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**HM COURTS & TRIBUNALS SERVICE
LEASEHOLD VALUATION TRIBUNAL**

Properties : Nos. 6 & 40 Smallshire Close, Wednesfield, West Midlands, WV11 3SL.

Applicants : Frederick Barnes and Christine Barnes representing themselves.

Respondent : Hamilton Court (Wednesfield) Management Company Limited. represented by Mrs Dawn Clarke ARLA of Messrs Nock Deighton, Managing Agents, 34 Whitburn St., Bridgnorth, WV16 4QN.

Case number : BIR/00CW/LIS/2012/0031

Date of Application : 9th April 2012

Type of Application : Determination of service charges under Section 27A of the Landlord & Tenant Act 1985 and costs under Section 20C.

The Tribunal : I.D. Humphries B.Sc.(Est.Man.) FRICS
D.R. Salter LL.B.

Hearing : 8th October 2012

DECISION

Background

- 1 This application relates to disputed service charges on two flats in a development of 49 houses and 18 flats in Smallshire Close, Wednesfield, West Midlands which was a new development built in 2002. The applicants, Mr and Mrs Barnes, bought the flats as buy to let investments in 2002/3 and under the terms of the leases agreed to pay service charges to a Managing Company, 'Hamilton Court (Wednesfield) Management Company Limited' ('HCWMC') who were responsible for maintaining and insuring the common estate. The freehold in the development was initially retained by the developer, Wimpey, but is currently owned by a company known as Wallace Properties Ltd. who have no responsibility for the service charge which is entirely the responsibility of HCWMC.
- 2 The shares in the management company, HCWMC, are owned by the leaseholders.

- 3 HCWMC employs Managing Agents to look after the estate. Initially they employed a firm known as CPM Ltd. but the management transferred to Castle Estates Ltd. and more recently in September 2010, to Messrs Nock Deighton of Bridgnorth who are the present managing agents.
- 4 When Nock Deighton took over, Mr and Mrs Barnes received service charge bills for the flats substantially higher than the bills for previous years, the charge for No.6 increased from £624 in 2010 to £879 in 2012 and the charge for No.40 from £117 to £879. They declined to pay, Nock Deighton served them with a seven day notice and Mr and Mrs Barnes applied to have the charges determined by the LVT under the service charge provisions of s.27A of the Landlord & Tenant Act 1985. They also applied for an Order under s.20c to prevent the costs of the application being added to future service charge bills.
- 5 The Tribunal held a pre-Trial review in June 2012 at which Nock Deighton explained that they had been supplied with limited information when taking over the management, they had not been given copies of all the leases but having seen the relevant leases their representative conceded that several items listed on the bills did not relate to Mr and Mrs Barnes' flats. These comprised:
- Window cleaning
 - Block Building Insurance
 - Home Service Scheme
 - Insurance Valuation
 - Electrical Repairs
 - Door Entry
 - Garage Charge
 - Fire Alarm
 - Advertising
 - Roof Repairs
 - TV Aerial
- 6 However, the following items were still in issue and became the subject of the subsequent hearing:
- Gardening
 - Minor Repairs
 - H & S Inspection
 - Electricity - Common Parts
 - Site Lighting
 - Gate Entry
 - Contingency Reserve Fund
- 7 The Tribunal inspected the property and heard the full case on 8th October 2012, considered the parties' submissions and find in respect of the disputed charges as follows.

The Leases

- 8 The leases are in similar but not identical terms.
- 9 No.6 Smallshire Close, originally known as Plot 20, is held by lease dated 10th June 2003 granted by George Wimpey Midland Limited (Landlord) to Frederick Barnes and Christine Barnes (Tenants) for a term of 99 years from 31st March 2002 for an initial premium of £89,995 and rising ground rent commencing at £60 p.a. for the first 33 years to £180 p.a. for the last 33 years. In addition, the tenants agreed to pay a Maintenance Charge defined as 1/67th of the amount spent by the management company defined in the lease as Hamilton Court (Wednesfield) Management

Company Limited', on the cost of maintaining two areas of amenity land in the development coloured yellow on the lease plan. The yellow area comprises two parcels; an area for the communal benefit of all the residents on an island site in the centre of the development known as 'Bluebell Wood' and a second area around a neighbouring block of flats, also within the scheme but only for the benefit of some residents, not the entire scheme. They are also required to pay a share of the cost of maintaining an area coloured blue comprising a car park and access to the back of their building.

- 10 No. 40 Smallshire Close, originally known as Plot 54, is held on similar terms save that the lease was dated 20th December 2002, the term 150 years, the premium £84,995 and the ground rent was fixed at £1 p.a. The main difference between this lease and the lease of No. 6 is that the 'yellow area' on the lease plan only includes Bluebell Wood, not the area around the flats next to No.6. The lease of Flat 40 also requires the lessee to contribute to a common parking area coloured blue on the plan but not the same parking area referred to in the lease of No. 6.
- 11 HCWMC's maintenance responsibilities are set out in Schedule 6 of the lease.
- 12 The issues therefore relate to the maintenance costs of Bluebell Wood, the parking areas and in the case of No.6, the cost of maintaining the garden around the adjacent block.

The Relevant Law

- 13 The Tribunal's powers derive from statute.
- 14 Section 27A(1) of the Landlord & Tenant Act 1985 provides that an application may be made to a Leasehold Valuation Tribunal (LVT) for determination of whether a service charge is payable and if so, the person by whom it is payable, to whom, the amount, the date payable and manner of payment. The subsection applies whether or not payment has been made.
- 15 Section 18 of the Act defines a 'service charge' as an amount payable by a tenant of a dwelling as part of or in addition to rent which is payable directly or indirectly for services, repairs, maintenance, improvements, insurance or the landlord's cost of management, the whole or part of which varies according to the relevant cost.
- 16 Section 19 of the Act provides that relevant costs shall be taken into account in determining the 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 carrying out of works, only if the works are of a reasonable standard and in either case the amount payable is limited accordingly.
- 17 These sections are significant as the Tribunal has no power to order parties to carry out work or issue injunctions preventing parties from acting in certain ways. Its powers derive from statute and under the Landlord & Tenant Act 1985 it is only able to determine whether money should have been spent on service charge items and whether the amount spent was reasonable for the type of service provided.

Facts

- 18 The Tribunal inspected the site on the day of the Hearing. The development comprises 67 residential units of which 49 are houses, 12 are flats with shared entrances in a block and 6 are self-contained flats including the subject properties Nos.6 and 40.

- 19 The Tribunal inspected both shared car parks, the areas coloured blue on the lease plans.
- 20 The 'yellow areas' of land were also inspected. 'Bluebell Wood' is an area of open space with a lawn, paving and around 12 trees surrounded by steel railings to the pavement that the residents can access. The other 'yellow area' is communal garden around a block of flats next to No.6.

Preliminary Issue 1 - Stay in Proceedings

- 21 At the pre-trial review, Mrs Clarke of Nock Deighton said there were discrepancies among the leases due to poor drafting resulting in HCWMC being unable to reclaim 100% of the costs incurred by the company in fulfilling its obligations under Schedule 6 of the subject leases. She asked for a stay in proceedings to allow time for the company to make applications for the leases to be varied.
- 22 The Tribunal considered the point but refused the request as:
- i No application had been made to the LVT to vary the leases under the Landlord & Tenant Act 1987;
 - ii The possibility of varying the leases had apparently been raised by Nock Deighton with their client over a year earlier but nothing had happened. It seemed likely that further delay would ensue without reaching a solution and the LVT is mindful of acting expeditiously;
 - iii It had been suggested in a written submission by Nock Deighton's adviser, Mr Platts, that an application could be made by Hamilton Court to the LVT to vary the leases but s.37(4) of the Landlord & Tenant Act 1987 made no provision for applications by a Management Company. It only referred to a 'landlord' or 'tenant' and Hamilton Court were neither.

Preliminary Issue 2 - Limitation

- 23 The application asked the Tribunal to determine service charges from 2003 to 2012. As a preliminary issue, the Respondent made submissions through its solicitors, Messrs Brethertons, and prepared by Justin Bates that the application should be subject to limitation. The grounds were:
- 1 that the Limitation Act 1980 applied to the application;
 - 2 that the limitation period is six years under s.9 of the Act;
 - 3 alternatively that the limitation period is six years under s.5 of the Act;
 - 4 alternatively if no limitation period applied, it would be subject to the doctrine of laches and
 - 5 that the Tribunal is empowered by regulation 11 of the LVT Procedure (England) Regulations (2003) to limit the scope of the case to ensure it is dealt with in a proportionate and fair manner.

Further and alternatively, the Respondent invited the Tribunal to decline to decide the case and leave it to the parties to litigate in the County Court.

- 24 The submission cited the following cases:
Hillingdon LBC v ARC Ltd. [1999] Ch 139.
Warwickshire Hamlets Ltd. and another v Gedden and others [2010] UKUT 75 LC
Attorney General v Singer [2012] EWHC 326

re Farmizer (Products) Ltd. [1977] 1 BCLC 589
R (Daejan Properties Ltd.) v London LVT [2000] 3 EGLR 44(High Ct.); [2001] EWCA Civ 1095; [2002] HLR 25
Royal Borough of Kensington & Chelsea v Mezziani LON/00AW/LSC/2009/0246
Daejan Properties v London LVT [2001] EWCA Civ 1095; [2002] HLR 25
Murphy and others v St. Andrew's Square (West) Management Co.Ltd. LON/0AW/NSI/2003/0054
Continental Property Ventures v White [2007] L&TR 4
Canary Riverside Pte v Schilling [LRX/65/2005]
Wandsworth London Borough Council v Griffin [2000] 2 EGLR 105 (LT)
Havenridge Ltd. v Boston Dyers Ltd. [1994] 2 EGLR 73
Regent Management Ltd. v Jones [2011] UKUT 369 (LC)
Southall Court (Residents)Ltd. v Tiwari [2011] UKUT 218 (LC)
Yorkbrook Investments Ltd. v Batten [1995] 1 EGLR 100.

- 25 The Tribunal considered the point and does not exclude any part of the application for the early years from 2003 due to limitation. The issue of limitation and the related issue of recovery would be a matter for the parties to litigate in the County Court but whether a Court would find that part of the application would be barred would be a matter for the court and it would be wrong for the LVT to anticipate the outcome by applying a limitation period at the earlier stage of LVT proceedings.

Submissions

- 26 The parties addressed the Tribunal on each of the points in paragraph 6 above. It finds that in each case the items are part of the Maintenance Charge within clause 2.9 of the lease and 'service charges' within the terms of s.20 of the Landlord & Tenant Act 1985 and its determination on each is as follows:

Gardening

Applicants

- 27 The Applicants submitted the cost of gardening should be only to 1/67th of the cost of maintaining Bluebell Wood. In respect of No.6, they said they had no access to the grassed area around the adjacent block and should not be charged for its maintenance. They produced no alternative quotes to challenge the amounts in the service charge accounts.

28 *Respondent*

Mrs Clarke for Nock Deighton was unable to comment on the service charge costs prior to her firm's appointment in 2010. Nock Deighton had not been provided with any records from the previous managing agents and were only able to comment from the date of their appointment. Their own accounts itemised the cost of Bluebell Wood at £14.43 per property for the year ending 31st March 2012 and £107.39 per property for 'general grounds maintenance' that included the 'yellow area' around the adjacent block.

29 *Tribunal*

The Tribunal finds that while there may be deficiencies in the leases of the development as a whole, the subject leases formed the contract between the parties and as the area around the adjoining block is coloured yellow on the lease plan the cost of its maintenance must be reflected in the service charge for No.6. Both units should also pay the appropriate share for Bluebell Wood.

- 30 In the absence of alternative quotes, it finds the amount charged for the year ending 31st March 2012 for Bluebell Wood to be reasonable at £14.43 / unit, and determines a reasonable amount for

the applicant's share of the cost of maintaining the additional garden at £50.00 for the year ending 2012.

- 31 The Accounts show the cost of gardening in respect of No.6 at £16.31 for 2003 and £40.64 in 2004 which the Tribunal find to be reasonable. However, as this included more garden than provided for in the lease of No.40, the cost for No. 40 should be less although in fact no charges were raised for No.40 until 2008. Using the submitted Accounts as a datum, the Tribunal finds the following amounts reasonable in respect of the two properties:

	No.6 £	No.40 £
2003	16.31	0
2004	40.64	0
2005	40.64	0
2006	40.64	0
2007	33.45	0
2008	50.00	10
2009	50.00	10
2010	55.00	15.07
2011	64.00	3.77
2012	64.43	14.43

Minor Repairs

32 *Applicants*

The applicants had seen nothing to show that any repairs had been carried out to the gardens or parking areas and invited Nock Deighton to justify the charges.

33 *Respondent*

Mrs Clarke for Nock Deighton was unable to comment on service charge costs prior to her firm's appointment in 2010. She had been provided with no information relating to 'repairs' of the garden or parking areas.

34 *Tribunal*

In the absence of any evidence, the Tribunal determines the amount payable at nil for the years covered by the application to 31st March 2012.

Health & Safety

35 *Applicants*

The applicants considered this probably referred to the cost of employing a Health & Safety Consultant to survey the block of flats which was outside the scope of their own lease responsibilities. They invited Nock Deighton to justify the charges.

36 *Respondent*

Mrs Clarke for Nock Deighton was unable to comment on service charge costs prior to her firm's appointment in 2010. They had not charged the applicants anything under this heading since their appointment.

37 *Tribunal*

It is possible that the Consultant could have inspected the lawns as part of its remit. The fee paid to Phoenix Health & Safety was £495 in 2011 which probably related mainly to the flats but if around 25% related to the grounds of which 50% was chargeable to Bluebell Wood and 50% to the additional garden, then the amounts chargeable to Nos.6 and 40 would be minimal. For the sake of completeness the Tribunal determines the amounts at:

	No.6 £	No.40 £
2003	2	1
2004	2	1
2005	2	1
2006	2	1
2007	2	1

Electricity and Site Lighting

38 *Applicants*

The applicants advised that there were no lights or other electrical appliances in Bluebell Wood. They had been provided with no information showing what the charge was for. The bills provided by Nock Deighton were based on estimated readings and they challenged them to clarify exactly which meters they related to and the apportionment between the lessees.

39 *Respondent*

Mrs Clarke for Nock Deighton was unable to comment on service charge costs prior to her firm's appointment in 2010. She had been provided with no information relating to these costs.

40 *Tribunal*

In the absence of any direct evidence, the Tribunal determines the amount payable at nil for the years covered by the application to 31st March 2012.

Gate Entry

41 *Applicants*

Mr and Mrs Barnes said the entrance to the car park had originally been via manual gates but they were changed to electrically controlled gates and they had objected, primarily because of the cost but also because the noise of operation disturbed their tenants at No.6 which is a flat directly above the archway entrance to the car park. The service charge accounts had shown a major sum for repairs and maintenance but Mr and Mrs Barnes said they suspected it was really a disguise to cover the cost of purchase and avoid the landlord having to comply with the consultation requirements in s.20 of the Landlord & Tenant Act 1985. They objected to the cost in principle.

42 *Respondent*

Mrs Clarke said the electric gates had been installed for security reasons and that HCWMC was entitled to recover the cost of repair under clause 7.5 of Schedule 6 to the lease: 'All sums paid by the Management Company in relation to the repair maintenance and management of the Management Company Item whether or not the Management Company was liable to incur the same under its covenants herein contained.'

43 *Tribunal*

Having reviewed the lease and facts, the Tribunal finds the lease ambiguous on the ability of the management company to recover the cost of the gates. It finds the lease should be construed contra proferentum (i.e. against the party granting the lease in the event of dispute) and consequently find the amounts in the service charge accounts for both gate and door entry for Nos.6 and 40 to be non-payable for the service charge years to 31st March 2012.

Contingency Reserve Fund

44 *Applicants*

The applicants pointed out that there were two amounts for reserve funds in the service charge accounts; an estate reserve and a general reserve.

45 They were willing to pay the amount charged for the estate reserve of £4.78 / flat (since it was feasible that the communal areas covered by their leases may need periodic maintenance and the cost of allowing for replacement items ought to be set aside in a reserve account), but they objected strongly to paying to the general reserve account that covered property outside their leases.

46 *Respondent*

Mrs Clarke was unable to comment on the charges made for the years prior to Nock Deighton's appointment. Her firm was charging £4.78 / flat for the estate reserve and £100.00 / flat for the general reserve in 2012.

47 *Tribunal*

The Applicants have agreed that the estate reserve charge of £4.78 / unit is reasonable with which the Tribunal agrees.

It finds the general reserve charge unreasonable and non payable as it relates to parts of the property not covered by the Applicants' properties.

Management Fee

48 This cost was not specifically raised at the pre-trial review but raised in the initial application to the LVT, in the parties' submissions and again at the Hearing.

49 The Respondent had charged £50 plus VAT for the houses (sold Freehold subject to estate charges), £100 plus VAT for flats with their own entrances (including Nos.6 and 40) and £150 plus VAT for flats with communal entrances. At the Hearing Mrs Clarke for the Respondent said they had revised the charge for the flats with their own entrances to £50 plus VAT in line with the houses which the Tribunal finds to be reasonable.

Section 20 Limitation on Costs

50 *Applicant*

Mr and Mrs Barnes said the dispute was unnecessary. They had advised Nock Deighton that they were not liable for various costs but had not received a reply and had no choice but to refer the matter to the LVT for determination.

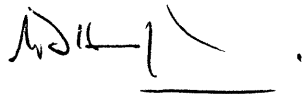
51 *Respondent*

Mrs Clarke said that they advised the Directors of HCWMC in 2011 that there were discrepancies in the leases of the development as a whole and had to delay responding to the Applicants while they waited for copies of all the leases and other documents. They met the Applicants in March 2012 to try and resolve the problems before referral to the LVT and spent over two hours in discussion with Mr and Mrs Barnes after the pre-trial review explaining the problems of the different charging structures in the various leases.

52 *Tribunal*

The Tribunal accepts that Nock Deighton had difficulty trying to manage the estate due to the different covenants in the leases at Smallshire Close and the practical problem of being provided with copies of all the leases by their client. However, the subject leases form the basis of the contracts with the Applicants and there was no suggestion at either the pre-trial review or Hearing that HCWMC had applied for variations in the leases to bring them into line either by agreement with the lessees or by LVT resolution.

53 The respondent conceded at the pre-trial review that a large number of the items billed to Mr and Mrs Barnes were not chargeable and should have been deleted. Furthermore, on closer examination the Tribunal found that some of the charges could not be justified and should be reduced or deleted. On balance, it finds that the Applicants have substantially won the case and as costs follow the decision it determines that the costs of this referral should not form part of the lessees' service charge liability pursuant to s.20 of the Landlord & Tenant Act 1985.



I.D. Humphries B.Sc.(Est.Man.) FRICS
Chairman

Date **21 FEB 2013**