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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00BN/LSC/2014/0080**
Property	:	**Sir Williams Court, 190, Hall Lane, M23 1 DL**
Applicants	:	**Rachel Whitelegg – 79, Sir Williams Court** **Kim Hyde – 186Q Sir Williams Court** **Michael Fairclough – 77, Sir Williams Court** **Michael Ratigan – 71, Sir Williams Court** **Jason Finnegan – 72, Sir Williams Court** **Daniel Hunt – 70, Sir Williams Court** **Hannan Amin – 184L, Sir Williams Court** **Ahmed Sharif – 74, Sir Williams Court**
Representative	:	**Ahmed Sharif**
Respondent	:	**Sir Williams Court Management Company Limited**
Represented by	:	**EDGE Property Management Limited**
Type of Application	:	**Landlord and Tenant Act 1985 – s27A** **Landlord and Tenant Act 1985 – s20C**
Tribunal Members	:	**Mrs.C.Wood** **Mr.D.Bailey** **Mrs.H.Clayton**
Date of Decision	:	**29 April 2015**

DECISION

ORDER

1. In this Order, the following terms shall have the following meanings:

1.1 "Phase I" means the 5 blocks comprising Apartments 1-89, Sir Williams Court;

1.2 "Phase II" means the 3 blocks numbered 184,186 and 188 A-W;

1.3 "Phase I Applicants" means Ms.R.Whitelegg, Mr.M.Fairclough, Mr.M.Ratigan, Mr.J.Finnegan, Mr.D.Hunt and Mr.A.Sharif;

1.4 "Phase II Applicants" means Ms.K.Hyde and Mr.H.Amin;

1.5 "Phase I Lease" means a lease in the same form and content as the lease dated 31 October 2002 and made between Amstone Homes Limited (1), the Respondent (2) and Ms.N.Coyle and Mr.C.Coyle relating to Apartment 70;

1.6 "Phase II Lease" means a lease in the same form and content as the lease dated 16 December 2005 and made between Lowry Properties Limited (1), the Respondent (2) and Mr.P.A.Hazelhurst relating to Apartment 184L.

2. The Tribunal orders as follows in respect of the 2014/2015 service charge year:

2.1. that the Phase I Applicants have no liability to pay service charge in respect of costs incurred on the Phase II balcony remedial works ;

2.2 that the net costs of £21,538.70 (£97,201.50 less the NHBC contribution of £75,662.80) incurred in respect of the Phase II balcony remedial works were reasonably incurred and each of the Phase II Applicants is liable to pay as service charge the sum of £341.88 in respect of such works;

2.3 that the costs of £25,576.10 incurred in respect of the external redecoration of Phase I and Phase II were reasonably incurred and each of the Applicants is liable to pay as service charge the sum of £167.15 in respect of such works;

2.4 that the costs of £51,975.00 incurred in respect of the re-carpeting of the internal communal areas of Phase I and Phase II were reasonably incurred and each of the Applicants is liable to pay the sum of £339.71 in respect of such works;

2.5 as there is no provision in the Phase I Lease or in the Phase II Lease which permits the Respondent to charge, as service charge, monies for the establishment of a reserve fund, each of the Applicants is entitled to a refund of £89.72 as calculated on the basis of a credit balance on the reserve fund account of £13,727 as at 31 December 2014;

2.6 the aggregate liability of each of the Applicants for the amounts included in the service charge as expenditure on Phase II balcony remedial works, external redecoration and re-carpeting is as follows:

Phase I		**Phase II**
	Balcony remedial works	£341.88
£167.15	External re-decoration	£167.15
£339.71	Re-carpeting	£339.71

Less:	Reserve funds of	
£82.22	£12579.66 allocated	£82.22
£424.64		£766.52
Less: £ 89.72	Reserve funds of	£ 89.72
	£13727 as at 31.12.14	
£334.92		£676.80

2.7 Having regard to all the circumstances, the Tribunal determined that it was not fair and equitable to grant the Applicants' application under section 20C Landlord and Tenant Act 1985, which is refused.

BACKGROUND

3.1 By an application dated 28 May 2014, ("the Application"), the Applicants applied to the Tribunal for a determination as to the liability to pay, and the reasonableness of, the levy service charge of £565.43 per leaseholder charged in the service charge year 2014/15.

3.2 Directions dated 11 July 2014, ("the Initial Directions"), were issued which confirmed that the Application concerned the 2014/15 service charge year together with a section 20C application.

3.3 As a result of certain issues raised by the parties when seeking to comply with the Initial Directions, a Case Management Conference was held on 8 October 2014, ("the CMC"), at which all parties were represented and further Directions dated 20 October 2014, ("the Further Directions") were issued.

3.4 A hearing was scheduled to take place at 1130 on Friday 20 March 2015 following an inspection at 1000 on the same date.

INSPECTION

4.1 The inspection was attended by Mr.Sharif, Ms.Hyde, Mr.Ratigan and Mr.Fairclough of the Applicants, and by Mr.D.Partington and Mr.P.Green of Edge Property Management for the Respondent.

4.2 The Tribunal inspected the internal communal areas of the Phase I block comprising Apartments 70-77, and the Phase II block comprising Apartments 184A-G. The parties attending the inspection confirmed that these 2 blocks were representative of the re-carpeting works which had been carried out to the internal communal areas of all the Phase I and Phase II blocks and that there was no need for the Tribunal to inspect any further blocks.

4.3 The parties identified the balconies on the Phase II blocks which were the subject of the NHBC claim and to which the remedial works had been carried out between August 2014 and January 2015. It was confirmed that all works had been completed.

4.4 The Respondent's representatives pointed out to the Tribunal how the actual layout of Phase I and Phase II differed from the plan attached to the Phase II Lease. Specifically, they drew to the Tribunal's attention the vehicular access to Phase II through Phase I, that the Phase II access which had been envisaged on the plan had since been closed, and that Phases I and II share the only vehicular access/egress from the development.

LAW

5.1 Section 27A(1) of the Landlord and Tenant Act 1985 provides:

An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to-

(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

5.2 The Tribunal is "the appropriate tribunal" for this purpose, and it has jurisdiction to make a determination under section 27A of the 1985 Act whether or not any payment has been made.

5.3 The meaning of the expression "service charge" is set out in section 18(1) of the 1985 Act. It means:

... an amount payable by a tenant of a dwelling as part of or in addition to the rent–

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements, or insurance or the landlord's costs of management, and
(b) the whole or part of which varies or may vary according to the relevant costs.

5.4 In making any determination under section 27A, the Tribunal must have regard to section 19 of the 1985 Act, subsection (1) of which provides:

Relevant costs shall be taken into account in determining the amount of a service charge payable for a period-

(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

5.5 "Relevant costs" are defined for these purposes by section 18(2) of the 1985 Act as:

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.

5.6 There is no presumption for or against the reasonableness of the standard of works or services, or of the reasonableness of the amount of costs as regards service charges. If a tenant argues that the standard or the costs of the service are unreasonable, he will need to specify the item complained of and the general nature of his case. However, the tenant need only put forward sufficient evidence to show that the question of reasonableness is arguable. Then it is for the landlord to meet the tenant's case with evidence of its own. The Tribunal then decides on the basis of the evidence put before it.

5.7 Section 20C of the 1985 Act permits the Tribunal to order that the costs incurred by the landlord in connection with these 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 by any other person specified in the application for the order. The Tribunal may make such order as it considers just and equitable in the circumstances

HEARING

6.1 The Applicants' submissions in respect of the Application can be summarised as follows:

(i) following discussions with the Respondent in 2010/11, there had been agreement to an increase in the service charge rather than the imposition of a "one-off" levy in order to provide funds for the establishment of a reserve fund to meet the cost of future works set out in the dilapidations schedule, (Tab 12, pages 30-37);

(ii) as a result, in the service charge year 2011/12, the service charge increased to £851 from £604 in the previous year and had been maintained at that level since;

(iii) specific reference was made to the notes produced to leaseholders in or about 2011 which appear at Tab 13, pages 41-43, and, in particular, to note 12 on page 43 where it states that "Reserve funds will now be collected in order to provide for future life cycle costs, such as replacement carpets in communal areas or major roof repairs...";

(iv) the works carried out in 2014/15, as detailed in the levy request dated 16 April 2014 ("the s20 works") (Tab 6, page 9), are works which were anticipated in the dilapidations schedule and the increase in the service charges since 2011/12 should have raised sufficient funds to cover these;

(v) the Respondent's accounts show that there was a surplus of £22,000 as at 31 December 2013 but the service charge for 2014/15 has not reduced by this amount. Further, if there were insufficient funds to meet the costs of the s20 works from the increased service charges, the Applicants wanted to know why: where had the monies already collected gone? Also, when one of the Applicants sold their Apartment, they should be entitled to a refund of the monies collected for the reserve fund but unexpended at that date;

(vi) in any event, it was not reasonable of the Respondent to run 3 projects at the same time. Specifically, none of the Applicants had complained about the state of the carpets: these could have been replaced in Phases I and II over 2/3 years.

6.2 The Applicants also raised questions about the Respondent's alleged past failures to carry out s20 consultation procedures where it was claimed they should have been, and a recent increase in cleaning costs. It was explained that, as neither of these issues had been raised previously by the Applicants in the Application or subsequently at the CMC, it was not possible for the Tribunal to consider them as part of the Application at this late stage. The Tribunal made no comment on the merit, or otherwise, of these claims.

6.3 The Respondent's representative's submissions can be summarised as follows:

(i) they were appointed as agents in or about 2010. At that point, no reserves had been established although it was apparent that life cycle works would be needed in the short-, medium- and long-term;

(ii) the increase in the service charge in 2011/12 to £851.15 from £604 in 2010/11 was intended to start to provide a reserve fund, was the preferred option of the leaseholders to a levy at that time but was not a guarantee against future levies;

(iii) the dilapidations schedule was handed out to leaseholders at the 2011 AGM: however, it is a "working document" and there have been 13 versions since it was first drawn-up. The inclusion of any item in the dilapidations schedule did not mean that monies collected/reserves established by the increase in the service charge would necessarily be sufficient to meet the costs in full of those works;

(iv) reference was made to the minutes of the 2013 AGM (at which none of the Applicants were present)(Tab 13, pages 56-59) and to the Major Works Summary, (Tab 13, page 60);

(v) despite the increase in the service charge, there was no surplus until 31 December 2012, when a surplus of £12,579 had been established, (Tab 2, page 12). As at 31 December 2013, the surplus had increased to £27,168, (Tab 2, page 20). Reserves have been allocated to the budget eg in 2014, £10,106 was allocated to the budget;

(vi) reserves were necessary to ensure that the Respondent could provide the services to the Estate set out in the Seventh Schedule to the Phase I and II Leases, paragraphs 1-3;

(vii) the NHBC claim was first presented in 2012 and was finally concluded in 2013. Considerable work had been required on their part to persuade NHBC that the claim should be allowed;

(viii) it was denied that there had been any previous requirement to conduct a s20 consultation in respect of Phases I and II. Further, there are no current long term agreements in place, although there is to be a s20 consultation in 2015 as a result of a request from the Respondent that all services provided to Phases I and II are to be re-tendered. However, this is of no relevance to the Application;

(ix) the intention to proceed with the s20 works was raised at the 2013 AGM which none of the Applicants attended. Further, there were no e-mails,

letters or telephone calls from any of the Applicants in response to the s20 notices. The issues which have been raised in the Application were only raised when the Applicants received their invoices for the levy;

(x) in response to the Applicants' claim that the monies already collected to pay for the s20 works has "gone", all the service charge expenditure is audited by independent accountants and service charge accounts produced annually. Some leaseholders request copies of these accounts but, to date, none of the Applicants has done so. Consideration of the accounts will show that the Respondent has not paid twice for the same works and that monies standing to the credit of the reserve account have been properly expended on service charge works.

6.4 In response to questions from the Tribunal, the Respondent stated as follows:

(i) the provisions of the Phase I and II Leases which entitle the Respondent to charge as service charge (i) the cost of the s20 works; and (ii) reserve fund monies are as follows:
Phase I Lease: (i) Seventh Schedule, paras. 1, 3(a) and 7; (ii) no specific provision in the Phase I Lease relating to the establishment of a reserve fund;
Phase II Lease : (i) Seventh Schedule, paras. 1 and 3(a); no specific provision relating to re-carpeting; (ii) no specific provision in the Phase II Lease relating to the establishment of a reserve fund.
Whilst the Respondent acknowledged that there was no specific provision in either the Phase I or Phase II Leases allowing the collection of service charge to establish a reserve fund, they considered that their contractual obligations to maintain the Phases justified their decision to do so;

(ii) in deciding on how to allocate reserves to the s20 works, they looked at the nature of the works eg they did not consider the Phase II balcony works to be a "life cycle" cost but rather something that had arisen out of defective workmanship, the need to retain funds for future life cycle works eg the roofs of both Phases, and that the cash was actually available at the time. As a result of these considerations, they decided to allocate c £13,000 to the s20 works from the reserves;

(iii) Phases I and II were managed as one development and all costs were apportioned equally between the 153 units of Phases I and II. It was acknowledged that this was not in accordance with the Phase I and II Leases where the apportionments are: Phase I: 1/90th; and Phase II: 1/63rd;

(iv) the NHBC monies contributed in part to the balcony works at Phase II. The other external redecoration works at Phase II are yet to be done;

(v) as at 2013/14, the carpets in Phases I and II were in different states of repair. The Phase I carpets were 12/13 years' old whilst the Phase II carpets were 10 years' old. All of the carpets had been cleaned 2 years' earlier but had not made any significant improvement to their appearance. In some of the Phase II blocks, the concrete under the carpets was loosening and the floors needed screeding. The possibility of phasing the re-carpeting work was raised at the 2013 AGM (which none of the Applicants attended) but it was decided all leaseholders should be treated equally and that all the carpets should be replaced at the same

time. There was also the benefit that, going forward, they should wear equally;

(vi) the directors of the Respondent are three of the leaseholders of Phases I and/or II;

(vii) the Respondent had not made any claim against the builder for the apparently defective workmanship of the Phase II balconies as it was insolvent;

(viii) as at 31 December 2014, there is a credit balance on the reserve fund account (after payment of the s20 works) of £13,727.

7. The hearing concluded with the Applicants making a s20C application to the Tribunal.

DELIBERATIONS

8. In reaching the decisions set out in paragraph 2 of this Decision, the Tribunal had regard to the following matters:

8.1 it was apparent from the inspection and from the evidence given to the Tribunal at the hearing that, in the provision of services and overall management of Phases I and II, the Respondent considers them to be one development. Whilst understanding the reasons for this on a practical basis, this is not in accordance with the terms of the Phase I and II Leases. Specifically, in this case, the respective definitions of "the Estate" in the Phase I and Phase II Leases make it clear that the liability of the Phase I leaseholders for maintenance and repair is limited to buildings etc at Phase I and vice versa for the Phase II leaseholders. As a matter of construction of the Phase I Leases, there can therefore be no liability on the part of the Phase I Applicants to pay as service charge any part of the costs incurred in respect of the balcony remedial works carried out at Phase II;

8.2 with regard to the apportionment of the costs of the external redecoration works (excluding the Phase II balcony works) and the re-carpeting costs, following its inspection of Phases I and II, the Tribunal was satisfied that, in this instance, it was reasonable for the Respondent to conclude that these costs were incurred equally between Phases I and II. As a result, in these instances, the apportionment of these costs by dividing them equally between the 153 units at Phases I and II results in the same liability on each of the leaseholders as if they had been apportioned in accordance with the Phase I and II Leases. The Tribunal had noted the Respondent's acknowledgment that apportionment of expenditure had not been in accordance with the terms of the Phase I and II Leases and in other circumstances where it is not reasonable to split the expenditure equally eg in the case of the balcony remedial works where no part of the expenditure was properly apportionable to Phase I, or, in other cases, where the split is, eg, 60% to Phase I and 40% to Phase II, the apportionment must be made in accordance with the terms of the Phase I and II Leases in order for them to be correct;

8.3 the Tribunal fully understands, and sympathises with, the reasoning behind the Respondent's decision to increase the service charge with a view to establishing a reserve fund to meet future expenditure on "life cycle" works. However, in the absence of any provision in the Phase I

and Phase II Leases authorising the Respondent to include this as a service charge item, there is no entitlement to do so and the Tribunal has as a result had to make the order in paragraph 2.5 above repaying to each of the Applicants their share of the reserves as at 31 December 2014;

8.4 the Tribunal is satisfied, on the evidence, that all monies collected for the reserve fund have been properly expended and that there is no evidence to support the Applicants' claims that monies collected have been spent twice on the same works;

8.5 the Tribunal wishes to make it clear that the refund ordered in paragraph 2.5 is only as a result of the absence of any provision in the Phase I and II Leases entitling the Respondent to collect monies to establish a reserve fund. The Applicants' suggestion in evidence that they should be entitled to a refund on sale of their apartment indicates a lack of understanding of the purpose and operation of such reserve funds where there is provision in the lease to establish them. Their purpose is to try to equalise the burden of the cost of major works across all leaseholders by establishing a reserve fund over time and thus limiting the financial liability of those leaseholders who happen to be the owners at the time when major works are required. As such, the establishment of reserve funds should be welcomed by landlords and leaseholders (and purchasers from leaseholders) alike ;

8.6 the Tribunal was satisfied by the Respondent's explanation for allocating c£13,000 of the reserves towards the costs of the s20 works;

8.7 with regard to the s20C application, the Tribunal's determination of the Application has established that the Applicants are liable to pay the 2014/15 service charge levy (albeit not in the amounts charged in the invoices), and that the amounts incurred in respect of the s20 works were reasonably incurred. Whilst the Tribunal takes seriously the Respondent's "failures" to act in accordance with the terms of the Phase I and II Leases, they are satisfied that, in seeking to establish a reserve fund, they were acting in the best interests of the leaseholders, and that, in managing Phases I and II as one development, they were not acting unreasonably on a practical level and, indeed, this may have been to the leaseholders' advantage. In the Order set out in paragraph 2.1, the Tribunal had redressed the adverse consequences for the Phase I Applicants of the Respondent's failure to apportion correctly the liability for the Phase II balcony remedial works. The Tribunal did not consider this to be a case where the Respondent was wilfully ignoring the terms of the relevant leases to the general detriment of leaseholders but rather a case of the Phase I and II Leases not reflecting the changes which had been made to the situation "on the ground". Accordingly, having regard to all the circumstances, the Tribunal concluded that this was not a case where it was just and equitable to grant the Applicants' s20C application.