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THM COURTS AND TRIBUNALS SERVICE
LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/19UH/LSC/2012/0111

Between:

Mr and Mrs G Coward

(Applicants)

and

Barton Lodge (Cerne Abbas) Management Limited

(Respondent)

Premises: Apartments 5-10, Barton Lodge, The Folly, Cerne Abbas, Dorchester ("the Premises")

Hearing: 22nd January 2013

Tribunal: Mr D Agnew BA LLB LLM Chairman
Mr A J Mellery-Pratt FRICS
Mr J Mills

DETERMINATION AND REASONS

Background

1. On 13th August 2012 the Applicants applied to the Tribunal for a determination as to the payability of certain service charges levied in respect of their property at Apartment 5 of the Premises of which they are the long lessees. The Respondent is the Management Company, of which the Applicants and all other owners of units at Barton Lodge are members, and is responsible for levying the service charges.

2. At a pre-trial review held on 23rd October 2012 at The Kings Arms Hotel, Dorchester, it was directed that the hearing would concern the service charge years 2010/11 and 2011/12 and the budget for the year 2012/13. Directions were given for statements of case to be filed by the parties and this was duly done. The case came before the Tribunal for determination at the Kings Arms Hotel, Dorchester on 22nd January 2013. The Applicants appeared at the hearing to present their case in person. The Respondent was represented by Mr Justin Fielder, a Director of the

Respondent company and in attendance was Mrs Carol Bowden, the company secretary of the Respondent and a Director of the Respondent's managing agents, Dickinson Bowden Lettings Limited.

Inspection

3. The Tribunal inspected the Premises immediately prior to the hearing on 22nd January 2013. Barton Lodge is a development comprising six apartments in a large Grade II listed house (hereinafter referred to as "the main house"), four new build apartments and nine freehold cottages. The main house was originally built in or about 1825, latterly used as an old people's home before being converted into apartments in or about 2007 and extended. Behind a porticoed front entrance to this building there is a lobby which contains the post boxes for flats 1-10 and behind that an entrance hall with a fireplace and two winged chairs. There is an electronic key pad for which the owners of all 19 properties at the Folly have the code to enable them to access this area. In this entrance hall is situated two cupboards, one containing the satellite tv system for the whole development and the other containing the electricity distribution unit which directs the electricity supply to all parts of the development. A modern lift is situated behind this entrance hall serving the upper two floors of the main house.

4. At the same time as the conversion the four new apartments were constructed to conjoin with the main house. The nine freehold cottages are in three terraces of three units each within the grounds. There is also one garage or carport for each of the 18 units in the development together with gardens and estate roads.

The Applicants' case

5. The Applicants summarised in their statement of case the issues that they wished the Tribunal to determine as follows:-
1) Whether, in the light of the budget for 2011/12 it was reasonable for the amount actually sought on account of service charge for that year to be £215 per quarter when the budget showed that a contribution of £175 per quarter would be sought. In evidence at the hearing the Applicants pointed to the budget document which indicated that a charge of £175 per quarter would be sought but the amount actually demanded was £215.
2) Whether it was reasonable for payment towards a sinking fund to be demanded before the consultation procedure under section 20 of the Landlord and Tenant Act 1985 had been completed and whether it was reasonable to demand that sinking fund contribution when the amount sought was based on a higher estimate for the proposed works than was actually accepted. The Applicants referred to documentation stating that the cost of external redecoration upon which the sinking fund demand was based would be £23,713 whereas in actual fact the cost of the works only came to £8,820.

3) Whether it was fair to put the sinking fund monies into one single account with the service charge contributions for everyday expenditure as was being done by the current managing agents, rather than in a separate designated account. The Applicants' concern was that instead of building up a fund to meet specific future expenditure which would be an asset for their property should they wish to sell it, the fund was being dissipated on general expenditure and that insufficient monies were being demanded from all 19 unit owners for the credit of the No 1 account for communal areas.
4) Whether, in the light of the definitions in the lease some of the charges levied against the lessees of the apartments in the main house should have been allocated differently so that they should have been sought from all 19 unit owners. The Applicants explained that the service charge accounts are divided into three parts. Account no 1 relates to charges for the "communal areas" where the expenditure is divided between all 19 units. Account no 2 relates to expenditure which is said to relate to the main house only (divided between the six lessees of the apartments in the main house) and Account no 3 which relates to expenditure said to relate solely to the new build apartments and is divided between the four lessees of that part of the development. The Applicants identified the following charges that they say should have been allocated to all the property owners and not just the six lessees of the apartments in the main house namely a charge of £185 for the cost of redecoration to the entrance porch to the main house in August 2012 and the cost of lift maintenance and the lift telephone. In 2010/11 the amounts for these items were £472 for lift maintenance and £210 for lift telephone and in 2011/12 the amounts for these items were £1127 and £308 respectively. The Applicants considered that it was important to establish the principle as to where these charges should be allocated as they anticipated that the figures for these items are likely to be more substantial in the future. The Applicants referred to the definition of "common accessways" contained in their lease to support their argument. Those provisions are set out below. The Applicants did not challenge any of the figures contained within the budget for 2012/13 and were reminded by the Tribunal that it was open to them to challenge the actual amounts expended during the 2012/13 service charge year once the end of year accounts have been received by them should they wish.

The Respondent's case

6. The Respondent's case was in the main given by Mr Fielder, a Director of the Respondent company and the owner of one of the freehold cottages. He accepted that the budget produced for the 2011/12 service charge year indicated that the charge for the lessees of apartments in the main house would be £175 per annum, but by the time it came to sending out demands for the first quarter of that year it was evident that £175 would be insufficient to cover the likely costs as there had already been some unexpected expenditure. Consequently, £215 per quarter was charged on account and as the actual expenditure for the year worked out at

£256.04 for that year it cannot be said that an on account figure of £215 was unreasonable.

7. With regard to the "sinking fund" Mr Fielder explained that it was realised when the residents took control of the Management Company, four years into the seven year cycle for external decorating that a significant sum of money would need to be paid by those liable to pay for the work when it was done as there had been no provision made for this ever since the development had been carried out in 2007. As not all lessees were in the fortunate position of being able to find the necessary funds in one go, it was decided at the AGM of the Management Company in September 2011, that this would be collected over 10 quarters from January 2012 so that by the summer of 2014 sufficient funds would have been collected to fund the work estimated to cost in the region of £23,713 although some of the work included in this figure was more pressing and would be carried out in 2012. It was suggested that the contributions for this work would comprise a "sinking fund" and a document setting out Questions and Answers with regard to a sinking fund was circulated to all members of the Management Company including the Applicants. This scheme, although voted against by the Applicants was approved at that AGM. The more urgent work was carried out towards the end of 2012 at a cost of £8820. This was redecoration of the render on the new build apartments and repair work to the main house windows. Mr Fielder said that it was not appropriate to compare the estimate on which the "sinking fund" contributions were based with the actual cost of the more urgent work because the scope of the works was completely different. The original estimate included much more work than was actually done and further work is still to be carried out. He said he is not a lawyer but he has been advised that the demand for a payment on account of service charges including the amount for the "sinking fund" is not subject to section 20 consultation.

8. As for putting the monies described as the "sinking fund" into a separate account, Mr Fielder confirmed that if the monies actually comprised a reserve fund then in accordance with the lease these monies would be placed in a separate account bearing interest. However, the monies referred to by the Appliants cannot be regarded as reserve funds because they are needed as part of the service charge to cover the expenditure required for the current year and the next year. He assured the Applicants that once the immediate costs of the works required to be carried out as part of this round of external decoration has been carried out (this "hump" of expenditure as he described it) the way would be clear to start paying into a reserve fund which would indeed be held in a separate interest-bearing account. With hindsight, he regretted that there had ever been mention of a "sinking fund" as this has only served to confuse the Applicants but it had been done to try to separate out the costs of everyday items of expenditure from the redecoration and window repair costs.

9. Mr Fielder considered that the apportionment of costs between the Nos 1,2 and 3 Accounts has been correctly done. The decoration of the front porch was to the main house building and the lift only serves that building. He accepted that if the Tribunal formed a different view then the accounts would have to be re-cast. Unfortunately, there was no copy of a specimen lease of the new build apartments or a copy of the registered title to the freehold cottages before the Tribunal so it could not be said whether either the new build apartment owners or the owners of the freehold cottages were liable to contribute to the costs which the Applicants say have been wrongly apportioned. Finally, Mr Fielder said that late payment interest charges of £42.05 had accrued due to the Applicants not paying their service charge from 1st January 2012 until 23rd October 2012 and that the Respondent had incurred the costs of the managing agent in attending the two Tribunal hearings which had not yet been invoiced of between £150 and £200 and he asked the Tribunal to determine whether, in principle, these costs could be sought from the Applicants as he considered it unfair for the other members of the management company to have to bear part of the costs which the Applicants have generated in applying to the Tribunal.

The lease

10. The Applicants' lease is dated 29th November 2007 and is made between Strongvox Limited (1), the Respondent (2) and the Applicants (3). By paragraph 24 of the Fifth Schedule to the lease the lessees, therein referred to as "the Owner," covenant to pay the rent and by paragraph 25 covenant to pay the estimated service charge, the service charge adjustment and the additional estimated service charge.

11. Paragraph 26 of the Fifth Schedule to the lease provides that the Owner is liable to pay interest on any rent or service charges not paid within 21 days of demand at the rate of 4% per annum above base rate. Paragraph 34.4 makes the Owner liable to pay the costs and expenses in connection with the Landlord and Tenant Act 1985 including any legal costs incurred in seeking a declaration that the Estimated Service Charge and/or Service Charge is reasonable.

12. By paragraph 49 of the Sixth Schedule the Manager covenants to keep decorated in good and workmanlike manner and with appropriate materials of good quality the Common Parts or such parts as are usually decorated as often as in its opinion is reasonably necessary.

13. The First Schedule contains the definitions of the terms used in the lease. "Common Parts" is defined as "the "Estate" (excepting the Properties) and including (but not by way of limitation) the Common Accessways the Conduits and the Parking Areas. "Common accessways" is defined as "all private pathways forecourt areas roads pavements halls lifts reception areas entrances stairways landings passages in the Estate not being part of the Properties". The Properties" means the property set out in Schedule 2 to the lease (i.e. apartment 5) and the "Other Properties." The

"Other Properties" are defined as "any dwelling or any part thereof... in the Estate.... But excepting the Property and the Common Parts." The "Reserve Fund" is defined as "funds to meet future expenses and contingencies as provided in clause 65 and 83.5."

14. By paragraph 65 of the Eighth Schedule the Respondent may demand an Additional Estimated Service Charge if "notwithstanding the Manager having endeavoured accurately to anticipate the amount of the Service Charge Expenditure it shall appear to it that its estimate thereof is likely to be understated and the receipts by way of Estimated Service Charge insufficient to meet the expenditure to be incurred." Further, by paragraph 83.5 of the Ninth Schedule service expenditure is stated to include :-

" The sums required to create a Reserve Fund as determined by the Manager as being fair and reasonable to meet any future expenses and contingencies which the Manager shall expect to incur in the performance of its obligations under this lease and in particular.. for the provision of future expenditure on items which call for intermittent expenditure including provision for capital costs maintenance replacement and renewal of machinery apparatus and equipment."

15. By paragraph 63 of the Eighth Schedule to the lease it is provided that "the manager may set aside from the Estimated Service Charge such sums of money as it may determine as being fair and reasonable to meet any future expenses and contingencies which it expects to incur in the performance of its obligations set out in this lease and it shall keep proper records of, hold and account for separately (by way of Reserve Funds and Reserve Fund Investment Accounts) such sums of money and all interest (if any) earned thereon UPON TRUST to expend them in subsequent years upon such future expenses and contingencies as become actual (as it shall determine) and subject thereto UPON TRUST for the Owners according to their respective entitlements.

16. By paragraph 9 of the "Particulars" the Applicants are liable to pay 1/19th of the Estate Service Expenditure and 16.666% of the Building Service Charge, the Building being the main house or, as described in the lease, "the main structure of the building of which the apartment is comprised in the Property."

The Tribunal's determination

17. Taking the matters upon which the Applicants sought a determination in turn the Tribunal finds as follows:-

1) It was reasonable for the Respondent to seek an interim service charge of £215 per quarter for the service charge year 2011/12 notwithstanding that the budget had indicated that the figure would be £175 because it had become evident between the date of that budget and the demand for the first service charge payment for the year in question that £175 would be insufficient to cover the expenditure

necessary. In the event, the service charge for that year was in fact £256.04 and so £215 was too little, if anything.

2) There is no requirement for a landlord or management company to undergo any part of the section 20 consultation period before seeking a payment on account of future service charge expenditure. It is the expenditure of the funds that must await the completion of the consultation process and not the raising of money on account. Therefore the Respondent was perfectly entitled to seek to charge monies for the redecoration work before the section 20 consultation had finished. As the amount sought was a payment on account, the fact that less has been spent to date than the contribution sought was designed to cover is immaterial if, as is the case here, the accounts show the amounts standing to the credit of Accounts no 1, 2 and 3 so that monies not expended can clearly be seen as standing to the credit of the individual accounts until expended.

3) Whilst the Accounts produced by the Respondent are in a different form to those that the Applicants were used to seeing from the previous managing agents, they are sufficiently detailed and clear if one takes time to study them. Unfortunately, the Applicants have not seen the full final accounts for the 2011/12 year notwithsdtanding that they have been available for several months and were, according to the Respondent, available as part of the "pack" for discussion at the AGM in September 2012 which the Applicants were unable to attend. It may be that some documentation has gone astray as this should be redirected to them in France and that arrangement may have broken down. It is, however, surprising that the Applicants have seemingly not made much effort to obtain a copy of those accounts when they were aware that these proceedings were in train. Although the full 2011/12 accounts were not produced to the Tribunal and the managing agent was unable to supply a copy at the hearing the Tribunal expects (if these are in a similar format to the 2010/11 accounts, as the Tribunal was assured they are) that the Applicants should be able to see from those accounts how the service charge and "sinking fund" so called has been spent and what remains available for future expenditure. It was unfortunate that the Respondents should ever have referred to the monies required for the imminent redecoration work as a "sinking fund" as, in reality, it was part and parcel of the service charge and the Respondents have only served to confuse the issue as far as the Applicants are concerned by referring to it as such. The terms "sinking fund" and "reserve fund" are used interchangeably by most people albeit that there is in theory a subtle difference. The Applicants, however, now have an assurance from Mr Fielder that once the immediate expenditure requirement has been overcome, the intention is to begin to build up a reserve fund at which time a separate interest bearing account will be set up. In the meantime, a careful study of the accounts will show that there has indeed been an increase in service charges caused by the need to provide for redecoration and window repair work and that once this

has been attended to, the service charge should revert to a lower level, with provision for major future expenditure being provided for by a reserve fund. The Tribunal reminds the parties that once the year end accounts for the 2012/13 year have been produced it is always open to either party to apply to the Tribunal to determine whether the expenditure for that year, which will include that of the external redecoration of the new build apartments and the repair to the main house windows was reasonably incurred and of a reasonable amount.

(4) The Tribunal does find that the Applicants are correct in that it would seem that some items of expenditure for 2010/11 and 2011/12 and for the budget for 2013 have been apportioned wrongly between the three service charge accounts. The entrance porch and hall of the main building is part of the "Common Accessways" as defined by the lease of Flat 5 as is the lift that is situated in the main building. Consequently, the costs associated with the redecoration this porch and the maintenance and repair of the lift and the lift telephone will be shared with all those whose leases or freehold covenants require them to contribute to the costs of the "Common Accessways". The definition of "Common Accessways" in the lease includes halls, lifts, reception areas and entrances. As the Tribunal has not seen any of the leases of the new build apartments or the registered title to the freehold cottages it is unable to determine whether they contain the same wording as in the lease of apartment 5 thereby creating a liability to contribute towards the costs of maintaining these areas so that those costs should be shared between 10 units (that is, if only the flats share this wording) or 19 units (that is, if all the units on the estate including the 9 freehold cottages contain this obligation). It would seem that it is likely that the entrance porch and hall of the main building is regarded as a common accessway as the post boxes for all10 apartments are located there and all 19 owners have been given the code to allow entry to this area. If the parties are unable to agree how these costs are to be apportioned liberty is hereby given for either party to apply in writing to the Tribunal within the next four weeks for the Tribunal to determine the point. The Tribunal will deal with the matter on written submissions only and will need to have copies of the relevant title documents. If the Respondent accepts that as a result of the Tribunal's findings given above that the lift maintenance, lift telephone and redecoration costs of the entrance porch should be divided between more than the six units in the main house it will be necessary for the accounts for 2010/11 and 2011/12 to be recast and for the allocation of costs for the 2013 budget to be revised.

18. The Management Company's right to interest on late payments is a right which is fixed by the lease and is not a matter within the Tribunal's jurisdiction to determine or interfere with. The amount of the late payment may, however, be affected as a result of the Tribunal's finding at paragraph 17(4) above. As far as recovery of the managing agent's costs of preparing for and attending the Tribunal is concerned,

the proceedings before the Tribunal are normally costs free in that the Tribunal may only normally order one party to pay another party's costs if they have acted in a way with regard to the proceedings that is frivolous, vexatious, abusive, disruptive or otherwise unreasonable. (Schedule 12 of the Commonhold and Leasehold Reform Act 2002). The Tribunal does not find that either party has behaved in such a way. The Applicants have asked for the Tribunal to make an order under section 20C of the said Act which, if granted, would mean that the Respondent would be unable to seek to recover its costs of the Tribunal proceedings through the service charge which all those contributing to service charges would otherwise be liable to pay. The Tribunal has power to make such an order if it is "just and reasonable" for such an order to be made. The Tribunal does not consider that it is just and equitable for such an order to be made. The Applicants have largely been unsuccessful in their application, save for some success as to the apportionment of some of the expenditure, the precise extent of their success cannot be calculated until the leases of the new build appartments and the freehold covenants are examined. The Tribunal does not consider that the Respondent should be prevented in those circumstances from seeking to recover its costs through the service charge if it wishes to do so. It may, however, prefer to invoke the provisions of the lease and seek recovery of its costs from the Applicants alone as a contractual right. The lease is drawn widely enough by virtue of paragraph 34.4 of the Fifth Schedule of the lease for the Respondent to seek payment of costs from the Applicants which the Respondent has incurred under the Landlord and Tenant Act 1985. If they do so this would be an Administration Charge as defined in the Commonhold and Leasehold Reform Act 2002 Schedule 11 and is subject to it being reasonable. If the Respondent does decide to try to recover its costs in relation to the Tribunal from the Applicants alone the Applicants may apply to the Tribunal for a determination as to whether those costs are reasonable or not. In making that determination the Tribunal seised with the matter will no doubt wish to hear whether it was necessary or reasonable for the managing agent to have attended the hearings in this case. This Tribunal feels compelled to say that Mrs Bowden's attendance was, arguably, unnecessary. She made hardly any contribution to the Respondent's case which was conducted almost entirely by Mr Fielder, and when asked for documentation or additional information she was unable to assist. No doubt the Applicants would wish to bring these comments to the attention of any Tribunal when or if it is asked to make a determination of the reasonableness of the Respondent's costs.

Dated this 7th day of February 2013

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D. Agnew BA LLB LLM