9040

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/OOML/LIS/2013/0053**
Property	:	**52a Surrey Street, Brighton, East Sussex BN1 3PB**
Applicant	:	**Ms E Partington**
Respondent	:	**Miss A Falciola**
Type of Application	:	**Sections 19, 20, and 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act")**
Tribunal Members	:	**Judge Robert Wilson (Chairman)** **Nigel Robinson (Surveyor Member)**
Date and venue of Hearing	:	**15th July 2013** **Jury Inn, Brighton**
Date of Decision	:	**29th July 2013**

DECISION

The Application

1. This matter, which has been transferred to the Tribunal from the Willesden County Court (Claim No2QZ23644) requires the Tribunal to make a determination of the Respondent's liability to pay service charges arising out of roof repairs carried out by the Applicant in June 2012. The amount claimed in the Court proceedings, excluding Court fees, is stated to be £1,028.16. The Respondent has admitted liability for £250 and judgment has been entered for this sum.

2. The Tribunal gave directions on the 17th April 2013 for the conduct of the case and directed that the determination would be made on the papers alone and without a hearing unless either party objected. Neither party objected and accordingly the Tribunal convened on the 15th July 2013 and the application was determined solely upon consideration of the papers received and without a hearing.

Summary of Decision

3. In the absence of a dispensation order from the Tribunal, the statutory cap of £250 applies to the roof works carried out to the property in June 2012. As the Respondent has already admitted this sum and there is a County Court judgment for this figure, no further amounts for this work are currently payable by the Respondent in her capacity as the leaseholder of the ground floor flat.

The Inspection

4. The Tribunal inspected the subject property on the morning prior to its determination. The property is a late Victorian mid terrace house with bow fronted and rendered elevations, which has been converted into two flats; a ground floor flat and a first/second floor maisonette. The original roof void has been adapted to create the second floor by raising the roof level and forming a central flat roof area with sloping artificial slate section, including a Velux style window to the front elevation. The rear elevation was not inspected and could not be seen from any of the areas visited.

5. The interior of the maisonette was inspected to observe the two areas where there had been water / damp penetration. These were to the ceiling of the first floor west facing bow window and the ceiling wall abutment above the second floor staircase on the south side of the property. Both areas had been redecorated (under insurance) following the repairs and whilst there was no sign of recurrence, it was possible to see where the decorations had been touched in to the second floor due to a slight shading difference between the old and new paintwork.

The Lease

6. The Tribunal only had before it a copy of the lease for the maisonette flat but the papers suggested that the ground floor flat lease is in similar terms. The lease is dated 3rd August 2004 and is for a term of 99 years from 25th March 2004 at a yearly ground rent of £200 for the first 33 years and rising thereafter.

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7. The relevant provisions in the lease may be summarised as follows:

   (a) The lessee is responsible for the repair of the demised premises, which are defined so as to include the ceilings and floors and windows but to exclude any of the main timbers or joists of the building.

   (b) The lessor is responsible for insuring the building and for the repair and renewal of the main structure, the roof, rainwater pipes, drains and common areas.

   (c) The lessee covenants to pay 50% of the lessor's costs as set out in clause 4 (the service charges). On the 25th March and the 29th September the lessee is to pay such sum as the landlord shall stipulate is a fair and reasonable amount on account of the tenants annual liability.

   (d) The service charge year runs to each 25th March and as soon as practicable after each year end the landlord is to serve on the tenant an annual maintenance account which shall certify the actual amount of the lessees liability for that year taking into account any amounts paid on account in that year.

   (e) Upon receipt of that account the lessee is to pay a balancing charge in respect of any under payment or is entitled to a credit if the amounts paid on account have exceeded actual liability.

The Law and Jurisdiction

8. The Tribunal has power under S.27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The Tribunal can decide by whom, to whom, how much and when a service charge is payable.

9. By S.19 of the Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard.

10. By S.20 of the Act and regulations made thereunder, where there are qualifying works or the lessor enters into a qualifying long term agreement, there are limits on the amount recoverable from each lessee by way of service charge unless the consultation requirements have been either complied with, or dispensed with by the Tribunal. In the absence of any required consultation, the limit on recovery is £250 per lessee in respect of qualifying works, and £100 per lessee in each accounting period in respect of long term agreements. As regards qualifying works, the recent High Court decision of Phillips v Francis [2012] EWHC 3650 (Ch) has interpreted the financial limit as applying not to each set of works, as had been the previous practice, but as applying to all qualifying works carried out in each service charge contribution period.

11. A lessor may ask a Tribunal for a determination to dispense with all or any of the consultation requirements and the Tribunal may make the determination if it is satisfied that it is reasonable to dispense with the requirements (section 20ZA). The Supreme Court has recently given guidance on how the Tribunal should approach the exercise of this discretion: Daejan Investment Limited v Benson et al [2013] UKSC 14. The Tribunal should focus on the extent, if any, to which the lessee has been prejudiced in either paying for inappropriate works or paying more than would be appropriate as a result of the failure by the lessor to comply with the regulations. No distinction should be drawn between serious or minor failings save in relation to the prejudice caused. Dispensation may be granted on terms. Lessees must show a credible case on prejudice, and what they would have said if the consultation requirements had been met, but their arguments will be viewed sympathetically, and once a credible case for prejudice is shown, it will be for the lessor to rebut it.

Applicant's case

12. The Applicant's case is set out in her statement of case which includes a chronology of the events surrounding the commissioning of the roof works and the subsequent demand for reimbursement. The statement reveals that damp to the maisonette was evident in late May 2012. On the 4th June 2012 the Applicant contacted North Road Timber and Joinery Company to provide a quotation for the necessary work. This was provided on the 10th June 2012 and on the 12th June 2012 the Applicant instructed the company to carry out the work. It appears that the work was completed on or about the 20th June 2012 following which the Applicant applied to the Respondent for her share of the work amounting to a little over £1000.

13 The statement points to the difficulty that the Applicant encountered in discussing the need for the work with the Respondent. It appears that the Respondent's flat was tenanted at the time and the Respondent was residing in Australia.

14 There is reference to a number of legal letters sent to the Respondent requesting payment after the work had been carried out and the Applicant avers that despite a number of reminders, payment was not made. Accordingly she issued a small claims summons against the Respondent on the 30th September 2012.

15 The statement of case contains no legal submissions on the recoverability of the amount as a service charge item but it can be deduced that in seeking reimbursement of one half of the cost of the work the Applicant relies upon clause 4 of the lease.

Respondent's case

16 The Respondent's defence can be ascertained from the County Court pleadings and can be simply stated. She claims that despite being asked to obtain three quotes for the work, the Applicant failed to do so and instead the Applicant commissioned the work within a week of notifying the Respondent that there was a problem. She was not happy with the choice of contractor and the apparent lack of a credible

guarantee covering the works. She also contends that the Applicant failed to carry out statutory consultation before commissioning the works.

17 The Respondent contends that the Applicant failed to carry out the necessary statutory consultation exercise and in particular did not provided estimates, did not provide the Respondent with the opportunity to make observations on the proposed work or the opportunity to nominate alternative contractors. In these circumstances she contends that her liability to contribute as a leaseholder is capped at £250, an amount which she has admitted in the County Court proceedings.

Consideration

18 A feature of this case is that the Applicant has, apparently without authority from the Respondent, who is a joint freeholder, instructed a builder to proceed with the work without getting quotes or estimates from other contractors. It is abundantly clear from the Applicant's statement of case that she did not carry out the statutory consultation procedure referred to in this decision prior to the commissioning of this work. This has opened the door for the Respondent to challenge the costs.

19 The Respondent's case is that there has been a failure to consult under S.20 of the Act and so the charges for all qualifying works in this year should be limited to £250 per leaseholder.

20 Even under the pre Phillips v Francis state of understanding of the law, the Applicant should have consulted with regard to the job of repairing the roof because the works carried out were qualifying works and the overall cost of this set of works exceeded £250 per lessee. Accordingly in the absence of compliant consultation or a dispensation order from the Tribunal the statutory cap of £250 applies. Within the context of this application the Tribunal has no discretion to dispense with this requirement and must apply the cap.

21 It is open to the Applicant to apply to the Tribunal for a dispensation order to lift the cap but this must take the form of a fresh application to the Tribunal and the Tribunal will review the application in the light of the legal submissions then made. There is no guarantee that the Tribunal would exercise its discretion and grant dispensation.

22 Accordingly for these reasons the Tribunal determines that having regard to the partial admission of liability in the sum of £250 already made, no further sums are due from the Respondent in her capacity as leaseholder.

Appeals

23 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 the Regional office which has been dealing with the case.

24 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.

25 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 the time limit, or not to allow the application for permission to appeal to proceed.

26 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.

Concluding Remarks

27 It is plain that the Property is a building that will require further repair work, possibly substantial in nature. The Applicant needs to ensure she is familiar with the requirements of the lease and the legal framework in which she is required to operate, especially if she does not engage outside managing agents. Although the law relating to statutory consultation is complex and will result in delay, these factors cannot serve as an excuse for avoiding the requirements to consult in the proper manner. The fact that the repairs may have been urgent still does not obviate the need for consultation or in the alternative a dispensation order from the Tribunal.

28 It is not in the remit of the Tribunal to investigate if the Respondent may be under a liability to contribute further sums in her capacity as joint freeholder under the doctrine of ostensible authority. This would be an issue for the County Court, if pleaded by the Applicant. Accordingly the Tribunal makes no findings on this issue.

Signed:

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Judge Robert Wilson
Chairman

Dated: 29th July 2013