FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00BN/LSC/2021/0026**
Property	**:**	**Skyline Central 1, 50, Goulden Street, Manchester, M4 5EJ**
Applicant	**:**	**Anna Ortega, Nathan Prescott and Jarnail Chopra**
Respondent	**:**	**Adriatic Land 3 Limited**
Represented by	**:**	**J B Leitch, Solicitors**
Type of Application	**:**	**Landlord and Tenant Act 1985 – s 27A** **Landlord and Tenant Act 1985 – s 20C** **Commonhold and Leasehold Reform Act 2002 – Schedule 11 (5)(a)** **Landlord and Tenant Act 1985 – s20ZA**
Tribunal Members	**:**	**Tribunal Judge C Wood** **Tribunal Member I James**
Date of Decision	**:**	**25 March 2022**

DECISION

Order

1. The Tribunal orders as follows:

1.1 the additional costs totalling £387,066 (including VAT) in respect of the cladding construction project are relevant costs to be taken into account in determination of the service charge payable by the Applicants in the 2021 service charge year in accordance with s19(1) of the Landlord and Tenant Act 1985, and the Applicants are liable to pay them accordingly;

1.2 the Service Charges (Consultation Requirements)(England) Regulations 2003 do not apply to the professional fees of Gateley Vinden of £141,675.73 (including VAT) charged as service charge in the 2020 service charge year;

1.3 in view of the Tribunal's determinations in paragraphs 1.1 and 1.2 of this Order, it would not be just and equitable in the circumstances to grant the Applicants' s20C application, which is denied accordingly.

2. In view of the Respondent's acknowledgment that there was no contractual provision in its leases with the Applicants entitling it to recover its legal fees, the Tribunal makes no determination under paragraph 5 of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

3. In view of the Tribunal's determination in paragraph 1.2 of this Order, the Tribunal confirms that it will consent to an application by the Respondent to withdraw its application under s20ZA of the Landlord and Tenant Act 1985, which is currently stayed at the Respondent's request.

Background

4. By an application dated 25 March 2021, the Applicants sought a determination under s27A of the Landlord and Tenant Act 1985, ("the 1985 Act"), of the reasonableness of, and liability to pay, the following costs charged as service charges:

4.1 the additional cladding costs of £387,066 (including VAT) charged as service charge in the 2021 service charge year;

4.2 the professional fees of Gateley Vinden of £141,675.73 (including VAT) charged as service charge in the 2020 service charge year;

4.3 a determination under s20C of the 1985 Act that the legal fees of the Respondent incurred in connection with the Tribunal proceedings should not be charged as service charge; and

4.4 a determination under paragraph 5 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, ("CLARA"), as to the reasonableness of, and liability to pay, the Respondent's legal fees in connection with the Tribunal proceedings charged as administration fees in accordance with the terms of the Applicants' leases.

5. In accordance with directions issued by the Tribunal, both parties submitted written evidence to the Tribunal.

6. A remote hearing took place on Friday 21 January 2021 at 10:30 at which representatives on behalf of the Applicants, the Respondent, Home Ground Management Limited, ("HGM"), Rendall & Rittner, ("RR"), and Gateley Vinden, ("GV") each attended.

Law

7. Section 18 of the Landlord and Tenant Act 1985 ("the Act") provides:

(1) in the following provisions of this Act "service charge" 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.

(2) The relevant costs are 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.

(3) For this purpose –
(a) "costs" includes overheads, and
(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

8. Section 19 of the Act provides that –

(1) 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.

9. Section 27A of the Act provides that -

(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 date at or by which it is payable, and

(d) the manner in which it is payable.

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

(3) .....

(4) No application under subsection (1)...may be made in respect of a matter which -

(a) has been agreed 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.

10. In *Veena SA v Cheong* [2003] 1 EGLR 175, Mr. Peter Clarke comprehensively reviewed the authorities at page 182 letters E to L inclusive. He concluded that the word "reasonableness" should be read in its general sense and given a broad common sense meaning [letter K].

11. Section 20 of the Act provides-

(1) Where this Section applies to any qualifying works or qualifying long term agreement..... the relevant contributions of tenants are limited..... 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 ..... the First Tier Tribunal.

12. Section 20ZA(2) of the Act provides-
"qualifying works" means works on a building or other premises, and
"qualifying long term agreement" means an agreement entered into by or on behalf of the landlord for a term of more than twelve months.

13. Section 20 applies to qualifying works and/or to a qualifying long term agreement, if relevant costs incurred on carrying out the works or under the agreement exceed an "appropriate amount".

14. As prescribed by the Service Charges (Consultation Requirements) (England) Regulations 2003, ("the Regulations"), the "appropriate amount":

14.1 in respect of a qualifying long-term agreement is an amount which results in the relevant contribution of any tenant in any service charge year being more than £100; and,

14.2 in respect of qualifying works is an amount which results in the relevant contribution of any tenant being more than £250.00.

15. Section 20ZA(1) of the Act provides-
Where an application is made to a Tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works…the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

Evidence

16. The parties' written and oral evidence is summarised as follows:

16.1 the Applicants

(1) the Applicants seek determinations from the Tribunal under s27A of the Act in respect of costs charged as service charge in the 2020 and 2021 service charge years as follows:

(a) 2020: the professional fees of Gateley Vinden, ("GV"), of £141,675.73 (incl VAT) in respect of the cladding project.

(b) 2021: the additional cladding costs of £387,066 (incl VAT), comprising costs of £330,000 (incl VAT) paid to Fill UK Limited, ("Fill"), the contractor for the project, and additional professional fees of £57,066 (incl VAT) paid to GV.

(2) The Applicants' claim in relation to the GV fees in 2020 is that each Applicant's contribution is limited to £250 by reason of the Respondent's failure to consult in respect of these costs as required under s20 of the Act.

(3) Specifically:

(a) Mr.Nathan Prescott, one of the Lead Applicants, had objected to GV's involvement in the project but the Respondent did not have regard to these observations, and did not obtain any other quotes for a consultant surveyor and project manager;

(b) the Respondent's position, as set out in RR's letter dated 22 February 2021, that the appointment of professionals and their associated professional fees are not subject to s20 consultation, and it is not standard practice to tender the appointment of a professional service, is not accepted by the Applicants who state that this position is not supported by statute or the case law;

(c) GV's appointment is either "qualifying works" or the subject of a "qualifying long term agreement" and is therefore subject to the s20 consultation requirements.

(4) The Applicants' claim that the additional cladding project costs have not been reasonably incurred is based on the following:

(a) the Respondent's failure (and that of its agents, namely, RR, HGM and GV) to properly manage the construction project as evidenced by:

(i) the poor quality of information about the project provided to leaseholders and, in particular but without limitation, the absence of any reference prior to October 2020 of pandemic-related delays, and a succession of different completion dates;

(ii) a failure to adhere to project management processes, in particular but not limited to, by GV;

(iii) changes to those project management processes in particular by the Respondent's appointment of Thomason Partnership Limited, ("Thomason"); and,

(iv) the Respondent's general and unreasonable unwillingness to share information with leaseholders;

(b) the length of the negotiation period required to get Fill back on site which increased the costs incurred; and,

(c) the works have not been done to a reasonable standard as evidenced by mould and water ingress damage to a number of apartments.

(5) Specifically:

(a) the failure by both GV and RR to identify before October 2020 that there was any significant problem with the progress of the works;

(b) the Respondent's failure to adequately explain the length of delay in final completion of the works, and/or to reconcile this with the extent of works certified as completed and paid for prior to Fill walking off-site;

(c) GV's failures as project manager, and of RR's failures in its oversight role as evidenced by the communication of a succession of projected, but unfulfilled, completion dates;

(d) the Respondent's appointment of Thomason on resumption of the works on 21 December 2020 was evidence of the Respondent's/RR's lack of confidence in GV;

(e) the unwillingness to provide information as requested by the leaseholders prior to the institution of the tribunal proceedings included the Respondent's failure to provide to the Applicants a copy of the signed and dated JCT contract; the Respondent's failure to provide any evidence to support Fill's assertion that the delays to completion were primarily attributable to covid-19 pandemic restrictions and/or effects eg social distancing requirements, staff absences and shortages caused by illness/isolation rules; the Respondent's initial failure to provide a full breakdown of the additional costs charged; and, the Respondent's refusal to provide information relating to the legal advice obtained in respect of Fill's claim for additional funding/time, and/or more generally on the negotiations/settlement reached with Fill;

(f) during the 10 week period of negotiations, equipment/plant/machinery etc all remained on site incurring additional costs;

(g) it appeared "incomprehensible" to the Applicants that the negotiations took 10 weeks to conclude. As they were not party to those negotiations and had no control over the time taken, they should not be held liable for increased costs as a result of the length of time taken; and,

(h) the instances of mould and water ingress in a number of apartments are indicative of works not undertaken to a reasonable standard and the remediation costs should not be met by leaseholders.

16.2 the Respondent

Fill

(1) Fill had not been initially included in the tender review but was subsequently included at the leaseholders' suggestion, having successfully undertaken works on one of the adjoining blocks;

(2) at the time of the tender review, there was a lack of contractors willing and/or qualified to undertake works of this kind;

(3) GV had identified concerns with Fill's financial position but these were subsequently addressed;

(4) Fill had £10m indemnity insurance cover, where other tender contractors only had £2m;

(5) Fill's tender price was £1.3m less than the next nearest bidder.

Parties

(6) The roles of the Respondent, HGM, RR, GV and Fill are as follows:

(a) the Respondent is the landlord and, acting through its agent HGM, the employer under the JCT contract;

(b) RR is the managing agent for the Property and had an "oversight role" with respect to the works;

(c) GV is the consultant surveyor and "Employer's Agent" under the JCT contract;

(d) Fill is the contractor under the JCT contract.

GV

(7) A s20 consultation is not required because:

(a) GV is engaged by the Respondent on its standard terms and conditions which, under clause 8.1, permit termination of the contract at any time upon written notice;

(b) having regard to the relevant case law, there is no "qualifying long term agreement" in relation to the GV fees, (Corvan (Properties) Ltd v Abdel-Mahmond [2018] EWCA Civ 1102), and nor did the GV fees constitute "qualifying works" (Paddington Walk Management Ltd v Peabody Trust [2010] L&TR6);

(c) Mr. Prescott's objections to GV's appointment were acknowledged but there was a lack of evidence provided to support them.

Delays to completion of the works

(8) Specifically:

(a) there is no dispute that there was a delay to the original contractual completion date but it is denied that this was a result of any failures on the part of the Respondent, RR or GV;

(b) the principal cause of delay was the covid-19 pandemic which affected:

(i) the availability of materials;

(ii) the availability of labour;

(iii) the cost of labour and materials;

(iv) the restrictions on the number of workers permitted on site due to social distancing requirements; and,

(v) the unpredictability of labour supply.

(9) Initial progress was good but problems arose in June 2020 which became apparent from August 2020.

Negotiations

(10) The chronology was as follows:

(a) 10 September 2020: receipt of Fill's initial "Covid 19 Loss and Expense Claim" for £284,320 plus VAT (£341,184);

(b) 13 October 2020: Fill's revised claim for £378,912 plus VAT (£454,694);

(c) 20 October 2020: apparent that Fill had insufficient funds to complete the works;

(d) 28 October and 20 November 2020: updates to leaseholders;

(11) there were 3 options open to the Respondent:

(a) accept Fill's claim and pay;

(b) deny claim and litigate;

(c) negotiate to achieve reduced claim;

(d) the Respondent, having obtained legal advice on the claim/Fill's claims regarding the force majeure provisions in the JCT contract in the context of a pandemic, considered that to achieve a commercial settlement based on a reduction of the claim was the most pragmatic way to ensure the completion of the works with the least delay;

(e) a reduced claim of £275,000 plus VAT, (£330,000), in respect of Fill's additional costs together with GV's additional fees of £57,066 (incl VAT) was agreed, a total of £387,066 (incl VAT), a reduction of £124,694 on Fill's revised claim;

(12) Thomason's fees were borne entirely by the Respondent, therefore at no cost to the leaseholders;

Quality of works

(13) the Respondent denies that works were not carried out to a reasonable standard generally, and with regard to the Applicants' claims regarding mould and damp issues at the Property:

(a) there was a lack of detail by the Applicants regarding the apartments which had been affected by such issues;

(b) where problems had been identified as a direct cause of the works, following a review undertaken by the Respondent, interim remedial works had already been undertaken. The same review had identified that some problems had been caused by eg poor ventilation of the apartment by the occupier; and,

(c) it was accepted that any further remedial works required will be carried out at no additional cost to leaseholders.

17. Witnesses from each of HGM, RR and GV gave oral evidence to the Tribunal summarised as follows:

17.1 Ms Lauren Rowland, ("LR"), HGM:

(1) LR outlined the peripheral role initially played by HGM in the management of the project, which was undertaken by a collaboration between RR, GV and Fill: this included having no direct contact with GV, and having no involvement in the release of service charge monies to Fill against certificates;

(2) HGM first became aware of delays to the completion of the project/request for additional costs in October/November 2020;

(3) When faced with Fill's claim for additional funding, the Respondent's efforts were focussed on agreeing as low a settlement figure as possible whilst getting Fill back on site as early as possible;

(4) LR has no information regarding the interrogation of Fill's position regarding any insurance cover against losses caused by the covid-19 pandemic, and/or the availability to Fill of government-backed covid grants, loans or furlough monies, but questioned their relevance in any event;

(5) Thomasons was appointed as a second "layer" of scrutiny/security for achievement of the objective of completion of the project once Fill were back "on site".

17.2 Mr.Sasha Pisarevic-Young, (SP-Y), GV:

(1) SP-Y clarified that GV's appointment was not as a project manager (ie an appointment by a contractor to project manage the works under a building contract) but as the employer's agent in connection with the project. The use of the term "project manager" to describe their role/involvement was to confuse the nature and/or extent of their duties in this context;

(2) SP-Y was satisfied that all certificates issued were in respect of works carried out, and that there was no evidence of over-valuing of works by Fill;

(3) all completion extensions were agreed between Fill and the Respondent;

(4) SP-Y opined that it was reasonable to believe that most/many of the workers on site would have been self-employed so eg furlough would not have been available, even if the availability of covid loans, grants, furlough monies was relevant which he did not consider it was;

(5) he also opined that it was unlikely that Fill's insurance would have covered covid-related losses;

(6) the additional £57066 of GV's fees had been calculated on the previously agreed monthly rate of £10,000 for a further 5 months, and then on an agreed hourly rate for the rest of the period up until completion of the project.

17.3 Katie Murphy, ("KM"), R&R:

(1) in response to questions regarding failures by R&R to provide timely information to the leaseholders regarding delays to the project, KM acknowledged that she had limited previous experience of and/or expertise in managing a project of this kind but that she had properly relied on both Fill and GV for regular progress updates;

(2) first became aware of delays in October 2020 which information was passed onto the leaseholders;

(3) KM was not privy to the negotiations between Fill and the Respondent regarding the settlement of Fill's loss claim, nor in respect of GV's additional fees.

Reasons

18. In reaching the determinations set out in clause 1 of this Decision, the Tribunal took into account the following matters:

18.1 additional costs of £387,066

(1) based on the evidence before the Tribunal, the Tribunal considered that it was reasonable to conclude that there may have been some failures regarding the oversight of the project by both RR and GV, and, in particular, but without limitation, some apparent confusion between HGM, RR and GV as to the boundaries/extent of their roles. It was also satisfied, however, that any such failures were neither the cause of nor a contributory factor to the delays to completion of the project, including, without limitation, the decision by Fill to leave site when the works were partially-completed;

(2) despite the use of the term "project manager" to describe GV's role, it was clear from the JCT contract that their appointment was as employer's agent, and this was supported by the evidence given to the Tribunal regarding the nature and extent of their role from SP-Y on behalf of GV;

(3) the Tribunal was satisfied, from the evidence before it, that the most likely cause of the delays to completion was the effect of the covid-19 pandemic on the availability and methods of operation of the workforce, and the increased cost of labour and materials, which, in turn, led to the costs' overrun;

(4) the Tribunal noted that there was some conflicting evidence regarding the dates when RR and/or GV became aware of the problems on site but considered that it was reasonable to conclude that any failure by RR and/or GV to anticipate and/or identify the cause or consequences of these problems earlier in the project, would have had very limited, if any, effect on their ability to require the contractor to take any/further mitigating measures, having regard, in particular, to the limitations on their roles within the project, and to the legal nature of the covid regulations;

(5) whilst the Tribunal understood the Applicants' frustration at the limited information provided to them regarding the discussions between the Respondent and Fill following Fill's submission of its loss claim, it also recognised the commercial sensitivities of such discussions, the relevance of issues of client confidentiality and privilege, and the absence of any lawful entitlement on the part of the leaseholders to receipt of much of this information;

(6) the Tribunal further understood the Applicants' frustration at what may appear to them to have been a settlement by the Respondent with Fill based on a dubious legal entitlement to any further monies. The Tribunal considered that this is to ignore the very real predicament of an employer when faced with a part-completed construction project and a contractor who has walked off site and is claiming financial difficulties. The Tribunal also took into account the limited number of contractors who, at the tender stage, were willing to undertake the works, which they considered it was reasonable to assume would have been further reduced because the project was part-completed and because of the continuing effects of the pandemic/the covid regulations;

(7) the Tribunal noted the 3 options which the Respondent had identified as being available to it, summarised as (i) pay the claim as submitted; (ii) dispute the claim and litigate; and (iii) negotiate the lowest amount possible. It did not accept the Applicants' claim that the Respondent had merely chosen the easiest option, but accepted that the Respondent had chosen to pursue a pragmatic commercial resolution with the objective of securing Fill's co-operation to complete the works. Having regard to all of the circumstances, the Tribunal considered that this was a reasonable response on the Respondent's part in the circumstances which had achieved a settlement within a reasonable period in an amount lower than that claimed;

(8) further, the Tribunal also noted that, even allowing for the additional costs, the total sum paid to Fill was still less than the next cheapest tender, as identified in the s20 consultation process;

(9) the Applicants had not produced any evidence to the Tribunal that it would have reduced the additional costs to have arranged for the removal of equipment from the site during the period when Fill were off site. Further, such a claim relies on the benefit of hindsight as it would have been very difficult for the Respondent to know with any certainty at the time how long Fill would remain off site;

(10) the Applicants had also not produced any evidence to support their claim that the length of the negotiations increased the additional costs payable, whereas the Respondent's evidence showed that the final settlement figure was lower than Fill's revised claim.

18.2 Damp and mould

(1) The Tribunal agreed with the Respondent that the Applicants had failed to adequately particularise this claim or to show that service charges had been charged relating to the cost of remedial works to address damp and/or mould issues. It also accepted the Respondent's evidence that any issues of this kind which did arise should, in the normal course of events, be addressed by the contractor at its own expense.

18.3 GV fees

(1) The Tribunal noted that, whilst the Applicants stated in both written and oral evidence that they disagreed with the Respondent's position regarding the applicability of the Regulations to the GV fees, they provided no evidence to support their position or to distinguish the decisions cited to the Tribunal by the Respondent.

(2) The Tribunal is satisfied that, having regard to those authorities:

(a) the GV fees as professional fees relating to the project did not constitute "qualifying works";

(b) there was no "qualifying long term agreement" as the appointment was made subject to GV's standard terms and conditions of business which, inter alia, permitted summary termination on notice; and,

(c) the Respondent was not required to undertake a s20 consultation process accordingly.

(3) There was therefore no obligation on the part of the Respondent to have regard to the objection raised by Mr. Prescott regarding GV's appointment.

(4) In view of these determinations, the Tribunal recommends that the Respondent makes application to withdraw its s20ZA application.

19. Section 20C

(1) In view of the determinations in paragraph 1 of this Decision, the Tribunal considers that it would not be just and equitable in all the circumstances to limit the Respondent from charging any of its costs as service charge.

(2) Accordingly, the Applicants' s20C application is denied.

Tribunal Judge C Wood
25 March 2022