9241

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOAW/LSC/2013/0342**
Property	:	**Flat O, Basement, 159 Holland Park Avenue, London, W11 4UX**
Applicant	:	**C H Chesterford Limited**
Representative	:	**Mr J Fieldsend of Counsel**
Respondent	:	**Mr N P Devadasan**
Representative	:	**In person**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Ms N Hawkes** **Mr S Mason FRICS** **Mr J Francis**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR** **3.9.13**
Date of Decision	:	**17.9.13**

DECISION

Decisions of the tribunal

(1) The sum of £7,939.42 demanded from the Respondent in respect of a payment into the reserve fund in the service charge year 2012 is reasonable and payable.

(2) The actual costs of £6,864.83 incurred by the Applicant in respect of external repair and redecoration work carried out to the building in which the Property is situated, which was completed in 2012, are reasonable and payable.

(3) The Tribunal does not make an order pursuant to section 20C of the Landlord and Tenant Act 1985.

(4) Since the Tribunal has no jurisdiction over county court costs and fees, this matter should now be referred back to the West London County Court.

Preliminary

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") (i) that the sum of £7,939.42 demanded from the Respondent by way of a payment to the reserve fund in the service charge year 2012 was reasonable; and (ii) that the sum of £6,864.83 is payable by the Respondent in respect of external repairs and the redecoration of the building in which the Property was situated which was completed in 2012 ("the Works").

2. Proceedings were originally issued in the West London County Court under claim No.3YJ14535. By order of District Judge Ryan dated 26th April 2013, the matter was transferred to the Tribunal to determine the Respondent's liability in respect of the claim for service charges.

3. The amounts claimed in the County Court proceedings were estimated figures but, by the time of a pre-trial review on 11th June 2013, the service charge accounts were being finalised and it was agreed by the parties and by the Tribunal that the scope of the issues before the Tribunal should be widened to include a determination as to the reasonableness of the the actual expenditure.

4. The Respondent has included in his statement of case challenges to the actual costs claimed as general service charge. However, at the commencement of this hearing, the parties were agreed that the matters before this Tribunal relate solely to the sum demanded by the Applicant for the reserve fund in the year 2012 in connection with the anticipated cost of the Works and to the actual cost of the Works. The Respondent is not precluded from challenging the actual expenditure in

respect of the general service charge for the year 2012 but any such challenges do not fall within the scope of the matters before this Tribunal.

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

The hearing

6. The Applicant was represented by Mr Fieldsend of Counsel at the hearing and the Respondent appeared in person.

7. During the course of the hearing, the Applicant handed in a letter from Shaw & Company addressed to the Lessee, 159 Holland Park Avenue dated 23rd November 2010. The Respondent did not object to the late admission of this document.

The background

8. The Property which is the subject of this application is a basement flat at 159 Holland Park Avenue which is a converted, semi-detached house of traditional construction built in the 1800s. The house comprises a basement, a ground floor and three upper floors, (including living accommodation situated in the roof space) and it has been divided into six flats. The freehold is owned by the Applicant, CH Chesterford Limited.

9. 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.

10. The Respondent holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

The issues

11. At the start of the hearing the parties identified the relevant issues for determination as follows:

    (i) Whether the sum of £7,939.42 demanded from the Respondent in respect of a payment into the reserve fund in the service charge year 2012 was reasonable and payable.

    (ii) Whether the sum of £6,864.83 incurred by the Applicant in respect of the actual costs of external repairs and redecoration

work carried out to the building in which the Property is situated which was completed in 2012 is reasonable and payable.

(iii) The Respondent's application for an order under section 20C of the Landlord and Tenant Act 1985.

12. In summary, the Respondent contended that the statutory consultation process was defective; he raised some issues in relation to the extent and cost of the Works; and he argued that because no sinking fund had been built up over the years the Applicant should be precluded from requiring him to make a substantial one off payment.

13. Gillian Byfield, the Managing Director of HML Hawksworth Limited ("Hawksworth"), the Applicant's managing agents; Marjorie Smith, a Property Manager employed by Hawksworth; and Andrew Walker RICS, a director of EBW Consultancy, gave evidence on behalf of the Applicant. The Respondent also gave evidence.

14. Having heard evidence and submissions from the parties and having considered all of the documents referred to, the Tribunal has made determinations on the various issues as follows.

The lease

15. The Applicant is the current freehold owner of 159 Holland Park Avenue and the reversioner to the Respondent's lease ("the Lease"). The Respondent is a party to the lease and the Applicant is a successor to the original grantor.

16. The service charge year (referred to in the Lease as "the Accounting Period") runs with a year end of 31st December (see clause 1.2). The lessee's covenant to pay a service charge and an interim service charge is provided for at clause 4.4 of the Lease and the mechanism for the calculation and the payment of the service charge and the interim charge is provided for in Schedule 5.

17. The Particulars to the Lease provide that the Respondent's share of the service charge expenditure is 10%. By clause 4.4 of the Lease (when read in conjunction with Schedule 5 and Paragraphs 1.2 and 7 of the Particulars) the Respondent covenants to pay:

(i) A sum (to be specified at the discretion of the Applicant or its managing agents) that is a fair and reasonable interim payment on account of his service charge liability in respect of each "Accounting Period" (which is the period beginning the 1st January in each year and ending on 31st

December) by two equal payments in advance on the 24th June and 25th December.

(ii) By way of service charge, 10% of various specified costs including:

(a) The total expenditure incurred by the Landlord in any Accounting Period in carrying out or attempting to carry out its obligations under clause 5.5 of the Lease;

(b) The costs of employing surveyors to supervise works to be carried out to the Building and/or the Common Parts in pursuance of the Landlord obligations under clause 5 of the Lease.

18. The Applicant's covenants under clause 5.5 of the Lease include (subject to and conditional upon payment being made by the Tenant of the Interim Charge and the Service Charge as provided for in the Lease):

(i) A covenant to maintain and keep in good and substantial repair and condition the main structure of the Building including the principal internal timbers and the exterior walls and foundations and the roof thereof with main water tanks main drains gutters and rain water pipes other than those included in the Respondent's demise or in the demise of any other flat in the Building (see clause 5.5.1(a)).

(ii) A covenant as and when the Applicant shall deem necessary to re-paint the whole of the outside wood iron and other work of the Building (see clause 5.5.2(a)).

(iii) Provision for such sums of money as the Applicant shall reasonably require to be set aside in a sinking fund ("the Reserve Fund") to meet such future costs as the Applicant shall reasonably expect to incur in replacing, maintaining and renewing those items which the Applicant has covenanted to replace, maintain or renew (see clause 5.5.17).

The Statutory Consultation

19. The Respondent argued that there was a delay in giving one of the other leaseholders the Statement of Estimates dated 10.12.09. This leaseholder did not attend the hearing to give oral evidence to the Tribunal. Marjorie Smith attended the hearing and gave oral evidence on behalf of the Applicant that she had supplied the Statement of Estimates to each tenant. The Tribunal accepts her evidence.

20. The Respondent initially stated that he did not receive a Notice of Reasons dated 7.7.11 but this was not pursued. The Tribunal notes that, in any event, it was not necessary for the Applicant to supply the Notice of Reasons because, MBS Contractors Service ("MBS"), with whom the contract for the Works was entered into, submitted the lowest estimate (see Regulation 13(2) of the Service Charges (Consultation etc.) Regulations 2003, Schedule 4, Part 2).

21. After the statement of estimates was given on 10.12.09, it was intended that the Works would be undertaken in the 2010 service charge year in conjunction with similar works to other properties owned by the Applicant in Holland Park Avenue. However, there followed a period of delay because, owing to a failure of leaseholders at 159 Holland Park Avenue to pay their contributions to the cost of the Works, there were insufficient funds to finance the Works and it was necessary to defer them.

22. The consequences of the deferment were (a) that the Works became subject to a higher rate of VAT (20% effective from 4.1.11); and (b) that the cost of providing scaffolding increased because it was no longer possible to split the scaffolding costs with the Applicant's other properties and, in particular, an access gantry originally to be shared with the adjacent building had to be provided with the sole cost borne by 159 Holland Park Avenue.

23. Once it became apparent that the costs were going to increase, the Applicant contacted the potential contractors in order to ascertain the increased cost of the scaffolding. Only MBS replied (and the increase in price amounted to a small proportion of the total cost of the Works). The Tribunal finds that this alteration to the specification was not sufficiently great on the facts of this case to invalidate the consultation process which had taken place and to compel the Applicant to consult again. Further, as noted above, the Respondent did not ultimately pursue the assertion that he did not receive the Notice of Reasons.

24. The Respondent argued that there was a failure to consult in relation to the surveyor's fees of 8.5% which were incurred in connection with the Works. He was concerned that, as a consequence of the fact that there was no tender in respect of the professional fees, the surveyors' fees might be too high. However, he did not have any comparables and that

he sensibly accepted was not in a position to put forward a positive case in this respect.

25. The Applicant submitted that the requirement to consult does not apply to the surveyors' fees citing Marionette Ltd. Visible Information Packaged systems Ltd. [2002] EWHC 2546 (Ch) [90-98] and the Tribunal accepts this submission.

26. Mr Walker gave evidence that his fee of 8.5 % of the cost of the work was agreed on the basis that work would be carried out to five different properties simultaneously. He stated that his usual fee for a stand-alone project of this type is 10% but that he did not re-negotiate the fee when the work to 159 Holland Park Avenue was deferred.

27. The Tribunal is of the view that 10% would have been a reasonable rate for the surveyors' fees for the work which was carried out to 159 Holland Park Avenue in isolation and that the leaseholders benefitted from the fact that Mr Walker did not seek to negotiate any increase in his fees when the work to 159 Holland Park Avenue was deferred.

28. The final issue raised by the Respondent under this heading was that, in his view, insufficient detail of the proposed works was provided in the Notice of Intention dated 22.7.09.

29. Regulation 1(2) of the Service Charges (Consultation etc.) Regulations 2003, Schedule 4, Part 2 provides that the notice shall "describe, in general terms, the works proposed to be carried out."

30. The following description of the proposed work was given in the Notice of Intention: 1. Erect Scaffold 2. Prepare and redecorate external parts of all woodwork including windows and main communal front door 3. Prepare and redecorate all masonry surfaces 4. Prepare and redecorate all railings. 5. Prepare and redecorate the pillars leading to the building. 6 To carry out any necessary repairs to the roof and outside brickwork of the building."

31. The Tribunal finds that this was sufficient to constitute an appropriate description of the proposed works "in general terms" within the meaning of the 2003 Regulations.

32. The Tribunal notes that the Respondent accepted that he did not make any observations within the 30 day consultation periods.

33. Accordingly, the Tribunal finds that the Applicant complied with the statutory consultation requirements.

The reasonableness of the Works

34. The Respondent argued that the specification for the Works was based to a large extent on speculation (because parts of 159 Holland Park Avenue were viewed from a distance, the Applicant having chosen to avoid the substantial costs of erecting scaffolding prior to the commencement of the Works). He also argued that the majority of the work was not "urgently" needed.

35. However, the Respondent accepted that the work which had been carried out was of a reasonable standard and that he was not in a position to advance any positive case that work had been carried out which was unnecessary. He also accepted that there is no provision of the Lease requiring or allowing the Applicant to defer "non-urgent" work.

36. As stated above, the Applicant has covenanted (subject to receipt of the specified payments) to maintain and keep in good and substantial repair and condition the main structure of the Building and when deemed necessary to paint the exterior. There is no distinction made between "urgent" and "non-urgent" work in the relevant provisions of the Lease.

37. The Respondent expressed surprise that Works were substantially more expensive than work which was carried out to 159 Holland Park Avenue approximately 10 years ago but he did not put forward any comparables or argue that the cost of any specific items was unreasonably high. The Tribunal considers the costs to be reasonable having regard to the nature of the work which was carried out on this occasion.

38. Accordingly, the Tribunal finds that the work in question was carried out to a reasonable standard and that the cost of the work was reasonably incurred by the Applicant.

The Reserve Fund

39. The Respondent argued that, because no reserve fund had been built up over the years, the Applicant should be precluded from requiring him to make a substantial one off payment.

40. Gillian Byfield stated, when giving oral evidence, that it would have been "best practice" to have built up the reserve fund over time to finance the Works. The Tribunal agrees with the Respondent and with Mrs Byfield that best practice was not followed but makes no criticism whatsoever of Hawkesworth or of the Applicant because the failure to build up the reserve fund formed part of the policy of a previous freeholder to keep service charge payments relatively low.

41. However, whilst the Tribunal has some sympathy for the Respondent's position, there is no provision in the Lease which disentitles the Applicant to claim the sums outstanding as a result of a failure on the part of its predecessor to build up the reserve fund over time. Although the actual costs of the Works are lower than the reserve fund payment which was demanded, the Tribunal finds that the reserve fund payment made reasonable provision for the anticipated cost of the Works plus a sum on account of future expenditure. It is the policy of the current freeholder to build up the reserve fund over time in accordance with "best practice".

42. Accordingly, the Tribunal finds that the reserve fund payments were reasonable and payable and that the actual costs of the Works are reasonable.

The application under section 20C of the Landlord and Tenant Act 1985

43. At the hearing, the Respondent applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above that the sums claimed by the Applicant are reasonable and payable, the Tribunal determines that it is not just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Applicant may not pass any of its costs incurred in connection with the proceedings before the Tribunal through the service charge.

The next steps

44. The Tribunal has no jurisdiction over county court costs, county court interest or solicitors' costs. This matter should now be returned to the Willesden County Court.

Name: Naomi Hawkes **Date:** 17.9.13

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.