9094

Leasehold Valuation Tribunal

Case Reference	:	**CAM/00KF/LSC/2013/0033**
Properties	:	**3, 4, 6 & 15 Ash Court and 6, 8 & 18 Beech Lodge, Thorpe Green Estate, Shoeburyness, Essex SS3 9FA**
Applicants	:	**Mr. and Mrs. A. Barwick Mr. and Mrs. A. Eades Mr. and Mrs. Morris Kenneth Ridgeway Freyaal Buta Nicholas Turner Farida Turner**
Respondent	:	**H D Blackgate Ltd. by its agent Countrywide Property Management counsel: Mr. J. Parker (Countrywide in-house legal department)**
Date of Applications	:	**26th February 2013**
Type of Application	:	**To determine reasonableness and payability of service charges**
The Tribunal	:	**Bruce Edgington (lawyer chair) Stephen Moll FRICS David Cox**
Date and venue of hearing	:	**24th June 2013 Southend Magistrates Court, Victoria Avenue, Southend-on-Sea, Essex SS2 6EU**

DECISION

---

1. H D Blackgate Ltd., as the current freehold owner of the properties, is substituted as Respondent in place of Hardy Developments Blackgate Ltd.

2. As far as service charges are concerned, the decision of the Tribunal is that £250 per flat is payable and reasonable towards the costs of redecoration arising from the "*Major Works 2010*" described in the letter to the lessees dated 8th January 2013 at page 90 in the bundle provided for the hearing of this case.

3. Dispensation from the full consultation requirements in respect of such works is refused.

4. No further monies in respect of the structural repairs to the balconies are payable.

5. The request for an order that the Respondents be prevented from recovering its costs of representation before this Tribunal as part of any future service charge demand is granted.

Reasons

Introduction

6. There are 34 flats in the development of which the properties form part. There are 2 buildings which appear to have been built as officers' accommodation in Shoeburyness Barracks in Victorian times. The buildings are of brick construction under slate roofs. There are some uPVC windows but the majority still appear to be the wooden sash windows. There are balconies along one side of each building and their concrete floors and metal stairways at each end appear to have been fairly recently refurbished.

7. The lease terms commenced in 1983 and from page 33 in the hearing bundle provided by the Applicants, it appears that the then lessees were told of possible problems with the balconies in October 1993. Repairs were undertaken at the landlord's cost at that time and the lessees were told that major refurbishment would be needed about 10 years after then.

8. On the 7th December 2005, the landlord's agent served a notice of proposed works under Section 20 of the **Landlord and Tenant Act 1985** ("the 1985 Act") stating that the landlord wanted to undertake "*remedial concrete and steelwork replacement to the existing balconies and external decoration of*" the 2 buildings.

9. The second stage of the consultation process took place on the 14th August 2006 when the lessees were written to following receipt of the estimates for the work with a breakdown of the estimates received to include the structural repairs to the balconies, external decoration work and the various fees. The cheapest tenders were recommended and the total cost of this work was given as £7,758.86 for each lessee. The notice confirming the award of the contracts was sent out on the 17th January 2008 without any explanation for the delay. This notice confirmed the amount which would be payable by each lessee i.e. £7,758.86.

10. The bundle includes, at page 47, a document prepared by the Respondent's agents called a 'Tender Report' which is dated 3rd July 2006. This sets out the tender process and in respect of both the repairs and the re-decoration works the contractors were asked to submit fixed price tenders. The cheapest tender for the repairs was from Peter Eden Contracts in the sum of £152,260.00 plus VAT. For the re-decoration work it was from C S Cox Ltd. in the sum of £45,000.00 plus VAT.

11. Unfortunately, the specification for the tenders was not included but it does seem clear that the tender for the re-decoration was for complete decoration works rather than just touching up after the structural works. Apart from anything

else, the cost of scaffolding is likely to have been less than normal as it had to be there for the works to the balconies.

12. At page 10 in the bundle, the Applicants say that "*At the time we had no reason to query the works or the process, although in hindsight, there are elements which raise concerns and inaccuracies in the figures. Structural works were completed and invoiced by 17/12/2008*". As will be seen, this Tribunal does not have jurisdiction to hear a case where service charges have been agreed or admitted. As far as the structural works are concerned, it is this Tribunal's view that it cannot look into the payability or reasonableness of those costs.

13. The next significant step was the service of a new Section 20 consultation notice on the 20th April 2009 wherein the Applicant says that it intends to undertake "*The external redecoration and associated repairs and preparation of all timber, masonry, metal and plastic to...*" the properties. The reason stated for these works is "*due to the existing contractors demanding huge uplift's* (sic) *on existing tender prices, Countrywide have decided that re-tendering is necessary for the external decorations*".

14. The Respondent's statement of case at pages 13 and 94 in the bundle says "*the original contractor (P Eden) was not willing to complete the external decorations at the original quote price; therefore the works had to be retendered*". In fact the original contractor was C S Cox Ltd. and this error was acknowledged at the hearing. Without any further explanation, this is a very unsatisfactory state of affairs as the 2006 tenders were said to be fixed price tenders. Further, the documents show that the contract had been awarded to C J Cox Ltd. in a notice to all lessees dated 17th January 2008 at pages 34 and 35 in the bundle.

15. On the 4th March 2010, a letter was send to the lessees by Cubit Consulting which purported to be the second stage in the consultation process. They signed the letter as 'duly authorised agents' for the Respondent. A list of 5 potential contractors and their tender figures was set out with the cheapest being Essex Maintenance (Roofing/building Co) Ltd. in the price of £117,485.00 plus VAT plus management fees of 4% and undisclosed 'professional fees' of 10%. What is interesting about this contract price is that it included works to drains and the car park which was not mentioned in the first Section 20 consultation letter of 20th April 2009. It is not easy to see exactly what part of the tender is attributed to these works but it would appear to be about £30,000.00 i.e. more than £250 per flat.

16. Of significance is a comment that the full estimates can be inspected at 23 Clerkenwell Close, London EC15 0AA. The Respondents say that this is unreasonable as the properties are many miles away.

17. Unlike for the 2005/6 consultation process, there is a copy of the specification in the bundle commencing at page 166. However, this is dated May 2010 i.e. some 2 months after the tenders had been received.

18. The next significant event is a letter from Countrywide dated 10th May 2010 which says that the contract for these works has been entered into and the commencement date is 17th May 2010. It then says "*These external decorations*

and associated drainage repair works will all be completed under the monies previously collected and therefore there are no further charges falling due under this contract and schedule of works". It then goes on to say that some lessees have not yet paid their contributions and that those are still payable. Finally, it says that the snagging works in connection with the structural repairs to the balconies are to be completed by JM2 Contracting who will be paid from the retention monies withheld from P. Eden.

19. Finally, by way of introduction, a letter was written to the lessees by Countrywide on 20th October 2011 at page 41 in the bundle stating that in respect of the decoration works, the original £7,758.86 per flat included £58,808.75 for that work. However, the decoration work undertaken as part of the second consultation process was a further £37,842.13 or £1,113.00 per flat plus £357.26 per flat as a shortfall on the structural works and a request is made for payment of these amounts. This was followed by a further letter written on the 8th January 2013 at page 90 in the bundle which attaches a statement showing £48,666.48 or £1,431,37 due from the lessees "*in settlement of the Section 20 costs*".

20. There have been letters and meetings but no resolution to the dispute because the Applicants do not see why they should have to pay this amount.

The Inspection

21. The members of the Tribunal inspected the outside of the properties in the presence of some or all of the applicants, Mr. James Watson from Countrywide and Mr. J. Parker, counsel for the Respondents. It was as described above. The Applicants pointed out several areas where paint work is starting to flake and some rainwater goods were the wrong colour.

22. The Tribunal did notice some areas of flaking as pointed out plus some of the door thresholds were also starting to flake. It seemed clear that some of the windows had not been opened for painting but with so many occupants, many of whom appear to be sub-tenants, it must have been almost impossible for the contractors to arrange for everyone to have windows open. The decoration work was completed at least 2 years' ago and the property is quite close to the entrance to the Thames estuary which will make the paintwork subject to salt damage in the wind. The Tribunal concluded that, so far as they could see, the decoration work had, by and large, been undertaken to a reasonable standard.

The Lease

23. The Tribunal was shown a copy of the original counterpart lease of what appears to be 6 Beech Lodge. It is dated 17th December 1986 and is for 199 years from 1st July 1983 at increasing ground rents. There are the usual covenants on the part of the landlord to maintain the structure of the property and insure it. There is also an obligation on the landlord to decorate the exterior of the buildings including the doors and window frames. The lessees have to pay their share of service charges incurred. There does not appear to be any dispute that the works which are the subject of this dispute are covered by the lease and that the proportions being attributed to each lessee are in accordance with such lease.

The Law

24. Section 18 of the 1985 Act defines service charges as being an amount payable by

a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'.

25. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. A Leasehold Valuation Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable and, if so, whether it is payable.

26. Section 20B of the 1985 Act says that "*if any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant*" then the tenant will not be liable to pay such costs unless the tenant was informed, in writing, that those costs had been incurred.

27. Section 27A(4)(a) of the 1985 Act says that no application can be made to a Tribunal to consider the reasonableness of a service charge which "*...has been agreed or admitted by the tenant*". Having said that, mere payment would not necessarily imply agreement or admission. It would depend on the circumstances in which payment was made.

28. By a combination of Section 42 of the **Landlord and Tenant Act 1987** and the Service Charge Residential Management Code published by the Royal Institution of Chartered Surveyors, money held on account of future service charges is held on trust and should be held in a designated interest bearing account for the benefit of the lessees.

29. The purpose of Section 20 of the 1985 Act as now amended by the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") and the appropriate Regulations is to provide a curb on landlords incurring large amounts of service charges and, now, entering into long term agreements, which would involve tenants paying large amounts of money.

30. The original regime meant that if service charges were over a certain limit, then the landlord had to either (a) provide estimates and consult with tenants before incurring such charges (b) have such service charges 'capped' at a very low level or (c) try to persuade a judge to waive the consultation requirements.

31. The 2002 Act which came into effect on the 31st October 2003 tightened up these provisions considerably and extended them to qualifying long term agreements i.e. agreements involving a tenant in an annual expenditure of more than £100 and which will last for more than 12 months. The limit on qualifying works which is relevant to this application is £250 per flat per contract for such works.

32. The 'usual' consultation requirements in the Regulations are extensive and include:-
    (a) The service of a notice on each tenant of an intention to undertake works. The notice shall set out what the works are and why they are necessary. It shall invite comments and the name of anyone from whom the landlord or the landlord's agent should obtain an estimate within a period of not less than 30 days.
    (b) The landlord or landlord's agent shall then attempt to obtain estimates including from anyone proposed by a tenant.

(c) At least 2 detailed proposals or estimates must then be sent to the tenants, or made available to them, one of which is from a contractor unconnected with the landlord, and comments should be invited within a further period of 30 days

(d) A landlord or landlord's agent must take notice of any observations from tenants, award the contract and then write within 21 days telling everyone why the contract was awarded to the particular contractor if the lowest tender had not been selected.

33. Some case law was referred to at the hearing but the most important leading case from this Tribunal's perspective is the Supreme Court case of **Daejan Investments Ltd. v Benson** [2013] UKSC 14; [2013] PLSCS 69. This will be discussed later.

The Hearing

34. The hearing was attended by those who were at the inspection. As a preliminary point, the Tribunal chair asked Mr. Parker, counsel for the Respondents to clarify his position over what happens if the Tribunal finds that the consultation requirements in the appropriate regulations have not been met. He said that his clients would want an order dispensing with those requirements. There was then a discussion when it was pointed out that no notice had been given of such an application and it would have to be heard on another day if the Applicants did not agree to the matter being disposed of at this hearing. As it happened, they all said that they wanted this litigation concluded and were prepared to waive any right to notice and deal with that issue at this hearing.

35. The next matter put to the Respondent by the Tribunal chair was the lack of information in the bundle about the 2005/6 consultation and what happened about the decoration work. This was important because the first letter in the 2009 consultation should have said why the work proposed in the consultation was 'necessary'. Clearly the decoration work had not been done, but as the 2005 consultation had, on the face of it, given rise to a fixed price contract (save for contingencies) in the sum of £45,000 plus VAT, and such sum had been paid by the lessees, why was it 'necessary' to re-tender for the same work? Where was the copy of that tender so that the Tribunal could see what the contract said?

36. Mr. Parker took brief instructions and informed the Tribunal that the person present from the managing agents did not have this information and would need to take instructions from his line manager. This, despite the fact that this general issue had been raised by the Applicants some time ago. Half an hour was granted for this purpose. Thereafter Mr. Parker said that it had not been possible to speak to the correct person. A further hour was requested and he said that if it was still not possible to obtain instructions, it may be necessary for him to seek an adjournment to another day.

37. In fact the hearing was deferred until 1.15 pm which gave the Respondent a total of some 2 hours to obtain instructions and the copy contract. When returning to the hearing, Mr. Parker said that neither he nor Mr. Watson from Countrywide had been able to obtain the information or document requested and they wanted to continue with the hearing. In other words, no request was made for a further adjournment.

38. The Tribunal decided that it would be sensible for Mr. Watson, the representative from the Respondent's managing agent, to give evidence first as the Applicants' cases were fully set out in the bundle and seemed, on the face of it to be conceded, at least so far as the basic facts were concerned. James Watson said that he was a property manager at Countrywide. He joined the company on the 19th October 2012 and took over responsibility for the subject property on 5th November 2012. He said that the statement in the bundle from his colleague Hannah Ventom at page 93 was true to the best of his knowledge and belief. Unfortunately she was unable to be at the hearing due to a medical crisis in her family.

39. He said that he was unable to assist the Tribunal about what happened in 2005 and 2006 other than to refer to such documents as there were in the bundle. He was also unable to assist the Tribunal any further about the 2009/10 consultation other than what was in the bundle. He was asked about the comment by Cubit Consulting about the location of the estimates in London. Was it reasonable to expect lessees of properties in Shoeburyness to have to go to London to see the estimates? His reply was that his office in Basildon covered East Anglia which meant that if he was undertaking a Section 20 consultation for a property in Norfolk, for example, he would say that the estimates would be available in Basildon. He saw nothing wrong with that. He could not say why the estimates in this case had not been made available in Basildon which would at least have been much nearer than London.

40. He admitted to a number of mistakes on the part of Countrywide. In paragraph 6 of Ms. Ventom's statement, the reference to P. Eden should have referred to C J Cox Ltd. He had to concede that the information about the 2005/6 consultation was not available and he had no idea why the contract with C J Cox Ltd. had not gone ahead. In the 2009/10 consultation, he did not know why the first letter had not referred to the drainage work and work to the car park which had then been included in the estimates. He did not know why the monies collected from the lessees in advance of the re-decoration work had not been kept in a separate interest bearing account. All he could say was that these monies were separately identified in Countrywide's accounting system.

41. He could not explain why the lessees had been asked to pay £1,431.37 in May 2013 when they were told in the meeting of the 22nd April 2010 and then in the letter of the 10th May 2010 that there would be no further monies to pay for the subject works. He just said that a mistake had been made.

42. He said that Countrywide now had a new system called TRAMPS which ensured that proper case notes were kept for each property so that this sort of problem would not arise in the future. He said that the present situation was that his letter of the 8th January 2013 had enclosed a proper service charge demand for £1,431.37. This was conceded by the Applicants. That was the amount outstanding for the Section 20 work.

43. Ms. Barwick who, as one of the Applicants, had been their spokesperson, was questioned by Mr. Parker about whether the lessees had actually suffered any prejudice by having the estimates available in London as opposed to a more local venue. She said that following the receipt of the letter from Cubit of the 4th March 2010 saying what the new estimates were, the lessees were very angry and

demanded a meeting. The letter itself had said that comments were invited and the closing date for the comments was 3rd April 2010. The meeting happened on the 22nd April 2010. She said that the lessees were told that the estimates would be looked at again. In particular, it was said that Countrywide would look for some economies in the work particularly to the drains and to the car park.

44. She reiterated the views expressed in the papers that the monies held on account should have earned interest. She claimed that some £4,500-£7,000 should have been earned although she did not give any details as to how these figures were calculated. In view of the very low interest rates being paid by the banks in recent years, it was difficult to see how such a figure could be justified.

45. During this evidence she said that the lessees did not know that the structural work to the balconies had been completed in 2008 because they did not live in the properties. This was despite what was in the Applicants' written case. She said that this information had only been discovered as a result of disclosure in these proceedings. The Tribunal had some difficulty in accepting this. There must have come a time when the workmen and the scaffolding left the site and this was presumably in 2008 because the fact that the work was finished then and invoiced is not now being disputed. If owners of property do not bother to inspect it on a reasonably regular basis, it is difficult to see why the freeholder should have to suffer prejudice because of this. The Tribunal concluded that some or all of the Applicants either knew to ought to have known that, save for snagging, these works were completed in 2008.

Conclusions

46. There appear to be 2 elements of the claim now being made i.e. about £350.00 as a further contribution towards the **structural work to the balconies**. This was first mentioned in the letter of the 20th October 2011 at page 41 in the bundle. As both parties now agree that the invoices for this work were in the Respondent's agent's possession at the end of 2008, it is now not possible to collect any shortfall because of what is often referred to as the 18 month rule in Section 20B of the 1985 Act as set out above. After 2008, there was no reason for the lessees to suspect that further monies would be claimed for that contract.

47. The other part of the claim is a **balance being sought for re-decoration works** as set out in the letter of the 8th January 2013 at page 90. If the Respondent is to succeed in this respect over and above the £250 'cap', it must either satisfy the Tribunal that the full consultation requirements have been met or that it should be granted dispensation from compliance.

48. The Tribunal has no hesitation in concluding that in 2009/10 the full consultation requirements were not met for, amongst other things, the following reasons:-

(a) The first Notice must set out why the landlord says that the works are necessary. In this case, the landlord has set out why it is undertaking the works but this does not comply with this requirement. Why was it that a fixed price contract, subject to contingences, in the sum of £45,000 plus VAT towards which the lessees had paid their contributions, not completed? There could have been many reasons. One may have been that the tender was open to acceptance within a set period of time – as most such tenders are

– and that time had passed. If that happened, then why did it happen? An explanation should have been in the notice so that the lessees would know why a re-tender was 'necessary'.

(b) The works described in the first notice i.e. re-decoration and related repair work were not the works for which tenders were obtained. The contractors were asked to tender for the works to the drains and car park which seems to have increased the tenders by at least 30% and probably more. Of course, that work was not done but if the lessees were looking to nominate contractors, they would be nominating decorators and not contractors who could do work to drains and roads.

(c) The second notice in the consultation process did say that the estimates were open to inspection but at a location which was at least 30 or 40 miles away. That is unreasonable. Taken to extremes, if a notice had said to lessees in Cornwall that the estimates were open to inspection in, say, Carlisle, there would surely be no argument that this was unreasonable. The landlord had a managing agent in Basildon which is much nearer to the Applicants and the estimates could have been lodged there. The Tribunal concludes that the estimates should have been available for inspection at a location reasonably close to the subject properties and they were not. 'Availability' is a question of fact in each case.

(d) The meeting on the 22nd April 2010 was, in this Tribunal's view, part of the consultation process. It arose from the second Section 20 notice which asked for observations. The lessees wanted to give their observations at the meeting. They were told that Countrywide and, hence, the Respondent, appreciated their concerns and would not be making any further charge. Thus the consultation process came to an end with the lessees believing that they would not have to pay any more.

49. Having found breaches, the Tribunal must, in view of the **Daejan** case referred to above, find that the lessees have suffered prejudice if a dispensation order is not to be granted. In this case, the Tribunal finds that the first and last breaches mentioned above are very serious indeed. The Respondent has been given every opportunity to explain why the original tender from C J Cox Ltd in the fixed sum, subject to contingencies, of £45,000 plus VAT was not accepted and executed. The result has been that the Applicant lessees are being asked to pay virtually double the cost i.e. almost £90,000 for the same work.

50. If an explanation had been given which was reasonable and acceptable, then that would be a different matter. However, despite questions being raised by the Applicants and, more importantly, the Tribunal having spelt out very clearly indeed that it needed this information, the Respondent has failed to give any explanation at all. The only inference which can be drawn in these circumstances is that the management of the 2005/2006 works was undertaken negligently, which cannot be the fault of the lessees. The end result of this negligence is that the lessees have suffered severe prejudice.

51. Indeed, the Tribunal did serious consider whether there was an *estoppel* point here because of the assurance given to the lessees at the meeting on the 22nd April 2010 and confirmed in writing that there would be no further charges. The problem with *estoppel* or even a possible breach of an actual or implied contractual term is that one must show that the lessees either changed their positions as a result of the assurances given or provided some legal

'consideration' for the contract point. They may well have but the Tribunal concludes that the position of the lessees was and remains that they do not want to pay any more money. That does not represent a change.

52. So far as the landlord's managing agents are concerned, they acknowledge that they made a mistake in giving the assurance. The problem which the lessees have is that the evidence seems to suggest that the actual tender processes, as opposed to the second consultation process, was probably conducted properly. In each of the two tender processes, tenders were obtained from companies (different ones in each case) and at least 3 of the tenders in each case were quite close to each other. The agents chose the lowest tender in each case. The Tribunal remains puzzled as to why the cost had increased by quite so much in about 4 years. It may be that the second contractors chosen dealt primarily with drainage work or work to car parks rather than decoration works. This would need greater expertise. Whatever the reason, it is, of course, purely conjecture without knowing the criteria for choosing the contractors in each case. The Respondent has known about this glaring inconsistency since 2010 but has chosen not to explain the matter to the Applicants or the Tribunal.

53. However, the end result is that whatever may have been said by the agents, the cost of re-decoration works delayed for 4 years was almost bound to be higher. The decorative condition of the building would have been worse involving more preparation and costs after 4 years or so would have been higher. One also has the advantage that the next re-decoration works will happen 4 years later than would have been the case if the first contract had been concluded. Thus any reasonable lessee, looking at the matter objectively would have concluded that there would be an extra cost. The question is what should that extra cost have been? On the other hand, another part of the equation is that the lessees have had to put up with a building in a poor decorative state for about 4 years more than they would have done.

54. Taking all of these various threads into account, the view of the Tribunal members is that the result of the flawed second consultation process has badly prejudiced the lessees and that dispensation should not be granted. Thus, the cost to the lessees of the re-decoration works is capped at £250 each.

55. This will raise another £8,500 which is about 16% more than the original contract price of C J Cox Ltd in 2006 on the assumption that the total contract price would have been about £54,000 taking VAT and full use of contingencies into account. Although the Tribunal has not been asked this question, if it had been asked whether a 16% increase over 4 years was reasonable, it would probably have said that this would be a fair increase to cover the delay of 4 years or so. Thus, the end result of this decision is fairness in the widest sense of the word.

56. As to the problem of interest being earned on service charge monies paid in advance, the Tribunal has not been given sufficient information to even begin the task of working out what this could have been, if anything. As has been said above, it is known from the letter of the 10th May 2010 that some lessees had not paid their contributions to the earlier major works. It must also be assumed that the Respondent has paid for the structural works to the balconies. Bearing in mind the relative small amounts which a trustee account could attract in interest

payments and the remainder of this decision, it is hoped that the lessees will not spend time and effort and money trying to litigate this issue further.

57. Bearing in mind the result of these proceedings, the Respondent will not be surprised to find that the Tribunal also considers it to be just and equitable to make an order pursuant to Section 20C of the 1985 Act preventing recovery of its costs of representation as part of any future service charge.

....
Bruce Edgington
President
28th June 2013

© CROWN COPYRIGHT 2013