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

Case Reference : LON/00AZ/LSC/2013/0274

Property : Flat 11, Eastdown Court, 1-11
Eastdown Park, London, SE13 5HU

Applicant : Eastdown Court Ltd

Representative : Miss Soblecki of Counsel

Respondent : Mrs A Dey

Representative : Mr D Dey

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

Tribunal Members : Judge I Mohabir
Mr Lewicki
Mr Francis

**Date and venue of
Hearing** : 18 July 2013
19 September 2013
10 Alfred Place, London WC1E 7LR

Date of Decision : 5 November 2013

DECISION

Introduction

1. The Respondent is the lessee of the property known as Flat 11 Eastdown Court, 1-11 Eastdown Park, London, SE13 5HU pursuant to a lease dated 12 August 1983 made between (1) Eastdown Properties Ltd (2) Eastdown Court Ltd and (3) Richard Alan Cuthbert ("the lease"). The Applicant is the Management Company in respect of the development in which the property is located.
2. The Applicant commenced proceedings against the Respondent initially in the Northampton County Court to recover service charge arrears of £3,570.37 and administration charges of £238. The proceedings were defended by the Respondent and the case was transferred to the Clerkenwell and Shoreditch County Court. Pursuant to an order made by District Judge Sterlini in that Court dated 8 April 2013, the case was transferred to the Tribunal.
3. On 21 May 2013, the Tribunal issued Directions in this matter. It was identified that the service charges in issue relate solely to the year 1 September 2010 to 31 August 2011. The administration charges claimed relate to the additional costs incurred by the Applicant in having to pursue the Respondent for payment.
4. The Respondent did not contend that she was not contractually liable to pay the service charges in issue. It is, therefore, not necessary to set out the relevant terms of her lease that give rise to her contractual liability to pay the service charge.
5. At the initial hearing on 18 July 2013, the Respondent's husband said that she was only challenging the reasonableness of the balancing charge of £1,589.39 demanded by the Applicant on the basis that the expenditure relating to the cost of various internal works was not reasonable. Unfortunately, that hearing was adjourned with further Directions because the Respondent sought to rely on further disclosure made at the hearing, which had not been served on the Respondent.

6. The supplemental statement of case filed by the Respondent particularised the items of internal works challenged by her and these are set out and dealt with below. Essentially, the Respondent put the Applicant to proof as to the disputed expenditure. The following items of expenditure were agreed by the Respondent on the basis that they related to the cost of external works and were recoverable under the terms of the lease:

01.12.10	£331
21.01.11	£912
08.02.11	£1,062
08.02.11	£357
11.03.11	£642

Relevant Law

7. This is set out in the appendix annexed hereto.

Decision

8. The adjourned hearing took place on 19 September 2013. The Applicant was represented by Miss Soblecki of Counsel. The Respondent was represented by her husband, Mr Dey.
9. Witness evidence as to the disputed service charge expenditure was provided on behalf of the Applicant by Mr Darkwah of Salter Rex who is the managing agent of the development.

Redecoration of Flat 8

10. Redecoration of the kitchen and lounge was carried out on 5 November 2010 at a cost of £1,175.
11. Mr Darkwah's evidence was that Flats 8, 9 and 10 had suffered water damage as a result of a leak from a water tank that straddles all of the flats, which had been replaced in September 2010. The cost of the work was not the subject of a claim under the buildings insurance policy

because it fell below the policy excess of £5,000. Consequently, the cost fell on the service charge account. It seems that the owner of Flat 10 carried out the redecoration of his flat at his own expense.

12. The Tribunal raised the point with Miss Soblecki that the lease did not appear to expressly allow this expenditure to be recovered through the service charge account. Nevertheless, she submitted that the Tribunal should imply this into the lease terms. Understandably, Mr Dey made no submissions on this legal point.

13. The Tribunal did not accept Miss Soblecki's submission as being correct. The Tribunal has no power or discretion to imply any additional terms into a lease. In the absence of any ambiguity, when construction of the lease terms may be required, the parties are bound by the express terms of the lease. In the Tribunal's judgement, there is no ambiguity about the lease terms and it concluded that this expenditure was not recoverable as service charge expenditure for the following reasons.

14. The covenant given by the lessee in clause 3(i) of the lease is to pay a service charge contribution in respect of those costs incurred by the Applicant in the performance of its covenants.

15. Clause 4(ii) only obliges the Applicant to repair and maintain the "reserved property". This is defined in the Second Schedule of the lease as being:

"...the paths and forecourts entrance steps and gardens and dustbin area forming part of the Property and the halls staircases landings passages and other parts of the property which are used in common by the owners or occupiers of any two or more of the flats and SECONDLY ALL THOSE main structural parts of the Property including the roof foundations and external parts thereof...and also all other parts of the Property as are not the responsibility of the lessees of the flats."

16. It is beyond doubt that this expenditure was incurred in relation to areas specifically demised to Flat 8 and they do not fall within the definition of

“reserved property” in the lease. It follows, therefore, that, as a matter of contract, the Respondent (and other lessees) do not have any liability to a service charge contribution for this expenditure. If it was the case that the leak from the water tank was caused by the Respondent’s or freeholder’s breach of covenant by failing to repair and maintain it, then liability for the remedial cost of any damage to individual flats must be borne by either of them or is the subject matter of an insurance claim and does not accrue to the service charge account. In other words, the Respondent or freeholder is not entitled to seek an indemnity from the lessees through the service charge account for what may possibly breach a covenant on their part. Accordingly, the Tribunal concluded that this expenditure is irrecoverable by the Applicant and a corresponding credit should be applied to the Respondent’s service charge account.

Painting of Communal Ceiling to Block 11-15

17. This expenditure was incurred on 1 December 2010 in the sum of £221.75 and the Applicant was put to proof by the Respondent.
18. Mr Darkwah’s evidence was that the ceiling was damaged as a result of a roof leak and the remedial work, including the repair of a loose stair tread, was carried out.
19. The Tribunal accepted the evidence of Mr Darkwah and found that the expenditure had been reasonably incurred and was recoverable as service charge expenditure under the lease. The amount of the expenditure was not challenged by the Respondent and it was, therefore, allowed as claimed.

Repair and Redecoration of Flat 3

20. Mr Darkwah’s evidence was that expenditure of £3,258 was incurred for the repair and redecoration of Flat 3 on 22 July 2011 caused by a leak from Flat 12.

21. For the same reasons set out at paragraphs 13 to 16 above, the Tribunal found this expenditure was not recoverable through the service charge account and a credit should be applied to the Respondent's account.

Emergency Drain Works

22. Mr Darkwah's evidence was that emergency works were carried out from 8 to 9 April 2011 to unblock drains in the building. Apparently, the blockage was found to be in the communal stack and proved difficult to clear, which required specialist equipment using high pressure jetting. Whilst the works were taking place, a third engineer attended to clean and sanitise areas contaminated with waste spillage. Mr Darkwah's evidence was corroborated by an invoice and report from the contractor, ARD Local Ltd, dated 9 May 2011. The total cost of the works was £7,967.30.
23. At the hearing it was conceded by Mr Darkwah that the Applicant was obliged under section 20 of the Act to carry out statutory consultation in relation to these works and no application had been made under section 20ZA for retrospective dispensation. Consequently, unless and until such an application had been made and was granted, the Respondent's (and other lessees') liability for this expenditure was capped at £250 per lessee.
24. Mr Dey submitted that the Respondent had no liability for this expenditure because it was not relevant service charge expenditure. However, the Tribunal was satisfied that these works fell within the ambit of clause 4(ii) of the lease and was recoverable. Based on the report prepared by the contractor, the Tribunal was also satisfied that the expenditure had reasonably been incurred. Mr Dey did not challenge the quantum of the expenditure and it would have been allowed as being reasonable had the Applicant made an application for retrospective dispensation. For the present, the Respondent's liability remains at £250.

Repairs to Flat 2, 3 and 4

25. The following expenditure was variously incurred in relation to the above flats:

09.05.11	£678 to replace the ceiling
19.05.11	£861.20 for a new cupboard
26.05.11	£666 for plaster/paint
26.05.11	£654 for plaster/paint
20.06.11	£1050 to remove laminate flooring
20.06.11	£2,324 for laminate flooring
22.08.11	£2,184 for a plasterboard ceiling

26. Mr Darkwah said that the works arose from the leaks from the drains being backed up from the roof and were carried out by ARD Local Ltd, as it was already on site. He also said that these matters were not the subject matter of an insurance claim because in his view they would be treated as separate claims by the insurance company and the individual cost fell below the policy excess of £5,000. When asked by the Tribunal as to the basis on which he formed this view, he said it was simply his opinion and no approach had been made to the insurance company to clarify whether his view was in fact correct.

27. For the same reasons set out at paragraphs 13 to 16 above, the Tribunal found this expenditure was not recoverable through the service charge account and a credit should be applied to the Respondent's account.

28. Although not strictly relevant, it is perhaps convenient to note here a matter of some concern to the Tribunal. It seems that as part of these costs, the lessee of Flat 4, Mr Adojutelegan, agreed separately with ARD Local Ltd to have additional decorations carried out to his flat whilst the remedial work was done. He negotiated a price of £1000 for the additional work, with the remainder of the expenditure falling on the service charge account.

29. At the hearing, Mr Darkwah, somewhat surprisingly, said that neither he nor Salter Rex had been a party to the negotiations that took place between Mr Adojutelegan and ADR Local Ltd for the additional work to his flat. In the Tribunal's judgement, the potential scope for financial prejudice to the other lessees from the arrangement was obvious. Although there was no evidence that such prejudice had occurred, it should have been part of the managing agent's overall responsibility to ensure that the apportionment of the expenditure was fair and reasonable and Mr Darkwah and/or Salter Rex appear not to have done so.
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Administration Charges

30. These are:
£150 debt collection fee.
£28 disbursement.
£60 administration fee.
31. The Tribunal accepted the submission made by Miss Soblecki that the Applicant had a contractual entitlement under clause 2(xix) of the lease to recover the administration charges claimed. The only issue the Tribunal was then required to consider was were the costs reasonable under Schedule 11 of the Commonhold and Leasehold Reform Act 2002 (see below).
32. As to the debt collection fee of £150, it was clear that the majority of the service charge arrears claimed had been admitted or agreed by the Respondent. The Applicant had, therefore, been entitled to incur this expenditure to pursue the Respondent for payment. However, steps taken amounted to no more than a debt collection agency "taking instructions". The Tribunal considered the overall amount to be unreasonable and allowed the sum of £25.
33. As to the disbursement of £28, this was disallowed completely as it represented the cost of obtaining office copies of the freehold and

leasehold titles. These documents should have been in the possession of the freeholder and/or Applicant and no explanation was given for the need to obtain these documents. Accordingly, the Tribunal found this expenditure was not reasonably incurred.

34. The Tribunal also disallowed the administration fee of £60 because no explanation was given by the Applicant why this expenditure had been incurred and it was found to be unreasonable.

Section 20C & Fees

35. The Tribunal made an order that the Applicant should only be entitled to recover one half of the overall costs it had incurred in these proceedings. It did so because it fairly and reasonably represented the outcome of this case. The majority of the service charge arrears claimed had eventually been agreed or admitted by the Respondent and the Applicant had been entitled to pursue payment. However, the Respondent had largely succeeded on the remaining challenges made by her and this ought to be properly reflected in the award of costs by a deduction of one half.
36. For the same reasons set out above, the Tribunal ordered that the Respondent should reimburse the Applicant one half of the total fee it had paid to the Tribunal to have this application heard.

Judge I Mohabir
5 November 2013

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

- (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
 - (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
 - (b) the whole or part of which varies or may vary according to the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose -
 - (a) "costs" includes overheads, and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
 - (a) only to the extent that they are reasonably incurred, and
 - (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

- (1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -
 - (a) the person by whom it is payable,
 - (b) the person to whom it is payable,
 - (c) the amount which is payable,
 - (d) the date at or by which it is payable, and

- (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
 - (a) the person by whom it would be payable,
 - (b) the person to whom it would be payable,
 - (c) the amount which would be payable,
 - (d) the date at or by which it would be payable, and
 - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
 - (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

- (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
 - (a) complied with in relation to the works or agreement, or
 - (b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.
- (2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.
- (3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
- (4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

- (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
 - (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.
- (5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
- (a) an amount prescribed by, or determined in accordance with, the regulations, and
 - (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.
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- (6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.
- (7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20C

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration 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 any other person or persons specified in the application.
- (2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
 - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
 - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold & Leasehold Reform Act 2002

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

- (1) An application may be made to a leasehold valuation tribunal for a determination whether an administration charge is payable and, if it is, as to—
- (a) the person by whom it is payable,
 - (b) the person to whom it is payable,
 - (c) the amount which is payable,
 - (d) the date at or by which it is payable, and
 - (e) the manner in which it is payable.
- (2) Sub-paragraph (1) applies whether or not any payment has been made.
- (3) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
- (4) No application under sub-paragraph (1) may be made in respect of a matter which—
- (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
- (a) in a particular manner, or
 - (b) on particular evidence,
- of any question which may be the subject matter of an application under sub-paragraph (1).