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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case References	:	**MAN/00CJ/LSC/2015/0031 & MAN/00CJ/LDC/2015/0018**
Property	:	**46 Pink Lane, Newcastle upon Tyne NE1 5DY**
Applicant	:	**Dr. Rajinder Mander**
Representative	:	**(unrepresented)**
Respondent	:	**Places for People**
Representative	:	**(unrepresented)**
Type of Application	:	**Landlord & Tenant Act 1985 - application under Section 27A (and 20C) and application by the Respondent for dispensation of consultation requirements under Section 20ZA**
Tribunal Members	:	**Mr S Moorhouse LLB (Chairman)** **Mr IR Harris BSc FRICS**
Date and venue of Hearing	:	**22 June 2015 and 16 November 2015 Manorview House, Kings Manor, Newcastle upon Tyne NE1 6PA**
Date of Decision	:	**11 December 2015**

DECISION

DECISION

(i) That the Respondent failed to comply with the requirement set out in paragraph 4 of Schedule 3 to the Service Charges (Consultation etc) (England) Regulations 2003 to state its response within 21 days to observations received from the Applicant in the course of the Respondent's consultation exercise.

(ii) Upon the retrospective application of the Respondent, the Tribunal makes a determination under section 20ZA of the Landlord & Tenant Act 1985 to grant dispensation in respect of the particular requirement (identified above) that the Respondent state its response to the Applicant's observations within 21 days.

(iii) That the routine service charge items of £39.94 per week are, as at 4 May 2015 (the most recent date of review), reasonable and payable in full.

(iv) That the costs of works to the Block allocated to the Applicant of £15,666 is not reasonable or payable in its entirety and that this is limited by the Tribunal pursuant to sections 19 and 27A of the Landlord & Tenant Act 1985 to the amount of £13,800.12 of which £5,758 is met by the Applicant's reserve fund, £626 by the Applicant's 2014/15 reserve fund contribution and the balance of £7,416.12 is payable directly.

(v) With the agreement of the Respondent the Tribunal makes an Order under section 20C of the Landlord & Tenant Act 1985 that any costs incurred by the Respondent in respect of these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant for the current or any future service charge year.

REASONS

The Applications

1. The applications determined by the Tribunal were made under the Landlord and Tenant Act 1985 ('the Act') as follows:

   - an application made by the Applicant on 20 February 2015 under Section 27A ('the Section 27A Application') relating to the reasonableness and payability of certain service charges levied or to be levied by the Respondent within the current year 2015;

   - a simultaneous application by the Applicant under Section 20C ('the Section 20C Application') on the issue of costs;

   - an application made by the Respondent under Section 20ZA ('the Section 20ZA Application') on 20 July 2015 for retrospective dispensation of consultation requirements following an interim decision of the Tribunal concerning the Respondent's consultation process.

Property and Inspection

2. The Applicant holds a leasehold interest in 46 Pink Lane, Newcastle upon Tyne NE1 5DY ('the Property') for a term expiring on 14 July 2100, his landlord being the Respondent. The Property forms part of a block ('the Block') comprising 6 residential apartments (mixed leasehold and social rent) and ground floor commercial premises (for which a single headlease has been granted). Of the residential apartments 44 and 46 Pink Lane each have dedicated access whereas the remaining apartments are accessed via communal entrances in pairs.

3. The Block is terraced and forms part of the Respondent's wider Pink Lane/Clayton Street West development. The overall development benefits from communal gardens and two separate laundry facilities.

4. The Tribunal inspected the Property, the exterior of the Block and the communal parts of the wider development on 22 June 2015 before convening a hearing of the Section 27A Application.

Interim Decisions & Stay of Proceedings

5. The hearing convened by the Tribunal on 22 June 2015 was attended by the Applicant and, on behalf of the Respondent, by Ms S Smith (Housing Services Manager), Mrs A Chadwick (Neighbourhood Officer), Mrs S Dixon (Senior Quantity Surveyor) and Mr N Russell (Contract Delivery Manager).

Preliminary Matters

6. The Tribunal raised as preliminary matters a number of questions concerning the set-up of the development and the scope of the Section 27A Application. The issues raised by the Applicant were as recorded in summary within a Scott Schedule. One of these issues was resolved between the parties prior to the hearing. The remainder concerned the cost of various works to the Block which were being recharged in part to the Applicant as service charge, the adequacy of the Respondent's consultation process in relation to these works and the question of whether the Applicant was liable to contribute via his routine service charges to certain communal costs.

7. The latter issue (contribution to communal costs) had not been raised within the application form but had been introduced within the Applicant's statement of case. With the agreement of the Respondent the Tribunal Ordered that the Section 27A Application is amended to encompass the issues concerning routine service charges set out within the Applicant's statement of case.

Section 20 Consultation

8. The Tribunal then heard submissions from the parties on the issue of consultation. The works in question had been summarised in a letter dated 6 August 2014 from the Respondent to the Applicant and included refurbishment of hardwood window frames, repairs to roofs and the replacement of communal doors and entry systems. It was common ground that the Respondent was required to consult with the Applicant pursuant to Section 20 of the Act.

9. The Applicant submitted that he had not been given the opportunity to nominate a contractor, that he hadn't been given information requested in an e-mail to the Respondent dated 26 August 2014 and that the cost of the works seemed high. The Applicant further stated that whilst the Respondent's letter of 6 August had advised that responses would not be given to observations by leaseholders until after 30 days had expired, he did not in fact receive a response to his e-mail until 24 October 2014.

10. The Respondent submitted that the works had been commissioned pursuant to an existing framework agreement (a Term Partnering Contract) procured in accordance with European Union requirements. Pursuant to the framework agreement a 'Stage 1' task commencement notice and brief had been issued to contract manager Keepmoat followed, once pricing was agreed, by a 'Stage 2' agreement. The framework agreement was, for consultation purposes, regarded as a 'Qualifying Long Term Agreement' and as such the consultation requirements differed to those that would have applied to a one-off contract. The Respondent submitted that the Applicant had been given the opportunity to view the contract documents in addition to being given a description of the works within the Respondent's letter of 6 August 2014.

Routine Service Charge Items

11. The Tribunal then moved on to hear submissions concerning the Applicant's liability to contribute via his routine service charges to certain communal costs, namely communal furniture and equipment, communal cleaning, laundry equipment and communal light and power. The overall cost totalled £39.94 per week from 4 May 2015 and the Applicant sought a reduction to £26.69 per week.

12. The Respondent clarified that communal furniture and equipment and laundry equipment referred to the contents of the communal laundry rooms. Communal cleaning included shared hallways, laundry rooms and other communal areas. The Applicant submitted that he did not have the use of these areas.

13. Reference was made to the Applicant's lease of the Property, in particular:

- the covenant on the part of the lessee at paragraph 17 of the Sixth Schedule to 'contribute to and keep the Lessor indemnified against a fair and reasonable proportion of....all costs and expenses incurred by the Lessor in carrying out its obligations under....the provisions of the Seventh Schedule hereto...';

- the lessor's obligation at paragraph 4(a) of the Seventh Schedule to 'keep the Reserved Property and all fixtures and fittings therein and additions thereto in a good and tenantable state of repair and condition including the renewal and replacement of all worn or damaged parts';

- the lessor's obligation at paragraph 7(a) of the Seventh Schedule to 'keep the windows, halls, stairs, landings and passages forming part of the Reserved Property properly cleaned and in good order and...keep adequately lighted and carpeted (where applicable) all such parts of the Reserved Property as are normally lighted carpeted and heated...';

- the definition of 'Reserved Property' in the First Part of the Second Schedule to include 'the gardens....drives paths and forecourts forming part of the Estate [defined to encompass the overall development at Pink Lane/Clayton Street West] and the halls staircases landings basements (if any) stores and other parts of the Block or any other building forming part of the Estate which is used in common by the owners or occupiers of any two or more of the flats...'

Interim Decisions & Stay of Proceedings

14. The Tribunal then adjourned the hearing for an hour to consider the submissions that had been made on the issues of consultation and liability for routine service charge items. Upon reconvening, the Tribunal notified the parties that it would be issuing in writing interim decisions in these areas. The Tribunal had determined the consultation process to have been flawed and therefore the remaining service charge issues raised by the Applicant (relating to the reasonableness of the cost of works) would only become relevant should the Respondent apply successfully for retrospective dispensation of consultation requirements. The Tribunal stayed the proceedings and advised that the Section 20C Application relating to costs would be determined by the Tribunal prior to the final disposal of proceedings.

15. The Tribunal issued the following Interim Decision in writing on the issue of consultation requirements:

'The Tribunal has considered challenges raised by the Applicant concerning the adequacy and fairness of the consultation process adopted by the Respondent in relation to certain major works carried out by the Respondent at a final cost of £15,666.43 per flat.

The Tribunal finds that the Respondent was correct to conduct a consultation exercise under Schedule 2 of the Service Charges (Consultation etc) (England) Regulations 2003 ('the Regulations') prior to entering into a Term Partnering Contract with its contractor Keepmoat. The Tribunal also finds that the Respondent was correct to conduct a consultation exercise under Schedule 3 of the Regulations prior to concluding an agreement under the terms of the Term Partnering Contract for the carrying out by Keepmoat of the major works in question.

However the Tribunal finds that the latter consultation exercise was not conducted in compliance with the Regulations. The Applicant complains, amongst other things, that whilst he raised observations with the Respondent concerning the proposed works by e-mail on 26 August 2014, he did not receive a response until receiving a letter dated 24 October 2014. The Respondents point out that the notice inviting observations stated "We will not be responding to formal individual enquiries through our email address until after the expiry of the 30 days notice period. We will then consider the responses received and provide full feedback to all leaseholders after the 6th September 2014". The Respondents also state that the time taken to write to leaseholders was influenced by the large volume of observations received.

Paragraphs 3 and 4 of the Regulations provide:

'3. Where, within the relevant period, observations are made in relation to the proposed works or the landlord's estimated expenditure by any tenant..... the landlord shall have regard to those observations.

4. Where the landlord receives observations to which (in accordance with paragraph 3) he is required to have regard, he shall, within 21 days of their receipt, by notice in writing to the person by whom the observations were made, state his response to the observations.'

Where the consultation requirements set out in the regulations have not been complied with, then unless the requirements have been dispensed with by the Tribunal, section 20 of the Act operates so as to limit the contribution that may be charged to any tenant to the amount prescribed or determined by regulation, currently the amount of £250.

The Tribunal determines therefore that the contribution payable by the Applicant in respect of the major works is limited to the amount of £250. Should an application be made by the Respondent for dispensation pursuant to section 20ZA such application would be considered by the Tribunal on its merits in accordance with the Act.'

16. The Tribunal issued the following Interim Decision in writing on the issue of the Applicant's liability to contribute via routine service charges to communal costs:

'The Tribunal has heard the parties' arguments concerning the Applicant's liability to contribute to certain routine service charge items, namely communal furniture and equipment, communal cleaning, laundry equipment and communal light and power.

The Tribunal finds that the charges in question relate in part to the communal parts of the 'Block' defined in the Applicant's lease, being costs which under the terms of the lease are to be divided equally by reference to the number of flats in the Block and, are in part attributable to costs relating to communal parts of the wider Clayton Street West Estate to which the Applicant is required to contribute under the terms of his lease.

The Applicant does not challenge the reasonableness of the charges themselves, only his liability to contribute under the terms of the lease. Accordingly the Tribunal finds in favour of the Respondent on this issue.'

Section 20ZA Application

17. The Tribunal convened on 16 November 2015 to hear:

- the Section 20ZA Application, submitted by the Respondent following the issue of the Tribunal's Interim Decisions and Stay of Proceedings;
- in the event that dispensation was granted, the remaining aspects of the Section 27A Application; and

- the Section 20C Application.

18. The hearing was attended by the Applicant and, on behalf of the Respondent, by Mrs J Hood (Regional Manager), Mrs S Dixon (Senior Quantity Surveyor) and Mrs A Chadwick (Neighbourhood Manager).

Submissions

19. The Respondent submitted in support of their Section 20ZA Application that the only element of the consultation process that had not complied with the regulations had been the failure to respond within 21 days and that no prejudice had occurred as a consequence.

20. The Applicant contended that if he had received a response earlier he would have taken a different approach on costs - he needed to obtain 'like for like' comparison on costs therefore if he had obtained information more quickly the matter might not have progressed as far as it had. The Applicant also stated within his written submission that it would be wrong to allow a landlord to fail to adhere to consultation requirements which were prescribed to facilitate that all parties involved were treated fairly and equally, to provide a satisfactory and just outcome.

21. The Respondent maintained that notwithstanding the delayed response, information had been available. In any event the Respondent had already been through a pricing exercise pursuant to its framework agreement with Keepmoat and had the Applicant been in a position to provide alternative information on costs any earlier this would not have changed the price or the amount of the Applicant's contribution.

Findings & Determination

22. Having heard the parties' arguments the Tribunal adjourned briefly for deliberations on the Section 20ZA Application. Upon reconvening the following findings and determination were communicated to the parties.

23. The Tribunal has the power pursuant to sub-section 20ZA(1) of the Act to make a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement if the Tribunal is satisfied that it is reasonable to dispense with the requirements. The Respondent identified within its written submission the established test of whether there has been any prejudice suffered as a consequence of a failure to comply.

24. The Tribunal found that notwithstanding the Respondent's delay in responding to the Applicant's e-mail dated 26 August 2014, no significant prejudice to the Applicant had been established. There was no compelling evidence that the Respondent would have adjusted its pricing or adjusted the contribution required from the Applicant had the delay not been incurred. In the Tribunal's opinion, the dispute over the reasonableness or otherwise of the pricing would have still fallen to be determined before the Tribunal.

25. The Tribunal considered that it was reasonable, in the light of its findings, to grant dispensation of the particular requirement that the Respondent state its response to the Applicant's observations within 21 days, and accordingly did so.

Section 27A Application

26. The Tribunal moved on therefore to the issue of whether charges levied by the Respondent in respect of works to the Block were reasonable and payable. In this respect section 27A of the Act makes provision for application to a tribunal *'for a determination whether service charge is payable, and if it is, as to.....the amount which is payable'*. Section 19 of the Act provides:

'(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 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.'

Submissions

27. The charges in question were identified by the Respondent within its letter to the Applicant dated 6 August 2014 and estimated as being £12,886.98 (including VAT and the Respondent's own management fee of 10% of the VAT exclusive costs). The Applicant was advised by the Respondent that his reserve fund (standing at £5,758 at 31 March 2014) would be utilised in full and the remaining balance invoiced upon completion of the works.

28. It was clarified at the hearing that an invoice had been raised (not yet paid) in the sum of £9,282 representing a final cost (including VAT and Management Fee) of £15,666 less the Applicant's reserve fund of £5,758 and less the Applicant's 2014/15 reserve fund contribution of £626. The sum of £15,666 represented the Applicant's one sixth share of costs (total £93,998) allocated to the residential units within the Block (allocated either to leaseholders or, in the case of the rented units, to be borne by the Respondent).

29. At the Tribunal's request the Respondent produced a schedule of costs detailing estimated costs and final costs for various aspects of the works, including the split between the residential and commercial units within the Block. The Respondent clarified the extent of the works as follows:

- Works to windows - 30 sash windows of residential units within the Block were refurbished with a full burn-off and repainting externally, replacement of sash cords as required (with associated work to frames) and catch replacement.

- Scaffolding - the Block was scaffolded, including additional scaffolding to gain access for a chimney inspection.

- Roof Works - work was undertaken to gutters, downpipes, slates etc. however this was treated by the Respondent as 'revenue works' and removed from the costs that were to be invoiced to the Applicant or charged to his reserve fund.

- Communal Entrance Doors - 2 communal entrance doors serving those apartments within the Block without dedicated entrances were replaced including door entry system panels.

- Rear Timber Doors - these were confirmed to relate to the Commercial Units and therefore not included in the rechargeable costs.

30. The Applicant identified a number of aspects of the work identified by the Respondent in its letter dated 6 August 2014 that did not appear to have been carried out. It was stated by the Respondent that the form of the letter was appropriate to the overall development and that some aspects had indeed been irrelevant to the Block, including in the context of windows the reference to 'new hardwood beading, new external weather strips, new hinges, new locking cockspur handles and new glazing units'.

31. The Respondent clarified that the estimate for works to windows (including the burn-off and repainting externally and with provision for necessary repairs) came to £46,461.76 (including the cost of scaffolding, but excluding VAT or the Respondent's Management Fee). The estimate excluding scaffolding came to £28,216.32. The final (actual) cost for windows (including scaffolding but excluding VAT and Management Fee) came to £62,809.68. The Respondent confirmed that the scaffolding cost had remained as per estimate and therefore the costs relating to windows had increased by £16,347.92 from estimate to actual.

32. The Respondent further clarified that the total cost in respect of windows covered the burning off and repainting of 30 windows, the replacement of 18 sash cords (7 of which were replaced in the Property), associated work to the window frame and window catch replacement.

33. The Applicant submitted that these costs were extremely high for the work involved. Further, it was clear that 7 sash cords had not been replaced within the Property. He stated that there were a total of 8 sash windows of which only one benefited from a new cord - the brand new cord was easily distinguished from the existing ones. In this respect the Respondent submitted that quality checks were undertaken but these were on a 10% sample basis.

34. The Applicant submitted that the windows had not needed painting externally at that time. Reference was made to the lease requirement that external painting take place at least every 5 years. The Applicant did not contend that external painting had taken place within the last 5 years.

35. The Applicant submitted also that the Block, unlike the adjoining buildings, was not listed and that this was relevant to the work required. The Respondent submitted that whilst the Block was not listed, the windows had been installed at approximately the same time as those in the adjoining buildings, it was important to maintain the integrity of the development as a whole, the development was situated within a Conservation Area and that for these reasons it was appropriate to continue to maintain the sash windows.

36. The Applicant challenged the cost of replacing two communal entrance doors. This was confirmed by the Respondent to come to a total of £7,318. It was accepted by the Respondent that the cost was far higher than for a standard composite door but that the type of door was appropriate in that location. It was supplied by Keepmoat's established subcontractor Goldfield and was a vandal resistant model with access reader, telephone handset and fobs.

37. The Applicant made the general point that the Respondent's approach of procuring the work through a framework agreement with Keepmoat did not represent value for money. The Applicant had obtained 3 alternative quotes based upon the works listed in the Respondent's letter of 6 August 2014 and these had subsequently been confirmed in writing. Two of the estimates came in at £55,000 and £54,000 respectively. Whilst these were based on the list of works within the Respondent's letter rather than the actual work undertaken, the costs were substantially lower than the total of £93,998 incurred by the Respondent. The third estimate was in the sum of £15,000 excluding scaffolding.

38. The Applicant raised specifically the issue of scaffolding costs noting that these alone totalled £18,868.25 (of which £16,299.01 was stated within the Respondent's summary to relate to the residential units). The Respondent commented that scaffolding had been supplied through Keepmoat's subcontractor ISL and that it was understood that Keepmoat had an agreed pricing structure with ISL. The Respondent also commented that the design of scaffolding on the development as a whole had to take account of basements and that the cost had remained as per the estimate notwithstanding the scaffolding being required for far longer than the 4 weeks originally priced.

39. The Respondent referred to its practice of establishing and utilising framework agreements procured in compliance with European Union requirements to achieve value for money and the requirement for contractors to be vetted through 'Constructionline'.

Findings & Determination

40. The costs under consideration have been incurred by the Respondent under a framework arrangement procured through an open tender exercise pursuant to EU requirements (with the exception of the Respondent's own management fee, which has not been specifically challenged). No compelling evidence has been put forward to suggest that it was inappropriate for the Respondent to utilise a framework arrangement for the carrying out of the works, save that the Applicant has obtained alternative estimates which whilst not directly comparable, are cheaper. The Tribunal has no means of assessing how the quality of work undertaken by the alternative contractors identified by the Applicant would compare to the quality of work undertaken via the Respondent's framework agreement, nor is the Tribunal able to assess the actual cost that would have been incurred had one of these contractors been appointed. The Tribunal finds that the Respondent was entitled to adopt the approach it did in relation to the procurement of the works and that, with the exception of the specific issues referred to below, no compelling evidence has been put forward to demonstrate that the costs incurred were unreasonable.

41. There are three specific areas in which the Tribunal finds in the Applicant's favour with regard to the reasonableness or payability of the costs.

42. First, the Tribunal accepts the Applicant's submission that only 1 of the 8 sash cords within the Property has been replaced. It follows that the associated work to the window frame was undertaken only once. On the Respondent's evidence costs have been incurred for an additional 6 sash cord replacements (and associated work) within the Property. It may be that this is indicative of a wider quality issue however there is no evidence before the Tribunal that this is the case.

43. The Tribunal has endeavoured to calculate a reasonable adjustment on the basis of the limited information before it. On the Respondent's evidence the cost estimate of £28,216.32 allowed for burn-off and repainting with provision for additional work. A cost increase of £16,347.92 related entirely to works to windows (the estimate including scaffolding costs was stated to be £46,461.76, actual cost including scaffolding was stated to be £62,809.68 and scaffolding costs were stated to have remained unchanged). On the basis that the increase must largely relate to sash cords and associated works it is reasonable to adjust proportionately for the failure to undertake 6 of the 18 sash cord replacements charged for. This ignores there being other elements such as catch replacement but also disregards the provision for works to windows within the estimate.

44. The Tribunal considers a reasonable adjustment therefore to be six eighteenths of the cost increase of £16,347.92 (prior to the addition of VAT and Management Fees), equating to £5,449.30.

45. Second, it was clarified by the Respondent that costs relating to timber doors were in fact related to the commercial units and not chargeable to the residential units. The Summary Schedule of Costs supplied by the Respondents includes a figure of £594.97 for 'Rear Timber Doors' in the calculation of costs to be allocated to the residential units (before the addition of VAT and Management Fees). The Tribunal finds therefore that this amount is not payable and an adjustment is to be made accordingly.

46. Third, the cost of scaffolding is estimated (as per the Respondent's Schedule of Estimated Costs) to be £18,868.25 of which £16,299.01 is allocated to the residential units and £2,569.24 to the commercial units. The allocation of part of the cost to the commercial units is logical since it is indicated also that the commercial units contribute to the cost of works to the roof. It is clear from the Respondent's evidence and summary that works to the roof have indeed been undertaken, notwithstanding that costs have been treated as revenue costs, and it has been submitted by the Respondent that scaffolding costs are as estimated. Nevertheless within the Respondent's schedule of final costs the commercial unit contribution to scaffolding costs has been reallocated to the residential units (the full figure of £18,868.25 being included in the total cost of works figure of £72,306.37). The Tribunal therefore finds that an adjustment in the Applicant's favour of £2,569.24 (before VAT and Management Fees) is appropriate.

47. These 3 adjustments give rise to a total cost of works of £63,692.86. With the addition of VAT and a 10% Management Fee (on the VAT exclusive figure) the total comes to £82,800.71. The Applicant's contribution of one sixth comes to £13,800.12.

48. The Tribunal determines that the revised contribution of £13,800.12 is reasonable and payable. Of this, £5,758 is funded by the Applicant's reserve fund, a further £626 by the Applicant's 2014/15 reserve contribution and the remaining £7,416.12 is payable directly.

Section 20C Application

49. With the agreement of the Respondent the Tribunal makes an Order under section 20C of the Act that any costs incurred by the Respondent in respect of these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant for the current or any future service charge year.

Draft Decision

50. Prior to this decision being finalised a draft was circulated to the parties inviting comments upon the accuracy of facts in view of the complexity of the submissions on the cost of works and the Tribunal's findings. In response the Applicant submitted comments that the Tribunal has taken into consideration already in reaching its decision and the Respondent confirmed that it had no comments on the accuracy of the facts in this case. The final decision is issued therefore in a form identical to the draft.