FIRST-TIER TRIBUNAL PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference :	CHI/00MR/LSC/2018/0103
Property :	Flat 1, 267 Copnor Road, Portsmouth PO3 5EF
Applicant :	Lee Johnson (the Lessee)
Representative :	---
Respondent :	Maxiwood Limited (the Landlord)
Representative :	Coole Bevis LLP
Type of Application:	Landlord and Tenant Act 1985 (the 1985 Act) service charge determination – Section 27A
Tribunal Members :	Judge P J Barber Mr P D Turner-Powell FRICS
Date of Decision:	3rd May 2019

DECISION

Decision

(1) The Tribunal determines that:-

- The insurance premiums in 2016, 2017 and 2018 are reasonable
- The lessor is entitled to apply the year end surplus in 2018 to the reserve fund
- The managing agent`s fees in 2017 and 2018 are recoverable

(2) The Tribunal makes no order for costs pursuant to any of Section 20C of the 1985 Act, Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (the 2002 Act) or Rule 13 of the First-tier Tribunal (Property Chamber) Procedure Rules 2013 (the 2013 Rules).

Reasons

INTRODUCTION

1. The application was for determination of reasonableness of service charges in the years 2012, 2013, 2016, 2017 and 2018. However, as a result of directions dated 13th February 2019, following a telephone case management hearing ("CMH"), the previous day, it became apparent that the charges in 2012 and 2013 had been previously agreed by the lessee, and as a result, the Tribunal has no jurisdiction in those matters. The matters remaining for determination are:

- the insurance premiums in 2016, 2017 & 2018
- whether the lessor was entitled to apply the year end surplus in 2018 to the reserve fund
- whether the managing agent`s fees in 2017 and 2018 are recoverable

The directions provided for the application to be determined on the basis of written representations, without an oral hearing unless a party objected; no objection was received within the time limit as stated in the directions.

2. The Applicant has provided a bundle of documents including copies of the application, the Respondent`s position statement, the directions, the lease, Harper Stone managing agent`s agreement, Applicant`s statement of case, Respondent`s statement of case, a Respondent witness statement and the Applicant`s reply.

3. The Property is a ground floor flat, demised pursuant to a Lease dated 13th February 2007 made between Kenneth James Gordon Harvey Ross (1) Lee Samuel Johnson (2) ("the Lease") for a term of 125 years from 1st February 2007.

THE LAW

4. Section 27A(1) Landlord and Tenant Act 1985 provides that:-

(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, the date at or by which it is payable, and

(d) The manner in which it is payable.

WRITTEN REPRESENTATIONS

4. The bundle included the Respondent`s position statement, as appended to a letter from Coole Bevis LLP dated 7th February 2019, which had been provided for the telephone CMH and which in broad terms indicated that the Respondent had purchased the freehold title in April 2016; in regard to insurance premiums, reference was made to the decision in *Cos Services Ltd v Nicholson & Willans [2017] UKUT 382 (LC),* and to the effect that the insurance premiums in 2016, 2017 and 2018 were all reasonably incurred. In regard to the management fee, clarification was sought from the Applicant regarding whether the issue raised was if the costs had been reasonably incurred, or whether the agreement was a Qualifying Long Term Agreement (QLTA). In regard to the reserve fund, the Respondent submitted that the creation of the same is permitted by Clause 5(16) of the Lease.

5. The Applicant`s statement of case dated 3rd March 2019 stated broadly in regard to insurance, that insurance costs had increased by 137% by early 2017, despite the removal of cover for terrorism, and that the Applicant had approached the broker, Arthur J Gallagher about excessive costs and commission, but had no effective response. The Applicant further submitted that the declared value of the building had in the relevant period, increased only by reference to inflation; adding that whilst he accepted that the landlord was not obliged to find the very cheapest insurance, the premium must still be a reasonable one. In regard to the reserve fund, the Applicant referred to Paragraph 2(ii) in the Fourth Schedule to the Lease, saying that it states that any surplus should be transferred to the account of the lessee; he also questioned whether the reserve fund bank account complies with Section 42 of the Landlord and Tenant Act 1987 ("the 1987 Act"), which relates to the holding of such funds in trust. In regard to the Management Agreement dated 22nd April 2016, the Applicant submitted that paragraph 7a deals with the length of the contract and termination, and clearly states the contract period to be for a term of 12 months, and unless terminated to continue thereafter, thus making it a QLTA.

6. The Respondent`s statement of case dated 19th March 2019, referred to the issues, including any scope for orders in regard to costs. In relation to the insurance premiums for 2016, 2017 and 2018, the Respondent referred to the obligation to insure at clause 5(4) of the Lease, and broadly submitted that the specified risks are extensive, with the premiums being £1,419.73 for 2016/17; £1,323.83 for 2017/18 and £1,423.96 for 2018/19. The Respondent referred to the decision in *Cos Services Limited*, which it said gave specific guidance about the approach to be adopted in assessing whether an insurance premium had been reasonably incurred; the Respondent cited extracts from the judgment, indicating that it will not be necessary for a landlord to show that the premium is the lowest that can be obtained, but must be satisfied that the charge was reasonably incurred, by reference to the selection process and on the basis of comparable cover as between insurers. The Respondent referred to the witness statement of Steven John Brindley dated 12th March 2019 in the bundle, being the Chairman of Weald Insurance Brokers Limited. The Respondent submitted that it is not necessary to obtain the lowest available premium, that the risks to be covered as set out in the Lease are extensive, that the policy selected is a leading market product and a block policy, that the insurance brokers had carried out a selection process to test the market, and that the AXA policy referred to by the Applicant did not provide

genuinely comparable cover, to the selected NIG policy, having significant advantages to justify the higher premium. In regard to the reserve fund, the Respondent referred to clause 5(16) of the Lease:

"*To set aside (which setting aside shall for the purposes of the Fourth Schedule hereto be deemed to be an item of expenditure incurred by the Lessor) such sums of money as the Lessor shall reasonably consider necessary to meet future costs to be incurred by the Lessor in complying with its obligations hereunder*"

The Respondent also referred to paragraph 2(ii) in the Fourth Schedule of the Lease and to which the Applicant had made reference:-

"*If the Interim Charge paid by the Lessee in respect of any Accounting Period exceeds the Service Charge for that period then such surplus shall be carried forward by the Lessor and credited to the account of the Lessee…"*

The Respondent referred to the service charge accounts for the years 2016 and 2017, as contained within the bundle, indicating that surpluses in those years had been allocated to the reserve fund. The Respondent also referred to an email dated 19th March 2019 in the bundle from its managing agent, confirming that whilst the managing agent does not have a separate account for the reserve fund, it does operate a single account for all the funds in the name of the landlord and in compliance with the statutory trust provisions of Section 42 of the 1987 Act. In regard to the Management Agreement, the Respondent broadly submitted that clause 7a does not mandate continuation beyond 12 months given that clause 7a provides:

"This agreement shall be for a term of 12 months from and including the date of signature hereof (the term) and unless terminated will continue thereafter. The parties shall have the right to terminate this Agreement upon giving at least 3 months prior written notice in letter, received by recorded delivery, addressed to the managing director, to expire no earlier that on the last day of the Term."

The Respondent referred to the decision in *Corvan (Properties) Ltd v Abdel-Mahmoud [2018] EWCA Civ 110*, where the contract period of the management agreement in question was expressed to be one year "*and will continue thereafter until terminated upon three months` notice by either party*". The Respondent distinguished the management agreement in the present case, on the basis, it said, that it does not mandate continuation beyond 12 months and accordingly is not a QLTA for which consultation under Section 20 of the 1985 Act would be required. In regard to costs, the Respondent referred to clause 4(6) of the Lease:

"*To pay all legal costs and other proper costs (plus any VAT) incurred by the Lessor."*

The Respondent submitted that the scope of clause 4(6) is wide enough to include its costs in relation to defending this application, adding that a significant issue had been summarily dismissed by the Tribunal at the telephone CMH, and that its right to claim costs under clause 4(6) should not be curtailed. In regard to Rule 13 costs, the Respondent submitted that the Tribunal is empowered to make an order if a person has acted unreasonably in bring or conducting proceedings, but that in this case neither party had done so. In regard to Section 20C costs, the Respondent said that as it appeared that the Applicant was linking the making of such an order to the outcome of the application, then if the Tribunal finds in favour of the Respondent, it follows on the Applicant`s own case that no Section 20C order

should be made. The Respondent referred also to the decisions in *Iperion Investments Corp v Broadwalk House Residents [1995] 2 EGLR 47* and *Staghold Limited v Takeda [2005] 3 EGLR 45*.

7. The Applicant made a Reply dated 26th March 2019, in which he said he remained disheartened by the Respondent`s earlier failure to reply to his enquiries regarding insurance, and which he said might have made it highly likely that the need for the FTT could have been avoided. In regard to insurance, the Applicant said that whilst the brokers had obtained insurance in the market and at arm`s length, the premium must still be reasonable and that whilst the cost had risen by 137%, it had not been stated what commissions and remunerations were taken. The Applicant acknowledged the experience of Mr Brindley, but referred to an alternative appended NIG policy for a similar building, less than a mile away, including property owners` cover of £5M and also similarly an Aviva policy, each with a lower premium. In regard to the reserve fund, the Applicant said that if paragraph 2(ii) to the Fourth Schedule of the Lease does not provide for the return of any surplus, then it has little purpose. Finally, in regard to the Management Agreement, the Applicant said he accepts that it is not a QLTA, but asked that it be tendered at the earliest opportunity. In regard to costs, the Applicant said that as his earlier requests for clarification from the landlord, had been ignored, he should not expect to incur any of the landlord`s costs in respect of this application, and further requested reimbursement of fees paid.

CONSIDERATION

8. The Tribunal, have taken into account all the case papers in the bundle.

9. In regard to insurance premiums, the fact in isolation of an increase in premium from 2015 to 2017, being from £609.00 to £1,420.00, does not automatically equate to such increased premium being unreasonable. The Tribunal further notes that the Respondent had tested the market through established brokers, that the risks are relatively extensive and considers that on the evidence provided it is not possible to be entirely clear whether the alternative insurances referred to by the Applicant, are necessarily on comparable or directly similar terms. The landlord is not under an obligation to seek the lowest possible premium and accordingly on the evidence as offered, the Tribunal concludes that the premiums are reasonable and payable.

10. In relation to the reserve fund, the Tribunal notes in particular, the provisions of clause 5(16) of the Lease to the effect that the setting aside of money to a reserve fund, is deemed to be an item of expenditure incurred by the Lessor, and accordingly such money so set aside to the reserve fund, does not constitute a surplus as envisaged by paragraph 2(ii) in the Fourth Schedule which more likely provides for crediting of funds, where for example, sums collected on an estimated basis on account, transpire to be in excess of the expenditure incurred. No clear evidence was provided to demonstrate that the Respondent had acted other than reasonably in regard to the amount which it set aside to the reserve fund in 2018, and consequently the Tribunal determines that the application of the year end surplus to the reserve fund was reasonable.

11. In regard to the management agreement, the Tribunal notes that the Applicant has not directly challenged the costs, but rather had suggested that the agreement was a QLTA for which consultation would be applicable. However, the Tribunal notes the subsequent acceptance by the Applicant that it is not a QLTA. The Tribunal

further considers that on a proper interpretation, clause 7a of the management agreement is for a term of 12 months with scope for termination within such 12 month period, but allowing for possible continuation after 12 months, unless previously terminated.

12. In regard to costs, the Tribunal accepts the Applicant`s submission that the Respondent might have responded with clarification on the issues sooner than it did, and that the Applicant accordingly had some justification for making this application. However, the Tribunal has found the explanations and evidence offered by the Respondent in the course of the proceedings to be overall, the more persuasive. In regard to Section 20C, the Tribunal has a discretion to make such order as it considers just and equitable in the circumstances. Accordingly, the decision of the Tribunal taking into account all the circumstances of this case is to make no order under Section 20C. In regard to costs limitation under Paragraph 5A of Schedule 11, of the 2002 Act, the Tribunal has discretion to make whatever order it considers to be just and equitable. In all the circumstances of the present case, the Tribunal makes no order under Paragraph 5A. In regard finally to Rule 13 of the 2013 Rules, the Tribunal may make an order if a person has acted unreasonably in bringing, defending or conducting proceedings. The decision of the Tribunal again taking into account all the circumstances is not to make any Rule 13 order, and further not to order reimbursement of any fees.

13. We made our decisions accordingly.

Judge P J Barber

A member of the Tribunal
appointed by the Lord Chancellor

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

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.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.