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RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0022/09/20

In the Matter of Dock Fictoria, Caernarfon, Gwynedd

And in the Matter of an Application under Part IV of the Landlord and Tenant Act 1987

Applicant:		**Dock Fictoria Residents Association**
Respondents:	**(1)**	**Homeground Management Limited**
	(2)	**Abacus Land 4 Limited**

Tribunal:	**Colin Green (Chairman)**
	Johanne Coupe FRICS (Valuer Member)
	Eifion Jones ACIB (Lay Member)

Date of determination: **26 January 2021**

DECISION

(1) The Applicant's application under section 37 of the Landlord and Tenant Act 1987 is dismissed.

(2) No order is made under section 20C of the Landlord and Tenant Act 1985.

REASONS

Preliminary

1. The relevant background to this matter is as follows. The Dock Fictoria (Victoria Dock) Commercial and Residential complex ("the Development") was developed between 2006 and 2009 by the Watkins Group Limited. The residential properties consist of 50 two or three-bedroom apartments, all let on terms of 150 years from 1 January 2006 and numbered 1 to 51 (13 was omitted). The original landlord was W. J. Developments (Gwynedd) Ltd ("WJ"). The apartment leases contain service charge provisions in respect of recovery of the landlord's expenditure across parts of the Development. The definition of "Service Charge Proportion" in each lease appears to have been by reference to a draft service charge budget attached to the lease, though the form of that budget may have differed in certain cases and may even have been omitted with some leases.

2. After the issue of initial service charge in early 2009 a number of tenants complained that the square footage by reference to which the service charge contribution for their apartment had been calculated was erroneous and that the square footage of a large proportion of apartments showed a significant increase from the details provided at the time of sale.

3. These anomalies were drawn to the attention of WJ's then manging agent, Carlton, and as a result in April 2009 WJ Homes Limited agreed to undertake a review of the measurements, which was carried out by Eric Pritchard, the technical director, who remeasured all the apartments. As a result, revised invoices were sent to tenants based on the new measurements. Some objected and were told to seek independent legal advice. Service charge contributions in the following years were calculated by reference to the revised square footage figures, expressed as a percentage figure.

4. On 7 September 2012 WJ sold the freehold to Abacus Land 4 Limited ("Abacus"), the Second Respondent. Homeground Management Limited ("Homeground"), which deals with the general management of Abacus' property portfolio, has been made the First Respondent, although the Tribunal does not consider that it was necessary for Homeground to be a party and it has played no part in the proceedings. For a number of years after the purchase by Abacus, CBRE acted as Abacus' managing agents for the

Development and continued to use the revised figures in calculating service charge contributions.

5. At the beginning of June 2018 Residential Management Group Limited ("RMG") were appointed Abacus' managing agents for the Development in place of CBRE and its initial service charge invoices from November 2019 did not adopt the revised figures but reverted to the original figures. As a result, there was an exchange of correspondence between the Applicant ("DFRA") – the Residents Association for the Development – and Homeground as to the legitimacy of using such figures in the light of the recalculations carried out by Mr. Pritchard previously which CBRE had used for several years in calculating service charge contributions. No relevant documentation appears to have been passed by CBRE to RMG and Mr. Pritchard's archive records from 2009 have been destroyed with no electronic copies having been made.

6. Homeground's position was that although it accepted that there had been a period of 9 years on which the new figures had been employed, no formal changes had been made to the leases so that it was obliged to use the original lease figures. There was no objection to a new report as to the correct square footage for each apartment, as a service charge expense, and a proper formal variation of the leases to reflect such figures. DFRA does not consider this necessary in the light of Mr. Pritchard's previous measurements and the established practice of using his figures.

7. The above information has been taken from an undated statement in support of the current application, presumably prepared by Gareth Jones, the Chairman of the Applicant, who signed the application form dated 25 June 2020. Paragraph 5 of that form – "Lease variation(s) to be considered by the tribunal" – contains a number of boxes to indicate under which provisions of the Landlord and Tenant Act 1987 the application is being made, and the box for section 35 was ticked. A statement dated 14 October was served by RMG on behalf of Abacus, a large part of which deals with difficulties that would be faced in relying on section 35. After having seen that statement Mr. Jones emailed the tribunal on 21 October stating that he ticked the wrong box and that it had always been his intention to rely on sections 36 and 37 (though an applicant cannot rely on section 36 which only applies to a variation sought by a respondent to the application). The tribunal asked that a copy of the application with

the correct box ticked be filed and Mr. Jones subsequently sent to the tribunal a copy of his original application but with the box for section 37 ticked in place of the section 35 box. Accordingly, the tribunal is considering this as a s. 37 application.

8. DFRA and Abacus have agreed that this matter can be determined on the papers without a hearing and on 26 January 2021 the panel members met virtually via a video link and deliberated on the same.

Statutory provisions

9. Section 37 of the 1987 Act provides as follows:

> *"37 **Application by majority of parties for variation of leases.***
>
> *(1) Subject to the following provisions of this section, an application may be made to the appropriate tribunal in respect of two or more leases for an order varying each of those leases in such manner as is specified in the application.*
>
> *(2) Those leases must be long leases of flats under which the landlord is the same person, but they need not be leases of flats which are in the same building, nor leases which are drafted in identical terms.*
>
> *(3) The grounds on which an application may be made under this section are that the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect.*
>
> *(4) An application under this section in respect of any leases may be made by the landlord or any of the tenants under the leases.*
>
> *(5) Any such application shall only be made if—*
>
> *(a) in a case where the application is in respect of less than nine leases, all, or all but one, of the parties concerned consent to it; or*
>
> *(b) in a case where the application is in respect of more than eight leases, it is not opposed for any reason by more than 10 per cent. of the total number of the parties concerned and at least 75 per cent. of that number consent to it.*
>
> *(6) For the purposes of subsection (5)—*
>
> *(a) in the case of each lease in respect of which the application is made, the tenant under the lease shall*

constitute one of the parties concerned (so that in determining the total number of the parties concerned a person who is the tenant under a number of such leases shall be regarded as constituting a corresponding number of the parties concerned); and

(b) the landlord shall also constitute one of the parties concerned."

10. It is clear from RMG's statement that Abacus does not oppose an application for variation under section 37. Nevertheless, the tribunal must decide if it has jurisdiction to determine the application and whether the relevant statutory conditions are satisfied.

Determination

11. The first issue is whether DFRA has standing to make an application under section 37, which section 37(4) provides "may be made by the landlord or any of the tenants under the leases". The definition of "tenant" for the purposes of the Act is contained in s. 59:

"(l) ln this Act "lease" and "tenancy" have the same meaning; and both expressions include—

(a) a sub-lease or sub-tenancy, and

(b) an agreement for a lease or tenancy (or for a sub-lease or sub-tenancy).

(2) The expressions "landlord" and "tenant", and references to letting, to the grant of a lease or to covenants or the terms of a lease shall be construed accordingly."

In other words, "tenant" bears its usual meaning: someone to whom a tenancy has been demised or assigned.

12. DFRA is not a tenant in that sense and is not a party to any of the leases. It is a Residents Association (also known as a Tenants Association) which was formed in November 2008 to safeguard and promote the interests of the residents and whose membership is limited to current tenants of the apartments. When the application was made there were 46 "owners" who were paid up members of DFRA, which on 5 June 2020 was recognised by the landlord pursuant to section 29 of the Landlord and Tenant Act 1985. The secretary of a Recognised Tenants Association can, with the members' consent, act on behalf of its members in respect of a number of issues, but that does not include making an application under s. 37 of the 1987 Act. Therefore, even though DRFA

represents tenants for certain purposes, and has been a useful conduit for expressing concerns over the above matters, it is not itself a tenant and cannot bind the tenants of the Development for the purpose of an application under section 37.

13. Second, although in cases under section 35 or 36 the tribunal is not obliged to accept the variation proposed by the applicant and can make any variation it thinks fit (section 38(4)) no similar power exists for applications under section 37, such that the tribunal must either accept or reject the variation as drafted, as section 38(5) does not contain the words "or such other variation as the tribunal thinks fit". In addition, under paragraph 6(2) of Schedule 2 to the Leasehold Valuation Tribunals (Procedure)(Wales) Regulations 2004, a draft of the variation sought is required as part of the particulars of the application.

14. In the present case, there is no draft variation. Paragraph 5 of the application form includes the following statement by Mr. Jones:

> *"As the application for variation relates to the overall measurements of the residential complex and not any particular section of the leases, it is impracticable to outline any draft variation."*

Without such a draft the tribunal will be unable to make any variation order under s. 37.

15. Third, it is not entirely clear how many of the 50 leases are to be varied. Paragraph 5 vi. of the statement in support of the application states:

> *"The lease documents of apartments owned by all association members have been examined by members or their legal representatives. It has been established that in excess of twenty bear no reference whatsoever to the issue of square footage, ten quote measurements that correspond with the revised re-measured figures and the remaining either quote incorrect figures or of recently purchased since 1/6/2018, the figures utilised by RMG since their engagement."*

Appendix 26 to the statement is a table of comparisons for each of the 50 apartments showing the remeasurement figures used by CBRE in column A and RMG's figures in column B. The tribunal has had difficulty reconciling this table with the statement that ten leases have the same measurement figures as the revised figures, since the table

shows only one apartment, 43, as having the same figure. In all other cases there is an increase or decrease to varying extents. Presumably, if one or more leases have the correct figures no variation is required in respect of those leases.

16. On any footing however, since the applicant seeks the variation of more than 8 leases, the provisions of section 37(5)(b) would be engaged so that at least 75 per cent of those concerned (as defined by section 37(6)) must consent to the application and it must not be opposed by more than 10 per cent. For the reasons set out in the decisions of the Upper Tribunal in *Dixon v. Wellington Close Management Limited* [2012] UKUT 95 (LC) and *Simon v. St Mildred's Court Residents Association Limited* [2015] UKUT 508 (LC) the relevant date for determining support or opposition is the date of the application, and having the requisite percentages is a pre-condition for making the application.

17. In addition, although there is no prescribed procedure for determining support and opposition, it is clear from *Simon v. St Mildred's Court Residents Association Limited* that the terms of the proposed variation must be put to each of the tenants whose leases are to be varied in a sufficiently clear fashion so that they can provide informed consent. (It should be noted that the Residents Association in that case was the landlord as a result of enfranchisement, which is not the position here.)

18. In the present matter, the fact that the service charge was calculated and paid for 9 years based on the revised figures, apparently without objection, does not in the tribunal's view constitute sufficiently clear evidence as to the level of support for, or opposition to, a variation of the leases amongst those who were tenants of the relevant apartments as of 25 June 2020, the date of the application.

19. According to paragraph 7 i of DRFA's statement:

> *"As nothing further had been heard from Homeground or RMG, at the Association's meeting on 30th January 2020, irrespective of the fact that there would be winners and losers, it was decided that in view of the intransigence of Homeground and RMG, the situation could not be allowed to continue and that steps be taken to seek independent determination under the Landlord and Tenant Act 1985 [sic] from the Residential Property Tribunal Wales."*

Again, this is insufficient evidence of consent – how many tenants were present at the meeting and of those how many in favour or opposed? – and no particular variation was specified at the meeting. The only resolution passed was to seek an "independent determination" from the tribunal.

20. In the light of the above the tribunal does not consider it necessary to go on and consider other issues that arise, for example: from what date is the variation intended to take effect; is it to be backdated so that there may be credits or debits and reconciliation payments by certain tenants, or is it to have effect as from the next service charge year?

21. The tribunal's scope for resolving matters on this application is limited by the provisions of section 37 and the specific requirements which apply in such a case. Although the tribunal recognises the difficulties that have arisen, for the reasons set out above it has no alternative but to dismiss the application. That does not prevent a further application in the future however, and if that is contemplated the tribunal considers it would be prudent for specialist legal advice to be sought before an application is made.

Section 20C of the 1985 Act

22. This gives the tribunal jurisdiction on the application of a tenant to order that all or part of the costs incurred by the landlord in the 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 other tenants, and the tribunal may make such order as it considers just and equitable in the circumstances. DRFA has indicated in paragraph 7 of the application form that it wishes to make such an application as "some of the residents are elderly persons with limited means".

23. Under section 30 of the 1985 Act, "tenant" is again given its usual meaning for the purpose of section 20C, so that since DRFA is not a tenant the tribunal has no jurisdiction to consider the 20C application. Even if it were able to do so however, it would not be minded to make an order as any additional management fees arising from RMG's involvement in these proceedings, on behalf of Abacus, will have been as the result of Abacus having been made a respondent to the application and compliance by Abacus with the requirement under paragraph 1 of the directions made on 15 September

that it provide a statement setting out its position. Abacus did not instigate this failed application and has done no more than it was directed to do.

DATED this 4th day of February 2021

C Green,
Chairman