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HM Courts
& Tribunals
Service

LEASEHOLD VALUATION TRIBUNAL

Case number : CAM/33UG/LSC/2012/0002

- Property** : 36 Fugill Road, Heartsease, Norwich NR7 9QY
- Applications** : For determination of liability to pay service charges for the year 2009–10 [LTA 1985, s.27A]
- For an order that all or any of the costs incurred by the landlord in connection with past proceedings before a leasehold valuation tribunal, and costs to be incurred in these proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant [LTA 1985, s.20C]
- Applicant** : Mr Dennis Jeans, Lonicera House, 96 Norwich Road, Salhouse, Norwich NR13 6PB
- Respondent** : Home Ownership Section, Norwich City Council, City Hall, St Peter's Street, Norwich NR2 1NH [Attn Rob Daines]

DECISION

following a paper determination

- Tribunal** : G K Sinclair (chairman) & G F Smith MRICS FAAV REV

Summary

1. This application concerns not one year's service charge but a single item, namely the cost levied by the local authority landlord for carrying out major works to resurface a drying area serving the block of flats in which the subject premises are located. The amount sought is £1 355.75 plus a management charge of £40, making a total of £1 395.75. This compares with an original charge of £2 208.
2. For the reasons set out below the tribunal determines that the work was carried out to a reasonable standard and at a reasonable cost for work which necessarily carries its share of the overheads inherent in major works undertaken under a qualifying long term agreement. However, the tribunal determines that the apportionment of that cost is not in accordance with the provisions of the lease and, in the absence of any separate and specific agreement between all relevant parties, is not enforceable. The amount which may lawfully be levied against the Applicant in accordance with his lease is capped at 5.56% of the total project value, or £678.42.

Background

3. The Applicant's complaint is that the work was not necessary but that, if it were, he told the council that he would be prepared to carry it out for much less. The council simply

ignored his comments in favour of its own project and contractor, Lovell. In response the landlord says in its Statement of Case that the major works were carried out under a qualifying long term agreement for which Lovell successfully tendered in 2006. A section 20 notice was served on Mr Jeans, enclosing Lovell's schedule and estimate of costs. At that stage the figure quoted was £2 305.55 per flat. As a result of investigating matters mentioned by Mr Jeans the council discovered errors in measurements taken by the contractor. It was asked to re-measure and re-price the work, resulting in a substantial reduction to the amount finally sought but still disputed.

4. Neither party asked for an oral hearing and the tribunal dealt with the application by way of a paper determination based on the documents and written submissions provided in a 97 page bundle. When considering the terms of the lease, however, the tribunal noted one aspect about which neither party had made any submissions. The tribunal case officer later wrote to each party, identified the point troubling the tribunal and asked for their respective written responses. These were eventually received and the tribunal, upon further consideration, determined the amount recoverable to be as set out above.

Applicable legal principles

5. Section 18 of the Landlord and Tenant Act 1985 defines the expression "service charge", for the tribunal's purposes, as :
 - an amount payable by a tenant of a dwelling as part of or in addition to the rent...
 - (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management...
6. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :
 - a. only to the extent that they are reasonably incurred, and
 - b. where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.
7. The tribunal's powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.
8. Please also note sub-sections (5) & (6), which provide that a tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment, and that an agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement)¹ is void in so far as it purports to provide for a determination in a particular manner or on particular evidence of any question which may be the subject of an application to the Tribunal under section 27A.
9. Insofar as major works are concerned, ie those in respect of which the contribution of

¹ Eg. provisions in a lease stating that the landlord's accountant's certificate shall be conclusive, or that any dispute shall be referred to arbitration

any tenant liable to pay towards the service charge will exceed £250, then section 20 provides that the relevant contributions of tenants are limited to that amount unless the consultation requirements have been either complied with in relation to the works or dispensed with by (or on appeal from) a leasehold valuation tribunal. Where qualifying works are the subject (whether alone or with other matters) of a qualifying long term agreement to which section 20 applies, the consultation requirements for the purposes of that section and section 20ZA, as regards those works, are the requirements specified in Schedule 3 to the Service Charges (Consultation Requirements) (England) Regulations 2003² (as amended).

10. Paragraph 1(1) of Schedule 3 provides that the landlord shall give each tenant notice in writing of his intention to carry out qualifying works, and sub-paragraph (2) prescribes that such notice shall :
- (a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;
 - (b) state the landlord's reasons for considering it necessary to carry out the proposed works;
 - (c) contain a statement of the total amount of the expenditure estimated by the landlord as likely to be incurred by him on and in connection with the proposed works;
 - (d) invite the making, in writing, of observations in relation to the proposed works or the landlord's estimated expenditure;
 - (e) specify –
 - (i) the address to which such observations may be sent;
 - (ii) that they must be delivered within the relevant period; and
 - (iii) the date on which the relevant period ends.
11. Please note that Schedule 3 does not require the landlord to invite submissions as to who should undertake the major works, as they shall be undertaken by the contractor already engaged under a qualifying long term agreement which would itself have been the subject of prior statutory consultation under the same regulations.

Material lease provisions

12. The lease, to be found in section B of the bundle, is a typical Norwich City Council "Right to Buy" lease. Dated 29th February 1988, it begins with a definitions clause that includes the following material expressions :
- a. The Building the buildings (sic) at Fugill Road Norwich shown for identification edged red on the plan annexed to this lease
 - b. The Property the flat numbered 36 on the second floor of the Building and the store shed on the ground floor of the Building both of which are shown for identification coloured pink on the plan annexed...
 - c. The Estate the Council's housing estate and shown for identification edged blue on the plan annexed...
13. The plan in the bundle was monochrome, but at the tribunal's request a colour copy was produced. The flat and store are each shown coloured pink, the whole of the building

is edged in red, and the land edged in blue comprises the footprint of the building plus its surrounding grounds (including the drying area concerned). The estate does not include any other housing, whether on Fugill Road or elsewhere.

14. By clause 3 the flat is leased together with the rights, privileges and other matters specified in Schedule A but subject to rights reserved in Schedule B and restrictive covenants, etc in Schedule E.
15. By clause 4(3) the lessee covenants with the council to pay such sums of service charge as are payable in accordance with the provisions of Schedule C.
16. Amongst the rights granted to the tenant by Schedule A is the right in common with the council and all others entitled to the use and/or enjoyment of the drying areas and communal gardens and/or landscaped areas on the estate.
17. Clause 6 contains the council's covenants. These include obligations to keep the structure and exterior of the property and the building in repair, and any other property over which the lessee has rights as specified in Schedule A.
18. Schedule C provides that the council's expenditure shall be the reasonable expenditure of the council in complying with its obligations in clause 6(1), (2) and (9), in respect of any improvements that the lessee may be required to contribute, and keeping the property insured in its full value. Of this expenditure the lessee is required to pay :
 - ...such percentage as shall from time to time be a fair share as determined by the council's Housing Manager or such other officer of the council as shall be appropriate of the council's expenditure attributable to the property proportionate to the number and/or nature and/or size of the properties from time to time comprised in the building and/or claiming to exercise or entitled to use the rights specified in Schedule A....

Discussion

19. The building comprises flats 32 to 66 (evens); not just 32-48. The statement of service charges for 2010-11 [pages 25-30] indicates that the lessee's share of both estate and building costs is 5.56% (an equal division amongst 18 flats). If all flats in the building have the right under Schedule A to enjoy the benefit of the drying areas why is this particular major works cost apportioned between fewer flats, and by what right does the lessor do so?
20. This question was posed to the parties, but the council's only answer is that there are two separate drying areas; one at each end of the building. In a letter to Mr & Mrs Jeans dated 16th April 2010 [page 59] the council states :
 - As you are no doubt aware, works to resurface the drying area at the neighbouring block, 50-66 Fugill Road, were completed in 2008. No objections to this work were received from the affected leaseholders.
21. It seems necessary to remind the council that 50-66 Fugill Road is not a "neighbouring" block ; it is one half of the building and of the estate as defined in the lease. Just why the council thought it appropriate to divide the cost only amongst one half of the flats is not

made clear. Does the council consider that only the occupants of flats at one end of the building will make use of this particular area? There may be some practical sense in such an arrangement, but that is not what the lease provides. Any of the lessees of flats in the building may use this drying area. If the council can reach agreement with all the lessees to charge them on a different basis then that is a contractual issue which can be enforced through the courts, but in the absence of such general agreement the council can rely only upon its rights under the lease.

22. Nor, where in every other respect the building and estate costs are apportioned on the basis of a 5.56% share, would it in this tribunal's determination be reasonable for the council to determine that a fair share of some costs should be markedly different.
23. What of Lovell's cost for this work? Mr Jeans says that he could have done the work himself at lower cost. Unfortunately, that is not to compare like with like. A local authority with a substantial housing portfolio needs to ensure that maintenance issues can be dealt with quickly by someone always on hand, without having to negotiate the price of each job individually. No large organisation could work on such a basis. The cost in management time, and the lack of consistency and co-ordination, would lead to expense and inefficiency. A large organisation needs a large contractor that has the capacity to undertake all standard maintenance and repair tasks, perhaps bringing in specialists only for specific technically challenging tasks. To do this a public authority has to give public notice of its intention to put such a contract out to tender, under EU rules. By contrast, an individual householder or small landlord can approach any small builder who, if work is slack, can fit in one more task without necessarily affecting its overheads.
24. Subject to what follows on the subject of "management fees" the tribunal does not consider that the rates charged by Lovell, after measuring the job properly, are out of the range that might be expected from contractors willing to take on a large long term agreement for a property portfolio of this size.
25. In Lovell's revised estimate for works to the "drying areas" (note the use of the plural) which was served under cover of the council's letter dated 7th May 2009 [pages 62-63] the final project value is given as £12 201.74. This includes an element for overheads and profit. The lessee's contribution is stated to be £1 355.75, but if the correct percentage is applied then the proper amount due is £678.42. This may mean that the council is unable to make full recovery, as its perception of who might benefit and who should pay may have resulted in a failure to undertake a statutory consultation with the lessees of flats in the other half of the building, properly or at all.
26. Mr Jeans also challenges the addition of a £40 management fee. This is not the council's management fee but is explained in an e-mail dated 17th July 2009 [page 83] :
Management fees refer to a proportion of the costs that the council's contractors, Lovells, incur for operating out of a warehouse with all relevant costs for staffing. There are staff operating who do not have their costs covered by a specific major works project, so therefore have their costs allocated across all projects carried out on behalf of the council.

Management fees are spread across all contracts on a percentage basis.

27. That is the extent of the evidence about management fees. The tribunal accepts that in the case of a long term agreement covering a large volume of business for the council additional staff and premises will probably be required. But is this not what overheads and profits are designed to cater for? £40 is a suspiciously round figure, and if calculated as a percentage then a percentage of what? Is it an apportionment of this contract value as against the annual repairs and maintenance budget to be spent by Lovell? Without any greater explanation the tribunal is not satisfied that this element is justified but, even if it were, the too-round figure is suspicious and the adjustment made above to the overall contribution level would require a reduction here too.

Section 20C

28. The application also contains a request that the tribunal make an order under section 20C disallowing recovery of the lessor's costs of and incidental to this application as part of this or any future year's service charge. However, as the standard Norwich lease makes no provision for recovery of any legal costs as part of any service charge there is no need to make any such order.

Dated 23rd July 2012

Graham Sinclair – Chairman
for the Leasehold Valuation Tribunal