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MAN/00CY/LSC/2010/0045

Residential Property Tribunal Service

Decision of the Leasehold Valuation Tribunal in respect of Apartments 23 & 24 Calder Edge and 100, 101 & 103 Troooper Lane, Halifax, HX3 9LS

Landlord & Tenant Act 1985 - Section 27(A) & Commonhold & Leasehold Repair Act 2002 – Schedule 11, paragraph 5.

Applicant:	Calderdale Management Company Limited, represented by Mr J. Normington of counsel.
Respondent:	Mrs M. L. Dales represented by Mr H. Derbyshire of counsel.
Dates of Hearing:	2/8/2010
Date of Decision:	3/8/2010
Members of Tribunal:	Mr A. M. Baker, LL.B. (Chair) Mr C. R. Wormald, FRICS Mrs C. M. Hackett, JP

Inspection and Interests Held and Background

1. The Tribunal inspected the Calder Edge and Trooper Lane development and its environs prior to the hearing, both externally and as to the common parts, internally; no access being afforded to any of the 5 subject units. The parties agreed that the 5 properties (comprising the 2 flats at Calder Edge and the 3 houses at Trooper Lane) were held on essentially identical leases of 999 years at an initial annual ground rent of £150 with an annual service charge being payable, the amount of which being dependent on whether a unit was a flat or a house. The Applicant was a party to the leases as the nominated Management Company thereunder.

2. The entire development was built in 2005-6 and comprises 9 houses and 2 identical blocks of 12 flats each on either side of a service road being constructed of Bradstone (or equivalent) and with tiled roofs on an elevated and exposed site above Halifax. Every unit on site is in practice held by the respective tenants on a buy-to-let basis, the site being some distance from the nearest shops but having a bus stop adjacent to it.

3. The site is currently poorly maintained for reasons to be explained hereafter. The verges and grassed areas are overgrown. Several external light fittings are broken. The outside of windows are grimy. Neither flat block's lift was in use. The common parts were fairly dirty and clearly had not been cleaned for some time. In addition, one external bin store was out of use and another damaged. There was no evidence however of any structural damage on site, but merely of superficial defects.

4. It is common ground that the history of this site is somewhat chequered, in that the quality of initial construction thereof was unsatisfactory and very soon after its physical completion and around the time of the Respondent legally completing her acquisition of all her 5 units, the roof came off one flats' block in inclement weather in January 2007 and partially came of the other flats' block, rendering the properties temporarily uninhabitable. Disputes between, inter alia, the developer, the contractor, the insurer and the NHBC ultimately led to repairs being carried out and tenants receiving a service charge holiday pending re-occupation. As a result also, much of the service provision was suspended and several tenants declined to then resume payments thereafter, resulting in the Applicant's constantly being under-funded to finance the services obligations specified in the leases and provided for in annual service charge budgets calculated as required.

5. After the developer went out of existence soon afterwards, the Applicant was able in 2009 to authorise the managing agent (Countrywide) to take county court proceedings against the tenants of the 15 units then substantially in arrears. Allegedly, all units bar the subject ones are now substantially up to date and this matter was referred to the Leasehold Valuation Tribunal for assessment of the reasonableness of the disputed service charges for 2008 and 2009, on 1/4/2010 by Pugh D.J., sitting in Altrincham County Court.

6. Directions were issued to the parties on 24/5/2010 but the Respondent has not complied with them and has totally failed to engage with the Tribunal, despite correspondence reminders, either personally or via her solicitors of record. She did not appear at the hearing but wholly unexpectedly, was represented by Mr Derbyshire.

The Hearing

7. The hearing was held at the Halifax Training & Development Centre and started with Mr Derbyshire seeking to serve a fairly brief undated and unsigned Respondent's statement of case with 5 attached copy documents from third parties. Despite the usual warnings having been previously given to the Respondent, to give better structure to the hearing, after a short adjournment for consideration thereof, the

Tribunal allowed the statement and 3 of the annexes to be admitted, with the Applicant's consent.

8. The Applicant's case, as presented, essentially was that under the Respondent's leases, she had covenanted under Clause 4.3 to pay the annually estimated service charge in advance, together with any adjustments thereto when they fell due. Further, under Clause 8.11.1, no set-off or deduction was permitted and any disputes should be raised as a separate matter. It is claimed such had not occurred and that over 2008 and 2009, arrears from the Respondent totalling £5,410.49 had accumulated, comprising unpaid insurance, service charge and administration fee arising from the arrears accrued.

9. Mr Normington, via the evidence of Mr Lates of Countrywide, readily acknowledged that several items of service provision had either not been carried out at all or had been progressively/drastically reduced but this was solely due to a lack of received service charge from tenants at large to fund same. The use of funds that were held had to be prioritised to cover the maintenance of insurance, health and safety, the chasing of those in arrears and the payment, when funds so permitted, of the agents. In default of third party introduction of funding, which did not occur, the Applicant had no other viable choice in context and its behaviour was entirely reasonable. Whilst the deterioration of facility that had occurred was unfortunate, it was the inevitable consequence of financial deprivation by certain tenants frequently as here, remotely based, who failed to recognise the inevitable outcome of their own actions to the detriment of all. For example, the budgeted service charge expense for 2009 was £19,720 + insurance premium but as at 27/1/2010, the accumulated arrears amounted to £15,371, so putting the Applicant and Countrywide into a wholly impossible position necessitating the taking out of a temporary loan to fund the payment of the insurance premium as it fell due. In addition, the proposed roadway cyclical maintenance fund had not been funded either as intended and all tenants so advised accordingly, as with the financial position at large. In 2008, management fees had been claimed well below the budgeted figure and in effect, Countrywide had subsidised the tenants, for although their maintenance role was diminished de facto, they more than made up for it in time spent by effectively financially fire-fighting in all its various aspects, so behaving entirely reasonably. Accordingly, the budgets were entirely reasonable when they were drawn and submitted in anticipation of their implementation, funding have been due and payable in advance from the tenants. This was in no way diminished retrospectively by the absence of works as such was the inevitable consequence of the delays in settlement which could only have the effect of inevitably exacerbating the position. The practical effect of arrears now having very largely being made up (save for by the Respondent), is that the funds received would enable the carrying out of the accumulated outstanding works and, if such resulted in a surplus, tenants would be credited accordingly against future service charge levies in future years once the site was back on an even keel.

10. Mr Derbyshire, via the Respondent's statement of claim response, effectively conceded responsibility for the vast bulk of the evidenced invoices in the Applicant's

bundle which were shown to have been paid which were characterised at being 'in excess of £3,000 + VAT' (but absolutely no specific figures or allocations were volunteered in respect thereof). However, he did identify a few small payments made by Countrywide not allegedly supported by invoices. It was recognised that they could be said to be covered by the principles of de minimis in the round, but more importantly, as they had not been raised prior to the hearing, Countrywide could not be expected to have the relevant paperwork immediately to hand in respect of same and so such could not be held against it. More substantially, the main thrust of Mr Derbyshire's argument was that the reasonability of the service charges raised had to be looked at in the light of what occurred in reality and not merely as such were projected. Even if the actual underspend was due to the lack of funding from recalcitrant tenants, including the Respondent, such original projections could not properly be carried forward to allow it to unwind in time once matters have been regularised, i.e. it is what actually happened retrospectively that should count. In addition, he submitted that the administration fee charged by Countrywide for preparing the case for legal proceedings against the Respondent, was disproportionate, unreasonable and contained some element of double charging.

Tribunal Findings

11. The Tribunal feels this is a very unfortunate case where there are no winners, as events flowed from a badly built development and the consequences of its problems. However, for all tenants, the principle of caveat emptor applies to their respective initial purchases and the bizarrely ostrich-like attitude many have exhibited by refusing to fund service charges raised, could only have the inevitable consequence of the downward spiral in provision that indeed occurred to general detriment.

12. The principal difference in approach between the representatives was whether the Tribunal's job was to consider the reasonableness of the service charges raised at the time they were levied, or with 20/20 hindsight retrospectively in the light of the events by way of under-funding that unfolded. The lease provisions seem to us to be clear and unchallenged; the tenants are to pay in advance together with subsequent adjustments without set-off or deductions being permitted. This the Respondent has singularly failed to do and has so alone, been responsible for 15% of the estate's under-funding, an onerous responsibility which largely contributed to the situation that then arose. Mr Lates, who the Tribunal found to be a witness of truth and administrative efficiency, gave an unequivocal assurance which the Tribunal accepted, that the effect of the amelioration in the arrears problem would be that the outstanding works would now be carried out, services reinstated and a more normal maintenance regime put in place with tenants being credited with any surplus arising. This is as it should be, but in no way invalidates the reasonableness or otherwise of the original figures if they were valid at the time of creation and issue. To decide otherwise would be a nonsense. Using its own knowledge and experience, the

Tribunal finds, that both the issued 2008 and 2009 service charge figures were, after close examination, indeed fully reasonable under the terms of the legislation and so were and are now due and payable by the Respondent. This includes the subsequently added administration fees added due to the Respondent's default and who, by her own short-sightedness and breach of covenant, along with certain other tenants, have been the architects of their own downfall, unfortunately taking with them, the tenants who have behaved responsibly and reasonably throughout.

13. In view of the Respondent's failure to engage with the Tribunal process in advance as required, as explained above, the generalist and admittedly de minimis questions raised orally at the hearing without prior notice, will not be dealt with here in detail, especially as the Tribunal saw no merit generically in them.

14. The Tribunal declares that the 2008 and 2009 service charge accounts submitted by the Applicant to the Respondent were both entirely reasonable and duly payable in full. It further directs that a copy of decision to be lodged forthwith with Altrincham County Court in respect of the stayed proceedings between the parties hereto.

A. M. Baker
Chairman

Date: 6/8/2010