1052

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AN/LSC/2014/0402**
Property	:	**Ground Floor Flat, 19 Kilkie Street, London, SW6 2SH**
Applicant	:	**London Borough of Hammersmith & Fulham**
Representative	:	**Mr E McKenzie, Legal Officer**
Respondent	:	**Mr Michael John Spratt**
Representative	:	**In person**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Mr L Rahman (Barrister)** **Mr Martindale FRICS** **Mrs Hart**
Date and venue of Hearing	:	**13th November 2014 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**5th January 2015**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the sum of £47.90 is payable by the respondent in respect of the roof repairs. The tribunal determines that interest is payable by the respondent on this sum and the relevant interest is paid by the respondent after the applicant has calculated the relevant amount and demands the same from the respondent.

(2) The tribunal determines the respondent is not liable to pay any other sums demanded by the applicant in relation to the major works.

(3) The tribunal makes the determinations as set out under the various headings in this decision.

(4) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

(5) The tribunal determines that the respondent shall not reimburse any tribunal fees paid by the applicant.

(6) This matter should now be referred back to the County Court sitting at West London.

The application

1. Following a transfer of proceedings from the County Court sitting at West London under claim no. 3YU13262, by order of District Judge Ryan dated 23.7.14, 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 by the respondent in respect of the service charge year 2010-2011.

2. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

3. The applicant was represented at the hearing by Ms Philippa Seal (counsel) and Ms Maylene Cave (Service Charge & Income Recovery Manager) and the respondent appeared in person.

4. At the start of the hearing the applicant provided a copy of the tribunal directions dated 20.8.14, photographs of the building, and the "certificate of major works expenditure for window repairs and other

works to the communal area ground floor flat 19 Kilkie Street" (inserted as page 126A of the bundle).

The background

5. The property which is the subject of this application is a terraced house converted into 2 flats. The respondent owns the ground floor flat, having exercised the right to buy in 1995. The first floor flat was sold by the applicant at auction in October 2010 to a friend of the respondent. In 2011, the respondent and his friend purchased the freehold to the building from the applicant and thus ceased to be leaseholders.

6. 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.

7. At the relevant time the respondent held a long lease of the property which required 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.

The issues

8. The applicant clarified at the hearing it seeks to recover £15,241.51 from the respondent in connection with the major works it carried out to the property in 2009. The final cost of the respondents share, 50% under the lease, is in the sum of £14,092.66 (page 126A). The applicant also seeks to recover interest up to 31.8.12, in the sum of £1,148.85.

9. The applicant had indicated at the case management conference on 19.8.14 that it would accept £11,739.19 as a settlement offer. The parties were unable to reach a settlement and in the circumstances the applicant now sought to recover the full amount.

10. At the hearing the applicant was unable to provide clear evidence on the actual cost for each of the items of works under the major works programme. In particular, the applicant was unable to explain the discrepancy between the detailed works and costing as set out on pages 91-109 of the bundle and the final figures provided on page 126A of the bundle. Ms Cave initially provided a set of figures, amending the figures on page 126A, based upon her understanding of the information set out on pages 91-109. Those figures were later changed by Mr Richmond, Major Works Manager, who attended the hearing in the afternoon to clarify the figures on behalf of the applicant. However, during the course of the hearing, Mr Richmond again changed those figures. When Mr Richmond tried to change the figures for a third time, the tribunal

told the parties that it had come to the conclusion that the evidence on this particular issue was at best unclear.

11. The tribunal refused permission for Mr Richmond to provide further evidence on the matter for the following reasons. The applicant had not provided any witness statement from Mr Richmond. The tribunal did not ask for Mr Richmond to attend and give evidence. A decision was taken by Ms Cave to ask him to attend and the tribunal was told after the lunch break that he was already on his way to the tribunal. The tribunal stated it would allow Mr Richmond to give evidence if there were no objection from the respondent and so long as his evidence was simply to clarify the figures, and time permitting. Mr Richmond was allowed to give his evidence. After finishing his evidence, whilst sitting at the back of the hearing room, Mr Richmond, without any prompting from Ms Cave or Ms Seal, stated that he wished to clarify the figures. The tribunal allowed him the opportunity to do so. At 15:25, without any prompting from Ms Cave or Ms Seal, Mr Richmond, again stated that he wished to clarify the figures. Bearing in mind the time, the number of issues that remained to be covered, the opportunity already provided to the applicant and in particular Mr Richmond to clarify the figures, and the confusing evidence from the applicant concerning the final figures, the tribunal refused permission for the applicant to provide any further evidence on the matter.

12. Although the tribunal had identified at the case management conference that the only issue to be determined was whether the costs of replacing the roof was recoverable and was reasonably incurred, both parties confirmed at the hearing that the relevant issues for determination were as follows, namely, whether costs were reasonable and payable in relation to; window repairs, window redecoration, front entrance door refurbishment, roof repairs, roof renewals, external repairs & redecoration, scaffolding, and fees.

13. Both parties agreed at the hearing that under the lease interest was payable on any service charge the tribunal found was payable (at the rate of five per centum per annum above the lessors bankers base or similar lending rate, calculated on a day to day basis from the date of the same being due or demanded to the date of payment (clause 7 of the Seventh Schedule)).

14. 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.

Window repairs

15. The respondent stated that no repairs had been carried out to any of the windows in his flat. He had carried out repairs himself in 2007 when he replaced the soft wood window sills with hardwood sills, primed and

painted them. With respect to the list of works set out on pages 95-102, under the heading of "Window Repairs", none of those works had been carried out to any of the windows in his flat.

16. After inspecting a breakdown of the works and associated costs, the respondent wrote to the applicant on 26.4.11 (copy of letter on page 119 of the bundle|), stating *"On close examination and now having access to the first floor flat, I can confirm that much of the work being charged for has not been done at all. I note the windows have had thousands charged for new sash cords and to be re-puttied, also loosened to move freely. I once again invite you to send someone to make a comparison of invoice to works that have clearly not been carried out..."*

17. The applicant stated that it was invoiced for all the works and had paid the contractors. It was unable to state how many properties were involved in this particular programme of works but it had checked 10% of the properties prior to making any payments. Ms Cave stated she was unable to state if the respondents property was one of the 10% that had been inspected. Ms Cave confirmed that all the repairs listed on pages 95-102 related to works that were done to the upstairs flat and not to the respondents flat, however, the respondent was liable to contribute towards half of those costs under the lease.

18. Ms Cave stated that in response to the letter from the respondent an inspection was carried out and the findings are set out in the applicants letter dated 24.6.11 (page 122 of the bundle), which states *"Recently we have carried out inspections to the paint-work applied to your property...These investigations have concluded that the paint specification has been followed and the required number of coats has been applied, however in certain areas the paint-work appears to have prematurely aged, causing peeling / cracking. This has occurred because of direct sunlight on these specific areas and we also believe this has been further extenuated by water penetrating the woodwork from internal condensation. Whilst these are the likely reasons, it has resulted in an unsatisfactory finish, one which we would seek to rectify. As such we propose to return to your property on Wednesday 6th July 2011 to strip down and repaint affected areas..."*

19. Ms Cave further stated, having taken instructions from her legal team, that the respondent was not liable to pay the three items listed on page 101 in the sums of £259.61, £451.50, and £58.48.

20. The tribunal found the respondent is not liable to pay towards any of the window repair costs.

21. The applicant stated that it had paid for the programme of works, having checked only 10% of the properties within the programme of works. The applicant is unable to state whether it had inspected the

respondents property as part of the 10% of properties that had been checked. The respondent had written to the applicant and had specifically stated that no repairs had been carried out to either his flat or the upstairs flat windows (letter page 119). The applicant accepts it had not carried out any repair works to any of the windows in the respondents flat, only to the upstairs flat. However, according to the response sent to the respondent (letter on page 122), the applicant inspected the respondents property and details the paint-work. The letter does not state that the upstairs flat had been inspected or that any checks had been carried out to confirm whether any works had in fact been carried out to the upstairs windows. On balance, in light of the evidence before the tribunal, the tribunal is not satisfied that repair works to the upstairs windows had been carried out.

Window redecoration

22. The respondent stated that nothing was done inside or outside his flat. With respect to the upstairs flat, only one coat of paint was put on the outside of the front bay window. He was sure of this as he was there observing at the time. Nothing had been done on the inside of the upstairs flat. He was sure of this as he viewed the inside of the upstairs flat after his friend had purchased it. The respondent further stated that contrary to what was stated in the letter dated 24.6.11 (page 122), that the applicant proposed *"to return to your property on Wednesday 6th July 2011 to strip down and repaint affected areas"*, nobody returned to carry out the proposed works.

23. Ms Cave stated on behalf of the applicant that she accepts that the information on page 95 shows that there was no redecoration works carried out to the respondents flat, only to the upstairs flat. She accepted that the letter on page 122, in response to the concerns raised by the respondent, should have been more specific about the checks that had been carried out, but she assumed that the upstairs flat had been checked. She was unable to state whether the applicant or the contractor had inspected the property in preparation of the letter / report on page 122 and she was unable to dispute the respondents evidence that it was not the applicant but the contractor that had carried out the inspection. Ms Cave stated she was unable to state whether anyone had returned to carry out the proposed work referred to in the letter on page 122.

24. The tribunal found the respondent is not liable to pay towards any of the window redecoration costs.

25. The respondent claimed the works had not been done and complained to the applicant (letter page 119). The applicant has failed to satisfy the tribunal that it had checked whether the works had been carried out. The applicant is unable to state whether it had inspected the respondents property as part of the 10% of properties that had been

checked. The inspection that was carried out in response to the respondents complaint was not independent, but done by the same contractors who the respondent claimed had failed to do the work in the first place. The assumption made by Ms Cave, that the upstairs flat would have been checked, is unsatisfactory. Ms Cave accepts the letter should have been more specific about the checks that were carried out. The letter / report does not state whether the upstairs flat was inspected or that any checks had been carried out to confirm whether any works had in fact been carried out to the upstairs windows.

26. The tribunal noted that some painting was done to the outside of the front bay window of the upstairs flat. However, the letter on page 122 confirms that in certain areas the paint-work appears to have prematurely aged, causing flaking and peeling, and that this would be remedied by stripping down and repainting the affected areas. The respondent stated that this was not done and the applicant was unable to provide any evidence to the contrary.

27. On balance, in light of the evidence before the tribunal, the tribunal is not satisfied that redecoration works had been carried out and the only painting work which the respondent accepts, was not done to a satisfactory standard or subsequently remedied.

Front entrance door refurbishment

28. The respondent claimed that the contractors did not do any work to the front door. He himself had stripped down the door, filled it, painted it, and fitted a brass letter box, before the major works programme started. Hence the applicants acceptance in its letter dated 9.12.08 (page 82) that "*...it was agreed that the front entrance door was in relatively good condition and therefore the works we do to this are not likely to be extensive, but will be dependent on the findings of the survey*".

29. Ms Cave stated the works that were carried out are listed on page 103. Ms Cave further stated that to her knowledge, nobody checked to see whether works had been done to the door.

30. In light of the evidence before the tribunal, the tribunal is not satisfied that any works were carried out to the front entrance door or that any work was reasonably required to be carried out. Therefore, the respondent is not liable to pay anything towards the front entrance door refurbishment costs.

Roof repairs

31. The applicant stated that the relevant works that were carried out are listed on pages 108-109 of the bundle, which included cleaning out the existing guttering and pipes and renewing pipes and brackets.

32. The respondent accepts that some works were carried out to the rear of the property but he states that water continued to leak after the works were completed.

33. The tribunal found that the works as set out on pages 108-109 were carried out. Whilst the tribunal accepts that water may have continued leaking, it does not follow that cleaning the gutters and pipes were not necessary or that renewing some of the pipes and brackets were not necessary.

34. According to the information provided on page 126A, the total cost of the roof repairs was £98.10. However, according to the information on page 109, the total cost of the roof repairs was £82.84. Mr Richmond explained that the total cost was in fact £95.80. Assuming that the evidence provided by Mr Richmond was correct, the tribunal found the respondent is liable to pay £47.90 (50% of the total costs, as stipulated in the lease).

Roof renewals

35. Ms Cave stated that the roof was scheduled to be replaced because it had come to the end of its useful life. It was more economical to replace it when other works were being carried out. The works were competitively tendered.

36. Ms Cave stated at the hearing that she did not know if a report was ever prepared to consider the state of the roof, she was unable to state how old the roof was, and she was unable to state whether anything was done to the roofs on the adjacent properties.

37. The respondent stated that the roof was in reasonably good condition and did not need to be replaced. The adjacent properties, also owned by the applicant, had similar roofs, were of a similar age, and were in the same condition as the roof on his property, yet they were not replaced. The respondent provided photographs of the adjoining properties (17 and 21 Kilkie Street) which were taken in 2011.

38. The tribunal found the respondent is not liable to pay towards any of the cost of the roof renewal.

39. The cost of the roof renewal was the single most costly item of expenditure under the major works, representing more than 50% of the total cost of the major works (£17,344.43 according to the information on page 126A). The respondent had categorically stated in his defence

submitted at the County Court and at the case management conference at this tribunal that the roof did not need to be replaced, although he accepted that it needed some attention. The respondent provided photographic evidence of the adjoining roofs, which he states were of a similar type, age, and condition to his own roof and which have not been renewed by the applicant. Yet the applicant has failed to provide any persuasive evidence that the roof on the respondents property needed to be renewed. Although Ms Cave stated at the hearing that the roof had come to the end of its useful life and therefore needed to be renewed, she accepted at the hearing that she was unable to state how old the roof was. Ms Cave stated that she did not know if a report was ever prepared to consider the state of the roof. The tribunal was not referred to any report concerning the state of the roof, which the tribunal found unusual and surprising, given the significant cost involved and the need to justify such an expenditure to lessees.

External repairs & redecoration

40. Ms Cave stated the relevant works are listed on pages 105-107 of the bundle, she assumed the relevant works had been carried out, and she had no evidence that the works had not been done. Ms Cave however also stated at the hearing that she did not know whether anyone had been to check if the relevant works had been carried out.

41. The respondent stated that he had himself painted the masonry, no brick work was replaced except perhaps on the roof, no pointing work was carried out, and no painting work was carried out either. He was sure of his evidence as he was watching whilst the major works were taking place. He had written to the applicant that he was being charged for works that had not been done (letter page 119).

42. The tribunal found the respondent is not liable to pay towards any of these costs. The respondent has consistently stated that the relevant works had not been carried out, he had complained to the applicant, and Ms Cave stated at the hearing that she did not know whether anyone had been to check if the relevant works had been carried out. On balance, in light of the evidence before the tribunal, the tribunal is not satisfied that the relevant works had been carried out.

Access scaffolding

43. Ms Cave stated the scaffolding was required for the roof works and the external redecoration. Ms Cave was unable to explain why the actual cost for the scaffolding was £1,670.38 when the estimated cost was only £670.65. She stated the Major Works Billing Officer would have been able to provide an answer. Ms Cave confirmed there was no relevant evidence from the Major Works Billing Officer in the bundle.

44. The respondent stated the scaffolding was in situ for three months and the actual work was completed over 14 days.

45. The tribunal found the respondent is not liable to pay towards any of the scaffolding cost.

46. The tribunal found the main reason for the scaffolding was in relation to the roof renewal, which the tribunal found was not necessary, and therefore the scaffolding cost was not reasonably incurred. The external paint work which the tribunal accepts was carried out was done to a poor standard and was not subsequently remedied. Clearing the guttering and pipe work and replacing a few brackets would not, in itself, have justified scaffolding costs. The tribunal found the other works the applicant has paid for had not been carried out.

Fees

47. Ms Cave stated the professional fees related to technical services, such as surveyor and architect fees, that were carried out on behalf of the applicant. It was calculated at 7% of the overall costs.

48. The respondent stated that he should not pay anything at all as "the whole thing was a total shambles and work was never done".

49. The tribunal found the respondent is not liable to pay towards any of these fees as these fees are based upon works which the tribunal has found were either unnecessary, done to a poor standard, or not done at all. The only work which the tribunal found the respondent should contribute towards, namely, cleaning the guttering and replacing brackets, is not work that would have needed any professional fees to be incurred.

Application under s.20C and refund of fees and costs

50. At the end of the hearing, the applicant made an application for a refund of the fees that had been paid in respect of the hearing. Having heard the submissions from the parties and taking into account the determinations above, the tribunal does not order the respondent to refund any fees paid by the applicant.

51. At the hearing, the respondent applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the tribunal determines the respondent acted reasonably in connection with the proceedings and was successful on nearly all the disputed issues, therefore it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the applicant may not pass any of

its costs incurred in connection with the proceedings before the tribunal through the service charge.

The next steps

52. This matter should now be returned to the County Court sitting at West London.

Name: Mr L Rahman **Date:** 5.01.15

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 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.

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.