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HM COURTS & TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL

In the matter of applications under section 27A of the Landlord and Tenant Act 1985 (service charges)

Case No.CHI/21UD/LSC/2013/0016

Property:	**Ground Floor Flat,** **1 The Lawn,** **St Leonards on Sea,** **East Sussex TN38 0HH**
Between:	**Maxiwood Ltd** **(the Applicant/landlord)**
	and
	Ryder Gourdeau **(the Respondent/lessee)**

Date of hearing:	19 April 2013
Date of the decision:	4 June 2013
Members of the Tribunal:	Mr M. Loveday BA(Hons) MCIArb Mr RA Wilkey FRICS Ms JK Morris

INTRODUCTION

1. This is a landlord's claim for service charges and other sums arising from a lease of a flat in St Leonards on Sea. The matter has been remitted to the Tribunal by the County Court under paragraph 3 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002.

BACKGROUND

2. The claim concerns the Ground Floor Flat, 1 The Lawn, St Leonards on Sea, East Sussex TN38 0HH. The applicant holds a headlease owner of the building, and the respondent is underlessee of the flat.

3. On 19 July 2012, the applicant issued a claim for payment in Northampton County Court under claim no.2YL18388 supported by detailed Particulars of Claim. The claim sought a sum of £3,088.70 together with solicitors' costs and expenses of £400.

4. The claim included the following Schedule:

PARTICULARS OF CLAIM: SCHEDULE					
Date		**Description**	**Due**	**Paid**	**Balance**
25/12/2010	23/06/2011	Half yearly Service Charge in Advance	148.06		148.06
24/06/2011	24/12/2011	Half yearly Ground Rent in Adv	37.50		185.56
24/06/2011	24/12/2011	Half yearly Service Charge in Advance	258.63		444.19
25/12/2011	23/06/2012	Half yearly Ground Rent in Adv	37.50		481.69
25/12/2011	23/06/2012	Half yearly Service Charge in Advance	258.63		740.32
9/05/2012		External Redec & Repair front & side elev	2052.25		2792.57
24/06/2012	24/12/2012	Half yearly Ground Rent in Adv	37.50		2830.07
24/06/2012	24/12/2012	Half yearly Service Charge in Advance	258.63		3088.70
		Balance to pay	3088.70	0.00	3088.70

5. On 26 August 2012, the respondent filed an Acknowledgement of Service and Defence disputing liability on various grounds. The matter was then transferred to Hastings County Court and on 9 January 2013, DJ Lusty made an order to "Refer [the] file to the Leasehold Valuation Tribunal forthwith". The Tribunal gave directions on 28 January 2013 and the matter was listed for hearing on 19 April 2013. At the hearing itself, the applicant appeared by Mr Kevin Pain of counsel and Mr Darren Wheeler BSc (Hons), a surveyor from the managing agents Austin Rees. The respondent did not appear.

THE LEASE

6. By a lease dated 20 April 2000, the flat was demised for a term of 99 years from 20 April 2000. The lease included the following covenants:

   a. By clause 4.4 on obligation on the part of the lessee to pay an Interim Charge, Further Interim Charge and Service Charge.

   b. By paragraph 13.4 of the Fifth Schedule the landlord could levy a Further Interim Charge where the costs of performing its obligations during a service charge year exceeded the Interim Charge. Such a charge was payable on demand within 7 days of any such demand.

   c. By paragraph 13.1.2 of the Fifth Schedule 1(3) the service charge was defined as being 25% of Total Expenditure. Total Expenditure was in turn defined by paragraph 13.1.1 as the relevant costs of the landlord in complying with its obliga tions under clause 5.5 of the lease.

   d. By clause 5.5.1 of the lease, the landlord was required "to maintain and keep in good and substantial repair and condition:

      5.5.1 the main structure of the Building including the principal internal timbers and the exterior walls and the foundations and the roof thereof with its main water tanks mains drains gutters and rainwater pipes (other than those included in this demise or in the demise of any other flat in the building"

   e. By clause 5.5.2 of the lease, the landlord agreed "as and when the Lessors shall deem necessary":

      5.5.2.1 to paint the whole of the outside wood iron and other work of the Building heretofore or usually painted and grain and varnish such external parts as have been heretofore or are usually grained and varnished."

INSPECTION

7. The premises comprise a semi-detached house in a pleasant residential area of St Leonards of brick under a pitched slate roof. The house itself is on 4 stories (basement and three upper stories) and has been converted into three residential units. The elevations are rendered and painted, although the paintwork to both elevations has deteriorated and is stained. Patch repairs were evidently required to various parts of the rendering. The rainwater goods and balcony railings were badly corroded. Joinery

was exposed, the head of the main street door was rotten and decorative plaster details had deteriorated in places. The steps to the front door were broken and there were weeds in places. To the side elevation was a lightwell which had steel mesh bird netting that was in poor condition. In short, the external condition was poor. The Tribunal was unable to inspect the roof in any detail, but it appeared that the slate covering has not been overhauled for some time. There was weed growth in the guttering.

THE ISSUES

8. The Tribunal's jurisdiction is given by sections 18 and 27A of the Landlord and Tenant Act 1985 ("LTA 1985").

9. The order of 9 January 2013 did not elaborate on which elements of the County Court claim were transferred for the Tribunal to determine. Nevertheless, it is clear that the Tribunal does not have jurisdiction to deal with certain matters included in the County Court claim. These include (a) the solicitors' costs of £400 and (b) ground rent.

10. The Defence in the Acknowledge of Service dated 28 August 2012 accepted that "service charges [were demanded] according to contractual annual agreed contribution". Six issues were raised:
    a. The agents had not demonstrated that the proposed work to the front and side elevations was "essential repair work and not property enhancement/improvement".
    b. The agents had not allowed sufficient time to remedy the disagreement via first a lawful mediator or through a determination by the Leasehold Valuation Tribunal.
    c. Two thirds of lessees were still in discussion with the agents over this point.
    d. The respondent had been abroad since 20 June 2012 and was not kept informed despite the agent having his email address.
    e. A scaffolding tower was erected during June/July and an inspection had been carried out. The respondent had been informed that no urgent repairs were reported to the residents.
    f. The agents had the task of providing evidence that the proposed work was "essential repair work and not just enhancement".

11. Mr Pain submitted that the Defence only disputed liability for the contribution towards external redecorations and repairs in the sum of

£2,052.25. The Tribunal accepts that those relevant costs are the only items specifically challenged in the Defence.

THE APPLICANT'S CASE

12. Mr Pain submitted that the applicant had complied with the consultation requirements for major works set out in LTA 1985 s.20 and Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003. He relied on an initial notice of intention dated 16 February 2011, which included a detailed Schedule of Works prepared by the agent.

13. The Schedule of Works can be summarised as follows:
    a. Paragraph D1.3: repair to various cracks in the render and render repairs
    b. Paragraph D2.5: resin repairs and joinery repairs
    c. Paragraph D3.1-3.3 and D3.5-3.6: removal of weeds, making good, pc sums for roof repairs, checking and clearing of rainwater goods and associated pc sums for rainwater goods repairs and replacing bird netting to side elevation.
    d. Paragraph D3.4: fabricating and installing new railings to the front elevation.
    e. Paragraphs D4.9.1-4.9.5: preparing, painting, staining and treating all previously painted masonry, render, woodwork, metal surfaces, plastic surfaces and self-finished surfaces to the front and side elevations.
    f. Paragraph D5.1: a contingency of £750.

14. Mr Pain also referred to a statement of estimates dated 12 April 2011 and paragraph (b) statement. Attached to these were estimates from Colin A May (£11,550) and United Builders (UK) Ltd of Lewes Estate Sussex (£9,210 incl VAT). In the premises, the evidential burden of showing that the proposed works are works of enhancement or improvement rather than repair shifted to the respondent: ***Schilling v Canary Riverside*** (LRX/26/2005) at para 15. The respondent had failed to challenge any element of cost during the consultation and failed to discharge this evidential burden. Alternatively, the external works were plainly works of repair.

15. The applicant further relied on a witness statement of Mr Wheeler dated 9 April 2013 and Mr Wheeler gave oral evidence at the hearing. Mr Wheeler

confirmed that no responses were received to either notice referred to above until 16 November 2011, some 6 months after the consultation procedure was completed. On that date, the respondent and the occupier of the lower ground floor flat accepted "that some maintenance to the façade is necessary", but raised objections about the quotations obtained for the works. The letter suggested that £10,000 was "twice the real value". The suggestion was that Mr Bingham (at 2 The Lawns) had just carried out an extensive upgrade to the front and side of his property including timber replacement, plaster remoulding and canopy repainting. Using local specialists, the total came to £5,300 including scaffolding. The letter also suggested that a local independent builder Adams Development Ltd had been provided with the schedule of works and had quoted "around £5,000 + VAT" for that work.

16. As a result, Mr Wheeler met with the respondent on 11 January 2012. Specific objections were made to two items in the United Builders' estimate, namely (i) the cost of replacing the front balcony railings and (ii) to the contingency of £750 + VAT. The respondent also suggested another contractor (a Mr Beck). As a result, Mr Wheeler asked United Builders to omit the balcony railings from their quotation and to reduce the contingency sum in the estimate to £400. He informed the respondent of this on 6 February 2012. As to Mr Beck, on 6 February 2012 and 7 March 2012, Mr Wheeler asked for copies of his employer's and public liability insurance certificates. However, no copies were forthcoming. The agent therefore decided to go ahead with the amended estimate from United Builders. The charges were demanded on 21 February 2013.

17. Mr Pain concluded by stressing that the landlord had a wide discretion to select works to be carried out: ***Southall Court (Residents) Ltd v Tiwari & Tiwari*** [2011] UKUT 218 at para 11.

18. Mr Pain also applied for costs in the sum of £500 under Schedule 12 paragraph 10 to the Commonhold and Leasehold Reform Act 2002. He contended that the respondent had behaved unreasonably. The only substantive step taken by the respondent was to put in an Acknowledgement of Service to the County Court proceedings. It had not submitted a Statement of Case to the LVT or filed any properly particularised Defence in the County Court. This caused the applicant to incur significant legal costs in an attempt to anticipate the arguments that might be raised. These legal costs far exceeded the limit of £500.

THE RESPONDENT'S CASE

19. As explained above, the respondent did not attend the hearing. He did not submit any statement of case in the LVT proceedings. The Defence in the Acknowledge of Service dated 28 August 2012 is set out above. It appears to raise two matters:
    a. Are the works described in the Schedule of Works "repairs" within the meaning of clause 5.5 of the lease?
    b. Is the interim service charge "reasonable" under LTA 1985 s.19(2) by virtue of any lack of consultation over the works?

THE TRIBUNAL'S DETERMINATION

20. The Tribunal has considered the works set out in Schedule of Works. It has no hesitation in finding that the works described there all plainly fall within clauses 5.5.1 and 5.5.2 of the lease. These provisions are perfectly standard-form repairing and decorating covenants, and the landlord's obligation is not expressly limited to carrying out only "essential" repair works (which the respondent twice suggests in his Defence). None of the works in the Schedule can be considered an "improvement/enhancement" as suggested by the respondent. On inspection the exterior rendering, joinery, rainwater goods, metalwork and masonry were all in poor condition.

21. As to reasonableness, LTA 1985 s.19 provides:

> **19. Limitation of service charges: reasonableness**
> ... (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

22. As far as reasonableness is concerned, the landlord has carried out full consultation under the 2003 consultation regulations. There is evidence from Mr Wheeler that no immediate response was received to that consultation. It appears that the lessees only made representations several months later. At this stage, the agents (i) made efforts to confirm whether an alternative estimate could be obtained from the respondent's nominee and (ii) adjusted figures in the estimates in response to the respondent's representations. In such circumstances, it cannot be said

that the applicant did not properly consult the lessees or that on this basis the sums claimed were not reasonable under LTA 1985 s.19.

23. As to costs, Schedule 12 to the 2002 Act provides that:

> 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

24. As far as the amount claimed is concerned, the Tribunal is satisfied that the applicant has incurred legal costs of more than £500, even though there was no costs schedule or other evidence produced. It is plain from the applicant's statement of case and the attendance of counsel that it has incurred costs of well in excess of £500.

25. The Tribunal is satisfied that the respondent has behaved "unreasonably" under paragraph 10 of Schedule 12. His only engagement with these proceedings was apparently to file an Acknowledgement of Service raising a number of points. The respondent is entitled to put the applicant to proof, but the lack of engagement in the application has had consequences for the applicant. The applicant has had to prepare to meet a wide range of potential objections to the claim, and to incur costs in doing so. In those circumstances, it was unreasonable for the respondent not to file a statement of case or arrange attendance at the LVT hearing.

26. The one concern that the Tribunal has is that no notice of the application for a costs order seems to have been given to the respondent. The Tribunal notes that there is nothing in the Leasehold Valuation Tribunal (England) (Procedure) regulations for written notice to be given of such a claim. Such an application may be made orally at any LVT hearing. In this case, the Tribunal considers that this was always a possibility, and when deciding not to arrange attendance at the hearing, the respondent always ran the risk that an application for costs under Schedule 12 might be made. Indeed, a lessee is warned of the possibility of such an application in the summary of rights and obligations which accompanies service charge demands under LTA 1985 s.21B (in this case such a summary accompanied the demand dated 21 February 2013 in the papers before the Tribunal). On balance, the Tribunal therefore considers that lack of formal notice of an application for costs under paragraph 10 of Schedule 12 is not a reason to refuse to make an order for costs.

CONCLUSIONS

27. The Tribunal determines under LTA 1985 s.27A that the respondent is liable to pay the applicant on 9 May 2012 a "Further Interim Charge" of £2052.25 for external redecorations and repairs to the front and side elevations due.

28. The respondent has admitted liability for half yearly service charges on account for the period 25 December 2010 to 24 December 2012. The Tribunal does not have jurisdiction to deal with the other sums sought in the Particulars of Claim dated 19 July 2012.

29. In addition, the Tribunal orders that the respondent shall pay costs of £500 to the applicant under paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002.

MA Loveday BA(Hons) MCIArb
Chairman

4 June 2013