9525

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	LON/00BB/LSC/2013/0488
Property	:	54 Hooper Road, Custom House, London, E16 3QW
Applicant	:	London Borough of Newham
Representative	:	Wilkin Chapman, Solicitors
Appearances for Applicant:		(1) Mr Chris Green, solicitor agent (2) Ms Donna Morelli, Head of Leasehold Services (3) Ms Lorraine Parkins, Service Charge Team Leader
Respondent	:	Mrs Dewan Syeda Ismat Reza Gofur
Representative	:	None
Appearances for Respondent:	:	None
Type of Application	:	For the determination of the reasonableness of and the liability to pay a service charge
Tribunal Members	:	(1) Mr A. Vance, LLB (Tribunal Judge) (2) Ms S. Coughlin, MCIEH (3) Mrs L. West, MBA
Date and venue of Hearing	:	04.11.13 10 Alfred Place, London WC1E 7LR
Date of Decision	:	04.11.13

DECISION

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Decision of the Tribunal

1. Neither the sum of £948.52 demanded by the Applicant in respect of major works nor the £350 legal costs claimed by the Applicant have been reasonably incurred. The amount payable is limited to nil.

The application

2. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of service charges and (where applicable) administration charges payable by the Applicant for the service charge year 2008/09 in respect of 54 Hooper Road, Custom House, London, E16 3QW ("the Property").

3. Proceedings were originally issued in the Northampton County Court under claim no. 2YN02191. The claim was transferred to the Bow County Court and then in turn transferred to this tribunal, by order of District Judge Vokes on 02.07.13. The order of 02.07.13 specifies that the reason for the transfer is for the tribunal to determine the reasonableness of the service charges claimed.

4. The relevant legal provisions are set out in the Appendix to this decision.

5. Numbers appearing in square brackets below refer to pages in the Applicant's hearing bundle.

The background

6. The Respondent is the leasehold owner of the Property, an upper-floor, two-bedroom maisonette in a four-story block ("the Block") located on an estate comprising six blocks in total ("the Estate"). The Applicant has the benefit of the freehold reversion of the Property.

7. There was considerable discussion relating the extent of the Estate in this case and it was submitted by the Applicant that it comprised a total of six adjacent blocks

8. The lease for the Property is dated 11.06.04 and was originally granted by the Applicant to Maria Spurden for a term of 120 years from 11.06.01. The unexpired term of the lease is now vested in the Respondent. The pertinent provisions can be summarised as follows:

    8.1. The Respondent covenants to pay by way of a service charge a proportion of the expenses and outgoings incurred by the Applicant in the repair maintenance, renewal and insurance of the Estate and the provision of services and of improvements to the Estate (insofar as the expenses and outgoings incurred in respect of such improvements are

reasonable) as well as additional heads of expenditure set out in the Third Schedule to the lease.

8.2. The method of apportionment of the service charge is based on the rateable value of the Property compared to the other flats in the Block (in respect of the Block costs) and compared to other flats in the Estate (in respect of the communal Estate Costs). The method of apportionment was not challenged by the Applicant.

8.3. The service charge year as set out in the lease is the period commencing 1st day of April in each year and ending on the 31st day of March in the following year.

8.4. The Respondent also covenants to pay *"all expenses including solicitor's costs and surveyor's fees incurred by the Applicant incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court"*.

9. A pre-trial review took place on 01.08.13 which the Applicant attended. The Respondent did not attend and was not represented. Directions were issued the same day. The tribunal identified the issues requiring determination to be the Respondent's liability to pay and/or the reasonableness of the following costs:

 9.1. The sum of £948.52 demanded by the Applicant in respect of major works.

 9.2. £350 legal costs claimed contractually by the Applicant as costs incurred in pursuing the Respondent for service charge arrears.

10. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

The hearing

11. The Applicant was represented at the hearing by Mr C. Green, solicitor agent for Wilkin Chapman, Solicitors. The Respondent did not appear and was not represented. No statement of case or witness statement was provided by the Respondent and the only document before the tribunal setting out her case was a Defence filed within the county court proceedings **[24]**. In the Defence the Respondent raises the following relevant issues:

 11.1. What are the costs being sought?

 11.2. When does the Applicant believe the costs became due?

 11.3. When does the Applicant maintain that she was notified of the sums sought?

12. She also asserts that she did not receive a statement of rights and obligations from the Applicant as required by Section 153 of the Commonhold and Leasehold Reform Act 2002 ("CLARA") nor a breakdown of the major works.

13. Immediately prior to the hearing and during the course of the hearing the Applicant handed in further documents. The tribunal took time to consider these new documents and considered it equitable to allow the Applicant to rely on the documents despite their late submission. The documents were added to the bundle and comprised copies of the following:

    13.1. Service charge account printout **[88]**.

    13.2. Letter dated 31.10.13 from Zoe Buckley, Customer and Service Charge Recovery Manager to Respondent enclosing major works statement of account **[89-94]**.

    13.3. Major works demand dated 11.08.10 addressed to Respondent **[95]**.

    13.4. Letter dated 07.09.12 from Wilkin Chapman LLP to Respondent enclosing summary of tenants' rights and obligations **[96-99]**.

    13.5. Letter dated 18.09.13 from Respondent to Applicant querying the major works account **[100]**.

    13.6. Letters from Wilkin Chapman LLP to Respondent dated 07.08.13 **[101]**, 24.09.13 **[102]**, 27.09.13 **[103]**, 27.09.13 **[104]** and an email dated 13.04.05 from John Whyman referring to repairs needed on the Estate **[105]**.

14. At the start of the hearing the tribunal expressed concern that the documents included by the Applicant in the hearing bundle were of limited assistance in addressing key issues relating to the major works expenditure incurred by the Applicant. For example there was no clear explanation as to the actual costs of the works incurred by the Applicant's contractors. Moreover, neither of the authority's representatives present at the hearing, Ms Morelli and Ms Parkins, were able to provide witness evidence concerning the need for these works, the extent of the works carried out and why the authority considered the costs to have been reasonably incurred.

15. We adjourned to allow the Applicant to seek to collate information regarding the extent of the works carried out, their cost and how those costs had been apportioned to the Applicant. When we resumed, Mr Green requested that the hearing be adjourned. He stated that the authority was not in a position to proceed with the hearing. He indicated that there were only two persons at the Applicant authority who could address queries relating to the major works expenditure. One was a quantity surveyor and the other was Head of Assets. Both were on holiday. Mr Green requested that if the Tribunal was not minded to grant an adjournment that the Applicant be granted permission to submit further written submissions together with a witness statement.

16. The tribunal refused the request to adjourn and the request to be allowed to submit further submissions for the following reasons:

    16.1. Whilst it was correct that the Respondent had played no active part in these proceedings and had failed to attend both the pre-trial review and the hearing, this was the authority's application and it was incumbent on it to properly prepare its case.

    16.2. The issues that the Applicant needed to address were clearly identified by the tribunal at the pre-trial review more than three months earlier. They

included the Respondent's liability to pay towards the costs of the major works and the reasonableness of those costs. It had sufficient time to obtain the necessary witness evidence or to seek additional time from the tribunal to comply with its directions.

16.3. Having regard to the overriding objective as set out in Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 it was considered inappropriate to adjourn or to allow further submissions given the relatively low amount in dispute, the need to seek to deal with cases proportionately, and to avoid delay. The Respondent was entitled to a speedy resolution of this application regardless of her lack of participation in the process and the costs to the tribunal in adjourning and reconvening would be significant and disproportionate to the amount in dispute.

17. Having heard evidence and submissions from the Applicant and considered all of the documents provided, the tribunal has made determinations on the various issues as set out below.

The Applicant's case

18. The Applicant's statement of case **[44]** is signed by a trainee legal executive in Wilkin Chapman LLP, the Applicant's solicitors. At paragraph 5 of the statement it is averred that the major works in issue *"were reasonable as the property had fallen into disrepair. The Applicant considers that repairs and maintenance were necessary for the benefit of the Leaseholders and residents."* It is asserted that the statutory consultation procedures were complied with and that all service charge demands were accompanied by a booklet that contains a summary of rights and obligations. No additional information is provided concerning the major works and no witness evidence was relied upon by the Applicant in these proceedings.

19. It is asserted that an undated Section 20 consultation notice was sent to the Respondent in September 2005 notifying her that the Applicant intended to enter into an agreement to carry out qualifying works and inviting observations by 23.10.05 **[47]**. The description of the works identified in that notice were internal communal decorations, external decorations and associated repairs required in order to maintain properties in a good condition. The reason for the works is stated to be *"to maintain the properties in a good condition"*.

20. The initial notice was then followed by another undated notice **[49]** stating that two contractors had been shortlisted, Topcoat Construction and Barry Stewart & Son. Observations regarding the estimates attached to the notice were invited by 02.02.06. The notice also records that no written observations were made at the initial notice of intent stage.

21. The statement of estimates attached to the second notice specified Topcoat's estimate as being £165,089.59 (£152,860.73 cost of works plus £12,228.86 professional fees) with what was described as being an estimated cost to the Estate totalling £8,857.55. The Respondent's estimated contribution was assessed as £738.15.

22. Barry Stewart & Sons estimated total cost of works was £166,289.76 with an estimated cost to the Estate totalling £8,211.30. The Respondent's estimated contribution was £684.28.

23. Given the sums specified in this statement for total cost of works it appeared to the tribunal that the figures described as being estimated costs "to the Estate" must, in fact, refer to costs for the block (although probably for a block of 12 flats rather than a block of 6 flats).

24. What was unusual about the statement of invoices was that the lower estimate of Topcoat involved a higher contribution by the Respondent. Mr Green could not explain why this was the case. The applicant appointed Top Coat to carry out the works, this being the lowest estimate for the contract although not the lowest estimate for the Respondent.

25. We were informed that works started on-site on 06.02.06. However, neither Mr Green nor the witnesses present at the hearing could confirm when they were completed or what they comprised. The only specification of works included in the bundle **[68]** appears to relate to all six blocks in the Estate with each block comprising six flats. This specification refers to internal re-decoration and external repair and re-decorating to the blocks. However, neither Mr Green or the witnesses present could assist with identifying which of these works listed were relevant to the individual block in which the Property is situated.

26. The cost of works identified in the specification totals £19,700 **[69]**. That figure forms part of a total sum of £30,402.15 referred to in the spreadsheet at **[70]** which includes further costs in relation to preliminaries for the six blocks totalling £10,476.50 and a performance bond of £225. At **[71]** the sum of £152,860.73 (as per the Topcoat estimate) is stated to be the contract sum.

27. The documents at **[71-73]** show various adjustments to remove the cost of provisional items and to include actual costs incurred.

28. When asked by the tribunal Mr Green stated that his instructions were that the final contract price was £162,433.10 adjusted to £160,995.36 and that the latter was the sum charged to the Applicant. However, these figures do not accord with the figures mentioned in the documents in the bundle and Mr Green could not explain why the difference between these two figures was not passed on to the tenants. Nor was he in a position to explain how the final contract price was calculated or how these costs were apportioned to the Respondent.

29. It appears from the breakdown of major works invoice **[46]** that the actual Block costs incurred were £30,310.90 and £2,424.87 professional fees totalling £37,735.77. However, Mr Green could not explain how that sum was arrived at when compared with the sums for the contract of £160,995.36, although we noted that the spreadsheet on page **[66]** referred to works being carried out across 4 similar sites.

30. The sum stated in that breakdown as being the total works cost to the Property is £2,727.98 **[46]**. This is stated to be based on the rateable value calculation set out in the lease. However, the sum stated as being payable by the tenant is £948.52. Mr. Green could not explain how that sum was arrived at. Nor could he explain why that sum had increased from the estimated contribution of £738.15 stated in Topcoats estimate **[51]**. Nor is there anything in the documents that assists in understanding these discrepancies.

31. No demand for the legal costs sought in the sum of £350 was drawn to our attention. The Applicant asserts that these were incurred in pursuing the Respondent for service charge arrears and that they comprised a charge of £150 for sending a letter before action to the Respondent **[96]** and £200 costs incurred in drafting and issuing the county court claim form. Mr Green submitted that these were recoverable from the Respondent under the terms of her lease because they were *"incurred by the Applicant incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 ..."*

The Respondent's case

32. The Respondent made no specific challenge as to whether or not the sums in issue were *payable* under the terms of her lease. Her challenge, as identified in her Defence to the county court proceedings, appeared to rest on whether or not the sums demanded had been reasonably incurred.

Decision and reasons

33. The Tribunal has been asked by the county court to determine the reasonableness of the service charges claimed.

34. In our determination there is insufficient evidence to satisfy us that the sums demanded from the Respondent in respect of major works were reasonably incurred. We determine that the whole of the sum of £948.52 demanded by the Applicant in respect of major works has not been reasonably incurred. This is for the following reasons:

    34.1. There is no adequate evidence of the need for major works to the Block or Estate whether by way of a survey report or witness evidence.

    34.2. There was no satisfactory explanation provided as to what works were carried out to the Block and to the Estate. It is not possible to discern what works were carried out to the Block from the specification of works at **[68]** and the uncertainty with which Mr Green presented the Applicant's case (no doubt because of lack of instructions) leaves us in considerable doubt that all of the works carried out to the Estate are included in that specification.

    34.3. There was no explanation available as to the differences between the estimated costs referred to in the Topcoat estimate and the final cost of works for both the Estate and the Block.

    34.4. The contract clearly involved more widespread works than those carried out on the Estate as defined to us by the Applicant and there was no adequate explanation provided of how these works had been assigned to the Estate and to the Block.

    34.5. There was no adequate explanation as to how the sum demanded from the Respondent was calculated.

35. We make the determination that the whole of the sum of £948.52 is not reasonably incurred with some reluctance. The evidence indicates that some

works were carried out and we note that the Respondent is not asserting otherwise. Nor does she challenge the standard of any works carried out. However, the very unsatisfactory manner in which the Applicant's case was presented to the tribunal renders us unable to identify whether *any* of the costs sought were reasonably incurred.

36. There is no documentary evidence that a summary of rights and obligations accompanied the service charge demand dated 11.10.10 **[95]**. No covering letter has been provided. We note the assertion in the Applicant's statement of case that the Applicant states that service charge demands are accompanied by a booklet. However, there is no documentary evidence that this took place and no direct witness evidence of this.

37. A summary of rights and obligations is attached to the letter of 07.09.12 from the Applicant's solicitors to the Respondent **[97]**. This was handed up to the tribunal on the day of the hearing and would appear to have been received by the Respondent as her letter of 18.09.13 **[100]** refers to a letter from the Applicant's solicitors.

38. We do not know if the Respondent accepts that a summary of rights and obligations was received with the letter of 07.9.13 and if, if so, what impact she believes this has on her assertion in her Defence that the Applicant failed to comply with the statutory requirements concerning such summaries. Given the decision of the tribunal set out in paragraph 34 above and in light of the lack of direct evidence on this point from either party we do not consider it necessary or appropriate to determine whether or not there has been a breach of those requirements.

39. The legal costs of £350 that the Applicant asserts were incurred in pursuing the Respondent for service charge arrears amounts to a variable administration charge for the purposes of Schedule 11, paragraph 1 of CLARA. They either fall within paragraph 1(1)(c) as they relate to the Respondent's failure to pay service charges by the due date to the Applicant or they fall within paragraph 1(1)(d) as being payable in connection with a breach of a covenant or condition in her lease.

40. We are not satisfied that the costs were *"incurred by the Applicant incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 ..."* Mr Green confirmed that no s.146 notice had been served on the Respondent and there appears to be no document in the hearing bundle threatening service of such a notice. Mr Green did not draw our attention to any such document.

41. The evidence indicates that the only legal action contemplated by the Applicant was the recovery of the service charge sought as a debt. In our determination there is no evidence that the costs in question were incurred for the purposes of service of a section 146 notice or that they were incidental to the preparation and service of such a notice. As such they do not fall within the terms of the lease and are irrecoverable.

The next steps

42. This matter should now be returned to the Bow County Court.

Name: Amran Vance, LLB **Date:** 06.12.13

Annex - Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18 - Meaning of "service charge" and "relevant costs"

(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 – Limitation of service charges: reasonableness

(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 – Liability to pay service charges: jurisdiction

(1) An application may be made to the appropriate 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 the appropriate 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.

[......]

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—

(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
   (a) specified in his lease, nor
   (b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

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).