UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2016] UKUT 365
UTLC Case Number: LRX/128/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – house converted into four flats – management company – validity of s20 Notice --reasonableness of amounts claimed – amounts reduced to exclude elements not specified in s20 Notice - appeal allowed in part

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN

23 DOLLIS AVENUE (1998) LIMITED **Appellant**

-and-

NIKAN VEJDANI

NAHIDEH ECHRAGHI **Respondents**

Re: 23B and 23C Dollis Avenue,
London
N3 1DA

Before :**His Honour Judge John Behrens and Peter McCrea FRICS**

Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL
on
26 July 2016

Brynmor Adams (instructed by Comptons LLP) for the Appellant
Mukhtiar Singh (instructed on a Direct Access basis) for the Respondents.

The following cases are referred to in this decision:

Southall Court (Residents) v Tiwari [2011] UKUT 218(LC)
Carey Morgan v De Walden [2013] UKUT 0134(LC)

DECISION

Introduction

1. This is an appeal by 23 Dollis Avenue (1998) Limited ("the Appellant") against part of a decision of the First-Tier Tribunal (Property Chamber) (Residential Property) ("the FTT") dated 1st October 2015. The appellant is the management company for a house, converted into four flats, at 23 Dollis Avenue, London, N3 1DA ("the Building"). The long leasehold owners of each flat are: 23A, Mr Bourne; 23B, Mr Vejdani; 23C, Mrs Echraghi; and 23D, Mr Hashemi and Mrs Yazdandost.

2. Mr Bourne and Mr Hashemi are Directors of the Appellant company. Mr Vejdani and Mrs Echraghi are the respondents.

3. The relevant part of the FTT's decision related to a demand dated 5 December 2014 for £10,200 which was served by the Appellant on the Respondents in respect of major works that were intended to be carried out at 23 Dollis Avenue.

4. The FTT decided that the consultation process had not been carried out in accordance with the statutory requirements primarily because the estimates provided by the Appellant were sufficiently detailed to comply with the statute. It went on to hold that the demand for £10,200 was unreasonable and therefore not payable except for the sum of £250 per flat in accordance with statute.

5. The Appellant challenges that decision. In summary it contends that the FTT was wrong to find that the consultation process had not been carried out in accordance with the relevant regulations. It further contends that there was no basis for the FTT to find that the amount demanded on account was unreasonable.

6. The Respondents seek to uphold the decision of the FTT. In summary they rely on the reasoning of the FTT. They contend that there was insufficient link between the work contained in the estimates provided by the Appellant and the work set out in the Notice of Intention. They also contend that the FTT was justified in expressing concerns about one of the proposed contractors – Multicore Ltd – and that that was a factor the FTT was entitled to take into account when it decided that the demand was unreasonable.

7. Permission to appeal was granted by the Deputy President on 8 January 2016. In his view it was arguable that the FTT had given too much weight to the imperfections it found in the tender process.

The facts

8. The relevant facts were not in dispute. Accordingly, much of this section is taken from the Agreed Statement of Facts.

23 Dollis Avenue

9. The building is a three-storey detached house in North London. It is of solid wall construction under a tiled roof. The external walls are rendered and painted.

The leases

10. Each flat is leased on a 125-year lease – Flats A to C commenced in 1985; Flat D in 1986. Each lease is a tripartite lease. The freeholder title is now vested in Victor Abrahams who has taken no part in these proceedings. The Appellant replaced the original management company in 1998.

11. It is not in dispute that the lease contains obligations to pay a service charge. Under clause 2(5)(a) the service charge was subject to a term that:

> That Purchaser shall if required by the Company … pay to the Company on demand such sum in advance and on account of the Service Charge as the Company shall specify at its discretion to be a fair and reasonable interim payment.

12. It is not in dispute that the position is governed by the statutory regime relating to service charges.

The Proposed Works

13. Under the terms of the leases the Appellant is under a duty to maintain and repair the building.

Notice of Intention

14. On 18 June 2013 the Appellant sent to the Respondents a notice of intention to carry out qualifying work at the property. The notice described the work in the following terms:

> Re Rendering of the two flank walls and the rear wall on the outside of the house and painting of the outside of the house. Following investigation, after the erection of the necessary scaf[f]olding for the above works, further works may be necessary to the roof area. We will consult if and when that need is made clear by the contractors.

15. The notice set out the reason for the work, invited the Respondents to make observations on the proposals, and invited the Respondents to propose any contractors from whom the Appellant should try to obtain an estimate for the propose works.

16. The reason given for carrying out the work was:

> Recent heavy rainfall and the forthcoming winter has identified an increased need to carry out the works in order to prevent the building and flats within from suffering further water damage and therefore increased maintenance costs.

17. On 10 July 2013 the husband of one of the tenants sent a letter which suggested that the condition of the building had not changed since 2007 and that there were no emergency works that needed immediate attention. The problems were purely cosmetic and superficial. The letter made no proposals for contractors from whom to obtain an estimate for the works.

The Survey

18. The Appellant instructed a surveyor, Mr Hobbs, to inspect the building and provide a condition survey. The report dated 25 September 2013 and accompanying photographs revealed that work was required to the roof, external render and paintwork of the property.

Estimates

19. The Appellant obtained 3 estimates for the work – from BR Building Services Limited dated 23 February 2014 in the sum of £39,060 inclusive of VAT, from W J Norman & Son dated 2 April 2014 in the sum of £38,167 and from Multicore Ltd dated 22 April 2014 in the sum of £34,200.

20. In paragraph 27 of its decision the FTT found:

> Mr Bourne could not recall if he had sent a copy of Mr Hobbs' report to the contractors chosen to tender. There were no copies of the letters sent to the contractors in the bundle and there was no other useful evidence on the point … they had been asked to advise on the repair issues needing attention This was inadequate to demonstrate that like for like[1] tenders had been received

21. In the light of the criticism it is worth summarising the estimates a little further:

BR Building Services Ltd - £39,060 inclusive of VAT

[1] The phrase "like for like" was later replaced by "reasonably comparable"

22. This is a relatively short estimate extending to 2 short pages. However, it does make clear that the work involves removal of the existing render from the chimney breast, sides and back of the house, the installation of K render and the painting of the front of the building in white. It does not price the individual elements of the work nor does it refer to any specification.

23. It includes one item – "Tidy up loose roof tiles, and replace broken ones" which is outside the work within the notice of intention although the notice contemplated that work might be required to the roof.

W J Norman - £38,167 inclusive of VAT

24. This was a much more detailed estimate extending to 4 pages. Each of the individual items were priced. The majority of the work can plainly be seen to fall within the general description of the work in the notice of intention. However, there are some items – such as items totalling £720 in respect of the front garden wall to pavement which arguably are not within the work specified in the notice of intention.

Multicore Ltd - £34,200 inclusive of VAT

25. This was a relatively detailed estimate extending to 5 pages. However it did not price the individual parts of the estimate. Whilst the estimate did include the work included in the notice of intention it also included work that fell outside such work. Thus it included work to the front garden wall, work to the driveway, and a significant amount of roofing work.

26. There was a significant amount of evidence about Multicore at the hearing before the FTT. The Respondents adduced a number of documents proving that it was not registered as a building company and that between 2001 and 2005 it had been involved in the illegal export of arms to Iran. This led the FTT to conclude that there were genuine concerns as to the background of Multicore and that its credibility was in issue.

27. On 7 May 2014 the Appellant sent copies of the estimates to the Respondents. The letter requested written observations on the estimates within 30 days. No observations were sent.

<u>The Invoice and Notice of Reasons</u>

28. On 10 June 2014 the Appellant sent two further documents to the Respondents. The first was a notice of reasons for awarding the contract to Multicore. The document set out 5 reasons why it was the intention of the Appellant to award the contract to Multicore. Amongst the reasons given was that the summary of work to be carried out by Multicore was more extensive than that contained in the surveyor's report and the other contractors.

29. The second document was an invoice for £10,200 in respect of each of the Respondents' share of the cost of repairs. The £10,200 was one quarter of the cost of the works based on the Multicore estimate. The overall cost was the £34,200 contained in the estimate plus 10% in respect of a contingency amount and 10% as an estimate for the fee for a surveyor to check the work and sign it off.

30. It emerged at the hearing before the FTT that the contract had not in fact been awarded to Multicore. In paragraph 29 of the judgment the FTT said:

> Mr Hashemi, who is one of the two Directors of [the Appellant] made it clear in oral evidence that, despite everything he had heard, he trusted his friend and was prepared to risk his contribution to the works by instructing Multicore to do the work. Mr Bourne was more cautious but declared himself undecided.

The Decision of the FTT

31. The reasoning of the FTT can be taken from passages in paragraphs 27 and 29 of the decision.

a. The FTT decided that the s 20 notice formalities as a process were adequate

b. The s 20 description of works was quite amateur, but was just sufficient for the work proposed.

c. As the Respondents had submitted, none of the tenders gave sufficiently specific details of the extent of the areas they based their tenders on or unit prices. This was mainly due to the vague and defective nature of the specifications given to them. The content of the notice of estimates given on 7 May 2014 was irretrievably tainted by this problem. The FTT decided that this point was enough to invalidate the s 20 notice procedure.

d. The point was made that [the Appellant], and thus the directors, were effectively trustees of the money demanded. It seemed to the FTT that there was a distinct possibility that some or all of the money demanded would be handed over to Multicore if it was paid. Until an adequate specification including satisfactory references, normal safeguards for security of funds, and supervision of the work had been successfully tendered, any estimated demand was premature. Thus the FTT decided that the demand for £10,200 dated December 2014 was unreasonable.

The Statutory provisions

<u>The 1985 Act</u>

32. Sections 19 and 20 of the 1985 Act provide as follows;

19 (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period--

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

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

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

20 (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either--

(a) complied with in relation to the works or agreement, or

(b) dispensed with in relation to the works or agreement by (or on appeal from) [the appropriate tribunal].

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement--

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or

(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount--

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

> (6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.
>
> (7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.

33. A number of points can be made about these provisions:

a. We agree with Mr Adams that the limitation in s 20 to the contribution payable by the tenant is referable to costs incurred by the landlord in carrying out the work rather than in respect of work to be carried out in the future. This is clear from the wording of ss 20(2) and 20(3).

b. In our view therefore there is no statutory limit to the amount that can be recovered by way of an on account demand under the lease other than under s 19(2) It is, in our view, not necessary that there should be a valid consultation process before a sum in excess of £250 can be recovered by way of a service charge in respect of intended works.

c. We agree with Mr Singh and the FTT that "reasonableness" in s 19(2) involves more than a mathematical exercise of looking at the costs of the estimates and the amount claimed. We were referred to two decisions of this Tribunal where it in effect held that the test of reasonableness in s 19(2) is the same as the test in s 19(1). [See *Southall Court (Residents) v Tiwari* [2011] UKUT 218(LC) paragraph 11 and *Carey Morgan v De Walden* [2013] UKUT 0134(LC) paragraphs 22, 33 and 35]. We agree with those decisions.

d. Under s 19(1)(a) this Tribunal has held that there is a two-stage test – (1) whether the decision making process was reasonable and (2) whether the sum to be charged is reasonable in the light of the evidence.

<u>The Service Charges (Consultation Requirements) (England) Regulations 2003 ("the 2003 Regulations")</u>

34. The relevant regulations under s 20(4) are contained in Part 2 of Schedule 4 of the 2003 Regulations. There are 4 relevant obligations on the landlord[2].

35. Under r 1 there is an obligation to give a notice of intention to carry out qualifying works. That notice has to describe in general terms the proposed work, the reason for considering the works necessary and invite the making of observations in relation to the works and to give details of any contractor from whom the landlord should try to obtain an

[2] The landlord is widely defined and would include the Appellant in this case.

estimate. Under r 3 the landlord is bound to have regard to any observations made by the tenant.

36. It is not in dispute that the notice of 18 June 2013 complied with r 1. It is equally not in dispute that the Respondents did not identify any contractors from whom the Appellant was to attempt to obtain estimates.

37. Under r 4 the landlord is obliged (under r 4(5)(a)) to obtain written estimates "for the carrying out of the proposed works" and supply (under r 4(5)(b)) a statement setting out

> As regards at least two of the estimates the amount specified in the estimate as the estimated cost of the proposed works.

38. Under r 4(10) the landlord is obliged to invite the making of observations in relation to the estimates.

39. These provisions are of course central to the findings of the FTT. It is, however, to be noted that no observations were made by the Respondents in relation to the estimates. Thus there was no criticism of Multicore; nor was it pointed out that the estimates were not referable to the proposed work.

40. Under r 5 the landlord is bound to have regard to any observations that are made.

41. Under r 6 the landlord is obliged to send a notice to the tenant within 21 days of entering into a contract explaining his reasons if he did not enter into the contract with the person submitting the lowest estimate.

42. In this case the notice was sent out before the contract was entered into and merely stated an "intention to award the contract to Multicore". Furthermore, Multicore had provided the lowest estimate. Thus no r 6 notice was required.

Discussion

Breach of the 2003 Regulations

43. The word estimate is not defined in the 2003 Regulations. There is nothing in the 2003 Regulations which requires the estimates to contain unit prices or to contain specific details of the areas upon which the estimates were based. In so far as the FTT based its decision on those points we think it was wrong to do so.

44. However, the matter does not end there. Under r 4(5)(a) the estimate must be an estimate for the carrying out of the proposed works. The proposed works are the works described in general terms in the notice served under r 1(2)(a). Furthermore, the r 4(5)(b) statement has to refer expressly to the estimated cost of the proposed works.

45. In our view none of the 3 estimates satisfies r 4(5) of the 2003 Regulations. There are 2 elements to the proposed work – (1) rendering of the two flank walls and rear wall on the outside of the house and (2) painting of the outside of the house. Each of the 3 estimates includes work that goes beyond the proposed work. As noted above the estimate from B R Building Services included an item for replacement of roof tiles; the detailed estimate from WJ Norman included a number of relatively small items not within the proposed work; the estimate from Multicore contained a significant amount of work not within the proposed work. The amounts specified in the r 4(5)(b) statement were accordingly not the estimated cost of the proposed works. They were the estimated cost of the proposed works plus the additional works identified in the estimates.

46. In our view therefore the FTT was right to hold that the Appellant had not complied with the 2003 Regulations.

S 19(2) of the 1985 Act.

47. We do not think the FTT was entitled to limit the amount payable in advance under clause 3(5)(a) of the lease in respect of the works to £250 per flat. For the reasons set out above the statutory limit under s 20 only applies to claims where work has been carried out and there is non-compliance with the 2003 Regulations.

48. We accept that the fact that there has been a failure to comply with the 2003 Regulations may be relevant to the reasonableness of the amount to be paid under s 19(2). In our view, however, it is simply a factor to be taken into account.

49. We are also concerned at the reasons given in paragraph 29 of the decision. The fact that some money may be paid in advance to Multicore does not seem to us to be a good reason for determining that an on account demand was unreasonable. .First, it was by no means clear that the contract would be awarded to Multicore in the light of the evidence before the FTT. Second, the fact that Multicore had criminal convictions for illegal export of arms to Iran in 2005 or before says very little about its position in 2015. Third, it is entirely normal for a building contractor to expect payments in advance and as the contract progresses. Fourth, there is no basis for the statement that a payment in advance was premature until:.

> … an adequate specification including satisfactory references, normal safeguards for security of funds, and supervision of the work had been successfully tendered,

50. Such a requirement would largely emasculate the provisions for payments in advance. In our view therefore the FTT erred in its approach to the s 19(2) issue and its decision cannot stand.

51. In those circumstances we have a discretion as to how to proceed. We take the view that we have sufficient material before us to deal with the application and that it would be preferable to do so rather than impose upon the parties the delay and further expense of a further hearing before the FTT.

52. The following factors seem to us to be relevant in the first stage of the two-stage test:

a. It is plain that the works specified in the June 2013 notice need to be done. There is no basis for delaying them. It cannot be said that an application for an advance payment of a service charge is premature.

b. Whilst it is true that we have held that the Appellant has not complied fully with the s 20 procedure, it has attempted to do so. On the other hand the Respondents have not engaged seriously with the process at all. They have not proposed alternative contractors; they have not commented on the estimates. In this context we agree with the observations of Mr Rose FRICS in paragraph 16 of *Southall Court (Residents) Ltd* where he emphasised the need for tenants who are unhappy about the proposed works to make their concerns known to the landlord within the appropriate period. In the absence of such objections the landlord is entitled to conclude there is no serious objection to the proposed works.

53. The current failure to comply with the consultation requirements is by no means fatal to the Appellant's claim for reimbursement of the sums expended on the works. It is open to the Appellant to obtain further estimates in the light of this decision.

54. In our view therefore it is reasonable for there to be a payment of an advance service charge.

55. The next question is whether the amount claimed is reasonable. We note that the 3 estimates are within an acceptable range of each other, even though the amount of work proposed differs in each case. We think it reasonable to use the figure in the lowest estimate as a starting point and then using our knowledge as an expert tribunal to deduct from that sum figures for the work which is not included in the proposed works as set out in the June 2013 notice.

56. On this basis we would deduct £650 in respect of the front garden wall, £2,000 in respect of the Driveway and Passageway and £4,000 in respect of the roof. In the result we would allow £21,850 in respect of the proposed work. We accept that it is reasonable to allow 10% for contingencies and would allow £2,000 in respect of the surveyor's fee. All of these sums are subject to VAT.

57. As can be seen below that results in a sum of £7,810.50 being paid by each tenant. We would accordingly reduce the demand to that figure.

Multicore Quote		£28,500.00
less		
Front Wall	£650.00	
Driveway and Passageway	£2,000.00	
Roof	£4,000.00	
Deductions		£6,650.00
Revised Amount		£21,850.00
Contingencies		£2,185.00
Surveyor		£2,000.00
Total Costs		£26,035.00
VAT		£5,207.00
Total Inclusive of VAT		£31,242.00
Payable by each tenant		£7,810.50

58. The appeal is therefore allowed in part. The respondents are each liable to contribute a further £7,560.50, in addition to the sum of £250.00 determined by the FTT.

Dated: 16 August 2016

His Honour Judge John Behrens

Peter D McCrea FRICS