1244

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BE/LSC/2017/0152**
Property	:	**Flat 16 Aylesford House, Long Lane, London SE1 4BL**
Applicant	:	**London Borough of Southwark**
Representative	:	**Mr Greg Brutton, in-house enforcement officer**
Respondent	:	**Mr Hitan Zaveri**
Representative	:	**In person**
Also present	:	**Mr Joe Sheehy (Applicant's Capital Works Officer) and Mr Martin Gross Smith (Applicant's contracted surveyor)**
Type of Application	:	**For the determination of the liability to pay a service charge**
Tribunal Members	:	**Judge P Korn** **Miss M Krisko FRICS**
Date and venue of Hearing	:	**12th July 2017 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**31st July 2017**

DECISION

Decisions of the Tribunal

(1) The disputed estimated service charge is reduced from £1,299.28 to £707.46, and therefore the balance payable by the Respondent (his having already paid £493.38) is £214.08.

(2) The amount payable by the Respondent pursuant to the Lease by way of interest on the above unpaid service charge is £23.48 up to 12th July 2017.

(3) The case is transferred back to the County Court for final disposal. For the avoidance of doubt, nothing in this determination is intended to fetter the discretion of the County Court in relation to County Court interest or County Court fees, and it will also be for the County Court to determine what further interest (if any) is payable under the Lease in respect of the period from 13th July 2017 to the date of final disposal.

Introduction

1. The Applicant seeks and, following a transfer from the County Court, the Tribunal is required to make a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("**the 1985 Act**") as to the payability of certain service charges levied by the Applicant.

2. The amount at issue is £805.90, which represents the sum allegedly outstanding in respect of certain major works, plus interest on that sum pursuant to the Lease. The Order issued on 28th October 2015 by District Judge Zimmels (Claim Number B39YJ994), sitting in Lambeth County Court, simply states *"Transfer Out to Law (sic) Tier Property (Chamber) Formerly LVT"*. It follows that the County Court has transferred to the Tribunal all aspects of the claim falling within the Tribunal's jurisdiction, these being the payability of (a) the service charge and (b) the interest claimed by the Applicant under the Lease.

3. The works in question comprise works to the front entrance doors to the building and associated works, and the works have been completed. The service charge claim is for the unpaid balance of the **estimated** service charges of £1,299.28 in respect of the aforementioned major works, as the Applicant did not have the final figures when the claim was issued. As noted above, the unpaid balance is stated to be £805.90.

4. The relevant statutory provisions are set out in the Appendix to this decision. The Respondent's lease ("**the Lease**") is dated 15th December 1997 and was originally made between the Applicant (1) and George Tomlinson (2). The Respondent is the current leaseholder.

Respondent's position

5. In written submissions, the Respondent states that the work was carried out to an unacceptable standard and he lists some specific concerns, including in relation to painting of doors. He has also provided some colour copy photographs. He questions the reasonableness of the cost and states that a PVCu framed door could be purchased from B&Q for £299 and that, according to an independent builder, the installation cost should be less than £100.

6. At the hearing, he confirmed that he felt that the work was sub-standard, and he also believed that the Applicant had been poor at communicating with leaseholders. The Applicant had taken a minimalist approach to the work and had charged an unreasonable amount. In his view, the doors on the flats in his estate were of a poorer quality than those on neighbouring estates, but he did not have any documentary or other evidence to support this point.

Applicant's response

7. In written submissions, the Applicant states that although the estimated cost was £1,299.28 the actual cost has turned out to be only £707.46, and the reconciliation will be carried out by way of credit adjustment. Therefore, the ultimate cost to the Applicant will be the lower figure of £707.46.

8. As regards the method of apportioning the total cost between leaseholders, the Applicant refers the Tribunal to paragraph 6(2) of the Third Schedule to the Lease which states that it *"may adopt any reasonable method of ascertaining the said proportion [i.e. the service charge proportion payable by the particular leaseholder] and may adopt different methods in relation to different items of costs and expenses"*. In this case it decided to apportion the cost equally between all 45 flats.

9. As regards the standard of work, the Applicant notes the photographic evidence provided by the Respondent but questions its relevance. In addition, none of the photographs is properly labelled or date-stamped. Following completion of the works the Applicant's professional team carried out two inspections, the latter being carried out by a project surveyor with no prior involvement in the works, and the Applicant's team concluded that the standard of works was satisfactory.

10. As regards the cost, the Applicant notes the Respondent's B&Q quote but comments that it makes no reference to the need for the doors to be fire resistant, which was the main purpose of the exercise. As to whether the Respondent could have arranged for his door to be installed more cheaply, the Applicant submits that this is irrelevant as

the Applicant was entitled to use qualified personnel and any price comparison needs to be on a 'like for like' basis.

11. The Applicant also refers the Tribunal to certain previous decisions, including a decision by the First-tier Tribunal in a case with similar facts, this being the case of *London Borough of Southwark v Mr R Furlong (Ref: LON/00BE/LSC/2013/0305).*

12. At the hearing, Mr Brutton for the Applicant said that the B&Q quote in the hearing bundle makes no reference to fire safety. He also referred the Tribunal to email correspondence confirming that the works were signed off by the contractor and inspected and found to be of a reasonable standard. As regards the issue raised by the Respondent in written submissions in relation to decoration, Mr Brutton referred the Tribunal to an email from the Applicant to the Respondent stating that he had been advised on a number of occasions that the work done did not include any decoration of the doors.

13. Whilst the Applicant accepted that the Respondent was not happy with the position, Mr Brutton denied that communication had been poor and said that the Respondent's case largely relied on anecdotal evidence.

14. In response to a question from the Tribunal, Mr Brutton said that the estimated charge was based on the worst-case scenario of all doors needing to be replaced and that no inspection had taken place prior to the estimate being sent out.

Tribunal's analysis and determination

The cost of the works

15. It is accepted by the Respondent (a) that the relevant works were carried out, (b) that the Applicant went through a full and proper consultation process and (c) that in principle the Applicant is entitled under the terms of the Lease to charge the Respondent for his share of the cost of the works (subject to the question of whether the amount charged was reasonable).

16. The claim relates to estimated costs, not actual costs. Under section 19(2) of the 1985 Act, *"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".* The estimated cost need only be a reasonable estimate, and it is in the nature of an estimate that it is made before the relevant works (or services) have been carried out, or at least before they have been completed, otherwise it would not be an

estimate. The quality of the works themselves is therefore irrelevant to the question of the reasonableness or otherwise of the estimated charge. It is relevant to the actual charge, and any leaseholder aggrieved with the actual charge can challenge the actual charge separately (provided that such a challenge does not, for example, constitute an abuse of process).

17. The quality of the works is therefore not relevant to the reasonableness or otherwise of the estimated charge. In any event, the Respondent's evidence on quality of work is weak. His photographic evidence is unlabelled and undated and is also not comprehensive enough to demonstrate that there were general problems with the quality of work. Subject to the point made below, his other concerns have in our view been answered sufficiently well by the Applicant such that they do not constitute evidence of sub-standard work or of the Applicant ignoring his concerns.

18. At the hearing, the Tribunal asked the Applicant's representatives about the contents of an internal email from Robert Barr to Tony Hunter (both employees of the Applicant) dated 29th February 2012. The email related to the Respondent's complaints about experiencing excessive draughts through his front door after the works had been completed. In reply, the Applicant's representatives expressed the view that the gaps of which the Respondent had complained were not a problem for fire safety purposes. Whilst we are not convinced that these gaps pose no fire safety problem, the Applicant's overall evidence on the quality of the works is more persuasive than that of the Respondent and, as noted above, the standard of work is not strictly relevant to the reasonableness of the estimate.

19. As regards cost, the Respondent's comparable evidence is partly anecdotal and is to that extent not very reliable. Even his B&Q quote, whilst more useful than purely anecdotal evidence, is insufficiently detailed for us to have any confidence that it was obtained on a 'like for like' basis.

20. However, we note that the estimated charge which forms the basis of the Applicant's claim was based on the worst-case scenario of all doors needing to be replaced and that no inspection took place prior to the estimate being sent out. The Applicant commissioned Turner & Townsend Project Management to carry out a Fire Risk Assessment in June 2010, and the Assessment Report is in the hearing bundle. In carrying out the works which are the subject of this claim the Applicant relied on section 18.9 of the report to justify carrying out the works. However, in that same small section of the report the Applicant is advised *"to inspect the fire rating of [the] flat doors and replace any that are not of fire rated construction ...".*

21. Whilst a subsequent inspection did take place, the Applicant on its own evidence did not inspect any doors before producing an estimate and requiring leaseholders to pay based on that estimate. The quality of the estimate therefore had real financial consequences for leaseholders, which is why estimated charges are only payable to the extent that they are reasonable. In this case, not only was the estimate seemingly based on a complete guess as to the amount of work that would be needed but it was – as the Applicant admits – based on the worst-case scenario. It was therefore not a reasonable estimate to make, given that it was open to the Applicant to carry out an inspection in order to ascertain the extent of the work required. As to what level of inspection would have been reasonable, this could be the subject of a legitimate debate. On a cost/benefit analysis, one might be able to argue – for example – that just a representative sample of doors should have been inspected and that an estimate could have been extrapolated from that exercise. We do not, though, accept that a reasonable cost estimate could have been made in this case without an inspection.

22. The Applicant in written submissions refers to certain decisions of the Court of Appeal and the Upper Tribunal, but none of these decisions is in our view authority for the proposition that one can make a reasonable estimate of the cost of works of this nature without carrying out an inspection.

23. As regards the First-tier Tribunal case of *London Borough of Southwark v Mr R Furlong*, we note that this relates to another flat in the Respondent's block and that it also relates to the reasonableness of the estimated cost of these same works. However, in that case the leaseholder did not attend the hearing, was not represented and made no written submissions on the estimated charges. In any event, we are not bound by previous First-tier Tribunal decisions and, on the basis of the information that we have (for the reasons explained above), we do not consider that the Applicant acted reasonably in putting together its estimate.

24. The actual cost per flat is now known to be £707.46. Based on our own knowledge and experience and considering the amount of work done, we accept that the actual charge is a reasonable one, albeit one that is arguably slightly towards the higher end of the band of reasonableness. The actual cost reflects the amount of work that was actually needed, and in our view it is the best evidence available to us on the facts of this case as to what would have been a reasonable estimate. Indeed, had the Applicant carried out an inspection it might well have produced an estimate similar to the actual cost.

25. Therefore, the estimated charge of £1,299.28 per flat was an unreasonable one, and in our view a reasonable estimated charge would have been £707.46 per flat. In its claim form the Applicant states that of the £1,299.28 charged the amount of £805.90 remains outstanding,

and it therefore follows that the Respondent has so far paid £493.38. The balance of the estimated charge actually payable by the Respondent is therefore reduced to £707.46 less £493.38, which amounts to £214.08.

The interest charges

26. Under paragraph 5 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("**CLARA**") an application can be made to a First-tier Tribunal for a determination as to whether an administration charge is payable and, if so, the amount which is payable. By virtue of paragraph 1(1)(c) of Schedule 11 to CLARA, the term "administration charge" includes an amount payable by a tenant in respect of a failure by the tenant to make a payment by the due date to the landlord.

27. Under clause 2(3)(b) of the Lease *"if any payment of or on account of Service Charge is not made on the due date for payment thereof for any reason including dispute as to the amount properly payable then to pay interest thereon from the due date until the date of payment as well after as before any judgment upon the amount properly payable at 5% above the National Westminster Bank PLC Base Rate prevailing from time to time"*. The claim for interest therefore constitutes an administration charge under paragraph 1(1)(c) of Schedule 11 to CLARA and the First-tier Tribunal has jurisdiction to make a determination following a transfer from the County Court.

written submissions on this issue following the hearing, the Applicant states that it also incurred a county court fee, a First-tier Tribunal application fee and a First-tier Tribunal hearing fee. The county court fee is a matter for the County Court. As regards the First-tier Tribunal application and hearing fees, the Applicant was specifically asked whether it wished to make any applications for the recovery of any costs or fees and it said that it did not wish to make any such applications. It is too late for the Applicant to change its mind on this point. In any event, it was made clear at the end of the hearing that written submissions were only being invited on the narrow issue of the calculation as to the amount of interest.

29. The Applicant's submissions on the interest calculation are overly complicated, but they do contain a statement as to the contractual interest rate (5.25% for the whole of the relevant period) and a statement as to what amount was outstanding in respect of which period. The Respondent has not challenged the Applicant's analysis, and therefore subject to the question of what was properly payable in respect of the works this analysis can be taken to be agreed in the absence of any clear error, subject to the point made in paragraph 31 below.

30. As can be seen from the wording of clause 2(3)(b) of the Lease, interest is only due upon the amount of service charge (or, in this case, estimated service charge) "properly payable". Based on our determination, the amount of estimated service charge properly payable is £707.46, of which £493.38 had already been paid by the earliest date in respect of which the Applicant is claiming interest (subject to paragraph 31 below), as impliedly confirmed by the Applicant's own breakdown of interest.

31. In relation to the interest of £127.75 claimed by the Applicant in its original Particulars of Claim, the Applicant states in written submissions to the Tribunal simply that *"overall the Applicant claimed contractual interest of £127.75 in the particulars of claim (POCo dated 17 February 2015 (page 174 of bundle)"*. However, the Particulars of Claim contain no clue as to the period in respect of which this sum has been calculated, nor does it state what the principal sum was in respect of which the interest was calculated. The Tribunal invited the Applicant to make written submissions after the hearing in relation to the amount of interest claimed precisely so as to clarify the basis of its calculations. In the absence of any clarification as to the basis for this element of the claim we are forced to reject the claim for interest in respect of the period up to and including 17th February 2015.

32. In its breakdown of interest **after** 17th February 2015, the Applicant states that the sum outstanding for the period 18/02/2015 to 21/03/2017 was £805.90. On the basis of our determination on the main issue, the sum outstanding is the smaller amount of £214.08 as this is the balance due of the amount which was properly payable.

33. No interest is claimed by the Applicant for the period 22/03/2017 to 10/05/2017. As regards the period 11/05/2017 to 12/07/2017, the Applicant states that the sum outstanding was £657.44. This is not challenged by the Respondent, and therefore again the figure simply needs to be corrected to reflect our determination on the main issue. If the sum outstanding, when stated to be £805.90, was in fact £214.08 (based on our determination on the main issue) it should follow that when the sum stated to be outstanding was £657.44 it should in fact have been £65.62.

34. Therefore the amount of interest due to 12th July 2017 is to be calculated as follows:-

Period	Sum outstanding	Number of days	Contractual interest rate	Daily rate	Total interest
18/02/2015 to 21/03/2017	£214.08	762	5.25%	£0.03	£22.86
11/05/2017 to 12/07/2017	£65.62	62	5.25%	£0.01	£0.62
TOTAL PERIOD					**£23.48**

As this case is being transferred back to the County Court for final disposal we will leave it to the County Court to determine the position in relation to interest from the period from 13th July 2017 to the date of final disposal.

Cost Applications

35. The Applicant stated at the end of the hearing that it would not be putting through the service charge any costs incurred by it in connection with these proceedings, and nor would it seek to charge any such costs to the Respondent direct. On that basis, no application was made for a section 20C cost order. No other cost applications were made, and on this point the comments in paragraph 28 above should be noted.

Name: Judge P Korn **Date:** 31st July 2017

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

APPENDIX

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.