10463

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AW/LSC/2014/0452**
Property	:	**2 Hamilton Court, 65-67 Longridge Road, London SW5 9SG**
Applicant	:	**Hamilton Court (SW5) Management Limited**
Representatives	:	**Dr & Mrs Lovely**
Respondent	:	**Mr C Costagliola di Fiore**
Representative	:	**In person**
Type of Application	:	**For the determination of the liability to pay a service charge**
Tribunal Members	:	**Mr L Rahman (Barrister)** **Mrs J Davies FRICS** **Mr P Webb (Solicitor)**
Date and venue of Hearing	:	**24th November 2014 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**15th December 2014**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the sum of £2,500 is payable by the respondent in respect of the proposed works to the roof of the building.

(2) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

The application

1. The applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charge payable by the respondent in respect of proposed works to the main roof of the building, at an estimated cost of £2,500 per lessee.

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

The hearing

3. The applicant was represented at the hearing by two of its Directors, Dr and Mrs Lovely, and the respondent appeared in person.

4. The tribunal had before it an agreed bundle of documents prepared by the applicant. Both parties were allowed to adduce further evidence, namely, copies of two emails which the respondent wished to rely upon and a breakdown of the estimates obtained from two of the contractors, which the applicant wished to rely upon.

The background

5. The property which is the subject of this application comprises ten leasehold flats over five storeys within two converted terraced properties. The respondent occupies one of the two basement flats. Each lessee owns a one tenth share in Hamilton Court (SW5) Management Limited, the holder of the freehold.

6. 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.

7. 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.

8. The applicant proposed to carry out external decorations and repairs to the premises in 2009. It had consulted all the lessees and estimates had been obtained from seven contractors, four of whom had been nominated by the respondent (page 35 of the bundle). Each contractor provided two estimates. Option 1 was to include "repairs" to the roof and option 2 was to include "recovering" of the roof. The applicant preferred option 2.

9. The estimates for option 2 varied between £55,393 and £87,302, and the average was £70,435 (a further 12.5% surveyors fee plus vat was to be added to the actual final account for each of the estimates). The lowest estimate was provided by Amber Construction Services Ltd ("Amber"), nominated by the respondent. The second lowest estimate was from Fahey Contracts ("Fahey"), recommended by the applicants managing agents, in the sum of £60,706.

10. The applicant chose Amber, whose total estimated cost was approximately £62,000 (including the surveyors fee etc). The applicant already had about £5,000 in reserve, therefore, it calculated that each lessee should contribute £5,800, giving a total of £63,000.

11. The respondent objected to the proposed works for a number of reasons, one of which was that the roof did not require major intervention, i.e. "recovering" and that smaller patchwork repairs would be adequate.

12. This resulted in an application to this tribunal in May 2010 involving the same parties. The applicant on that occasion sought a determination from the tribunal as to whether the respondent should contribute £5,800 in respect of the costs of external decorations and repairs to the premises. Having inspected the property, the tribunal, in a decision dated 27th September 2010, found as follows;

13. *"... we accept from our inspection and our comments below that substantial redecoration works are required, and certainly some roofing works will be necessary. Accordingly we accept that a payment of £5,800 towards these costs is a reasonable payment on account"* (paragraph 33).

14. *"Insofar as the roofs are concerned we, from our inspection of the main roof, concluded that substantial repairs would be required to the lower flat roof where the dormer windows are to be found as it did appear to be in poor condition. Insofar as the main roof was concerned we thought that appeared to be in reasonably good condition and that some minor repairs to the general surfaces together with attention to the upstands and flashings followed by the application of one or more further coats of solar reflective paint, should be sufficient. We could see no evidence of the need to completely recover the roof at this time. That is not to say that it should not be*

kept under review but without any clear evidence as to water ingress to the flats below or other associated problems it seems to us this is an expense that need not be met at this moment in time. It is something however that should perhaps be funded for the future" (paragraph 37).

15. It is not in dispute that after the tribunal determination the proposed works, excluding recovering of the main roof, were carried out by Fahey in 2011.

16. The applicant now wished to resurface the main roof. Since the repairs that were carried out to the main roof in 2011, there was water ingress into the top floor flats. It believed that it was economical to resurface the asphalt roof surface, as it had passed its life expectancy, rather than repair the roof and carry out decorations to the flats that had been affected by water ingress. The applicant stated at the hearing that it had obtained two estimates for the proposed works only last week. One estimate was just over £22,000 and the other was just under £20,000.

The issues

17. The respondent confirmed at the hearing that he accepts that the proposed works to the main roof is required and that he had been consulted on the matter. The tribunal noted the respondent had not challenged that the estimate of £2,500 was excessive. The respondent stated at the hearing that he did not challenge or concede the cost of the proposed works. The respondent stated that he refused to pay towards the cost of the proposed roof works as he believed that he had already paid for it as part of his £5,800 contribution towards the works carried out in 2011, which the applicant should have held on account as directed by the previous tribunal. The respondent also relied upon the points that he had raised in his letter on pages 14-16 of the bundle.

18. The tribunal identified the main issue for determination as follows:

    (i) Whether the previous tribunal had directed that the applicant hold part of the £5,800 paid by the respondent on account for future works to the main roof.

19. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal determines the issue as follows.

Did the previous tribunal direct that the applicant hold part of the £5,800 paid by the respondent on account for future works to the main roof?

20. The applicant stated that it had followed the previous tribunal decision, which had identified that some roofing work was required and in

particular that substantial repairs would be required to the lower flat roof as it appeared to be in poor condition. It had accordingly resurfaced the top of the mansard roof at the rear of the property (referred to by the tribunal as the lower flat roof) and had only carried out repairs to the main roof, as suggested by the tribunal. It did not issue any new section 20 consultation notice as nothing new was added to the proposed works upon which all the lessees had already been consulted.

21. The work was carried out by Fahey as Amber had failed to respond to the repeated requests for their revised tender price, as the previous tender was already 18 months old, and had failed to confirm when they could start the work. Fahey, who had provided the second lowest estimate, were able to confirm that they would hold their price (£43,688 excluding vat) and could start work in May 2011. This was explained to all the lessees in a letter dated 8th April 2011 (page 48 of the bundle).

22. The total cost of the 2011 works was £62,730 (page 40 of the bundle). The applicant stated that whilst Fahey had estimated the cost of the works under option 1 (repairs to the roof and not recovering) to be £50,241 (inclusive of vat) in 2009, vat had risen from 15% to 17.5% by 2011. As with the other estimates and including the estimate from Amber, a further 12.5% plus vat was to be added for the surveyors fee. A further £792 and £1,080 were paid for a structural survey and construction & design maintenance co-ordinator respectively. Therefore, the final total cost was higher than the £50,241 estimate Fahey had provided under option 1.

23. The applicant stated that the roofing repair cost was £11,388. This covered not only the repairs to the main roof but included the cost of the works to the mansard roof, repairs to the balcony, and the tank, all of which were included in the original specified works. It stated that the Amber estimate for the same work, excluding any works to the tank, was £6,800 (item 12 on page 32) and £1,240 (item 13b on page 33), totalling £8,040. Adding the surveyors fee plus vat in the sum of about £1,180 and vat at 17.5% in the sum of about £1,400, gave a total figure of about £10,600, to which an amount should also be added for the work to the tank.

24. The applicant stated it did not have any monies left over from the 2011 works and there was nothing left in the reserve either. Furthermore, by 2011 it had also spent £5,765 in legal fees in dealing with the application that had been made to the tribunal.

25. The applicant stated that its understanding of the previous tribunal decision was that the exact costs of the 2011 works was not known therefore it determined that £5,800 per lessee was a reasonable estimate for the future works that were to be done. It did not agree with

the respondents view that the tribunal had stated that an amount should be kept on account from the £5,800 for future works to the main roof.

26. The respondent stated the tribunal had decided in its 2010 decision (paragraphs 33 and 37) that recovering the main roof was not required at that time, that it should be funded for the future, and that whilst the £5,800 was a reasonable payment for the redecoration and some roofing, that the money should stay on account.

27. The respondent stated the difference between Amber option 1 and 2 was £7,860.00 (excluding vat), which he states reflects the cost of recovering the main roof. The applicant would have had to pay 17.5% vat at the time (prior to 1.1.10).The applicant would also have had to pay 12.5% surveyors fees plus vat on that, amounting to £1,154. Therefore, by not having to recover the main roof, the applicant should have saved £10,389. If that money had been put aside, as suggested by the tribunal, it would have attracted 3% interest year on year, thereby further increasing the amount in reserve.

28. The respondent stated that Amber had estimated only £1,240 to repair the asphalt defects on the entire main roof (item 13b on page 33) whereas Fahey had charged £11,388 on roof repairs (page 40). Therefore, the applicant had used even more for roof repairs than Amber had estimated for recovering the entire main roof (£9,100, item 13a on page 33).

29. The respondent stated he emailed Amber on 12.5.11 to ask if they had been approached by the applicants managing agent to carry out the works. The respondent stated that he does not have any written response from Amber but he was told over the telephone that they were not contacted. The respondent stated that when he spoke to the applicants managing agent he was told that they had contacted Amber but they did not get any response from them. The respondent stated that Fahey were awarded the contract because there was a "link" between Fahey and the applicants managing agents. When asked to explain what he meant by the word "link", the respondent stated that the managing agents had recommended Fahey and he thought that there may be a financial link between them, but he was only speculating as he did not have any evidence of any financial link between them.

30. The respondent stated the applicant was mistaken and that the applicant had over £5,000 in its reserve in 2012. The respondent referred the tribunal to a copy of an email dated 20 September 2012 which refers to £5,825 in the deposit account (page 40).

31. The tribunal found that the previous tribunal determination did not state that the applicant should keep on account, an unspecified amount of money from the £5,800 contribution made by each lessee, for future

works to the main roof. The tribunal clearly stated, having identified the works it thought were required and having excluded any recovering of the main roof area, that it accepted that a payment of £5,800 towards these costs was a reasonable payment on account. The previous tribunal did not suggest that any money would be left over, which should then be kept on account for future works to the main roof.

32. We found the words "on account" meant the money that was to be paid in advance of the proposed works that the tribunal had identified, excluding recovering of the main roof, which it stated should be kept under review and should perhaps be funded for the future.

33. We found that our understanding of what the previous tribunal had determined is not only consistent with what the applicant is stating, but is also consistent with what the other lessees understand it to mean, as the respondent confirmed that none of the other lessees were challenging the applicants intention to demand £2,500 from each lessee to carry out the proposed works to the main roof.

34. The tribunal found the other points raised by the respondent were not relevant to the main issue. Nevertheless, the tribunal makes the following observations on those matters.

35. The applicant states it carried out the 2011 works as specified in the section 20 consultation notices, excluding the recovering of the main roof as determined by the previous tribunal, and that it did not carry out any additional works. The respondent has not provided any evidence to show that the applicant had carried out any additional works such that it needed to serve new section 20 notices in relation to those 2011 works.

36. The respondent states the applicant had or should have money in its reserve account and relies upon the email on page 40. The tribunal noted the email is dated 20 September 2012 and states *"Looking back at the 2009 workings, the works were estimated to cost £63,528, in the deposit account there was £5,825, leaving a balance of £57,703 to fund. £5,800 per flat was requested"*. We found the email clearly explains what the state of the reserve account was in 2009, not in 2012. The applicant stated, and the respondent has not provided any evidence to the contrary, that no monies were left over from the 2011 works and there was nothing left in the reserve either.

37. The respondent has raised a number of issues concerning the contract being awarded to Fahey instead of Amber. The tribunal found no evidence of any links between Fahey and the applicant / managing agents. The respondent stated that the managing agents had recommended Fahey and he thought that there may be a financial link between them, but he acknowledged that he was only speculating and he did not have any evidence of any financial link between them.

38. The tribunal found the applicant had provided a credible and reasonable explanation for its decision to award the contract to Fahey. The respondent has not provided any supporting evidence, such as a letter from Amber, which the tribunal found he could easily have obtained from Amber, to show that the applicant had failed to contact Amber in 2011.

39. In any event, the respondents main concern is that had the contract been awarded to Amber, the cost of the overall works would have been less. However, the tribunal found that the evidence does not support this.

40. Fahey confirmed in 2011 that the estimate they had given in 2009 would be honoured. There is no evidence from Amber as to whether it would have honoured its 2009 estimate or what its estimate would have been in 2011.

41. The tribunal noted that the Amber estimate for the roof repairs was the total of item 12 on page 32 in the sum of £6,800 and item 13b on page 33 in the sum of £1,240, totalling £8,040. Adding the surveyors fee plus vat in the sum of about £1,180 and vat at 17.5% in the sum of about £1,400, gave a total figure of about £10,600. Therefore, the difference in the roof repair cost between Fahey (£11,388) and Amber is only about £788. Bearing in mind the Amber estimate did not cover the cost of the works to the tanks, the Amber figures were described as "provisional sums" and were based upon the lowest estimate, and the Amber estimate had a contingency sum of an additional £2,000, the tribunal found Fahey's overall actual roof repair cost was not significantly different to or higher than the estimate given by Amber.

42. Furthermore, the tribunal is satisfied that Fahey's overall cost for the works was reasonable. Estimates had been obtained from seven contractors, four of whom had been nominated by the respondent. With respect to option 1, the estimates were between £46,000 and £78,000 (including vat at 15%), and the average was £60,000. Were this average estimate to be calculated at 17.5% vat and a further 12.5% surveyors fee plus vat (approximately £8,800) were to be added to the actual final account, the average estimate would be significantly higher than Fahey's actual final cost.

Application under s.20C and refund of fees and costs

43. The applicant did not make an application for a refund of the fees that had been paid in respect of the application/ hearing.

44. At the case management conference the tribunal directed that limitation of costs under section 20C would be considered by the tribunal. The tribunal noted that the applicant acted reasonably in

connection with the proceedings and was successful on the issue in dispute, therefore the tribunal decline to make an order under section 20C.

Name: Mr L Rahman **Date:** 15.12.14

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

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 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.

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.