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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	LON/00AP/LSC/2013/0312
Property	:	167 Lordship Lane, London N17 6XF
Applicant	:	Residential Properties Limited
Representative	:	Mr Abe Berger (Feldgate Limited)
Respondents	:	Mr Kevin Kirton Metropolitan Housing Trust
Representative	:	Mr Kirton appeared in person
Type of Application	:	Determination of the reasonableness of and the liability to pay a service charge
Tribunal Members	:	Mr Robert Latham Mr Stephen Mason FRICS FCIArb
Date and venue of Hearing	:	30 October 2013 at 10 Alfred Place, London WC1E 7LR
Date of Decision	:	5 November 2013

DECISION

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(1) The Tribunal determines that:

(i) The main contract price of £22,308.75 + VAT and the Surveyor's Fees £3,088.59 are reasonable and payable.

(ii) The charge for the CDM Coordinator of £1,600 should be reduced to £1,000.

(iii) The charge of a management fee of 10% + VAT is unreasonable. Rather, a sum of £500 + VAT is payable.

Each Respondent is liable for 50% of these sums.

(2) The Tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

(3) The Tribunal determines that each Respondent shall pay the Applicant £250 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicant.

The Application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to whether proposed major works and the costs of them which are yet to be occurred, will be reasonably incurred and payable. The application which was issued on 30 April 2013, is at pp.1-7 of the Bundle.

2. 167 Lordship Lane ("the property") is a two storey house divided into two flats:

(i) The tenant of the Ground Floor Flat is Metropolitan Housing Trust ("Metropolitan"). They have let the premises to Ms Olywafunilayo Olaniyan. Under the terms of her lease, she is obliged to pay any service charge which the landlord is entitled to recover from Metropolitan.

(ii) The tenant of the First Floor flat is Mr Kirton. Mr Kirton has never occupied the flat which has been sub-let. Mr Kirton has been reluctant to provide any other address to either his landlord or the Tribunal.

3. On 28 May, the Tribunal gave Directions (at. p.11-13). Mr Berger appeared for the landlord. Mr Kirton appeared in person. Metropolitan did not appear. It subsequently became apparent that Metropolitan had not been served with the application. It was common ground that that the consultation documents in respect of the major works had not been received by Mr Kirton. It is apparent that they were sent to the property (the only address known to the landlord) but these were returned by the post office.

4. The Tribunal directed that the landlord should reserve the consultation documents on his Solicitor, Ms Nageswaran, of Warren and Co. The landlord did so on 4 June (see p.80).

5. The Tribunal further directed that Mr Kirton should serve on his landlord his detailed case including all the documents on which he relies. Mr Kirton failed to comply with this Direction.

6. The landlord complied with the subsequent Directions filing his Statement of Case (at pp.153-4) on 18 July and a Bundle of Documents on 26 July.

7. The Tribunal had directed that the matter be set down for hearing on 7 August. On 6 August, Metropolitan notified the Tribunal that they had not been served with the application and requested an adjournment. Metropolitan also notified the Tribunal that the Ground Floor Flat had been sub-let on a shared ownership basis under which the lessee would ultimately be liable for any service charge. The Tribunal granted the adjournment.

8. The Tribunal recognised that Metropolitan's lessee had an interest in these proceedings. It therefore directed Metropolitan to provide details of their lessee. On 8 August, Metropolitan notified the Tribunal that their lessee was Ms Olywafunilayo Olaniyan. On 14 August, the Tribunal notified Ms Olaniyan of the application and that it considered that she should be joined as a party to the proceedings. She was invited to attend a Pre-trial Review on 3 September.

9. The position in respect of the Ground Floor Flat is as follows:

(i) On 2 September, Metropolitan notified the Tribunal that it did not wish to play any further part in the proceedings.

(ii) Ms Olaniyan has taken no step to be joined as a party to the proceedings.

10. On 3 September, the Pre-trial Review was held. Mr Berger attended on behalf of the landlord. Mr Kirton did not appear. The Tribunal considered that a paper determination was appropriate and directed that this be held in the week commencing 28 October. The Respondents were given until 20 September to serve a Statement of Case if they wished to oppose the application. Mr Kirton did not file any Statement of Case.

11. On 8 October, Mr Kirton e-mailed the Tribunal requesting further time in which to file his case. He stated that he had been assisted by Lawworks. However, they had suggested mediation which he did not consider to be appropriate. He had an appointment with the Leasehold Advisory Service on 15 October.

12. On 10 October, the Tribunal refused this application for further time. He was notified that he could renew his application after he had seen

his adviser. However, any such application should be in writing and should outline his case, together with the reason for the delay.

13. On 18 October, Mr Kirton e-mailed the Tribunal making a further application for more time. He did not explain the delay that had occurred since 28 June when he should have filed his case. He raised the following issues:

(i) At paragraph 9 of the Particulars of his lease, no percentage had been inserted as to his contribution to the maintenance fund.

(ii) He understood that the landlord maintained a maintenance fund. The major works should be funded from this reserve fund.

(iii) He had a claim in damages against the landlord arising from the removal of a tree which had been growing along the wall of his bathroom.

14. On 22 October, the Tribunal refused the application for further time. The Tribunal listed the case for an oral hearing on 30 October.

15. The relevant legal provisions are set out in the Appendix to this decision. The Consultation provisions are to be found in the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003 No.1987) ("the Regulations"). The relevant provisions are set out in Part 2 of Schedule 4 ("Consultation Requirements for Qualifying Works for which Public Notice is not Required").

The Hearing

16. Mr Berger appeared on behalf of the landlord. Mr Kirton appeared in person. Neither Metropolitan nor their lessee appeared.

17. Mr Berger referred us to the demand at p.184. The Applicant is seeking to levy an advance service charge of £17,068.07 against each of their tenants. This is made up of the following of which each tenant is liable for 50%:

(i) Main Contractor: £26,770.50 (inc VAT);

(ii) CDM Co-ordinator: £1,600;

(iii) Surveyors Fee at 12.5%: £3,088.59;

(iv) Management Fee of 10% + VAT: £2,230.88 + VAT.

18. Mr Kirton relied on the matters which he raised in his e-mail of 18 October. He also indicated that he considered that the additional professional and management charges which the Respondent was seeking to charge were excessive. He did not dispute that the scope of the works that the landlord intended to execute.

19. The Tribunal are satisfied that Mr Kirton's claim for damages in respect of the alleged tree damage falls outside the scope of this application. This is an application which has been brought by his landlord and is restricted to the proposed major works.

20. In his Statement of Case, the landlord describes the previous case before the LVT. At that hearing, Mr Kirton had complained that the landlord had failed to maintain the property. The landlord had therefore arranged for a Surveyor to inspect the property and prepare a schedule of works.

21. The first step in the Consultation process is the Notice of Intention to Carry Our Works (Paragraph 1 of the relevant Schedule of the Regulations). This was initially served on 13 December 2011 and is at p.154-155.

22. No builder was nominated by the tenants and the landlord therefore invited three builders to tender for the works. All three contractors returned their tenders on 21 February 2012. These are at pp.159-178.

23. On 1 May 2012, the landlord served the Statement of Estimates in Relation to the Proposed Works (Paragraph 4(5)). This is at pp.180-2. This included the additional professional fees and management charges which the landlord intended to add to the builder's estimate. No observations were received from an of the tenants during the 30 day consultation period

24. On 7 January 2013, the landlord served demands on the tenants for their share of the proposed works (at p.184). The landlord has applied to this Tribunal to determine the reasonableness of the proposed works to enable it to take the necessary action should the tenants fail to pay the sum demanded.

The Tribunal's Decision

25. The lease in respect of the Ground Floor Flat is at pp.15-78; whilst that for the First Floor Flat is at pp.46-78. Whilst the lease for the Ground Floor Flat specifies 50% as the relevant contribution to the service charge account (described as "the maintenance fund") (at p.16), no figure has been included for the First Floor Flat (at p.47). This was an obvious error. It is quite apparent from the lease that the parties contemplated that the tenant would contribute towards the service

charges for the building and that between them, the tenants would contribute 100% of the costs of the services that are provided. The lease is dated 4 December 1992. Since that date, the landlord has demanded, and the tenant has paid a 50% contribution. This is what one would expect in respect of a two storey property that has been converted into two flats.

26. Feldgate Limited has managed the property for some 10 years. Mr Kirton has held his interest for a longer period. Whilst Mr Kirton has suggested that there has been some ambiguity as to how much he is required to contribute, we are satisfied that there has been no such ambiguity. There have been previous proceedings before this Tribunal which were determined on 15 January 2012 (LON/00AP/LSC/2011/0639). These proceeded on the basis that Mr Kirton was obliged to contribute 50% to the service charge.

27. Were there to be any ambiguity, it would be open to either party to apply to vary the terms of the lease. We are satisfied that there is no such ambiguity. On any application to vary, a tribunal would be bound to insert a figure of 50%.

28. The costs and expenses which the landlord may charge to the "maintenance fund are set out in the Eighth Schedule to the lease. This includes the cost of employing a managing agent or surveyor. The Fifth Schedule makes provision for an advance service charge.

29. Mr Berger explained how the landlord operated the maintenance fund. Demands are made for service charges twice a year on 1 January and 1 June (see Fifth Schedule of the lease). £100 is demanded on each occasion toward ongoing repairs. A reconciliation is made at the end of the year. If less than £200 has been spent on repairs, the surplus is credited to the tenant's service charge account. Thus there is no reserve fund upon which the landlord could draw to fund these works. We are therefore satisfied that Mr Kirton's belief that there is a reserve fund is misguided.

30. The Tribunal are more concerned about the level of the additional professional and management charges. We deal first with the fee of £1,600 which is to be charged for the CDM Coordinator. We accept that the landlord is obliged to appoint such a Coordinator in order to comply with the Construction, Design and Management Regulations 2007. The Coordinator ensures that the works are carried out safely. We were told that this was an estimate from Alan Stephenson Associates, an independent firm used by the managing agents. This is an expert tribunal. We consider that the sum sought is excessive, and reduce this to £1,000, 50% which is payable by each tenant.

31. The Tribunal accept that the landlord is entitled to employ a Surveyor to draw up a schedule of works, prepare the tender documentation and

supervise the execution of the works. A fee of 12.5% is not unreasonable.

32. However, the Tribunal was surprised to note that the landlord is also seeking to charge an additional management fee of 10% of top of this. A percentage charge might be appropriate were the managing agents to be supervising the execution of the works. However, this is the responsibility of the Surveyor whose charge reflects this role. We accept that the managing agent is responsible for ensuring that the landlord complies with the Consultation Procedures. The managing agent may also need to deal with problems of access, once the works have commenced. However, we are satisfied that a managing agent should only charge a fixed fee for any work which falls outside their normal duties as managing agents and for which an annual charge is levied. We assess this additional fee at £500 + VAT for the property, 50% of which will be payable by each tenant.

Application under s.20C and Refund of Fees

33. At the hearing, Mr Berger informed the Tribunal that the Applicant intends to pass on its costs in respect of these proceedings to the tenants through the service charge account. It is not for this Tribunal to determine whether the lease makes provision for this and the reasonableness of such charges. The sole issue for us is whether we should make an order that all or any of the costs incurred by the landlord in connection with these 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 tenants. We are entitled to make such an order if we consider it just and equitable in the circumstances to do so. We decline to make such an order. Neither party participated in the consultation process. We are satisfied that the landlord had no option but to bring this application.

34. At the end of the hearing, the Applicants made an application under Regulation 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for a refund of the fees that they had paid in respect of the application/hearing. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal orders the Respondents to refund the fees of £500 (£350 application fee and £150 hearing fee) paid by the Applicants. Each Respondent is liable for 50% of this fee.

35. Any party has the right to appeal to the Upper Tribunal (Lands Chamber) (s.175 Commonhold and Leasehold Reform Act 2002). Permission to appeal is required which should initially be sought from this Tribunal.

Robert Latham
Tribunal Judge
5 November 2013

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 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) the appropriate 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 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 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 leasehold valuation 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 a leasehold valuation tribunal;
(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation 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.

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Regulation 13

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.