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HM COURTS & TRIBUNALS SERVICE
LEASEHOLD VALUATION TRIBUNAL

Property	:	**8, 9 & 11 Quarry Rigg, Bowness on Windermere, Cumbria, LA23 3DT**
Applicants	:	**Mr J Dunn (Flat 9), Mr P Brooks (Flat 8) and Miss L W S Wong (Flat 11)**
Respondent	:	**Quarry Rigg Management Limited**
Case number	:	**MAN/16UG/LSC/2012/0017**
Date of Application	:	**6 February 2012**
Type of Application	:	**Application for a determination of liability to pay and reasonableness of service charges**
The Committee	:	**P J Mulvenna LLB DMA (chairman) P Livesey FRICS**
Date of decision	:	**1 August 2012**

ORDER

That the element of the charges incurred by the Respondent in 2009/10 and 2010/11 in respect of window replacements which can be recovered as a service charge under the Lease from the Applicants is limited to an equal share in common with the owners of the other Shops and Flats.

INTRODUCTION

1. By an application dated 6 February 2012, the Applicants applied for a determination as to the payability and reasonableness of the service charges in respect of 8, 9 and 11 Quarry Rigg, Bowness on Windermere, Cumbria, LA1 4JR ('the Property') for the years 2009, 2010 and 2011.

THE PROPERTY

2. The Property comprises three three-bedroom, self-contained apartments in a purpose built development containing 18 shops and 83 apartments. ('the Development'). Each of the apartments comprising the Property is held under identical leases. The lease produced to the Tribunal was that in respect of Flat 9. It was made on 13 August 1996 between (1) Quarry Rigg Management Limited and (2) John David Dunn and Ann Dunn for a term of 999 years from 30 September 1995. The Tribunal accepts that the provisions in that lease are the same in respect of all three apartments comprising the Property and references hereafter to 'the Lease' are to be construed accordingly.

THE INSPECTION

3. On 1 August 2012, the Tribunal inspected the Property. At the inspection, the Applicants were represented by Mr J Dunn. The Respondent was represented by Mrs M Fenna, chairman, Ms G Marson, company secretary, and Mr J Kemp of Counsel.

THE PROCEDURE

4. Directions were issued by a procedural chairman on 24 February 2012, amended on 28 March 2012 on application by the Respondent, further amended on 16 May 2012 on application by the Applicants and again amended on 16 July 2012 on application by both parties.

5. The substantive hearing of the application was held at Kendal Magistrates' Court, on 1 August 2012 at 1.00 pm. The Applicants were represented by Mr Dunn, accompanied by Mr W O'Leary. The Respondent was represented by Mr Kemp.

6. The Tribunal had before them the written evidence and submissions of the Applicants and the Respondent. They heard oral evidence from Mr Dunn on behalf of the Applicants and oral submissions from Mr Kemp on behalf of the Respondent.

THE ISSUES FOR DETERMINATION

7. The Applicants asked for a determination of the reasonableness of the service charges for the financial years 2009/10 and 2010/11. In particular, the Applicants challenged the reasonableness of the charges for replacement windows There was no dispute as to the need for the works, the quality of the works or the cost of the works as a whole, although the Applicants claimed that the Respondent should have undertaken a fresh consultation exercise on the liquidation of the original contractor and that some of the replacement windows did not conform with Building Regulations in relation to means of escape in case of fire..

8. The agreed facts are that the windows at the Development were single glazed and, in some cases, were showing signs of deterioration. This led to their replacement by UPVC double glazed units. The evidence before the Tribunal is that the replacement had elements of both repair (in respect of deteriorated windows) and improvement (by the provision of double glazing). The Respondent has sought to recover the costs

incurred on the basis of a degree of benefit calculation. The Applicants contend that there should be an equal contribution for all in accordance with the Lease.

9. The final costs of the works have not yet been determined and, whilst interim demands have been made, the total service charge proposed to be demanded cannot be calculated until the final accounts have been settled.

THE LEASE

10. The Tribunal has read and interpreted the Lease as a whole but in reaching its conclusions and findings has had particular regard to the following matters or provisions contained in the Lease, none of which were the subject of dispute or argument by or on behalf of the parties:

    (a) Clause 20 of the Sixth Schedule which makes provision for the Applicants to contribute to the costs , etc, incurred by the Respondent in carrying out obligations under the Lease; in particular the contribution is expressed as being 'an equal share in common with the owners of the other Shops and Flats';

    (b) Clause 4 of the Seventh Schedule which sets forth the Respondent's obligations for keeping 'the Reserved Property and all fixtures and fittings therein and additions thereto in a good and tenantable state of repair and redecoration and condition';

    (c) Clauses 11 to 13 which provide for keeping accounts and for the recovery of costs incurred in the discharge of those obligations.

THE LAW

11. The relevant law is contained in the following provisions of the Landlord and Tenant Act 1985:-

(i) Section 27 A(1) provides that '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... (c) the amount which is payable'.

(ii) Section 27 A(3) provides that an application may also be made 'if costs were incurred '.

(iii) Section 19(2) states that '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'.

(iv) Section 20(2) provides –

'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.'

(v) Section 27A provides, so far as it is material to the present case –

'(4) No application under [the provisions relating to the determination by a leasehold valuation tribunal of the payability of service charges] may be made in respect of a matter which –
(a) has been agreed or admitted by the tenant...

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

THE TRIBUNAL'S DELIBERATIONS

12. The Tribunal considered the evidence and submissions and relied on its own knowledge and expertise to address the matters in issue.

13. The issue before the Tribunal might be expressed simply as follows: is the cost of replacing windows and doors at the Development recoverable under the Lease on the differential basis proposed by the Respondent?

14. The Respondents have relied in their evidence and submissions on the nature of the work and have sought to rely on Section 20 of the Landlord and Tenant Act 1985 as a vehicle to support their basis for the apportionment of the expenses incurred. In this respect, it was originally argued that the works were improvements rather than repair or maintenance and were the subject of particular consultation under Section 20 of the Landlord and Tenant Act 1985. At the hearing before the Tribunal, Mr Kemp indicated that, having considered the decision of the Upper Tribunal in *Craighead -v- Islington Homes Limited*, it was now accepted by the Respondent that the element of improvement in the works was not relevant to the issues before the Tribunal.

15. A detailed history (with supporting evidence) has been provided by the Respondent of agreement by the Leaseholders, both collectively in Annual General Meetings and severally in a ballot of their views. The Tribunal is satisfied on the evidence before them that the Respondent's basis for apportionment was canvassed fully and openly throughout the consultation process, although there was no reference in the consultation to apportionment provisions contained in the Lease. The minutes of the Annual General Meeting held on 26 April 2008 record (at minute 7) that there should be 'an assessment... for each flat...according to the number and size of windows in that flat...' The second question in the ballot conducted on 30 July 2008 was in these terms: 'Do you wish the cost to be recovered by a supplementary quarterly Service Charge over a fixed time scale but varying according to the number of windows in your flat...?' The first two Applicants (Mr Dunn and Mr Brooks) voted in favour of the proposals. The third Applicant (Miss Wong) did not complete a ballot paper.

16. It was submitted by Mr Kemp that, by voting in favour of the proposals, the first and second Applicants had agreed to the proposed method of calculating the service charges and were debarred from making an application to the Tribunal by Section 27A(4) of the Landlord and Tenant Act 1985. In relation to Miss Wong, Mr Kemp acknowledged that she had not voted at the ballot, but submitted that she was, nonetheless, caught by the provisions. He relied on *Julian Shersby -v- Grenehurst Park Residents Co Ltd [2009] UKUT 241 (LC).* The Tribunal has considered these submissions and found as follows.

17. If a tenant is to be found to have agreed or admitted any matter so as to forfeit his or her right to make an application for a determination of an issue by a leasehold valuation tribunal, he or she must be seen to have done so freely, without undue pressure or influence and in the full knowledge of all material facts. In the present case, it is clear that the Respondent was open about the proposed method of apportionment of the costs, but did not at any stage refer to the provisions for apportionment which were contained in the Lease, although there was arguably an implicit reference in the second question on the ballot paper. It was apparent from the outset that the provisions in the Lease were not presented to the leaseholders as an option. The proposals for funding the window replacement programme was predicated on the basis of that there '...would be a supplementary Service Charge...[which would]...naturally, vary from flat to flat.' (See Mr Snowden's letter of 30 July 2008 which was distributed to the Leaseholders with the ballot papers). Moreover, the ballot papers contained no reference to the apportionment provisions in the Lease – it simply asked for a vote as to whether or not the windows should be replaced and how the voter preferred to pay his share on the predetermined differential basis. The burden of the information and proposals presented to the leaseholders strongly implies that the works would not have been undertaken had the differential contribution not been agreed by those who responded to the ballot.

18. Mr Dunn gave evidence, which the Tribunal accepts, that, at the material time, he felt that he had no choice. If he wanted the windows to be replaced, he had to vote on the questions posed and could not raise other issues. The provisions in the Lease were not, however, something which he contemplated. In the absence of express reference to that position by the Respondent, it had simply not occurred to him. Mr Brooks did not appear before the Tribunal, but it is reasonable to assume that he had the same inadequate understanding of the position.

19. Mr Kemp submitted that a leaseholder could reasonably be expected to know the provisions in the lease and that reference to 'a supplementary Service Charge' was sufficient to alert him or her to the issues which were now being raised. That submission is not entirely without merit, but the position must be assessed against all relevant factors. The Applicants are lay people with no legal training. They were faced with an unequivocal proposition by the Respondent said to have been

formulated with the benefit of legal advice. The proposition did not, in fact, accurately represent the position because it failed to address the basis of apportionment under the Lease. The Tribunal would not go so far as to say that the position was misrepresented, because it does appear that the Respondent's officers had an erroneous and imperfect understanding of the position. Nonetheless, the leaseholders, including the Applicants, were misled, albeit innocently, by the omission of material information in the presentation of the proposals. They acted as they did in the mistaken belief that the only substantive question was whether or not the windows should be replaced; the questions as to payment related only to instalments, not the basis of apportionment which had already been determined unilaterally by the Respondent. There had been no reference to the leaseholders on the question of apportionment at any stage of the proceedings.

20. In these circumstances, the Tribunal finds that the first and second Applicants have not agreed or admitted the matters now under consideration. The same would apply to the third Applicant, but the Tribunal have, nonetheless, considered her position on the basis of *Shersby*. The judgement contains no statements of principle but applies Section 27A(4) and (5) of the Landlord and Tenant act 1985 to the facts of the particular case. On that basis, it is clear that an assessment is fact sensitive and that each case must, therefore, be considered on its own merits. In *Shersby* the facts included a lease which had provision under which the service charge apportionment might be varied and a previous application to a leasehold tribunal which had not raised the issues under consideration. It was held that payment over a long period, coupled with the failure to raise the issues in the earlier application amounted to agreement by the tenant. It is to be observed that such agreement was not found in relation to the issues after the date of the earlier application. In the present case. The third Applicant's position can clearly be distinguished. There is no evidence that she has actually agreed or admitted any facts and no sustainable basis upon which agreement or admission might reasonably be implied.

21. The Tribunal has addressed the question as to whether or not the amount due from the Applicants under the Respondent's proposal can be recovered as a service charge under the terms of the Lease and, if so, the basis upon which it might be recovered. The costs were incurred in the discharge of the Respondent's obligations under the Lease and are properly recoverable. The Lease is clear as to the basis of recovery of expenses. It is to be by way of 'an equal share in common with the owners of the other Shops and Flats'. There is no provision in the Lease for departure from that basis of recovery. Section 20 of the Landlord and Tenant Act 1985 does not assist the Respondent – that relates to service charges as recoverable under leases and does not introduce an independent means of assessing or calculating contributions. If the Applicants' contribution to the cost of the works in question is to be recovered by way of service charge, it must be recovered in accordance with the relevant provisions in the