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RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL



HM Courts
& Tribunals
Service

Re: Flats 1-18 Houghton House, 23b Cavendish Place, Eastbourne, East Sussex BN21 4UN

Application under Section 20ZA Landlord and Tenant Act 1985

(Application for dispensation from consultation requirements)

DECISION AND REASONS

Case Number: CHI/21UC/LDC/2013/0001

Applicant: Amicus Horizon Ltd

Respondents (Tenants):

Flat 1 Mr & Mrs T P Geaney	Flat 10 Mrs M Oliver
Flat 2 Mr J Ashfield	Flat 11 Mr & Mrs M Blamane
Flat 3 Mrs C A Martin	Flat 12 Mrs C E Bassett
Flat 4 Mr F C Bigsby	Flat 13 Mr J Dyer
Flat 5 Miss D L Pattenden	Flat 14 Mr & Mrs M M Ngunzi
Flat 6 Mr & Mrs D J Stocker	Flat 15 Mr G Nash
Flat 7 Mr N Hart	Flat 16 Mr L Hamilton
Flat 8 Miss T Pearce	Flat 17 Mr W Spence
Flat 9 Miss S H Wetz	Flat 18 Mr H Bowes

Appearances:

For the Applicant

Miss M Emery, AIRPM – Head of Home Ownership (Income and Service Charges)

Mr Dimitri Karalis BSc– Housing Officer

For the Respondents

No representatives or appearances

Tribunal Members:

Mr R Athow FRICS MIRPM (Chairman)

Mr P A Gammon MBE BA (Lay Member)

Hearing Date: 21st January 2013

Decision Date: 21st January 2013

The Decision

1. The Tribunal determined that dispensation should not be granted.
2. The full reasons for the decision are set out below.

The Application and Proceedings

3. The Application dated 28th December 2012 was made by Amicus Horizon Limited, the freeholders of the building known as 23a, 23b Cavendish Place and 99 – 107 Seaside Road, Eastbourne.
4. Directions were issued by the Southern Leasehold Valuation Tribunal appointed on 7th January 2013. A Hearing ('the Hearing') took place on 21st January 2013 at Eastbourne Magistrates Court.

The Law

5. The statutory provisions primarily relevant to these applications are to be found in S.20ZA of the Landlord & Tenant Act 1985 as amended (the Act).
6. Section 20ZA (1) of the Act states :
 - a. *'Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.'*
7. In Section 20ZA (4) the consultation requirements are defined as being :
 - a. *'Requirements prescribed by regulations made by the Secretary of State'. These regulations are The Service Charges (Consultation Requirements) (England) Regulations 2003 ('the Regulations').*
 - b. In section 20(2) of the Act 'qualifying works' are defined as being *'works' ... 'to the costs of which the tenant by whom the service charge is payable may be required under the terms of his lease to contribute by the payment of such a charge'.*
8. If the costs of any tenant's contribution exceed the sum set out in section 6 of the Regulations (which is currently £250) the Landlord must comply with the consultation requirements. The relevant requirements applicable to this application are those set out in Part 2 of Schedule 4 of the Regulations.
9. The Tribunal may make a determination to dispense with some or all of the consultation requirements but it must be satisfied it is reasonable to do so.

The Tenancy Agreements

10. The Applicant provided 2 specimen tenancy agreements. Both are Assured Tenancies. The first example was in the same form for all flats with the exception of flats 8, 10 and 13 which were in the form of the second example.
11. The first example includes a section at 1(8) "Where such services are provided in connection with the Premises, the Association shall provide the services detailed in Appendix A to this Agreement, for which the Tenant shall pay a weekly service charge to be included in the rent." Section 1(9) sets out the terms which make this payment a variable service charge.
12. However, no copy of Appendix A was included in the bundle.
13. The second example is not so clearly enumerated. Most headings are in one of two sizes of bold, with General Terms being enumerated. At page 2 "weekly rent" is stated, but there is no bold heading. Similarly there is no bold heading for the next which is "service charges if this applies" and there are 10 items listed below this, one of which is 'service charges for depreciation' and another 'service charges for lift (communal)'. All of this is in the same type style.
14. Under the bold heading of "General Terms" at page 3 is a bold sub-heading 'Rent'. paragraph 1 states "The total weekly charge is made up of:
 - The rent;
 - Any general or specific service charge for services which we may provide: and;
 - Any other charges that may be listed in the tenancy.
15. Under the bold heading of "Service Charges" paragraph 12 confirms that the charges are variable service charges.
16. Paragraph 13 states "We will provide, maintain and renew the services and equipment listed on the schedule of services".
17. Under the Bold heading of "Our Responsibilities – we agree:....."
"Services" paragraph 28 states "To provide the services listed in the service charge schedule for which you will pay a service charge."
18. There was no separate schedule as mentioned in paragraph 13 above attached to this example.

The Inspection

19. The building is set over five floors with commercial units occupying the ground floor and four floors with 18 flats above. It was constructed in 2001 with the lift being installed at that time.
20. There is an entrance door to the large communal entrance hall to the flats in Cavendish Place. Each floor has a spacious landing and access to the lift as well as a separate staircase. The lift has a label stating the manufacturer as "Dewcroft Elevators" and it is an 8 person lift.
21. The Tribunal inspected the common parts of the building and travelled in the lift which was working at the time of the inspection. Miss Emery had some keys but these did not allow access to the lift motor room. As a result the Tribunal was not able to ascertain the type or condition of the machinery. However the lift car itself appeared to be in good condition and the doors opened at the correct levels at all floors.
22. Mr S Farley of Amicus Horizon Ltd was due to attend in his capacity of project manager, but adverse weather conditions had prevented him from getting to the hearing.

The Hearing

Applicant's Case

23. Initially, the Tribunal addressed the lack of full copies of the tenancy agreements as mentioned above and a 45 minute adjournment allowed Miss Emery to make attempts to locate copies of the missing pages, but as the records have all been stored electronically it would appear that these pages were missed when they were scanned originally. After checking with colleagues at her office she reported that no hard copies could be found quickly and that she would need to carry out a physical search of the old files herself, which are in storage, to attempt to locate missing pages. It was agreed that the publication of the written decision would be delayed by 7 days to allow her time to carry out the manual search and provide copies of the missing pages as this could impact on the full decision of the Tribunal.
24. Miss Emery confirmed the contents of the application were correct and explained that the lift manufacturers had gone out of business in 2006 and the lift is currently serviced and maintained by Liftec.
25. In recent times the lift has failed on numerous occasions. Replacement parts are difficult to source as the manufacturer no longer exists. On some occasions the lift is out of action for several days. On one occasion around September the lift was out of commission for 5 weeks whilst a replacement part was manufactured. Electrical wiring alterations have needed to be undertaken in order that replacement components can be utilised from other lift manufacturers. The lift was also out of action in December for 2 weeks. There was a recent problem when a controller on the main processor board failed and a temporary repair has had to

- be made. This is not a permanent repair, but will allow time for the refurbishment to be completed.
26. The Applicant was already in the process of carrying out phased renewals of the lifts to all of their blocks. This process was being overseen by Vertical Transport Specialists (VTS), a firm of consultants specialising in lifts. They had carried out surveys on all lifts and assessed a priority listing. The subject lift was scheduled to be in the third phase, but now needs to be brought forward to high priority.
 27. The Applicant had gone through the tendering and consultation stages for Phase 1 of their programme. A schedule showing tendering results for 8 hydraulic lifts was included in the bundle. The schedule showed various sized lifts serving between 2 and 4 floors. Pickerings were the cheapest and best choice taking into account the Applicant's tendering requirements. The lift serving 4 floors was tendered at £55,780 plus fees of 5% and VAT at 20%.
 28. As a result VTS were asked to report on the subject lift. Their report was in e-mail form dated 30th October and because they were the cheapest tenderer on phase 1 they had asked Pickerings to quote for the replacement of the lift in Haughton House. Their quote was stated in that report as being £66,000.00, but it did not state whether this was inclusive of fees or VAT.
 29. The Tribunal enquired why the lift was being changed from a traction lift to a hydraulic lift, as noted in the letter dated 28th Decemebr 2012 from the Applicant to the Respondents. Miss Emery was unable to explain the reasons as she did not deal with that part of the running of the block. It was unfortunate that Mr Farley was unable to attend as he would have been likely to know the reason.
 30. Miss Emery confirmed that even though Liftec were the current maintenance contactors they had not been asked to report or quote for the lift replacement. Nor was she aware that anyone had been asked to undertake a feasibility study of carrying out a major renewal of the lift using existing parts where they still had a good serviceable future.
 31. The quote was formally dated 15th November, and parts were included at pages 65 – 69 of the bundle, but there was no price shown and it would appear that this was not the complete document. It stated that the lift would be a hydraulic lift. It states that it was based on the Applicant's standard specification, but this has not been submitted with the bundle.
 32. It was confirmed that the actual period of time that the lift would be out of commission would be 2 weeks.
 33. The Applicant confirmed that they have emergency procedures should the lift fail again. They have carried out a survey of the tenants and 2 are wheelchair bound and 5 have restricted mobility. They have already used these procedures in the past and they include access and egress assistance by their staff who have a 'stair climber'. Additionally, they assist with residents' shopping, etc. to ensure that tenants do not suffer unduly.

34. Miss Emery was not aware of the need for regular independent Lift Engineers Inspection Reports as is usually required by the insurers covering the lift, and was not aware of the existence of any such document.
35. The Applicant would normally have carried out the full Consultation process, and this is the field that Miss Emery specialises in. Because the work was considered urgent, the Applicant decided to apply for dispensation.
36. The Tribunal enquired why there appeared to have been delays in making the application. Miss Emery explained that although they knew in October that there would be a need for formal consultation, there were internal procedures required if expenditure was known to be in excess of £25,000. In that case the matter would need to be considered by their Risk Appraisal Group and they only met every two months. Once their approval had been obtained, the application was made.
37. They have now realised the problems that meeting only every 2 months causes. They have addressed this and there are now procedures in place to deal with such an occurrence.
38. By a letter dated 28th January 2013 the Applicant stated they had not been able to find the missing Appendix and pages within the seven days allotted, but found evidence that they had collected a variable service charge from all tenants from the beginning of the occupancy of the flats in 2001.
39. Other statements were made in that letter, but they were in the form of new evidence and therefore could not be considered by the Tribunal. Had Mr Farley been at the Hearing he could have presented these to the Tribunal at that time.

Respondent's Case

40. No representations were made by any tenant.

The Consideration

Recoverability

41. Firstly the Tribunal needed to consider the liability to pay the service charge as the case involved tenancy agreements.
42. There is a requirement for the tenancy agreement to contain a paragraph confirming that this is a variable service charge in addition to the basic rent payable. Due to the absence of complete copies of the tenancy agreements, in the absence of Appendix A in the case of the first example agreement this was a significant consideration, as if it did not allow recovery it meant that the proposed expenditure could not be recovered in any form and the Hearing would not need to make a decision on the application.
43. It could be considered that the second example was poorly drafted and that the schedule referred to was in fact the section on pages 2 and 3.

44. It was unfortunate that the sections were missing and as a result this placed doubt on the ability to recover any of the service charges. The Applicants were given seven days to find these missing pages, but as they were unable to, this required the Tribunal to consider the issue on the papers before it.
45. The letter dated 28th December 2012 stated that the element of service charge under the heading of “depreciation” was £0.84 per week and was from when the lift was first installed. The total cost of replacement would be split over 25 years across all flats and this would result in a contribution of about £4.02 per week. It did not state that it was not an increase of this amount, but was partly depreciation and partly the cost of repair or replacement. Miss Emery stated the £4.02 would be less than the amount the tenants are paying now. Miss Emery confirmed that the depreciation was not a contribution to a Reserve or Sinking Fund.

Replacement

46. The Tribunal considered the application to dispense with the requirements for the full consultation process under Section 20 of the Landlord and Tenant Act 1985.
47. The main consideration was whether there was a real need to totally replace the existing lift. The existing one is only 11 years old and most parts should not be in need of replacement even though they are not available ‘off the shelf’ due to the original company going out of business.
48. It was unfortunate that there had been a series of failures in recent times which had caused the lift to be out of commission from time to time.
49. The second consideration to be made was whether there had been adequate consultation with the tenants. It did this based on the evidence placed before it and the explanations given as evidence at the Hearing.

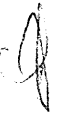
The Findings and Reasons

Recoverability

50. With regard to the recoverability of the variable service charges, the Applicant had collected service charges from all tenants since the property was constructed and as a result it was considered likely that this was the original intention of all parties.
51. As a result it was felt, under the balance of probabilities, the service charges should be recoverable from all of the tenants.
52. The changes in the Service Charge amount were not clearly stated in the letter of 28th December and create confusion. It is not clear whether the costs relate to the repairs and maintenance or the depreciation elements. This needs to be clarified in detail to the tenants.

Replacement

53. As the lift was operating when the inspection took place there was no need to consider this as an emergency case.
54. No consultation process had been undertaken on this issue. The only letter was the one dated 28th December 2012 and this did not begin to cover the basic requirements under the Consultation process. Attempts should always be made to comply with such of the provisions of the regulations as apply in any case as far as possible, since the extent of compliance or non-compliance and the efforts made to comply are a relevant factor in the exercise of the Tribunals discretion.
55. There were errors of fact in this letter. Firstly, the change in the amount of Service Charge payable as a result of the proposed works. Secondly, the lift type was incorrectly stated. (This was not made known to the Tribunal until the letter of 28th January 2013). As a result the letter is misleading to the tenants.
56. It is unfortunate that there was no correspondence or communication from the tenants. If there had been unanimous approval for the proposal, there might have been a case for the Tribunal to consider.
57. The health and safety of the residents is not at risk as the Applicant has backup procedures in place if the lift were to fail and be capable of repair in a short time.
58. With regard to the Applicant's intention to totally replace the lift mechanism with another style, the Applicant has not fully investigated this issue. This may have been done, but no evidence of this was presented in the application bundle or at the Hearing. The letter in paragraph 55 above explains that there was an error in the Applicant's statement of case which was made due to incorrect records within the Applicant's office.
59. It might be feasible that a cheaper alternative could be found if a full appraisal were to be undertaken and a written report issued with recommendations. Once this exists it will allow the Applicant to obtain quotes for the options available and then they can consider which path is the correct one to follow. This should be done in conjunction with the normal Section 20 Consultation procedures.
60. In the meantime, if the lift should fail and not be repairable, the applicant can always make another application to the Tribunal.

Signed: 

Richard T Athow FRICS MIRPM

Chairman of the Panel, Appointed by the Lord Chancellor

Date: 29th January 2013