10678

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Property	: Carmel House, Westbourne Street, Hove BN3 5PE
Case Reference	: CHI/00ML/LSC/2014/0097
Applicant	: Mr D E Wilmshurst
Respondent	: Anchor Trust represented by Debbie Matusevicius
Type of Application	: Payability of service charges under s.27A Landlord and Tenant Act 1985 Disregarding costs of proceedings under s.20C Landlord and Tenant Act 1985
And Case Reference	: CHI/00ML/LDC/2014/0053
Applicant	: Anchor Trust represented by Debbie Matusevicius
Respondent	: Mr D E Wilmshurst
Type of Application	: Dispensing with consultation requirements under s.20ZA Landlord and Tenant Act 1985
Tribunal Members	: Judge A Johns (Chairman) Mr Roger Wilkey FRICS (Surveyor Member) Mr B H Simms FRICS (Surveyor Member)
Date and venue of	: 22 January 2015, City Gate House, Dyke Road, Brighton, East Sussex BN3 1TL
Date of Decision	: 13 February 2015

DECISION

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Introduction and factual background

1. Carmel House in Westbourne Street, Hove ("the Building") is a retirement development. This case concerns fire safety works carried out to the Building by the landlord Anchor Trust ("Anchor"). The costs of those works have yet to be demanded as service charge. Mr Wilmshurst as lessee of flat 23, and with the support of many of the other leaseholders, says that the costs are not in any event recoverable. He makes an application under s.27A of the Landlord and Tenant Act 1985 on the bases that the costs do not come within the terms of his lease or, if they do, they are irrecoverable because of a failure to comply in full with the statutory consultation process. Anchor maintains that the costs are within the terms of the lease and, accepting that there were errors in the consultation process, seeks dispensation of the consultation requirements under s.20ZA of the Act.

2. The fire safety works carried out comprised:

2.1 The fitting of new intumescent smoke seals to the doors of each of the flats. These strips are attached to the sides of each door and fill the gap between the door and frame.

2.2 The fitting of a new fire resistant letter box with intumescent seal in the body of each flat door.

2.3 The replacement of door hinges and door closers.

3. Before the works were carried out, Anchor gave notice of intention to the leaseholders by letter dated 7 August 2013. In response to that notice, Mr Wilmshurst nominated BFA Property Services as a contractor that should be invited to tender.

4. But when tenders were invited, Anchor mistakenly failed to invite a tender from BFA Property Services. The tenders which were obtained were duly notified to the leaseholders by way of a statement of estimates dated 4 December 2013. The lowest tender was from EPB Builders and was in the sum of £11,371 including VAT.

5. Given the error in failing to invite a tender from Mr Wilmshurst's nominated contractor, the tender process was run again. The upshot was that only EPB Builders tendered again. It did so in a higher sum, namely £12,097.28 including VAT. Further problems with the process have also emerged, namely

that the cost of the new letter boxes was not included in the tender and that some items which were included in the tender (in particular, toilet facilities) were not in fact provided.

Inspection

6. The Tribunal inspected the Building immediately before the hearing.
7. It comprises a purpose built block of self-contained flats built of brick with a tiled roof. The flats are approached from well-maintained common ways.

Jurisdiction and law

8. By s.27A of the Landlord and Tenant Act 1985 (as amended by the Transfer of Tribunal Functions Order 2013) the Tribunal may determine whether service charge is payable and in what amount.
9. By s.20ZA of the Act the Tribunal may make the determination to dispense with all or any of the consultation requirements which would otherwise limit the payability of service charge under s.20 of the Act if satisfied that it is reasonable to dispense with them. It is now clear from the Supreme Court's decision in *Daejan Investments Ltd v Benson* [2013] UKSC 14 that there can be dispensation on terms, with such terms addressing any prejudice suffered by the lessees.

Hearing

10. The hearing followed the inspection. Mr Wilmshurst represented himself and Mrs Matusevicius represented Anchor. The Tribunal wishes to express its gratitude to both sides for the clarity and courtesy to one another which characterised their submissions.
11. The parties explained at the hearing that they had reached agreement on the second limb of Mr Wilmshurst's challenge, namely the failure to meet the consultation requirements. The agreement was that there should be dispensation of such requirements on condition that Anchor limited the total service charge sum sought in respect of the works, including any fees, to

£9321.47. Such agreement was without prejudice to the parties' cases on Mr Wilmshurst's first limb of challenge, being that no sum at all was recoverable on the true construction of the lease.

12. Mr Wilmshurst's case in that regard was a simple one. He pointed to the extent of his demise which was, by clause 2 (of the original lease dated 10 September 1980, incorporated by reference into the new lease dated 25 March 2014), expressed to include the following: "all walls wholly within the demised premises which are not load-bearing walls the internal plaster coverings and plaster work of the walls surrounding the demised premises *and the doors and door frames except the external face of the front door* ..." (italics added). Thus, he said, the door was his. The landlord could not simply, as it had done, carry out works to his property and charge him without agreement. The landlord's obligations, found in clause 7 of the lease and the cost of complying with which were recoverable as service charge, included only "the outside faces of all external doors".

13. Mrs Matusevicius's case was that a term must be implied. The precise scope of such an implied term was not spelt out. But the substance was that the landlord's obligations in clause 7 should be extended to the carrying out of work to the flat doors where such is necessary to ensure the safety of common parts from fire.

Discussion

14. The Tribunal cannot accept Mrs Matusevicius's submissions. No term of the sort contended for can be implied.

15. Quite apart from the difficulty of formulating such a term, a term of that sort cannot be said to be necessary or obvious, particularly when the lease includes a term designed to ensure compliance by the lessee with the requirements of any competent authority, which would include the fire authority. Clause 6(10) of the lease is a covenant by the lessee:

"Upon the receipt of any notice order direction or other thing from any competent authority affecting or likely to affect the demised premises whether the same shall be served directly on the Tenant or the original or a copy thereof be received from any person whatsoever the Tenant will as far as such

notice order direction or other thing or the Act regulations or other instrument under or by virtue of which it is issued or the provisions hereof require him so to do comply therewith at his own expense ...".

16. The width of that obligation, extending as it does even to notices which are not served on the tenant by the fire authority, leaves no room, in the Tribunal's judgment, for the suggestion that the lease is unworkable without an implied term.

17. Mrs Matusevicius nevertheless appealed to the Tribunal to imply a term on the basis that clause 6(10) suffered from the disadvantage that Court proceedings would need to be brought against an uncooperative lessee. The Tribunal understands Anchor's laudable reluctance to bring proceedings against residents in a retirement development, but such reluctance is no basis for implying a term. Such a term would, in the judgment of the Tribunal, be a rewriting of the bargain between the parties to the lease.

18. And there was at least one further pointer against implying such a term. The draftsman of the lease has included a right of entry in favour of the landlord to carry out works to the demised premises, such being at clause 6(4). But the draftsman has chosen to limit such clause to failures by the tenant to repair on notice.

19. It follows that Mr Wilmshurst is, in the Tribunal's judgment, correct in saying that the cost of the fire safety works are not payable as service charge.

20. We should add that, even if Anchor's case for an implied term had been accepted, the Tribunal would not have been persuaded on the evidence that the works carried out came within the scope of such a term. Any such term would be confined to necessary works, being those required by a fire authority. But the works carried out by Anchor were not required by the fire authority. They were carried out following a risk assessment undertaken by Anchor itself, and not all of the works carried out featured even in that internal assessment. Further, the Tribunal doubted an obligation to upgrade existing buildings to meet current regulatory requirements in the absence of any new construction or conversion works.

21. Anchor could have proceeded by establishing first with the fire authority what, if any, works were required, then offering to undertake them on behalf of lessees. Given the obvious goodwill between landlord and tenant in this case,

there must have been a very good chance of any necessary works proceeding by agreement. In the event of a lessee refusing to accept that offer or carry out themselves works directed by the fire authority, clause 6(10) provides a mechanism for Anchor to ensure the works are done. What Anchor cannot do, on the Tribunal's view of the lease, is simply carry out works without agreement and then recover the cost as service charge.

22. Finally, the Tribunal records that had it accepted Anchor's case that the cost of the works was otherwise payable as service charge, it would have made an order reflecting the parties' agreement on dispensation, namely dispensing with the consultation requirements on condition that Anchor limited the total service charge sum sought in respect of the works, including any fees, to £9321.47.

Section 20C

23. Mr Wilmshurst asks for an order under s.20C of the Act that the costs of these proceedings are not to form part of his service charge.

24. Mrs Matusevicius indicated that Anchor did not object to such an order being made. The Tribunal has decided that there should be such an order. As Mr Wilmshurst has been successful in establishing that the costs of the works to the doors are not payable as service charge, it would be wrong for him to have to contribute to Anchor's costs of these proceedings by way of service charge.

Summary of decision

25. From the above, the Tribunal:

25.1 Determines that the cost of the fire safety works is not payable as service charge.

25.2 Orders that Anchor's costs of these proceedings are not to be taken into account in determining the amount of any service charge payable by Mr Wilmshurst.

Appeal

26. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

27. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

28. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit. The Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

29. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Judge A Johns (Chairman)
Dated 13 February 2015