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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BK/LSC/2017/0143**
Property	:	**Penthouse 5, Wellington Court, 57-70 Wellington Road, London NW8 9TD**
Applicants	:	**Mr DM and Mrs S Ghosh**
Respondent	:	**Wellington Court (St Johns Wood) Residents Management Limited**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Judge P Korn** **Mr T Sennett**
Date of decision	:	**17th July 2017**

DECISION

Decisions of the Tribunal

(1) The Applicants' contribution to the sinking fund for the 2015/16 service charge year is reduced to £2,153.13.

(2) The Tribunal hereby makes an order under Section 20C of the Landlord and Tenant Act 1985 that the costs (if any) incurred by the Respondent in these proceedings cannot be recovered through the service charge and an order under Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 that such costs cannot be recovered under the Lease as an administration charge.

The application

1. The Applicants seek a determination pursuant to section 27A of the Landlord and Tenant Act 1985 as to the reasonableness and payability of the amount demanded by the Respondent by way of contribution to the sinking fund for the 2015/16 service charge year, namely the sum of £10,828.14.

2. The relevant legal provisions are set out in the Appendix to this decision.

Paper determination

3. In its directions the Tribunal stated that the application was to be determined without a hearing unless either party requested a hearing prior to the determination. No such request has been made, and accordingly the application is being determined on the papers alone without a hearing.

The background

4. The Property is a penthouse flat forming part of a purpose-built mansion. The lease of the Property ("**the Lease**") is dated 21st September 2010 and was originally made between Standard Securities Limited (1) the Respondent (2) and Dekra Holding Limited (3). The Applicants are the current leaseholders of the Property and the Respondent is the management company under the Lease.

5. The building comprises 86 flats plus 8 penthouses. When the building was first constructed there were no penthouses. In the 1990s 4 penthouses were constructed, and in approximately 2010 a further 4 penthouses were constructed.

6. The Tribunal has not inspected the building, as an inspection was not considered necessary and neither party has requested an inspection.

Applicants' case

7. The Applicants refer in written submissions to the various provisions in the Lease relating to service charge and also list the demands for contributions towards the sinking fund that they have received over the years.

8. The demand which is the subject of this application was dated 8th April 2015 and was accompanied by a letter stating (amongst other things) the following: *"The Board has also noted that historic penthouse contributions to the Reserve Fund have been negligible, resulting in virtually no accumulated sums from these residents. Therefore, in addition to the annual contributions proportional to these made by flats for this and future years, an additional one-off payment is required of penthouse residents to achieve appropriate parity of Reserve Funds".* By an email dated 14th May 2015 the Senior Service Charge Accountant at Trust Premier Property Management, the Respondent's managing agents, stated that the sinking fund contribution charged to the penthouses for 2015/16 was calculated so as to achieve a sinking fund attributable to the penthouses of 9.24% of the overall sinking fund as at 25th March 2016, with the remaining 90.76% being attributable to the flats.

9. The Applicants' submit that the service charge contribution must be calculated annually on a fair and reasonable basis and that the service charge provisions do not grant to the Respondent the power to achieve parity as between the respective contributions of the penthouses and the flats on any given date. The Respondent's attempt to achieve such parity as at 25th March 2016 has resulted in the penthouses between them being charged 33.85% of the sinking fund contributions for 2015/16 whilst accounting for only 9.24% of the square footage of the building. The one-off charge for the Property in 2015/16 was 14 times greater than the previous year and 5 times greater than the following year, thereby offending against the requirement in paragraph 2(ii) of the Eighth Schedule to the Lease that the annual contribution shall not fluctuate unduly from year to year.

10. The Applicants go on to argue that even if the Respondent is justified in seeking parity as between the penthouses and the flats the proper time to have done this was when the Lease was granted, not by way of a one-off demand 4½ years after the grant of the Lease. In any event, the Applicants do not accept that there has been a historic undercharge. Based on their own analysis of the accounts for previous years, they submit that there have been errors in methodology which in some years have worked against the Property and also that if the correct method of recovery been used for the year 2010/11 the Applicants would have been able to recover sums from the assignor of the Lease.

11. The Applicants submit that a reasonable charge would be £2,153.13. This is calculated by taking the amount charged to the flat owners (namely £173,780.93), dividing this by the percentage of the total attributable to the flat owners (namely 90.76%) based on the Respondent's own figures for square footage, multiplying by the percentage of the total attributable to the penthouse owners based on those same figures for square footage (namely 9.24%) and then multiplying by the Applicants' proportion (12.17%).

Respondent's case

12. The Respondent states that the leases contain no specific percentage contributions. When the penthouses were constructed the Respondent had to find a reasonable and satisfactory way to ensure that it did not recover more than 100% of service charge but that the leaseholders of the penthouses paid a fair contribution to expenditure. Therefore, based on square footage it allocated a service charge percentage of 9.24% to the penthouses and 90.76% to the (other) flats.

13. The Respondent notes the Applicants' analysis of paragraph 2(ii) of the Eighth Schedule and takes issue with their argument. The Respondent notes the requirement to ensure as far as reasonably foreseeable that the amount paid on account by the Applicants should not unduly fluctuate from year to year but argues that in previous years penthouse owners have received demands for much less than the 9.24% that they should have paid and the wrong amount has been demanded in those years. Therefore, it has been necessary to bring the contributions up to the correct level. The Respondent is merely seeking to achieve fairness, and it has now achieved a position whereby the penthouses have now contributed 9.24% of the total (taking the relevant service charge years in aggregate).

14. The Respondent further argues that paragraph 2(ii) of the Eighth Schedule states that the annual Service Charge contribution "shall" not unduly fluctuate from year to year. It does not use the word "must", and the Respondent submits that it only needs to "try" to ensure that the contribution does not unduly fluctuate. As regards the word "unduly", the Respondent submits that this means "unreasonably" and that its actions have been reasonable in that it has merely sought to bring the penthouse contributions up to what they should have been. In addition, the Respondent states that it will have to carry out substantial works in the coming years and that it needs to collect substantial reserves in order to fund these.

Tribunal's analysis

15. Much emphasis has been placed by both parties on paragraph 2(ii) of the Eighth Schedule to the Lease, but in our view the more relevant provision in this case is paragraph (j) of the section of the Lease

containing a list of definitions and numbered (1). The said paragraph (j) defines "the Service Charge Contribution" as meaning *"the sum equal to a fair proportion (as determined by the Management Company acting reasonably) of the annual Service Charge Provision for the whole of the Property for each Maintenance Year (as computed in accordance with the provisions of the Eighth Schedule hereto)".* "Property" in the context of the above definition means the building of which Penthouse 5 forms part (i.e. the whole of Wellington Court).

16. Paragraph 17 of the Sixth Schedule contains the lessee's obligation to pay a service charge to the management company in respect of costs incurred by the management company in carrying out its obligations under the Seventh Schedule. The computation of the service charge is set out in the Eighth Schedule. However, the key issue here is not the reasonableness of the overall amount of the service charge as computed pursuant to the Eighth Schedule but rather the reasonableness of the lessee's proportion of that service charge, and more specifically the reasonableness of the lessee's proportion of the reserve fund contribution for 2015/16.

17. The Applicants' service charge payment obligation under paragraph 17(a) of the Sixth Schedule is to pay the Service Charge Contribution each year. Turning back to the definition of Service Charge Contribution, this entitles the management company, acting reasonably, to charge a fair proportion of the annual Service Charge Provision for each year, and the Service Charge Provision includes (as per paragraph 2 of the Eighth Schedule) a contribution towards the reserve fund.

18. The proportion in any given year must be a fair one, with the management company acting reasonably in this regard. In our judgment it is clear that the proportion sought for 2015/16 is not a fair one. According to the Respondent's own evidence, the proportion sought is more than it can justify charging for that (or any other) service charge year, and the purpose of charging such a high proportion is to try to claw back amounts not charged in previous years but which the Respondent claims that it could or should have claimed in those years.

19. As to whether the Respondent did in fact undercharge the penthouses in previous years, there is conflicting evidence and the position does not appear to be crystal clear. It is possible that greater clarity would have been obtained on this point in cross-examination had there been an oral hearing, but in any event it is not necessary to make a factual finding on the point. In our judgment a management company cannot make up for past undercharging simply by charging a demonstrably unreasonable proportion in respect of a subsequent service charge year. In any event, there would have been other options open to the Respondent if it felt that it had undercharged in any given year, for

example issuing a corrected demand at the time. Alternatively, if a problem has resulted from penthouses being built after the other flats or being built in two tranches, an alternative option – to the extent relevant – might have been to apply for a variation of the leases. Or it is possible that something could have been negotiated direct with the penthouse owners at lease grant.

20. We appreciate that the Respondent is a residents' management company and that it is seeking funds to carry out major works. However, in our judgment that is not sufficient to justify charging the Applicants an unreasonable proportion of the reserve fund contribution in a specific year in order to make up for what may or may not have been an undercharge in one or more previous years and which (if it was an undercharge) may have arisen as a result of an avoidable error on the part of the Respondent. £10,828.14 is a large sum of money and there is a strong case in any event for arguing that it is unfair to burden the Applicants with such a large service charge in one year to make up for errors which were not of the Applicants' making. Furthermore, there is the argument that having only become the leaseholders of the Property in June 2012 it is unfair for the Applicants to take on an extra financial burden which may in fact be attributable at least in part to a period prior to their becoming the leaseholders.

21. For the above reasons we consider the contribution sought by the Respondent to be unreasonable in amount. The alternative amount proposed by the Applicants is £2,153.13. This is calculated by dividing the amount charged to the other flats (i.e. the non penthouses) by the percentage attributed by the Respondent to the other flats and then multiplying this by the percentage attributed by the Respondent to the penthouses and multiplying this by the percentage attributed by the Respondent to the Property. We agree with the logic and the calculation of the Applicants' analysis, and accordingly the Applicants' contribution to the sinking fund for the 2015/16 service charge year is reduced to £2,153.13.

Costs

22. The Applicants have applied for an order under section 20C of the Landlord and Tenant Act 1985 (a "Section 20C Order") and an order under Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (a "Paragraph 5A Order"). A Section 20C Order is an order that the whole or part of any costs incurred by the Respondent in these proceedings (if any) be irrecoverable as service charge. A Paragraph 5A Order is an order that the whole or part of any costs incurred by the Respondent in these proceedings (if any) be irrecoverable as an administration charge.

23. This case has involved a single issue. The Applicants have been successful and it was reasonable for the Applicants to have made the

application. It is unlikely that the Respondent has incurred any relevant costs, but if and to the extent that it has incurred any such costs we hereby make an order under Section 20C that those costs cannot be recovered through the service charge and we also make an order that those costs cannot be recovered under the Lease as an administration charge.

Name: Judge P Korn **Date:** 17th July 2017

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. 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.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. 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

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.