FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/33UF/LIS/2018/0031**
Property	**:**	58 & 76 Earlham House, Earlham Road, Norwich NR2 3PF
Applicant	**:**	Richard Bennett & Elizabeth Bennett James Leith Jeremy Wigglesworth (employee of a leaseholder company)
Respondent	**:**	Grey GR Limited Partnership
Representative	**:**	Ben Stimmler (counsel), instructed by J B Leitch Ltd
Type of Application	**:**	for determination of reasonableness and payability of service charges for the years 2017 & 2018 [LTA 1985, s.27A]
Tribunal Members	**:**	G K Sinclair, G F Smith MRICS FAAV REV & M E Hardman FRICS IRRV (Hons)
Date and venue of Hearing	**:**	Wednesday 23rd January 2019 at Norwich Magistrates Court
Date of decision	**:**	12th March 2019

DECISION

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1. In this application the applicant lessees sought to challenge service charges levied by or on behalf of the respondent in respect of the accounting years 2017 & 2018, but at the outset of the hearing Mr Bennett agreed to abandon the challenge to the 2018 budget and concentrate instead on the actual figures for the year 2017.

2. For the reasons given below the tribunal determines that the service charge account for the year 2017 be allowed, subject to the following adjustments :
   a. Schedule A – caretaker : reduce £6 069 claimed to £5 488
   b. Schedule A – sundries : reduce £667 claimed but leave credits . . -£123
   c. Schedule B – general repairs & maint : reduce £12 893 to. £12 770
   d. Schedule B – fire safety : reduce £925 to £470
   e. Schedule A & B –management : substitute a global unit fee of £260

Background

3. Mr Bennett applies to this tribunal to determine questions concerning the service charges due from the residential lessees occupying the first and second floors of Earlham House; the balance being payable by the commercial tenants occupying units on the ground floor.

4. The tribunal has dealt with disputes concerning service charges levied in respect of this building (mainly concerning the cost of major works of refurbishment) on two previous occasions : in 2013 and again in early 2015. These each involved Mr Bennett. Since then, on 21st February 2017 Bellgold Ltd, the former freeholder, divested itself of the freehold reversion in the building (but not the surrounding land, including a small Co-op supermarket and car parking areas, in which some but not many residential lessees enjoy defined parking rights) by selling Earlham House to Castlenau Acquisitions Ltd. In turn, that company sold it on to the respondent, Grey GR Limited Partnership of Aberdeen, by transfer dated 9th November 2017. The tribunal then dealt in 2018, on paper, with a further dispute concerning the liability of two flats held by another company as lessee for historic service charge liabilities owed to Bellgold Ltd.

5. The tribunal has no jurisdiction to determine disputes concerning the amounts payable by the commercial tenants, and in fact just such a dispute concerning the proper apportionment between the two groups was the subject of a commercial arbitration. The award, by P A Forrester FRICS, was issued on 15th January 2016 and appears in the hearing bundle at [53–79]. This notes at paragraph 5.2.1 [62] that :

> Historically the service costs have been apportioned between the residents and the commercial tenants on the basis of 68% to the residential lessees and 32% to the commercial lessees.

6. However, while he notes the past involvement of the tribunal he determines (at paragraph 5.2.13) that the altered use of unit 1a means that these percentages should be adjusted to 67.3% to residential lessees and 32.7% to commercial tenants. At paragraph 5.2.11 he observes that :

> When apportioning service costs, particularly where different tenants or groups of tenants benefit from the provision of different services, it is industry best practice that wherever practicable and appropriate costs should be allocated to separate schedules and the costs apportioned to those tenants that benefit from the services to ensure that individual

occupiers bear an appropriate proportion of the total service charge expenditure that reflects the availability, benefit and use.

The lease

7. A copy of a specimen lease dated 21st January 2008, for flat 58, was granted by Relayarch Ltd (a previous freeholder) to Charles Bentsir Ebenezer Addison for a term of 125 years from 1st January 2007, at an initial (and current) annual rent of £200 plus insurance rent and service rent.

8. Due to the subsequent history of the freehold property, it is important to note that in the Particulars the term "the Building" is defined as meaning "Earlham House, Earlham Road, Norwich NR2 3PD as is registered at HM Land Registry with Title Absolute and comprising Title Number NK285045."

9. In Schedule 1 "the common parts" are defined as :

> all main entrances passages landings staircases lift (if any) gates accessways car parking areas means of refuse disposal gardens (if any) and other areas provided by the landlord for the common use of occupiers of the building and their visitors.

10. In the same Schedule the "service rent" is defined as meaning :

> A fair and proper proportion as determined by the landlord's surveyor of the service costs

These in turn comprise :

> the total sum computed under paragraph 1 of part 3 of schedule 6.

11. The demised premises are defined in Schedule 2, and by reference to the part shown edged red on the lease plan.

12. By clause 3.1 the tenant covenants with the landlord to pay the annual rent by half yearly payments in advance on the 1st January and 1st July in each year of the term… and the insurance rent and the service rent at the times and in the manner provided without any deduction or set-off whether equitable or otherwise.

13. By clause 4.4 the tenant also covenants with the landlord and flat owners to pay the service rent at the times and in the manner provided in schedule 6; such service rent to be recoverable in default as rent in arrear.

14. The landlord's covenants appear in clause 5. At 5.5.1 the landlord covenants to use its best endeavours throughout the term to provide and carry out or procure the provision or carrying out as economically as is practicable of the several services and other matters specified in part 1 of schedule 6.

15. Schedule 6 provides in detail for the provision (part 1), addition to, variation or discontinuance (part 2) of services and for the calculation and payment of service costs (part 3). By paragraph 1.1.1 of part 1 the landlord covenants to use its best endeavours :

> to repair, rebuild, renew, reinstate, decorate, cleanse and maintain in good and substantial repair and condition the foundations roofs outside walls and structural parts of the building (but not the inside plaster surfaces of

the walls and ceilings of the demised premises and of any other premises in the building let or intended to be let by the landlord) and the common parts

and by paragraph 1.1.2.3 to provide cleaning of the outside glass surfaces of the building once in every month;...

16. Paragraph 1.2 of part 3 provides that in calculating the annual service costs there may be included an amount "to be revised annually by the landlord at his discretion" towards a reserve fund for the replacement of certain items or for the decoration of external or common parts, and that any expenditure on any such item during an accounting year shall first be met out of the reserve to the extent of the credit in the reserve in respect of the item in question.

17. Detailed provisions for payment of the service costs appear in paragraph 2 of part 3, subject to certain provisos in paragraph 3.

18. Paragraph 3.5 of part 3 of schedule 6 is also relevant to one issue in dispute, viz the means by which each flat's proportion of the service charge expenditure is to be calculated. It provides :

> In calculating the service rent to be paid by the tenant the landlord and/or the landlord's surveyor may from time to time apply the same proportion to all service costs or different proportions up to 100% to constituent elements of the service costs or may use an alternative basis of calculation if it or they reasonably consider in all the circumstances and in accordance with the principles of good estate management that this would be fair and/or equitable to the tenants of the building provided that in any case the proportion to be applied is applied on the same basis and using the same criteria for each of the tenants in the building who are contributing to the relevant service cost.

Material statutory provisions

19. Section 18 of the Landlord and Tenant Act 1985 defines the expression "service charge", for the tribunal's purposes, as :

> 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...

20. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :

a. only to the extent that they are reasonably incurred, and
b. where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.

21. The tribunal's powers to determine whether an amount by way of service charge is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no

further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

Inspection and hearing

22. The tribunal inspected the exterior and common parts of the premises, including the external staircases and the waste storage area to the west and rear of the long wing and its commercial units, on the morning of and before the hearing. At all times the tribunal was accompanied by the parties and their representatives. The building is L-shaped, with commercial premises including shops and restaurants on the ground floor and the flats above. The pedestrian approach to the building is by a covered walkway with built-in surface water drainage. While it may be said primarily to benefit shoppers, it ensures that residents can shelter while walking along either wing of the building to reach the communal entrance lobby.

23. Beginning in the main entrance lobby, the tribunal noted the parquet floor and had pointed out where the flooring above a hatch cover had to be relayed – at some expense – after access had been required to a telecoms junction box below the floor. Mr Bennett was keen to point out the controls for the fob operated security system used by residents to gain entry to the building. This included a manual override on the inside of the building, to ensure egress during a loss of electric power. On the spiral staircase the tribunal noted that some of the LED lighting – some at low level – was not working. This may or may not have been due to inefficient light sensors.

24. The quality of the carpets, double fire doors and decoration of the corridors was noted. At the end of each is a fire escape door which again is controlled by a green button to leave and fob access to enter the building. By the exits to the south, on the top floor of the east-west wing of the building, ingress of water was pointed out by the top of the doors. Externally, the tribunal noted where imperfect lead flashing attempted to cover the joint between the sloping roof of the building and the flat roof above the fire escape, which at both first and second floors comprised a concrete bridge between the building and an external staircase perhaps 5 metres distant from it.

25. At the hearing the tribunal had before it a 365 page bundle, including the parties' respective statements of case with accompanying documents and a very detailed witness statement by Sarah Parkin, a Member of the Institute of Residential Property Management (MIRPM) and director of Residents Quarter Ltd. This is a professional managing agent which is wholly owned by Inspired Property Management Ltd, the respondent's managing agent. It appeared from her oral evidence that Residents Quarter Ltd was created to serve the property needs of Grey GR Limited Partnership only and, although a subsidiary of Inspired, was responsible for selecting it as managing agent and providing supervision.

26. Amongst the evidence produced by her was a copy of the year end accounts for 2017, which would assist in evaluating the reasonableness of the "on account" demands issued for the year 2018 save for the fact that in his Reply Mr Bennett withdrew his challenge to that accounting year. The tribunal therefore dealt only with 2017, based on the actual figures.

27. Mr Bennett's challenges were many and various, but all followed a pattern :

a. Work done by national contractors who had to travel some distance to the building could more cheaply by undertaken by a local Norwich contractor that he had since found
b. Cleaning of the ground floor canopy was not a valid expense as it benefited only the commercial tenants and customers, so should be in a separate schedule
c. The cost of replacing the previous electrically controlled communal door entry system with a new one was unreasonable, and a manual push-button combination lock would be much cheaper
d. The cost of repairing the wooden lobby floor are too high, and would have been much cheaper if a surface of carpet tiles was used instead
e. The costs of taking work in-house by directly employing as a caretaker a man who had previously worked for an external cleaning and maintenance company were too high
f. The cost of work such as an asbestos survey was unreasonable because the previous freeholder (Bellgold) had obtained one, and the landlord should have relied on that instead of commissioning a new one
g. The sums demanded in respect of a reserve fund were unreasonable because he had already contributed to one established by Bellgold, which was not properly accounted for by the respondent
h. The cost of removing CCTV cameras from the building is not a service to the residential lessees and should not be payable by them
i. The cost of rodent control was the sole responsibility of the commercial tenants (especially the take-away food establishments) and not residents
j. The management fees were too high, and higher than previously awarded at this building (and in certain other tribunal cases)
k. The accountant's bill was not unreasonable in amount, but it was not incurred in 2017 and so should await payment as part of the 2018 service charge account.

28. The respondent disputed these challenges.
a. While it would happily consider lessees' suggestions for local contractors to undertake work at the premises, Ms Parkyn said that Inspired is a national management company and does try to use local suppliers, but finds that they are not necessarily the cheapest. Local suppliers are used if appropriate, but if the work is specialist then it relies on expertise rather than proximity. In many cases the company will use a trusted national contractor, which provides value for money and a good level of service
b. The ground floor canopy is part of the structure or exterior of the building and is a benefit to all lessees, so the cost is rightly shared
c. The door entry system had been an electric one managed by keyfobs and was replaced with an updated version. Using a manual lock would not be practical, would not better ensure security as the number could be given to friends, and announcing the regular change of code with each service charge demand would be impractical. Manual locks are just as likely to fail, and cause frustration and delay to users
d. Until seeing Mr Bennett's statement of case the respondent was unaware of the possibility of recovering part of the cost of floor repair from the telecoms contractor, but in any case its experience is that a solid floor is more hardwearing and more suitable than carpet tiles in a heavy traffic location such as an entrance lobby. Cleaning costs are also lower

e. Although it involved certain additional direct management costs, which included supplying him with a mobile phone, taking work in-house by employing a caretaker was financially and practically advantageous for residents as he carried out a number of other tasks when moving about the building, such as rotating the external waste bins, packing down the contents, taking meter readings, checking fire doors, etc

f. In the course of acquiring the building solicitors wrote to Bellgold seeking evidence such as asbestos surveys of the property that had been obtained. Despite repeated requests Bellgold never responded and so, bearing in mind the age of the building and thus the likelihood that asbestos might be present, the respondent as landlord felt obliged to obtain its own report and this was a reasonable decision on its part. Best practice is that a survey be done every five years

g. Again the respondent struggled to obtain information from Bellgold. While leaseholders may have thought that a separate sinking fund had been maintained in fact they each merely had a credit on their service charge accounts at hand-over. The respondent credited this figure against the first year's demand and started afresh to build up a reserve fund

h. The CCTV cameras overlooked the communal car park (of benefit to a few lessees but not many, but largely used by those using the supermarket or other shops). However, they were mounted on the building and powered (and paid for) from its communal electricity supply. Now that the car park was in separate ownership legal advice was taken about getting the electricity supply separated and the CCTV cameras removed. A meeting was held and assistance sought from three local councillors. Eventually the cameras were removed. The discontinuance of this non-service and continuing expense was a legitimate task

i. Residents also dump food waste in the bins at the rear of the premises, but rodents had also been detected elsewhere, including in service ducts. As documented at page 245, workmen were called in to deal with a waste pipe that had been damaged by them

j. The management fees levied were reasonable. The requirement is for an agent that is professionally qualified and regulated, and the fee is similar in level to that sought by a local firm of managing agents that are not

k. RICS and ICCA practice is to treat accountants' fees on an accrual basis, so they are properly included in the 2017 account even though the work was not completed until later.

Discussion and findings

29. Where the landlord or its managing agent sets out a reasonable explanation for a service cost (and there is no dispute that these sums were actually incurred by it) then the burden is on the applicant challenging the figures to justify doing so.

30. On the whole the tribunal disagrees with Mr Bennett. His approach is a mixture of cheeseparing and failing to understand precisely what is involved. Thus, for example, when he thought that he had obtained a quote for legionella testing at £75 this may have been sufficient for his own purposes as landlord of a flat that he wished to let. This would not have involved the nature and extent of work required properly to test the water systems serving the entire building.

31. The tribunal determines that employing a caretaker is a reasonable course of

action for the landlord to take, as is the replacement of a non-functional keyfob-operated entry system by an updated one. It could have replaced it with a manual push button combination lock at lower cost, but probably caused great irritation to leaseholders and/or their residential tenants.

32. Bellgold having decided to separate ownership of Earlham House from the car park and supermarket, it was entirely legitimate for the new landlord to take advice on and arrange for the removal of the CCTV cameras monitoring parking, especially as this was being undertaken using an electricity supply from and paid for by the lessees of the building. The amount claimed is allowed in full.

33. Where it does take issue with the respondent is with the costs of managing a staff member (the caretaker). These are part of the managing agent's general office overheads, although the tribunal is prepared to allow the cost of funding a mobile phone for someone working entirely alone, so he can keep in touch with head office while going about the building. The figure of £6 069 in the final account under Caretaker is therefore reduced to £5 448, while the £214 for telephone rental is allowed in full.

34. Also under Schedule A is an item for sundries, including postage and Land Registry fees. Again, these are costs that ordinarily form part of the per unit fee that an agent charges for ordinary Blue Book tasks, as opposed to the menu with prices allowed for the consultation and tendering for and supervision of major works, or for anything else out of the ordinary. These items are deducted, leaving only the credits. The sum of £667 therefore becomes -£123.

35. Management fees appear under both Schedule A and B. They shall be addressed later.

36. In Schedule B the most substantial element of general repairs and maintenance is the cost of cleaning the canopy over the pedestrian walkway. Replacing an earlier concrete canopy, this nonetheless forms part of the structure or exterior of the building and is of benefit to residential as well as commercial lessees. The cost of this is therefore allowed save that the figure of £12 893 is subject to a modest reduction, as conceded by the respondent's counsel in recognition of an error, to £12 770.

37. Under fire safety counsel also conceded the last invoice listed on [142], reducing the claim from £925 to an agreed £470.

38. That leaves only the two items declared as management fees : £2 887 under A (of which the residential lessees' share is declared to be 68%) and £18 520 under B. That makes a combined total of (£2 887 x 68%) + £18 520, or £20 483. To split a residential management fee in this way seems artificial, as it may disguise the price per unit by which such fees are usually calculated.

39. The tribunal had before it evidence of comparable fee quotes and considers that for a block of this size and complexity (part residential, part commercial and, when major works are required, the costs and consultation requirements tend to be significant) would be in the order of £250 to £275 per unit. The tribunal considers that the building is at last being managed reasonably efficiently and,

if one were to put back into the mix something for the cost of managing the caretaker and postage, etc which had been accounted for separately, determines that a reasonable fee for the residential flats is £260 per unit per annum. This is broadly in accord with the amount sought.

40. Subject to these few amendments the tribunal allows the service charge account for 2017 as claimed, finding for the landlord on all other disputed issues.

Dated 12th March 2019

[redacted]

Graham Sinclair
First-tier Tribunal Judge