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RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference no. LVT/0067/01/14

In the matter of 50 Kilcredaun House, Ferry Court, Grangetown, Cardiff CF11 0JB

In the matter of Applications under Section 27A and 20C of the Landlord and Tenant Act 1985
And in the matter of an Application under Schedule 11 of the Commonhold and Leasehold Reform Act 2002

TRIBUNAL	David Evans LLB LLM Roger Baynham FRICS
APPLICANT	Mr Trystan Jones
RESPONDENT	Prospect Place Management (Cardiff) Ltd

DECISION

1 PRELIMINARY

1.1 Prospect Place (the Development) is a substantial development of one and two bedroom apartments built by Bellway Homes Ltd (Bellway) on the western side of Cardiff on the shores of Cardiff Bay. It is adjacent to the A4232 which links to the M4 and is close to the Sports Village, several supermarkets and a number of out of town stores. There are at present over 700 apartments, as well as a business centre and leisure facilities. Bellway is in the course of completing the Development.

1.2 The management of the Development is the responsibility of Prospect Place Management (Cardiff) Ltd (Prospect) which, as its name suggests, is a limited company set up for that purpose. Each lessee has a single share, but Bellway maintains control of the company through the appointment of its nominees as Directors. Under the terms of the leases, it is open to Prospect to appoint a professional manager to carry out the day to day management of the Development. Originally, Prospect appointed Mainstay Residential Ltd (Mainstay) to act as its managing agents. In 2013, that arrangement was terminated and Warwick Estates Property Management Ltd (Warwick) was appointed managing agent in place of Mainstay .

1.3 The leases for each of the apartments are in a common form. They are for 125 years from the 1st January 2003 at a ground rent. In the case of the Applicant's flat the ground rent is £150 pa, subject to review every 10 years. Both Bellway and Prospect are parties to the leases which follow the usual pattern of leases of this nature. We were given to understand that the freeholds of a number of completed blocks have been sold. The current freeholder of the block in which the Applicant's apartment is situated is Fabrevan Ltd which is not a party to these proceedings. Under the leases, the costs of maintaining the Development are payable through the service charge with each lessee contributing a defined proportion of these costs. The costs themselves are separated into Block costs and Estate costs and each lessee pays a different proportion of each as set out in his/her lease.

1.4 The Applicant is the lessee of number 50 Kilcredaun House (the Property). It was purchased on the 20th October 2006. It is located on the fourth floor of Kilcredaun House (Block K) which is accessed from the entrance to the Development by a footpath and a roadway. There is undercroft parking as well as outdoor car parking close by. The apartments at Kilcredaun house are reached by means of two staircases and a single lift and long well lit corridors. The Applicant's proportion of Estate costs is 0.1812% of the total and his proportion of the Block costs for Block K is 2.1283% of the total of those costs.

1.5 The services to be provided by Prospect are set out in the Sixth Schedule of the lease. Part A of that Schedule deals with the Estate Service Charge, part B the Block Service Charge and part C those costs which are applicable to either or both the Estate and the Block. Paragraph 5 of Part A refers to "the cost of the provision of water and electricity to the Maintained Property", ie the common areas of the Development including the "entrance halls passages landings staircases and other internal parts of the Building(s)…" There is no mention of electricity in part B. However, it was confirmed to us, and we accept, that the electricity supply for lighting and heating the common parts including the undercroft parking and the nearby external parking were charged on a block by block basis rather than on an estate basis as envisaged by the lease. As the principle issue between the parties related to the Block K electricity charges, it was agreed that, irrespective of the wording of the lease, we should continue to deal with the electricity charges as a Block Charge.

1.6 Not long after he had acquired the Property, the Applicant became concerned about the electricity charges. There were two main reasons for this: firstly, there was a substantial difference between the amounts budgeted and the amounts actually charged; and secondly, there were large fluctuations in the amounts from year to year. The Applicant contacted Mainstay on a number of occasions over the years, but received no satisfactory explanation for the differences and the fluctuations. Initially, he paid the annual "on account" service charge demands, but withheld payment of the balancing charge which he continued to query. However, the Applicant accumulated arrears from June 2011 and on the 16th January 2013, in the face of a threat of legal action and heavy costs, he paid up. On the 12th September 2013, he began an action in the Northampton County Court (Claim No 3QZ23885) against Prospect claiming overpayment of the electricity charges in the sum of £1,048.08 and reimbursement of the £529.50 debt recovery charged by Mainstay and its debt recovery company Maybeck Debt Recovery (Maybeck) as well as his own Solicitor's costs of £250. Together with interest claimed, the amount the Applicant sought to recover was £1,905.58 plus the Court fee of £80 (total £1985.58).

1.7 On the 10th December 2013, District Judge A T North sitting in Cardiff referred the "determination of the electricity charge and administration charge (if any) (for the years commencing October 2006 to November 2013)" to this Tribunal. The case was heard at the Tribunal Offices on the 11th and 12th June 2014. Prior to the hearing, we inspected the Development and the common parts of Block K. We were accompanied on our inspection by the Applicant and Mr Richard Jones (Property Manager) and Mr Keith Spenceley (Head of Compliance) from Warwick on behalf of Prospect. We shall deal with each of the issues in turn. Following Directions given by this Tribunal, the Applicant also made an application under section 20C of the Landlord and Tenant Act 1985 (the Act) for an order that he should not be required to contribute, through the service charge, to Prospect's costs relating to the proceedings before this Tribunal.

2 ELECTRICITY CHARGES -2006 to 2013

2.1 The parties had prepared a substantial bundle of documents for the hearing. Included in that bundle were many of the electricity invoices and extracts of the accounts for the electricity charges. The invoices referred to three supply numbers. Only one of those supplies provided the electricity for the common parts of Block K. One of the other two supplies related to a substation which was located within Block K, but served Bellway as well as other blocks. Its only relevance to Block K was that it probably provided a back-up supply for the lift in the event of a failure of the

main supply. As this supply was used in common with a number of blocks (except to the extent that it was used by and ought properly be charged to Bellway) it was accepted by Mr Spenceley and Mr Richard Jones that it should not have been charge to Block K but should have been charged as Estate Charges. Mr Richard Jones and Mr Spenceley accepted that the third supply should also have been charged as an Estate Charge.

2.2 After considering the evidence, Mr Spenceley put the following proposal to the Applicant:

(a)	Year 2006 - 2007 - Charges as per accounts -	£15,783.78	
	Allow	£9,251.62	
	Consumption Block K	£6,532.16	Credit £180.14
(b)	Year 2007 - 2008 - Charges as per accounts -	£18,837.40	
	Allow	£11,269.30	
	Consumption Block K	£7,568.10	Credit £219.42
(c)	Year 2008 - 2009 - Charges as per accounts -	£8,116.25	Agreed. No credit.
(d)	Year 2009 - 2010 - Charges as per accounts -	£15,058.35	
	Allow	£1,662.39	
	Consumption Block K	£13,395.96	Credit £32.36
(e)	Year 2010 - 2011 - Charges as per accounts	£8,957.00	Agreed. No credit.
(f)	Year 2011 - 2012 - Charges as per accounts	£3,958.00	Agreed. No credit.
(g)	Agreed credit on respect of third supply		£ 12.00
	TOTAL AGREED CREDIT - ELECTRICITY CHARGES		£443.92

2.3 It was apparent from the evidence that the electricity supplier for the year 2011-2012, Haven Power Ltd, had for several months consistently misread the meters and erroneously given credits making the annual figure of £3,958 a substantial under assessment of the charges for the electricity used in Block K. This will have been corrected in the accounts for subsequent years. As the original claim only dealt with the accounts up to 31st May 2012, we have not ventured beyond that year and no papers were before us to enable us to do so even if we had been so inclined.

3 ADMINISTRATION CHARGES

3.1 Amounts payable in respect of the "failure by the tenant to make a payment by the due date" are "administration charges" (see Schedule 11 of the Commonhold and Leasehold Reform Act 2002) and as such are only payable "to the extent that they are reasonable". It is now settled law that a lessor must serve a notice under section 146 of the Law of Property Act 1925 before seeking to forfeit a lease as a result of the lessee's failure to discharge his/her obligations to pay his/her proportion of the cost of services provided by the lessor or managing company through the service charge (see Freeholders of 69 Marina, St Leonards-on-Sea -v- Oram [2011] EWCA Civ 1258]).

3.2 Paragraph 4 of Part One of the Eighth Schedule to the Applicant's lease requires the Applicant to "pay all costs charges and expenses…incurred by the Lessor in contemplation of any proceedings…" When the Applicant raised the issue of the electricity charges with Mainstay, he withheld some of his service charges. This eventually led Mainstay to instigate its credit control procedure and to refer the case to its debt recovery arm, Maybeck. The steps taken by Mainstay,

the warning letters and the preparation of the file for Solicitors, were therefore necessary preliminaries to the process which would ultimately result in "proceedings".

3.3 The Applicant argued that Mainstay should never have started the process as he was still in dispute with Mainstay over the charges. The case should not have been referred to Maybeck as he was still awaiting feedback from Mainstay. He had not asked for the account to be placed on hold as he assumed that this would be done automatically. He had not availed himself of the offer of a meeting and he conceded that he had been slow (nearly 3 months) in responding to an e-mail from Mainstay. He accepted that there were arguments on both sides although he felt that the charges were high.

3.4 Mr Richard Jones told us that £48 would have been set as the default amount for Mainstay's costs in connection with the credit control letters 2 and 3. Mr Spenceley explained that it would have taken time for the file to have been collated. He acknowledged that the Applicant had however raised genuine queries and that Mainstay had not followed through the request for a meeting. He also accepted that there was a deterrent element in the amounts charged and that they were high in terms of the job done. He suggested that if the Applicant was prepared to pay Mainstay's charges, Prospect would waive Maybeck's charges. The Applicant accepted the proposal. On that basis, the parties agreed that the Applicant is entitled to a further credit of £257.50.

4 COSTS

4.1 With regard to the application under section 20C of the Act, section 20C(3) gives us power to "make such order on the application as [we] consider just and equitable in the circumstances". This is a wide discretion, but in exercising that discretion, we must "have regard to what is just and equitable in all the circumstances" which includes "the conduct and circumstances of all the parties" (per HH Judge Rich QC in The Tenants of Langford Court (Sherbani) –v- Doren (LRX/37/2000)). Judge Rich continues that we should keep in mind "that the power to make an order under section 20C should only be used in order to ensure that the right to claim costs as part of the service charge is not to be used in circumstances that make its use unjust". The entitlement to costs is after all "a property right". We should not lightly deprive the Applicant of such a right (see also HH Judge Mole in Plantation Wharf Management Co Ltd –v- Jackson and Irving [2011] UKUT 288 (LC)).

4.2 In The Church Commissioners –v- Derdabi [2010] UKUT 380 (LC), HH Judge Gerald provides guidelines as to the exercise of our discretion. He suggests that we consider the degree of success enjoyed by (in this case) the Applicant, proportionality, the conduct of the parties and other "circumstances" such as the property being part of a resident-managed development. In St John's Wood Leases Ltd –v- O'Neil [2012] UKUT 374, the Upper Tribunal reinforced the principle that "whether the order should be made depends upon the facts and circumstances of the case and what is just and equitable in those circumstances" and that "the reasons why and amounts by which any service charge expenditure have been disallowed will always be important".

4.3 We must therefore balance Prospect's contractual property right to have its costs paid as part of the service charge, provided such costs are recoverable under the terms of the lease, with the Applicant's right not to have to pay in circumstances where it would be unjust.

4.4 Our starting point in this case must be that the Applicant was in arrears. Mainstay had a responsibility to manage the Development, and efficient management is in the interests of all lessees. Defaulting lessees reduce the pot of money available for services, repairs and (where permitted under the leases) improvements. It is also not fair on those who pay their share of the service costs for others to have those services provided without payment. How robust the process adopted is down to the individual manager provided it does not stray beyond the bounds of reasonableness. Inevitably, if payments are not made, the manager has to commence some sort of legal process. This takes up management time and it is common practice for managers to charge lessors for the additional time spent in carrying out enforcement whether in the County Court or in Tribunal. The annual management fee is usually only intended to cover the costs of general

management. This may include the start of the recovery process, but it is rarely, if ever, intended to cover Court or Tribunal proceedings.

4.5 We must also consider the extent to which the Applicant was successful in challenging the service and administration costs. The Applicant has succeeded in his argument that there was something wrong in the way the electricity charges were allocated. His claim for the years ending 2007 to 2012 was £958. His contribution has been reduced by £443.92 (46%). His challenge to the administration charges has reduced the amount payable from £529.50 by 49%. The only way the Applicant was able to establish his claim was by starting proceedings either in this Tribunal or in the County Court. The Applicant must also be given credit for limiting the issues he wished to challenge. Too often this Tribunal is faced with lessees who adopt the scatter-gun approach, more in hope than in expectation that reductions will be achieved.

4.6 Once Mainstay was aware that there was an issue with the electricity costs, it should have realised that something was not right and investigated the claim more thoroughly. On the other hand, once the Applicant had received the various invoices from Warwick, he did not go through them for three months. If he had, some of the errors may have come to light sooner. Yet, neither party was proactive in attempting to settle the dispute and the requests for and offers of a meeting were never taken up. As the Applicant commented, there were arguments on both sides.

4.7 As in all cases of this nature, it is a question of balance, weighing up the material facts and arguments and coming to a fair and reasonable conclusion based upon those facts and arguments. It is often the case that we will make an order referring to the percentage of costs which must not be exceeded. In this case, we determine that there were "faults" on both sides and in the circumstances that Prospect's costs must not exceed 50% of those actually incurred. We have no evidence as to the amount of those costs which will, of course, be payable through the service charge. For the avoidance of doubt, we are not determining that the amount of those costs is reasonably incurred for the purposes of s19 of the Act, merely the proportion of those costs which can be charged as service costs payable by the Applicant.

4.8 WE ORDER that the costs in excess of 50% (inclusive of VAT) incurred by the Respondent in connection with the proceedings before this Tribunal are not to be regarded as service costs to be taken into account in determining the amount of any service charge payable by the Applicant.

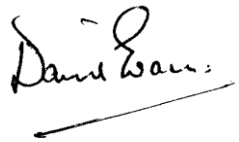
5 SUMMARY

5.1 The parties have agreed that the Applicant is entitled to a credit of £701.42 in respect of the electricity charges and the administration charges.

5.2 The Tribunal has made an order under section 20C of the Act in respect of the Tribunal proceedings.

5.3 The issue of the Applicant's Solicitor's charge (included in the claim), the costs of the County Court proceedings and the implementation of our decision are matters for the County Court.

DATED this 25th day of June 2014



CADEIRYDD/CHAIRMAN