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RESIDENTIAL PROPERTY TRIBUNAL (WALES)

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0042/09/13

Property: Flats 1, 2, 6, 7, 8, 9 and 10, Daniel Court, Bridge Street, Shotton, Flintshire CH5 1TW

Applications: Applications under section 27A and section 20C of the Landlord and Tenant Act 1985

Tribunal: Dr Christopher McNall (Lawyer – Chair)
Mr Colin Williams FRICS (Surveyor – Member)

Applicants: Mr Paul Lindon Caddick (Flat 1)
Mrs M Davies (Flats 2 and 6)
Ms Carole Czachur (Flat 7)
Ms Sandra Morris (Flat 8)
Clwyd Alyn Housing Association Ltd (Flat 9)
Mr Alan Richards and Mrs Irene Richards (Flat 10)

Respondent: Elmdon Real Estate LLP

DECISION

Summary of Decision

1. By its letter dated 30 December 2013, the respondent landlord has waived the service charge (being £100 per flat) for the service charge years beginning on 1 April 2011, 1 April 2012, and 1 April 2013.

2. The accountant's fees are recoverable in principle under the Clause 4.2 of the applicants' leases, and the sums claimed for 2011 and 2012 (£420 per year) are reasonable in amount.

3. The cost of building insurance, although recoverable in principle, is unreasonably high, and the Tribunal has reduced the recoverable sums.

4. The respondent landlord is not entitled to recharge its costs and expenses of the Applications as service charge.

Background and Reasons

5. This decision concerns an application made on 10 September 2013 under section 27A of the Landlord and Tenant Act 1985 ('**the Act**') to determine the liability of the applicant leaseholders ('**the Applicants**') to pay service charges in respect of their flats at Daniel Court, Bridge Street, Shotton for the years beginning 1 April 2011, 1 April 2012, and 1

April 2013. The application was advanced by Clwyd Alyn Housing Association Ltd on its own behalf and on behalf of all the other Applicants. Applications originally made in relation to Flats 3 and 13 were withdrawn on 16 October 2013. The remaining Applicants each confirmed that they were happy for Clwyd Alyn Housing Association Ltd, and for its representative, Mr Robert Hopkins (its Leasehold and Sales Manager) to present their applications.

6. An application was also made under section 20C of the Act.

7. The respondent is the freeholder ('**the Landlord**'), whose registered office is Permanent House, 133 Hammersmith Road, London W14 0QL. It was represented at the hearing by Mr Julian Walters, a solicitor's agent, instructed by Jeffreys Solicitors, Swansea.

8. A site view and hearing both took place on 24th March 2014.

9. Following the hearing, we invited, and have considered, further written submissions from the Landlord and from the Applicants in relation to the buildings insurance.

The Property

10. Daniel Court is a residential development constructed in 1993 on the site of the former Butler Buildings. It was built by Roberts (Builders and Developers) Limited, which was named as lessor to the original leases, and which retained the freehold until 9 June 2011 when it was sold to the present respondent.

11. Daniel Court is a single building which contains 13 units (a mixture of flats and maisonettes) over two stories, with car parking and ancillary space behind the building, accessed along an accessway though an arch from Bridge Street.

12. At the site view, attended by the Applicants, but not by anyone on behalf of the Landlord, several matters were pointed out to the Tribunal, including unpainted door and window frames, heave in the tarmac of the accessway leading to the car park, weeds in the car park, the untidy state of the drying area (with broken rotary driers), defective electrics in the archway, missing lap-tiles, and missing mortar between some ridge tiles. The Tribunal had also been supplied with colour photographs of some of the alleged deficiencies in maintenance. We were not invited to inspect any part of the interior of the building.

The Leases

13. The Tribunal was provided with copy Leases to Flats 8 and 13. The Tribunal is satisfied that the leases for those two flats are in materially identical terms to each other. Since this was a development in which the leases were granted by a common grantor, we are also satisfied that we can infer that the leases of all the Applicants' properties are in materially identical terms to those which we have seen.

The Application

14. The Applicants sought a determination of service charge for 2011, 2012, and 2013.

15. The Tribunal ordered the production of 'Scott' schedules, and three were provided on behalf of each applicant (one schedule for each of the years beginning 1 April 2011, 2012, and 2013). They were all in materially identical terms, both from year to year, and as between each applicant. Each applicant sought to challenge (i) the service charge and (ii) the property insurance. The comments were (in each case) that there had been no breakdown of any figures provided by the Landlord over the years; that no audited service charge accounts had been provided; and that no details of tenders for any services had been provided.

16. Although the Landlord provided a series of documents, described as 'Scott' Schedules, those dealt only with the buildings insurance (and in any event, it was revealed during the course of the hearing, were arithmetically inaccurate). These was no response by the Landlord to the Applicants' other points. Nor was there any evidence from the Landlord as to the work which it had in fact done, or its costs, and which it was seeking to recover from its tenants by way of service charge.

The service charge

17. The service charge is charged at £100 per year per flat.

18. On 31 December 2013, the Landlord wrote to the Tribunal in the following terms:

> '*As a gesture of goodwill, the respondent will waive the £100 per annum service charge apart from the £420 per annum accountancy costs. That*' (i.e., the accountancy costs) '*equates to £32 per annum per flat.*'

19. At the beginning of the hearing, the Landlord's representative produced a copy letter, dated 23 March 2014 (i.e., the preceding day). It was addressed 'To whom it may concern' and it was unsigned. No copy had been provided previously to the Tribunal, or to the Applicants. Mr Walters told the Tribunal that it had been procured by him in response to his own inquiry as to the waiver.

20. That letter read (in its entirety):

> '*With reference to the £100 per annum management fees per apartment charged in previous year* (sic) *for the management of the scheme we confirm that we are prepared to refund them* (sic) *as a gesture of goodwill, less the costs of preparing the annual accounts for the block*'.

21. The Landlord's representative invited the Tribunal to treat the correspondence as meaning that the Landlord's letter of 31 December 2013 and the waiver contained within it was intended to extend only to 2013, and not to any previous years.

22. Following submissions from Mr Walters, we rejected the Landlord's submission. The starting point is that there was clearly a waiver. All that was in issue was its scope. Brief reasons for that decision were given at the hearing. The following reiterates and amplifies those reasons:

22.1 The letter of 31 December 2013, read neutrally, extended to all the years which were in dispute. The language of that letter was clear and unambiguous. It was written with full knowledge of the extent of the dispute. It did not contain any suggestion, whether express or by way of implication, that it was intended to be restricted in scope to any particular year or years;

22.2 Nor was there anything in that letter which allowed it to be read as limited to 2013 through comparison with other, extrinsic, evidence. For instance, the reference to £420 per year in relation to accountancy fees is ambiguous, in that it could refer both to 2011 and 2012 (that is, to two years);

22.3 The March letter was unsigned, without any good explanation for this;

22.4 The March letter was itself somewhat ambiguous, in that it referred to 'previous year' (in the singular);

22.5 The March letter was very late. On 18 December 2013, directions had been given for the exchange of evidence, including any other documents which the Landlord wished to introduce at the hearing, which was to take place by no later 10 January 2014. Those directions gave clear warning that failure to comply with the directions could result in the Tribunal being unable to consider evidence or documents. No good reason was advanced as to why the letter was being produced at such a late stage;

22.6 Taking all the above into account, we were not prepared to allow the inclusion of the letter of 23 March 2014.

23. Having found that the Landlord, therefore, and as a matter of fact, had waived the service charge for 2011, 2012 and 2013, it was not necessary for the Tribunal to hear any further submissions, receive evidence, or make any findings as to what works (if any) the Landlord had carried out at Daniel Court, whether these were reasonable in cost, or reasonably done.

24. However, and for the sake of completeness, the Tribunal notes that the Landlord had failed to filed any evidence in response to the application, except for the Schedules referred to above. Nor did the Landlord deal with the amount of service charge in its letter of 31 December 2013, except to waive it. As such, there was no evidence before the Tribunal as to the Landlord's case as to the reasonableness of its service charges, whether going to the issue (a) that the decision-making process which the Landlord had undertaken in relation to service charge items was reasonable or (b) whether the sums charged themselves were reasonable in the light of market evidence.

The accountants' fees

25. There are accounts for the years ending 31 March 2012, and 31 March 2013 (and both sets of accounts are dated 9 August 2013), compiled by a firm of chartered certified accountants. The accounts are certified as prepared from the books, records, information and explanations made available to the accountants from the Landlord. In each case, the accountancy fee is given as £420.

26. The Landlord submitted that the accountants' fees were recoverable in principle under Clause 4(2) of the Lease, which reads:

> *"4. THE Lessee hereby covenants with the Lessor in manner following that is to say: -*
>
> *4.(2) To pay and discharge (or to repay to the Lessor in the event of payment by it) all rates taxes duties assessments charges and outgoings whatsoever whether parliamentary parochial or any other description and whether of an annual or recurring nature or otherwise which are not due or during the term hereby granted shall be imposed or charged on the Lessor or the Lessee or occupier in respect thereof."* (emphasis supplied).

27. The Landlord submitted that the accountants' fees, although not expressly referred to in Clause 4.2, could properly be regarded as falling under the 'catch-all' provision ('all ... charges and outgoings whatsoever') which had been 'imposed or charged' on it in respect of its occupation. In support of this submission, the Landlord invited us to consider section 21(6) of the Act. That provides that, if relevant costs (as defined) are payable by the tenants of more than four dwellings (as is the case in Daniel Court), then the written summary of costs incurred by the landlord must be certified by a qualified accountant. That is a mandatory provision. It is neither optional nor discretionary. It was further submitted that this requirement is 'parliamentary', since it was imposed by an Act of Parliament. It was also submitted that this requirement was introduced to the Act by way of amendment in 2002 (that is, after the leases in this case were executed) meaning that it can be treated as 'imposed'.

28. The Applicants accepted that the Landlord was obliged to have accounts certified, and that the accountants' fees were recoverable in principle. It was further accepted that £420 per year was reasonable.

29. Those were sensible concessions. But, even if they had not been made, we find that the accountants' costs would have fallen within the scope of Clause 4.2 of the Lease, and that £420 was a reasonable sum to have paid. In order to certify the accounts, the accountants will have had to perform a number of tasks, including considering the documents, communicating with the Landlord, and drawing up the account in a conventional form.

30. For the sake of completeness, we note that the only ground on which the Applicants sought to challenge the accounts was the length of time which it had taken to produce them. In the

case of the accounts for the year ending 31 March 2012, this had been about 18 months. However, the Applicants were not able to refer us to any specific provision of the Act which could operate so as to make the costs incurred irrecoverable, and we do not see that the amounts charged should be excluded on that basis. Although the 2012 accounts were produced some 18 months after the end of the accounting period, the same cannot be said for the 2013 accounts, which were produced far more promptly. Moreover, and in any event, the accounts were produced before the applications were made. Whilst criticism was advanced at the hearing that the accounts are in such short form that it is not possible, from the accounts themselves, to work out whether the service charge income (for example) was accurately recorded, that is a matter which falls outside the scope of what we had to decide, given our decision on the waiver.

31. Accordingly, the accountants' fees for 2011 (£420) and 2012 (£420) are allowed.

Insurance

32. Clause 1 of the Lease entitles the landlord to charge ground rent '*and also ... by way of further or additional rent from time to time a sum of sums of money equal to the amount which the Lessor may from time to time expend in effecting or maintaining the insurance of the development against loss or damage by fire and such other risks (if any) as the Lessor may from time to time think fit in accordance with the provisions of 5.(4) hereof...*"

33. Clause 5(4) provides that:

"*The Lessor will at all times during the said term (unless such insurance shall be vitiated by any act or default of the Lessee) insure and keep insured the development against loss or damage by fire and such other risks (if any) as the Lessor shall from time to time think fit in some insurance office of repute and whenever required (but not more frequently than once every twelve months) produce at its office to the Lessee the policy or policies of such insurance and the receipt for the last premium for the same and in will in the event of the development being damaged or destroyed by fire or other insured risks as soon as reasonably practicable lay out the insurance moneys received in the repair rebuilding or reinstatement of the development.*"

34. Upon its purchase, we were told that the Landlord added the development to a policy of insurance already in existence for its portfolio. Thereafter, insurance cover was maintained. The overall position is this:

Insurer	**Effective date of policy**	**'Building's Declared value'**	**'Building sum insured'**	**Total premium stated as payable on schedule**
Aviva	14 June 2011	£1,560,000	£2,106,000	£4,841.54
Aviva	29 May 2012	£1,613,040	£2,177,604	£3,913.84
Aviva	1 January 2013	£1,629,170	£2,199,380	£5,503.13
Axa	1 January 2014	£1,661,753	£2,243,367	£5,806.64

35. It is not disputed that both Aviva and Axa are insurers of repute. The policies have all been on a 'full perils' basis, and the Applicants have not challenged the appropriateness of that basis.

36. The nub of the matter was put in correspondence by the applicant Ms Morris, in a letter dated 27 April 2013 which appeared as part of her application. She stated that the insurance had been £100 per year under the previous landlord, Roberts Homes. It was now being claimed at £425 per year. She wrote:

> *"I will be straight to the point: there can [be] only one explanation for the difference between paying the previous landowners ... £100 in 2010/2011 and paying you ... £425.44 in 2013. Either Roberts Homes under insured the value of the building or you ... are over insuring the buildings. It's as simple as that."*

37. It is well-established that tenants are only obliged to pay the Landlord for the performance of its insuring obligations. If it is established that the Landlord has gone beyond those obligations, and has over-insured (for instance, by insuring for a higher reinstatement value than necessary) then the additional sum is not recoverable. We reject the Landlord's submission that the rebuild cost has not been queried by the leaseholders. The Application is quite clear that the Applicants believed the property insurance to be excessive, and that sum flows from the stated rebuild cost. A challenge to one is a challenge to the other.

38. The Landlord's representative relied on Berrycroft Management Ltd v Sinclair Gardens Investment (Kensington) Ltd (1997) 29 HLR 444 as support for the proposition that the Landlord is not obliged to nominate the cheapest insurer. He submitted that we were entitled to infer, from the fact that the Landlord had changed insurer from Aviva to Axa, that the Landlord had in fact tested the market. However, the Landlord could not put its case at any higher than inference, since there was no evidence as to what inquiries, in fact, it had made when it came to insurance. No alternative quotes were put before us.

39. We were troubled by the general lack of precision in the Landlord's case, and in particular the Landlord's concession, made, for the first time, during the course of the hearing, and in response to questioning from the Tribunal, that the figures – both in the letter of 31 December 2013, and the Landlord's schedules - were arithmetically inaccurate. Figures had been transposed and/or incorrectly calculated. Corrected figures have not been provided to the Tribunal.

40. Aside from inaccuracies, there were very significant gaps in the evidence. Although it was conceded at the hearing that the Landlord was responsible for getting the right rebuilding value, and bears the burden of showing that the insurance premiums are reasonable, the Landlord had not produced copies of any valuation which it had obtained, and it provided no information at the hearing as to when the last valuation for rebuild costs was carried out, or as how the initial rebuild figure had been arrived at.

41. On the other hand, the Applicants had not sought any alternative premium quotations on a like for like basis; nor did they advance any comparable evidence from any other broker, or (in the case of Clwyd Alyn Housing Trust) evidence of any similar blocks insured.

42. The Tribunal, having had the benefit of a site view, formed an initial view, as an expert tribunal, that the declared value of the building, and the buildings sum insured, appeared far too high. Therefore, and following the guidance in Arrowdell Ltd v Coniston Court (North) Hove Ltd [2007] RVR 39 (latterly endorsed by Tribunal Judge McGrath in the Upper Tribunal in Red Kite Community Housing Ltd v Robertson [2014] UKUT 0134 (LC)) it wrote to the parties: asking the Landlord to explain its figures, and asking the Applicants to provide the Tribunal with an estimate on the same terms.

43. Responses were received from both parties.

44. The Landlord's response was that the rebuild cost was based on a rebuild cost of £120,000 per apartment (being £100,000 plus VAT at 20%). The Landlord attached a calculation which it had recently made, using March 2014 values, on the RICS Building Cost Information Service ('BCIS') Residential Rebuilding Cost Calculator, available online. We note that the Landlord's calculation seems to have been performed in response to the Tribunal's inquiry, and that, even now, the Landlord does not argue that it had previously performed any valuation. In short, it now seeks, relying on a 2014 calculation, to retrospectively justify 2011 figures. We do not consider that approach a reasonable one.

45. The Applicants' response (through Clwyd Alyn Housing) was that its insurance company would charge, 'based on details supplied by the Landlord', an annual premium of £1,327.14.

46. Irrespective of our criticisms of the Landlord's approach, we reject the Landlord's calculations:

    46.1 The calculations are on the basis of two-bedroomed flats, when the flats are in fact one-bedroomed. Although the Tribunal did not inspect the flats internally, the plans are very clear on the point;

    46.2 The Landlord states the gross internal floor area of each flat to be 74m2 (800 ft2). Having re-considered the plans supplied and the measurements taken from them, the flats are of differing sizes. Doing the best that it can, on the information before it, the Tribunal has taken 46m2 as the appropriate figure for the gross internal area of each flat;

    46.3 The Landlord's figures produce a rebuild cost of £86,000 per flat, which the landlord has uplifted to £100,000 (which is very close to the rebuild cost of an 'excellent quality' flat: £105,000). In the absence of any evidence that any genuine consideration was given to the matter in 2011, we do consider there to be any real justification for that uplift now. It seems little more than an attempt to inflate the rebuilding cost to a level which matches the actually declared value.

47. The Landlord has had sufficient time, and two opportunities, to demonstrate the reasonableness of the insurance figures. It has not satisfied us that its figures are reasonable.

48. Unfortunately, we do not find the Tenant's figure particularly helpful either. It is simply a figure said to be for the cost of comparable insurance. However, there is no confirmation that the cover is directly comparable, or indeed comes from a reputable insurer. The fact that insurance can be obtained more cheaply elsewhere is not determinative of the issue, since we accept that the Landlord is not bound to accept the lowest quote. For the avoidance of any doubt, we also reject the Applicants' submissions that the aggregate market value of the flats in the development should be treated as the rebuilding cost. That is not the correct approach.

49. As an expert tribunal, we make the following findings:

    49.1 Using the same calculator as the Landlord, and the figure of 46m2, for one-bedroom flats, the calculation produces the following figures: 'Basic' - £55,000; 'Good' - £66,000; 'Excellent' - £80,000;

    49.2 We consider, from our inspection of the development, consideration of the plans, and experience, that the development is best characterised as falling in the middle band – 'Good';

    49.3 Whilst re-building a residential property is zero-rated for VAT, we take account of the fact that most insurance claims are not total losses but are for partial re-builds, which are standard-rated for VAT on the whole cost of the works;

    49.4 Thus, the appropriate rebuild cost is £66,000 x 13 = £858,000 plus VAT at 20% = £1,029,600.

50. We note the differential between the building's declared value and the building sum insured. We also note that the insurance includes the cost of reasonable alternative accommodation for residents in the event of damage. That is a matter which is of benefit to all the tenants. We consider that the costs of providing by way of insurance for reasonable alternative accommodation must account, at least in part, for the differential. Accordingly, and in the absence of any other explanation, we consider that the appropriate figure for us to consider is the building's declared value.

51. The Tribunal has used the figures for March 2014, but, given the relatively modest increase in the building's declared value from 2011 to date, it considers that the figure of £1,029,600 should be applied (without any adjustment for inflation) for all the years in dispute.

52. We conclude that, even taking the building's declared value (as opposed to the higher 'buildings sum insured') the building is significantly over-valued for insurance purposes, and has been significantly over-valued in every year of the Landlord's ownership. The

amount of the over-value ranges from £530,400 (2011 figures) to £632,153 (2014 figures). It is our view that the difference between the appropriate rebuild cost and the declared building sum is so large, both in monetary and percentage terms, that it cannot be disregarded, and it must engage the Tribunal's jurisdiction.

53. The Tribunal considers that there should be an adjustment of the total premiums chargeable to the tenants, and that the adjustment should be in direct proportion to the amount of over-insurance.

54. Accordingly, the Tribunal finds that the proper position is this:

Insurer		**Building's Declared value**	**£1,029,600 as a %age of the declared value (rounded)**	**Total premium (charged)**	**Total premium (adjusted)**
Aviva	14 June 2011	£1,560,000	66%	£4,841.54 x 66% =	£3,195.42
Aviva	29 May 2012	£1,613,040	64%	£3,913.84 x 64% =	£2,504.86
Aviva	1 January 2013	£1,629,170	63%	£5,503.13 x 63% =	£3,466.97
Axa	1 January 2014	£1,661,753	62%	£5,806.64 x 62% =	£3,600.12

55. The sums chargeable by way of insurance must be adjusted accordingly, and credit given for all sums already paid by the tenants.

Costs

56. The application under section 20C was not resisted by Mr Walters, on behalf of the Landlord. But, even though it was not, we still must have regard to what is just and equitable in all the circumstances: section 20(C)(3)

57. We have concluded that none of the costs incurred by the Landlord in connection with the proceedings before the Tribunal are to be regarded as relevant costs to be taken into account in determining the amount of service charge payable by the tenants.

58. We consider this to be a just and equitable outcome. In our view, the Landlord has behaved unreasonably in a number of important respects. We were particularly troubled by the identification of (hitherto uncorrected) arithmetical errors at a very late stage. The fact that a mistake had been made should have been communicated to the Tribunal and to the applicants as soon as it was known to the Landlord. That failure has to be seen against the background of ongoing proceedings, lasting several months, during which no apparent effort had been made by the Landlord to review or correct the figures.

59. Moreover, the Landlord, on the basis of what it should have known were incorrect figures, pursued at least two of the applicants (Ms Morris and Ms Czachur) quite vigorously, through its former solicitors, for payment. Both had made payment under protest and without prejudice to their rights to challenge the sums before the Tribunal.

60. We also consider that the Landlord's attempt to rely on its letter of 23 March 2014 was unreasonable.

ORDER

(i) The Tribunal determines that the Applicants are not liable for service charge in the years beginning 1 April 2011, 1 April 2012, or 1 April 2013, except for £420 accountants' fees for 2011-12 and £420 accountants' fees for 2012-13.

(ii) The Tribunal determines that the amount of buildings insurance chargeable to the Tenants must be reduced for the service charge years 2011/12, 2012/13, and 2013/14 in accordance with the adjusted figures set out in Paragraph 54 of this Decision.

(iii) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 preventing the Landlord from recovering any of its costs of the applications by way of service charge.

Dated this 8th day of May 2014

CHRISTOPHER MCNALL
Chairman