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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**: CHI/29UQ/LSC/2014/0132**
Property	**: Flats A – D** **41 Lime Hill Road** **Tunbridge Wells** **Kent TN1 1LJ**
Applicants	**: Mr. M. D. Rayner** **Miss N. Richmond** **Mr. P. G. South** **Miss C. Wickens**
Respondent	**: Braear Developments Limited**
Representative	**: Mr. D.J. Earwaker**
Type of Application	**: Liability to pay service charges** **Section 27A Landlord and Tenant Act 1985** **Limitation of Costs** **Section 20C Landlord and Tenant Act 1985** **Reimbursement of fees** **Rule 13(2) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013** **Costs**
Tribunal Members	**: Judge R. Norman (Chairman)** **Mr. C. C. Harbridge FRICS** **Mr. P.A. Gammon MBE BA**
Date and venue of Hearing	**: 22nd June 2015** **Tunbridge Wells**
Date of Decision	**: 29th June 2015**

DECISION

Decision

1. The Tribunal makes the following determinations:

(a) The Tribunal is satisfied that the report of Mr. M. Atkinson MRICS correctly sets out the scope of the works required to be carried out to 41 Lime Hill Road ("the subject property").

(b) Mr. M. D. Rayner, Miss N. Richmond, Mr. P. G. South and Miss C. Wickens ("the Applicants") are obliged to contribute to the cost of those works in accordance with the terms of their leases when the service charges are properly demanded.

(c) In the estimate for the works (item 30) there is the sum of £400 for repair and reinstatement of windows. In respect of that item, Miss Wickens, the lessee of the top flat, is liable to pay for the repair of those windows and if the windows are repaired and reinstated then only the sum of £100 may be charged to the service charges to cover reinstatement and Miss Wickens is liable to pay the cost of repair of those windows. If Miss Wickens decides to have new windows installed rather than have the existing windows reinstated then Miss Wickens is liable to pay the cost of the new windows and their installation and the sum of £400 will not be payable.

(d) In respect of work carried out in June/July 2014 for which a charge of £2,250 was made, the Applicants are liable to contribute only £1,000 and therefore each of the Applicants is to be credited with the sum of £312.50.

(e) No order is made under Section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act").

(f) No order is made in respect of reimbursement of fees.

(g) No order is made in respect of costs. The parties are to bear their own costs.

Background

2. The Applicants hold leases of the four flats at the subject property and the freehold is held by Braear Developments Limited ("the Respondent"). The managing agents are Dawson, Harden & Tanton and Mr. D. J. Earwaker FNAEA MARLA has an interest in both the Respondent and the managing agents and represents the Respondent.

3. The Applicants made an application for a determination of their liability to pay service charges in respect of work to the roof and dormer at the subject property and applications for an order under Section 20C of the 1985 Act, reimbursement of fees and costs.

4. Directions were issued and documents were provided by the parties.

Inspection

5. On 22nd June 2015, before the hearing, the Tribunal inspected the subject property. Present at the inspection were the Applicants, Mr. Earwaker Mr. Atkinson and a builder who attended to provide a ladder giving access to the scaffolding.

6. The property is a mid-terrace four storey house with attic accommodation, in a terrace of similar properties. The construction is traditional, with solid red and yellow stock brick walls with rendered and colour-washed panels to the front elevation. Windows are framed in softwood and single glazed. The property appeared to be generally well maintained externally with the common parts, which were seen, to be in satisfactory order.

7. The main roof is pitched with a hipped roof over the front bay projection. All slopes are clad with interlocking concrete tiles. The rear slope accommodates a dormer which serves a bathroom and a bedroom to the attic accommodation. That dormer is framed, we were advised, in timber, the face accommodating two softwood framed single glazed windows, with the remainder clad in mineral impregnated bituminous felt tiles. These are dressed to the cheeks of the dormer which, in turn, are clad in mineral impregnated bituminous felt. The face and cheeks of the dormer are weathered to the main rear roof slope by lead flashings. The roof is of flat design and, we are advised, clad in a bituminous roofing felt.

8. The Tribunal inspected Flat C on the first floor, and were shown by the Lessee Applicant Miss Richmond, a small hole in the ceiling of the living room at the front of the house. Miss Richmond stated that water had damaged the ceiling and furniture in the room. She believed that water which had entered the rear of the subject property had travelled above the ceiling to the front of the subject property before coming through the ceiling.

9. The Tribunal also inspected Flat D on the second floor accessed by the Applicant Lessee Miss Wickens, which extended into the roof space. The Tribunal was told by Mr Earwaker, during the course of the hearing, that the date of the adaptation when the dormer was fitted was not known, but was thought to be at least 25 years ago. The Tribunal was shown a 75mm hole in the rear second floor bedroom ceiling, where there was evidence of water penetration. In the rear bedroom and bathroom on the floor above, the Tribunal noted that at the time of the inspection, there was no visible evidence of damp penetration to walls and ceilings, but heavy condensation was apparent to the window frames, which had disrupted the painted surfaces.

10. In-situ scaffolding afforded limited access to the rear roof slope and dormer and Mr. Harbridge, accompanied by Mr. Rayner and Mr. Atkinson inspected those parts of the subject property.

(a) Mr. Harbridge found that the condition of the felt tiles to the dormer was poor, and there was evidence of tiles and felt fillets missing /slipped. The condition of the window paintwork was poor. It was noted from tiles which

could be seen, that there was inadequate over-lapping to the interlocking concrete tiles; tile fixings, at the head of the tiles were visible. Some new tiles, similarly fixed, were apparent at the eaves. We could not inspect the flat roof of the dormer.

(b) Mr. Harbridge informed the other members of the Tribunal of the result of his inspection and showed photographs which he had taken. He also showed the photographs to Mr. Rayner and Mr. Atkinson.

Hearing and Reasons

11. The hearing was attended by the Applicants, Mr. Earwaker and Mr. Atkinson and the Tribunal received evidence and submissions from those present.

12. The Tribunal considered all the documents which had been provided by the parties, all that had been seen at the inspection and all the evidence given and submissions made at the hearing and made findings of fact on a balance of probabilities.

13. The application was made in respect of the proposed costs of £12,415 + VAT. However, in the documents produced by the parties, the Applicants had referred to work carried out in June/July 2014 and described as emergency storm damage repairs to roof. A charge of £2,250 had been made for that work and the Applicants had paid their contributions to that sum although they pointed out that the works had not cured the leak. Indeed there was still evidence of water penetration at the time of the inspection.

14. At the hearing Mr. Earwaker explained that he had made an insurance claim on the basis of storm damage and had arranged for scaffolding to be erected so that the insurance assessor could inspect the dormer and rear roof. The assessor refused to accept the claim; stating that the damage had resulted from a lack of maintenance. Some efforts by letter and by telephone had been made to have that decision reversed but without response from the insurers. The scaffolding had been left in situ because Mr. Earwaker knew that it would be needed to access the roof and dormer to effect repairs. The invoice for the £2,250 comprised £1,400 for scaffolding, £475 for the repair and £375 VAT. The consultation procedure under Section 20 of the 1985 Act had not been followed. As the scaffolding had been left in situ, no allowance had been made in the current Section 20 notice procedure for scaffolding. It was clear that the Tribunal had to consider the charge made for the June/July 2014 works as they were relevant to the proposed works. Mr. Earwaker had not considered the need to use the Section 20 procedure in respect of those works. As a result, the present position is that in respect of the June/July 2014 works, the Applicants have paid more than the £250 they were each obliged to pay and the Respondent must credit each Applicant with the sum of £312.50.

15. The Applicants submitted that as the insurance assessor had refused the claim because of a lack of maintenance and that as the Respondent was responsible for the maintenance of the structure, including the roof of the subject property, then the Respondent should bear the cost of the proposed

works. There was no evidence of what exactly was suggested to be storm damage. The Applicants alleged that no repairs had been carried out in the last 20 years but the Respondent had produced some documentary evidence of past repairs and Mr. Earwaker and Mr. Atkinson gave evidence of inspecting the subject property every 5 years when scaffolding was in place to carry out external decorations. Mr. Atkinson made the valid point, which was accepted by the Tribunal, that if inspections were carried out more often, other than in response to particular problems, then the Applicants would have cause to complain at the cost of scaffolding required each time when not required for the cyclical external decoration. Had some works been carried out earlier, then the cost of those works would have been passed on to the Applicants as part of the service charges and there was no evidence that carrying out works earlier would have resulted in any saving.

16. The Tribunal was satisfied on the evidence presented that there was no evidence of an absence of a reasonable programme of maintenance which would render the Respondent liable to contribute to the proposed works.

17. The lease of Flat D had been produced as a specimen and there was no suggestion that the other leases were different in any material way.

18. The Applicants accepted that they were required by clause 1(2)(a) of the lease to pay "...a just and fair proportion of the amount which the Landlord may from time to time expend and as may reasonably be required on account of anticipated expenditure:- (a) in performing the Landlord's obligations as to repair maintenance and insurance..."

19. However, the Applicants submitted that they were not liable to contribute to works which did not come within repair and maintenance and that some of the proposed works did not come within that definition and were improvements.

20. Mr. Earwaker submitted that the works which were not strictly repairs or maintenance were proposed on the advice of Mr. Atkinson and that it was sensible to provide, for example, better insulation and a proper overlap of the roof tiles and to do this work while the scaffolding was in place rather than have the considerable expense of erecting scaffolding again. Mr. Atkinson stated that in his opinion it was sensible and that in respect of some of the work, for example the removal of more than 50% of the roof tiles, Building Regulations required the installation of insulation.

21. Mr. Rayner, on behalf of the Applicants, stated that the Applicants had no argument about the price estimated as the cost of the works but they disputed the scope of the works.

22. The Tribunal referred to Clause 1(2)(d) of the lease which provides that the Applicants are required to pay "...a just and fair proportion of the amount which the Landlord may from time to time expend and as may reasonably be required on account of anticipated expenditure:-...(d) in providing such services facilities and amenities or in carrying out works or otherwise incurring expenditure as the Landlord shall in the Landlord's absolute

discretion deem necessary for the general benefit of the Building and its tenants whether or not the Landlord has covenanted to incur such expenditure or provide such services facilities and amenities or carry out such works".

23. Neither party had referred to Clause 1(2)(d) of the lease. Mr. Rayner stated that he was aware of it but had not referred to it as it was against the interests of the Applicants. Mr. Earwaker was unaware of it. Mr. South sought to argue that the clause referred back to repair and maintenance mentioned earlier in Clause 1(2)(a) and therefore did not render the Applicants liable to pay for improvements but the Tribunal was not persuaded by that argument. The Tribunal pointed out that although the clause gives the landlord a wide discretion to carry out more than just repair and maintenance, service charges are only payable so far as they are reasonable. Mr. South also argued that it was unreasonable to carry out works so that the lessees were presented with big bills for external decorations and repairs in the same or consecutive years. The Tribunal was not persuaded by that argument. Mr. South informed the Tribunal that the Applicants were working towards an application to buy the freehold of the subject property but that no notices had yet been served. The Tribunal was satisfied that that had no relevance to the matters to be determined in this matter.

24. The Tribunal was satisfied that Clause 1(2)(d) did provide that the landlord could do more than just repair and maintain and in fact could make improvements and charge them to the service charges payable by the lessees provided that the works are "for the general benefit of the Building and its tenants" and are reasonable. The landlord does not have carte blanche to do as he pleases.

25. In the documents provided, the Applicants had submitted that the Respondent should have obtained 3 estimates rather than 2. When the notices required under the consultation procedure in Section 20 of the 1985 Act were served, the Applicants had the opportunity to suggest contractors from whom estimates should be obtained. Had they done so then the Respondent would have had to follow the procedure required by the 1985 Act and Regulations as to the consultation procedure. However, no contractors were suggested within the time allowed. As a result, it was necessary to obtain only 2 estimates. The Applicants have obtained reports and quotes for part of the works proposed but not for all the works.

26. The Tribunal considered the report and other documents submitted by Mr. Atkinson and accepted his conclusions. Those proposed works which are in addition to repair and maintenance, such as the provision of insulation and the improved overlap of the tiles, will bring certain aspects of the subject property up to present day standards, will make the occupation of the subject property more comfortable, have the potential to reduce energy bills and reduce the possibility of water ingress. Therefore the Tribunal was satisfied that the additional works are "for the general benefit of the Building and its tenants" and are reasonable. They come within the provisions of Clause 1(2)(d) and may be charged to the service charges payable by the Applicants. It follows that the lessees are obliged to make their contributions towards the

cost of those works in accordance with the terms of their leases. No copies of demands for the contributions have been provided to the Tribunal so it is assumed that demands have not yet been made. When demands are made properly in accordance with the terms of the leases and the requirements of the law then the lessees will be liable to pay them.

27. By the lease of Flat D, there is demised to the lessee "the Flat" which expression includes:- "(b) all windows window frames doors and door frames and all internal non-load bearing walls (c) the linings and surfaces of the interior of all walls (d) the ceiling of the Flat together with the boards or other surface of the floors of the Flat but excluding the floor and ceiling joists".

28. In the estimate for the works (item 30) there is the sum of £400 for repair and reinstatement of windows. The Tribunal accepts that the windows are in need of repair. In respect of that item, Miss Wickens, the lessee of the top flat, is liable to pay for the repair of those windows and if the windows are repaired and reinstated then only the sum of £100 may be charged to the service charges to cover reinstatement and Miss Wickens is liable to pay the cost of repair of those windows. If Miss Wickens decides to have new windows installed rather than have the existing windows reinstated then Miss Wickens is liable to pay the cost of the new windows and their installation and the sum of £400 will not be payable at all.

29. Miss Wickens stated that she wished to install new windows and to carry out that installation while the scaffolding is in place and while the other works are proceeding. Mr. Earwaker was concerned that there could be some difficulty in the new windows being installed while the other works are proceeding but Mr. Atkinson assured him and the Tribunal that that would not be a problem. Miss Wickens will have to make arrangements for the purchase and installation of new windows without delay so that the work can be carried out while the scaffolding is in situ and at an appropriate time during the proposed works.

30. As to the internal linings, surfaces and ceilings, there is provision in the estimate for some internal work which will be necessary because of the proposed works being carried out and the Tribunal is satisfied that for that reason the Respondent is required to carry out the internal works and that the cost, as included in the estimate, should be included in the service charges.

31. There is before us an application for an order under Section 20C of the 1985 Act, for reimbursement of fees paid to the Tribunal in respect of the application and the hearing and for costs. At the hearing the Tribunal explained the effect of an order under Section 20C.

32. At the hearing, representations were made on the basis that if the Applicants were successful in their application concerning the proposed works then an order should be made under Section 20C, together with an order that the Respondent reimburse the fees and for costs. We find that it is just and equitable in the circumstances not to make such orders because the Applicants were almost completely unsuccessful in their application. However, the Respondent did not assist by dealing with the issue of the

scaffolding as he did. The Tribunal finds that the parties should bear their own costs.

Appeals

33. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

34. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

35. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

36. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Judge R. Norman (Chairman)