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HM Courts & Tribunals Service

LEASEHOLD VALUATION TRIBUNAL
Case no. CAM/22UB/LSC/2012/0159

Properties	:	**23 & 27 Rokells, Basildon, Essex SS14 2BH**
Applicants	:	**Colin Williams (23)** **Heidi Rowe (27)**
Respondent	:	**Basildon Council (represented by Craig Vickers of counsel)**
Date of Applications	:	**26th November 2012**
Type of Application	:	**To determine reasonableness and payability of service charges** **To determine whether part or all the consultation requirements should be waived for major works**
The Tribunal	:	**Bruce Edgington (lawyer chair)** **Derek Barnden MRICS** **Lorraine Hart**
Date and venue of hearing	:	**13th March 2013 at Garden Room, Holiday Inn, Cranes Farm Road, Basildon, Essex SS14 3DG and 17th April 2013 at Basildon Magistrates Court, Great Oaks, Basildon, SS14 1EH**

DECISION

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1. Dispensation is granted to the Respondent from the full consultation requirements of Section 20 of the **Landlord and Tenant Act 1985** ("the 1985 Act") in respect of the work undertaken in 2011 to replace the roof of the building in which the properties are situated.

2. The Tribunal finds that in respect of the amount claimed by the Respondent from the Applicants for major roof works at the properties (£5,238.54 from each Applicant), the amount of such service charges which are reasonable and payable are £4,500.00 for each Applicant.

3. The Tribunal makes an order pursuant to Section 20C of the **Landlord and**

Tenant Act 1985 ("the 1985 Act") preventing the Respondent from recovering its costs of representation before this Tribunal from the Applicants as part of any future service charge.

4. The Tribunal orders the Respondent to refund the fees of £350.00 to the Applicants.

Reasons

Introduction

5. The facts in this case are largely agreed. In 2011, the Respondent landlord of the long leases of the properties wanted to undertake 2 sets of major works i.e. some electrical work and work to re-roof the block in which the properties are situated.

6. There is no dispute about the electrical works and the Applicants have agreed to pay the demand for £146.15 for these works. As this cost is below the £250 threshold, it is at least arguable that no consultation was needed.

7. There is a dispute about the works to the roof. The Applicants claim that they were not consulted properly and that their contribution to these works should be limited to £250 each rather than the £5,238.54 each which has been claimed. This is presumably as a result of what the Applicants see as a breach of **The Service Charges (Consultation) Requirements) (England) Regulations 2003** ("the Regulations") made pursuant to the powers given by sections 20(4) and 5) and 20ZA(3) to (6) of the 1985 Act. They do not dispute that they were each served with an initial letter stating that the Respondent was proposing to undertake works to the roof.

8. This initial letter was dated 20th January 2011 but a further letter was written on the 27th April 2011 in identical terms save for the date and the date for the end of the consultation period. At the hearing the Respondent said that the 2nd letter was sent in error. These letters were written by St. Georges Community Housing although there is no explanation in the letters as to why that organisation is writing rather than the Respondent landlord.

9. The original Application was for this Tribunal to determine the reasonableness and payability of the service charge demands for the roof works. In the pre-hearing papers, the parties concentrated on the question of compliance with the Regulations. There was practically no evidence in the bundle relating to the reasonableness of either the need for or the cost of the works themselves.

10. During the first hearing the Tribunal started to ask questions of the Respondent's witness about the reasonableness of the service charges for the roof works. Counsel for the Respondent asked for an adjournment so that evidence could be adduced about this issue. This was not opposed and was granted.

11. At the resumed hearing, The Tribunal informed the parties at the outset that it was minded to decide that there had been defects in the consultation process and invited the Respondent to consider whether they wanted to make an application for dispensation. The Tribunal explained to the Applicants that the

reason for this was that if the Tribunal were simply to determine that there had been a defect in the consultation process, the Respondent, as a body handling public money would be almost bound to appeal and/or ask for retrospective dispensation which would prolong matters considerably. Ms. Rowe, in particular, had said that this litigation was causing her considerable anxiety and she was anxious that it should not last longer than was necessary.

12. The Respondent asked to make an application for dispensation and the Applicants did not oppose this course of action. The Tribunal therefore proceeded on the basis that it was dealing with 2 applications i.e. under both Sections 27A and 20ZA of the 1985 Act.

The Inspection

13. The members of the Tribunal briefly inspected the property on the 13th March 2013 in the presence of the Applicants together with Tom Jones and Emma Stenson from the Respondent and counsel Craig Vickers who represented the Respondent. It was a cold late winter's day, although dry. The properties are in a 3 storey block which is semi-detached to similar blocks. It appeared to be of a brick construction under a flat roof which could not be seen from the street because of parapet walls around it.

14. The blocks are in an estate of similar properties which is within reasonably close proximity to Basildon town centre and a rail link to central London. A reasonably healthy person could easily walk to both the centre and the station.

The Lease

15. The Tribunal was shown a copy of the counterpart lease of 23 Rokells which is dated 26th September 1988 and a copy of the original lease of 27 Rokells which is dated 1st November 1989. Both leases are for 125 years from those dates with a ground rent of £10 per annum.

16. There are the usual covenants on the part of the landlord to maintain the structure of the property and to insure it. Under clause 21 of the 6th Schedule of the leases, the lessee has to pay 16.66% of the costs incurred by the landlord in complying with its obligations under the 7th Schedule, as a service charge. This includes "*the renewal and replacement of all worn or damaged parts and making good of any structural defects and also so as to provide shelter and protection...*". Clearly this would include keeping the roof in good repair or renewing it if repairs became uneconomic.

17. There is no provision enabling the landlord to recover the cost of any improvement.

The Law

18. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'.

19. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are

payable 'only to the extent that they are reasonably incurred'. A Leasehold Valuation Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable and, if so, whether it is payable.

20. 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.

21. 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.

22. The 2002 Act which came into effect on the 31st October 2003 tightened up these provisions considerably. The 'capped' limit on qualifying works which is relevant to this application is £250 per flat.

23. The 'usual' consultation requirements in the Regulations are extensive and include:-
    (a) 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.
    (b) The landlord or landlord's agent shall then attempt to obtain estimates including from anyone proposed by a tenant.
    (c) 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
    (d) A landlord or landlord's agent must take notice of any observations from tenants, award the contract and then, if the lowest quote is not chosen, write within 21 days telling everyone why the contract was awarded to the particular contractor.

The Hearing

24. The hearing on the 13th March was attended by those who had attended the inspection. As has been said, there was an application to adjourn which was granted. The Tribunal made it clear that even if the consultation requirements had been met, this was still an application for the Tribunal to consider the reasonableness and payability of the service charges.

25. It was also agreed that the Respondent would need to file and serve further evidence. This was then encapsulated in a directions order to include a timescale and an opportunity for the Applicants to comment on any further evidence/submissions presented by the Respondent.

26. At the adjourned hearing, Mr. Tom Jones attended and resumed his evidence. There was nothing particularly controversial about such evidence which related, for the most part, to how these works were funded.

27. Mr. Alan Woodhouse then gave evidence. He is the Project Manager for the Respondent which he has been for some 17 years. He explained that the need for possible replacement of the roof in question was 'flagged up' by a stock condition database held by the council which classifies a flat roof lifetime as 15 years. Thus, the roof on this building was due to be replaced in 2010, as were the roofs of several similar buildings of similar age in the vicinity of this one.

28. He then said that before a roof was replaced, he would undertake a condition survey by having scaffolding erected from which he could see the roof. He said that he did this sometime in 2011 and he 'identified that the roof was in poor condition and it did not meet the current flat roof insulation regulations'. Paragraph 9 of his statement then says that his employers have a policy of maintaining their properties to a good standard of repair. He goes on 'Therefore, the roof was renewed in line with council policy and brought up to date with current building regulations including upgrading the flat roof insulation.'

29. He was pressed about whether and when he had inspected this particular roof. The Applicants could not remember any scaffolding until the work was done. He said that he could have just used a scaffold tower and this would have been erected and taken down quite quickly and they might not have realised. He added that he could see several roofs at a time by doing this i.e. by erecting one tower, he could see several roofs. He had no records with him to tell the Tribunal when and how this was done. His evidence was really on the basis that this is what he would have done and his diary, which was in his office, would tell him when it was done.

30. There were several issues dealt with by Mr. Woodhouse during his evidence about which the Tribunal was not convinced. Some of them are:-

- In his statement and part of his oral evidence he said that the lifespan of this roof was 15 years. He confirmed that he did not know the name of the manufacturer of the roof, what such manufacturer said about lifespan or whether a guarantee had been supplied. He even changed his evidence about lifespan by saying that it could be 8 years or 8-12 years or 20 years. Written evidence from the Council's own records at page 109 would suggest 10 years.
- He insisted that this particular roof needed replacing even though there had been only one very minor repair, reported on the 12th February 2010 as being of fairly low priority with a cost of £45.02. At that time, no doubt an assessment would have been made as to whether any more extensive work should be undertaken. When challenged on this he said that if it had been decided that the roof was not so bad as to need replacing now then it would have had to be replaced anyway within 2/3 years. Therefore replacing it now would save the lessees the cost of repairs in the meantime and the cost of replacing this roof under separate contract in the future would be likely to cost more than that which has been incurred now.
- When challenged about the costings, it was put to him that the 'winning' contractor had said that consortium figures would be reduced by 16.5% and yet the end figures appeared to indicate a reduction in the order of 9%

in a sample put to him. He could not explain this.

- On the costings from Bauder – the manufacturer – he first said that the 69.26 per square metre included preparation whereas when he was pressed about this, he accepted that all the preparation had been separately charged
- Other written evidence supporting Mr. Woodhouse's evidence was contradictory. For example, it was not clear how many flats were covered by the cost breakdown supplied at page 163 in the bundle.

31. Both Applicants in the Section 27A application gave evidence. Of significance was the admission of Ms. Rowe that she had shown the figures to a surveyor who had not inspected the property and was unaware of its problems. She had been told that for the work set out in the papers, the figures were not unreasonable and she accepted such advice whilst still maintaining that replacement was not necessary.

32. At one stage there was an argument between Ms. Howe and Mr. Woodhouse about what happened in 2011. Mr. Woodhouse insisted that he had hand delivered the second letters in the Section 20 consultation because Ms. Rowe had telephoned on receipt of the second one. Miss. Rowe insisted that she had telephoned on receipt of the first letter when she was told not to worry about and to ignore the letter. She had then telephoned on receipt of the bill, not the second letter. She had been told that she had 2 years to pay.

33. Mr. Jones confirmed that because of a change in policy, the lessees would now have 3 years interest free to pay plus at least a further 2 years, and maybe more, with a payment of interest.

34. Counsel for the Respondent then addressed the Tribunal on the issue of a Section 20ZA dispensation by quoting extensively from the judgement of Lord Neuberger, the President of the Supreme Court in the case of **Daejan Investment Ltd. v Benson et al** [2013] UKSC 14.

35. Finally, counsel made representations that in view of the change in nature of the hearing, the Tribunal only had jurisdiction to deal with the issue of dispensation because the lessees had not raised any issue of prejudice or challenge to the figures. Thus it could not go on and consider whether the roof cost was reasonable.

36. The Tribunal chair told him that this was not the case. Prejudice was the most important issue in dealing with the dispensation application, but even if dispensation were granted, the Tribunal still had a live application to consider the reasonableness and payability of these service charges under Section 27A of the 1985 Act. The Applicants had said that replacement was not necessary. They had not raised any other issues but with an application where the Applicants were asking the Tribunal to consider the reasonableness and payability of service charges, it was up to the Tribunal, as an expert Tribunal, to consider just that.

37. Reasonableness covers a spectrum and a Tribunal is entitled to look at all parts

of the spectrum of reasonableness even though a party may not have raised all relevant issues. Payability is usually a matter of law. The Upper Tribunal has, in recent cases, said that Tribunals should not raise new issues themselves but these cases involved completely new issues being raised which were not part of an application. In this case, the first application to the Tribunal is for it to determine whether the service charge raised is reasonable or not and whether it is payable or not. This allows the Tribunal to consider all issues which are relevant to those questions.

Conclusions

38. **Did the consultation comply with the Regulations?** The first letter in the consultation process is written not by the landlord but by St. Georges Community Housing. There is nothing in the letter which explains who they are apart from a comment that 'St. Georges Community Housing on behalf of Basildon Borough Council has a responsibility to maintain leasehold properties in accordance with the leasehold agreement'. If they did then this is, of course, nothing to do with the Applicants. Their only agreement is with Basildon Council.

39. The next point to make is that the letter has a heading which says 'Notice to carry out works to renew roofing to block'. However, the body of the letter appears to contradict that by saying 'The works to be carried out under the agreement relate to communal roofing repairs'. Thus the letter gives a confusing message. Is the roof to be renewed or repaired?

40. The Respondent accepts that it has to comply with Schedule IV, Part 2 of the Regulations. This therefore makes it necessary for the initial letter to describe, in general terms, the works proposed to be carried out. There must be a doubt as to whether the letter in this case does comply with that requirement in view of the ambiguity.

41. The Regulations then say that the letter must 'state the landlord's reasons for considering it necessary to carry out the proposed works'. What does this letter say? It merely says that the works are necessary because St. Georges Community Trust has an obligation to maintain the properties. Well, as between the Applicants and the Respondent, that is simply not relevant. It may have some contractual relationship with Basildon Council, but that is nothing to do with the Applicants.

42. The Respondent has a contractual obligation to the Applicants to maintain the roof. That obligation existed at the time and still exists. That cannot, of itself, be a reason why the works are 'necessary' within the context of the Regulations. The reason why a lessee must know this, is so that he or she can provide meaningful comments on the reason why the work is 'necessary', as well as consider the appropriate contractor from whom an estimate should be sought.

43. Put simply, the letter does not say why the Respondent considers that the work (either replacement or repair) is actually necessary.

44. The second letter in the consultation process must, in accordance with the Regulations, set out, as regards at least 2 of the estimates obtained, 'the amount

specified in the estimate as the estimated cost of the proposed works'. It must then make all the estimates available for inspection. It is common ground that the second letter dated 9th August 2011 does not do that. It simply says that the charges are 'pre-set by London Housing consortium'. It does not say what those charges are or why estimates were not actually obtained from the proposed contractors, which is what the Regulations say.

45. The letter suggests that 4 contractors have been approached and they have agreed to charge the London Housing consortium costs less a certain percentage in each case. Whilst the letter confirms that the 'estimates' can be inspected, it does not say whether the estimates contain actual costings. In fact that second letter estimates the likely cost per flat to be £7,000 which turned out to be far from the actual cost. The proposed contractors also seem to have quoted for both a flat roof and a tiled roof.

46. These failings, of themselves, mean that the consultation process was not complied with. However, as to whether the second letter was delivered to the lessees, the Tribunal prefers the evidence of Ms. Rowe and Mr. Williams. It is also interesting to note that if consultation had been necessary for the electrical works, as the Council clearly believed, the 2nd stage in the procedure relating to the electrical work was accepted by the lessees, as is set out in the application. That 2nd letter is at page 142 in the bundle, is dated 27th September 2011 and has the word 'COPY' on it. The 2nd letter in the roofing works consultation is at page 134, is dated 9th August 2011 and does not have the word 'COPY' on it.

47. Furthermore, the first letter which Ms. Rowe has written is dated 31st August 2012 following a meeting on the 25th July 2012. This would tend to corroborate her version of events because the invoice sent to her is dated 29th June 2012 at page 152. If she had had a letter saying that her possible share of the costs was £7,000, the Tribunal is satisfied that she would have raised the issue in correspondence at the time. The Tribunal concludes that the 2nd letter was not sent or delivered and that probably the letter which the council and Mr. Woodhouse are talking about is that relating to the electrical work.

48. **Should there be dispensation?** This is a difficult issue. The Tribunal is satisfied that the lessees would have challenged the need to replace the roof if the initial letter had been clearer and if Ms. Rowe had not been put off by the person she spoke to in Basildon Council. The fact that the defect in the process in this case is a serious one as opposed to a merely technical one is no longer relevant since the Daejan decision.

49. The Tribunal takes the view that in this particular case, Basildon Council would have replaced the roof in any event. It was not convinced by the evidence of Mr. Cox and Mr. Woodhouse that a decision was made about this particular roof based on an individual survey. The Tribunal is well aware of the Decent Homes policy and it is to be commended for public landlords of large stocks of housing. However, this is a 'one size fits all' policy of programmed improvement based on anticipated lifespan of things such as roofs.

50. It is, perhaps, an unintended consequence of selling off flats in council housing

stock because a programme of renewing all roofs of a particular age in a locality is inconsistent with the test to be applied in this particular case. In this case, the Tribunal has to consider whether it was necessary or advisable to renew this particular roof. The fact that a similar roof in an adjoining block may be having problems should not determine whether this particular roof is in need of replacement.

51. Therefore, if the Council was going to replace the roof in any event and there is no suggestion that the cost of the work they did is unreasonable, then there is no actual prejudice in the Council failing to comply with the consultation process. Perhaps a rather stark conclusion, but nevertheless it follows the Daejan principle. The lessees accept that they received the first letter in the process. It was ambiguous but it did invite comment and the submission of names of contractors.

52. **Is the cost reasonable?** To suggest that the Tribunal cannot deal with this question is not a reasonable or responsible stance to take for a public body. It suggests that if the consultation process is undertaken or dispensation is given and there is no challenge to the cost of the work actually undertaken, then a lessee cannot challenge the reasonableness of either the work or the cost.

53. If that is not what is being suggested, then it follows that these lessees will have to issue another application challenging the reasonableness and payability of these service charges simply because they did not make all possible allegations in this application. The Tribunal has tried to look at this whole matter in a pragmatic way with a view to saving the parties and the taxpayer the cost of protracted litigation. It invited Basildon Council to make its application for dispensation rather than force them into making a separate application. If this had become necessary, it would have cost the Council the sum of £300 in fees plus any costs of representation. For it to suggest that these lessees cannot have the whole issue of reasonableness and payability looked at now is not accepted by this Tribunal.

54. There are two issues. Firstly, the Tribunal concludes that there was no real evidence in 2011 to suggest that the roof on this block needed replacing. It had only one very small past problem which cost only £45.02 to repair and to suggest, as Mr. Woodhouse did, that a look at the top of this particular roof could have determined that the roof was beyond economic repair, is unconvincing. Obviously it would not have lasted for ever, but this Tribunal, using its considerable knowledge and experience concludes that it would, on the balance of probabilities, have been economic to repair for at least 3 years.

55. The second issue is that of payability. There is nothing in the lease which enables the Council to recover service charges for improvements. Everyone in this case accepts that the new roof is an improvement in that the material used is longer lasting and it has insulation which the previous one didn't.

56. On the second issue, the Tribunal is assisted in having costings for various levels of roofing material. The prime one used by the Council in this case cost £70.37 per square metre which attracts a 20 year guarantee. For a 15 year guarantee,

the cost would have been £61.10 per square metre. Even though this has the improvement of insulation, the Tribunal considers that this version is much more a 'like for like' replacement than the one installed. 191 square metres was used which makes a difference of £70.37 - £61.10 x 191 = £1,770.57.

57. This reduces the total cost down to £30,660.26. Assuming a lifespan of 20 years, this equates to £1,533.01 per annum. It should be noted that where a manufacturer guarantees a product for 15 years, it can be expected that it will actually last longer. The replaced roof was installed in July 1995. It was replaced after 16 years. The Tribunal concludes that it could have lasted 3 years more. If one replaces a roof after 16 years rather than 19 years then one effectively 'loses' 3 years' use. Assuming the cost of replacement at £1,533.01 per annum, then the loss is £4,599.03.

58. If one then deducts repairs which may have been necessary at an estimated cost of, say, £150, then the resultant loss is £4,449.03, which equates to £741.51 per flat. Taking this away from the claim leaves a balance of £4,497.03 which the Tribunal rounds up to £4,500.00 as being the amount which it is reasonable for each of these lessees to pay.

59. Finally, the Tribunal turns to the question of the **Council's costs of representation** and the **fees** incurred by the Applicants. The Applicants had asked in their application form for an order pursuant to Section 20C of the 1985 Act and the Tribunal is free to make any order in respect of the fees paid. As the Applicants succeeded in respect of the thrust of their argument that the consultation requirements had not been met, the Tribunal considers it just and equitable to make an order under Section 20C.

60. In respect of the fees of £350 paid by the Applicants, the Tribunal again considers it just and equitable to order that these be refunded by the Council. Apart from the fact that the Applicants have succeeded in their main argument, the Council has been able to obtain dispensation from the consultation process without paying the fee of £300 which it would have had to pay with a free standing application.

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Bruce Edgington
President
23rd April 2013