FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	:	**BIR/00GF/LIS/2019/0026**
Property	:	**10 Beaconsfield, Telford, TF3 1NF**
Applicant	:	**Sekoa Ltd**
Representative	:	**Anifatu Ayers**
Respondent	:	**York Montague Ltd**
Representative	:	**Chandler Harris LLP, Solicitors**
Types of application	:	**Application for a determination of liability to pay and reasonableness of service charges and an application for orders under section 20C of the Landlord and Tenant Act 1985 and an application under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002**
Tribunal members	:	**Judge C Goodall LLB** **Mrs S Hopkins FRICS**
Date of inspection and deliberation	:	**7 October 2019**
Date of decision	:	**15 October 2019**

DECISION

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Background

1. This is a decision on the liability to pay for an estimated service charge for the period 1 April 2019 to 31 March 2020 ("the Charge") for a flat at 10 Beaconsfield, Telford, ("the Property") which is owned by the Applicant. The landlord is the Respondent. The block in which the flat is located is known as 7-12 Beaconsfield ("the Block"). It is managed by KDG Property Ltd (KDG).

2. The Tribunal has jurisdiction to consider the payability of service charges under sections 19 to 27A of the Landlord and Tenant Act 1985 ("the Act").

3. The Charge was invoiced to the Applicant on 3 May 2019. The invoice total was £2,025.00 comprising legal fees of £609 and service charges for 1 April 2019 to 31 March 2020 of £1,416.00.

4. On 2 July 2019, the Applicant applied to this Tribunal for a determination of liability to pay and reasonableness of service charges covering 2017-2019. By a direction dated 26 July 2019, the Tribunal struck out the application in so far as it related to 2017 and 2018 service charges but determined that the application in relation to 2019 should proceed. The grounds for the strike out were that the previous years had already been determined by a court and thus the Tribunal had no jurisdiction to consider them (see section 27A(4)(c) of the Act).

5. Within its application, the Applicant also applied for an order that the Respondents costs of these proceedings should not be included within any service charge payable by the Applicant under section 20C of the Act. It also asked the Tribunal to make an order under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") reducing or extinguishing the Applicant's liability to pay the Respondent's costs under any other contractual provision in the lease.

6. Both parties indicated they wished for the application to be determined without a hearing. The Tribunal inspected the Block on 7 October 2019. Mr Sakol Tobwongsri from EDG attended the inspection. There was no attendance by the Applicant. Afterwards, the Tribunal met to determine the application. We considered the undated and unsigned representations of the Applicant received by the Tribunal on 27 August 2019, and the representations of the Respondent dated 6 September 2019. We also considered the documents supplied by the Respondent under cover of their solicitor's letter dated 5 August 2019.

Inspection

7. The Block, together with an adjoining block comprising flats 1 – 6, Beaconsfield, is located on the north side of Brookside Ave, with its western elevation facing onto Beaconsfield itself. It is a 3 storey rectangular block of brick construction with flat roof, and was probably constructed in around the 1970's. The six apartments in the Block are

located off a central communal area with both front and rear doors and stairs. Flats 7 and 8 are located on the ground floor, either side of the central area, with flats 9 and 10 being on the first floor and 11 and 12 on the second floor.

8. The communal entrance and stairway have tiled flooring with exposed brick walls and plastered ceilings. There is a substantial double-glazed uPVC window on the southern aspect, though the window catches are loose. The general appearance of the communal area is that it is rather run down. It does not appear clean, though there was no litter evident. The doors and external paintwork are in average condition at best. There were some lighting units fixed to the ceilings, but no switches. It is unclear how those lights operate and Mr Tobwongsri did not know. We could not turn them on. They do not appear to be movement activated. They might be on a timer, but we asked to see this and it could not be located.

9. There must be an electrical supply to the communal area because there were both lights and a door entry system, but there did not appear to be a meter. We were told that the Respondent intends to install a sub-meter in the Block but were given no further details of the location of the main supply.

10. There were no fire detection devices apparent at the inspection. The door entry system was broken.

11. At the rear, there is an alley with outbuildings to the east. There were two small lock-up sheds, presumably used by two of the lessees, and a bin area. At the time of inspection, the bin area was cleared and had been swept. Mr Tobwongsri told us this had been done the previous week in readiness for our inspection.

12. To the front (north) of the Block there are some shrubs and a small grassed area.

The Law

13. Sections 18 to 30 of the Landlord & Tenant Act 1985 ("the Act") contain statutory provisions relating to recovery of service charges in residential leases. Normally, payment of these charges is governed by the terms of the lease – i.e. the contract that has been entered into by the parties. The Act contains additional measures which generally give tenants additional protection in this specific landlord/tenant relationship.

14. Under Section 27A of the Act, the Tribunal has jurisdiction to decide whether a service charge is or would be payable and if it is or would be, the Tribunal may also decide:-

    a. The person by whom it is or would be payable
    b. The person to whom it is or would be payable
    c. The amount, which is or would be payable
    d. The date at or by which it is or would be payable; and

e. The manner in which it is or would be payable

15. Section 19(1) of the Act provides that:

"Relevant costs shall be taken into account in determining the amount of the service charge payable for a period –

(a) Only to the extent that they are reasonably incurred, and

(b) Where they are incurred on the provision of services and the carrying out of works, only if the services or works are of a reasonable standard:

and the amount payable shall be limited accordingly."

16. The construction of the lease is a matter of law, whilst the reasonableness of the service charge is a matter of fact. On the question of burden of proof, there is no presumption either way in deciding the reasonableness of a service charge. If the tenant gives evidence establishing a prima facie case for a challenge, then it will be for the landlord to meet those allegations and ultimately the court will reach its decisions on the strength of the arguments. Essentially the Tribunal will decide reasonableness on the evidence presented to it (*Yorkbrook Investments Ltd v Batten [1985] 2EGLR100 / Daejan Investments Ltd v Benson [2011] EWCA Civ 38*).

17. In relation to the test of establishing whether a cost was reasonably incurred, in *Forcelux v Sweetman* [2001] 2 EGLR 173, the Lands Tribunal (as it then was) (Mr P R Francis) FRICS said:

"39. ...The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred.

40. But to answer that question, there are, in my judgement, two distinctly separate matters I have to consider. Firstly, the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Second, whether the amount charged was reasonable in the light of that evidence. The second point is particularly important as, if that did not have to be considered, it would be open to any landlord to plead justification for any particular figure, on the grounds that the steps it took justified the expense, without properly testing the market."

18. In *Veena v Cheong* [2003] 1 EGLR 175, the Lands Tribunal (Mr P H Clarke FRICS) said:

"103. ...The question is not solely whether costs are 'reasonable' but whether they were 'reasonably incurred', that is to say whether the action taken in incurring the costs and the amount of those costs were both reasonable."

19. In *The London Borough of Hounslow v Waaler [2017] EWCA Civ* 45, the Court of Appeal was considering whether the cost of replacing windows by Hounslow was reasonable where there was also an option of repair. The repair option (replacement of hinges) was substantially less than the cost of replacing the windows. The Court said that in applying the statutory test under section 19 to Hounslow's decision, it was necessary to go further than just consider whether the decision-making process was reasonable; the outcome of that process also needed to be considered (paragraph 37) as did the legal and factual context (at least in consideration of expenditure on improvements) (paragraph 42).

The Lease

20. The Applicant's lease is dated 16 August 2017. The tenant is the Applicant and the landlord is named as 365 Asset Management Ltd. We have been told that the Respondent purchased the freehold from this company in December 2017. The lease was granted for a term of 125 years from 1 January 2017 at a ground rent of £350 per annum.

21. The Applicant has covenanted in the lease to pay a service charge. The service charge mechanism is contained in Schedule 6. Before, or as soon as possible after the start of each Service Charge Year, the landlord shall prepare an estimate of the service costs to be incurred in that year and send it to the tenant (clause 31.2). As soon as reasonably practicable after the end of the service charge year, a certificate of the service costs and the charges for that year has to be sent to the tenant (clause 31.3).

22. The sums that can be included in the service charge are set out in Schedule 7. These are the costs of maintaining, decorating, repairing and replacing those parts of the Block that are not let out; i.e. the Property and the other flats in the Block. The landlord can also charge for "any other service or amenity that the landlord may in its reasonable discretion (acting in accordance with the principles of good estate management) provide to the benefit of the tenants and occupiers of the Building". Schedule 7 also allows recovery of the insurance premium for insuring the Block, and costs of employing managing agents and accountants.

23. By clause 12 of Schedule 4, the Applicant has covenanted to pay both the estimated service charge calculated under clause 31.2 and the balance due when the final accounts are produced under clause 31.3. If there is an excess of charge over cost, the tenant is entitled to a credit of that sum (see clause 12.3).

24. The service charge year is 1 January to 31 December with a right for the landlord to change that not more than once in each year upon giving notice to the tenants.

25. The tenant's proportion of the service charge costs incurred is a fair and reasonable proportion determined by the landlord of the service charge costs.

The estimated service charge costs for the year from 1 April 2019 to 31 March 2020

26. These are the costs at issue in this case. We note that the service charge year has changed from January to December. We have not been provided with any explanation or copies of any documentation about this. The Applicant has not raised this as an issue. We work on the basis that all parties accept that this is now the service charge year under the lease.

27. The sum invoiced to the Applicant on 3 May 2019 was £1,416.00.

28. The estimate for the year sets out the budgeted costs as follows:

Proposed expenditure	**Cost (£)**
Audit and accountancy	600
Repairs and maintenance	2,410
Management fee (incl VAT)	1,236
Building insurance	1,290
Communal electricity	300
Communal cleaning	600
Estate gardening	350
Refuse collection	450
TV aerial	150
Entry phone	250
Total	**7,636**
Total per flat	1,272.66

29. The Applicant has not made any challenge to the individual components of the estimated service charge apart from the general statement that they are excessive and unreasonable, and they lack transparency. There is a challenge based upon failure to consult under section 20 of the Act which will be dealt with below. There is also a challenge to the apportionment of the costs, as to which also see below.

30. The Respondent's case is that the estimated costs are reasonable. It has provided specific representations on four of the proposed costs as follows:

    a. The audit and accountancy charge is the same sum as was charged for accounts for 2017 to be prepared (which have been copied to the Tribunal).

    b. The repairs and maintenance charge includes a sum of c£600 for the cost of running a cable to the Block and then installing a new meter and consumer unit.

    c. Refuse collection cost is based upon actual charges that had to be incurred in August 2018 (£450) and February 2019 (£307.25) because rubbish had built up in the bin store area which had to be cleared under pressure (for the 2019 cost) from the council.

d. The insurance premium was supported by the invoice for the previous year provided in the documentation (though this invoice showed the premium payable in November 2018 was £782.14).

31. Apart from these representations, the Respondent provided no submissions or evidence to support any of the sums which they estimated they would need to budget for in the 2019/20 service charge year.

Discussion and determination on the 2019/20 estimated service charge

32. The first point to make is that the Charge should have been for £1,272.66, not £1,416. The Respondent has accepted that it made an error on its invoice but has not provided any explanation.

33. With the exception of the representations made by the Respondent in relation to 4 elements of the Charge, neither party has either sought to provide a rationale to justify any of the elements of the Charge, nor specifically challenged them. Particularly if a case is going to be determined on written representations, it is beholden upon the parties to make out their cases to the Tribunal. It would have been helpful, for example, to have actual outcome figures for the two preceding years upon which to base our estimate for 2019/20, but neither party provided these. We were given actual figures for 2017 but the main expenditure on the Block itself for that year was wrapped up as a single figure of £2,760, and the service charge year was not the same as the current service charge year, so we had no opportunity to ascertain the individual elements of the charge for that year. As it is, the Tribunal will have to do the best it can, using its experience and expertise, to determine what it thinks would be a reasonable budget for the Block for the period in question.

34. Looking therefore at each cost element in the Charge:

    a. Audit and accountancy - We allow the accountancy and audit fee in the sum of £600. Using our experience and expertise, this is approximately what a landlord would expect to pay in the market for this work. The Applicant should have provided us with some estimates from other accountancy practices if it wished to persuade us to adopt a different figure;

    b. Repair and maintenance - We have no information to explain the reason for asking for a budget of £2,410 for repairs and maintenance, apart from the proposal to spend c£600 on installing a metered electrical supply to the communal areas. We are not persuaded that this is a maintenance and repair item. There must be some form of supply currently. We have not been provided with any evidence of an actual payment for an electrical supply in previous years. We therefore do not accept, on the basis of the information given to us, that expenditure of £600 on the electrical installation would be

service charge expenditure that is reasonably incurred. So far as other repair and maintenance expenditure is concerned, as we have no supporting rationale for any figure, we use our expertise and experience to determine that an amount in the region of £1,250 should be adequate as an estimate for 2019/20;

c. Management charge - The management charge claimed is £206 per unit. We think this is above current market rates and allow £150 plus VAT per unit, or £1,080 in total. We have borne in mind that the managing agents manage other properties on the estate and we therefore do not think that an uplift to reflect the challenges of managing a small unit would be justified.

d. Insurance - On insurance, we do not understand why the Respondent has estimated a premium of £1,290 when its own supporting documentation shows the premium payable in Nov 2018 was £782.14. We allow the sum budgeted for the previous year of £820.

e. Communal electricity - There has been no evidence to support any level of charge for communal electricity. We consider that the budget figure of £300 is excessive and allow £150.

f. Communal cleaning – We have some evidence that the Respondent has engaged cleaners on an occasional basis who have charged £45 per clean. We do not have much confidence in the cleaner's attendance sheets provided as they demonstrably do not relate specifically to these premises. For instance, there are no carpets, though these are referred to on the sheet, and there are no power points from which any hoovering (also referred to) could be undertaken. The entrance hall is the communal area, rather than being a separate area. We consider that the cleaning requirement for the communal areas would be satisfied if one cleaner spent one hour sweeping, dusting, and generally tidying the area. The current company employed is located about 36 miles from the Block, so we think that if travelling time is allowed in the charge of £45, this is probably excessive, as we think that local cleaners would be available in this area. We allow an estimate of £25 per month for communal cleaning, i.e. £300 per annum.

g. Estate gardening – The gardening requirement is minimal. The grassed area would need mowing probably fortnightly in the growing season, and the shrubs will need pruning possibly twice a year. It is very likely that there is a contract for general grounds maintenance for all the residential flats in the vicinity of the Block, and it would be reasonable for the Respondent to make an arrangement for that contractor to carry out some gardening services for the Block whilst working in the area. We cannot see that anything more than around £15 per month would be needed as a reasonable fee for that work. We allow £180.

h. Refuse collection – We accept that residents of the Block or the area have, unacceptably, piled refuse in the bin store rather than putting it into their own refuse bins, and that has necessitated a full clearance of the bin store on two occasions. We consider that this issue needs active engagement with the lessees, and possibly some variation of the cleaning contract, for the worksheet for the cleaning contractor says that the contractor is to include for disposal of paper junk, and it would be sensible for the cleaner to remove other rubbish as it builds up. The Respondent could also arrange for a communal bin to be supplied which the cleaner could use. We do allow some cost for an additional refuse collection in case these active management processes do not resolve the issue. The cost of the clearance in Feb 2019 was £307, so we allow an estimated sum of £300.

i. TV aerial – we noted that a satellite dish is attached to flat 7, which appears to provide a wired aerial to all the other flats. We do not understand what cost needs to be incurred for this existing infrastructure and we do not allow any provision within the estimate for it.

j. Entry phone – We have not been supplied with any evidence of any form of maintenance contract for this. We consider that the repair cost for any breakdown of the system should be adequately covered by the provision for repairs and maintenance. We do not allow for this in the estimate for 2019/20.

35. Our determination of the estimated service charge for 2019/20 which would be payable by the Applicant is therefore as is shown below:

Proposed expenditure	**Cost allowed (£)**
Audit and accountancy	600
Repairs and maintenance	1,250
Management fee (incl VAT)	1,080
Building insurance	820
Communal electricity	150
Communal cleaning	300
Estate gardening	180
Refuse collection	300
TV aerial	0
Entry phone	0
Total	**4,680**
Total per resident	780

Determination

36. The amount payable by the Applicant as its contribution towards the estimated service charge for 1 April 2019 to 31 March 2010 is £780.00.

Costs

37. We have to consider whether to make any order under section 20C of the Act or paragraph 5A of Schedule 11 to the 2002 Act.

38. We are required to determine what order we consider to be just and equitable in relation to costs.

39. We have seen some of the correspondence between the parties. We have not detected any obvious sign that the Respondent has tried to address the issues raised by the Applicant. On the contrary, it has been fairly swift to resort to court proceedings or levy additional charges upon the Applicant.

40. The outcome of these proceedings is that we have determined that the Applicant must pay £780 for 2019/20, rather than the original demand of £1,410. That is a very substantial reduction. We cannot see that it would be just and equitable for the Applicant to have to pay any of the costs incurred by the Respondent in this case.

41. We therefore order that none of the Respondent's costs of these proceedings are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant to the Respondent.

42. We also order that the Applicant's liability to pay any administration charge in respect of the litigation costs of these proceedings is extinguished.

Other issues

43. A number of other issues were raised by the parties in their documentation on which the Tribunal makes some general comments:

    a. Consultation under section 20. There is no evidence that the Respondent is planning to spend £1,500 or more (i.e. £250 per flat) on a works that would fall within the consultation obligation under section 20 of the Act. If it did, the Applicant would only be obliged to pay £250 for those works unless a proper consultation was conducted, or dispensation was granted.

    b. Apportionment. The Applicant has suggested it is being charged an unfair proportion of the service charge costs. In fact, it appears from all documentation supplied that it is being charged one sixth of the expenditure. As there are six equally sized flats in the Block, our view is that the apportionment is correct.

    c. With-holding service charges under section 21 of the Act. This provision does not assist the Applicant in respect of payment of an estimated service charge.

d. Administration charges. Some charges for non-payment on invoices have been levied against the Applicant. These do not fall within the ambit of the Tribunal jurisdiction on service charges. If the Applicant wishes to challenge these fees, it should do so by bringing an application for a determination of the reasonableness of administration charges under Schedule 11 paragraph 5 of the Commonhold and Leasehold Reform Act 2002, unless the charge has already been determined by a court.

e. Fees for water leak. The Applicant has been charged legal fees of £534 by the Respondent in connection with a water leak. This also does not fall within the ambit of this Tribunal's service charge jurisdiction. The Applicant should seek further advice on this matter if it wishes to challenge this charge.

f. Address for service of documents. This is not a matter for this Tribunal to adjudicate upon. It is clear that in respect of these proceedings, both parties have been notified of them.

g. Failure to carry out repairs in previous years. Again, this is not a matter for this Tribunal, as the only issue in this case is the reasonableness and payability of the estimated service charge for 2019/20.

Appeal

44. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)