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HM COURTS & TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL

Case number: BIR/00CN/LIS/2012/0016

Property: 9 Frogmoor House, 571 Hob Moor Road, B25 8XD

Applicant: Birmingham City Council

Represented by: Mr Justin Bates of Counsel

Respondent: Mr J E Williams

Represented by: Mrs J Roper

Application: Application for the determination of liability to pay and reasonableness of service charges under s27A and s19 Landlord and Tenant Act 1985

Hearing date: 10 September 2012

Hearing venue: RPTS, 2nd Floor, Louisa House, 92-93 Edward St, Birmingham B1 2RA

Tribunal: Mr C Goodall MBA LLB (Chair)
Mr D Satchwell FRICS

Date: 7 December 2012

Background

1. This is an application for a determination of the liability to pay, and the reasonableness of service charges charged to Mr John Edward Williams ("the Respondent") by Birmingham City Council ("the Applicant"). The service charges are for repairs and refurbishment of the block of 24 flats known as Frogmoor House ("the Block") in which the Respondents flat at 9 Frogmoor House, 571 Hob Moor Road, B25 8XD ("the Property") is situated.
2. The Respondent's parents purchased the Property from the Applicant in 1989. It was their former council flat, and the purchase was under the Right to Buy legislation contained in the Housing Act 1985. The interest purchased was a leasehold interest for 125 years from 10 April 1989 under a lease dated 16 October 1989 and made between the Applicant and the Respondent's parents ("the Lease"). By an assignment dated 23 January 2008, the Respondent became the lessee of the Property.
3. This application has reached the Tribunal via the County Court. Proceedings in the Birmingham County Court were started by the Applicant on 3 August 2011 to recover a sum claimed of £21,997.68 from the Respondent ("the Claim"), plus costs and interest. A defence was filed on 5 September 2011, and by consent the case was transferred to the Tribunal by an Order dated 10 November 2011.
4. The papers were not finally received by the Tribunal until some time in February 2012. At the request of the Tribunal, the Applicant has also completed an application form for the Respondent for consideration of the liability to pay and reasonableness of the service charge for which the Respondent has been sued, which arose in the 2007/08 service charge year.
5. This application was considered at a hearing on 10 September 2012 at the LVT hearing centre in Birmingham jointly with an application in respect of flat 14, in respect of which there were identical issues. The hearing was preceded by an inspection of the Block in the presence of the Tribunal members and representatives of all the parties.

The Lease

6. Section 139 of the Housing Act 1984 provides that a grant of a lease pursuant to a right to buy transaction shall conform with Parts I and III of Schedule 6.
7. Para 14 of Schedule 6 of the Housing Act 1985 provides that where the dwelling-house is a flat, there are implied covenants by the landlord to keep in repair the structure and exterior of the flat and the building in which it is situated (including drains, gutters and external pipes) and to make good any defect affecting that structure; to keep in repair any other property over which the tenant has rights by virtue of Schedule 6; and to ensure, so far as practicable that services which are to be provided by the landlord and to which the tenant is entitled are maintained at a reasonable level and to keep in repair any installation connected with the provision of those services.
8. The Lease contains the following material clauses:

2(a) In these presents the following expressions shall unless the context otherwise admits or requires have the meanings respectively assigned to them as follows:

...

(ii) "the Building" shall mean the building described in the First Schedule hereto [the First Schedule identifies the building as the Block]

3. The Lessee [that is the Respondent] hereby covenants with the Council as follows:

...

(c) To pay to the Council in every year of the term a service charge calculated in accordance with and paid at the times and in the manner provided in the Sixth Schedule hereto

...

4. The Council hereby covenants with the Lessee that...

...

(b) The Council shall

...

(ii) caretake and generally maintain the Building...

THE SIXTH SCHEDULE

1. The service charge shall be a reasonable proportion of the aggregate of:

(a) The actual cost of carrying out the covenants of the Council implied herein by the Act (other than the costs and expenses (if any) of discharging such obligations as are by the Act required to be borne exclusively by the Council) after deducting all or part of that cost pursuant to paragraph (c) below [Note: paragraph (c) relates to a reserve account and is not relevant in this case].

(b) The cost of carrying out the Council's covenants set forth in clause 4(b) hereof...

(d) A management charge equal to ten per centum of the aggregate of the sums referred to in sub paragraphs (a) (b) and (c) above or Ten Pounds whichever is the greater

...

5. The costs defined in paragraph (1)(b) of the schedule shall be ascertained by such method as shall be reasonable

The Law

9. Under Section 27A(1) of the Landlord & Tenant Act 1985 (1985 Act), the Tribunal has jurisdiction to decide whether a service charge is payable and if it is, the Tribunal may also decide:-

(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

10. In considering the amount payable under a service charge, Section 19 of the 1985 Act provides that:

"Relevant costs shall be taken into account in determining the amount of the 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 and the carrying out of works, only if the services or works are of a reasonable standard:

and the amount payable shall be limited accordingly.”

11. In relation to the test of establishing whether a cost was reasonably incurred, in *Forcelux v Sweetman* [2001] 2 EGLR 173, the Lands Tribunal (as it then was) (Mr P R Francis) FRICS said:

“39. ...The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred.

40. But to answer that question, there are, in my judgement, two distinctly separate matters I have to consider. Firstly, the evidence, and from that whether the landlord’s actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Secondly, whether the amount charged was reasonable in the light of that evidence...”

12. In *Veena v Cheong* [2003] 1 EGLR 175, the Lands Tribunal (Mr P H Clarke FRICS) said:

“103. ...The question is not solely whether costs are ‘reasonable’ but whether they were ‘reasonably incurred’, that is to say whether the action taken in incurring the costs and the amount of those costs were both reasonable.”

The issues in this application

13. From about July 2006, and for a period of 32 weeks thereafter, the Applicant carried out a substantial amount of repair and maintenance of the Block (“the Works”), and the two other identical blocks of flats adjoining (together called “the Estate”). The Applicant claims that this was in compliance with its covenants under the Leases and so the Respondent is obliged to pay the sum of £21,997.68 as his service charge contribution towards the cost of the Works, by virtue of clause 3(c) and para 1 of the Sixth Schedule of the Leases.

14. The Respondent disputes that this sum is payable; hence these proceedings.
15. In his Defence in the County Court action, the Respondent raised 11 reasons as to why he should not have to pay the Claim. These are (in summary):
 - a. The Works are not within the covenant to repair as they were temporary works not amounting to repair
 - b. The Works are not within the covenant to repair because they are improvements, not repairs
 - c. The Charge was not reasonably incurred or of a reasonable standard
 - d. The Charge had not been apportioned fairly between the parties
 - e. The Consultation process (under the Service Charges (Consultation Requirements) (England) Regulations 2003) was not complied with so that the Charge is limited to £250
 - f. The County Court proceedings are illegal as the decision to sue was in breach of a legitimate expectation created by the Applicant to the effect that payment would not be claimed
 - g. The County Court proceedings are illegal as a properly advised local authority would have exercised its discretion to waive the Charge
 - h. The claim is in breach of the Respondents human rights
 - i. The Applicant owes damages to the Respondent for misrepresentation in the notice issued under s125 Housing Act 1985 when they bought the Property which should be set-off against the Charge
 - j. The Applicant owes damages to the Respondent for breach of warranty given in the s125 notice, which should be set-off against the Charge
 - k. The Applicant owes damages to the Respondent for failure to comply with their repairing covenant in the lease, leading the Respondent to incur higher costs than they would have incurred had the covenant been complied with, which should be set-off against the Charge.
16. The Defence and Counterclaim also counterclaimed for damages as a result of the Applicant's claimed breaches mentioned in sub-paragraphs i, j, and k in the preceding paragraph.
17. The first issue for the Tribunal was to determine the scope of the hearing and the issues to be dealt with.

18. Paragraph 3 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002, under which county court proceedings can be transferred to the Tribunal, says:
- 3(1) Where in proceedings before a court there falls for determination a question falling within the jurisdiction of a leasehold valuation tribunal, the court-
- (a) may by order transfer to a leasehold valuation tribunal so much of the proceedings as relate to the determination of that question, and
- (b) may then dispose of all or any remaining proceedings, or adjourn the disposal of all or any remaining proceedings pending the determination of that question by the leasehold valuation tribunal as it thinks fit.
19. The consent order transferring these cases to the Tribunal simply stated that the proceedings were transferred, without stating any particular question for determination. The Tribunal has therefore assumed that all issues within its jurisdiction were intended to be transferred.
20. The Tribunal's jurisdiction under s27A of the Landlord and Tenant Act 1985 is wide. But not every issue which it may consider, should necessarily be considered by it, at least where one party asks it not to do so (*Canary Riverside v Schilling* (LRX/65/2005 decision dated 16 Dec 2005), and *Continental Property Ventures v White* [2006] 1 EGLR 85, penultimate paragraph). All issues listed in paragraph 16 were discussed with the parties and:
- a. Mr Bates said that issue g, relating to the exercise of a discretion by the Council, was not a matter that the Tribunal could consider, under the authority of *Craighead v Islington* (LRX/2/2009 para 49). The Tribunal accepts this submission, which was not challenged by Mrs Roper.
- b. Mrs Roper said she did not wish to proceed with the human rights issue (issue h)
- c. The parties or one of them requested that the Tribunal should not deal with issues f, i, j and k.
21. Bearing in mind that the issues in para 20c above raise difficult questions of law, issues of fact for which only very limited evidence was before the Tribunal, and the issues would have been difficult for the Tribunal to deal with justly, in the light of the parties request, the Tribunal agreed that these issues would not be determined within these proceedings.

22. This therefore left the five issues a-e in para 10 above for the Tribunal to determine.
23. Although directed to do so, the Respondent did not provide any written statements, documents, expert reports or witness statements. The only document available that explained the Respondent's case was therefore the Defence and Counterclaim, which was a County Court pleading and therefore contained no detail of the evidence or basis upon which the particular defence was made out.
24. The Respondent's representative, Mrs Roper, also made oral submissions at the hearing, which covered the following points:
 - a. The decision to undertake the repair works was unfair and unreasonable as the Council knew the tenants could not afford the bills; the Council's hardship scheme was expensive and because of the large amount of the Claims, the tenants could lose their homes
 - b. This claim has resulted in the Respondent feeling distraught at the behaviour and actions of the Council
 - c. The decision to undertake the repair work was unfair and unreasonable as the Council know they would only be buying the flats another 10 years of life and the cost for this was too high
 - d. The windows did not need to be replaced
 - e. The works have not resolved the problems with the flats – in particular the balconies were in poor condition, the internal service pipe-work regularly became blocked and the basement flooded
 - f. So far as the detail of the Claim itself is concerned, the Respondent is not a builder or surveyor and is not in a position to make detailed challenges, but the costs seem high.
25. Putting the arguments derived from the Defence and Mrs Roper's submissions together, it seems to the Tribunal that the following arguments are engaged:
 - a. Whether the costs were reasonably incurred and of a reasonable standard (15c), consideration of which would take in the issue of whether the work should have been done at all (24c), whether the problems have been resolved (24e) and whether the charge is too high (24f).

- b. Whether the Works were temporary works, or improvements, and if so whether they are therefore outside the scope of the service charge (15a and 15b).
- c. Should the windows have been replaced (24d)?
- d. Whether the personal impact upon the Respondent of the service charge bill should be taken into account in deciding whether it is payable (24a and 24b).
- e. Whether the overall bill was apportioned correctly (15d)
- f. Whether the consultation requirements were correctly adhered to (15e).

Were the costs reasonably incurred and of a reasonable standard

- 26. The Block was built in 1957. In 2003 investigations revealed that the structural condition of the Block was of concern. This was drawn to the attention of all residents including the Respondent. The Applicant carried out a consultation with all residents as to whether the Block should be repaired or demolished. The decision then taken by the Applicant was that repairs should be undertaken to secure the life of the Block for a further ten years. Nobody suggested then, and the Respondent has not suggested in these proceedings, that repair was not necessary.
- 27. The Tribunal has to decide whether that decision was a reasonable one for the Applicant to take. It is not open for the Tribunal to decide whether it would have taken that decision; just whether it was reasonable for the Applicant to do so. The Applicant had to consider the overall costs of repair against demolition, other factors such as impact upon housing availability and needs, the views of the residents, and availability of funds.
- 28. The Tribunal is in no doubt that the decision to repair was a reasonable decision that it was open to the Applicant to take.
- 29. It is not the case that at the end of the ten year period the Block will have to be demolished. Hopefully the works will last much longer. The Applicant has an ongoing obligation to maintain the Block and would, it was said by the Applicant, carry out further reviews in due time and make further decisions in the light of those reviews.

30. The Tribunal has determined that the undertaking of the Works was reasonable. The next question is to ask what sums were incurred and whether those sums were reasonable sums.
31. The Applicant claims the sum of £21,997.68. This is the sum due under an invoice dated 12 February 2008. This invoice includes a charge of £1,254.45 plus management charges of £125.45 (total £1,379.90) for refurbishment of an existing lift. That claim has formed no part of the Applicant's case in these proceedings. The sums in dispute in these proceedings are the costs incurred in carrying out major works from July 2006 to February 2007 for repairs and refurbishment at the Block, for which under the invoice the Respondent was charged £20,617.78.
32. The breakdown of the sum of £20,617.78 (from page 2-113 of the bundle and Exhibit TT1 of Mr Taplin's statement) is as follows:

Item	Description	Total amount claimed for Estate (£)	Applicants share (£)
1	Central heating survey	61,903.70	25.00
2	Replacement of windows	248,332.05	4,401.41
3	Communal rewire	118,212.00	1,641.83
4	Scaffolding	136,990.80	1,902.65
5	Painting	52,497.36	729.13
6	Structural work	300,361.03	4,171.68
7	Roofing	116,928.00	1,624.00
8	Prelims	162,641.29	2,258.91
9	Design fees	18,632.04	251.32
10	Project fees	104,013.39	1,402.99
11	Insurances	8,325.17	112.29
	Sub-total	-	18,521.21
12	Urban design fee (1.14%)	-	211.14
	Sub-total	-	18,732.35
13	Respondents management fee as per lease of 10%	-	1,873.23
	Total	-	20,605.58
	Unexplained discrepancy		12.20
	Total		20,617.78

33. The Tribunal has carefully considered the invoices submitted in support of these costs and the explanations for them contained in Mr Taplin's statement. The Tribunal has determined from its analysis of this evidence that not all of these costs have clearly been incurred. The following adjustments therefore need to be made:
- a. The cost of the roofing should reduce to £112,249.43 overall, amounting to £1,559.02 for each Respondent. This is because the invoices from Limmer Roofing Ltd in the bundle of documents only supported this sum.
 - b. Preliminary costs should reduce to £141,967.33. A detailed analysis of the invoices in support of page 2-170 in the bundle of documents could not justify that overall charge but could support the reduced amount. Each Respondent's share of this cost would be £1,971.77.
 - c. As a result of the adjustments above, items 9 and 10 need to be adjusted, as they are costed as a percentage of the total of the previous items. The design fee (at 1.5% of items 1 – 8) reduces to £246.04. The project fee (at 8.25% of items 1 – 9) reduces to £1,373.50.
 - d. The Tribunal considers that the urban design fee at item 12 is not reasonably incurred because it is clearly charged for management of the Works, and the Lease does not allow it, but instead allows a fixed percentage (10%) of the overall cost of the repair works as the Applicant's management fee.
 - e. As a result of the adjustments, the overall cost prior to the management fee is £18,022.03, to which is added the management fee of £1,802.20, making a total of £19,824.23.
34. In considering whether this is a sum reasonably incurred, the Tribunal has in mind that the Respondent did not seek to challenge any specific item but commented that the sum seemed high. However, the Works were undertaken under a long term partnering agreement which was competitively tendered. The Applicant itself had to bear around 80% of the costs as approximately 80% of the tenants of the Estate are still council tenants, and would have had no reason to pay excessive sums. When repairing a substantial six storey block of flats, costs of scaffold and health and safety inevitably increase the costs. The Tribunal on balance finds that the cost of the Works, as identified in para 33 above, was reasonably incurred.

35. Finally in this section, the Tribunal needs to consider the Respondent's argument concerning the standard of work, in so far as the claim is that there are still defects at the Property and in the Block. The Tribunal noted on its inspection that there is some flooding to the basement and some limited deterioration to the balcony and the windows. The internal service pipe-work was said to cause problems. It is now some six years since the Works were undertaken, and some limited fair wear and tear would be expected to be showing. Some of the problems seen on the inspection would not appear to have been covered by the Works, and the Claim cannot be reduced unless it can be shown that the Works were not of a reasonable standard. The Tribunal does not consider that the defects seen on inspection, which were relatively minor, are of a nature to justify a finding that the Works were not of a reasonable standard thereby resulting in a reduction in the service charge.

Were the Works temporary works, or improvements, and if so were they therefore outside the scope of the service charge

36. In relation to temporary works, in the absence of any detail from the Respondent about this point, it is rejected by the Tribunal. The Works were extensive and costly and in the opinion of the Tribunal, using its expert knowledge, were clearly works of repair, falling within the covenant to repair, or were improvements.
37. In relation to improvements, it is settled law that the Respondent is not obliged to pay the costs of giving the landlord something different from that which he originally let. In the opinion of the Tribunal, the only element of the Works where this might apply is the window replacement, as new double glazed units were installed instead of the old single glazed metal framed windows. The other work, being re-roofing, rewiring, redecorating, and repairs to the brickwork and concrete work could not properly be described as improvement work, in the opinion of the Tribunal, as it was work to repair what was already there.
38. The Respondent adduced no evidence about whether replacing the windows was a repair or improvement. There is ample authority for the proposition that even though replacement of old single glazed windows is an improvement in terms of its functional efficiency, the work was carried out in effecting repairs through the only cost effective and lawful method that was practically sensible to employ, and the window replacement work

constituted repair within the terms of the covenants in the Lease, and the Tribunal therefore finds that replacement of the windows constituted a repair.

Should the windows have been replaced?

39. The Block was built in 1957 with metal framed Crittal windows. These were therefore nearly 50 years old when the Works were carried out. Whilst the metal is galvanised, with the passage of time the galvanisation tends to break down often from internal condensation, which runs into the putty and corrodes the metal. This requires re-glazing which is very difficult on high rise buildings. The hinge joints also tend to corrode and become stiff. Over time therefore, it is known that these types of window become draughty and slightly misshapen with glass cracking then occurring. Cyclical maintenance increases in cost.
40. Mr Taplin gave evidence to the effect that in his view the windows were suffering from internal condensation, and were dilapidated, rusting, and hard to open. The putty was not in good condition and had started to fall out in many instances.
41. In the opinion of the Tribunal, the replacement of the windows with modern double glazed uPVC windows was a reasonable decision, and will have saved future maintenance cost.

Personal impact upon the Respondent

42. In paragraphs 9 and 10 the statutory basis for the Tribunal's jurisdiction is set out. As a statutory tribunal, the Tribunal has no jurisdiction or authority to determine anything other than whether a service charge is payable in law. There is no discretion given to the Tribunal in the statute to reduce a legal obligation on the grounds of sympathy or take into account personal circumstances. The Upper Tribunal has made it clear (in, for example, *Garside & Anson v RFYC Ltd and Maunder Taylor LRX/54/2010, para 20*) that financial hardship cannot be taken into account in considering liability to pay a service charge. Anxiety caused by the receipt of a large bill is not legally recoverable (at least in the absence of an intention to cause harm or evidence that it is an act of harassment). The Tribunal fully understands and accepts that the Respondent has

suffered anxiety, but has to find, with sympathy to the Respondent, that this does not constitute a legal basis for reducing the service charge.

Was the overall bill apportioned correctly?

43. Where a cost was specifically attributed to an individual flat, the Applicant has charged that flat owner the specific sum. This applies to cost of windows, which were separately identified by the contractor, and to the cost of a central heating survey. This is reasonable in the view of the Tribunal.
44. For the balance of the costs, the global cost for each element of the Claim has been divided into three (as there are three virtually identical blocks) and the resultant sum has been divided between the 24 flats in each block.
45. The Lease requires the Applicant to allocate costs by such method as shall be reasonable. The Tribunal considers that the method adopted by the Applicant is a reasonable method.
46. In his defence, the Respondent puts the point about apportionment in the following way:

“the costs have not been apportioned reasonably and fairly between the Defendant and the Claimant, whose periodic tenants have benefitted disproportionately more from the works carried out”.
47. This point was not developed by Mrs Roper, but it seems to the Tribunal that all residents of the Block have benefitted equally from the Works, in the sense that they are all living in a better building as a result of the repairs. It is of course true that the periodic tenants are able to do so without having expended any money, but there is no basis upon which they could ever be asked to contribute, and their landlord, the Applicant, has contributed. The Tribunal therefore cannot see a legal basis for challenge to the method of apportionment of the costs arising out of the defence pleaded.

The Consultation process (under the Service Charges (Consultation Requirements) (England) Regulations 2003) was not complied with so that the Charge is limited to £250

48. The consultation process (under the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Regulations")) is intended to give leaseholders the right to have input into decisions about expenditure on their properties. In general terms, they are to be consulted on selection of contractor, price, the works required, the reasons for the works, and how the works are to be carried out.
49. Where a landlord has multiple properties, it may prefer to go through a process of choosing a contractor, and the prices to be charged by that contractor, once only, rather than on many separate occasions, in order to reduce cost and bureaucracy. Where it does this, it enters into a qualifying long term agreement. In that eventuality, it will normally consult leaseholders, firstly on the appointment of a contractor under a qualifying long term agreement, and secondly on the specific works.
50. In this case, the Works were undertaken by Thomas Vale Ltd, who had entered into a qualifying long term agreement with the Applicant. No consultation had taken place with the Respondent, or any leaseholders of the Block on this agreement. The Applicant's case is that the Regulations do not require consultation on a long term qualifying agreement if public notice of the contract had been given by the Applicant before the date on which the Regulations came into force. Public notice was given on 16 May 2003, and the Regulations came into force on 31 October 2003. The Respondent did not challenge this analysis.
51. The Applicant was still required to consult on the specific works. Its case is that it did so, and the consultation notice is included in the bundle of documents at page 2-64 and 2-65.
52. Apart from making reference to this issue in the defence, the Respondent has advanced no further argument on it. In the absence of any challenge, the Tribunal should not investigate the point forensically (see *Birmingham City Council v Keddle & Hill* [2012] UKUT 323). There is therefore no basis upon which the Tribunal can disagree with the Applicant's position.

Determination

53. The Tribunal determines that:

- a. It makes no finding in respect of the Applicant's claim for £1,254.45 plus management charges of £125.45 (total £1,379.90) for refurbishment of an existing lift, as this element of the Applicant's claim was not raised by any party in the Tribunal proceedings.
- b. It finds that the sum of £19,824.23 is payable by the Respondent as a service charge in respect of the cost of works undertaken by the Applicant for major repairs carried out by Thomas Vale Ltd and charged in the 2007/08 service charge year, which sum was originally invoiced by the Applicant in the sum of £20,617.78.
- c. This decision does not dispose of paragraphs 12 to 21 of the Defence, nor any aspect of the Counterclaim in the County Court proceedings brought by the Applicant in the Birmingham County Court under claim number 1BM00905.

C Goodall, Chair

Date 7 December 2012