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HM Courts & Tribunals Service

LEASEHOLD VALUATION TRIBUNAL

Application for a determination of liability to pay and reasonableness of service charges under sections 27A, 19 and 20C of the Landlord and Tenant Act 1985 ("the Act").

Case Number:	CHI/18UE/LSC/2012/0119
Property:	1 Castle Rock Mortehoe Woolacombe Devon EX34 7EP
Applicant :	Valerie Jeffrey
Respondent :	Castle Rock 2002 Management Limited
Date of Application:	10 September 2012
Date of Hearing:	30 November 2012
Appearances:	Valerie Jeffrey Applicant and George Jeffrey
	Alex Ashworth Michelmores Solicitors for Respondent
Tribunal Members:	Cindy A. Rai LLB (Solicitor) Chairman
	Timothy N. Shobrook BSc FRICS (Chartered Surveyor)
	Martin J. Wright FRICS FAAV (Chartered Surveyor)
Date of Decision:	11 January 2013

Summary of Decision

1. Service charges demanded during 2010-2011 and 2011–2012 for the costs of works which relate to demised parts of Castle Rock are not recoverable from the Applicant because the costs of such works are not within the definition of service charges within section 18 of the Act.

2. Therefore the Tribunal disallows the costs of removing the railings in front of Flat 2 and the construction of the Flat 2 patio, and the costs of replacing the Flat 3 Patio from being included within the service charge due from the Applicant during the disputed years.

3. It also disallows the costs in relation to the construction of the low wall at the front of Castle Rock because inadequate consultation occurred prior to the works being undertaken and because in any case the works were not needed or required to repair or maintain the Building.

4. The Tribunal does not accept that either clause 33 or clauses 74(7) of the Lease would enable the Respondent to include the disallowed costs as part of the service charges.

5. The Tribunal orders that any costs associated with the Respondent dealing with this application are not relevant costs and should not be added to the service charges for the current or subsequent service charge years.

6. The reasons for its decision are set out below.

Background

7. The Application was made by Valerie Jeffrey who is the owner and lessee of the Property. Directions were issued by the Tribunal on 12 September 2012 which anticipated that a hearing would be required to determine the Application. The parties complied with the Directions and a single paginated bundle of documents and statements was produced by the Respondent. In its statement the Respondent requested that the application be determined on the basis of written representations only. The Applicant requested a hearing and the Tribunal also considered that a hearing was necessary to enable it to make its determination.

8. On the day of the Hearing, but before it, the Tribunal Members inspected the external parts of the Property and the building known as Castle Rock of which the Property forms a part. They were accompanied by Stephen Brown the managing agent, Mr and Mrs Jeffrey and Alex Ashworth.

9. The Tribunal drove into the grounds of Castle Rock and walked behind the building around to the front of the Property which is one of the three ground floor flats. Castle Rock comprises 11 apartments on four floors three on each of the ground first and second floors and two on the third floor. The eight upper flats have balconies. Apparently the middle ground floor flat was originally constructed with a wooden decked balcony. Castle Rock is situated in an elevated position overlooking Woolacombe Bay with uninterrupted views across it. Access to Castle Rock is from the adjacent public road but controlled for security purposes by a rising bollard.

10. The Tribunal members looked at the patio areas in front of the Property and in front of the other two ground floor flats. They also saw the railings remaining in situ adjacent to the side of Apartment 1 and the low wall built at the same level as the patios which separated them from a bank which sloped steeply down to a lower driveway cut into the side of the cliff. That driveway led to an additional overflow parking area. Some of the turf adjacent to the low wall appeared to have been recently laid. The two patios in front of Flats 2 and 3 appeared to be relatively new.

11. Castle Rock was constructed by Prowting Homes South West Limited ("Prowting") and completed during 2002. The Applicant was the original purchaser of the Property. Following her purchase serious structural problems with the construction of Castle Rock became apparent and 9 of the 11 leaseholders pursued a claim against Prowting, (the "Prowtings Claim").

12. It is apparent from the papers submitted by the Respondent that the Prowtings Claim was settled and a consent order was made. Following settlement some works (primarily to the lower driveway) were carried out by Prowting and a financial settlement was paid to the claimants. The Tribunal were told,(during the Hearing),by the Respondent that a sum of money had been shared between those claimants.

13. At the time the Prowtings Claim was made Prowting retained ownership of the freehold although it appears to have been subsequently transferred to the Respondent. Thereafter all eleven owners of the flats agreed that other necessary works comprising both rectification and improvement of the Castle Rock would be undertaken.

Applicants' case

14. The Application is for a determination of the reasonableness of service charges demanded for the years 2010/2011 and 2011/2012 (the "disputed years"). Liability of the Applicant to contribute towards service charges for the Building and in the share demanded is not disputed. The Applicant has also asked for an Order under section 20C of the Act to be made preventing the Respondent's costs associated with the Application from being added to the current year's service charges.

15. The Applicant disputes the reasonableness of the service charges demanded during the disputed years for:-

    a. The replacement of the wooden decking forming the balcony of Flat 2 with an extended new paved patio.

    b. The replacement and extension of the patio in front of Flat 3.

    c. The removal of the railings originally sited in front of Flat 2 and the construction of the low wall beyond the new patio protecting the steep drop at the front of the building.

16. She explained that service charges had been demanded on account to fund a proposed programme of works of rectification to remedy defects identified as part of the Prowtings Claim. She is questioning whether it was reasonable to include within the service charges the estimated cost of what she described as additional works of improvement unrelated to the original defects.

17. She stated in the Application that the works neither related to the proper maintenance safety or administration of Castle Rock and were not for the benefit or safety of the owners (collectively), for which reason it is her case that the cost of these works is not recoverable as part of the service charge. She had therefore withheld payment of some of the service charges demanded.

18. When she received letters from Stephen Brown who was at all material times the managing agent she questioned how the Service Charge Estimates had been prepared, the basis of the calculation and whether the anticipated costs related to items which were properly recoverable as service charges. This was to enable her to ascertain if the charges were reasonable.

19. She also questioned whether or not there had been sufficient consultation as is required under the Act.

20. It is her case that she was not given any satisfactory explanations. Instead the Respondent claimed that it was her fault on account of email filters that information sent to every owner was not received by her.

21. Unfortunately this omission led to an accusation later withdrawn that she was described as "Refusenick" by the Respondent's solicitor.

22. The Applicant accepts that a programme of works was agreed to enable works of repair arising from Prowting omissions during the construction process to be rectified. She was unaware of the full extent of the works proposed because an email containing that information did not reach her and thereafter she had to make her own enquires of the architect and the planning authority.

23. She was unhappy with the proposal to remove the railings in front of the balcony serving Flat 2 being convinced that the only purpose was to create an infinity view.

24. She also believed that the patios in front of Flats 2 and 3 have been extended beyond the original footprint. The wooden decking structure in front of Flat 2 was removed and replaced with a patio. The patio in front of Flat 3 was re-laid and extended using new flagstones. She was apparently offered a new patio, (although it is not clear if it was suggested it would be extended), but was content for old flagstones to be used to fill in where flagstones were damaged or removed to accommodate necessary repair works to the supports for the balconies of the flats above the Property.

25. Although much more information was disclosed at the AGM which took place in August 2010 she believed she was prejudiced by not having received the same information at the same time as the other owners and prior to that meeting. She also believed that insufficient reasons were given as to the need for some of the works to be carried out such as the replacement of the wooden decking in front of Flat 2 and the removal of the railings and the replacement of the two patios.

26. She contends that the patios belong to individual flat owners so that the cost of any works to them cannot be recovered as part of a service charge. Neither should the cost of removing the railings or replacing the wooden deck with a patio be included within the service charges for the disputed years. She has not been provided with any information suggesting that the decking was defective or needed to be repaired or replaced. Even if she had been it would still not explain why the costs were recoverable as part of the service charge. The first suggestion that there was disrepair was a reference in the document "notification of outcome of consultation" dated 22 May 2011, [Page 283 of the bundle. Specific reference paragraph 6 of which refers to "the faults within the deck structure, Page 287].

27. Following receipt of that information she had explained to the managing agent that she did not think that the cost of such work was recoverable as part of the service charge. She also said that it was not part of the Prowtings Claim.

28. She suggested that the two new patios are two thirds larger and the boundaries between the Flats and the Common Parts are now blurred which will make it even less clear which repair costs can be recovered as part of the service charge.

29. Finally she said that following her questioning the inclusion of these costs within the service charges the Respondent had tried to pressurise her to drop

her objections by threatening legal proceedings to recover the service charges withheld.

30. She explained that she thought the definition of a service charge recoverable under her lease would include cost of works to communal parts of Castle Rock. That is what has prompted her to apply for an order under section 20C of the Act. The Respondent has threatened to sue her for recovery of costs under clause 14 of her lease. She would like the Tribunal to make an order preventing it from recovering costs from her as part of her service charges under either clauses 13 or 14 of the lease.

31. When asked to comment on whether if was sensible for improvement works to be undertaken at the same time as the remedial works she said that all discussions at the 2010 AGM had centred around the works that were to be undertaken as a result of the settlement of the Prowtings Claim. She agreed that there had been discussions between the owners prior to the 2010 AGM and that she had seen the Architects brief in 2009.

32. However there had been no AGM in 2011 so the minutes of the 2010 meeting were not approved formally until the 2012 AGM. She disputes their accuracy as she cannot recollect a "general resolution". She accepted that she had not raised this when the minutes were first circulated.

33. Whilst some costings were produced at the 2010 meeting it was not her recollection that these were formally approved. Discussions between the Applicant and Mr Ashworth did not result in any agreement between the parties as to the accuracy of those minutes.

34. The Applicant stated that the works she is disputing were never part of the Prowtings Claim; neither were they referred to in the Consultation Notice. She also disputed the architect's reference to a risk analysis relating to the removal of the railings.

35. When questioned about the relevance of clause 74.7 of her Lease she said it was a "catch all" provision referring to expenditure "for the proper running and administration of Castle Rock.

36. In response to a question as to whether she accepted that costs savings had been achieved because the railings in front of Flat 2 were removed and not repaired and referred to costs itemised on a sheet entitled estimated costs of disputed works [page 240] she said that she did not know who had prepared that sheet of costs but it was tabled at the 2012 AGM. The analysis of building costs, [pages 233 – 239], had been emailed after 10 September 2012, (the date of the 2012 AGM).

37. She is not disputing the accuracy of the figures but, as a matter of principle, is objecting, which she honestly believes she is entitled to do, to the inclusion of the costs of works to other owner's property being included within the service charges. Whether or not other costs have been saved is irrelevant to her case which is that service charges are only recoverable in respect of works which the Respondent is obliged or entitled to undertake pursuant to the lease of her Property which only includes works to those parts of Castle Rock not leased to other owners.

Respondent's Case

38. It was always agreed by the Prowtings Claim claimants that the sum recovered should be used to pay for remedial works to the Building. This can

be demonstrated from the minutes of the 2009 and 2010 AGM's. [Pages 103 and 168 of the Bundle].

39. The agreed intention was to rectify the defects but consideration was also given to improvements in design where the cost was marginal. Three owners Walker Durgan and Robbins agreed to put together a proposal.

40. Some consultation followed where owners voted on the uses of materials such as the steel for the replacement balustrades.

41. The omission to send plans and information to the Applicant had been unfortunate but accidental and unforeseen. When identified information was provided albeit not prior to the 2010 AGM.

42. John Robbins believed that those who attended the 2010 AGM had accepted the proposals relating to the works. The costings were produced and later attached to the 2012 AGM minutes.

43. The Respondent believes that the consultation which took place in 2010 was adequate. It has done enough to comply with the "spirit" of the Act. Mr Ashworth cited the Daejan case as authority for the fact that a freeholder company of which all owners or lessees are members or shareholders has a lesser duty to consult. As he did not have a copy of the case with him and had not produced it prior to the Hearing he sent it to the Applicant and the Tribunal following the Hearing referring to paragraph 67(ii) of the decision as his authority for this statement. It was his view that more informal consultation in such circumstances would be acceptable and should be accepted by the Tribunal as being adequate consultation.

44. The figures referred to in paragraph 36 above had been prepared by John Robbins. Tenders had been obtained albeit perhaps not exhibited for all of the proposed works. Dismantling repairing and replacing balconies was expensive and cost savings were achieved by the owner of Flat 2 foregoing the replacement of the railings. In fact he said that those railings had never been part of the original design but were substituted later when Prowtings realised that the cost of terracing would be unaffordable. It was entirely appropriate to have removed the railings and construct the small wall instead.

45. The remedial works necessitated the removal of some of the paving slabs on the patios and therefore those slabs lifted from Flat 3 had been used to repair the patio to Flat 1 leaving an insufficient number to relay that patio. The only purpose of the enlargement was to avoid an unnecessary junction with the downpipe from the upper flat.

46. Improved edging to the patios was motivated on Health and Safety grounds to reduce a trip hazard and facilitate access for the maintenance of the higher area adjacent to the slope. The low wall is a safer alternative to what it had replaced. Furthermore the architects said it complied with "best practice" guidelines.

47. Paragraph 27 of the Prowtings Claim referred to all balconies. Therefore he does not understand why the Applicant questions why the removal of the balcony of Flat 2 was not a valid service charge as it was always part of the remedial works. He said that the Prowtings Claim referred to repair and upgrades of all balcony structures and implied that the decking was a balcony structure.

48. The works actually undertaken had saved money because it was less expensive to construct a new patio that it would have been to remedy the

defects and repair the balcony. He quantified the saving as being in the region of £12,400.

49. The crux of his case is that pursuant to the Prowtings Claim all balconies and balustrades should be treated in the same way wheresoever these are situate within the Building. He went on to suggest that the replacement of the railings, costs of renewal of the Flat 2 balcony structure and the replacement of the balustrade would have cost a total of £17,232 and a 1/11 share would be £1,567 which would have increased each owners service charge contribution by £1,109

50. He also expressed dissatisfaction that copies of the Application had not been sent to all the other owners although he admitted that they all were aware of it. In his written submissions he stated that the Application was invalid but did not pursue this argument at the Hearing. Neither did he offer any reason for it save but to stress that any determination by the Tribunal that the service charge demands are unreasonable will result in a shortfall in the service charge account to the detriment of each of the Owners of flats at Castle Rock.

51. He opposed the application for a section 20C order stating that if the Respondent cannot recover the costs it has incurred under the service charge it will instead seek a cash injection into the company. The Applicant will be obliged to pay either way and on that basis such an order will not benefit her at all.

52. Finally Mr Ashworth made the point that the Prowtings Claim resulted from a combination of two things, inadequate design and defects in the construction. This meant that to remedy the problems works were undertaken which were not like for like. He suggests that there had been consultation and that the owners had all agreed on the extent of the works.

53. Even if the Tribunal should determine that the works undertaken were improvements the costs were very modest within the scale of the total works which had been undertaken.

54. In response to questioning from the Applicant he denied that the Respondent was seeking to deny the Applicant the opportunity to pursue her legal rights under the Act. He does however accuse her of withholding her service charges and threatening the Respondent with an application to the Tribunal.

55. Mr Ashworth had some difficulty in answering a question about which clause in the Applicant's lease enabled the Respondent to carry out works to balcony doors and recharge the costs as part of the service charge. He referred to clause 33 and said if the works were necessary for good management of Castle Rock, these could be undertaken by the Respondent and the cost recovered as part of the service charge.

The Law

56. Section 27 of the Act gives the Tribunal jurisdiction to determine issues in relation to service charges.

57. Section 18 of the Act sets out the meaning of "service charge" and "relevant costs"

S18 Meaning of "service charge" and "relevant costs".

(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] [FN1] 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 purposes—

(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.[...] [FN2]

[FN1] word inserted by Commonhold and Leasehold Reform Act (2002 c.15), Sch 9 Para 7

[FN2] word inserted by Commonhold and Leasehold Reform Act (2002 c.15), Sch 9 Para 7

58. Extracts from section 27A of the Act are set out below

S27A Liability to pay service charges: jurisdiction

(1) 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—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

Section 27A should be read in conjunction with section 19(1) of the 1985 Act which provides:-

S19 Limitation of service charges: reasonableness.

(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 provisions 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.

An extract from Section 20C of the Act is set out below too.

S20C Limitation of service charges: costs of proceedings.

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

Decision and Reasons

59. In this case the issues relate to both the reasonableness of the service charges for the disputed years and whether these are payable by the Applicant. It is contented that the disputed service charges relate to works which the Respondent had no obligation to undertake or to works to individual owners property or to works of improvement and not repair and therefore should not be recoverable.

60. The lease, of the Property is dated 19 December 2002 and was made between Prowtings (1) and the Respondent (2) and the Applicant (3). (the "Lease"). A copy was produced to the Tribunal by the Applicant. It is assumed by the Tribunal, and it was never suggested otherwise by either party, that the leases of the other flats in Castle Rock are in a broadly similar if not identical form in all material respects.

61. The liability of the **Owner** (which is how the lessee is referred to in the Lease) to pay a service charge is not disputed by the Applicant. The annual amount payable by the Applicant is a 1/11 share of Service Charge.

62. The Respondent can demand a sum on account of the Service Charge at the beginning of each **Service Charge Period** (which commences on 1 June and ends on 31 May), the **Estimated Service Charge** is such sum as the Manager shall specify by notice in writing at its discretion to be a fair and reasonable interim payment having regard to the Service Expenditure estimated by the Manager under clause 22.

63. The **Manager** is the Respondent. Under the said clause 22 it must "estimate the Service Expenditure in advance for each Service Charge Period and based upon such estimate (to) give notice to the Owners and take all necessary steps to collect the amounts of Estimated Service Charge due on the due dates"

64. **Service Expenditure** is defined as being all the expenditure properly incurred by the Manager in carrying out all its obligations in this Lease including the items set out in the Ninth Schedule

65. The Ninth Schedule sets out the provisions for Service Expenditure and Insurance Expenditure. (The latter is not in dispute and therefore not considered). It includes the following:-

    a. Expenditure incurred by the Manager in fulfilling its obligations in the Lease

    b. Costs associated with the running of the Respondent company

    c. Costs of employing managing agents

    d. Costs of an Accountant or Surveyor to determine if the Service Charge expenditure is reasonable

    e. Sums required to create a reserve fund for future capital expenditure

    f. Interest or other charges on borrowings

    g. All other expenditure which the Manager deems appropriate for the proper running and administration of Castle Rock (Clause 74.7)

66. The Respondents obligations are set out in the Third Schedule to the Lease which includes clause 22 referred to above. Clause 26 obliges the Respondent to "keep in good and substantial repair and condition and

whenever necessary rebuild reinstate and renew and replace all worn or damaged parts of the Common Parts"

67. Clause 27 contains an obligation to clean and light the Common Accessways.

68. Clause 32 contains an obligation to maintain the gardens.

69. Clause 33 states "to do or cause to be done all other things as at its discretion are necessary or advisable for the proper maintenance safety or administration of Castle Rock or for the benefit or safety of the Owners (or any of them) including the provision of any additional facilities for them either within Castle Rock or on any adjoining land which may become the property of the Seller or the Manager

70. **Common Parts** are defined as being Castle Rock except the Properties and including the Common Accessways the Visitors Parking Spaces and the Conduits.

71. **Properties** is defined as the Property and Other Properties. Flat 1 which is the Property so defined in the Lease is the ground floor flat shown edged red on the Plan 1 of the Lease and includes a parking space. A full description is included in the Eighth Schedule which contains no reference whatever to the patio or indeed any external area such as a balcony. The only indication therefore as to whether such areas are included within the definition of Property is by reference to Plan 1 the coloured copy of which is in the copy lease in the bundle and shows the patio areas in front of Flats 1 and 3 and what must have been the original extent of the balcony in front of Flat 2. The doors and glass in the windows in the Property (but not the door frames and window frames) are specifically included.

72. **Other Properties** is defined as any flat or any part thereof as the case may be in Castle Rock.

73. **Common Accessways** are all pathways forecourt areas drives halls reception areas entrances landings passages and lifts in Castle Rock not being part of the Properties.

74. Following the settlement of the Prowtings Claim the Respondent with the agreement apparently of all the Owners at Castle Rock put together proposals for remedial works to be undertaken. It seems likely that the scope of these works went far beyond works that would normally be undertaken or in fact be the responsibility of the Respondent under its obligations in the Lease. Clearly works to replace patio doors were not works to Common Parts doors being specifically included within the definition of Property. It is worth noting that three owners put together these proposals Messrs Walker Robins and Durgan and that Mr Durgan was not party to the Prowtings Claim and presumably therefore did not share in the cash settlement of £280,000 Presumably however he would have benefitted with all of the owners from the works undertaken by Prowtings. He would however perhaps also have contributed towards some of the costs which the claimants paid. In letters produced in the bundle and referred to later, Stephen Brown insisted that he could only collect service charges in accordance with the lease terms so 1/11 from each owner.

75. As is recorded in the minutes of the 2009 AGM the owners had at that meeting agreed to collectively instruct a plumber to check all the toilets within the Building notwithstanding that the maintenance and repair could not come within the definition of a Common Part unless the identified problem related to common Conduits. It is not clear from those minutes [pages 103 – 109] if this

was the case. It was suggested that none of the flats are occupied as main residences or dwellings and most of the owners apparently live far from Devon. Therefore it seems to have been the case that it was commonly accepted that the management would be more avuncular to take this into account.

76. Given that nine of the eleven owners had been party to the Prowtings Claim it is understandable that a joint venture was undertaken to commission the works required following settlement of that claim. The 2009 minutes refer to a budget of around £25,000 per owner. It is noted however that only eight owners plus the Respondent were party to the consent order.

77. Following plans relating to a planning application not being received by the Applicant she raised various issues primarily relating to the Architects suggested removal of the balcony for Flat 2 and the removal of the railings. John Robbins, (Flat 2), (one of the three owners who had put together the proposal for the works), responded to her and in that response he confirmed that the two patios and the balcony serving the ground floor flats were included within the leases but that the gravelled areas fronting them was not. [Email at pages 138 – 141]. It is possible that this prompted or influenced the architect in proposing the extension of the patio in front of Flat 3 and the replacement of the balcony in front of Flat 2. Whether the explanation offered by the Respondent at the Hearing that the enlargement was to avoid a junction with the downpipe is correct is impossible for the Tribunal to assess as no supporting evidence was provided.

78. It seems impossible to justify that works to balconies or patios belonging to individual flat owners can be communal so that the costs are properly recoverable as part of the service charge. This would not prevent the Owners agreeing to collectively commission works some of which relate to their own Property and share the costs but it is not clear that that was agreed. Certainly the Applicant does not believe that this was so. The Respondent seems to assume that if the works undertaken were part of the claim the cost must be recoverable as a service charge but never explains why, instead using this as an argument that the Applicant has been selective in the items she has challenged when other works benefitted apartments on the upper floors. However the relevance of such an argument to the Application was not explained.

79. The definition of Service Charge Expenditure within the Lease does not enable the Respondent to recover costs of other expenditure which it has no obligation to carry out and the suggestion, put forward on behalf of the Respondent, that clause 33 of the Lease which enables it to do "anything else necessary for good management", and by implication to recover the cost, would enable it to replace patio doors, is at best tenuous and at worst mischievous.

80. In so far as consultation was undertaken and it is accepted that some was, this seems to have only occurred following the Applicant's repeated requests for information about the estimated costs of the proposed works and after the main contractor had been chosen.

81. It is perhaps useful to consider the chronology of the exchanges of correspondence during which the Applicant became increasingly unhappy about the service charge demands:-

Date	Document	Reference
02.07.10	Stephen Brown (SB) to Applicant which sets out	

	Estimated Service Charge Expenditure for 2010-2011 at £27,000 being £7,000 + £10,000 on 1 Oct and £10,000 on 1 Dec	
12.07.10	Applicant to SB asking for more information and cost estimates	Page 144
24.09.10	Applicant pays £7,000 and asks for copies of quotations for works	Page 262
15.10.10	SB replies stating that the owners had already agreed that no owner wanted to nominate an alternative contractor and that a decision had already been made to appoint Morgan Sindal. He reminded the Applicant that interest was due on arrears of service charges.	Page 263
20.10.10	Applicant pays £10,000 and requests further information	Page 265
19.01.11	Applicant requests proper consultation	Page 266
02.12.11	Consultation Notice sent	Page 268
12.07.11	SB sends demand for £11,500 for Estimated Service Charge Expenditure being £1,500 + £9,000 for works He also demands outstanding £10,000 and indicates a further £3,000 is likely to be due later in the year He commented that settlement of the Prowtings Claim meant that the owners would effectively be paying for only half of the cost of the works which would benefit Castle Rock and that the true cost to those who had been party to it was even less	Page211 and 296
18.07.11	Applicant to SB asking why he had commented on sums recovered by owners who had been party to the Prowtings Claim	Page 212
08.08.11	SB to Applicant reiterating that she had benefitted from recovery of monies under the Prowtings Claim and could offset this against the service charges	Page 213
09.08.11	Applicant pays £10,500 and asks for an explanation as to why owners who participated in claim would be paying less from their own resources and explains why she is withholding other payments	
19.08.11	SB to Applicant insisting that expenditure for all works fall within service charges which have been properly levied and threatens recovery proceedings if she withholds payment	Page 215
30.08.11	Applicant to SB responding. It seems she might have assumed that unequal amounts were being demanded and collected. She suggests his last letter was overly complicated	Page 216

03.09.11	SB to Applicant in which he suggests that the settlement of the claim and the division of funds is "personal business" but states that the same amount of service charge is demanded from each owner and that the settlement of the claim has resulted in a lower service charge from which all have benefitted	Page 217
28.09.11	Applicant to SB stating that if the claim had not in part been settled in kind the claimants would have received more cash and therefore would be in a better position as those owners who did not participate have benefitted from the works without risk or cost; she also asks again which "works" are improvements and why these fall within the scope of the service charge. She specifically refers to clause 33 of the lease.	
16.11.11	Applicant pays £1500 being standard annual charge	Page 219
01.11.11	Boyce Hatton (solicitors to Applicant) send Michelmores (solicitors to Respondent) payment of £11,047.71	Page 221
08.12.11	Michelmores send SB £8,804.79 [copy poor figure not entirely clear]	Page 220
22.05.12	SB to Applicant estimating Service Charge Expenditure at £4,500 being £1,500 + £3,000 for works (due 1 Jun)	Page 299
28.05.12	Applicant pays £1,500 being standard annual charge	
01.06.12	Applicant to SB again stating that her issue is with improvements benefitting individual owners being charged to all owners as part of the service charge and asking for a breakdown of the building accounts for the remedial works	Page 300

82. The total amount demanded during the period of the correspondence listed above is £42,000 and the Applicant has already paid £40,047.71 although presumably the amount paid by Boyce Hatton included costs which appear to total £2,432.98 or a similar amount as it appears that the Applicant settled proceedings instituted by the Respondent and paid its costs. (Unfortunately the copy letters supplied are a little indistinct so the exact figures are not clear). This rather counters the Respondent's argument that she withheld payment since with the exception of the £11,047.71 paid through Boyce Hatton and of which only £8,804.79 appears to be service charges other sums have been regularly paid.

83. The Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Regulations") oblige a Landlord to consult with tenants where it is proposed to carry out qualifying works in any service charge year, which will require a contribution of more than £250 per flat. In this case the payment on account of anticipated expenditure appears be set at £1,500 per flat. As it is a payment on account it can validly be demanded and collected but it cannot be

used to carry out any works costing in excess of £2,750 in any year (11 x 250) without consultation prior to those works being undertaken.

84. The Respondent believes that its obligation to consult is watered down because in paragraph 67 of the Daejan Case to which it referred at the hearing Lord Justice Gross in the Court of Appeal considered whether where lessees are their own landlord (as in this case) the consultation requirements have to be considered against the background that they are spending their own money. In paragraph 68 of the report he suggests that the Lands Tribunal (as it then was) might have been in error in contemplating a less rigorous approach but that "the point does not go anywhere" (albeit in that case) Daejan was an appeal from a decision of the Lands Tribunal in respect of an LVT decision to the Court of Appeal which related to an application for dispensation from the consultation requirements. The grounds of the appeal were that the LT had erred in law when considering that the nature of the landlord was relevant and the LT should not have adopted a more rigorous approach. That particular ground of appeal failed. [paragraph 67(iv)]

85. The Applicant suggests that although a consultation notice was eventually sent in February 2011 it was prompted by her and that the list of the works set out in it do not include the removal of the balcony rail to Flat 2 or the removal of the balcony, or the replacement of the Flat 3 patio and the extension of the area formerly the flat 2 balcony with a new patio. In addition a low wall was constructed albeit it appears not to be disputed that this is within a Common Part

86. In fact the Consultation Notice does refer to the reassembly of balcony structures other than Flat 2. It also refers to the removal of the railings and the construction of the low wall. The only reasons given for the works are to correct or remedy faults the subject of the Prowtings Claim. Paragraph 27 of that claim which was referred to by Alex Ashworth in his submissions on behalf of the Respondent refers to defects and recommends replacement. It contains no mention of the replacement of the decking to the balcony in front of Flat 2. The Respondent argued that this paragraph was sufficient evidence of the need for replacement but the Tribunal is not persuaded by his argument.

87. The removal of the black railings in front of Castle Rock and the construction of the low retaining wall is referred to in the Consultation Notice. [page 172] and presumably the reason for it was "to restore or enhance the appearance of the building and ground and views from the building and grounds". It is difficult however to interpret this as being anything other than an improvement and it would appear although no actual evidence was provided that the rails removed formed part of the common parts. If these did not the cost of the works should not be recoverable as service charges.

88. The low retaining wall is clearly within the Common Parts but the Consultation Notice does not really establish a reason for the construction save for that given in paragraph 86 above.

89. The Tribunal determines that the costs of constructing the patio in front of Flat 2 and replacing the patio in front of Flat 3 are not recoverable as service charges. It accepts that it is clearly the case that the patios have been extended and are in part constructed on Common Parts but this does not justify that the costs of the construction be shared between eleven owners unless each agreed to this. It is clear from the Application that the Applicant did not.

90. The Tribunal accepts that the Consultation Notice was sent in 2011 albeit it believes it was only produced because of the Applicant's persistence. The contractor had already been chosen. That notice does identify the work proposed to construct the small retaining wall without providing a satisfactory explanation of the need. It does not justify the costs of replacing the balcony in front of Flat 2 with a patio even if the removal of the railings which were defective and the fact that these were not reassembled saved "communal money". It seems to the Tribunal that the Prowtings Claim also saved communal money but those owners who participated were not offered other works to their flats by way of compensation as seems to be the case in relation to the owner of Flat 2.

91. On that basis it determines that the costs of constructing the low retaining wall are not recoverable as part of the service charges as the consultation notice does not establish a need for the works therefore the cost is not reasonable. Furthermore the reason given for the works in the consultation notice is to restore or enhance the appearance of the building and grounds. The Lease contains no provision enabling the Respondent to carry out works for such a purpose and the Tribunal does not accept that it can rely upon Clause 33 because the evidence that the works were required on safety ground is not persuasive. It prefers the Applicants explanation which was a desire perhaps prompted by the architect to enhance the appearance and improve the views from the building.

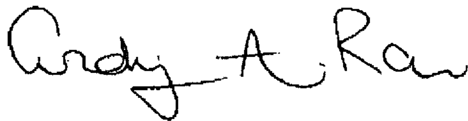
92. The Respondent's suggestion that the Applicant must accept a lesser obligation from it because she is a part owner of the Company is unacceptable and expressed in a quite outrageous way in the Respondent's written submission. It would enable directors of freeholder companies of which all lessees were members or shareholders to circumvent the Act and undertake works at shared costs for the benefit of individual properties, if they chose to do so. Such inappropriate behaviour is what the Act is intended to prevent. It appears that this is exactly what the Applicant has objected to "as a matter of principle", and it is her adherence to her principles which has already resulted in expenditure of in excess of £2,000 in payment of the Respondent's costs.

93. As the Tribunal has determined that the Application succeeds in relation to the service charge costs which relate to the two patios and the low retaining wall it would be inequitable not to allow her application for a Section 20C order. Had the Respondents addressed the Applicant's concerns and approached the way in which service charges collected were being allocated more transparently the Application may not have been made. There was clearly a facility for individual owners to fund works to their own property as there is a note on analysis of building costs, [page 235], that the extra cost of decking to Flat 8 would be met by Ben.

94. The Tribunal makes an Order under Section 20C which prevents the Respondent recovering its costs of these proceedings pursuant to clauses 13 and 14 of the Lease as service charges in the current year or in any subsequent year.

95. The Respondent has argued that for the Tribunal to find against it or make a section 20C order is self defeating. There is some merit in the argument because the Tribunal believes that the attitude displayed by the Respondent in failing to address the Applicant's concerns was directly responsible for this Application. Consequently it is the Respondents' claim which has been defeated not that of the Applicant. Stephen Brown stated correctly that the

Respondent must collect service charges from owners equally as the leases provide. He failed to accept that it was equally unfair for an argument to be made that costs saved from the total project could be diverted for use to benefit specific owners. He specifically denied this could and should occur on account of the benefit to all owners of the works undertaken by Prowtings in settlement of the Prowtings Claim but effectively supported service charge demands which enabled other owners to benefit from what he termed to be collective savings.



Cindy A. Rai LLB (Solicitor)

Chairman

References

- Daejan Case - **Daejan Investments Ltd v. Benson & Ors [2011] EWCA Civ 38**
- All references to page numbers are page numbers in the single bundle