the grounds specification is the same as and no more extensive than the yellow hatched area in Plan A & Plan B as can be seen in the hatched plan on pages 84 and 85. The gardening contractors were made aware of the correct correlation between the two when tendering. This included contractors being walked around the grounds by Phil Lush who is a resident occupier with experience in this type of grounds maintenance.

27. This methodology was discussed with those present at the AGMs. An example of the type of paper presentation provided by Mr Calderbank to such meetings to explain the percentage apportionment applied is found in the 'Financial Presentation' to the December 2010 AGM (Bundle page 170).

28. Watergarden Management accounts showing the actual costs incurred for grounds maintenance before apportionment were included in the hearing bundle (see for example page 142) and were not disputed. Examples of the resulting individual account for Mr Honey (page 226) and of the service charge invoice to him (page 220) were provided in the hearing bundle.

29. The lease provisions are directed at identifying the grounds management areas for which Mr Honey is liable to pay contribution toward the actual costs incurred in management. It also dictates the appropriate apportionment between estate lessees.

It does not provide a mechanism for dividing the total actual costs for grounds management between the grounds management areas. In such circumstances the question for the Tribunal is whether the mechanism used by Watergarden Management reflects the intention of the lease, and provides a rational and reasonable way of arriving at the actual costs incurred in respect of those grounds management areas in relation to which Mr Honey is required to pay a service charge contribution under the terms of his lease.

30. The Tribunal determines that the mechanism devised and engaged by Watergarden Management satisfies that test.

The Mill Race & Mill Island issue

31. Mr Honey accepted that the lease dictates that he is liable to pay a contribution of 1/31st for maintenance of the Mill Race area (being within the yellow hatched management area) and of 1/17th for the Mill Island (being outwith the yellow hatched area but within the green hatched area). However, he contended that the service charges demanded, in so far as they relates to these areas, are unreasonable in that the Mill Race and Island areas were not maintained at all or certainly not maintained in a manner commensurate with the service charges demanded.

32. In response to direct questions from the Tribunal both Mr Baker and Mr Calderbank, in their capacity as directors of the Watergarden Management Company Limited, stated that the responsibility for maintenance the blue (Mill Island and verges to the front and side of the Mill) and red (car park to the side of the Mill) areas described in the 2008 Grounds Specification (Bundle page 187) was transferred to Burghfield Mill Limited on 1 July 2008 . Burghfield Mill Limited acquired the freehold of the Mill Building in July 2007 and consists of the lessees of the flats in the Mill Building and owners of the houses identified as 'No 1' and 'The Gatehouse'. This is borne out by documentation in hearing bundle. Accordingly, the Tribunal accepts the assurances of Mr Baker and Mr Calderbank that the service charges demanded by Watergarden Management Company Limited in 2010, 2011 and 2012 do not include any relevant costs relating to the Mill Island.

33. Mr Honey stated that his flat looks straight down on Mill Race and that very little if any time is spent on maintaining it. He detailed his observations in his witness statement. He complained that it was in good condition with clear water when he occupied but is now silted up as plant growth has obstructed the flow of water. He stated that it is malodorous in the Summer. Mr Baker and Mr Calderbank stated that the Race silts up because the water pipe into it is of insufficient circumference to provide a good water flow. They stated that Watergarden Management have considered a number of options for remedying this and maintaining the Race in a better state but have not adopted any as they are very expensive. They stated that Mill Race is not included in the grounds maintenance contract. No maintenance work is carried out to it. No relevant cost is incurred, nor service charge demanded in relation to it. This is borne out by the Grounds Maintenance specification (bundle page 187) and other contractor documents in the bundle. The Tribunal accepts the claimant's evidence.

34. It follows that service charge demands to Mr Honey does not include any charges in relation to Mill Race and Mill Island.

The Dewe Lane houses issue

35. Mr Honey contended that the costs of grounds maintenance to the 'return' section of Dewe Lane adjacent to the large houses situated on that section of the grounds have been incorrectly included in the 'driveway area' of the grounds and so improperly included in the service charges demanded of the Mill building lessees. He stated at the hearing that this relates to the costs of maintaining the bushes and hedges adjacent to House No. 16 and to the pump house and electricity station, together with a broad expanse of land running from the house nearest the Mill building to the roundabout at the far end of the return section of Dewe Lane which can be seen marked as a shaded area above the yellow hatched management area on the plan on pages 84 and 85 of the hearing bundle.

36. Mr Baker and Mr Calderbank stated that the cost of maintaining that area was not included in the service charge demanded of Mr Honey and the Mill Building lessees.

37. The Tribunal can understand why Mr Honey may have believed that the cost of maintenance of the ' shaded' area has been recharged to him as the grounds specification at page 188 includes the following words, as part of the narrative description of the green area, "manicured area....around the pump house and roundabout".

38. However, the Tribunal accepts the express assurance of Mr Baker and Mr Calderbank that the costs relating to that area are not recharged to Mr Honey. Both gave cogent, detailed and compelling evidence on the detail of the procedures employed to ensure that individual lessees are charged for only those grounds management costs for which they are liable under the provisions of their lease.

39. The Tribunal determines that the service charge demanded from Mr Honey does not include the costs of maintaining the large houses area situated on the return section of Dewe Lane.

The reasonableness of the actual costs & service charges

40. Given the issues in dispute neither party addressed the Tribunal in detail as to the reasonableness of the quantum of the actual costs incurred and resulting service charges. In reality Mr Honey did not appear to challenge the reasonableness of the costs or resulting charges. The production of a grounds maintenance specification is sensible for grounds of this size and relative complexity. The specification produced was a reasonable standard. The tendering process appeared to be appropriate. The engagement of Mr Lush on the ground keeping an informed eye on the performance of the contractors is a useful management tool provided at no costs to the lessees. The actual costs in the accounting years 2010, 2011 and 2012 are unremarkable. On the evidence and materials before it the Tribunal determines that the actual grounds maintenance costs for those service charge years are reasonable.

The costs of the proceedings before the Tribunal

41. Having considered the lease the Tribunal determines that it does not contain any provision for the claimant Watergarden Management Company Limited to recharge the costs incurred in relation to the proceedings before the Tribunal to Mr Honey as a

service charge. Clause 2(2) provides no contractual liability for costs as neither the county court claim nor the proceedings before the Tribunal have been issued or continued in contemplation of service of notice of forfeiture pursuant to section 146 of the Law of Property Act 1925 as was accepted for the claimant landlord during the hearing. Clause 9(a)(i) does not clearly impose liability for the costs incurred in relation to proceedings before the Tribunal. The *contra proferentem* rule enjoins the Tribunal to construe the clause against the claimant.

Stephen Reeder
Judge of the First-Tier Tribunal
Property Chamber

24 June 2014