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HM Courts & Tribunals Service

Leasehold Valuation Tribunal
Case Number: CAM/11UE/LSC/2012/0020

Property	:	**2 Europa House, Marsham Way, Gerrards Cross, Buckinghamshire, SL9 8BQ**
Applicant	:	**Miss Clare Russell**
Respondent	:	**Mr. J. Hunt**
Date of Applications	:	**10th February 2012**
Type of Application	:	**Application for a determination of liability to pay and reasonableness of service charges, pursuant to section 27A of the Landlord and Tenant Act 1985** **And** **Application for a determination of liability to pay and reasonableness of an administration charge, pursuant to Schedule 11 of the Commonhold and Leasehold Reform Act 2002**
Date of (Paper) Determination	:	**1st June 2012**
Tribunal	:	

Mrs. J. Oxlade — **Lawyer Chairman**
Mrs. H. C. Bowers MRICS — **Surveyor Member**

DECISION

For the reasons given below, the Tribunal makes the following orders:

(a) the service charge payable for major works in service charge year end 2010, are limited to £250,
(b) a reasonable administration charge for costs incurred by the Respondent in considering an application to consent to sublet the whole of the premises are assessed at £25,
(c) the Respondent shall not add to the service charge account sums incurred by him in responding to this application,
(d) the Respondent do pay to the Applicant the sum of £150 as reimbursement of fees paid by the Applicant to the Tribunal,
(e) the Respondent has behaved unreasonably in these proceedings, as a result of which the Applicant has incurred costs, and so the Respondent shall pay to the Applicant the sum of £500.

REASONS

Background

1. The Applicant is the Lessee of Flat 2, Europa House, Marsham Way, Gerrards Cross, Buckinghamshire and the Respondent is the Lessor, pursuant to a lease made on 2nd July 1979 between Bruce and Lumb Investments Limited and Doreen Annan.

2. The Applicant challenged the payability of some of the service charges demanded by the Respondent, and in the course of correspondence with the Respondent, the Respondent raised as an issue the Applicant's subletting of the premises without prior his consent.

3. The material parts of the lease provide as follows:

   (i) the Tenant will pay to the Lessor on demand 5.26% of the annual expenses and outgoings incurred by the Lessor in the repair maintenance renewal and insurance of the building and the provision of services (clause (clause 2(2)(a)),
   (ii) the Tenant will not assign underlet or part with possession of the whole of the demised premises without the Lessor's prior written consent (such consent not to be unreasonably withheld), provided that it would not be considered unreasonable for the Lessor to require from the proposed assignee undertenant or person to whom the tenant intends parting with possession a direct covenant with the Lessor to pay the proportion of the service charge as a condition precedent to consent (clause (21(b))
   (iii) the Tenant will pay all legal costs and surveyors fees incurred by the Lessor attendant upon or incidental to every application

made by the tenant for a consent or licence, whether or not the consent is offered (clause 24).

Proceedings

4. Accordingly, the Applicant issued two sets of proceedings, for determination of the payability and reasonableness of service charges and administration charges, over which the Tribunal has jurisdiction by virtue of section 27A of the 1985 Act and Schedule 11 of the 2002 Act, as set out in Appendix A to these reasons

5. On 16th February 2012 the Tribunal made Directions for the filing of evidence. Both parties were content for the case to be considered on the papers alone, which the Tribunal did on 1st June 2012.

Issues

6. The parties identified the substantive issues, as follows:

(a) whether the Respondent had complied with the section 20 consultation procedure in respect of decorations in the year end 31st December 2010, of which the Applicant's contribution was calculated as £1332.57,
(b) if so, then, whether the costs incurred in respect of the decorative works, were reasonable,
(c) whether the Applicant was liable to pay a demand for 5.28% of costs incurred or 5.26%,
(d) whether or not the Respondent's demand for £75 plus vat was a reasonable sum to meet the costs incurred in respect of giving past and future consent to sublet,
(e) whether the Respondent could demand the administration charge annually.

7. The Applicant sought the following Orders, consequential on the Tribunal's findings on the substantive issues:

(a) an order pursuant to section 20C of the 1985 (set out in Appendix A), so that any costs incurred by the Respondent in responding to these proceedings would not be added to the service charge account,
(b) an order pursuant to paragraph 10 of Schedule 12 of the 2002 Act (set out in Appendix A) that the Respondent pay costs of £500 on the basis that the Respondent had behaved unreasonably in the proceedings, as a result of which the Applicant had incurred further costs,
(c) an order pursuant to Regulation 6 of the Residential Property Tribunal Procedure (Fees) (England) Regulations 2006 (set out in Appendix A) that the fees paid by the Applicant to the Tribunal in issuing the application and having the applications listed for hearing be reimbursed to her by the Respondent.

Evidence

8. The Applicant filed a bundle of documents, which being indexed, need not be listed herein. The Tribunal has carefully read the papers filed by both parties.

Findings

Substantive Issues

Consultation

9. The Respondent has filed in evidence the schedule of works to the premises dated 1st March 2012, and the copy invoices tendered by Avondale from July to November 2010 for the works done, totalling £31,194.40. The Respondent says that the schedule of works is made up of the following separate items: repair, render and redecorate; inside decoration to the common areas; repairs to windows and decorating; repairs to doors and decorating; roof repairs to tiling on pitched roof; roof repairs to felt on flat roof; replacement of roof lights. The Respondent's position is that prior to her purchase of it the Applicant was aware that works would be done to the premises.

10. The Applicant disputes that the Respondent has followed the statutory consultation procedure in accordance with section 20 of the 1985 Act, has adduced in evidence copies of all documentation passing between the parties on this point, and disputes that items can be artificially separated in such a way as to seek to avoid or mitigate the financial impact of the statutory limitations.

11. The Tribunal has considered all of the documentation filed, and note that the first documentation relating to these works is dated 14th June 2010 (document 12) in which the Respondent notified the Applicant that "we have now programmed external decorations and repairs to commence on Monday 21st June". The Applicant responds by email dated 20th June 2010 (document 13) asking "please can you let me know what you mean by external decorations and repairs and if there will be any cost for me". It is apparent that this exchange is the first notice that the Applicant has had that there are to be works and that service charges could be demanded as a result. The relevant extracts from the conveyancing file (2008) refers to replacement of the windows to her flat, but which are not included in these works.

12. The Tribunal finds that there is no evidence that the Respondent undertook the consultation procedure in accordance with the statutory requirements of section 20 of the 1985 Act. Further, in the correspondence dated 14th June 2010 and 21st June (document 14) the Respondent has referred to these works as one set of works - being undertaken by the same contractors at the same time, as part of an

overhaul of the building - and this mirrors the schedule of works. Any attempt to treat them as separate parcels of work, is artificial, and it is difficult to say with any precision where one parcel of the work ended and another started.

13. It follows that the Respondent is limited to recovering from the Applicant the sum of £250 for these works, being the sum set by statute.

Reasonableness

14. In light of the above finding that the Respondent is limited to recovering £250 for these works, and in the absence of an application for dispensation with the need to comply with the consultation requirements, the Tribunal need not consider whether the sums were reasonably spent or not. We do note that despite the Tribunal making Directions for the filing of evidence the documentary evidence filed by the Respondent on the issue of reasonableness falls far short of what would be needed for the Tribunal to make a proper assessment of the same.

15. For completeness, the Tribunal notes that the lease clearly provides that the Lessee's liability for service charges is 5.26% of the costs incurred, nor 5.28% as demanded. Further, the Respondent's method of calculating the Applicant's liability is less than clear: for example, the invoices from Avondale include payment of VAT at 17.5%, yet appear in the service charge demand net of VAT at 20%.

Administrative Costs

16. The lease requires that a Lessee will obtain consent from the Lessor *prior* to letting the whole of the premises, and that the Lessor can make a charge for legal and surveyor costs incurred by him in doing so.

17. The parties respective positions are as follows: the Applicant says that reasonable costs would be £25; that the Respondent cannot charge this sum retrospectively for past lettings. The Respondent says that the industry norm is £75, and that the sum can be charged annually.

18. The Tribunal finds that the Respondent can only charge as a fee the sum which he has actually incurred (or will incur) in legal and surveying costs on each letting, which sum will nevertheless be subject to a test of reasonableness. It follows that the sum cannot be charged annually, unless the tenant changes annually.

19. The Respondent has adduced no evidence – for example, by way of a invoice or quote from either a Solicitor or a surveyor – to show what costs he has or will incur. The Respondent cannot demand an industry norm if he has not incurred the cost. In the absence of evidence to the

contrary we find that £25 is a reasonable sum to incur in legal and surveying costs.

20. The Applicant cannot now comply with the terms of the lease in respect of the current subletting, as prior consent should have been sought. Equally, there is nothing to prevent to Respondent from granting retrospective consent, to avoid the Applicant being in breach of the lease. The terms of the lease are wide enough to enable the Respondent to recover any fees incurred by him in providing retrospective consent, as clause 2(24) refers to the application being made as "hereinbefore required *or made necessary*". Any sum demanded would be subject to reasonableness, which on the evidence adduced we find to be £25.

Costs

S20C

21. The Respondent has not indicated that he will seek to recover from the Applicant or add to the service charge account the sums incurred by him in responding to these applications. Nevertheless, the Applicant has made an application for us to considering making the Order. The Applicant set out her case fully and clearly in correspondence prior to issuing proceedings, has succeeded in both of her applications. The Tribunal finds that it would be just and equitable in the circumstances to make such an Order.

Costs – Conduct

22. The circumstances in which a party can seek costs against another party to proceedings, on account of their conduct in those proceedings, is set out in Appendix A.

23. The Applicant says that the Respondent has acted frivolously, vexatiously, abusively, disruptively, and unreasonably throughout by (i) consistently failing to justify its position with reasoned logic within the legislative and contractual framework (ii) failed to accept the Applicant's offer to settle prior to and after proceedings were issued (iii) failed to file a statement of case in accordance with the date set in Directions (iv) failed to comply with statutory obligations, and drip fed information to the Applicant rather than making proper disclosure at the outset, and materially only notified her about the major works a matter of days before it started.

24. The Respondent has not responded to this application.

25. We find that the Applicants points are generally well made, and that the Respondent has behaved unreasonably. However, we remind ourselves that it is the conduct of a party during proceedings (and not leading up to it) which gives rise to the facts which could provide the

foundation to the Order being made. The Tribunal finds that: the Respondent has not participated in the proceedings by providing a detailed or appropriate response to the Applicant's case; the disclosure provided on the reasonableness of the Respondent's expenditure falls considerably short of that which would have been necessary to make a finding had the Tribunal found that consultation had been complied with); the terms of the Applicant's attempt in March 2012 to settle were reasonable, but not accepted, and largely mirror the findings of the Tribunal. The Tribunal finds that the Applicant has incurred legal cost as a result of the Respondent's unreasonableness in the proceedings. Although the threshold test is high, we are satisfied that it is met in this case and so Order the Respondent to pay to the Applicant the sum of £500.

Fee Reimbursement

26. The Applicant incurred fees of £150 when issuing the application and setting the case down for hearing. In light of the above findings, we find that the Respondent should pay these costs, particularly taking into account the Applicant's statement of issues and offer to settle before issuing proceedings.

Joanne Oxlade

Chairman

Appendix A

S27A of the Landlord and Tenant Act 1985

"(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter".

Schedule 11 of the Commonhold and Leasehold Reform Act 2002

"5(1) An application may be made to a leasehold valuation tribunal for a determination whether an administration charge is payable, and if it is, as to:

(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable".

S20 of the Landlord and Tenant Act 1985

"(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) a leasehold valuation 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".

S20C of the Landlord and Tenant Act 1985

"(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court , residential property tribunal or leasehold valuation tribunal, or the Upper Tribunal, or in connection with arbitration 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 or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court; in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances".

Paragraph 10 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002

"10(1)A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2)The circumstances are where—

(a)he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or

(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—

(a) £500, or

(b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph".

Regulation 6 of the Residential Property Tribunal Procedure (England) Regulations 2006

"(1) Subject to paragraph (2), in relation to any appeal or application in respect of which a fee is payable under regulation 3, a tribunal may require any party to the appeal or application to reimburse any other party to the extent of the whole or part of any fee paid by him in respect of the appeal or application .

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party or his partner is in receipt of assistance of any description mentioned in regulation 5(2)".