(1993

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00BN/LSC/2016/0084**
Property	:	**Apartment 8, 72-76, Newton Street, Manchester M1 1EU**
Applicant	:	**Wentwood RTM Management Company Limited**
Represented by	:	**Shoosmiths LLP**
Respondent	:	**Mr Robert Johnstone**
Type of Application	:	**Landlord and Tenant Act 1985 – s27A**
Tribunal Members	:	**Judge C Wood** **Mr I James**
Date of Decision	:	**5 March 2017**

DECISION

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DECISION

1. The Tribunal determines that the Respondent is liable to pay the amount of £990.22 in respect of the service charge levy for basement works at the Premises.

2. The Respondent's application under section 20C of the Landlord and Tenant Act 1985, ("the Act"), is not granted.

BACKGROUND

3. By an order of the Kingston County Court dated 13 September 2016, the Tribunal was required to make a determination pursuant to section 27A in respect of the amount of £990.22 being a service charge levy for urgent remedial works carried out at the Premises. The amount claimed also included a final notice fee of £90 and an administration charge –legal of £60.

4. Directions dated 15 November 2016 were issued by the Tribunal pursuant to which both parties submitted written evidence. Neither party requested a hearing and the matter was initially considered for determination by the Tribunal on 7 February 2017.

5. Further directions were issued on 8 February 2017 requesting the Applicant to provide further information to the Tribunal of the claims made by the Applicant to seek recovery of the cost of the remedial works from the insurers of the Premises. This information was provided to the Tribunal in a witness statement of Debbie Yarrow dated 2 March 2017.

6. The Tribunal re-convened to consider the further information on 3 March 2017.

LAW

7. Section 18 of the 1985 Act provides:

   (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.

8. Section 19 provides that –

(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 provision 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.

9. Section 27A provides that:

(1) an application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to –

(a) the person by whom it is payable

(b) the person to whom it is payable

(c) the date at or by which it is payable, and

(d) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) .....

(4) No application under subsection (1)...may be made in respect of a matter which –

(a) has been agreed by the tenant......

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

10. In *Veena SA v Cheong* [2003] 1 EGLR 175, Mr. Peter Clarke comprehensively reviewed the authorities at page 182 letters E to L inclusive. He concluded that the word "reasonableness" should be read in its general sense and given a broad common sense meaning [letter K].

EVIDENCE

11. The Applicant's evidence, as set out in the witness statements of Steve Austin dated 6 December 2016 and 9 January 2017, and in the witness statement of Debbie Yarrow dated 2 March 2017, is summarised as follows:

    11.1 following a leak at one of the apartments at the Premises on 20 August 2013, investigations uncovered a large basement area underneath the ground floor apartments and communal area. Failures in the original construction work had allowed a considerable amount of water to seep into this basement area through the brickwork and the damp conditions in the basement had caused/contributed to the dry rot and deterioration in the flooring timbers;

    11.2 it was considered that this constituted a build defect but it became apparent that there was only a 6 years' architect's certificate (which had expired) and not a 10 year NHBC/Zurich warranty;

    11.3 a claim was submitted to the insurers of the Premises on 20 August 2013 but was repudiated on the basis that the damage was caused by a build defect and long-term water ingress rather than a one-off peril and, as such, was not covered by the insurance;

    11.4 two appeals against this decision were submitted to insurers but again these were rejected;

    11.5 as a consequence the Applicant sought recovery of the costs of the remedial works from the leaseholders: reference is made to the relevant provisions of the Respondent's lease dated 18 October 2004, and, specifically, to clauses 7.1, 1.9 and paragraph 1 of the Second Schedule;

    11.6 due to the urgency of the remedial works, a section 20ZA application was made to the Tribunal seeking dispensation from the consultation requirements, which application was granted by the Tribunal's decision dated 7 January 2015;

    11.7 in response to the Respondent's claims that (a) the Applicant failed to respond to the Respondent's queries and (b) that the Applicant failed to consider the legal scope of liability, the Applicant asserts that (i) there is evidence produced to the Tribunal confirming that it had communicated with the Respondent and had provided it with adequate information in response to questions raised; and that (ii) there is no obligation under the terms of the lease for the Applicant to have obtained legal advice on the insurers' repudiation of the claim.

12. The Respondent's evidence, as set out in his witness statement dated 27 December 2016, is summarised as follows:

12.1 that the Applicant's failure to seek legal advice on the insurers' repudiation of the claim for the remedial works to the basement at the Premises was a breach of a duty of care owed by managing agents to their tenants "to explore all avenues in their pursuit of large insurance claims of this nature";

12.2 that the Applicant has failed to fully and adequately communicate with the Respondent in connection with the remedial works and to answer the Respondent's questions regarding recovery of the costs of these works from insurers.

REASONS

13. In making the decision set out in paragraph 1, the Tribunal took into account the following matters:

13.1 it was satisfied that the Applicant had made reasonable efforts to claim for the cost of the remedial works from the insurers;

13.2 that it was reasonable for managing agents, familiar with the making of claims in these circumstances, to assess the legitimacy of the insurers' repudiation of the claim;

13.3 in this case, the Tribunal considered that it was reasonable for the Applicant/its managing agents to regard the stated reasons for repudiation of the claim, namely, that the damage had been caused as a result of a build defect and long-term water ingress, as valid grounds for repudiation of their claim;

13.4 that there is no common law duty of care on the Applicant/their managing agents "to explore all avenues in their pursuit of large insurance claims", and nor was there any requirement under the terms of the lease for the Applicant to seek legal advice on a repudiation of a claim. Where the grounds for repudiation were reasonably to be regarded as valid, it would arguably have been considered unreasonable for the Applicant/its managing agents to have incurred further expenditure on legal costs to confirm this;

13.5 the Tribunal noted that, despite the Respondent having notified the Applicant's managing agents of his change of address on 12 December 2014, their failure to amend their records until March 2015 meant that the Respondent did not receive the initial correspondence regarding the levy and the section 20ZA application. The Tribunal also noted, however, that this correspondence was re-sent to the Respondent as an attachment to the e-mail dated 19 March 2015 from Paul Golds and further information was provided to the Respondent in Mr.Austin's e-mail dated 19 July 2015 to the Respondent's representative which appeared to provide answers to the Respondent's questions regarding the basement works;

14. Having regard to the statement made by the Respondent's representative, Regalty Law, in its letter dated 29 June 2015 to the Applicant's managing agents that: "Our client is happy to pay the amount settled upon conclusion of proving that he is liable for the money", the Tribunal considered this to be an agreement by the Respondent to pay the service charge levy in the sum of £990.22 in accordance with section 27A(4)(a) of the Act;

15. In view of the Tribunal's decision that the Respondent was liable to make payment of the service charge levy of £990.22, the Tribunal did not consider it would be just and equitable to grant the Respondent's application under section 20C of the Act;

16. In the absence of any evidence regarding the final notice fee of £90 and the administration charge – legal of £60, the Tribunal was unable to make any determination as to the reasonableness of these charges. If they had been asked to make such a determination, having regard to their knowledge and experience, they would have considered them to be at a level which was commensurate with similar charges of this kind and would have determined them to be reasonable accordingly.