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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BG/LSC/2017/0345**
Property	:	**70 Rainhill Way, London, E3 3JD**
Applicant	:	**Poplar HARCA**
Representative	:	**Mr Grundy QC of Counsel**
Respondent	:	**Stephen Green**
Representative	:	**Mr Owen, Solicitor**
Type of Application	:	**For the determination of liability to pay a service charges**
Tribunal Members	:	**Judge I Mohabir** **Mr J Barlow FRICS**
Date and venue of Hearing	:	**29 January 2018** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**27 February 2018**

DECISION

Introduction

1. The Applicant commenced proceedings against the Respondent in the County court to recover unpaid service charges in the sum of £20,538.21 together with statutory interest thereon in the sum of £6,037.52 and legal costs in the sum of £960. The Respondent has filed a Defence to the claim.

2. The service charge arrears can be broken down as follows. £19,836.77 relate to the estimated costs of window replacement ("the major works") at the Bow Bridge and Rainhill Estate of which 70 Rainhill Way ("the property") forms part. The demand served on the Respondent in respect of these costs is dated 25 April 2017. The remaining balance of £701.44 relates to outstanding annual service charges that fall within the year ended 25 April 2017.

3. The Applicant is the freehold owner of the block of flats at 44-90 Rainhill Way. The Respondent is the lessee of the property pursuant to a lease dated 18 February 2002 made between the London Borough of Tower Hamlets ("Tower Hamlets") and Norma Green and Stephen Green ("the lease"). The Respondent is now the sole lessee. The Applicant acquired the freehold interest on the block of flats on a stock transfer from Tower Hamlets on 2 March 2007.

4. By an order dated 11 August 2017 in the County Court at Central London, the case was transferred to the Tribunal.

5. In the Tribunal's Directions dated 5 October 2017, the following issues were identified:

   (a) whether the construction of the lease permitted the Applicant to recover the replacement of other windows in the block.
   (b) whether the Respondent's service charge liability was capped at £10,000.

(c) whether the Applicant validly carried out statutory consultation under section 20 of the Landlord and Tenant Act 1985 (as amended) ("the Act") in relation to the major works. However, at the hearing, the Respondent conceded that valid consultation had been carried out by the Applicant and this issue was no longer being pursued by him.

(d) whether the service charges had been correctly apportioned.

6. It should be noted here, that the claim for statutory interest is not a service or administration charge within the meaning of section 18 of the Act or paragraph 1, Part 1 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002. Therefore, the claim for statutory interest remains within the jurisdiction of the County Court and is contingent upon the sum determined to be recoverable by the Tribunal.

7. It should also be noted that the Respondent did not challenge the quantum or reasonableness of the service charge costs claimed by the Applicant.

The Lease

8. Clause 4(4) of the lease contains the lessee's covenant to pay the service charge at the times and manner set out in the Fifth Schedule. In the Schedule, the recoverable service charge expenditure is defined generally as those costs incurred by the lessor in the discharge of its obligations under clause 5(5)(p) together with any other costs and expenses reasonably and properly incurred in connection with the building.

9. Essentially, clause 5 of the lease sets out the lessor's repairing obligations which includes, *inter alia*, all other parts of the building not included in the demise.

10. Paragraph 1(2) of the Fifth Schedule permits the lessor to attribute a "reasonable proportion" of the total service charge expenditure to the demised premises.

11. The demised premises is defined in the First Schedule of the lease. This expressly includes *"the glass of the windows and the doors and door frames fitted to the* (internal) *doors and door frames..."*.

12. The lessee's repairing obligation contained in clause 4(1) of the lease is limited to the demised premises including *"all windows glass and doors..."*.

Relevant Law

13. This is set out in the Appendix to this decision.

Decision

14. The hearing in this case took place on 29 January 2018. The Applicant was represented by Mr Grundy QC of Counsel. The Respondent was represented by Mr Owen, a Solicitor.

Recovery of Costs for Other Windows in Block

15. It is common ground that the windows in the property were not replaced. These costs relate to the cost of replacing the windows in other premises within the same block.

16. The Respondent's case is that the lease does not permit the costs to be recovered as service charge expenditure because the windows are demised to each leaseholder under the residential leases and, therefore do not fall within the Applicant's repairing obligation. Alternatively, the Respondent submitted that the windows were not in disrepair and the windows that were installed amounted to an improvement, the cost of which is not recoverable under the lease.

17. The ambiguity in the lease is created by reference to "glass of the windows" in the definition of the demised premises in paragraph (a) of the First Schedule, which is repeated again in clause 4(1) regarding the lessee's repairing obligation.

18. It has generally been held that the "exterior" of a building includes all external parts of that building including the windows and the window frames[1]. It follows that the windows and the glass within fall within the lessor's external repairing obligation under clause 5(5)(a)(i) of the lease.

19. The Tribunal also accepted the submission made by Mr Grundy, for the Applicant, that the lessor's repairing obligation in clause 5(5)(a)(i) applies whether or not the subject of the repairing obligation is within the demised premises. This is because the exclusion of any part of the demised premises from the lessor's repairing obligation is limited by clause 5(5)(a)(vi) to those items not otherwise in the lessor's repairing obligation by virtue of sub-clauses 5(5)(a)(i) to (v). Therefore, those items in clause 5(5)(a)(i) to (v) are within the lessors' repairing obligation whether demised pursuant to the lease or another lease of a flat in the block or not.

20. As to whether or not the windows in the block were in disrepair, the Tribunal accepted the evidence of Mr Stannard, a Home Ownership Manager employed by the Applicant, that a condition survey report dated 14 May 2010 concluded that the original wooden windows were suffering from varying degrees of wet rot, the repair of which was uneconomic. In any event, the Respondent had not adduced any evidence on this point.

21. As to whether the replacement PVCu windows amounted to an improvement, the Tribunal concluded that they were not. It is always a question of fact and degree as to what amounts to an improvement.

[1] see Hill & Redmond at 3250-3260

For items such as windows, there can never be a like for like replacement over the passage of time. There are often improvements in technology and materials in construction. The replacement or repair of original windows may prove to be uneconomic, as was the case here. In addition, the specification of replacement windows may be constrained by the requirements of current Building Regulations. For these reasons, the Tribunal did not consider the replacement windows to be of a sufficiently different nature to amount to an improvement on the original windows.

22. Accordingly, the Tribunal was satisfied that the original windows in the block were in disrepair and their replacement fell within the lessor's repairing obligation under clause 5(5)(a)(i) of the lease. As such, the Respondent is contractually obliged under clause 4 and paragraph 1 of the Fifth Schedule of the lease to pay a reasonable proportion.

The Cap

23. It seems that a £10,000 service charge cap was offered to leaseholders by the Applicant subject to certain eligibility criteria. These were set out at paragraph 16 of the first witness statement of Mr Stannard dated 3 November 2017.

24. The Respondent relied on a letter he received from the Applicant dated 9 September 2013 purporting to cap his overall service charge liability to £10,000. The letter was written by a Mr Tesner who is no longer employed by the Applicant. Apparently, Mr Tesner was a temporary contractor who had not worked for the Applicant for many years. In evidence, Mr Stannard said that Mr Tesner did have ostensible authority to write the letter to the Respondent.

25. The Tribunal found that the Respondent could not rely on the letter dated 9 September 2013 to "cap" his service charge liability in this instance to £10,000 because it was not evidence of an agreement or an

offer that was capable of being accepted him. The Tribunal did so for the following reasons:

(a) it was common ground that no amended invoice was issued by the Applicant for the sum of £10,000. This could only have been done with the agreement of senior management and the Tribunal accepted Mr Stannard's evidence that no such record exists.

(b) there was no evidence that the Respondent provided the Applicant (or Mr Tesner) with details of his income to demonstrate financial hardship, which is one of the express criteria for eligibility for this cap.

(c) the terms of any such agreement or offer were not certain because the date and term were omitted from the letter dated 9 September 2013.

(d) on the Respondent's own case, he had breached any purported agreement or offer by failing to pay the agreed instalments of £100 per month because *"no documents had been provided by the Applicant"* (our emphasis). The inference to be drawn is that no documents were provided because no agreement or offer had in fact been made to the Respondent, which corroborates the evidence of Mr Stannard.

26. Accordingly, the Tribunal concluded that the Respondent's service charge liability here was not subject to a limit of £10,000.

Apportionment

27. The other issue raised by the Respondent was that his service charge liability had not been correctly apportioned by the Applicant.

28. Historically, the Applicant had always apportioned service charge liability by reference to the floor area of each flat. There are 24 flats in the building that are used to calculate the apportionment of service charges. There are 12 each of two different sizes. The measurements of

the flats used by the Applicant are those "inherited" from Tower Hamlets.

29. It was the Respondent's case that the measurements of his flat are incorrect. He contended that it was 89 sq m whereas the measurement used by the Applicant was 88 sq m. In support of this, the Respondent relied on the measurement he had taken of his flat using a laser measure and his knowledge and experience as a self-employed Property Services Provider.

30. On balance, the Tribunal found that the Applicant was entitled to rely on the measurements of the property that had been provided by Tower Hamlets when the freehold interest had been transferred to it. It was clear that the measurements had been taken from plans that had been prepared at the time the leases had been granted. There was a strong presumption that the measurements were correct unless there was clear evidence otherwise. The Respondent had not provided any such evidence. The plans obtained on the Internet by the Respondent from "Metropia" were qualified as to their measurements and could not be relied upon. The Tribunal placed no weight on the Respondent's own evidence in this regard because it was not independent and he could not be considered to be an expert in this area despite his property experience. In any event, the difference in the respective measurements of the property of 1 sq m was *de minimis*.

31. The Tribunal, therefore, found that the use of a measurement of 88 sq m used by the Applicant to apportion the Respondent's service charge liability was ruled that the Respondent should reimburse the applicanreasonable in accordance with paragraph 1(2) of the Fifth Schedule of the lease.

Section 20C

32. No application under section 20C of the Act had been made by the Respondent in relation to the Applicant's costs in relation to the Tribunal's proceedings.

Fees

33. Given that the Applicant has succeeded entirely on the issues, the Tribunal orders the Respondent to reimburse the Applicant, within 28 days of this decision being issued, the sum of £200, being the fees it has paid to have this application issued and heard.

Judge I Mohabir
27 February 2018

Appendix of relevant legislation

Landlord and Tenant Act 1985

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 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 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 a leasehold valuation 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) a leasehold valuation 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.

Leasehold Valuation Tribunals (Fees)(England) Regulations 2003

Regulation 9

(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

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 a leasehold valuation 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 a leasehold valuation 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).