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**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **LON/00BJ/LSC/2013/0741**

Property : **156C Trinity Road Wandsworth
Common London SW17 7HT**

Applicant : **Mr Akintayo Adeniji**

Representative : **In Person**

Respondent : **Quadron Investments Limited**

Representative : **Ms R Selby of Altermans solicitors**

Type of Application : **For the determination of the
reasonableness of and the liability
to pay a service charge**

Tribunal Members : **Judge Peter Leighton LLB
Mr Neil Maloney FRICS**

**Date and venue of
Hearing** : **19th February 2014
10 Alfred Place, London WC1E 7LR**

Date of Oral Decision : **19th February 2014**

Date of written Decision : **4th March 2014**

DECISION

Decisions of the tribunal

- (1) The tribunal determines that the Applicant is entitled to be reimbursed in full for the insurance claims made by him and that the excess under the insurance policy in force is to be paid out of the service charge account. The applicant is therefore entitled to the return of £500 subject to his contribution to the excess through the service charge account.
- (2) The tribunal makes no order on the Respondents application for costs against the Applicant under Rule 13 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013
- (3) The tribunal determines that the Respondent shall pay the Applicant £190 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 the amount of service charges payable in respect of the property known as Flat C 156 Trinity Road Wandsworth Common London SW17 7HT("the flat")] The original application also contained an application to vary the Applicant's lease under Section 35 of the Landlord and Tenant Act 1987
2. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

3. A case management hearing took place on 3rd December 2013 at which directions were given in respect of both applications to which reference will be made later
4. The Applicant appeared in person at the hearing with his partner Ms Weick and the Respondent was represented by Ms R Selby of Altermans solicitors.
5. Immediately prior to the hearing the parties handed in further documents, namely [give brief description]. The start of the hearing was delayed while the tribunal considered these new documents. [Deal with any procedural matters]

The background

6. The property which is the subject of this application is a Victorian house divided into four self contained flats.
7. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.
8. The Applicant holds a long lease of the flat which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease will be referred to below, where appropriate.
9. Clause 3 of the lease imposes a number of covenants on the lessee including the liability jointly with the other lessees to maintain repair and redecorate the premises and to contribute to the payment of insurance premiums .
10. By Clause 5(5) the landlord covenanted

“.....at all times during the said term(.....) insure and keep insured the Property in the name of the lessor and the lesseeagainst comprehensive risks with some insurance company of repute through the agency of the lessor including loss or damage by fire, and loss or damage or liability to any persons arising from ownership or occupation or user of the property and all other risks usually described as property owners liability and such other risks (if any) as the lessor or its agents may think fit in the full value thereof.”

The issues

11. At the start of the hearing the parties identified the relevant issues for determination as follows:
 - (i) The payability and/or reasonableness of service charges for year relating to the excess payable under the insurance policy
 - (ii) Whether the Respondent is entitled to costs under Rule 13 of
 - (iii) Whether the applicant is entitled to reimbursement of fees incurred in bringing the proceedings

12. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

Issue 1 The Insurance Excess

The Tribunal's Decision

13. The tribunal determines that the Applicant is entitled to be paid in full for the value of his claim on the insurance and that the excess under the policy of 500 being in respect of two claims in the sum of £250 for each claim falls to be paid to the Applicant by the Respondent out of the service charge account to which each of the lessees contribute

Reasons for the Tribunal's Decision

14. On 1st May 2012 the Applicant and his partner returned from abroad to find their bed soaking wet as water had come through the roof terrace and sliding door of Flat D above.. It had caused a hole in the ceiling and caused the Applicant loss and damage and inconvenience.
15. A roofer ascertained that the cause of the water ingress was a hole beneath the sliding door of Flat D's bedroom which and caused water to pour in.
16. The owners of Flat D instructed a plumber to who carried out what was described as a temporary repair and sent the invoice to the insurers without showing it to the Applicant. The repair failed and on 30th June another water ingress occurred to the flat.
17. At the end of July 2012 the owners of flat D instructed a surveyor whose report indicated that the roof terrace was not demised to Flat D. The Respondent did not instruct a surveyor itself preferring to rely upon the surveyor appointed by Flat D
18. A further water ingress occurred on 23rd September 2013 and on 15th October 2012 a third attempted repair was carried out to the sliding door
19. Following considerable correspondence the owners of Flat D in April 2013 confirmed they would pay the excess on the insurance claim if it was proved it had been caused by their flat. In fact they did not pay and the applicant was forced to bear the excess of £500 being two claims of £250 each.
20. The matter became more confused as the insurance company's loss adjuster originally refused to cover the cost to the Applicant's bedroom

but this was reversed on appeal to the insurance company. The insurance company would not negotiate direct with the Applicant as the insurance policy had been taken out by the respondent.

21. In the view of the tribunal the annual requests for insurance premiums is a service charge within the meaning of Section 18 of the Act and the excess is part of the contract of insurance and accordingly part of the service charge.
22. The reasons for this is that the level of the premium is directly related to the level at which the excess is set. The higher the excess the lower the premium and vice versa.
23. The principle for which the Applicant contends appears to be accepted by the Lands Tribunal in Denise Green -v- 180 Archway Road 2012 UK UT 245. and Seacon Residents Co Limited -v- Oshodin 2012 UKUT 54
24. In Nadav -v- Sinclair Gardens investment (Kensington) Ltd CHI 00ML LSC/209/0110

At paragraph 29 the tribunal stated :

“On the issue of payability the effect of clauses 3(2) paragraph 5 of the Fourth Schedule and Paragraph 3 of the fifth Schedule ... is to make the reasonable costs of the excesses chargeable to the maintenance account. This is the case even though the lease does not make explicit reference to excesses . In the tribunal’s experience excess are now an inevitable feature of property insurance and they ca on the proper construction of this lease be properly regarded as a cost or expense of insurance .The commercial rationale is that the existence of an excess leads to a lower premium than would otherwise be the case if there were no excess. “

25. The Applicant relies specifically upon that paragraph and the tribunal agrees that the reasoning in that case would apply in the present application.
26. In the circumstances the tribunal determines that the Applicant is entitled to recover the excess sums of £500 paid by him and that such excess is to be treated as the service charge liability and is thus recoverable from each of the four leaseholders equally

33. The solicitors issued an invoice to their clients in the sum of £1437 plus VAT for work undertaken between 7th October 2013 and 10th January 2014 . This sum is claimed against the Respondent as costs under Rule 13 on the ground that he acted unreasonably either in issuing the application or in failing to withdraw it in time in accordance with the directions given by the tribunal.
34. The Applicant was anxious in issuing the application to resolve the position within the building for all four leaseholders but now accepts that the manner in which he chose to do so was misconceived. He made a mistake in the process which he adopted but this did not amount to “unreasonableness” for the purposes of Rule 13 in the view of the tribunal. That rule is not intended to visit an order for costs upon every mistake made by a litigant but is designed to punish unreasonable conduct of the proceedings
35. The Applicant who is a solicitor accepts that when he sent the email of 5th December he should have copied the same to the Respondent’s solicitor but expected to receive the directions before 17th December and thought that the tribunal would have notified the Respondent’s solicitors.
36. This was again an unfortunate mix up and although the Respondent was in breach of the directions he did not realise it at the time and did not act deliberately to frustrate the proceedings . The tribunal therefore does not consider that this attracted the sanction of Rule 13 either
37. If the tribunal were thought to be wrong in finding that the Applicant had not acted unreasonably it would nonetheless have limited the costs to the period after 17th December 2013 by which time the Applicant was due to notify the Respondent .In the view of the tribunal such costs would not have exceeded a few hundred pounds.

Application under s.20C and refund of fees

38. No application was made under Section 20C of the 1985 Act so the tribunal was not required to deal with it At the end of the hearing, the Applicant made an application for a refund of the fees that he had paid in respect of the application and hearing¹. Having heard the submissions from the parties and taking into account the determinations above, the tribunal orders the Respondent to refund the sum of £190 hearing fee paid by the Applicant within 28 days of the date of this decision

¹ The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

Issue 2 Respondent's Application for penal costs

The Tribunal's Decision

27. The tribunal determines that no order will be made against the Applicant in relation to his application for variation of the lease which was subsequently withdrawn

Reasons for the tribunal's decision

28. By Rule 13 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 it is provided

*(1)The tribunal may make an order in respect of costs only
(a) under section 29(4) of the 2007 Act (wasted costs)and
the costs incurred in applying for such costs ;*

*(b) if a person has acted unreasonably bringing defending
or conducting proceedings in*

*(ii) a residential property case or
(iii)a leasehold case*

29. The basis of the Respondent's claim was that the Applicant had included in his application an application to vary the lease. At the directions hearing on 3rd December 2013 the Applicant was informed by the tribunal that such an application appeared to be misconceived and he was given the opportunity to withdraw it by 17th December 2013 or the Respondent could apply to have it struck out.
30. The directions arising from that hearing were dated 5th December but according to the Applicant were not received by him until 16th December and not received by him until 17th December. He sent an email to the tribunal on 5th December withdrawing the application for variation but did not send a copy to the Respondent's solicitors
31. According to a statement from Aisha Khan a legal assistant employed by the Respondent's solicitors she telephoned the tribunal on 13th December 2012 to ask about the directions and was informed they would be sent out that day or on Monday 16th. During that conversation she states that she was not informed that the section 35 application had been withdrawn
32. The directions state that copies of any communications with the tribunal should be sent to the other party but the directions were not received until 17th December whereupon the Applicant notified the Respondent. Unfortunately Ms Selby had already undertaken some written submissions in relation to the variation application .

39. The tribunal considered whether to refund the application fee for £190 and the hearing fee for the same amount. The tribunal considered that the original application was partly misconceived for the reasons given earlier and that this resulted in some unnecessary work being undertaken by the respondent. In the circumstances the Applicant should not recover the fees for the application
40. However in the case of the hearing fees the Applicant has been wholly successful and the Respondent at the hearing adopted a somewhat ambivalent position effectively leaving the matter to the tribunal to decide. Ms Selby did not attempt to argue against the legal authorities produced by the Applicant who made out his case to the satisfaction of the tribunal. In the circumstances the Applicant is entitled to recover the hearing fee of £190

Name: Peter Leighton

Date: 4th March 2014

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 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.

- (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

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 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 that tribunal;
 - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property 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.

Leasehold Valuation Tribunals (Fees)(England) Regulations 2003

Regulation 9

- (1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

- (2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).