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**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case Reference** : **LON/00AP/LS/2013/0221**

**Property** : **3 Thistle Court N17 9PB**

**Applicant** : **Mr Khalid Khan**

**Representative** : **Mr Sandham of Counsel**

**Respondent** : **HERON WHARF (PHASE TWO)  
LIMITED**

**Representative** : **Mr Gwyn Hopkins Director  
assisted by Ms Christine Tait, Site  
Manager**

**Type of Application** : **For the determination of the  
reasonableness of and the liability  
to pay a service charge**

**Tribunal Members** : **Mr S Carrott LLB  
Ms M Krisko BSc(EstMan) BA  
FRICS  
Ms S Wilby**

**Date and venue of  
Hearing** : **12 August 2013  
10 Alfred Place, London WC1E 7LR**

**Date of Decision** : **23 October 2013**

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**DECISION**

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### **Decisions of the tribunal**

- (1) The tribunal determines that the sum of £1800 (being the amount paid by the Applicant for replacement windows) is payable by the Respondent to the Applicant together with the agreed sum of £72.86 by way of interest.
- (2) The tribunal determines that the further sum of £952 (being the total of the additional sums paid to the Respondent by the Applicant from 2011 to the date of the hearing) is payable by the Respondent to the Applicant.
- (3) The sums in (1) and (2) above should be repaid to the Applicant within 28 days of the date of this Decision.
- (4) The sum of £179.84 by way of administration charge is not payable to the Respondent/landlord by the Applicant.
- (5) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the Respondent's costs of the tribunal proceedings may be passed to the lessees through any service charge.
- (6) The tribunal determines that the Respondent shall pay the Applicant £250 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicant.
- (7) The Tribunal further orders that the Respondent shall within 28 days of the date of this Decision pay to the Applicant costs assessed at £800.

### **The application**

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 as to whether certain paid by the Applicant to the Respondent in respect of window replacement works, which works are agreed not to have been carried out, should be repaid to the Applicant.
2. Additionally the Applicant seeks the Tribunal's determination in respect of an administration fee of £179.84, the Applicant contending that this sum is not reasonable and consequential orders in relation to costs of this application.

### **The hearing**

3. The Applicant was represented by Mr James Sandham of Counsel at the hearing and the Respondent was represented by one of its Directors, Mr

Gwyn Hopkins and assisted by the site manager, Ms Christine Tait, the site manager

### **The background**

4. The Applicant Mr Khan is the leaseholder of the subject property 3 Thistle Court, London N17 9PB.
5. The Respondent Heron Wharf (Phase Two) Management Company Limited is a management company whose membership is made up of the lessees of the blocks under the company's management.
6. The provisions of the lease do not allow the landlord to carry out repairs to the windows. It is the Applicant's responsibility as the windows fall within his demise. Therefore in 2008 the Respondent put in place a scheme whereby the windows would be replaced with UPVC windows so long as the lessees including the Applicant made a contribution to the costs. The lessees would pay the sum £1,800.00 to the management company who would in turn instruct contractors to carry out the works.
7. Although Mr Khan paid £1,800, the Respondent did not accept until recently that the sum had been paid. Mr Khan's windows were not replaced and understandably Mr Khan wanted reimbursement of this amount. In addition, Mr Khan had been making a separate contribution towards the sinking fund of approximately £408 per annum towards windows from April 2011 to August 2013 to cover the cost of window replacement. Under the scheme devised by the management company, that sum would be refunded once the windows were replaced.
8. It is now common ground between the parties that the Applicant not only paid his contribution towards the sinking fund but also that he paid his £1800. The windows have not been replaced and neither sum has been refunded to Mr Khan.
9. When Mr Khan originally issued his application his complaint was in relation to the fact that he had paid the sum of £1800 for windows and his windows had not been installed. He also complained about the administration charges for late payment of service charge. Mr Sandham on the day of the hearing purported to expand the issues to include a complaint about the accounts and the reserve fund. We were satisfied that this complaint was not contained within the original application and that insufficient notice was given to the Respondent in order for the Respondent to deal with the evidential and legal issues raised. Accordingly the Tribunal limited the issues to those which were contained in the application or otherwise raised at the directions hearing namely:

- (i) The window replacement and consequential accounting.
- (ii) Administration Charges.
- (iii) Reimbursement of fees and costs.

### **Evidence and Submissions of the Parties**

- 10. Mr Khan was unable to attend his hearing. The Tribunal nevertheless had regard to the contents of his written witness statement dated 5 July 2013.
- 11. Mr Khan set out the general background to the arrangement with Respondent as regards the issue of window replacement. He said that he had paid the sum of £1800 in three separate instalments of £600 as agreed with the Respondent. He said that no explanation was offered to him as to why his windows had not been replaced but that he had spoken to Christine Tait, the site manager, who had informed him that no funds were held on account for him.
- 12. As regards the administration charges, Mr Khan at paragraph 16 of his witness statement said that he was charged £179.84 for a late payment for which in fact he had sent a cheque which had not been banked. The £179.84 was made up of legal fees, interest and a sum of £3.00 for the office copy entries.
- 13. Ms Tait, the site manager, who also made a written witness statement and gave oral evidence at the hearing set out the background to the scheme which we have referred to above. She denied having told Mr Khan that the Respondent did not have sufficient funds or had not received his payments towards the windows. She accepted however that it was not until May 2013 that the Respondent confirmed that it had in fact received his payment of £1800. She accepted that in addition to the £1800 Mr Khan had contributed the sum of £34 per month to the window replacement scheme.
- 14. On the basis of the evidence Mr Hopkins sought to argue that once the money was paid there was a contract between the lessee and Window Maintenance Services Ltd, the contractors. The Respondent's position was that it did not consider that Mr Khan should be reimbursed with any sums so far as the windows were concerned although it was conceded that the works would have to take place.
- 15. With regard to the administration charges, Mr Hopkins submitted that there was no evidence that Mr Khan sent a cheque which was not subsequently cashed and that the burden was therefore on Mr Khan to prove his case on this issue.

16. Mr Sandham submitted that regardless of whether there was a contract between the Applicant and Window Maintenance Services Ltd, it was clear that the monies held by the Respondent were held on trust for the Applicant and payable to him on demand. He submitted in the alternative that the scheme was collateral to the lease and referable entirely to the landlord and tenant relationship and therefore a sum paid 'as part of or in addition to rent' for the purposes of section 18 of the Landlord and Tenant Act 1985.
17. Mr Sandham further submitted that having paid the £1800 from 2011 Mr Khan had additionally paid the sum of £34 per month which was also in respect of the windows. Yet no works had been carried out. He submitted that Mr Khan was entitled to payment of the £1800 plus the £34 per month since 2011.

### **Reasons for the Tribunal's Decision**

18. Mr Khan had paid to the Respondent the sum of £1800 plus £34 per month (since 2011) for his windows to be replaced. It mattered not whether the Respondent was holding those sums as agent or alternatively the sums were to be viewed as 'part of or in addition to rent' for the purposes of section 18 of the Landlord and Tenant Act 1985. The work had not been carried out and there was therefore no basis upon which the Respondent could continue hold on to any of those sums paid by Mr Khan.
19. It was unnecessary for the Tribunal to resolve the conflict on the evidence between Mr Khan and Ms Tait and neither do we criticise Ms Tait. What ever may have been said on that particular occasion, it was clear that it was not until May 2013 after the application was made that the Respondent finally admitted that it had received Mr Khan's £1800. The Applicant had paid the money for window replacement works. The window replacement works have never taken place to his flat. The Respondent is therefore liable to repay Mr Khan the sum of £1800, the parties having agreed between them that interest of £72.86 is payable on that sum.
20. With regard to the contribution of £34 from 2011, Mr Khan had paid £408 for 2011/2012, £408 for £2012/2013 and £136 for 2013/2014 (up to the date of the hearing). Accordingly he was liable to be repaid the sum of £952 on the basis that the window replacement works had not been carried out to his flat.
21. With regard to the administration fee paid by Mr Khan, this was not payable. We accept his evidence that he was not late in paying the relevant service charge and even if he had not paid, the Respondent was in any event holding the sums which we have found due to be repaid to him in respect of the window replacement which never took place.

### **Application under 20c, costs and refund of fees**

22. At the end of the hearing, the Applicant made an application for a penal costs, a refund of the fees that he had paid in respect of the application and hearing and application pursuant to section 20C of the Landlord and Tenant Act 1985 to limit the landlord's costs.
23. Mr Sandham sought penal costs of £2880.00 plus VAT. There was some discussion about whether the Tribunal should apply the old rules or the new rules, the parties however agreeing that pre 1 July 2013 applications were governed by the old costs regime.
24. However the gravamen of the Applicant's complaint under this head was that the Respondent had acted unreasonably and whether considering the matter under the old or new costs regime, an order for costs should be made.
25. Having heard the arguments of the parties we considered that the Respondent had defended the proceedings unreasonably. Albeit that the Applicant had to surmount a high hurdle in persuading the Tribunal that an order for penal costs ought to be made, we accepted that Applicant had made out a case for such an order. There was no good reason why the Respondent ought not have repaid to the Applicant the sums which he had paid in respect of window replacement in circumstances where the work had not been carried out. The Applicant had been put to unnecessary expense in order to recover sums which were rightfully payable to him. The failure to make payment or even accept that the Applicant was entitled to repayment was wholly unreasonable. We do not accept that the Respondent genuinely believed that it was entitled to hold on to the sums which we have ordered to be repaid and neither do we accept, given the stance of the Respondent, that the Applicant was obliged to resort to mediation in circumstances where the Respondent well knew that the above sums were payable. Indeed an admission at an early stage in relation to this matter would have prevented the Applicant from incurring such expense.
26. However given the relatively simple issues in the case, the Tribunal considered that the sum of £2880.00 was excessive and would therefore make an order that the Respondent pay to the Applicant the sum of £800 in respect of costs.
27. It follows also having regard to the fact that the Applicant has succeeded that he is entitled to the reimbursement of his application fee and hearing fee, the total being £250.

28. Likewise, having regard to all of the circumstances of the case and in particular the conduct of the parties we consider that it is just to make an order under section 20C of the Landlord and Tenant Act 1985 so that none of the Respondent's costs of the tribunal proceedings may be passed on to the lessees through any service charge.
29. Accordingly the Applicant is entitled to the orders which we set out above.

Sylvester Carrott

23 October 2013