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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)

Case Reference : LON/00BK/LSC/2013/0110

Property : 103 Gloucester Place, London W1W 6JN

Applicant : 103 Gloucester Place Limited

Representative : Mr P Letman, counsel, instructed by
Manches LLP

Respondent : Mr A Spaul

Representative : Mr A Young, counsel, instructed by
Southfields Solicitors

Type of Application : Application for the determination of service
charges payable - s.27A Landlord and
Tenant Act 1985

Tribunal Members : F Dickie (Judge)
H Geddes (professional member)
S Wilby (lay member)

Date and venue of Hearing : 24 September 2013
10 Alfred Place, London WC1E 7LR

Date of Decision : 24 October 2013

DECISION

Decisions of the tribunal

- (1) The tribunal finds that it has no power to determine the proportion of the major works payable for the major works.
- (2) The tribunal orders the Respondent to repay to the Applicant tribunal fees of £500 within 28 days.
- (3) The application under s.20C of the Landlord and Tenant Act 1985 was withdrawn.

The premises and lease

1. The Respondent is the lessee of the subject premises and the Applicant is the Company and provider of services under the lease, to whom service charges are payable. The subject premises are a self contained flat within a grade II listed Georgian house built over five floors which has been converted into flats (presently that configuration having five flats, one on each floor). Major works of renovation had been carried out to the building in 2010/11.
2. The relevant parts of the lease (which it is not necessary to set out in this decision) provide that the leaseholder of flat C should pay as a service charge 20% of relevant expenditure, unless a surveyor on behalf of the landlord or the management company determines another figure is reasonable. In 1988 that percentage was increased to 25% because flats D and E were amalgamated in that year into a single dwelling. As a result of other works carried out during the 2010/11 project, flats D and E were separated again in the first half of 2011 and with effect from 1 April 2011 the original position was reinstated with each flat paying 20%.

The application

3. By an application dated 18th of February 2013, and amendments to it, the Applicant sought a determination under s.27A of the Landlord and Tenant Act 1985 as to:
 - a. the payable service charges for major work carried out at the subject premises in the service charge year 2010/2011,
 - b. annual service charges for the year 2010/2011.
 - c. annual service charges for the year 2011/2012.
 - d. estimated annual service charges for the year 2012/13.
4. The tribunal issued directions on the current application after a pre-trial review held on 19 March 2013 at which both parties were represented. Those directions included directions as to the manner of and timing of the exchange of statements of case by the parties.

5. A further case management conference was held on 18 July 2013 before the First Tier Tribunal Property Chamber (Residential Property) at which further directions were given for the parties' preparation for the hearing. The matter was listed for a hearing on the 24 and 25 September 2013.

Previous determinations of the Leasehold Valuation Tribunal

6. The Leasehold Valuation Tribunal reached a determination dated 11 May 2011 (Case references LON/00BK/LSC/2010/0879) in respect of the estimated costs of the major works at the premises for the service charge year 2010/2011 - the same works that are the subject of this application. The tribunal determined that the budget for 2010/11 was reasonable in light of the subsequent tenders (the lowest being from London Fit Out Ltd. in the sum of £227,997.50, who were eventually contracted).
7. The Leasehold Valuation Tribunal also made a determination in respect of the reasonableness of the Respondent's service charges following an application made by the Applicant landlord relating to the service charges for the years 2005/2006, 2006/2007, 2007/2008, 2008/2009, 2009/2010, and the budget estimates of 2011/2012. The tribunal's decision was dated 5 December 2011 (Case reference LON/00BK/LSC/2011/0381).

The Hearing

8. By the date of the hearing, and in light of a joint expert statement, the disputed major works costs and service charge expenditure had been agreed by the parties. Whilst the directions of the tribunal has provided for the exchange of experts reports by 13 August 2013, it was not until the morning of the hearing on 24 September that the tribunal was presented with the statement of agreed findings (dated 23 September) prepared jointly by Mr Andrew Garwood Watkins of Residential Facilities Management Limited, the Applicant's surveyor, and Mr Rob Carey, director of Ward Williams Associates, the Respondent's surveyor.
9. The experts agreed that the major works had been undertaken to a good standard, and that there was no evidence that the cost of the works to convert the maisonette into self-contained flats had been included with the accounts for the external works.
10. The experts agreed to the actual cost of the 2010/11 major works as demanded save for a reduction of £250 in respect of one item. The agreed amount was £246,603.42, conceded by the Respondent to be reasonable and recoverable. The costs of the professional fees incurred in respect of the major works were agreed as reasonable and recoverable in the sum of £55,839.90. The total of £320,443.32 was therefore agreed as being the reasonably incurred costs of the major works including professional fees and CDM.

11. The experts also agreed the cost of the service charges for the year 2010/2011, including the transfer to reserves, as reasonable and recoverable in the sum of £16,950.00.
12. Those within the application for the year 2011/2012 the parties agreed on the sum of £30,615.91 as reasonable and recoverable. The estimated cost of the service charges for the year 2012/2013, including the proposed transfer to reserves, were agreed as reasonable and recoverable in the sum of £27,120.00. All sums agreed by the parties were exclusive of VAT.
13. Pursuant to s.27A(4) of the Landlord and Tenant Act 1985, the tribunal has no jurisdiction in respect of matters that have been agreed or admitted by the tenant. By the date of the hearing, there were only two matters which were in dispute between the parties, and the tribunal heard submissions as to both, as set out below.

Illegality

14. Mr Young on behalf of the Respondent took the position that the acquisition of the freehold interest by the current freeholder Mr Shamash on 28 April 2010 had been tainted by illegality because the Respondent was denied his statutory right of first refusal to purchase the freehold interest in the property given to him as a qualifying tenant by section 1 of the Landlord and Tenant Act 1987. This was an entirely new issue which had not been raised by the Respondent in compliance with the tribunal's directions, but only by counsel in preparing his skeleton argument for the hearing.
15. Mr Young did not concede that any sums that were the subject of this application would be payable if that argument were to succeed. He acknowledged that by virtue of his ownership of flat A as well as flat C he would not have constituted a majority of qualifying tenants for the purpose of acquiring the freehold. However, he contended that the question of illegality could be pursued if the Respondent gained the support of the lessee of flat B at the relevant time.

Apportionment

16. Mr Young argued that 25% was not a reasonable apportionment of the major work costs, since they were incurred whilst works were ongoing to separate flats D and E into separate dwellings. He said that expert evidence for the Respondent would support this view.
17. Mr Letman for the Applicant considered that the question of apportionment of the service charges for that year was plainly *res judicata*. The decision of the previous tribunal in case LON/00BK/LSC/2010/0879 was that the demands were payable, and these demands were for 25% of expenditure. The Respondent had sought to appeal the decision, but not on the question of apportionment.

Tribunal's Determination

18. At the hearing the tribunal gave an oral summary of the following decision. The tribunal finds that it has no power to consider the apportionment of service charges for the major works. The tribunal agrees with the submission of Mr Letman that the matter is res judicata. The decision of the tribunal of March 2011 is that "the sums demanded to be paid on 1 July, 9 September and 10 December 2010 are due and payable by the Respondent lessees of the Applicant company". That was a decision that the demands for 25% of the expenditure were payable. It seems to this tribunal that in the strictest sense the determination as to the specific amounts payable includes as a necessary and integral step the proportion payable thereof. This was part of the basis of the judgment and the matter is therefore res judicata. This tribunal is satisfied that it has no power to reopen the matter in these proceedings.
19. In any event, the issue of the proportion payable is a matter which could have been raised in those proceedings, and in the proceedings over annual service charges for the year 2011/12 determined by the tribunal in December 2011. Where a party could have raised an issue in proceedings but did not do so they are estopped (according to the principle in *Henderson v Henderson* 3 Hare 100 and *Hoysted v Federal Commissioner for Taxation* (1921) 29 CLR 527. There is no reason the issue could not have been raised in those proceedings (when presumably it would have been observed that these overdue major works could have been carried out years before, when the flats were still combined). The fact that the Respondent did not at that stage know that the landlord would subsequently decide to lower the service charge percentage payable to 20% is not relevant to the fact that he could have challenged the reasonableness of charging 25% of the major works to him in the prevailing circumstances. It is clear, and not in dispute, that the Respondent knew at the relevant time that works to separate flats D and E were being carried out during the major works.
20. Not only could the point have been raised in proceedings relating to the 2011/12 service charges, but the question of the percentage payable was expressly raised in case LON/00BK/LSC/2011/0381, when the tenant accepted the percentage for two prior years to 2010/11 and one subsequent one, and no point on it was taken.
21. Even were the matter not res judicata (or the Respondent estopped from raising it), the tribunal would restrict the Respondent from raising matters not pleaded in his statement of case in accordance with the tribunal's directions (pursuant to its power under Rule 8(2)(e) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013. There have been two sets of directions in this case, and the parties have attended two case management conferences. In breach of directions, the question of apportionment has been raised only just before the hearing, such that the Applicant has not had the opportunity to file witness statements or make adequate preparations. The tribunal has not had sight of expert evidence, which the parties should have exchanged in

accordance with the directions. Mr Young did not consider an adjournment would be necessary, but it is not at all clear to the tribunal that the matter could in the circumstances have been fairly determined on the day, and no grounds have been put forward upon which it would have been reasonable to postpone.

Fees and Costs

22. Counsel for the Respondent withdrew the application under s.20C of the Landlord and Tenant Act 1985 and did not oppose the Applicant's request for an order for the reimbursement of tribunal fees totalling £500, which the tribunal makes under Rule 13(2).

Name: F Dickie

Date: 24 October 2013