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RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL

Property	:	**Whitehall Court, Newland Street, Essex CM8 2AW**
Applicant	:	**Douglas Management Ltd.**
Respondents	:	**The Resident long lessees**
Case number	:	**CAM/22UC/LSC/2009/0109**
Date of Applications	:	**(1) 8th September 2009 (2) 9th December 2009**
Type of Application	:	**(1) Determination of liability to pay and reasonableness of service charges (2) Application to dispense with consultation requirements in respect of qualifying works (Sections 19, 27A and 20ZA respectively of the Landlord and Tenant Act 1985 as amended ("the 1985 Act"))**
The Tribunal	:	**Mr. Bruce Edgington (Lawyer Chair) Mr. Roland Thomas MRICS Mr. David Cox**

DECISION

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1. The Applicant is refused retrospective dispensation from the consultation requirements in Section 20ZA of the 1985 Act and **The Service Charges (Consultation Requirements) (England) Regulations 2003** as amended ("the Regulations") in respect of work carried out in 2007 to replace paths at the property. This means that the amount payable is only £250.00 per property and any balance should be refunded.

2. No determination is made with regard to works to replace the alarm system at the property as the consultation process has not finished.

3. The application by Mr. John Allen for the Applicant to reimburse his costs of £269.95 plus a further £229.20 is refused.

4. The application by Mr. John Allen for the Applicant to refund his application fee of £125.00 is granted and this shall be paid to him within 28 days from the date this decision is received by the Applicant.

5. The application by Mr. John Allen pursuant to Section 20C of the 1985 Act that no part of the costs of the Applicant's representation before this Tribunal may be claimed from the Respondents as part of any future service charge is granted.

Reasons

Introduction

6. The Applicant owns Whitehall Court, Newland Street, Witham CM8 2AW which is development of 28 flats for people aged 60 years of age and over. In 2007 the Applicant, which also manages the property, arranged for the relaying of block paths at the property by a company owned by a director's son at a cost of £21,579.72. This sum was taken from the reserve fund.

7. Sometime after these works were undertaken, Mr. John Allen, who described himself, at certain stages, as being the chair of a Residents' Association, realised that the cost of the work was more than £250.00 per unit and therefore that the Applicant should have gone through the consultation process. He therefore lodged the first application insofar as it applied to his property, 10 Whitehall Court.

8. This application then prompted the second application by the landlord for dispensation from the consultation process for all the works for the whole development. It was directed that the 2 applications would be heard together. As the second application relates to the whole development, it has been decided to make the Applicant and the Respondent in accordance with the second application for ease of reference.

9. Part of the first application is a request that the Tribunal also considers the consultation process for the installation of a new alarm system at the property. However, the paperwork supplied for the hearing showed that the initial letter in the consultation process was dated 15th December 2009 i.e. after the applications had been made. It is therefore premature to deal with that matter at this stage.

10. Thus, the only issues in the case are (a) whether retrospective permission should be given to the Applicant to waive the consultation requirements for the replacement of the paving (b) if so, is the cost of the work reasonable and (c) who pays for work done in connection with this Tribunal case and the hearing.

11. It is common ground that the blockwork had been there since 1986 or thereabouts when this development was built and there were some problems because people felt that there was a tripping hazard. Mr. Allen considered that the tripping hazards should have been repaired at the time and then the Applicant should have considered whether the pathways needed to be taken up and repaired and, if they did, the normal consultation process should have taken place.

12. Amongst the papers submitted to the Tribunal before the hearing were documents purporting to represent the views of the other lessees. The

Applicant sent a copy of a letter it had sent to the other lessees i.e. those apart from Mr. Allen dated 15th December 2009 setting out the facts from their point of view and asking for each lessee to complete a reply crossing out one of two alternatives i.e. :-

> *"We support Mr. Allen's application and if he succeeds we shall require the repayment from you of the relevant amount"* or
>
> *"We are content with the contract made with Kingsland Property Company Ltd, referred to in your letter, and request that the Tribunal dispense with the consultation requirements in respect of that contract even though this means we will not be entitled to any payment"*

13. The lessees of Flats 1, 4, 6, 9, 11, 12, 14, 16, 17, 18, 21, 22, 23, 24, 26 and 28 crossed out the first question to apparently signify their agreement to the dispensation. The lessee of Flat 7 wrote to say that she bought the flat after the work had been done but she was not making any claim. Mr. Wilson at Flat 27 just put a note on the bottom of a letter relating to the alarm system saying "I agree with Mr. Banning" of the Applicant company. This is put forward as support for the Applicant's case whereas it is in fact a comment relating to the alarm system and not the paving.

14. It is said that 4 flats are 'not eligible' in addition to Flat 7 – see above – and the views of 3 lessees are not known. It is said that 2 are not interested. With Mr. Allen's flat, this makes 28.

15. It seems clear that Mr. Allen has sent around another questionnaire with no less than 20 tick boxes. There are 22 of these forms with the papers. They are not attributed and it is therefore impossible to say who completed them. Only one says that he/she would change their mind if they could.

16. The Tribunal wrote to all lessees and those from Flats 9, 18, 21, 22, 24, 27, 28 wrote saying that they supported Mr. Banning i.e. the Applicant. Furthermore, the Applicant sent in two pieces of paper with the words *"we, the undersigned, are aware of the above proceedings and do not wish to be involved. We do not require any further communications to be sent to us."* This was signed by lessees of Flats 1, 2, 3, 4, 6, 9, 11, 12, 13, 14, 16, 17, 18, 20, 21, 22, 23, 24, 26, 27 and 28. Flats 5, 7, 15 and 19 said either that they were not interested or were not involved at the time. Flat 8 says 'in care home' and Flat 25 says 'not decided'.

17. The result of this seems to be that the lessees have now been asked several times what they want to do about these applications. As is clear from some of the replies, some are becoming somewhat irritated by all this correspondence and who can blame them? The only proper conclusion which this Tribunal can draw is that a majority appear to be definitely in favour of the granting of dispensation whereas not one appears to be positively supporting Mr. Allen's case. Having said that, the matter is complicated by the terms of the letter written by Mr. Banning.

18. In this letter, Mr. Banning said, in effect that he was entitled to charge a rent for the warden's flat of some £7,000.00 but had not done so. The letter continues "*I have always kept this concession under review and am, of course, entitled to start charging the rent at any time.*" Whether his company is entitled to charge a rent is debateable. All the lease says is that the lessor shall provide furnished accommodation for the warden. The service charge provision under clause 19 of the 6th Schedule says that the lessees shall reimburse all costs and expenses incurred by the lessor. It is doubtful whether this includes charging the lessees a rent for the warden's flat.

19. Introducing such a potentially contentious issue in this letter lacked judgment at best. A more cynical interpretation – which Mr. Allen adopts – is that this was a direct threat. Whatever interpretation one places on this, there can have been no doubt in the recipient's mind that if he or she did not support the Applicant, then it would start charging £7,000.00 per annum as rent for the warden's flat. Why else mention the point in such a letter?

The Inspection

20. The Tribunal inspected the property in the presence of Mr. Banning and Mr. Allen. Others were also present. This is a very pleasant, well kept development close to Witham, town centre. The paths in question were inspected.

The Statutory Framework

21. The purpose of Section 20 of the 1985 Act as now amended by the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") and the Regulations is to provide a curb on landlords incurring large amounts of service charges which would involve tenants paying large amounts of money.

22. The original regime meant that if service charges were over a certain limit, then the landlord had to either (a) provide estimates and consult with tenants before incurring such charges (b) have such service charges 'capped' at a very low level or (c) try to persuade a judge to waive the consultation requirements.

23. The 2002 Act which came into effect on the 31st October 2003 tightened up these provisions considerably and extended them to qualifying long term agreements i.e. agreements involving a tenant in an annual expenditure of more than £100 and which last for more than 12 months.

24. The consultation requirements in the Regulations are extensive and include:-

    i. The service of a notice on each tenant of an intention to undertake works. The notice shall set out what the works are and why they are needed or where particulars can be examined. It shall invite comments and the name of anyone from whom the landlord or the landlord's agent should obtain an estimate within a period of not less than 30 days.

ii. The landlord or landlord's agent shall then attempt to obtain estimates including from anyone proposed by a tenant.
iii. At least 2 detailed proposals or estimates must then be sent to the tenants, one of which is from a contractor unconnected with the landlord, and comments should be invited within a further period of 30 days
iv. A landlord or landlord's agent must take notice of any observations from tenants, award the contract and then write within 21 days telling everyone why the contract was awarded to the particular contractor.

25. The 2002 Act transferred jurisdiction for the waiving of these requirements from the courts to Leasehold Valuation Tribunals ("LVT's").

26. The combined effect of Sections 19 and 27A of the 1985 Act means that this Tribunal has the power to say whether service charges are reasonable and, if so, whether they are payable.

27. Finally, the Tribunal has the power to determine whether a landlord can recover the costs of representation before this Tribunal as part of any future service charge (Section 20C of the 1985 Act); who should pay for the fees in respect of these applications and whether a party which has acted "*frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings*" (Paragraph 10 of Schedule 12 to the 2002 Act) should pay the costs and/or expenses of another party up to a limit of £500.00.

28. Whilst Lands Tribunal decisions are not binding on an LVT, some cases do provide important guidance. The case of **Daejan Investments Ltd. v Benson** [2009] UKUT 233 (LC) is relevant to the main issue in this case. Carnwath LJ was considering a case where a local authority did not provide the tenants with copies of estimates it had obtained in a consultation process. The LVT found this to be a material breach of the regulations and limited the cost to each lessee to £250.00. The Lands Tribunal did not disturb this decision saying that "*the evidence of actual prejudice* (to the tenants) *is weak. However we remind ourselves that we are reviewing their decision, not substituting our own judgment.*" It said that the nature of the parties and their relationship may be relevant and that an LVT may reasonably take a more rigorous approach to non compliance by a local authority or a commercial landlord.

29. In a case where the landlord is not a local authority or a commercial landlord, the correct test is to consider what prejudice may be suffered by a leaseholder by dispensation rather than how the landlord has behaved (**Eltham Properties v Kenny** – Lands Tribunal, 3rd December 2007)

The Lease

30. The Tribunal was supplied with a copy of the unstamped counterpart lease to Flat 20 Whitehall Court. This provides that the landlord shall

maintain, repair, decorate and renew the road and all paths forecourts boundary fences and walls of the estate (7th Schedule).

31. There is then provision for the landlord to recover to cost of this from the lessees in the agreed proportions (6th Schedule). There was some correspondence produced to the Tribunal about the proportion because there had evidently been an error, but this does not form part of this Tribunal's deliberations. There is provision for a sinking fund.

The Hearing

32. The hearing was attended by Mr. Banning and his son and Mr. and Mrs. Warwick on behalf of the Applicant. Mr. Allen attended and he was assisted by Mr. Terry Wirledge.

33. Each side put its case. The first issue for the Tribunal to decide is whether the Applicant is what the Lands Tribunal would interpret as a professional landlord. Mr. Banning said that at the time the Applicant owned this development and a development in Wickford of 58 units. It also now had a 38 bedded residential home. They had undertaken 3 large projects at this property namely replacing the windows in 2003, replacing stair lifts in 2006 and the work to the paths in 2007. It had not undertaken a consultation exercise compliant with the regulations in any of these projects.

34. Of great significance is a letter written by the Applicant to the residents on the 12th March 2003. This letter tells the residents that the Applicant is going to replace the windows with uPVC at a cost in excess of £2,000.00 per unit. It goes on to say "*The Landlord and Tenant Act 1985 s. 20 provides that when substantial works are to be undertaken which will be paid for by lessees, certain procedures need to be observed*". It then goes on to say that an additional estimate will be obtained and posted outside the warden's office.

35. When asked whether he or his co-directors had investigated what those procedures were, Mr. Banning and Mr. Warwick, a retired solicitor, said that they had not. Their accountant had told them about it and they understood that any consultation was only necessary where there was insufficient in the reserve fund for payment to be made to cover the cost.

Conclusions

36. The first decision for this Tribunal is whether the consultation requirements should be dispensed with. The landlord says that it only managed 2 properties at the time and it simply did not know about the consultation regulations. Is the landlord telling the truth? If so, then the Tribunal can be more flexible and the issue of what prejudice the lessees have suffered becomes much more relevant.

37. The matters which the Tribunal considered relevant in making such decision were:-

    i. The fact that the Applicant clearly did know about consultation requirements when the letter of 12th March 2003 was written. The fact that its directors, one of whom is a retired solicitor, did not bother to find out what

they were is simply not accepted by the Tribunal. If it did not at least raise some question in their minds about what the requirements were, then their competence as landlords of such large developments must be in question

ii. The fact that in 2008 Mr. Allen told Mr. Banning in a letter dated 29th September that consultation was required but Mr. Banning, in his reply simply said that it was not required. It seems clear that at that time Mr. Banning was either trying to fob Mr. Allen off or he did not bother to check whether Mr. Allen was right. In either case, it does put a further question mark over the Applicant's competence as a landlord

iii. The fact that in a letter to Mr. Allen dated 23rd January 2007, Mr. Banning said that he would obtain quotations for the work to the paths. Mr. Allen wrote on the 7th February asking to be kept informed about this. In a letter dated 27th February 2007, Mr. Banning said that he would be obtaining 3 quotations. Mr. Allen wrote on the 7th March saying that he wanted to be involved in the process. On the 27th March, Mr. Allen wrote asking progress. The contract for the work was then given to Mr. Banning's son's company and the cost taken out of the reserve fund. Mr. Allen wrote to Mr. Banning on the 12th October 2008 quoting the consultation requirements and stating that only £250.00 each could be taken from the lessees unless dispensation was obtained from this Tribunal. No such application was made for over a year.

iv. The fact that not only were no estimates obtained but the work proceeded on a day work basis which is likely to be expensive as there is no constraint on the contractor. The Tribunal did not accept the assertion that it was not possible to obtain an estimate. The contractor earned a profit, Kingsland Property Company Ltd. earned a 15% profit on both labour and materials and the management company earned a further 10%.

v. The fact that the lessees are elderly and vulnerable people who are likely to accept things for 'an easy life'. This is even more reason why management should comply strictly with the law to ensure that a reasonable price is paid for major works.

vi. The fact that for the purpose of this application, Mr. Allen obtained an estimate of just over £12,300.00 including VAT from Europave Ltd i.e. just over half the eventual cost. The Tribunal accepted that Mr. Allen had obtained this company's name from Yellow Pages and that he had no connection with it. It was noted that the 'expert' evidence from Mr. Gould of Charles Scott and Partners comes about without any inspection of the property by Mr. Gould and his report does not make this clear.

vii. The fact that it was still not clear at the hearing whether the replacement of the path outside numbers 25-30 was necessary. The problems complained about related to the stretch from the laundry to number 18. If the lessees had been involved in the process, this could have been investigated properly.

38. Taking all these matters and the totality of the evidence into account, the Tribunal concludes that the Applicant managed 2 reasonably large developments and put itself forward as being a professional manager. The directors knew or ought to have known about the consultation requirements. It also finds that it is likely that if the proper process had been undertaken, the work would have cost very much less than the ultimate cost and, in addition, it may not have been necessary to do all the work. Thus the lessees have probably been substantially prejudiced by the lack of consultation.

39. For these reasons, retrospective permission to dispense with the consultation requirements is refused. In these circumstances, it is not necessary to consider the question of the actual cost of the works in any detail. Having said that, the Tribunal, as an expert Tribunal, considered that dealing with the matter on a day work basis was expensive in itself for the reason given and that the rate of £150 per man per day inclusive of tools is high. Mr. Banning accepted that the workmen would probably be receiving less than £100 each per day

40. It was the Tribunal's view that a fair cost for this work would have been in the region of £12,000.00

41. On the issue of costs, the Applicant acknowledged that this application was only necessary because of a mistake it made. Therefore an order is made pursuant to Section 20C of the 1985 Act and the Applicant is ordered to refund the fee of £125.00 which Mr. Allen paid.

42. As to Mr. Allen's expenses, the Tribunal refuses to make an order refunding these. The hurdle to get over before such an order is made is a very high one. It is not made simply because a party has acted unreasonably. It is not made simply because a party has succeeded. It is a punishment for an act perpetrated by a party in the proceedings themselves.

43. The only matter which could come within that definition would be the issue of the late filing of evidence and the problems over the preparation of the hearing bundle. It is the Tribunal's view that the Applicant's behaviour is not so bad that such an order is justified. Indeed, the late provision of the estimate from Europave Ltd. by the Respondent did not assist either the Applicant or the Tribunal.

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Bruce Edgington
Chair
17th March 2010