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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BK/LVL/2013/0010**
Property	:	**71A Clifton Hill, London NW8 0JN**
Applicants	:	**Mr H And Mrs E Fisher**
Representatives	:	**In person**
Respondent	:	**71 Clifton Hill Limited**
Representative	:	**Dr M Rendel, sole director of Respondent company**
Type of Application	:	**For the determination of the liability to pay a service charge**
Also present	:	**Mrs Young-Taylor of Granvilles, managing agents for Respondent**
Tribunal Member	:	**Judge P Korn**
Date and venue of Hearing	:	**12th March 2014 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**9th April 2014**

DECISION

Decisions of the tribunal

(1) The tribunal determines that:-

- the Applicants' share of the cost of the repairs to the hall ceiling be reduced by £15.00;
- the Applicants' share of the managing agent's fees be reduced by £191.25;
- the Applicants' share of the contribution to the contingency fund be reduced by £10.00.

(2) The Applicants withdrew their challenge to the cost of installation of new boiler, basin and water heater in Dr Rendel's flat during the course of the hearing and therefore this issue no longer falls to be determined by the tribunal.

(3) The tribunal determines that the other service charges which have been challenged by the Applicants are fully payable.

(4) The tribunal hereby makes an order pursuant to section 20C of the Landlord and Tenant Act 1985 that the Respondent may not add to the service charge more than 50% of the reasonable costs incurred by it in connection with these proceedings.

(5) The tribunal declines to order the Respondent to refund to the Applicants the application fee and the hearing fee.

The application

1. The Applicants seek a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("**the 1985 Act**") as to the reasonableness and payability of certain service charges charged to the Respondent.

2. The relevant statutory provisions are set out in the Appendix to this decision. The Applicants' lease ("**the Lease**") is dated 2nd November 1959 and was originally made between Clare Sheppard (1) and Llewellyn Williams Gardner and Marylyn Gardner (2). The Respondent is the current landlord.

Disputed issues

3. At the hearing Mr Fisher for the Applicants stated that the issues in dispute were as follows:-

- cost of repairs to hall ceiling (the Applicants' share of the total cost of £500.00);

- cost of repairs to the interior of Dr Rendel's own flat (the Applicants' share of the total cost of £1,010.00);

- managing agent's fees for the major works (the Applicants' share of £1,530 inclusive of VAT);

- incorrect deduction from contingency fund (the Applicants' share of the total cost of £375.00);

- cost of installation of new boiler, basin and water heater in Dr Rendell's own flat; and

- cost of survey carried out in December 2008 (the Applicants' share of the total cost of £920.00).

He confirmed in particular that the cleaning charges – which formed part of the original application – were no longer being disputed.

Applicants' case and Respondent's response on the disputed issues

Repairs to hall ceiling

4. The Applicants' position was that they believed that these repairs were necessitated by water ingress and that the cost should have been claimed under the building insurance policy, in which case the Applicants would only have needed to pay their share of the excess. In written submissions the Applicants also stated that no repairs had been done for more than twelve years, "which negligence could well be the reason for the necessity for these works".

5. In addition, the Applicants argued that they had been refused access to the interior of the main building by the Respondent and therefore should not be expected to contribute towards the cost of maintenance of the hall ceiling.

6. In response, Dr Rendel said that the total cost of the repair of the hall ceiling was £500.00 and the excess on the building insurance policy was £250.00, and therefore it would not have been sensible to make an insurance claim as this would probably have increased future premiums.

7. In written submissions Dr Rendel stated that the repairs were required due to general wear and tear, not due to the Respondent's neglect over

the past twelve years as alleged by the Applicants. On the specific issue of water ingress, Dr Rendel stated that the configuration of the roofs presented particular problems when faced with adverse weather such as heavy rain.

Repairs to the interior of Dr Rendel's flat

8. The Applicants' understanding was that this work too was necessitated by water ingress. Again they considered that the cost should have been claimed under the building insurance policy. In the alternative, as the work done was to the interior, the Applicants did not consider that this work should form part of the service charge. Further in the alternative, they considered that the cause of the damage was the Respondent's negligent failure to maintain the relevant part of the building and that the cost should be borne by the Respondent itself.

9. In response, the Respondent said that the work concerned involved redecoration to the interior of Dr Rendel's flat, the need for which arose as a result of external defects, specifically a problem with the roof. In Dr Rendel's view the cost should be covered by the service charge because the source of the damage was external. Dr Rendel referred the tribunal to the Specification of Works dated 14th February 2013 although she accepted that there was nothing in this Specification which specifically demonstrated that the problem was caused by an external source.

10. Dr Rendel did not believe that the work could have been paid for through the building insurance as this was a long-running wear and tear issue and there was, in her view, no specific unforeseen event which constituted an insured risk.

Managing agent's fees for major works

11. Mr Fisher referred the tribunal to an undated letter in the hearing bundle from Russell Sioan of Granvilles Block Management to Mr Fisher in which he stated (amongst other things): "Fees will be 10% of Mr Yellops works costs". In his view this meant that the total professional fees would be 10% of the cost of the works.

12. However, the total professional fees were in fact 12.5% of the works costs. This was because the surveyor's fees were 7.5% of the works costs and the managing agent's fees were 5% of the works costs. He considered the managing agent's fees exorbitant for the amount of work done.

13. Mr Fisher also referred to a note prepared by Granvilles of a meeting held on 8th July 2013 attended by the Applicants, the leaseholder of Flat

B, Dr Rendel and three representatives of Granvilles which he said was silent on the subject of the escalation of fees.

14. Dr Rendel and Mrs Young-Taylor said that the Respondent had a written agreement with the managing agent that it would charge 10% of the cost of the works if it was solely in charge of the process. If an external surveyor was used then that surveyor could charge 10% and the managing agent would charge a further 2.5% on top for generally overseeing the process. The original intention was for the managing agent to manage the works without using external surveyors but it was later decided that it would be more sensible for it to split the responsibilities with an external surveyor.

15. Dr Rendel said that it was indeed the case that Granvilles had charged 5% rather than 2.5% in this case. However, the fee was considered reasonable and also the cost to leaseholders was not a full 2.5% more than it would have been if the total professional charges had been limited to 12.5%. This was because the external surveyor was not legally obliged to register for VAT and therefore his fees did not incur VAT which made this element of the fees cheaper for leaseholders.

Deduction from contingency fund

16. Mr Fisher said that it had been decided that the doorway into the hall from Flat B needed to be blocked in. The leaseholder of Flat B paid his own builder to carry out the work and he was then reimbursed from the service charge contingency fund. In Mr Fisher's view, this amount should not have been treated as a service charge item as the Applicants had no access to the main building of which the hall formed part.

17. In response, Dr Rendel referred the tribunal to a decision of a previous tribunal in 2010 in the case of *Mrs EA Fisher v Dr MN Rendel (Ref: LON/00BK/LSC/2010/0013)* which also related to the Property and in which the applicant was one of the current Applicants and the respondent was the sole director of the current Respondent. In the 2010 case, the tribunal determined that Mrs Fisher was required to contribute to communal cleaning costs even where she did not directly utilise the relevant parts of the building, namely the front entrance door, hall and stairs.

Installation of new boiler, basin and water heater in Dr Rendel's flat

18. Mr Fisher said that these items were all in Dr Rendel's flat and therefore the cost was not a service charge item.

19. In response, Dr Rendel said that these works were carried out in 2002/03 and that the cost of the works had never been charged to leaseholders as part of the service charge. She agreed that she would

write to the Applicants, with a copy to the tribunal, stating that if it later transpired that the cost had accidentally been included in the service charge the Respondent would refund the Applicants' share to them. On this basis the Applicants agreed to withdraw their challenge to this item.

Survey in December 2008

20. Mr Fisher said that the survey was undertaken but then no work was carried out, and so the survey was a waste of money.

21. Dr Rendel said that the survey was carried out because it seemed sensible to check whether there were any works which urgently needed to be carried out. The survey did not reveal any need for urgent repairs, nor any particular need for non-urgent repairs, and so no works were carried out.

Access to main building

22. In written submissions the Applicants stated that the lock on the front door to the main building was changed (for security reasons) at the beginning of May 2013 but that the Respondent refused, and continues to refuse, to let them have a key to the new lock.

23. When asked about the access issue at the hearing Dr Rendel said that she had refused to supply a key to the main building because the Applicants had refused to supply her with a key to their side gate which she would find it useful to have for practical and security-related reasons. In response Mr Fisher said that the Lease did not entitle the landlord to have permanent access through the side gate.

Other points raised at hearing and in written submissions

24. Mr Fisher said that the Applicants had been careful to pay all sums that they considered to be properly due. He also said that the Respondent had ignored a large proportion of the Applicants' letters over the years. Dr Rendel did not accept that this was fair comment and added that in any event there had been an unreasonably high number of letters of complaint from the Applicants.

25. In written submissions Dr Rendel stated that relations with the Applicants were difficult and that the Applicants had obstructed all of the Respondent's attempts to put the finances of the building on a viable footing. She also stated that the Respondent had not neglected its repairing obligations and that it had carried out repairs in 2002 and intended to do so again in 2009 but was prevented from doing so by financial constraints.

26. The hearing bundle contained a large amount of other material not specifically referred to in this determination but which has been noted by the tribunal to the extent that it is relevant to the issues in dispute.

Tribunal's analysis and determinations

General comments

27. It was apparent from the hearing and from the contents of the hearing bundle that the dispute between the parties has been a long-running and bitter one. Much of the language in the copy correspondence contained in the hearing bundle is highly emotive, and it is clear that the Applicants in particular feel very strongly about their grievances. However, both parties need to appreciate that the tribunal has to base its determination on the evidence, and in particular on the strength and relevance of the arguments on the specific issues in dispute.

Repairs to hall ceiling

28. The Applicants' evidence that the need for these repairs resulted from the Respondent's negligence is very thin. Effectively it amounts to no more than an assertion, and more solid evidence would be needed to persuade the tribunal to make a finding that the need for the repairs resulted from the Respondent's negligence.

29. As regards the proposition that the cost should have been claimed through the insurance, the Applicants have not provided any real evidence to demonstrate that an insurance claim would have been successful, and in any event the Respondent makes a persuasive case that in the light of the relatively low cost of the repairs and the existence of an excess on the insurance policy it was reasonable not to seek to put the cost through the insurance.

30. On the issue of lack of access to the main part of the building, a point that also arises in respect of the deduction from the contingency fund, the tribunal notes the decision of a previous tribunal in 2010 referred to by Dr Rendel. Whilst this tribunal is not bound by previous tribunal decisions, those decisions are of highly persuasive value and should not be departed from without good reason. The relevant part of the previous tribunal's decision is that Mrs Fisher was required to contribute to communal cleaning costs even where she did not directly utilise the relevant parts of the building, and Dr Rendel invites the tribunal to extrapolate and to reach the same conclusion in relation to the repair of the hall ceiling.

31. In principle the tribunal accepts what appears to be the rationale for the previous decision on this point, namely that the Lease requires the leaseholder to pay a service charge in respect of various items,

including the repair and cleaning of the common parts, and there is no exclusion from this responsibility based on which parts of the building the Applicants actually use. However, that decision was made in 2010, which was before the decision on the part of the Respondent in May 2013 to refuse to allow the Applicants to have a key to the new lock for the main building. The tribunal considers that the Respondent's justification for refusing to provide the Applicants with a key appears very weak, and this refusal would seem to amount to excluding the Applicants from the main part of the building. In principle, it does not seem right that a leaseholder can be expected to pay a service charge in respect of a facility that it is actively prevented by the landlord from accessing for no good reason.

32. However, the Applicants have only been excluded from the main building since May 2013 and therefore they have had the ability to access it at all times prior to that. Therefore, it seems to the tribunal that it is only appropriate to make a nominal deduction to reflect the lack of access since May 2013 and the tribunal determines that the Applicants' £125.00 share of this charge should be reduced by £15.00.

Repairs to the interior of Dr Rendel's flat

33. Again, the Applicants' evidence that the need for these repairs resulted from the Respondent's negligence is very thin. Again, the Applicants have not provided any real evidence to demonstrate that an insurance claim would have been successful and, although the Respondent's evidence on this point is not particularly strong either, the tribunal accepts on the balance of probabilities that the cost was not recoverable through insurance.

34. As regards the cause of the damage, the tribunal prefers the Respondent's evidence and accepts on the balance of probabilities that the need for the internal redecoration works was a direct consequence of a problem with the roof and therefore considers that it is right that it should be recoverable through the service charge. The Applicants' lack of access to the main building is not considered relevant to this particular issue, and in any event it was not argued by the Applicants. There is no challenge to the reasonableness of the cost itself, and accordingly the tribunal determines that this charge is recoverable in full.

Managing agents' fees for major works

35. Mr Fisher referred the tribunal to the contents of an undated letter from Granvilles stating that "Fees will be 10% of Mr Yellops works costs" but he was unable to refer the tribunal to the letter to which this undated letter was a response, and in the tribunal's view it is not clear on the face of that letter what was meant by this statement. Even if it

had been clear, it does not necessarily follow that the Respondent would have been bound by it.

36. However, the Respondent's evidence indicates that its standard procedure – where an external surveyor is appointed – is to agree to pay to its managing agent 2.5% of the cost of the works on top of the external surveyor's fees, and it is therefore reasonable to assume that in principle both the Respondent and the managing agent consider this to be a reasonable fee for generally overseeing the project to the extent necessary.

37. In this case the Respondent agreed to pay 5%, and it seems to the tribunal on the basis of the written and oral evidence provided that part of the justification for this doubling of the normal fee was the fact that the external surveyor was not charging VAT and therefore the leaseholders would not in practice be paying a full 2.5% more. In the tribunal's view this is not a reasonable justification; either 5% is a reasonable fee for the managing agent's role or it is not.

38. It was open to the Respondent to argue – and to offer evidence supporting the argument – that there was an unusually large amount of work for the managing agent to do in this particular case, but the Respondent has not argued this. In the circumstances, including the fact that the Applicants have argued that there was actually very little work for the managing agent to do, the tribunal prefers the Applicants' evidence on this point and considers that the managing agent's fees should be limited to 2.5% of the cost of the works. Accordingly, the tribunal determines that the Applicants' £382.50 share of this charge (inclusive of VAT) should be reduced by £191.25.

Deduction from contingency fund

39. The Applicants' sole argument on this issue is the fact that they have been excluded from the main building since May 2013. Again, in principle, it does not seem right that a leaseholder can be expected to pay a service charge in respect of a part of the building that it is actively prevented by the landlord from accessing for no good reason.

40. Again, as the Applicants have only been excluded from the main building since May 2013 they have had the ability to access it at all times prior to that. Therefore, it seems to the tribunal that it is only appropriate to make a nominal deduction to reflect the lack of access since May 2013 and the tribunal determines that the Applicants' £93.75 share of this deduction from contingency fund should be reduced by £10.00.

Installation of new boiler, basin and water heater in Dr Rendel's flat

41. The Applicants have withdrawn their challenge to these items. The Respondent has agreed to write to the Applicants, with a copy to the tribunal, stating that if it later transpires that the cost was accidentally included in the service charge the Respondent will refund the Applicants' share to them.

Survey in December 2008

42. The Applicants have argued that the survey was a waste of money on the basis that it did not lead to the carrying out of any works. Dr Rendel has argued that it was sensible to carry out the survey and that the reason why no works were carried out is that the survey report did not advise that there were any works that needed to be carried out at that stage. In principle Dr Rendel's evidence on this point is plausible and reasonable. There is a possible question as to why her evidence indicates a need (for which there were insufficient funds) to carry out works in 2009, but in the absence of a sharper and/or more detailed challenge from the Applicants the tribunal determines on the basis of the available evidence that this charge is payable in full.

Cost Applications

43. The Applicants applied for an order under section 20C of the 1985 Act that the Respondent should not be entitled to add its costs incurred in connection with these proceedings to the service charge. The Applicants have partially succeeded on three issues, although the reduction achieved by them on two of those issues has been nominal. The tribunal has some concerns about the highly emotive way in which the Applicants have approached these proceedings in their written submissions. Also, the length of, and lack of structure to, some of these submissions may have made it harder for the Respondent to respond than it should have been. Nevertheless, the tribunal appreciates that relations between the parties has been poor for some time and that the Applicants are elderly litigants in person (as is Dr Rendel).

44. In the circumstances, the tribunal considers it appropriate to make a partial section 20C order, and it hereby orders that the Respondent may not add to the service charge more than 50% of the reasonable costs incurred by it in connection with these proceedings. For the avoidance of doubt, this does not constitute permission for the Respondent to recover such costs if the Lease itself does not allow for these costs to be recovered.

45. The Applicants also applied for an order that the Respondent be required to reimburse their application and hearing fees pursuant to paragraph 13(2) of The Tribunal Procedure (First-tier Tribunal)

(Property Chamber) Rules 2013. In view of the fact that the Applicants have only achieved significant success on one of the disputed issues the tribunal does not consider that it would be appropriate to make such an order and accordingly it declines to order the Respondent to reimburse the Applicants' application and hearing fees.

46. There were no other cost applications.

Name: Judge P Korn **Date:** 9th 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.