10153

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AE/LSC/2014/0196**
Property	:	**3A, Hazelmere Road, London NW6 6PY**
Applicant	:	**Mrs Jubilee Brecker**
Representative	:	**Mr Martin Brecker (Husband)**
Respondent	:	**Orchidbase Limited**
Representative	:	**Mr Omar Ali of Richard Martin & Co Chartered Surveyors, managing agents**
Type of Application	:	**Section 27A Landlord and Tenant Act 1985 – determination of service charges payable**
Tribunal Members	:	**Judge John Hewitt** **Mr Neil Martindale FRICS**
Date and venue of Hearing	:	**Wednesday 6 August 2014** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**11 August 2014**

DECISION

Decisions of the Tribunal

1. The Tribunal determines that:
   1.1 The sum of £390.00 is payable by the applicant to the respondent being a contribution to the cost of repairs to the roof undertaken by the respondent;
   1.2 The respondent shall forthwith credit the applicants account in the sums of £562 and £125 being sums included in a debit to her account of £2,173.00 in respect of external repairs and redecorations carried out and which two sums relate to works of brick pointing and cill replacements which were not carried out by the contractor but the cost of which had been included in the invoice price paid to the contractor;
   1.3 The respondent shall by **5pm Friday 22 August 2014** credit the applicant's account with the sum of £190 by way of a reimbursement of the hearing fee paid by the applicant to this tribunal in connection with these proceedings.

2. The reasons for our decisions are set out below.

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing file provided to us for use at the hearing.

Procedural background

3. On 7 April 2014 the tribunal received an application from the applicant pursuant to section 27A Landlord and Tenant Act 1985 (the Act) [A1].

4. Directions were given on 1 May 2014 [A18].

5. The application came on for hearing before us on 6 August 2014. The applicant was represented by her husband, Mr Martin Brecker. The respondent was represented by Mr Omar Ali of Martin Richards & Co. chartered surveyors who manage the development on behalf of the landlord.

6. Evidently since the application was issued the parties have been able to resolve some of the issues between them. At the commencement of the hearing it was established that the issues for the tribunal to determine were:

   6.1 The applicant's claim that she was not obliged to contribute £390.00 towards the costs of a repair to the roof undertaken by the landlord;

   6.2 The applicant's claim that she was entitled to credits of £562 and £125 being sums included in a debit to her account of £2,173.00 in respect of external repairs and redecorations carried out and which two sums relate to works of brick pointing and cill replacements which were not carried out by the contractor but the cost of which had been included in the invoice price paid to the contractor;

6.3 An application by the applicant that the tribunal require the respondent to reimburse her the sum of £190 being the hearing fee paid by her to the tribunal in connection with these proceedings.

7. Evidence was given by both Mr Brecker and Mr Ali both of whom were cross-examined by the other and both of whom answered questions put to them by members of the tribunal.

The lease

8. The subject property is a one-bedroomed flat in a Victorian conversion.

9. The lease is at [A25]. It is dated 22 February 1985. It is relatively simple and crude. It grants a term of 99 years from 29 September 1984 at a ground rent starting at £50 pa and rising to £200 pa and an insurance rent of one fourth of the cost incurred by the landlord in insuring the building against specified perils.

10. Clause 2(9) is a covenant on the part of the tenant to contribute one fourth of the expense of renewing, repair and maintaining the roofs, structure, walls and foundations of the building and the cost of maintaining repairing and decorating and painting the exterior of the building.

11. There are no provisions for estimated expenditure, annual accounts and balancing debits or credits as the case may be.

The issues

Roof repairs

12. In or about February 2014 the top floor flat suffered ingress of rainwater from the roof above a dormer window and part of the ceiling of that flat collapsed.

13. Urgent repairs were required and undertaken by the respondent. An application pursuant to section 20ZA of the Act for dispensation of the need to comply with the statutory consultation requirements was made and granted.

14. One fourth of the cost of works amounted to £390.00 inclusive of VAT and that sum was debited to the applicant's account.

15. Mr Brecker submitted that the applicant was not obliged to pay that sum. He said that the need for the repair came about due to years of neglect by the landlord and its failure to carry out cyclical maintenance. For the alleged history Mr Brecker relied upon what others had told him because his wife had only recently bought the flat and they had little personal knowledge of what had occurred previously. Mr Brecker argued that the landlord should have carried out three yearly inspections as required by the lease. When asked to identify the lease provision relied upon Mr Brecker cited clause 5(6) [A29], but when the

tribunal pointed out that that clause related solely to external redecorating Mr Brecker accepted that.

16. Mr Brecker accepted that so far as he was aware the incident was a one off and there had not been a history of water ingress into the top floor flat.

17. Mr Ali also said that so far as he was aware the incident was a one off, the disrepair was reported to the landlord, the landlord acted promptly in dealing with it and the costs incurred were reasonable in amount. He said it was a typical reactive repair carried out in accordance with good estate management.

18. Mr Ali said that Mr Brecker's suggestion that the landlord have the roof inspected every three years to see if repairs were required was impractical and unnecessarily expensive. Mr Ali was adamant that a tower or scaffolding was required to give safe access to the roof, whereas Mr Brecker said he had been told that the actual repair was carried out by way of ladders.

Reasons for decision

19. On this issue we preferred the evidence of Mr Ali which struck a chord with the members of the tribunal. Both Mr Brecker and Mr Ali were agreed that there was no history of rainwater ingress to the top floor flat which might be indicative of a long standing roof defect. In the absence of anything to put the landlord on notice of a need to repair the roof we consider that Mr Brecker's submission that three yearly inspections should be carried out is impractical because an external visual inspection is unlikely to reveal any underlying problem. In our experience the cost of doing so would not be reasonably incurred.

20. In the absence of any challenge to the amount of the contribution we find that the applicant is obliged to contribute the sum of £390.00.

Major works

21. We set out below out findings made on the basis of the documents and evidence presented to us.

22. It was not in dispute that major works comprising external repairs and redecorations were required to be undertaken, indeed the applicant and, so we were told by Mr Brecker, the other lessees, were anxious that the works be carried out.

23. A specification of proposed works was drawn up by a member of staff at Martin Richards & Co. A copy is at [A33 – 37].

    At paragraph 3.5 is an instruction to the contractor to provisionally allow to rake out and repoint 75 sq. m of external brickwork. This brick work is at the rear for the building because the front is stucco painted. See the photographs at [A176 and 178] for general illustration.

At paragraph 3.6 is an instruction to the contractor to provisionally allow a PC sum of £500 for supply and fitting of any timber cills or windows.

Rather surprisingly Mr Ali told us that this specification was generic in the office and the person who drew it up would not have known whether any brickwork repointing or cill repairs would have been required.

24. A section 20 consultation exercise was carried out and Mr Brecker raised no points about that.

25. The specification was put out to tender.

A quotation dated 10 July 2013 was submitted by Ferns Construction (Ferns) in the sum of £9,500 [A41]. That firm had been nominated by a lessee.

A quotation was also submitted by a Mr George Theologitis (GT) which is dated 16 July 2013 [A42]. It is in the sum of £7,700 plus a contingency of £500, effectively a total of £8,200.

26. The lessees were keen that the contract should be placed with Ferns and Mr Ali said that the landlord was prepared to do so but Ferns then indicated they were too busy to take on the work. In the event the contract was placed with GT.

27. In the event it was common ground that that GT did not carry out any brickwork repairs or repointing and did not supply and fit any new cills, evidently deeming it that neither was required, although some cill repairs may have been carried out.

28. Mr Ali said that he was on site with GT soon after the contract had been awarded and works started and he was of the opinion that brickwork repairs were not required.

29. It was not in dispute that GT invoiced the sum of £8,200 and he did not include VAT as evidently he is not VAT registered. The invoice had not been included in the papers presented to us but Mr Brecker said he had been given a poor quality photocopy of it.

30. The gist of Mr Brecker's case was that the GT quote of £8,200 included provisional sums for brickwork repointing and supply and fitting cills, that work was not in the event carried out and thus GT's final invoice of £8,200 should have been somewhat lower.

31. Mr Ali in his evidence said that the GT quote did not include for the two provisional sums in question. He said that GT had inspected the subject property prior to tender and had expressly not included those two items. In support of this Mr Ali relied upon what was said to a breakdown of GT's quote which accompanied the quote dated 16 July

2014 [A43-A47]. This document is the original specification prepared by Michael Richards & Co made available to GT electronically on which GT typed three annotations:

31.1 Just ahead of paragraph 3.5 the words *"Note: 3.5 not applicable including points a,b,c and d below, therefore not quoted for."* have been added

31.2 At the end of paragraph 3.5 the words *"N/A and not quoted for."* have been added.

31.3 At the end of the specification the following has been added:

"Invoice Breakdown
3 Hazelmere Road
London, NW6 6PY

Scaffolding
To erect full scaffolding i.e. front elevation; over the roof and rear elevation.
Cost of scaffolding cover all points above from 2.1 to 2.6

Total *£4,000.00*

External Decorations
All the above from points 3.1 to 3.9 and point D (excluding 3.5) is included in the labour cost and price for materials below

Materials – all from Dulux
Total *£600.00*

**Cost of labour*
Total *£3,600.00*

Grand Total all inclusive of scaffolding, materials, labour and VAT ***£8,200.00***

** Cost of £500.00 Contingency included in cost of labour above"*

32. Mr Ali said that just after GT had commenced the works he, Mr Ali, went to the site inspected the brickwork on the rear elevation and agreed with GT that no repairs to it or repointing were necessary. Mr Ali was sure he communicated to the lessees that GT was not going to undertake any brickwork repairs. He was not too sure when this was done or exactly how; it may have been by telephone or by email. Mr Ali said that he not prepared to answer this question and had not gone through his email records prior to the hearing.

33. We find that we cannot rely with confidence on Mr Ali's evidence on this issue for several reasons:

33.1 We preferred Mr Brecker's evidence to the effect that GT had not inspected the rear elevation until after the commencement of works and thus could not have known the state of the brickwork at the time he submitted his tender. Mr Brecker said, and we accept, that although the applicant's flat is sublet the tenant would not have permitted GT access without first getting approval from the Breckers.

33.2 The second stage consultation notice [A53] is dated 17 July 2013. It describes the proposed works and the tenders received. There is reference to an analysis of the tenders and a recommendation to proceed with GT. There is then added: *"This builder will contract to undertake the works to the building as detailed in a specification previously provided. In total, we have obtained 3 quotations, one of which, (Fern...), was from a leaseholder nominated contractor.*
We find that if Michael Richards & Co had been aware at the time of sending out this notice that GT had not included for the 3.5 and 3.6 provisional sums they would probably have taken at least two actions. First, they would have drawn this to the attention of the lessees so that they would readily understand the two quotations cited were not like for like. Secondly, they would have referred back to Fern and invited a revised quotation omitting these two items. Neither action was taken. Mr Ali was unable to give a convincing explanation why not.

33.3 The evidence of Mr Brecker was that he was unaware that points 3.5 and 3.6 had been omitted until well after completion of the works and after the contractors had gone off site. He said it did not come to light until he was pressing for detailed answers to a number of concerns he had about the works. This evidence was supported by another lessee. At [A127] there is an email dated 2 March 2014 from Kathy Nettleship to Michael Richards & Co in which she says, amongst other things, but expressly in connection with the brick work repairs:

"Throughout this whole process there has been no correspondence in which we were notified that the specification was not being followed. We therefore have been misled and misinformed.

Please can you confirm in writing that the pointing (3.5) was checked and that Michael Richards approved that it was not required. We mentioned this in our previous correspondence ... and are particularly concerned that item 3.5 was not carried out ...".

The evidence of Mr Brecker, which we accept, was to the effect that he and other lessees had particular concerns about the need for brickwork repairs and that if they had been informed prior to

commencement of the works or during the course of the works that no such repairs were to be undertaken there would have been a discussion about it at that time and no such discussion took place.

33.4 The quotation at [A42] states that it is *"For the total external repairs and redecoration to front and rear of property as per the specification and items quoted for."* There is no mention of a copy of the specification being attached or that some items on the original specification had been omitted.

33.5 The language of the annotation on [A47] is that it sets out an ***"Invoice Breakdown"***. At this stage there is a quote only and an invoice is premature. The wording is indicative of past tense. It also states that the sum of £8,200 is inclusive of VAT when GT is not VAT registered.

34. We therefore find that the quotation as originally submitted by GT in the sum of £8,200 included provisional sums for 3.5 and 3.6 but that work has not been carried out.

35. Accordingly GT's final invoice for £8,200 has to be adjusted to reflect the work not carried out. 3.6 was a fixed provisional sum of £500. The applicant's contribution at 25% is thus easily established to be £125. There is no VAT element to add to that because GT did not charge VAT. We thus find the applicant is entitled to a credit to her account in the sum of £125 to reflect this item.

36. Item 3.5 is not quite so easy to determine because no express figure was cited in the specification. In support of the applicant's case Mr Brecker sought to rely upon a report prepared by Mr Jeremy Taylor BSc MRICS of Wenlock & Taylor. It is dated 28 November 2013. A copy is at [A61]. Mr Brecker told us that Mr Taylor had informed him that a reasonable rate for brickwork repointing work in the NW London area was in the region of £30 per sq. m. Mr Ali was not in a position to challenge this figure, even though he was aware from the application form that the applicant was seeking a credit of £562 + VAT for this item. The cost of £30 per sq. m struck a chord with the members of the tribunal and we have adopted it. There is no VAT element to add to because GT did not charge VAT. We thus find that the applicant is entitled to a credit to her account in the sum of £562 to reflect this item.

Reimbursement of fees

37. We were told that the respondent had already agreed to reimburse the applicant the £125 application fee.

38. Mr Brecker made an application that the respondent also reimburse the hearing fee of £190.

39. The application was opposed. Mr Ali submitted that the respondent had conceded a number of items in dispute and in consequence had

agreed to reimburse the application fee. It did not feel that any further concessions were justified and thus did consider that it should be obliged to reimburse the hearing fee as well.

40. Clearly the applicant felt justified in coming to a hearing to air a grievance over three items in dispute. In effect the applicant lost on one point but succeeded on two. In money terms the applicant gained more than she lost.

41. On balance we find it just and equitable that the respondent shall reimburse the hearing fee of £190 and we have required that it does so.

42. Before leaving this issue we wish to record our disappointment that the respondent was not represented at the CMC and that at the CMC Mr Brecker made an outright rejection of the suggestion that the parties might wish to consider the free mediation service the tribunal is able to offer. Parties must understand that they are expected to attend CMCs because they serve a very useful purpose and can often lead to a valuable saving of time, money and resources for both the parties and the tribunal service. Secondly, and for very similar reasons, parties are expected to try and resolve matters between themselves and mediation is a very useful way of trying to do so. Parties which refuse to consider mediation for no good reason are at risk of costs consequences.

The statutory provisions

43. The statutory provisions we have taken into account in this decision are set out in the Schedule to this decision.

Judge John Hewitt
11 August 2014

The Schedule

Landlord and Tenant Act 1985

18.— Meaning of "service charge" and "relevant costs".

(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.

19.— Limitation of service charges: reasonableness.

(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 provision 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.

(2A)-(3) (4) ... [repealed]

(5) If a person takes any proceedings in the High Court in pursuance of any of the provisions of this Act relating to service charges and he could have taken those proceedings in the county court, he shall not be entitled to recover any costs.

27A Liability to pay service charges: jurisdiction

(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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).
(7) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.