Y TRIBIWNLYS EIDDO PRESWYL

RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0021/05/13

In the matter of 95 - 97 Cathedral Road, Cardiff CF20 4DZ
In the matter of Applications under Sections 27A, 20ZA and 20C of the Landlord and Tenant Act 1985

TRIBUNAL David Evans LLB LLM
Ceri Trotman Jones MRICS

APPLICANTS Mr Brynley Gwynne Llewellyn Morgan and Ms Julia Claire Morgan

RESPONDENTS Mr D Fletcher, Mrs C Jarrett, Mr P Mackenzie and Ms A Robinson,
Rev A and Mrs K Kettle, Ms A Cartledge and Mr M Lemkey,
Mr and Mrs G Fairclough

DECISION

1 BACKGROUND

1.1 95 - 97 Cathedral Road Cardiff (the Property) is a substantial three storey building comprising two combined semi-detached houses now converted into 8 flats with a dental surgery on the ground floor of number 97 and a dental laboratory in the basement. The Applicants are the freehold owners of the Property and the Respondents are the lessees of 6 of the 8 flats. The other two flats are in the ownership of the Applicants.
1.2 The leases held by the Respondents require the Applicants to insure and maintain the building and the common parts the cost of which is passed on to the Respondents through the service charge. Unfortunately, as could be seen from the two leases which were provided for us, there are significant differences in the wording of the leases which could well affect the particular costs recoverable from individual lessees.
1.3 The Property has had an unfortunate history in recent years. The root of the problem is, what the Respondents consider to be, the inequitable distribution of the responsibility for payment of the costs of insurance and maintenance as set out in the leases. The dental practice pays 1/6th (the laboratory pays nothing), and the Respondents pay between 1/6th and 1/12th. The total contributions of the 6 flats and the commercial properties total 92/96^{ths} of the service costs. The Applicants are required therefore to contribute only 4/96^{ths} of those costs for the two flats which they retain. As the leases provide for the Applicants to be paid an administration charge of 15% of the service costs (again the precise terms vary) the Applicants, according to the Respondents, in effect contribute nothing towards the service costs and actually make a profit from them. The Applicants of course argue that the administration charge is remuneration for the time spent in managing the Property. We shall refer to this later in this Decision.

1.4 This is not the first occasion that the Property has been the subject of applications before this Tribunal. There have been 2 applications to dispense with consultations (s 20ZA of the Landlord and Tenant Act 1985 (the 1985 Act)), an application to determine whether certain service costs were reasonably incurred (s 27A of the 1985 Act), an application to appoint a manager (s 24 of the Landlord and Tenant Act 1987 (the 1987 Act)) and an application to vary the proportions of service costs payable by the Respondents (s 35 of the 1987 Act). The Respondents (the then applicants) were successful before this Tribunal in this last application, but the decision was reversed on appeal to the Upper Tribunal ([2009] UKUT 186 (LC), (LRX/81/2008)). That decision still stands.

2 THE APPLICATIONS

2.1 The present applications relate to service costs incurred between:

- 4th April 2012 and 28th September 2012 totalling £7,146.02 (2012 costs);
- 29th September 2012 and 24th March 2013 totalling £1,535.84 (2013 costs);

and estimated service costs to be incurred between;

- 25th March 2013 and 24th March 2014 totalling £61,346.57 (2014 costs).

2.2 The 2012 costs technically fall into the financial year ending 24th March 2013, but it was explained that following a meeting between Mr Morgan and some of the Respondents in August 2012, a line was drawn at that point and all the Respondents paid with the exception of Mr Fletcher. The application in respect of the 2012 costs therefore only related to Mr Fletcher. The applications in respect of the 2013 costs and the 2014 costs concerned all the Respondents.

2.3 Directions were given on the 29th May 2013 and the application was listed for hearing on the 6th August 2013 at the Tribunal offices. We inspected the Property prior to the hearing. Mr Morgan attended and the Applicants were represented by Mr Phillip Evans, Solicitor. Mr Fletcher, Mr Fairclough (representing himself and Mrs Fairclough) and Mrs Kettle (representing herself and the Rev Kettle) also attended. We shall refer to these Respondents as Participating Respondents. The Applicants' Solicitors had, as directed, prepared a bundle of documents to which we shall refer later in this Decision.

2.4 During the course of the first day, the Applicant's Solicitor conceded that he had not fully considered the implications of the recent decision of the High Court in Phillips and Goddard -v- Francis and Francis [2012]EWHC 3650 (Ch). The Applicants thereupon completed and filed an application under s20ZA of the 1985 Act. The Participating Respondents did not object to this.

2.5 On the morning of the 7th August, Mr Morgan and the Participating Respondents, together with Mr Evans, conferred at length and came to an agreement as to how to deal with nearly all the issues raised in the two applications as well as the question of costs (s20C of the 1985 Act). The terms of that agreement have been recorded in a document and Mr Morgan, Mr Fletcher, Mr Fairclough and Mrs Kettle signed that agreement on behalf of the Applicants and the Participating Respondents. The parties present recognised that not all Respondents had had sight of the agreement and further that there may still be other issues which may need to be determined by the Tribunal.

2.6 There were two issues which we were asked to determine:

- the Respondents contended that notwithstanding the fact that the leases stated the proportion of service costs payable by the Respondents, the Tribunal had a discretion under section 27A of the 1985 Act when determining "the amount which is payable" to determine an amount less than the proportion prescribed in each lease;

- the Respondents also contended that it was not reasonable for the Applicants to charge administration fees of 15% of the cost of the works proposed at the Property and on the surveyor's fees.

We shall deal with each of these issues in turn.

3 DISCRETION TO DETERMINE AN AMOUNT LESS THAN THAT CONTRACTUALLY PAYABLE

3.1 The Respondent's case was put principally by Mr Fairclough. He accepted that it was not open to us to revisit the application to vary the leases as the Upper Tribunal had determined that there was no jurisdiction to do so. However, section 27A(c) of the 1985 Act authorised us to determine the amount payable. We therefore had a discretion as to the amount payable. In exercising that discretion we should take into account the fact that the Applicants had not properly consulted the Respondents. He referred us to Daejan Investments Ltd -v- Benson and others [2013] UKSC 14 (Daejan) where the Supreme Court had granted the landlord's S20ZA application on terms that the amount payable was reduced by £50,000. We should also take into account the disparity between the Respondents' contributions to the cost and that of the Applicants. The Applicants were contributing approximately 4% of the costs for their 2 flats. Mr Fairclough was contributing over 16% for his one flat - over 4 times the amount. If the car park repair costs were to come to £20,000, the Applicants would pay about £800 for 2 flats and he would have to pay over £3,000 for 1 flat. That was not reasonable.

3.2 We directed Mr Fairclough's attention to section 19 of the 1985 Act which states that "relevant costs shall be taken into account in determining the amount of a service charge payable for a period only to the extent that they are reasonable incurred", ie it was the costs that had to be reasonably incurred (or reasonable in the case of estimate costs), not the service charge itself. Mr Fairclough conceded that he had no authority for his proposition.

3.3 Mr Evans stated that there was no authority to support Mr Fairclough's contention. The proportions were contractual. Once we had determined that certain costs were reasonable or reasonably incurred, we could not use our discretion under section 27A to promote what we might consider to be fair, in effect over-riding the contractual provision and the result of the application under section 35 of the 1987 Act.

Determination

3.4 It is inevitable that the result of the Upper Tribunal decision in Morgan and Morgan -v- Fletcher and others [2009] UKUT 186 (LC) has done nothing to ease the troubled relationship between the Applicants and the Respondents. The Upper Tribunal had some sympathy for the Respondents - as do we - but it cannot be right for us to interpret s27A of the 1985 Act in such a way as to over-ride that decision. Nor should we consider interfering with a person's contractual rights without clear authority or direction enabling us to do so. The Applicants are entitled to receive a defined proportion of the reasonably incurred service costs or, as the case may be, reasonable estimated service costs from each lessee in the form of the service charge. It is, as we invited Mr Fairclough to consider, the service costs and not the service charge which have to be reasonably incurred or reasonable.

3.5 The decision to "discount" the amount of the service costs to compensate the lessees for the failure to carry out the full consultation process in Daejan was part of the Supreme Court's decision. The dispensation was granted upon terms. Here, there is no determination to dispense with consultation under section 20ZA and therefore no terms to be incorporated.

3.6 We agree with Mr Evans. We have no power under these Applications to reduce the contractual proportion payable once the amount of the service costs has been agreed or determined.

4 ADMINISTRATION CHARGES

4.1 Included in the 2014 costs are two items relating to works which are proposed to be carried out at the Property. A summary of the proposed costs is contained in a document which is at page 10 in the bundle. The relevant items are:

- Section 20 works Crean Construction Ltd £43,141.34 plus VAT - £51,769.61
- Roger North Contract Administrator Fee £4,314.13 plus VAT - £5,176.96

These amounts are the cost of the works and the costs of the Roger North, Long and Partners (Roger North), a firm of Building Surveyors, which was given the responsibility for preparing the specification for the works, obtaining tenders, dealing with the statutory consultation process, dealing with the lessees' observations, advising on the tenders, placing and supervising the contract. At pages 79 and 81 are copies of two invoices from Roger North included in the 2013 costs - £630 for undertaking the site inspection and preparing the specification and schedule of works; £695 for reviewing the lessees' observations, amending the original schedule of works, issuing tender documents, analysing the tenders and issuing the relevant consultation notices. The lowest tender for the works was from Crean Construction Ltd. Roger North's fee for supervising the contract was to be 10% of the contract price.

4.2 Paragraph 9 the Third Schedule of Mr Fletcher's lease reads that "so long as the Lessor does not employ Managing Agents the Lessor shall be entitled to add the sum of 15% of all costs or expenses incurred by the Lessor hereunder…" Paragraph 10 of the Fourth Schedule of the lease of Flat 8 (Mr and Mrs Fairclough' flat) reads that "so long as the Lessors do not employ managing agents they shall be entitled to add the sum of Fifteen per cent to any of the above items for administration expenses". The "above items" refer to those listed in paragraphs 1 to 9 of that Schedule. The Applicants therefore claim they are entitled to charge an administration charge of 15% in addition to Roger North's fees. The Respondents challenge this.

4.3 The total of the 2014 costs including the insurance comes to £61,346.57. A copy of Mr and Mrs Fairclough's demand is at page 315. This shows that their contribution to those costs is £10,224.43. One half of this sum was payable on the 25th March 2013, the other half will be payable on the 29th September 2013. In addition, the lessees are required to pay the administration charge of 15%. The lessees, including the dental practice, will therefore have to pay an additional £8,818.60 (92/96ths of 15% x £61,346.57.) The amount in relation to the building works is:

Crean Construction Ltd (incl VAT)	£51,769.61	
Roger North - supervision @ 10%	£5,176.96	£5,176.96
	£56,946.57	
Applicants - administration @ 15%		£8,541.99
		£13,718.95
92/96ths		£13,147.32

4.4 The Applicants' case is that the administration charge is contractual. If they employ a managing agent, they are not entitled to make the charge. If they manage the Property themselves, then they are entitled to charge 15% of the service costs. Mr Evans referred us to the management contract which the Applicants had previously entered into with Mr Adrian James (p177). Mr Morgan now carried out the functions listed on page 184 (paragraphs 2.1.11 to 2.1.20). He submitted that the charge of 15% was not unreasonable for the work undertaken. Although Mr James charged 12½% of the contract value for "administering works" (p188), he would have charged for other things, eg statutory consultation (pp179 and 188).

4.5 There was an element of swings and roundabouts. If an electrician charged £20 to change a light bulb, the Applicants' administration charge would be £3 for organising it. For the period 29th September 2011 to 28 September 2012 (p8), the service costs were £7,146.02. The administration charge was only £1,071.90. This is less than would have been charged by Adrian James. Mr Evans likened the charge to an estate agent's fee which seems high if a property is sold quickly, but not so high if it takes a long time. This year the fee is limited, but there have been very significant issues. When the present lessees purchased their properties, they will have taken the administration charge into account in the price they paid. That was their bargain and they have to abide by the terms of the lease. Mr Morgan is not a building surveyor. It is reasonable for him to employ a professional and charge for it in accordance with the lease.

4.6 Mr Morgan told us that he had to supervise the project. He met Roger North and Richard Bond on site. He had to ensure access to the site and electricity supplies. Mr Evans explained that every architect needed a client. The client had to be involved in the project. He was particularly needed when things were not going well. He will need, for example, to ensure that the sky light is dealt with.

4.7 When questioned by the Respondents, Mr Morgan stated that he spent considerable hours on managing the Property. He did not keep time records. He dealt with enquiries from leaseholders - although Mrs Kettle interjected to say that she had been charged £20. He went every day to the Property but conceded that he went to collect his post there. He was called out to deal with a gas leak. He deals with the servicing of the alarms. He accepted that Roger North prepared the specification and obtained tenders, dealt with consultation and the Respondents' observations although he had been through Roger North's report with Roger North and Richard Bond and selected the contractor. His business was that of a property owner. He had a number of tenanted properties, mainly on short term leases

4.8 We suggested to Mr Evans that in our experience, 15% was higher than the norm and that whilst there were some leases which allowed a management charge of 5%, 10% was more general where a percentage was stated. Leases were, however, now moving away from the fixed percentage management charges. Mr Evans commented that hourly rates could do a justice or an injustice. A charge based on time this year with all its issues would be significant. The work involved in preparing for this Tribunal would be thousands of pounds.

4.9 Mr Fairclough commented that if Mr James had been retained, the cost would be 12½%. However, they were now paying Roger North 10% plus the Applicants 15% - ie 25%. Mr Fletcher referred us to paragraph 9 of the Third Schedule to his lease which refers to a "managing agent". There is no definition of a managing agent. It is anyone who carries out a management function on behalf of a landlord. By employing Roger North to carry out the consultation and supervision of the contract, the Applicants are employing a managing agent. Under the lease they are not therefore entitled to charge an administration charge. Mr James would have charged a flat fee of £1,000 for the consultation plus 12½% of the contract price. 15% in addition to the 10% being charged by Roger North is unreasonable considering what Mr Morgan said he did. Mr Fletcher told us that Seels charged 14% of service costs but that included VAT. However, he had no documentary evidence to support this.

4.10 Mr Fairclough drew our attention to his letter of the 12th June (p38) and the comments he had made there. He also referred us to Roger North's other invoices (pp79 and 81) for site inspection, notices, specification and schedule of works, dealing with the observations, tenders and further notices. He challenged the Applicants comment about the low level of administration fees some years as the insurance premium was £2,000 which gave the Applicants a management fee of £300 even though they employed a broker. He did not accept that Mr Morgan would be involved in sorting out access.

4.11 In response, Mr Evans stated that Roger North was a building surveyor, not a general practice surveyor. Mrs Kettle submitted that what we were being asked to determine was whether it was reasonable that the Respondents should be charged 27% of the net contract price - a point with which Mr Evans concurred.

Determination

4.12 It is common ground that the leases provide for the Applicants to charge an administration charge of 15% of relevant service costs where no managing agent is employed. It is also common ground that notwithstanding the contractual provision in the lease, the costs have to be "reasonably incurred" or, as in this case, where they are payable before they are incurred, they must be "reasonable" (s19 of the 1985 Act). The facts are also not in dispute. The cost of the works is estimated to be £43,141.34 plus VAT (£51,769.61). The Applicants have employed Roger North to manage works. He has charged to date £1,325 (£630 + £695) and his fee for supervision of the works will be 10% of the net price plus VAT, ie £4,314.13 + £862.83 = £5,176.96. The Respondents do not challenge this. Their objection is to the Applicants' declared intention to charge a further 15% administration charge in respect of both the cost of the works and Roger North's fees (£51,769.61 + £5,176.96 = £56,946.57 x 15% = £8,541.99). This means that the lessees are being asked to pay administration charges and supervision fees based upon a figure of £13,718.95 in respect of contract works of £43,141.34 net of VAT. This represents 31.8% of the net cost or 26.5% of the VAT inclusive cost. It is no surprise, given the history of relations between the Applicants and the Respondents that the matter has been referred to this Tribunal.

4.13 The Applicants arguments put forward by Mr Evans were: that the 15% was contractual and that the Respondents were aware of this when they purchased their flats; some years, the Applicants spend a great deal of management time for little reward, so they should not be penalised when they receive a larger management fee; Mr Morgan has been and will continue to be involved in the supervision of the contract and works and the Applicants should be recompensed for this.

4.14 The Respondents arguments are: Roger North is a managing agent and so the Applicants are not able to charge for any administration; Roger North is dealing with all aspects of the contract and works including the consultation, so the Applicants are not carrying out any management function for which they can reasonably charge an administration charge; 15% is high compared with what might be charged if a different agent had been instructed or if a managing agent had been employed to manage the Property.

4.15 The first question to consider is whether Roger North is a managing agent. We can accept Mr Fletcher's argument in the abstract that anyone who carries out a management function on behalf of a landlord is some sort of managing agent. However, we must consider the context in which the words appear. The Third Schedule of Mr Fletcher's lease and the Fourth Schedule of Mr and Mrs Fairclough's lease relate to the general management of the Property. Indeed, paragraph 9 of the Third Schedule of Mr Fletcher's lease starts with the words "generally to manage the property for the common good of the Lessee and the Lessor…" Also, the paragraph mentions the ability to employ and pay "managing and other agents," where the fees are included in the service charge, and "Managing Agents" (with capital letters) when it is dealing with the ability to charge the 15% administration charge. This suggests to us that the Managing Agent is a specific kind of person and not an agent (managing or otherwise) dealing with something specific. Further, both leases state that the charge is by reference to costs incurred "hereunder" in respect of Flat 3 and "the above" in respect of Flat 8 (p130). If the Lessor is receiving remuneration based upon the totality of the functions set out in the respective schedules, it is because he/she is carrying out the totality of those functions which otherwise would have been carried out by the managing agent. The lease, in our view, clearly envisages the managing agent as someone who manages the Property generally and in particular carries out those functions set out in the Schedule, where they are required. We accept that Roger North is carrying out some part of the management of the Property, but not the

general management. Roger North is, as Mr Evans stated, a Building Surveyor, not a general practice surveyor. He is managing the contract, not the building. We do not accept Mr Fletcher's argument on this point.

4.16 The question which we have to determine is, as Mrs Kettle put it and which Mr Evans agreed was the issue, whether it is reasonable for the Respondents to pay administration charges totalling (rounded up) 27% of the contract price. This is of course a question of fact and judgment and as in all cases, the exercise of our discretion or judgment must be based upon facts and exercised judiciously. In assessing what is reasonable we are required "to take account of all the facts, matters and circumstances relevant to it; and then to evaluate all of them in forming an overall factual judgment" (per Rimer LJ in Whitehouse -v- Lee [2009] EWCA Civ 375).

4.17 At paragraph 55 of the Applicants' Response (p148) Mr Morgan states: "Given the scope of the works and the applicable regulation in relation to consultation, I felt it appropriate to employ Roger North to undertake the <u>full process</u> so that any issues that were to be raised can be raised directly with them" (our underlining). Even to a seasoned landlord, the prospect of carrying out substantial works requiring consultation is not without its worries. We can well understand that the Applicants would wish to pass over the risks to a professional so that if there is an issue, it is the professional's insurers which cover any losses, not the landlord. Consequently, Roger North was responsible not only for the preparation of the specification and schedules of works and the tendering and supervision of the contract, but all the administration now required under the statutory consultation procedure - notices, dealing with observations - as well as advising the client. Mr Morgan was asked during the hearing what tasks did he undertake. We accept that he met the surveyors, and followed their recommendation as to the contractor. There may be occasions during the course of the contract when he will be required to make some input, but when asked what he would be required to do he could only refer to access and electricity and possibly an issue with the skylight. He did not enlarge upon this and as Mr Fairclough suggested, it is difficult to envisage a situation when access might present a problem considering the nature of the works.

4.18 We did not find Mr Morgan to be a convincing witness. Mr Evans put him in the rôle of a client - which he is of course - but apart from referring to the issues of access, electricity and the skylight and stating that the client has to be involved if things were going wrong, we were not given anything by way of evidence or argument from which we could conclude that the Applicants would be making any meaningful contribution to the consultation or the supervision and administration of the works. That is all being carried out by Roger North. Indeed the whole scheme has been organised to ensure that the work and all the risk is the responsibility of Roger North. It is Roger North who issued the statutory notices and it Roger North with whom the Respondents corresponded.

4.19 We appreciate Mr Evans' argument that some years when the administration charge is low Mr Morgan will need to be more involved than in other years, and therefore it is only reasonable that he should be able to receive the higher charges even when there is less to do. However, as Mr Fairclough pointed out, the Applicants receive approximately £300 on the annual insurance premium alone. The Applicants also receive the ground rents and the rack rent from the dental surgery and laboratory. For many ground landlords, the ground rent is the only source of income and that has to cover the administration costs. The correlation between income and administration will never be constant, but this does not mean that the Applicants are entitled to receive income totally disproportionate to the work involved.

4.20 We consider that on the facts of this case, the Applicants have delegated the responsibility for the administration of the works to Roger North. Roger North has charged and will be charging fees for carrying out that delegated responsibility. The Respondents will be contributing their respective proportions both of the cost of the works and Roger North's fees. The effect of the proposed administration charge is that the Respondents will be required to pay the Applicants 50% more than they are paying Roger North for, on the basis of the evidence, very little in the way of work and hardly anything in the way of responsibility. The Applicants will receive over £8,000 in

additional administration charges (92/96ths of £8,541.99 = £8,186.08) which will of course pay for their contributions to the costs involved (4/96ths of £56,946.57 = £2,372.77) as well as providing them with a substantial surplus (£5,813.31). If the administration charge is not payable, the Respondents will be paying for the works and for the services they receive, but they will not have to pay the additional charges. The Applicants will of course lose out on this amount, but they will not have done anything substantial which merits such a payment. Further they will have to fund their share of the costs out of the income generated from their own flats - which is what the Respondents have to do in any event. The Applicants administration charge will be reduced to £660 - but that is commensurate with the value of the administration work actually carried out. The ground rents and rack rent are unaffected.

4.21 On balance, we do not consider it to be reasonable that the Applicants should charge a further administration charge for which the Respondents will not receive any value. After all, as Mr Morgan stated (p148) he "felt it appropriate to employ Roger North to undertake the full process". We therefore determine that it is not reasonable to require the Respondents to pay any amount in respect of the Applicants' administration charges either in respect of the contract works or in respect of the fees of Roger North.

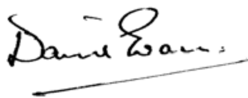
4.22 For the sake of completeness, we have considered whether it is reasonable to determine that the Respondents should be required to contribute a lesser percentage of the administration charge, but in view of the comprehensive nature of Roger North's involvement in the whole process as set out above, we do not think that even a partial payment would be reasonable.

4.23 We have also noted the charges of other surveyors which were mentioned during the hearing. However, in the context of this Decision it is not necessary for us to refer to them.

5 OUTSTANDING ISSUES

The Applicants and the Participating Respondents having agreed terms as set out in a document signed by them and lodged with the Tribunal, the Applications under sections 27A, 20ZA and 20C of the Landlord and Tenant Act 1985 are adjourned with liberty to any party to apply for further directions or a hearing.

DATED this 15th day of August 2013



CHAIRMAN