FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HN/LSC/2020/0016
Property	:	Flat 9 Kernella Court, 51-53 Surrey Road, Bournemouth BH4 9HS
Applicants	:	Valerie Burns, William Burns, James Burns & Paul Burns
Representative	:	Alexander M Burns, Solicitor Email: vburns999@aol.com
Respondent	:	Kernella Court Management Company Limited
Representative	:	Initiative Property Management Email: contact@initiative-pm.com
Type of Application	:	Determination of service charges: section 27A Landlord and Tenant Act 1985 ("the Act")
Tribunal Member(s)	:	Judge S Lal
Date of Decision	:	2 June 2021, on the papers

DECISION

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1. The Applicants seek a determination of the pay-ability- of:
   - a service charge demanded on account on 10th July 2019 in the sum of £2736.71 in relation to the cost of driveway works carried out in late 2020.
   - an increase of £500 in the sums demanded on account of service charges in June and December 2020 towards the cost of a replacement roof in five years' time.
   - Administration charges of £60 on 23rd October and £150 on 3rd November in connection with late payment of service charges.

2. The Applicants also seek orders limiting recovery of the Respondent's costs in the proceedings under Section 20C of the Act and/or paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

3. Directions were issued by the Tribunal on 24th March 2021. The Tribunal directed that the application be dealt with on the papers without an oral hearing in accordance with rule 31 of the Tribunal Procedure Rules 2013. The parties did not request an oral hearing and the Applicants have submitted the hearing bundle. The Respondent has submitted witness statements and relevant documents in response to the Application

The Applicants case

4. The Applicants are the registered lessees of the Property under a lease dated 30th September 1975 and a supplemental lease dated 16th January 1991.

5. The Applicants claim that on 10th July 2019 the Managing Agents, Initiative Property Management acting on behalf of the Respondent debited the service account of Valerie Burns with the sum of £2,736.71 being the Applicants share of the resurfacing costs of the driveway and car park at the complex.

6. Two notices under section 20 of the Act were served on the Applicants on 10th July 2019 giving the Applicants 30 days to make observations before 11th August 1985.

7. The Applicants contend that the no consultation was carried out by the Respondent as required by section 20 of the Act in respect of the sum of £2,736.71 being the Applicants share for the proposed works to the driveway and car park complex.

8. The Applicants contend that an earlier notice under section 20 of the Act dated 20th May 2019 related solely to the repairs to a sinkhole on the driveway and not to the resurfacing of the driveway and car park as a whole.

9. The Applicants contend that they should not have been required to pay the full amount of £2,736.71 on 10th July 2019 given the fact that the work was not carried out until late December 2020.

10. The Applicants further contend that a "late payment fee" of £60 debited to Valerie Burn's service account on 23rd October 2020 should not be payable as there is no provision in the lease documents that entitles the Respondent to levy a penalty.

11. Similarly, the Applicants contend that a "legal referral fee" of £150 debited to Valerie Burn's service account on 3rd November 2020 was not permitted by the lease documents.

12. Finally, the Applicants challenge the increase of £500 on the sums demanded in respect of service charge in June and December 2020 on the basis that the lease documents do not allow the Respondent to make charges for future advance works, in this case the replacing the roof in the next five years.

The Respondent's Case

13. The Respondent claims that a section 20 notice was served on the Applicants on 20th May 2019 which clearly sets out the works that were to be carried out to the driveway and rear parking area. The Respondent claims that this notice was clear in what works were being proposed including the resurfacing of the driveway and car park. The Respondent notes that no challenge to the proposed works was offered by the Applicants, nor did the Applicants propose any contractors of their own for the works in accordance with the notice. The Respondent states that the notice gave the Applicants 30 days to respond by 21st June 2019 and the Applicants did not do so.

14. The Respondent states that on 10th July the Applicants received the Statement of Estimates for the proposed works and the notice accompanying these in accordance with section 20 of the Act. The Applicants were given until 11th August to make any observations. No observations were received from the Applicants.

15. The Respondent states that on 10th July 2019, an invoice of £2,736.71 was issued to the Applicants. It confirmed that payment was due in 365 days and the offer of a 12-month payment plan. The Respondent therefore refutes the Applicant's claim that the Applicants were expected to pay the full amount up front.

16. The works were intended to commence in April 2020 but the Respondent explains that this was not possible due to the situation with Covid-19. The works were started later in the year and completed in December 2020.

17. The Respondent claims that the Applicants are not accurate in suggesting that payment was demanded 18 months before the work was completed. In fact, the Respondent states that payment was not due for 365 days which would have been 1st August 2020. Had matters not been delayed by Covid-19, this would have been some months after the works initially should have started. The Respondent claims it is not unreasonable to expect payment from the Applicants in advance in any event as the contractor would have to be paid in advance.

18. Furthermore, the Respondent claims that it was reasonable for the payment of the works to be payable in advance given that the works were completed in the same service charge year that payment fell due. The Respondent claims that it has complied with section 20 of the Act and the Applicants were given all reasonable opportunities to submit their representations at each stage.

19. The Respondent claims that the Applicants were given several warnings that their service charge was overdue and that they would incur administration and debt recovery charges if they did not bring their account up to date.

20. As far as paragraph 10 of the Applicants' case is concerned, the Respondent claims that the lease provides for the annual service charge to be increased every three years (Clause 5 of the lease dated 13th September 1975). The Respondent notes that in October 2020 a surveyor had inspected the roof and commented on the works that was likely to be required in future years. The Respondent noted that a 10-year expenditure plan had been produced to spread costs over a number of years and this plan had been sent to the Applicants. The Respondent therefore considers that it has acted within its rights in increasing the annual service charge fee by £500 in June and December 2020 and the Applicants are obligated under the lease documents to pay the annual service charge fee.

The Decision

21. The Tribunal has read the bundles of documentation including the witness statements of the Applicants and their representative and the Respondent and their representative, in each case with their accompanying papers. The Tribunal has also considered the terms of the lease documentation in so far as it relates to the points in dispute in this case.

22. The first question is whether the Applicants are liable to pay the amount of £2,736.71 by way of service. Clause 5 of the original lease of 30th September 1975 provides that:

"the Lessee hereby covenants with the Freeholder and as a separate covenant with the Managers that to enable the Managers to pay all costs charges and expenses which may be incurred by them in connection with Clause 4 hereof the Lessee shall contribute to a Common Fund to be administered by the Managers by equal half yearly payments in advance on the Twenty fifth day of December and Twenty fourth day of June during the term of the Lease the annual sum of Eighty pounds.....Such annual sum of Eighty pounds shall be subject to revision every three years during the term of the Lease but any increase or decrease in the said figure shall be applicable only on the granting of a Certificate by the auditor for the Managers."

Schedule 6 to the original lease sets out the repairing obligations of the Managers which are covered by the Common Fund. These specifically refer to the roof and the paths and drive coloured brown on the site plan.

23. The Tribunal is satisfied that the Applicants have an obligation to pay service charges under the lease documentation and that the works in question are covered by the service charge.

24. The next question is whether the Applicant received the correct notices under section 20 of the Act. Section 20 provides a leaseholder with the right to be consulted if the landlord carries out major works for which the leaseholder is asked to pay. The consultation process has three stages. The first stage is a notice of intention to do the works. The second stage is notification of

estimates obtained by the landlord and the third stage is notification of award of the contract.

25. The notice which the Respondent sent to the Applicants on 20th May 2019 was the first stage of the notification process. The Tribunal has read the notice and is satisfied that the proposed works relate not only to repairing the sinkhole as referred to by the Applicants but also to significant excavation works to the driveway and rear parking area. The Applicants were invited in the notice to make written observations in relation to the proposed works by 21st June 2019 and to propose within 30 days the name of a person from whom the Respondent should obtain an estimate for carrying out the proposed works. It appears that the Applicants did not take up either of these offers.

26. The second notice sent on 10th July 2019 was a statement of estimates which the Respondent had obtained for the proposed works. The Applicants were again invited to make written observations in relation to any of the estimates within 30 days of the notice. Again, it appears that the Applicants did not do this.

27. The third notice was also issued on 10th July 2019 giving reasons why the Respondent had opted to proceed with Randall Construction on the basis that they provided a tender for the full specification and were the lowest priced. Arguably the Respondent should have waited 30 days before issuing the third notice but as the Applicants are not challenging the choice of contractor, this is not relevant to this case. It is the Tribunal's assessment that notices complied with section 20 of the Act.

28. The Tribunal does not accept that the Applicants were expected to pay the sum of £2,736.71 in full in July 2019. It is clear from the correspondence that the Applicants were given a full year to pay this amount and that they were able to pay in monthly instalments.

29. The Applicants claim that it was unreasonable to expect them to pay upfront for works that were that not carried out until late December 2020. The Tribunal does not accept this argument. As the Respondent has pointed out, the works were due to commence in April 2020 but were delayed by a number of months due to the Covid-19 situation. The Tribunal also accepts that the Respondent would need to be in funds before the work commenced in order to be satisfied that the contractor could be paid.

30. In respect of the second issue, the Tribunal finds that the Applicants are liable to pay the charges of £60 and £150 both in connection with the late payment of the service charge (paragraph 17 of the fifth schedule to the original lease).

31. The Tribunal further finds in respect of the third issue, that the Respondent is entitled under the lease documentation to increase the service charge by £500 in June and December 2020 in order to plan for future expenditure on the roof of the premises provided that an auditor's certificate has been obtained and sent to the Applicants. This is because Clause 5 of the original lease

allows for an increase in service charge every three years subject to being certified by the Auditor.

32. The Tribunal agrees with the Respondent that plans for projected expenditure have been considered in detail and agreed by the management company but it appears from the documentation that an Auditors certificate has not been obtained and sent to the Applicants. Without this certificate, the Respondent has not strictly complied with the provisions of Clause 5 of the lease and therefore cannot increase the service charge. However, such omission can be remedied by the production of an auditor's certificate in due course but it does not invalidate the Tribunal's assessment that future expenditure can be provided for in the way suggested.

33. Having regard to the guidance given by the Land Tribunal in the **Tenants of Langford Court v Doren LRX/37/2000**, the Tribunal considers it just and equitable to make no order under s.20C of the Landlord and Tenant Act 1985. The Applicants have not succeeded in their arguments.

34. In respect of the Respondent's Costs Schedule, given that this case rests on a clarification of the Lease, the Tribunal makes no order for costs and each party should bear its own costs in respect of this Application.

35. The Tribunal had regard to the decision of **Willow Court Management Company (1985) Ltd v Alexander; Sinclair v 231 Sussex Gardens Right to Manage Ltd; Stone v 54 Hogarth Road London SW5 Management Ltd [UKUT 0290 (LC)].** It goes without saying but in Willow Court it was noted by way of conclusion that costs applications should not be regarded as routine, should not be abused to discourage access to the tribunal, and should not be allowed to become major disputes in their own right.

36. The Tribunal is satisfied that the Respondent has not been able to show that the Applicant has acted unreasonably in the conduct of proceedings and therefore refuses the costs application in what was ultimately a dispute over around the liabilities that arise from a lease.

37. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at rpsouthern@justice.gov.uk, which has been dealing with the case. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

38. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

39. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

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Judge S Lal