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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AY/LSC/2016/0360**
Property	:	**Studio 2, Blenheim Studios, 3 Stewart's Place, SW2 5AZ**
Applicant	:	**Martin Fuller**
Representative	:	**Lester Aldridge LLP**
Respondent	:	**Lexadon (Blenheim Studios) Limited**
Representative	:	**Goodsir Commercial**
Type of Application	:	**Service Charges**
Tribunal	:	**Mr M Martyński (Tribunal Judge)**
Date of Decision	:	**12 April 2017**

DECISION

DECISION SUMMARY

1. The Respondent is not entitled to change the structure of the Service Charge regime in the lease.

2. Any Service Charge levied on the Applicant that has been calculated without a contribution from Flats 1-3 on the upper floor is likely to be unreasonable in amount.

3. Any Service Charge levied on the Applicant in respect of the Courtyard that has been calculated without obtaining a reasonable contribution from others who use it is likely to be unreasonable in amount.

4. The proposed change to the Specified Percentage is not reasonable and is not payable by the Applicant.

BACKGROUND

5. The Applicant holds the long leasehold interest in Studio 2 at Blenheim Studios ('the Studio') which is a flat contained within a former industrial building ('the Building'). According to the Applicant's witness statement (dated 9 February 2017) the Building has, on the ground floor, five commercial studios and the Applicant's residential studio. The Applicant says that when he originally purchased the Studio (he is the original lessee) the first floor of the Building was entirely reserved for the, then, landlord who used it for antique storage. After the Respondent acquired the freehold of the Building in or about 2012, it developed the first floor of the Building to provide nine residential flats and in so doing raised the roof level of the Building.

6. I presume that the Applicant gains access to the Studio via a courtyard at the rear of the Building – he has a right to pass over this area and to park a vehicle there under paragraph (4) of the Second Schedule to his lease.

7. The Applicant's application was made on 5 October 2016. Directions on the application were given on 3 November 2016. The application was set down for determination on the papers alone without a hearing. I have determined this application on the basis of the document bundle provided by the Applicant and with reference to the tribunal's own file.

8. Both parties submitted Statements of Case and the Applicant submitted a Response to the Respondent's Statement of Case. The Applicant also provided a witness statement. No witness statements were provided by the Respondent.

The Applicant's lease

9. The Applicant's lease ('the Lease') is dated 23 November 1988 and is in respect of 29 Blenheim Gardens SW2. I assume, from markings on the lease that the Studio's address has now been changed to – Studio 2, 3

Stewart's Place. As stated above, the Applicant is the original party to the Lease.

10. The Lease is for a term of 125 years from 25 March 1988.

11. The lease contains the following provisions:-

> 1.(3) "The Demised Premises": are defined in the First Schedule which describes the Premises as;
> 'All that piece of land covering an area of 818 square feet including half the depth of the party walls and known as Unit 2 situated on the left hand side on the ground floor of the Building known as Blenheim House.....
>
> 1.(4)"The Building": is defined as;
> 'the property to be known as Blenheim House, 29 Blenheim Gardens London SW2.
>
> 3.(3)(b)"Specified Percentage" means 8 per cent
>
> 3.(3)(c)"Service Costs" means the total sum computed in accordance with sub clause (7) of this clause
>
> 3.(3)(d)"Service Charge" means the specified percentage of the Service Costs
>
> 3.(3)(e)"Expert" means a professionally qualified surveyor, or the appointed managing agent (being a person experienced in property management)
>
> 3.(4)(c) The Tenant will pay 4.5 per cent above the specified percentage in relation to the costs of providing the services in Clause 4(2) for the ground floor of the Building. The Tenant will not be liable for these clause (4)(2) services for the first floor of the building (which for the avoidance of doubt shall include the services provided for the lift and staircase)
>
> 3.(7) The items to be included in the service costs are the following: [there follows here a list of costs including the costs of complying with the landlord's repairing, decoration and maintenance obligations, insurance accounting, employment of managing agents in respect of the Building, the maintenance of the yard at the rear etc.]
>
> 3.(11) If in all the circumstances it is equitable to do so the expert may increase or decrease the specified percentage
>
> 4.(2)(a) To use all reasonable endeavours to provide reasonable lighting for the common entrance hall staircase passages and lift (if any) for the building of which the demised premises forms a part and which serve the demised premises.
> 4.(2)(b) to keep the ground floor communal toilets in good order and to provide hot water heating and lighting to this area.

12. In summary therefore, the Applicant is obliged to pay an 8% share of the costs of the Building and courtyard save for the specific costs of some itemised services to the ground floor where a 12.5% cost is specified. However, those percentages may be altered by the landlord if it is equitable to do so.

The issues raised by the Applicant

Excepted costs

13. The Applicant complains that the Respondent now no longer will except some costs in respect of the ground floor of the Building as per clause 3.(4)(c) of the Lease.

Flats 1-3

14. These are three of the flats on the first floor created by the Respondent. Access to these flats is from Brixton Hill rather than via the courtyard. The Applicant objects to these flats being taken out of the Service Charge regime so as not to make any contribution to the service costs of the Building.

Splitting the Service Charge

15. The Applicant is unhappy at a proposal for a splitting of the Service Charge for the Building so that 60% of those costs are met by the ground floor (with a further apportionment of these costs between the six ground floor units) and 40% being met by the units on the upper floor.

Courtyard costs

16. The Applicant complains that these are unreasonable in that the Courtyard is being used by other buildings owned and operated by the Respondent or its associated companies.

Amendment of the specified percentage

17. The Applicant asks if it is equitable for the Respondent to vary the Specified Percentage to 12.51%.

The Respondent's response

18. The Respondent's Statement of Case is brief and rather unhelpfully does not directly address many of the specific issues raised in the Applicant's Statement of Case. In the light of this, in order to set out the Respondent's case it is necessary to reproduce its Statement of Case (so far as it is relevant) as follows:-

    1. .....

    2. .....

    3. I can confirm that a detailed explanation and clarity has been provided further to the CMC to detail how the figure of 12.5% has been arrived at. It was deemed equitable and in the interest of all parties that the specific percentages were adjusted to a more simplified method, as per the lease.

4. Flats 1-3 Brixton Hill have self-contained access directly from Brixton Hill, they do not benefit from any of the services which the building enjoys with the exception of some utility pipes running through the communal parts.

5. The service charge was calculated based on the weighted floor areas of the units, further to all units being measured by my colleagues.

6. The reasoning behind the "double apportionment" as Mr Fuller has referred to it as it that there are certain service charge costs which may be isolated to the upper floor which are not relevant to the commercial service charge and vice versa.

7. So far as reasonability of costs are concerned the demanded figure is a budget for anticipated expenditure, the service charge process is transparent and the budgeted figure is compared with the actual spend at the end of the year to provide a variance report. If there is any money remaining in the budget which has been collected but not spent these funds can be used to offset against the proceedings years S/C or a refund can be organised.

8. .....

9. Indeed Lexadon do have other interest in the immediate vicinity which benefit from use of the courtyard, however this is limited to 3 flats contained within a larger development. These flats contribute towards a separate service charge, this service charge has provisions contained within the budget with contributions towards the upkeep of the communal courtyard.

Conclusion
We have tried to ensure this is dealt with as a matter of transparency and clarity, all occupants have been informed throughout as to intention to introduce a simplified manner of adjusting apportionments. Units 1-3 Brixton Hill do not benefit from the offerings of the site as they enjoy self-contained access, they shall still be liable for insurance contributions.

Decision

19. In summary, the Applicant is correct when stating that the Respondent has no power to unilaterally vary the lease (without a court or tribunal order) other than to amend the Specified Percentage.

Excepted costs

20. The Respondent cannot ignore the provisions of clause 3.(4)(c) of the Lease. It is bound by these provisions unless; (a) the parties agree to a variation of the lease, or; (b) the lease is varied by virtue of an order from a court or this tribunal.

Flats 1-3

21. It seems to me that it is open to the Respondent to exclude Flats 1-3 from contributing to the Service Charge for the Building. However, if the Respondent then seeks to impose upon the Applicant a Service Charge that is increased by virtue of flats 1-3 not contributing to the totality of that charge, then that increase will not have been reasonably incurred so

far as the Applicant is concerned and he will not be liable to pay it (pursuant to section 19 Landlord and Tenant Act 1985).

22. In any event, I agree with the Applicant's submissions that these flats will continue to benefit from repairs and decorations to the Building and they may benefit from other services not available to other flats or units. I am far from clear as to the reasoning behind excluding these flats from the Service Charge.

Splitting the Service Charge

23. The Respondent is not entitled to purport to vary the Service Charge provisions in the Applicant's lease in this way. I repeat my comments at paragraph 20 above.

Courtyard costs

24. I note the Respondent's comments. However, in order to ensure that Service Charges charged to the Applicant are reasonably incurred, it will be necessary for the Respondent to be completely transparent regarding; (a) the use that is made of this area by all those who have access to it, and; (b) the (appropriate) sums charged to those users who do not have tenancies or leases of the units in the Building.

Amendment of the specified percentage

25. The decision of the Upper Tribunal in *Windermere Marina Village v Wild* [2014] UKUT 0163 (LC) makes it clear that this tribunal has the jurisdiction to consider what is the equitable proportion of expenses to be paid by the Applicant where that proportion has been determined by the landlord pursuant to a clause in the lease allowing the landlord to decide on that proportion.

26. The first problem with the Respondent's suggested amendment to the Specified Percentage to 12.5% is that it is based on an alteration of the Service Charge provisions which I have already found are not permissible. This makes it impossible to consider whether 12.5% is reasonable. The second problem with the proposal is that, after reading through the Respondent's Statement of Case and the correspondence between the parties, I am far from clear as to the reasoning behind this suggested change. The onus must be upon the Respondent to justify that any change to the Specified Percentage produces a Service Charge that is reasonable in amount and payable by the Applicant. It has not done so and accordingly the Specified Percentage payable by the Applicant remains that in the original lease.

27. The Applicant has asked that this tribunal makes a ruling that the Specified Proportion is amended to the formula; Studio 2 floorspace/total of internal floorspaces of the flats/units in the Building. Whilst that may appear to be a reasonable and equitable way of determining the Specified Proportion, I am not willing to make a ruling on this because; (a) I do not

have the Respondent's comments on this; (b) to make such a ruling would require an inspection of the Building and, probably, a differently constituted tribunal including a Professional Surveyor/Architect member; (c) the Applicant's lease contains a Specified Percentage which remains in force pending an agreed change or a change approved by the tribunal; (d) it seems to me that it is for the landlord to propose the change and have this either agreed with the tenant or approved by the tribunal.

Mark Martynski, Tribunal Judge
12 April 2017

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal 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.

2. 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.

3. 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.

4. 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.