9357

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER

(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00CX/LSC/2013/0050.** **MAN/00CX/LBC/2013/0005**
Properties	:	**Flats 1 & 3, 12-14 Crossbeck Rd. Ilkley. LS29 9JN**
Applicant	:	**12-14 Crossbeck Road RTM Company Ltd.**
Respondent	:	**Mr J Markham.**
Type of Application	:	**Sections 27A,20ZA & 20C of the Landlord & Tenant Act 1985.** **Commonhold & Leasehold reform Act 2002 Section 168.**
Tribunal members	:	**Mr M J Simpson** **Ms J Jacobs**
Date of Determination	:	**7th November 2013**

DECISION

Determinations

1. **The Service charges as claimed by the applicant for 2011 are reasonably incurred and payable including £161.56 per flat for the Surveyors Fee and £67.50 per flat for the Legal Fees.**

2. **The Service charges as claimed by the applicant for 2012 are reasonably incurred and payable including £67.50 (outstanding) per flat for electrical work, £102.50 (paid) per flat for plastering and £245 per flat for Painting.**

3. **To the extent that it is required, Dispensation is granted in full in respect of any breach of the consultation requirements imposed by S 20ZA.**

4. **The demand for payment of £30.82 per cal. month per flat on account of service charge for 2013 is reasonable.**

5. **The interest claimed in the sum of £119.87 to the date of the hearing is reasonable in amount, in accordance with the Leases and payable.**

6. **We Certify that Mr Markham is in breach of his covenant in clause 5 of the Sixth Schedule of the lease re flat 3 (decorative condition) and that the breach is continuing.**

7. **We make no order as to costs but decline to make an order under S20C preventing the costs being relevant costs in the computation of the 2013 service charge.**

Application

This is an application by the RTM company in 2 parts, firstly for a determination of the service charges reasonably incurred and payable in respect of the years ended 31st December 2011 and 2012, and on account for 2013, and secondly for a determination that Mr Markham is in breach of covenants in his leases. The applications are dated 13th March 2013.

A Directions hearing took place on 20th May when several issues were resolved and the outstanding issues clearly defined. (Copy attached)

Written Representations

In accordance with the timetable (adjusted to accommodate the parties) set out in the Directions, both parties filed and served extensive written representations with relevant exhibits, including copy leases, which the Tribunal had the opportunity to consider in detail before the hearing.

The inspection

On Thursday 7th November 2013 the Tribunal inspected the property in the presence of Ms. Gledhill and Ms de Mowbray. Mr Markham was not present and there was no answer at his flat.

We inspected the common parts and the front and rear gardens and yard.

The property is a converted large house comprising 5 flats and a maisonette. Stone built with a slate roof, on a sloping site adjacent to Ilkley moor. The common entrance leads to a hallway, staircases and 2 further landings, which are carpeted and have the benefit of lighting, convector heating, and fire alarm detection system. The walls were plain paper with emulsion paint and the woodwork was glossed. In view of the outstanding issues regarding alleged breach of covenant, we paid particular attention to external paintwork and the state and apparent use of the common rear yard, garden and parking areas.

The hearing

This took place at Skipton Law Courts at 11.30 am following the inspection on 7th November. Ms. Gledhill and Ms. De Mowbray, as Directors, represented the applicant company. Mr Markham was in person.

The outstanding issues were reviewed in the light of developments since the Directions hearing.

With the agreement of the parties we sought oral representations from each of them on a topic by topic basis. Each party made oral representations, drawing the Tribunal's attention to the relevant parts of each party's extensive written representations.

Services charges

With the exception of an issue as to the basis upon which the surveyors report had been obtained, there were no issues regarding the terms of the leases as to the chargeability of any items of service charge.

It is convenient to précis each party's representations (both written, and at the hearing) on each outstanding issue and to give our determination immediately thereafter.

Service charge 2011

Mr Markham had paid those charges, the amount and reasonableness of which he did not challenge (subject to any issues as to payability under S20 & S20ZA –limits re qualifying works) He also indicated to the Tribunal that the amount of £55.52 per flat claimed in respect of the sash window was not challenged.

It was accepted by the parties that the items, which, in this year, could be classed as 'qualifying works' did not amount to more than £250 per flat and accordingly the consultation requirements were not engaged on any basis.

There therefore remained for determination by the Tribunal:-

Surveyor's fee (£161.56 per flat)

The applicant's representations are set out at paragraphs 2.1 – 2.13 on pages 38 -41 of the applicant's bundle. It says that, having taken over in contentious circumstances and anticipating that service charge expenditure would be vigorously challenged by Mr Markham, it was prudent to have an expert opinion as to the condition of the property and the works that needed to be undertaken. Westlakes are respected local surveyors and the cost is reasonable.

The respondent's representations are set out on pages 3-6 of his hearing bundle. He says that the report was unnecessary and, having regard to the published minutes of the RTM company (10th Nov. 2010 and 29th Nov. 2010) it is apparent that the report was commissioned only for the purpose of considering a demand of funds to set up a reserve fund, when in fact no reserve fund has been set up.

Determination

We find that the commissioning of a survey report was reasonable and well within the ambit of good management. The anticipated challenge to service charge claims was, as thing have turned out, prescient. Whilst a reserve fund was within the company's consideration, we accept that that was far from the only consideration. The primary intention was to ensure that works carried out could be supported by expert advice and protected from any criticism that the works were unnecessary.

In addition to the clause in the leases quoted by Mr Markham, they also contain a clear provision at Clause 3(b)(iii) to pay reasonable fees and charges for Surveyors, reasonably employed in connection with the management. Mr Westlake was so employed and his fees are reasonable.

Legal fees (£67.50 per flat).

The applicant's representations are set out at paragraphs 3.1 -3.12 at pages 42-47 of the applicant's bundle. The nature and extent of the advice sought is summarised at paragraph 3.8.1. It says that it sought advice in response to Mr Markham's invitation to do so after he had taken advice. The advice was germane to management issues and not related to advice obtained for enfranchisement or the like. The full advice had not been made available to Mr Markham for fear that waiver of privilege in this instance would lead to an assumption that privilege had been waived in respect of all advice taken by the RMT company.

The respondent's representations are set out on pages 6-8 of his hearing bundle. He says that the absence of consultation is, following Phillips v Francis [2012]All E R (D) 225, fatal to this claim. He says it is unreasonable to incur costs for legal advice if that advice is not disclosed to all the members of the RTM company, including him. He would be prepared to pay if there was a full disclosure.

Determination

On the understanding that it did not amount to a general waiver of privilege, Ms Gledhill, at the hearing, disclosed the solicitors' correspondence to Mr Markham. Mr Markam pointed out that that was not a full disclosure, as other documents were referred to in the letters. The issue was accordingly not compromised by agreement.

There is a distinction between the reasonableness in obtaining advice and the reasonableness of disclosure, to whom and to what extent. There will be circumstances when it is reasonable to obtain advice but not disclose it even to those who, under the terms of the leases, may be required to pay for it. We have reviewed the correspondence between the parties (not the solicitors' correspondence) set out in the bundles. We regard it as reasonable for the RTM company faced with Mr. Markham's stance to have obtained legal advice. The cost was reasonable. It was not advice from a source that conflicted with other advice that it had sought regarding, for example, enfranchisement.

It would have been better if the advice had been disclosed sooner. The obvious feeling amongst the other members of the RTM company that any sign of weakness (such as the waiver of privilege) would be exploited by Mr Markham is understandable, against the wider background of these disputes as evidenced by all the documentation we have seen, but in the event it would not have been inappropriate for it to be disclosed. That failure does not, however, undermine the reasonableness of incurring the cost of obtaining that advice in the first place.

Obtaining advice is not a 'specified work'.

Service charge 2012.

Mr Markham had paid those charges the amount and reasonableness of which he did not challenge (subject to any issues as to payability under S20 & S20ZA –limits re qualifying works). These payments included a payment on 6th November 2013 of £270 for the sash window replacement. He had paid £250 on account of electrical works (being the limit in respect of qualifying works to which S20ZA applies).

There therefore remained for determination by the Tribunal:-

Electrical work.

All issues remain outstanding in respect of the electrical works.

The applicant's representations are set out at paragraphs 6.1 - 6.35 at pages 61-74 of the applicant's bundle. This records the extensive correspondence and communication regarding finding a solution to the problem that the electricity supply to the common parts was sourced from the consumer unit in Mr Markham's basement and was not separate from his own supply.

The applicant avers the three invoices related to three separate jobs of work (invoice 127 to benefit Mr Markham, invoice 129 as recommended by surveyor, invoice 131 "emergency" work) none of which amounted to specified works. In the event that the Tribunal found that they were specified works, the applicant seeks dispensation on the basis that there has been no prejudice to Mr Markham, and that the actual consultation and attempts to involve Mr Markham have been far more extensive, than if it had slavishly, but technically accurately, complied with the Regulations. The respondent's representations are set out on pages 9-14 of his hearing bundle. He also recites the extensive correspondence. He points out that whilst he was managing the property, prior to the RTM company taking over the management, he was personally paying the electricity bill which was in part made up of the usage in the common parts.

He relies almost exclusively for his stance on the case of Phillips v Francis. He claims no other prejudice than the failure of consultation in accordance with the Regulations. When specifically asked by the Tribunal if he regarded the charges as unreasonable or contended for a different figure, he said he did not, but repeated that he was inhibited from doing so because of a failure to consult.

Determination

A strict interpretation of Phillips v Francis would lead to the conclusion that all 'works' in any year were qualifying works and should be aggregated. That includes all electrical, plastering and decoration work etc.

Both parties appear to have approached this year's claim on the basis that the electrical works are one set of works and the decorating and plasterwork is another set of works. This is an approach with which we respectfully agree. The applicant contend for an even greater segregation of work between different types of electrical work and separation of the decorations and plasterwork.

We find that both the electrical work and plasterwork following on from rewiring, on the one hand and the decorating on the other are 2 sets of works to which the £250 limit applies. It is a moot point as to whether the remedial plastering, following the electrical work, but dealt with at the time of the redecoration should be included as part of the electrical works or the decorating works. One way or another it would take one of those categories (if they are to be treated as distinct categories) beyond the £250 limit per flat.

So far as the electrical work is concerned it would be possible to argue that the £51 contribution is in respect of fault tracing and repairs, but the remainder, with the plasterwork, would still exceed £250.

However we are satisfied that dispensation from the consequences of failing to follow the consultation regulations should be granted in full. We find that there was in fact a greater degree of consultation and involvement than would have been brought about by merely following the Regulations. Mr Markham knew what was needed. He wished, not unreasonably, to be rid of the use of common parts electricity via his own supply. He contends for no prejudice apart from technical breaches. He contends for no different cost to that claimed. We follow the clear guidance in the decision of the Supreme Court in Daejan Investments Ltd v Benson [2013] All E R (D) 48.

Painting

The reasonableness of the painting charge (£980 - £245 per flat) is challenged. The question of aggregation with other 'qualifying works' is also an issue.

The applicant's representations are set out at paragraphs 7.1 - 7.22 at pages 75-79 of the applicant's bundle. It says that the cost was kept to a minimum by specifying only work which the volunteer Directors of the RTM company could not do themselves. The work was put out to tender and the lowest quotation accepted.

The respondent's representations are set out on pages 14-16 of his hearing bundle. He sees a conspiracy to keep the cost below £1000 so as to avoid the consultation requirements. He suspects the motives of those who did work on a DIY basis free of charge. He avers that the work was shoddy and incomplete (on the top landing where his cupboard was stored) and that the emulsion paint should not have been applied over the existing lining paper.

He also contends that in any event all works in any one year should be aggregated so as to give one £250 limit.

Determination

Our inspection revealed the work to be of satisfactory standard and reasonably priced having regard to its nature and extent. Some rectification work is required to damage to walls and balustrade on the upper staircase.

We find no evidence to support Mr Markham's contentions of conspiracy or bad motives in the Directors doing some work. The next highest quotation was almost half as much again.

If the work is to be viewed as one discrete category of qualifying works then the £250 has not been breached, (unless the post electrical plasterwork is included). If it

should be aggregated with any other work in this year then we grant dispensation as before, for the same reasons.

Service charge 2013

This was addressed at the Directions hearing. The only issue is as to the reasonableness overall of the budget upon which the demand for a monthly payment on account of £30.82 per flat is predicated.

It was recorded that Mr Markham agreed to pay the charge as it fell due. He has not done so since May 2013.

His case at the hearing was that he wished, on reflection, to await the outcome of the Tribunals adjudication in respect of the actual outturn for the previous years, upon which the budget was based, before making payment.

The applicant's case at the hearing was that the budget was reasonable having regard to the previous year's outturn, Mr Markham had not honoured his agreement recorded at the Directions hearing and in any event he had an obligation under the leases to pay on account.

Determination

In the light of our determinations, above, about the previous years, we find that the budget is reasonable, the payments on account demanded are reasonable and should have been paid both under the leases and in accordance with Mr Markham's agreement recorded at recording 13 of the Directions.

We observe the difficulties that are created in cash flow terms when regular payments are not made in respect of half of the flats due to pay service charge, especially when essential and unchallenged outgoings, such as insurance, have to be funded.

Interest payments

It follows from our findings above that all the service charges claimed were due and payable at the time they were demanded and that, accordingly, interest is due and payable by Mr. Markham under the terms of the leases in the sum of £119.87 per flat.

Alleged Breach of Covenants

Most of these allegations had either been compromised at the Directions hearing, or had been rectified or were not now pursued.

We regard the issue of the barbecue as unresolved but not susceptible to a determination by us at this stage. It was the subject of an indication that it would not be pursued by the landlord and an undertaking by Mr Markham that he would relocate it. He has not done so but we do not regard it as still on our agenda. That does not prevent it being addressed in any future application.

We do not find Mr Markham to be in breach of his obligation not to sublet part only of flat 3. We accept that the occupant of flat 3 does not use the parking space, and her visitors may park inappropriately, but the prohibition against partial letting of the flat is intended to prevent the flat being split into 2 or more separate dwellings and not intended to resolve car parking disputes.

The issue of the boat was the subject of an indication that it would not be pursued 'in the light of the above {recitals and recordings}'. Several of the recorded events have not taken place, or did not take place within the agreed timescale. It cannot be pursued on this application, but it appears to be a very clear breach of cause 8 of the Seventh Schedule to the lease.

The issue of the failure to paint in breach of Clause 5 of the Sixth Schedule was dealt with by Mr Markham agreeing to undertake the painting. No precise timescale, beyond an expectation, was set. The painting has not been done. Mr Markham indicates that some of the windows were found, on inspection, to be rotted and need replacing. He appears to accept that he is in breach of the obligation to keep the flats in good decorative condition and to paint not less than once every fifth year. We so certify that breach.

Costs

The applicant sought costs against Mr Markham in the sum of £385.45, on the grounds that his conduct in these proceedings had been frivolous and vexatious.

In fact those specific criteria are no longer applicable in the light of paragraph 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, which came into force on 1st July 2013. Under that provision, a wasted costs order may be made under section 29(4) of the Tribunals, Courts and Enforcement Act 2007 if a person has acted unreasonably in bringing, defending or conducting the proceedings.

Whilst we find that Mr Markham has not honoured some of the undertakings he gave at the PTR, and that his conduct, especially at the hearing, has been abrasive, the fact remains that we cannot find that his defending the claim was unreasonable or that his conduct was so inappropriate as to be unreasonable. He is patently disgruntled by being removed as manager. His disappointment, however unjustified, may still be a raw issue. It should be regarded as passed and will not be a justification for future inappropriate conduct.

We found for the applicant on almost every substantive aspect of this application. It was reasonable of them to bring the application. The need for dispensation in respect of some of the items of service charge meant they had no choice but to bring it, if Mr Markham was taking the point.

For those reasons we do not find that it would be just to Order Mr Markham to pay any costs as a party to these proceedings. We do find that it would be just and equitable for the applicant's reasonable costs to be regarded as an appropriate head of expenditure in respect of service charges. That is, they are to be regarded as relevant costs and we decline to make an Order under S20C preventing them from being so. The reasonable cost can be included in the service charge claim for 2013 and will be payable by each contributor to the service charge in the appropriate proportion attributable to each flat.

Schedule.

Re: Flats 1 & 3, 12-14 Crossbeck Road, Ilkley, LS29 9JN.

20th May 2013

DIRECTIONS.

Upon hearing Mrs Gledhill and Ms De Mowbray as representatives of the applicant Company and Mr Markham in person

It is recorded that:

As to Service Charges

1. There is no issue that the service charges claimed are other than within the scope of the Service Charge provisions of the Leases.
2. The insurance premiums have been paid by the respondent. There is no issue.
3. The reasonableness of the cost, for 2011, of the sash window, surveyor's report, and solicitors fees are in issue.
4. The reasonableness and cost of the drainpipe repairs, front path and property valuation, for 2011, are not in issue. There is an issue as to whether there should be a contribution demanded, from the next door neighbour, towards the cost of the front path. Mr Markham agrees to pay £101 for each flat in respect of these items, payable by 20th June 2013.Any contribution that may be recovered from the neighbour to be credited to the Service Charge account.
5. There is no issue as to the Fire Alarm inspection, which has been paid.
6. **For 2012**, the issue with the sash window is as to whether the lowest tender was accepted, and whether there was any improper connection between the contractor and the tenant who recommended a quote be obtained from him. An adequate Section 20ZA consultation took place, about which there is no issue. Mr Markham, in response to the quotations obtained by the applicant Company, provided his own lower estimate for replacing the window that he retained, having fitted it when he was managing the property. He removed it when there was a dispute as to him being paid by the applicant Company, which took over the management on 1st November 2010.
7. There is an issue as to whether a claim should/could be pursued against the contactor for damage allegedly caused by the contractor to Mr Markham's

roof. There is a dispute as to any damage being caused. Mr Markham avers that 2 slates were broken and the ridge tiles disturbed.

8. The Service Charge for the Fire Extinguishers, carpet cleaning and drain cleaning has been paid and there is no issue.

9. There is no issue with the reasonableness and cost of the wall/ceiling repairs, joinery or Fire Alarm & extinguisher test. Mr Markham agrees to pay £157.25 for each flat in respect of these items, payable by 20th June 2013.

10. There is an issue as to whether the Consumer Unit and the 2 sets of electrical work should be regarded as one item for the purposes of S20ZA. The applicant company avers that they were separate, with electrical work 1 being for heating appliances, whereas electrical work 2 was urgent and only discovered by the electrician on site. It concedes that there was no Section 20ZA consultation, and, if required, applies for dispensation. The cost of the work is not in issue. Mr Markham agrees to pay £250 per flat, payable by 20th June 2013, on account of the £317.50 claimed, pending a resolution of the S20ZA issue.

11. The reasonableness, cost and propriety of the Decorating work (£980) is in issue. Mr Markham suggests that it is more than coincidence that the total is just below the S20ZA consultation limit. He avers that the work said by Ms De Mowbray to have been carried out by her and her brother in law free of charge is unlikely to have been without remuneration, the cost of which would be included in the professional decorator's account. He objects in principle to any officers of the management company carrying out any work to the common parts, even free of apparent charge.

12. There is an issue as to the reasonableness of the general expenses incurred with particular regard to the cost of postage stamps to send communications to the tenants, when they are in the same building as those persons who are sending the communications on behalf of the applicant Company.

13. There was an issue as to the tenants' liability to pay on account of service charges in circumstances where it was said that no adequate budget had been prepared. This is an otiose issue for the historic claims (2011 and 2012), for which final actual out turn demands have been made. It is no longer an issue for 2013, a budget having been prepared and circulated. Mr Markham agrees to pay by 20th June 2013, such amount as is outstanding in respect of the on account service charge for 2013 at the rate of £30.82 per month per flat.

As to alleged Breach of Covenants

To the extent that there has been (which is not admitted) any breach by Mr Markham of the Covenants in the Lease, it is agreed that they will be addressed as follows, and

the applicant company will not pursue this application for a declaration, (save for the alleged breach of Clause 1 of Schedule Seven – use of flat 1 basement as a workshop - which remains a live issue).

1. Mr Markham will remove the CCTV camera and make good the wall. He reserves the right to maintain lawful CCTV security surveillance on his flats.

2. Mr Markham will, by 20th June 2013, remove the cupboard (which it is agreed is his) on the 2nd floor landing.

3. Mr Markham will, by 20th June 2013 remove all items belonging to him or his sub tenant, from the lobby by the back door. The applicant company will, by the same date, remove the bags of concrete mix (which it is agreed belong to it).

4. Whatever remedies may be available in respect of the lock on the cellar stairs, its existence is not a breach of Clause 7 (b) of the Sixth Schedule to the Leases.

5. Mr Markham will, by 20th June 2013 remove all items of his, or his sub tenant, from the back yard.

6. Mr Markham will relocate the car to within a parking space designated for his exclusive use under the terms of his leases.

7. In light of the above the applicant company is not minded to pursue the issue of the precise location of the boat.

8. Mr Markham agrees to redecorate the window frames and doors of both flats. Mrs Gledhill agrees to do likewise in respect of her flat. No timescale was agreed but it is the reasonable expectation of the Tribunal that these works will be completed before the Final Hearing.

IT IS ORDERED THAT:

1. The applicant company shall, by 20th June 2013, serve upon the respondent a narrative statement on the outstanding issues and attaching thereto copy documentation in support to include estimates (where obtained) and accounts for each head of claim. The statement and documents need not be served on the Tribunal, but should be included in the Hearing Bundle (see below). The Tribunal office should however be informed where and when the statement and documentation was served on Mr Markham.

   The outstanding issues are:-

   For 2011. Sash window, Surveyor's report, Solicitor's fees and contribution to cost of front path.

For 2012. Sash window, 3 items of electrical work, decoration and General expenses.

2. The respondent shall, by 20th July 2013, serve upon the applicant company a narrative statement in reply, attaching copies of any documentation upon which he relies, and setting out, in respect of each head of claim, the amount for which he contends as being payable (if any). The statement and documents need not be served on the Tribunal, but should be included in the Hearing Bundle (see below). The Tribunal office should however be informed where and when the statement and documentation was served on 12-14 Crossbeck Road RTM Company Ltd.

3. A party shall promptly report to the Tribunal any failure by another party to serve documentation etc on time.

4. The parties' statements shall stand as evidence in chief at the Hearing.

5. The applicant shall file at the Tribunal offices a Hearing Bundle in triplicate and serve a copy on the respondent. This shall be done by 6th September 2013. (An earlier date being impracticable due to the parties' holiday commitments).The bundle shall include a copy of the Application and accompanying documents, the Leases, a copy of these Directions and the parties narrative statements and exhibits'

6. The Hearing will be listed on a date to be fixed in the Hearing window 30th Sept -25th October 2013.

BY CONSENT:

Mr Markham will by 20th June 2013, pay £508.25 per flat in respect of the above recorded agreement, together with any sums due in respect of the agreement set out at recording 13 above.

M J Simpson.

Procedural Chairman.