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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BE/LSC/2013/0460**
Property	:	**Flat 34 Mistral, Sceaux Gardens, London SE 5 7DR**
Applicant	:	**London Borough of Southwark**
Respondents	:	**Shakirat Jadesola Ugbo** **Anite Charles Ugbo**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Judge Nicol** **Mr A Lewicki BSc MRICS MBEng**
Date and venue of Hearing	:	**9th October 2013** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**15th October 2013**

DECISION

Decision of the Tribunal

The Tribunal has determined each of the three issues referred to it by the County Court against the Respondents. Therefore, the service charges claimed by the Applicant in the sum of £11,311.31 are payable.

Background

1. The Respondents are the lessees of a fourth-floor flat in a purpose-built block of 72 flats called Mistral which is owned by the Applicant. They used to be secure tenants but exercised their right to buy over 9 years ago. Appendix B of the Right to Buy Offer Notice dated 22nd December 2003 indicated that their liability to contribute to repair costs until 31st

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March 2010 was limited to an estimated sum of £15,330. They were dismayed to receive an invoice dated 30th March 2012 which sought a payment for major works of £27,274.02, albeit payable in quarterly instalments until March 2014. They did not pay it.

2. In August 2012 the Applicant issued county court proceedings (claim no: 2YL79355) against the Respondents for a sum of £11,311.31 said to be owing to that point. Each of the Respondents put in a handwritten defence on county court form N9B indicating that they disputed the claim on six grounds:-

   1) The building was refurbished in 2001 on health and safety grounds.
   2) Section 20 of the Landlord and Tenant Act 1985 had not been properly implemented in that they were not contacted so that they could suggest a contractor.
   3) They could not afford £27,274.02.
   4) They expected the building insurance cover to pay for the repair.
   5) It was against their human rights to impose such a massive debt.
   6) The Applicant should ask for a government grant to cover the bill.

3. The case came before District Judge Zimmels in the Lambeth County Court on 14th June 2013. He struck out paragraphs 3, 5 and 6 of the Defence for failing to disclose an arguable case but referred to this Tribunal the balance of the claim and the defence of reasonableness to pay as set out in paragraphs 1, 2 and 4 of the Defence.

4. On 23rd July 2013 the Tribunal set out directions for the parties to follow. The hearing of the case took place on 9th October 2013. The First Respondent represented himself and the Second Respondent. Mr Andrew Cusack, an income enforcement officer, spoke on behalf of the Applicant. Miss Georgina Brown, a Pre-Assignment Manager, Mr Joseph Sheehy, a Capital Works Cost and Consultation officer, and Mr Paul Thomas, a Contracts Manager, provided witness statements and attended the hearing to speak to them.

The works

5. On 17th November 2008 the Applicant sent to lessees, including the Respondents, a notice that they intended to enter into Borough-wide Partnering Contracts and that lessees were entitled under section 20 of the Landlord and Tenant Act 1985 to submit written observations. These long-term contracts were tendered and advertised in the Official Journal of the European Union, in accordance with EU procurement regulations. A further notice was sent out on 22nd January 2010 with details of the priced schedules and informing lessees that five contractors would be appointed. In due course Apollo Group Ltd were

awarded a 5-year contract for the Camberwell and Peckham district in which Mistral is located.

6. On 15th December 2011 the Applicant sent another notice informing lessees, including the Respondents, that they intended to carry out work to Mistral consisting of:-

- Fire Safety works as identified by Fire Risk Assessments
- Front Entrance and Secondary means of escape Door Replacements as identified by Fire Risk Assessments
- Window Renewals
- Electrical rewiring
- Roofing works
- Structural and General repairs
- Decorations and associated works
- Internal works to tenanted buildings (non rechargeable to leaseholders).

7. The notice stated that the Respondents' contribution was estimated at £27,274.01 which would be invoiced in February 2012. There was provision for lessees to provide comments but the Tribunal were not told that the Respondents had submitted any.

8. The Respondents' contribution was calculated as follows. The total estimated cost of the works to Mistral was £1,888,693.25, of which £250,887.57 consisted of items, such as internal works to the tenanted dwellings, which could not be re-charged to lessees. The remaining £1,637,805.68 was apportioned equally between the 72 flats in Mistral – the Applicant has a method of calculation based on the number of rooms in each flat but all the flats in Mistral are one-bedroom properties with the same number of rooms.

9. The Respondents' contribution was therefore estimated at £22,747.30. On top of this were added professional fees at 9%, namely £2,047.26. To that total was further added the Applicant's administration fee of 10%, mandated by clause 7(7) of the Third Schedule to the lease, namely £2,479.46. Hence the total of £27,274.01.

10. The works have since been almost completed, after which the actual cost of the works will be calculated. The actual costs may well differ from the estimated costs because, as is normal with contracts of this size, the actual work done may have differed from what was intended. Some works may have turned out not to be necessary while others may have been more extensive or additional to the intended works. The Respondent may find themselves due a credit or having to pay

something extra, although it is to be hoped the latter will not be the case.

The 2001 works

11. The Respondents were living at the property when the Applicant carried out major works to the building in 2001. The First Respondent asserted to the Tribunal that the works were exactly the same as those in the current programme, save that window replacement had been included in the latter.

12. Mr Thomas gave evidence on this issue. He was involved in the current programme of works, including being on the roof at both Mistral and its sister building, Fontenelle, when their respective roofs were being inspected. He found that there were no documents in relation to the 2001 works because it was the Applicant's policy to destroy archived documents after 10 years. However, he was able to speak to Sharon Shadbolt, another employee of the Applicant, who was involved with the 2001 works. She told him that the 2001 works involved:-

    (i) External decorations

    (ii) Roof repairs

    (iii) The removal of asbestos panels to public walkways

    (iv) Door entry system installation

    (v) An electrical upgrade programme.

13. In his evidence, Mr Thomas went through each item and compared it with the works in the current programme. He was unable to say what the 2001 external decorations consisted of but pointed out that the cycle for such works would extend to 10-12 years at most. The Tribunal pointed out that, in their experience, they would not expect external decorations of a building like this to be left no more than 7 years. This means that, even in the unlikely event that the works were identical, not only was the Applicant right to institute the works, they would arguably have been in breach of their maintenance obligations not to do so.

14. In 2001, the roofs of Mistral and Fontenelle were repaired. In the current programme they are being renewed. The Applicant had been unable to provide the roof survey report for Mistral and provided the equivalent one for Fontenelle instead. The First Respondent asserted that the Applicant did this because they were deliberately withholding evidence that the roof of Mistral did not need renewal. He had no evidence to support this inherently unlikely claim. The Applicant has no motive to renew a roof unnecessarily. Mr Thomas said that he would be able to get a copy of the report later and, in any event, he had seen both roofs and their condition was virtually identical. It is credible that they would be so as they are of the same age and construction and would appear to have been maintained identically over the years. Since repair

and renewal are two different things, the Tribunal is satisfied that the current programme does not involve the same roof works as those in 2001.

15. In 2001, the Applicant removed asbestos panels to the walkways outside the front doors of the flats. In the current programme, they are removing panels to the front area of each flat. They are not the same and there is no overlap between the two sets of works.

16. The door entry system was installed in 2001 but is not being worked on in the current programme. Security doors are being installed but there is again no overlap.

17. Both in 2001 and in the current programme the internal wiring to the tenanted flats has been upgraded to meet current standards. However, such works are not chargeable to lessees and the costs of them are not included in the Respondents' service charge. There are works to the landlord's supply, outside the flats, which is being charged to the lessees but such works were not done in 2001.

18. The Tribunal has no doubt that the Respondents genuinely perceive there to be a substantial overlap between the works in 2001 and those in the current programme. However, the Tribunal is equally satisfied that they are mistaken. Mr Thomas has offered to show the Respondents around Mistral to show them the work that has been done. Both parties would be well-advised to do this in order to minimise the possibility that there will be further dispute after the costs of the actual works are compiled and notified to the lessees.

Consultation

19. Lessors are obliged under section 20 of the Landlord and Tenant Act 1985 to consult lessees before they enter into certain long-term agreements or carry out major works which are likely to result in service charges over a set amount. The detail of that consultation is set out in a number of Schedules to the Service Charges (Consultation Requirements) (England) Regulations 2003. The Respondents asserted that the consultation carried out by the Applicant could not have been in compliance with the Regulations because they had not had a chance to nominate their own contractor as provided for in Schedule 4.

20. The Applicant responded that the Respondents had identified the wrong Schedule. This matter was governed by Schedule 3. The contractor was chosen when the Applicant entered into the aforementioned long-term agreement with Apollo. There was no possibility of nominating an alternative contractor when it came to doing the works to Mistral. The Tribunal is satisfied that this is the correct analysis.

Insurance

21. The works being carried out by the Applicant were to comply with the maintenance obligations under the lease. They were not covered by the buildings insurance policy which the Applicant has placed with Zurich. This is entirely normal and the Tribunal did not expect the Respondents to be able to put forward any material submissions on this point.

22. However, at the hearing, the First Respondent's submissions were not that the insurer should have paid for the works programme. He pointed to evidence, including photos, which showed that water had penetrated into his flat. He said that he had made an insurance claim with the Applicant's neighbourhood office which had not been properly addressed. He said that some works were done internally to his flat although it was not clear what they related to. In any event, he said that the Applicant's failure to claim and apply insurance money on this occasion exemplified a general failure to do so when required, as a result of which the works were more extensive than they should have been.

23. The Respondents did not make out their case on the evidence on this point. It was not clear where the water had come from or that it involved the Applicant's maintenance obligations or an insurable problem. There was no evidence that this was anything more than a one-off event rather than an example of a wider pattern of any kind. There was also no evidence that any of the works involved remedying any problem of the type referred to by the Respondents.

24. If the Respondents have suffered an insurable incident, they can pursue a claim through the Applicant – at the hearing, Miss Brown offered to process any such claim. Alternatively, if there has been a breach of any of the Applicant's maintenance obligations, the Respondents may take legal advice and pursue their remedy elsewhere. In relation to the current proceedings, the Respondents have not established that the involvement of the insurers could or should have any impact on the amount of the service charges they should pay for the major works.

The next steps

25. The Tribunal has dealt with the issues referred by the County Court. Any remaining issues will have to be addressed by the parties returning to the County Court.

Name: NK Nicol **Date:** 15th October 2013

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 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 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.