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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00BR/LSC/2015/0043**
Property	:	**XQ7 Building, Taylorson Street South, Salford M5 3FN**
Applicant	:	**XQ7 Management Company Limited**
Represented by	:	**Zenith Management (NW) Limited**
Respondents	:	**Mr.&Mrs.V.J.Ellis and Others**
Represented by	:	**Mr.V.J.Ellis**
Type of Application	:	**Landlord and Tenant Act 1985 – s27A** **Landlord and Tenant Act 1985 – s20C**
Tribunal Members	:	**Mrs.C.Wood** **Mr.J.Faulkner**
Date of Decision	:	**6 October 2015**

DECISION

ORDER

1. The Tribunal orders in respect of the 2015 service charge year as follows:

   1.1 that the estimated costs of £43,200 for re-decoration of the internal communal areas are reasonable;

   1.2 that the estimated costs of £46,575 for re-carpeting of the internal communal areas are not reasonable;

   1.3 that the estimated costs of £40,000 for the repair/remediation of the structural steel are not reasonable;

   1.4 that the s20 consultation procedure has not been completed in accordance with the Service Charges (Consultation Requirements)Regulations 2003, ("the Regulations") and the amounts recoverable as service charge from the Respondents for the estimated costs of re-decoration of the internal communal areas are limited to £250 per Respondent; and

   1.5 that the Respondents' s20C application is not granted

BACKGROUND

2. By an application dated 7 April 2015, the Applicant sought a determination as to the liability of the Respondents to pay and the reasonableness of three items of estimated expenditure payable as service charge in the 2015 service charge year, ("the Application"). These were:

   2.1 re-flooring communal areas - £46,575

   2.2 redecoration of communal areas - £43,200

   2.3 repair/remediation of the deteriorating structural steel - £40,000.

3. Directions dated 11 June 2015 were issued and the parties made the following written submissions:

   3.1 Applicant's Statement of Case dated 22 June 2015, together with Appendices A-I, ("the Applicant's Statement");

   3.2 Respondents' Statement of Case dated 14 July 2015, together with Appendices 1-10, ("the Respondents' Statement");

   3.3 Applicant's Reply to Respondents' Statement, together with Appendices A-C, ("the Applicant's Reply");

   3.4 Letter dated 29 July 2015 from Mr.V.J.Ellis setting out comments on the Applicant's Reply, ("the Respondents' Reply");

3.5 Applicant's Statement dated 6 August 2015, ("the Applicant's Supplemental Statement").

4. The parties confirmed in writing to the Tribunal that they did not require a hearing of the Application.

5. An inspection was held on Friday 21 August 2015 at 10am which was attended by Mr.L.Lightfoot of Zenith Management (NW) Limited, as agent for the Applicant. The Respondents did not attend the inspection.

LAW

6. Section 27A(1) of the Landlord and Tenant Act 1985 provides:

6.1 *An application may be made to the appropriate 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.

6.2 The Tribunal is "the appropriate tribunal" for this purpose, and it has jurisdiction to make a determination under section 27A of the 1985 Act whether or not any payment has been made.

6.3 The meaning of the expression "service charge" is set out in section 18(1) of the 1985 Act. It means:

... an amount payable by a tenant of a dwelling as part of or in addition to the rent–

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements, or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

6.4 In making any determination under section 27A, the Tribunal must have regard to section 19 of the 1985 Act, subsection (1) of which provides:

Relevant costs shall be taken into account in determining the amount of a service charge payable for a period-

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

6.5 "Relevant costs" are defined for these purposes by section 18(2) of the 1985 Act as:

the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

6.6 There is no presumption for or against the reasonableness of the standard of works or services, or of the reasonableness of the amount of costs as regards service charges. If a tenant argues that the standard or the costs of the service are unreasonable, he will need to specify the item complained of and the general nature of his case. However, the tenant need only put forward sufficient evidence to show that the question of reasonableness is arguable. Then it is for the landlord to meet the tenant's case with evidence of its own. The Tribunal then decides on the basis of the evidence put before it.

6.7 Section 20C of the 1985 Act permits the Tribunal to order that all or any of the costs incurred by the landlord in connection with these 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 by any other person specified in the application for the order. The Tribunal may make such order as it considers just and equitable in the circumstances.

EVIDENCE

7. The Applicants' submissions in the Applicant's Statement are summarised as follows:

7.1 Zenith Management were appointed 1 January 2015;

7.2 The Application concerned the three items of "exceptional expenditure" (set out in paragraph 2 above);

7.3 a copy of the lease which is in standard form appears at Appendix A, ("the Lease");

7.4 reference is made to the relevant provisions including the Applicant's covenants in the Seventh Schedule , " [T]o keep the Reserved Property...in a good and tenantable state of repair decoration and condition including the replacement and renewal of all worn and damaged parts...", (paragraph 1), and "to maintain...the undercroft parking area...in good repair and

condition", (paragraph 2(b)). The definition of "Reserved Property" includes both internal and external communal areas;

7.5 the internal Communal Areas have never been re-decorated or re-carpeted;

7.6 reference is made to an Annual General Meeting held on 4 September 2014 at which this proposed expenditure was discussed and approved; the Minutes are attached at Appendix C;

7.7 the 2015 estimated service charge budget is attached at Appendix D. This includes the three items of expenditure, the subject of the Application. The costs of the re-decoration and re-carpeting are supported by contractors' quotes which appear at Appendices E and F;

7.8 the sum of £40,000 included for the structural steel repairs is described as "...a provisional sum...to be included for initial repairs to areas of most significant disrepair..", (paragraph 18c), and continues, "the full extent of the repair/remediation of the deteriorating steel structure remains unknown...", (paragraph 20);

7.9 it is confirmed that the service charge is calculated on the proportion that the square footage of each apartment bears to the total square footage of the Building;

7.10 it was recognised that, as the amount payable as service charge in respect of the costs of these works by some leaseholders would exceed £250, it was necessary to carry out a s20 consultation. A Notice of Intention to Carry Out Works dated 22 December 2014, ("the Notice"), was issued to all leaseholders and is attached at Appendix I.

8. The Respondents' submissions in the Respondents' Statement are summarised as follows:

8.1 the fundamental issue is not the proposed works (in respect of which there is "...little dispute as to the[ir] desirability..."), but the Applicant's failures to communicate, plan, control expenditure and engage members in a co-ordinated strategy for the long-term maintenance of the Building. The Applicant's decision to bring the matter before the Tribunal is considered to be unnecessarily "adversarial" in this context;

8.2 the works are wrongly described as "exceptional/one-off works" by the Applicant. The re-decoration and re-carpeting are cyclical works which are entirely predictable whilst the problems with the structural steel have been known for some time. Again, the real issue is the Applicant's failure to plan, to establish the necessary reserve funds and to control expenditure so that funds are available for these works;

8.3 reference is made to the AGM held on 4 September 2014 and the binding nature of any of the resolutions passed/decisions made at that meeting is challenged, having regard to the number of leaseholders who were present/represented at the meeting;

8.4 for many of the Respondents, the first notification of the proposed works was the 2015 service charge demand and the Notice. As a result of the 2014 deficit and the inclusion of the works in issue in the 2015 budget, the service charge for 2015 is 65% higher than the 2014 service charge;

8.5 Mr.Ellis made observations as part of the s20 consultation to the effect that the increase between the 2014 and 2015 service charges was unaffordable and claims that the Applicant has "...totally ignored their statutory obligations to have regard to the affordability of their proposals", (paragraph 26). In support of this contention, the Respondents cite the Upper Tribunal decisions in Marie Garside and Michael Anson v RFYC Limited and B R Maunder Taylor [2011] UKUT 367 and Miss C Waaler v London Borough of Hounslow [2015] UKUT 0017. They note that some of the proposed works are referred to as "improvements", as "improving the building", and "enhancements";

8.6 the Respondents claim that the Notice is defective because it refers to "an agreement" in the singular where it is now clear that the Applicant intends to enter into 3 separate agreements for the works. The Respondents should therefore have been invited to propose the names of 3 separate contractors;

8.7 further, the s20 consultation is incomplete and the Applicant has given no indication of how they have had regard to the observations received from leaseholders. Specifically, the Applicant has had no regard to observations made by Mr.Ellis that they should have considered the financial impact on leaseholders of the proposed works;

8.8 the Tribunal is invited to make determinations that either (i) the estimated costs of the proposed works are not "relevant costs", or (ii) that the costs should be limited to £250 per leaseholder;

8.9 the Respondents claim that (i) re-decoration is only necessary in those parts of the Building where there has been damage from water ingress or otherwise; (ii) re-carpeting is unnecessary because dirty/stained carpet tiles can either be cleaned or individually replaced; and (iii) whilst it is accepted that the works to the structural steel in the car park are in need of "some attention....in the absence of any actual detailed plan of what needs to be done, it seems unfair to demand monies for this when it may be unnecessary", (paragraph 36);

8.10 the Respondents suggests that the re-decoration and re-carpeting works should be done only when sufficient funds have been accumulated in the reserve fund to meet the expenditure. It is suggested that the Applicant should aim to increase the reserve fund by £10,000 in the current year. The

Respondents also suggest that the maximum that can be demanded in any one year from leaseholders is subject to a £250 limit;

8.11 the Respondents claim that their s20C application should be granted on the basis that the making of the Application by the Applicant was "unjustified and premature", (paragraph 40), and "entirely unnecessary", (paragraph 44). The Respondents refer to a "neutral evaluation" which was commissioned by them following their receipt of the Application and which appears at Appendix 10. This suggested that the Applicant should adopt a more conciliatory approach to the proposed works and seek to work in collaboration with the leaseholders. The Respondents suggest that this was dismissed by the Applicant who has "chosen unnecessarily to take an adversarial landlord and tenant approach".

9. The Applicant's submissions in the Applicant's Reply are summarised as follows:

9.1 the claim that they have adopted an adversarial approach is refuted: attempts to work collaboratively with the Respondents were made but failed and the Applicant now considers that bringing the matters before the Tribunal is in all parties' best interests;

9.2 the suggestion that the Applicant has, in any way, sought to "mask" the costs of these works is also refuted: "exceptional" is an accepted accounting term for an item arising from normal activity but which is greater or lesser than would be expected. The proposed works and their estimated costs were clearly set out in the 2015 budget;

9.3 the claim that the Applicant has failed to adequately communicate the intention to do these works is denied, and in support of this, the Applicant states that they were included in the agenda for the AGM held on 4 September 2014 which was circulated to all leaseholders; they were discussed at the AGM itself ; the discussions were recorded in the AGM minutes; and they were referred to within the letter dated 23 December 2014 enclosing the 2015 service charge demand and budget;

9.4 the Applicant refers to the history of the development and, in particular, to the Applicant's limited involvement in its management until mid-2013. The Applicant accepts that there has been a historic failure to establish a reserve fund. However, it claims that since 2013 the Applicant's directors have acted to try to ensure that the development is put on a sound financial footing;

9.5 with regard to the AGM, the Applicant states that all leaseholders were invited to the AGM. It is for the leaseholders to decide whether or not they choose to attend, although the Applicant considers that this is the most appropriate forum for discussion of matters such as these works. The Applicant claims that the AGM was quorate and the resolutions passed were validly passed;

9.6 the Applicant calculates that the Respondents constitute 11% of the total number of leaseholders. It is stated that, other than the Respondents, no other objections have been raised as to the reasonableness or affordability of the proposed works;

9.7 in addition to the mandate to proceed with these works which the Applicant considers it has been given by the decisions of the leaseholders attending the AGM, the Applicant considers that not to do these works would mean that they would be in breach of their obligation set out in the Seventh Schedule to the Lease to keep the Reserved Property and all fixtures and fittings in a good and tenantable state of repair, decoration and condition (including the renewal and replacement of all worn and damaged parts);

9.8 the Applicant states that it has put the second stage of the s20 consultation process "on hold" pending the Tribunal's determination of the Application;

9.9 the Applicant refutes that it has ignored the affordability of the proposed works. It makes the point that many of the Applicant's directors are not only leaseholders but are also owner-occupiers and will therefore be contributing to these costs, and that affordability was therefore a factor which was taken into consideration;

9.10 in this case, the amounts which leaseholders will be asked to contribute range from £347.80 to £540.64 per apartment. This contrasts with the significantly larger amounts which leaseholders were being asked to pay in the Upper Tribunal decisions referred to by the Respondents in the Respondents' Statement;

9.11 the Applicant denies that the works are "aspirational"; they do not constitute "an upgrade" and nor will they significantly change the development. Whilst the Applicant may have referred to the works as "improvements" and/or "improving" the development in communications with the leaseholders, the substantive nature of the works are "...repair works to put the development back into its original state of repair and expected standard", (paragraph 14);

9.12 with regard to the claim that the Notice is defective, the Applicant contends that the use of the singular, rather than the plural, in the Notice is not "...a material factor affecting the validity [of the Notice]...and [the Notice] is valid and in keeping with the spirit of the legislation", (paragraph 15). The Applicant reiterates the Respondents' request for the Tribunal to make a determination on the validity of the Notice. In doing so, the Applicant requests that the following matters are taken into consideration: (a) the purpose of the consultation procedure to protect leaseholders from paying for inappropriate works or paying more for works than is appropriate; (b) the prejudice to the leaseholders of the use of the singular rather than the plural; (c) the consultation procedure is incomplete and any procedural and/or

administrative errors can be remedied by re-issuing the first stage notice (although this would cause additional delay and costs for the Applicant); (d) since none of the leaseholders have put forward any alternative contractors, it is considered unlikely by the Applicant that changing the Notice from the singular to the plural would change this; (e) the letter accompanying the Notice used the plural when referring to observations and nominations for contractors; (f) in issuing the Notice, the Applicant was acting within "the spirit" of the legislation;

9.13 it is noted that, if the Applicant were to accede to the Respondents' suggestion to collect reserve funds sufficient to meet the proposed expenditure of the proposed works, it would take 12-13 years before the works were complete;

9.14 with regard to the s20C application, the Applicant states: (i) that the making of the application is a change of position by the Respondents as they stated at the Case Management Conference held on 9 June 2015 that costs should be recoverable from the service charge; (ii) whilst the Respondents claim that the Application is "unjustified and premature", they had previously made it clear that, if it was not possible to reach agreement between the parties, an application to the Tribunal was the appropriate course; (iii) the Applicant dismisses the "neutral evaluation" as a proper attempt at dispute resolution; (iv) the Applicant is a resident-controlled management company whose only revenue is through the collection of service charge. To prevent it from recovering its costs through the service charge would "...place it in an extremely precarious position going forward and would not be in the overall interest of the development or its Leaseholders", (paragraph 23).

10. The submissions in the Respondents' Reply are summarised as follows:

10.1 the Respondents dispute that the AGM is the appropriate or customary forum to consult with leaseholders on such matters;

10.2 the Respondents dispute (i) that the AGM minutes were circulated; (ii) that they represent only 11% of the leaseholders: they suggest that the proper figure is 18%; (iii) that no other leaseholder has raised any objection and refers to correspondence with two leaseholders, Mr.J.Dilsaver and Mr.S.Sriam; (iv) that the Applicant's assumption that because no-one else has complained that entitles them to proceed, and that payment of the 2015 service charge means they agree with the proposed works; (v) the Applicant's suggestion that it is inappropriate to "lump together" the 2014 balancing charge and the 2015 service charge, as they are 2 different things. From the leaseholder's point of view, they are all payable in 2015 and the financial impact of this should have been fully considered;

10.3 the Respondents also note that the Applicant has failed to meet its obligation under the Lease to provide audited accounts.

11. In the Applicant's Supplemental Statement the Applicant confirms that (i) Mr.Sriam is one of the Respondents and cannot therefore be regarded as an "other leaseholder"; (ii) whilst Mr.Disalver did initially raise certain objections, these were satisfactorily resolved by the Applicant.

REASONS

12. In making its determinations set out in paragraph 1 of this Decision, the Tribunal had regard to the following matters:

    12.1 in view of its observations at the inspection of the Building, and the Respondents' acknowledgement of the "desirability" of undertaking all of the proposed works (albeit not within the timeframe proposed by the Applicant), the Tribunal considered that:

    (i) in respect of the re-decoration of the internal communal areas of the Building, in undertaking these works, the Applicant was discharging its obligation under paragraph 1 of the Seventh Schedule to keep these areas "...in a good and tenantable state of repair decoration and condition..." and that the costs constitute "relevant costs" as being "reasonably incurred" within s19(1)(a) of the 1985 Act;

    (ii) in respect of the re-carpeting of the internal communal areas of the Building, that there was a marked distinction between the condition of the existing carpeting on Levels 4-7 and on Levels 8-13, although the Tribunal considered that the general condition of the carpeting was such as to justify its renewal in the foreseeable future. Accordingly, whilst it considered that the Applicant was acting reasonably in beginning the process of renewing the carpeting throughout the Building, it did not consider it was necessary, and therefore reasonable, for all of these works to be undertaken in the 2015 service charge year. Rather this could be phased over 2 service charge years beginning with the lower levels of the Building;

    (iii) in respect of the structural steel works, there appeared to have been very limited investigation of the cause of the problems, as acknowledged by the Applicant in its evidence, (please see paragraph 7.8 above). The £40,000 requested from the leaseholders appears to be the Applicant's "best guess" as to the anticipated costs of the repairs without any supporting expert evidence as to what works are required to address the problems (which it was apparent from the inspection undoubtedly exist). The Tribunal considered that the proper course of action by the Applicant was to instruct suitably qualified and insured professionals to fully investigate the matter and to then obtain estimates of the costs of works identified as required to remedy the problems. It is noted that these costs may be more or less than the £40,000 requested from the leaseholders, and may require a s20 consultation to be undertaken. The

Tribunal is satisfied that it is implicit within the terms of the Lease that the costs of employing such professionals to undertake this report (which is necessary for the Applicant to discharge its maintenance and repairing covenants) are recoverable as service charge;

12.2 the Tribunal was satisfied that none of the proposed works constituted "improvements" or "enhancements", (notwithstanding the Applicant's reference to them as such), but were works properly to be carried by the Applicant in discharge of its maintenance and repairing covenants under the Lease, the costs of which are properly recoverable as service charge. In this respect, the Tribunal referred to the judgment of Judge McGrath's in Miss C Waaler v The London Borough of Hounslow at paragraph 45 where she says, " In my view, Garside is limited in its ambit. Where works of repair are required and there is a reciprocal duty on a leaseholder to contribute to the cost of repair then the lessee's means are usually irrelevant to the issue of whether the costs are reasonably incurred". The Tribunal therefore considered that, as a matter of law, the Applicant was not required to take into consideration the financial impact on the Respondents (or the leaseholders generally) of the costs of the proposed works;

12.3 the Tribunal was satisfied that the Notice was not defective because of the use of the singular rather than the plural. However, as acknowledged by the Applicant, the s20 consultation procedure has not been completed, and having regard to the time that has elapsed since the issue of the Notice and the request for observations and the Applicant's apparent failure to have regard to the Respondents' observations, the Tribunal considers that the Applicant has failed to comply with the s20 consultation procedure and is therefore limited to recovering £250 from each of the Respondents in respect of the estimated costs for re-decoration of the internal communal areas of the Building. It is noted that the Applicant has not submitted a s20ZA application;

12.4 the Tribunal considered that it was just and equitable in all the circumstances not to grant the Respondents' s20C application as it was satisfied that the parties' discussions had reached an impasse which made it unlikely that any resolution could be reached save by a Tribunal's determination. The Tribunal did not therefore agree with the Respondents that the Application was "premature and unjustified" or "entirely unnecessary". Further, whilst the Tribunal has made determinations to the effect that the costs sought to be recovered as service charge in the 2015 service charge year for re-carpeting and structural steel repairs are unreasonable, this relates to the phasing of the works in the case of the re-carpeting and to the methodology for ascertaining the costs in the case of the structural steel repairs. In both cases, the Tribunal is satisfied that costs for such works once properly time-apportioned or identified are properly recoverable as service charge from the Respondents.

13. The Tribunal also makes the following points which do not form part of the Decision:

13.1 there is no provision within the Lease for the collection of monies as service charge for the purpose of establishing a reserve fund. The Tribunal considers that the establishment of such reserve funds is to the benefit of landlords, management companies and leaseholders alike and fully understands the Applicant's rationale for doing so. The Applicant may wish to consider with the leaseholders the most cost-effective way of providing authority for the establishment and maintenance of a reserve fund under the terms of the Lease, particularly in view of the Respondents' comments as to the desirability of doing so; and

13.2 the Respondents are correct in pointing out that the terms of the Lease provide for the auditing of service charge accounts.