9874

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AY/LSC/2013/0767**
Property	:	**11 Gye House Solon New Road Estate London SW4 7LU**
Applicant	:	**London Borough of Lambeth**
Representative	:	**Ms Hallett of Counsel instructed by Judge and Priestly solicitors**
Respondent	:	**Ms C Richardson**
Representative	:	**N/A**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Dr Carr** **Mr Cartwright** **Mr Clabburn**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**25th April 2014**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the sum of £11,368.48 (see para 13(1) below) is payable by the Respondent in respect of the service charges demanded in connection with the major works.

(2) The tribunal makes the determinations as set out under the various headings in this Decision.

(3) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985 as it has determined that the lease does not give the Applicant the power to charge its costs via the service charge account.

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

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 charges payable by the Applicant in respect of the service charge years.

2. Proceedings were originally issued in the Lambeth County Court under claim no. 3XZ71944. The claim was transferred to this tribunal, by order of District Judge Rowland on 1st November 2013.

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

The hearing

4. The Applicant was represented at the hearing by Ms Hallett of Counsel instructed by Judge and Priestly, solicitors for the Applicant. She was accompanied by Mr Mark Brown from Pellings, the consultant appointed by the Applicant in connection with the major works, and Mr Tim McClave, major works charges co-coordinator with the Applicant. The Respondent appeared in person. She was accompanied (but not represented) by Ms Natalie Martin.

5. The hearing commenced on 17th March 2014 at 1.30 pm following an inspection of the property. It reconvened on the morning of 22nd April 2014 to conclude hearing evidence and the submissions of the parties.

The background

6. The property which is the subject of this application is a 3 bedroom maisonette on the second and third floors of a purpose built low rise block of 16 units, constructed about 60 years ago. The block has a pitched roof and partially enclosed external staircases to each end.

7. During 2009 - 10 the Applicant carried out major works to the block including the renewal of windows.

8. The tribunal inspected the property in the presence of the Respondent and Counsel for the Applicant and Mr Brown and Mr McClave. The tribunal noted a cracked window adjacent to the entrance door, a poorly repaired crack caused by installing a new rear door to the balcony, a filled-in hole in the wall to the kitchen, which the Respondent said was created and then filled during the process of installing the double glazing. The Applicant said that the hole had been for a vent. Extractor fans were installed unless lessees requested otherwise. The explanation given was that the contactors had thought that an extractor fan was to be installed and then realised that the lessee did not want an extractor fan.

9. The double glazing which was installed by the Applicant was timber framed with trickle vents. It appeared that the Applicant considered additional ventilation was required in the kitchen and bathroom. As noted above this was not provided in the kitchen. An extractor fan was provided in the bathroom but not wired up as the Applicant considered this was the Respondent's responsibility. The tribunal noted that an alternative strategy would have been to install double glazing with larger trickle vents.

10. The Respondent pointed to condensation in the bedroom. The trickle vents had not been opened. She indicated that she did not know that she could open them. She had not received any handover information or the keys required to secure the windows. The Respondent said that the previous windows had been UPVC. She said she preferred UPVC as it was more effective and cheaper to maintain.

11. Glazing to the communal doors and windows had been replaced at the same time as the works carried out to individual flats. 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 will be referred to below, where appropriate.

12. The Respondent purchased her leasehold interest on 13th December 1999 under the Right to Buy provisions of the Housing Act 1985. She

therefore benefitted from protections set out in section 125 of the Housing Act 1985 for a period of five years from the purchase.

The issues

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

    (i) The payability and/or reasonableness of service charges totalling £13,368.48 (from major works final account) for works carried out during 2009 - 10 under a major works contract relating to replacement windows and repairs and maintenance to the block and the estate. More particularly

        a. Whether the Applicant provided the Respondent with the statutorily required notice of intention to carry out the works

        b. Whether clauses 2.2.1 and 2.2.2 of the Respondent's lease means that the Applicant is unable to charge the Respondent for the replacement of windows

        c. Whether the Respondent's charge is limited to £4000

        d. Whether the works are of an appropriate quality. In particular the Respondent argues that

            i. The Applicant installed timber frame windows instead of UPVC

            ii. The works have not been appropriately completed

            iii. The works are of poor quality

        e. Whether the charges for the works carried out are reasonable

14. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

Compliance with the statutory consultation procedures

15. The Respondent argued that she had not received the first notice in connection with the major works. She did receive the second notice,

and indeed responded to it. She made no other complaint in connection with the statutory consultation procedure.

16. The Applicant produced a copy of the first notice addressed to the Respondent. It had sent the notice by first class post. The Respondent had no explanation as to why she had not received it. She was living at the property at the time of the service of the first notice, (she subsequently lived elsewhere) and had no explanation as to why she did not receive it other than to suggest that it had perhaps been delivered to the wrong address.

The tribunal's decision

17. The tribunal determines that the Applicant complied with the statutory consultation procedure.

Reasons for the tribunal's decision

18. The Applicant gave evidence that it had served the notice by post. The presumption therefore is that the notice was served unless the Respondent provides evidence to the contrary. The Respondent has no explanation as to why she did not receive the notice and therefore the tribunal determines that it was properly served.

The effect of clauses 2.2.1 and 2.2.2 of the lease

19. The Respondent argues that she is not liable to make payment for the works because they fall within the 10 year Structural Defects limitation period pursuant to clause 2.2.2 of her lease.

20. The relevant clause of the lease provides:

> 2.2 The Tenant shall not be required to contribute to the repair of any structural defect in the building unless
>
> 2.2.2 The council or any of its officers or employees become aware of the said defect after a period of more than 10 years from the date hereof.

21. The Applicant argues that whilst the works fall within the relevant time period, they do not constitute a remedy of any structural defect to the property. Therefore the clause does not exempt the Respondent from any liability to pay for the works.

22. The Respondent points to a note prepared by the Applicant dated March 17, 1989, in which defective window frames are listed in handwriting under a heading 'structural defects'. The same document

also notes 'Window renewal/repair' in handwriting under the heading Notification of Improvements, with the tenant's likely contribution assessed at £5,900. Other documentation received in connection with the s.125 notice, dated 15 April 1999, and prepared at the time of her purchase under the Right to Buy did not list the windows as structurally defective, but listed possible windows renewal as improvements at an estimated cost to the tenant of £4,000.

The tribunal's decision

23. The tribunal determines that clause 2.22 does not limit the liability of the Respondent in this case.

Reasons for the tribunal's decision

24. The status of the note from the Applicant listing the defective windows as structural defects is very unclear. It is handwritten, and unlikely to have been written with any knowledge of the legal implications. No-one could provide any explanation as to the provenance of the document.

25. The later documents, which relate to the Respondent's actual purchase, do not record the windows as structurally defective.

26. Moreover the term 'structural defects' has a specific legal meaning. Works improving the windows are not legally works remedying structural defects.

Whether the Respondent's contribution is limited to £4000

27. The Respondent's argument is that she was served with a notice under s.125 of the Act at the time of her completion of the purchase of the lease. This gave the Respondent notice that the Council may carry out repairs and improvements during a period of five years from completion and gives estimated costs for those repairs and improvements. The possible repair works included a sum for window renewal which gave an estimated total cost of £60,000 and a unit cost of £4000. She therefore considers that her liability is limited to £4000.

28. The Applicant argues that as notice of the works was given outside of the period covered by the s.125 notice, the limit of £4000 does not apply.

29. The Respondent replies that it was the intention of the Applicant to do the works within five years of her purchase. She should not have to pay extra because the Applicant chose to carry out works to other blocks before Gye House, thus delaying work to her own property.

The tribunal's decision

30. The tribunal determines that the Respondent is not protected by the s.125 notice.

Reasons for the tribunal's decision

31. The works were not carried out during the period of protection offered by the s.125 notice.

The quality of the works

32. The Respondent has a number of complaints relating to the quality of works carried out to the property.

33. First she was very disappointed that the windows which were installed were not UPVC but timber framed. She had understood they were to be UPVC, Lambeth changed its mind and did not consult with the lessees about this.

34. She considered that the windows were not effective in insulating the property. She believes that the flat has got colder and noisier since they were installed. She pointed out that the window in the bedroom blows open in strong wind.

35. The Applicant explained that the Respondent took a policy decision to use timber window frames based upon its own Sustainable Construction Policy. As freeholder it was entitled to do this.

36. It found it difficult to believe that the windows had been ineffective and noted that the Respondent had produced no evidence to this effect other than her own feelings about the installation.

37. It noted the problem of the window blowing open was due to an ineffective window catch. It said that this could easily be replaced at very little cost.

38. The Respondent also complained that the works had been poorly executed and/or not completed. She pointed to a crack to the window adjoining the front door, the crack to the wall to the rear of the property, the filled in hole to her kitchen wall, and the failure to connect the extractor fan in the bathroom. She considered it very poor practice that Lambeth had failed to inspect the works at completion.

39. The Applicant responded by arguing that, as the Respondent had not been living in the property at the time of the works, she was unable to provide evidence that the broken window at the front door of the

property was caused by the contractors, or indeed that the cracked wall was their responsibility.

40. The Applicant argued that the lease precluded it from connecting the extractor fan as such works were the lessee's responsibility.

41. The Applicant pointed out that it would have inspected the works if the Respondent had made complaints and made an appointment for them to see the works. It noted that the Respondent's complaints did not come to light until it issued proceedings.

The tribunal's decision

42. The tribunal determines to reduce the sum demanded in connection with the major works by £2000.

Reasons for the tribunal's decision

43. The Respondent was being charged a great deal of money for works to be carried out to her property. She was entitled to a good service. The Applicant was not able to give direct evidence of a handover of the works to the lessee, or of letters requesting access so that the works could be inspected. There was certainly evidence in the property of problems with the execution and completion of the works.

44. The tribunal is not persuaded that it was not the responsibility of the Applicant to complete the installation of the extractor fan. It had decided to install windows that required extractor fans. It is unreasonable to expect lessees to complete work that had been instigated by the freeholder by relying on provisions in the lease which relate to a division of responsibilities between the parties emanating from quite difference circumstances.

45. The Applicant gave evidence that remedying the defects would cost around £1500. The Respondent was not satisfied that this was sufficient. Drawing on the expertise of the tribunal it determined that a sum of £2000 would more adequately reflect the costs it anticipated that the Respondent would incur in remedying the defects and completing the works.

The reasonableness of the charges

46. The Respondent considered that the costs of the works were unreasonable. She obtained an estimate from Kingseal Windows Ltd for the replacement of the windows and door with double glazed UPVC windows dated 1st November 2004. At that time Kingseal estimated that the costs would be £5822 plus VAT.

47. As part of these proceedings the Respondent obtained a further estimate from Kingseal. This indicated that the total contract price would be £8770.80.

48. The Applicant points to the fact that the Kingseal estimates are not like for like. They make no reference to the reglazing costs of the common areas, and are for UPVC windows. Having said that, the Applicant also notes that the costs of the window installation actually carried out did not differ markedly from the later Kingseal estimate.

The tribunal's decision

49. The tribunal determines that the amount charged was reasonable.

Reasons for the tribunal's decision

50. Drawing on the expertise of the tribunal it considers that the costs of this contract fall within a reasonable band of costs for window replacement and associated works, bearing in mind the additional costs involved when the freeholder is a local authority carrying out large scale programmes.

51. The Respondent has not provided any compelling evidence to the contrary.

Application under s.20C and refund of fees

52. At the hearing, the Respondent applied for an order under section 20C of the 1985 Act. Having considered the terms of the lease, the tribunal considered that there was no term within the lease which entitled the Applicant to claim its legal costs in connection with the tribunal proceedings.

53. The Applicant also asked for the tribunal to make a determination in connection with the interest it is owed on the monies, pointing to the term of the lease. The tribunal considers that the appropriate forum for the Applicant to pursue its claim for interest is the county court.

54. In addition Counsel applied for the Tribunal to exercise its powers under its procedural rules to award the Applicant its costs in connection with the Tribunal proceedings.

55. The basis of the application was that the Applicant considered that the Respondent had behaved unreasonably in her conduct of the proceedings. The Applicant had been prepared to mediate with the Respondent following the Case Management Conference (CMC); it had mediated successfully with another respondent, it had made an offer of

£1500 at the beginning of the hearing on March 17 which the Respondent had rejected, the Tribunal itself had made it clear that the Respondent should consider settling as it was not persuaded of her legal arguments in connection with the lease, the Applicant had made a further offer to settle in a letter to the Respondent during the adjournment.

56. The Respondent said that she had understood from the CMC that the Tribunal considered the case had progressed too far for mediation to be successful. She consider that the offers made by the Applicant were always accompanied by threats of serious consequences if she did not agree, she was adamant that she stood by her arguments in connection with the terms of the lease and the s.125 agreement.

57. The decision of the Tribunal is that it does not award the Applicant its costs in connection with the tribunal proceedings.

58. The reasons for its determination are

(i) The starting point is that parties to the tribunal bear their own costs unless there is provision in the lease for the freeholder to recover its costs or a party has behaved unreasonably in its conduct of the hearing. The tribunal considers that it should be slow to decide that an unrepresented party has behaved unreasonably.

(ii) The tribunal has considered the directions issued following the CMC and considers that for a lay person there was some ambiguity. The failure of the Respondent to accept the offer of mediation subsequent to the CMC was a result of a failure of understanding or a misinterpretation of the directions rather than unreasonable conduct.

(iii) It is understandable that the Respondent rejected the offer made before the commencement of the hearing when the Applicant was represented by Counsel and there were two witnesses for the Applicant present and she had no legal representation.

(iv) The failure to understand and act upon the indication from the Tribunal that, in its opinion, having heard evidence to that point, her case was not necessarily persuasive may have been misguided but the Tribunal does not consider that it was unreasonable, particularly as she was

unrepresented. The Tribunal may have communicated in a way which would be understood by those familiar with litigation, but its words could easily have been misinterpreted or misunderstood by a lay person.

(v) The Tribunal consider that there is a high bar to a costs order, particularly when a party is unrepresented. The Respondent misinterpreted suggestions from the Applicant and from the Tribunal in connection with pursuing possibilities of settling. Whilst this is unfortunate, it is not the equivalent of acting unreasonably.

(vi) The tribunal notes that the Applicant is entitled to costs in connection with its county court proceedings.

The next steps

59. The tribunal has no jurisdiction over ground rent or county court costs. The Tribunal notes that the Applicant asked for interest under the lease. It notes that the Applicant also asked for interest at the County Court. In the opinion of the Tribunal the matter of interest is better pursued at the Count. This matter should now be returned to the County Court.

Name: Dr H Carr **Date:** 25th April 2014

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 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) the appropriate 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 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

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.

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 the appropriate 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 the appropriate 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).