12776

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AZ/LSC/2017/0425**
Property	:	**Flat 2, Shirley Lodge, Sydenham, London, SE26 5HQ**
Applicants	:	**(1) Ms Q Bramothe** **(2) Mr E Tomburi**
Representative	:	**In person**
Respondent	:	**London Borough of Lewisham**
Representative	:	**Mr Robson from Clarke Willmott LLP, Solicitors**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay service charges**
Tribunal Members	:	**Judge I Mohabir** **Mr K Ridgeway** **Ms J Dalal**
Date and venue of Hearing	:	**5 March 2018** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**8 May 2018**

DECISION

Introduction

1. This is an application made by the Applicants under section 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") for a determination of their liability to pay and/or the reasonableness of various service charges.

2. The Tribunal was told that the parties settled the dispute regarding the service charge costs claimed by the Respondent for the years 2014/15, 2015/16, 2016/17 and the estimated costs for the year 2017/18.

3. The only service charge costs that remained in dispute was for major works in the sum of £8,197.74 demanded by the Respondent on 8 August 2017. However, the Respondent limits its claim to the lesser sum of £7,436.46.

4. The Applicants are the joint leaseholders of Flat 2, Shirley Lodge, Sydenham, London, SE26 5HQ having exercised their Right to Buy as tenants of the property. Their tenancy commenced on 19 March 2007 and the lease granted by the Respondent is dated 19 August 2013.

5. The major works were carried out to common parts of the building and included works such as concrete repairs, brick re-facing, repairs to soffits, fascia's, guttering, downpipes and communal windows. They commenced in 2014 and were completed approximately in April 2015.

6. It was common ground that the Respondent served both a Notice of Intention and Notice of Proposal on the existing leaseholders on 9 December 2009 and 8 October 2010 respectively, prior to the grant of the lease to the Applicants. On 2 July 2014, the Respondent served the Applicants with a Notice of Estimate stating that the major works would be carried out by the nominated contractor, Breyer, and also informed them that their estimated service charge contribution would be £14,825.93.

7. On 6 July 2014, the First Applicant wrote to the Respondent complaining that she should have been consulted under section 20 of the Act in relation to the proposed works and about the reasonableness of the cost of various items of work. On 6 November 2017, the Applicants made this application to the Tribunal.

8. At the hearing the Applicants confirmed that the challenges they were making in relation to the cost of the major works were:

On Liability

(a) that the Respondent had not validly consulted them under section 20 of the Act;

(b) that the cost of the major works were not in accordance with the section 125A(3)b Housing Act 1985 notice dated 2 April 2013 ("the section 125 notice");

(c) that their lease did not oblige the Respondent to repair and maintain the windows or require them to pay a service charge contribution for the cost of installing other windows in the block.

On Reasonableness

(d) that the overall cost of the major works was excessive and that the cost had increased because of historic neglect on the part of the Respondent.

These issues are considered in turn below.

Relevant Law

9. This is set out in the Appendix to this decision.

Decision

10. The hearing in this matter took place on 5 March 2018. The Applicants appeared in person. The Respondent was represented by Mr Robson, a Solicitor from the firm of Clarke Willmott LLP.

Section 20 Consultation

11. The Applicants confirmed that their challenge regarding the Respondent's failure to validly consult in relation to the major works was withdrawn.

Section 125 Notice

12. The relevant section 125 notice served on the Applicants prior to the grant of the lease is dated 2 April 2013. In addition to the purchase price, it gave an estimate of the annual service charge contribution they would have to pay together with estimates for anticipated repairs and improvements to the block broadly within the first 5 years of the lease.

13. The Applicants made two points. Firstly, they contended that the major works started within the first year of the lease and not during the first 5 years as set out in the section 125 notice. Secondly, that the estimated costs were for the entire block and not just her contribution.

14. The Tribunal was satisfied that the express wording in the section 125 notice was clear. It placed no limitation on the Respondent commencing the major works when it did and that the leaseholder's individual contribution was clearly apportioned and stated in the notice. Therefore, the notice did not restrict or cap the service charge contribution the Respondent could recover from the Applicant's under the lease or otherwise.

Liability for the cost of the Windows

15. It seems that the Applicants applied for and were granted consent to replace the windows in the flat in 2013. As part of the major works, the windows in 6 of the 8 flats were replaced, excluding those of the Applicants' flat. They conceded that in the e-mail dated 18 October 2013 they received from a Sadiq Makanjuola, a Leasehold Consultation Admin Assistant, on behalf of the Respondent they were put on notice that they would still be required to contribute towards the cost of renewing other windows in the block.

16. Paragraph 5 in Part 1 of the Tenth Schedule to the lease sets out the mechanism by which the Applicants service charge liability is calculated. This is:

> *"A x 1/B where A is the expenditure incurred and B is the number of Flats/Maisonettes and other dwellings receiving the benefit of the expenditure..."*

17. The Applicants, firstly, submitted that the *"glass of the windows"* formed part of the demised premises as defined in the Fourth Schedule to the lease. Therefore, it did not form part of the Respondent's repairing obligation under the lease. As such, the cost of replacing the windows was not recoverable by the Respondent as service charge expenditure under the lease.

18. The ambiguity in the lease is created by reference to "glass of the windows" in the definition of the demised premises, which is repeated again in paragraph 4 of the Seventh Schedule regarding the lessee's repairing obligation and expressly excluded in paragraph 1.1 of the Ninth Schedule from the landlord's repairing obligation.

19. It has generally been held that the "exterior" of a building includes all external parts of that building including the windows and the window frames[1]. It follows that the windows and the glass within fall within the lessor's external repairing obligation in paragraph 1.1 of the Ninth Schedule of the lease and the cost of doing so is contractually recoverable from the Applicants as relevant service charge expenditure.

20. The second submission made by the Applicants is that recoverability by the Respondent for the cost of replacing the windows was contingent upon them "receiving a benefit". As they had not done so, nothing was recoverable in this regard.

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[1] see Hill & Redmond at 3250-3260

21. The Tribunal did not accept this submission as being correct. The proper construction of paragraph 5 in the Tenth Schedule to the lease is that the reference to "receiving the benefit" is in relation to one or more of the various heads of expenditure set out in paragraph generally. The replacement of the windows formed part of the overall cost of repairs and maintenance carried out under paragraph 5.11 of the Schedule. Therefore, the cost of doing is recoverable as relevant service charge expenditure by the Respondent.

Reasonableness of Costs

22. As to the overall cost of the major works, the Applicants relied on the expert report prepared by Mr Mazalla-Tomlinson following an inspection he carried out on 20 December 2017. He found that the scope and quality of the purported repairs was insufficient and the some repairs including brickwork repointing, leadwork, roofing works, pathways, external decorations, timber and cleaning of brickwork were incomplete. He concluded that the value of the works completed to the property with the exception of the windows was nil. Had the works been carried out to satisfactory standard, he estimated the reasonable overall cost would have been £29,305 instead of the £58,652.16 that was incurred. Therefore, the Applicants submitted that the cost of the major works was not reasonable and had increased as a result of historic neglect on the part of the Respondent.

23. On behalf of the Respondent, the Tribunal heard oral witness evidence from Mr Andrew Little, who is a Chartered Surveyor and Partner in the firm of Baily Garner that was appointed to manage the major works project.

24. In cross-examination, he did not accept that any of the items within the scope of major works had not been carried out to a satisfactory standard. He denied that the condition of the property requiring major works to be carried out was as a result of historic neglect. For example,

the roof as a whole was approximately 45 years old and was at an end of its useful life.

25. When asked to comment on the findings and photographic evidence contained in the report of Mr Mazalla-Tomlinson, Mr Little confirmed that the pathways and roof insulation costs were not part of the scope of the works. He appeared to express some surprise at some of the defects identified in the report and had "spoken to the internal surveying team" about these matters. Mr Little said that he did not know the basis Mr Mazalla-Tomlinson had used for arriving at his estimated cost of the works, but confirmed that there had been no overcharging.

26. Even allowing for the 3 years that had elapsed since practical completion of the major works, the Tribunal was surprised at the extent of the deterioration that had occurred to some items of work. For example, this included the decaying timber to the store door of the block. However, the issue for the Tribunal to determine was whether the estimated cost of the major works was reasonable as at April 2015 not now.

27. The evidence contained in the report of Mr Mazalla-Tomlinson did not assist in this regard because his findings were made in December 2017. In addition, he did not attend the hearing to have his evidence tested in cross-examination, especially in relation to his estimated cost of the works. It was also clear that his report commented on various matters that did not form part of the original scope of works. Taken at its highest, his evidence would appear to cast doubt that certain items of work had not been carried out to a satisfactory standard.

28. In the Tribunal's judgement, this was not sufficient for it to safely find that this was the case in April 2015 and/or that the cost of the works was excessive. The Applicant conceded that there was no evidence to support their assertion of historic neglect nor did Mr Mazalla-Tomlinson comment on this matter in his report. The only

contemporaneous evidence as to the standard and cost of the works was from Mr Little and the Tribunal accepted it, albeit with some doubt.

29. Accordingly, the Tribunal found that the Applicants are liable under the terms of their lease to pay the service charge contribution of £7,436.46 for the estimated cost of the major works and that this sum is reasonable.

Costs & Fees

30. The Respondent confirmed that it was not seeking to recover its costs incurred in these proceedings through the service charge account or otherwise. Therefore, it was not necessary for the Tribunal to make an order in relation to the Applicants' application under section 20C of the Act.

31. The Tribunal does not make an order requiring the Respondent to reimburse the fees of £300 paid by the Applicants to have this application issued and heard because they have not succeeded on any of the remaining issues. In the circumstances, it would be inequitable and unjust to make an order requiring the Respondent to do so.

Judge I Mohabir
8 May 2018

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.

(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.

Leasehold Valuation Tribunals (Fees)(England) Regulations 2003

Regulation 9

(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).