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

Case Reference : MAN/00CH/LSC/2017/0090
MAN/00CH/LLC/2017/0002

Properties : 11, 12, 25 St. Mary's Green Whickham Newcastle
upon Tyne NE16 4DN

Applicants : (1) Paul Attley
(2) Stephen Carr
(3) Mohammed Choudhury

Respondent : Gateshead Metropolitan Borough Council

Type of Application : Landlord & Tenant Act 1985 – Sections 20 and
27A & Section 20(C)

Tribunal Members : Judge W.L. Brown
Mr I D Jefferson TD BA Bsc FRICS

Date of Decision : 12 June 2018

DECISION

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Order

- (1) The service charge costs for the major works to renew communal balcony flooring in service charge year 31 March 2014 are not reasonably incurred.
- (2) Order made under Section 20(C) of the Act
- (3) Respondent to reimburse to the Applicants the fees they have paid to the Tribunal in these proceedings.

Background

1. The Properties are in a block comprising 5 ground floor retail units with 6 one bedroom bedsits and 3 three bedroom maisonettes above. The residential units are hereafter described as the Apartments, for ease of reference.
2. By Applications dated 2 November 2017 (the "Application") the Applicants made application to the Tribunal to determine the payability and reasonableness of service charges in respect of the major works invoice for the period 1 April 2013 to 31 March 2014 in the total sum of 11,263.50 (Block Cost) £1251.50 (Unit Cost) to renew communal balcony walkway flooring outside of the Apartments (the "Works").
3. The Applicants are the long leaseholders of, respectively, Apartments 25 (Mr Attley), 12 (Mr Carr) and 11 (Mr Choudhury). On 4 April 2018, a rainy day, the Tribunal inspected the exterior of the Properties and the communal walkways and staircase to the first floor Apartments. In addition the Tribunal was shown inside three of the retail units, being the Newsagent's, Hairdresser's and Barnardo's charity shop. Present at the inspection were Mr Carr and Mr Choudhury and from the Respondent Ms J Brown (Solicitor), with from Gateshead Housing Company: Ms J Adams (Leasehold Manager), Mr A Mason (Senior Contract Administrator for home repairs) and Mr J Dawson (Principal Building Officer).
4. The Tribunal was informed that the management function of the Respondent local authority for the Properties has since 2004 been delegated by it to Gateshead Housing Company ("GHC") which is controlled by the Respondent but which operates as the Respondent's arms-length property management organisation.
5. Initial directions were made by the Tribunal on 4 January 2018.
6. The hearing of this matter took place on 4 April 2018 at SSCS Manorview House Kings Manor Newcastle-upon-Tyne NE1 6PA. The Applicants Mr Carr and Mr Choudhury appeared in person, with Mr Carr as agreed main speaker for all Applicants. Also present was Mrs Carr. For the Respondent, Ms J Brown, in-house Solicitor of the Respondent, appeared and witnesses for the Respondent were from GHC - Ms J Adams and Mr A Mason.

The Lease

- 7. The parties referred the Tribunal to the leases for the Properties. The Tribunal was informed that the leases of Apartments 12 and 25 were largely in similar form. The lease records an obligation upon the Respondent at Paragraph 6 which states:

“The Council hereby covenants with the Lessee as follows:

.....

(2) To keep in repair the structure and exterior of the Building including but without prejudice to the generality of the foregoing

(a) the foundations roof chimney stacks external and internal walls (but not the interior faces and plaster of the external and internal walls in the Flat) timbers (including the timbers joists and beams of the floors and ceilings) drains gutters and external pipes.”

The like provision in the lease for Apartment 11 appears in Schedule V clause 2.1.

- 8. The Applicants’ liability to pay service charge is set out in their respective leases In relation to Mr Attley and Mr Carr the relevant covenant is at paragraph 4(A) (iii) of their leases:

“To pay the Council on demand whether in advance or otherwise such amount as represents a reasonable part of the Council’s expenditure incurred or to be incurred upon the carrying out of major works of repair renovation or improvement to the flat the Building and the fixtures fittings and installations therein PROVIDED that the Lessee shall not be required to contribute to the cost of making good or insuring against the risk of any structural defect unless:

(a) The Council has notified the lessee of the existence of such defect before the granting of this Lease or

(b) The Council first became aware of it more than ten years after the granting of this lease.”

Schedule VII defines the Service Charge as a proportion of the costs incurred by the Landlord in providing the services including at paragraph 1.22:

“Carrying out major works of repair (including remedying a structural defect) or renovating or improving the Demised Premises or the Building or any fixtures and fittings and installations in them”

In relation to Mr Choudhury the relevant covenant is at Schedule III paragraph 1:

“To pay the landlord without deductions:

.....

1.2 by way of further and additional rent the Service Charge in accordance with the provisions of Schedule VII of the lease”

Schedule VII of the lease provides:

“Total costs incurred by the Landlord in providing the Services in the current financial year ÷ The total number of flats (or maisonettes) in the Building”

The Law

9. Section 19 of the 1985 Act states

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 provision of services or the carrying out of works, only for the services or works or are of a reasonable standard: and the amount payable should be limited accordingly.*

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than as reasonable as so payable, and after the relevant costs have been incurred any necessary adjustments shall be made by repayment, reduction or subsequent charges or otherwise.

10. Section 20 of the Act states:

Limitation of service charges: consultation requirements

(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 First-tier tribunal.

The relevant contribution is limited to £250.00.

The Section 20 consultation process generally has three stages:

A notice of intention

Notification of estimates

Notification of award of contract

11. Section 27A of the Act states

Liability to pay service charges: jurisdiction

(1) An application may be made to the appropriate tribunal for a determination whether 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 service, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the cost and, if it would,*
- 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.*

The Issues

12. Regarding the cost of the Works, whether, firstly, there had been compliance with the consultation requirements of Section 20 of the Act and secondly, whether the cost for the Works was payable in whole or in part by the Applicants, comprising £11,263.50 (Block Cost), £1251.50 (Unit Cost). The first issue became apparent from the bundle.

The Evidence and Submissions

13. The Applicants disputed the need for the Works and claimed that the Works have created much greater pooling of surface water. They stated that the Works were unnecessary and had caused a problem with the walkway surface. The replacement surface is trapping dirt and algae due to its texture. It is very dangerous in winter when black ice forms. It is already beginning to split and crack along its joints. Reduced drainage openings are unable to cope with very heavy rain fall and properties are at greater risk of flooding. GHC has been aware of the claims and concerns since October 2012. Under the Consumer Rights Act 2015 leasehold tenants deem the workmanship very poor and the finished pathway 'Not fit for purpose'.
14. The factual information of the sequence of events that follows (paragraphs 15 – 23, inclusive) was not disputed by the Applicants.
15. Janice Adams, Leasehold Manager of GHC since 1 October 2005, explained in her written statement steps taken regarding consultation for the Works, as follows.
16. A Notice of Intention to enter into a Qualifying Long Term Agreement in relation to the delivery of repairs and maintenance across the Respondent's housing stock was issued to leaseholders on 27 June 2011 inviting observations in respect of the Respondent's intention to enter into the agreement by no later than 26 July 2011. No observations were received.

17. Mr Attley and Mr Choudhury were included in that process. Although Mr Carr was registered at Land Registry as the proprietor of the leasehold interest in 12 St Mary's Green arising from an assignment of the lease from Mr and Mrs Richardson on 9 November 2001, the Respondent was not advised of this change in ownership until 26 April 2013, when Mr Carr advised he had taken ownership following the death of his father-in-law, the late Mr Richardson. Therefore notices had been issued to the former registered proprietors, Mr and Mrs Richardson.
18. Following advertisement of the invitation to tender in the Official Journal of the European Union a contractor selection panel was set up to interview the contractors invited to tender for the work. Subsequently on 14 December 2011 Notice of Proposal to enter into a Qualifying Long Term Agreement was issued to leaseholders, who were invited to make observations in respect of the Respondent's proposal to enter into the agreement by no later than 13 January 2012. No observations were received.
19. On 1 April 2012, following its successful completion of the tender process, GHC entered into partnership with Mears as its chosen contractor for repairs and maintenance across the Respondent's housing stock. The contract period was for 5 years extendable for a further 1 year subject to satisfactory performance.
20. Following complaints of water ingress from the occupiers of the commercial ground floor units, on 14 August 2012, David Grogan, surveyor of GHC advised that the walkway affecting the 9 apartments at St Mary's Green was in poor condition and allowing water ingress into a number of commercial units below. His advice was that the existing covering of ceramic tiling was at the end of its life and a successful and robust repair was almost impossible. It was felt the most expedient decision would be to replace the walkway.
21. On the 16 August 2012, a Notice of Intention to carry out qualifying works was issued in respect of renewal of the floor covering on the walkway, with thermal insulation below and flashing to the communal pathway. The notices were issued under the qualifying long term agreement, with Mears. The covering letter states: "The current surface of the pathway creates pooling areas and is slippery when wet. In order to rectify this David has consulted a number of roof covering manufactures and has agreed that the current tiled surface should be replaced with a textured non-slip surface". The cost of the works was estimated at £11,263.50 for the block, equivalent to £1,251.50 per unit. All leaseholders were invited to make observations in respect of the Respondent's intention to carry out qualifying works by no later than 14 September 2012. No observations were received.
22. On 3 October 2012 Mr Carr emailed the Respondent in relation to the Notice of Intention to carry out qualifying works, requesting a site visit to discuss his concerns. He explained his delay in responding due to him not being at his apartment at the relevant time. A meeting was arranged at St Mary's Green on 5 October 2012. David Grogan, Surveyor (GHC), Debbie Armin, Tenant Liaison Assistant (GHC) and John Dawson, Senior Buildings Officer for the Respondent attended the site and discussions took place with Mr Carr. Ms Craig, then Leasehold Officer, responded on behalf of GHC to Mr Carr's email referring to the site meeting and confirming the works to be undertaken.

23. The works were completed on the 9 November 2012. Costs were incurred by GHC when Mears invoiced on 30 July 2013. The total actual cost of the works was £13,557.63 (unit cost £1,506.40). David Grogan instructed that the amount to be recovered from leaseholders should be capped at the original consultation value of £11,263.50.
24. On 27 October 2013, Mr Carr emailed to advise the new walkway was uneven and pools were forming whenever it rained. A site meeting with the contractors who installed the floor covering took place on 26th November 2013, which confirmed the areas of pooling noted by Mr Carr. The contractor recommended limited repairs and materials to rectify the pooling problem were ordered and remedial works were completed on 5 December 2013. There was no additional charge to GHC for the remedial works.
25. Subsequently an extra layer of non-slip coating was added to the walkway in January 2014 at no cost to the leaseholders.
26. The Respondent's case concerning the replacement of the walkway surface is that Mr Grogan researched the available solutions for replacing the ceramic tiles and proposed the use of a liquid applied waterproofing system from Flag Soprema. This technique is commonly used for ensuring that flat roofs are waterproof and is also used on walkways. The system also came with a guarantee from the supplier. Soprema is one of the largest suppliers and manufacturers of waterproof membranes for roofing in the UK. GHC has used a similar system on a large number of Council properties in Gateshead with flat roofs and found it to be an effective solution.
27. The works were carried out by O'Connor Roofing using the Soprema system to remove the old walkway covering and install the new one. The works were inspected by the installer before they were signed off as complete. TGHC received a guarantee from the manufacturer.
28. On 14 February 2015 Mr Grogan emailed the installer and the manufacturer, about Mr Carr's complaints about pooling water. Soprema responded on 20 February 2015 stating that the walkway surface had been correctly installed and that it was not possible to create a greater fall on the roof surface.
29. Following further complaints from Mr Carr about pooling water on the surface of the walkway on 11 November 2016 an inspection was carried out by the manufacturer under the guarantee. The inspection found that the roof covering was performing as designed and was free from defects.
30. For the Respondent the evidence from Andrew Mason, Senior Contracts Administrator of GHC was that the walkway covering is in a good state of repair, was installed properly and is performing as designed. There are some small areas of ponding water on the walkway but in his opinion the effect of this is minimal and any method of covering a flat roof surface will inevitably lead to some areas of ponding due to the lack of a fall on the roof surface. He has asked the cleaner of the walkway to ensure that rainwater drain gullies on the walkway are cleared of leaves on a regular basis. GHC has also written to residents to ask them to remove plants from the walkway to reduce the number of leaves on the walkway.

31. The Tribunal was informed that Mr Mason has drafted a set of proposals to try to resolve the Applicants' concerns – one was to apply another layer of non-slip coating on top of the existing one; the other was to pave over the walkway area. Neither of these proposals has been deemed acceptable.
32. At page 10 of the application form to the Tribunal, in the box marked 'Description of the questions you wish the tribunal to decide' the Applicants set out 7 questions:

Are the leasehold tenants liable for the costs as invoiced?

Why was the pathway not replaced with a like for like replacement?

Why is the new pathway considerably higher than the original?

Why did the renewal of the pathway take so long?

Why are the concerns of the tenants not being listened to?

Why has no action been taken to resolve safety issues?
33. The Respondent represented that only the first one of those questions falls within the jurisdiction of the Tribunal and suggested that the Applicants were using the Application to air grievances about the condition of the walkway, rather than to challenge the service charge within the Tribunal's jurisdiction. In its written representations the Respondent asked that the Application be struck-out.

THE TRIBUNAL'S FINDINGS AND DECISION

34. The Tribunal was first satisfied that the Applicants' leases provide for recovery of the walkway repair service charge element which had been put at issue in the Application. The liability for the repair leading to the Works lies on the Respondent (see paragraph 7) and the basis of the Applicants' liability to pay for the costs of the Works is recorded in paragraph 8. The Tribunal asked if the commercial ground floor leases provided for contribution to the cost of the Works, or towards any repair or maintenance of the Block. The Respondent stated through those speaking on its behalf at the hearing that it had not consulted the leases of the commercial units. Apportionment for the Works remained unclear.
35. Notwithstanding the Respondent's representation (see paragraph 33) the Tribunal was satisfied that the Application was properly brought under Section 27A of the Act for determination regarding the payability and reasonableness of the costs of the Works.
36. The Consumer Rights Act 2015 does not apply to the Application within the Tribunal's jurisdiction and has no bearing on the matter in so far as the Tribunal's power of determination.

37. The Tribunal was not clear whether the Applicants were querying the Section 20 Consultation. In reality they were not challenging the consultation steps, either regarding the appointment of Mears as principal contractor, or leading to the Works, but the adequacy of the remedial works and the resulting costs. The Tribunal found no evidence of defective consultation regarding the appointment of Mears in 2011/12 nor in the selection of the contractor to undertake the Works.
38. On the question of the need for repair works to the walkway, from the evidence the Tribunal found that some repair was likely to have been necessary as there was evidence that the previous tiled surface was cracking during 2012. However, there was no evidence presented of the extent of investigation as to the cause of leaks into the ground floor shops. The Tribunal was given no documentary evidence of Mr Grogan's findings. There was no evidence as to whether localised repairs, for example around the drainage gullies, could have remedied any identified problems. We were informed by the Respondent that Mr Grogan identified the tiles as being at the end of their usable life, but this was not supported by direct evidence. The Applicants contended that leaks from foul and surface water pipework running through the commercial units could have been responsible for water penetration into those premises, wholly unconnected with the state of repair of the walkway. Having carefully considered all of the evidence presented the Tribunal is not satisfied that the Works were necessary, in whole or in part. The Tribunal therefore determines that the cost for the Works was not reasonably incurred.
39. Nevertheless if the Tribunal is wrong in its finding that the Works were not necessary and the walkway surface had indeed become defective by 2012, the Tribunal finds that the Works undertaken by the Respondent were badly designed and wholly inappropriate for such a walkway. At the inspection during wet weather it was apparent to the Tribunal that there is significant pooling of water on the walkway surface, which also is uneven. There are inadequate falls to drain gullies. There is an obvious risk of ice forming in low temperatures and a danger of falls in consequence. GHC prioritised thermal insulation (which was desirable but not absolutely necessary) over a safe functioning walkway. The Tribunal finds that the walkway is now in a potentially dangerous condition arising from unsuitable specification. The Tribunal finds that the costs of the Works were not costs reasonably incurred.
40. In the circumstances the Tribunal determines that the service charge costs for the major works in service charge year 31 March 2014 are not reasonably incurred.

As to Section 20C and Costs

41. The Applicants made application under Section 20C of the Act that an Order be made that the costs incurred, or to be incurred, by the Respondent in connection with the proceedings before the Tribunal should not be regarded as relevant costs to be taken into account in determining the amount of the service charge payable by the Applicant for a future year or years.

42. The Respondent stated that the Application was ill conceived and had no reasonable prospect of success. The Respondent has spent considerable time and expense on its response to the Application and should not have to bear the costs. It stated that the Applicants had failed to comply with the directions of the Tribunal and their lack of grounds for the Application meant that it would be just and equitable for them to pay the Respondent's costs.
43. The Tribunal was satisfied that the Respondent had tried to respond to the complaints by the Applicants, both before and during these proceedings. The Respondent alleged that the Applicants had failed to respond to the Tribunal's directions in omitting to fully explain their case or provide sufficient particulars for a Scott Schedule. However, the Tribunal finds that the Respondent had not been misled about the basis of the complaints about the need for remedial work to the surface walkway and the adequacy of the remedy so as to invalidate the lay Applicants' resistance to paying for the cost. The Application was certainly not mis-conceived as represented by the Respondent. The Applicants have been successful in these proceedings. Therefore the Tribunal determines that it should make an order under Section 20C of the Act.
44. At the hearing Mr Carr asked that the Respondent be ordered to reimburse the fees paid to the Tribunal for these proceedings. For the reasons set out in the preceding paragraph the Tribunal so orders.