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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00BY/LSC/2015/0051**
Property	:	**3, Carrington Hall, 16 Alexandra Drive, Liverpool L17 8TD**
Applicant	:	**Mr. W.W.Fields**
Respondents	:	**Lindsay Park Properties Limited, - ("the First Respondent")** **Carrington Hall Management Limited, - ("the Second Respondent")**
Represented by	:	**Town & City Management Limited**
Type of Application	:	**Landlord & Tenant Act 1985 – s27A** **Landlord & Tenant Act 1985 – s20C**
Tribunal Members	:	**Mrs. C.Wood** **Mr.D.Bailey**
Date of Decision	:	**6 October 2015**

DECISION

ORDER

1. The Tribunal orders as follows:

   1.1 that the Applicant is liable to pay as service charge the sum of £393.82 in respect of roofing works carried out at the Building;

   1.2 that the Applicant is liable to pay as service charge the sum of £256.18 in respect of the estimated costs of the damp-proofing works to be carried out at the Building;

   1.3 that it is just and equitable in all the circumstances not to grant the Applicant's s20C application in respect of the costs incurred by the Respondents in the proceedings before the Tribunal; and,

   1.4 the Respondents' application for costs under Rule 13 of The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, ("the Rules"), is dismissed.

BACKGROUND

2. By an application dated 27 April 2015, the Applicant sought a determination as to the liability to pay, and reasonableness of, the supplementary charges of £650 each levied in 2015 in respect of repairs to the roof of the Building, ("the Application"). The Applicant confirmed in the Application that he also wished to make an application under s20C of the 1985 Act.

3. Directions dated 28 May 2015 were issued to the parties pursuant to which the following documentary evidence was submitted:

   3.1 the Second Respondent's Statement of Case dated 3 June 2015 together with Appendices 1-18, ("the Second Respondent's Statement");

   3.2 the Applicant's Statement of Case in Response, ("the Applicant's Statement");

   3.3 the Second Respondent's Supplemental Reply to the Applicant's Statement dated 7 July 2015, ("the Second Respondent's Reply").

   3.4 A hearing of the Application was arranged for Monday 10 August 2015 at 1130am at the Civil and Family Court, 35, Vernon Street, Liverpool L2 2BX, following an inspection of the Building at 10 am on the same date.

4. Pursuant to the Directions issued by the Tribunal at the hearing in response to the Respondents' application for costs under Rule 13 of the Rules, the following written submissions were received from the parties:

4.1 the Respondents' submissions sent to the Tribunal by letter dated 10 August 2015;

4.2 the Applicant's submissions enclosed in a letter to the Tribunal dated 29 August 2015.

INSPECTION

5. The inspection was attended by the Applicant and by Mr.P.Bigge of Town & City Management Limited, and Miss.Ackerley of Counsel, both representing the Respondents.

6. The Tribunal made a visual inspection from ground level of the roof works.

7. The Tribunal inspected the communal areas on the ground and basement floors. There was a very obvious smell of damp in all of these areas and the extent of damp penetration was obvious in the meter rooms on the basement level.

LAW

8. Section 27A(1) of the Landlord and Tenant Act 1985 provides:

8.1 *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.

8.2 The Tribunal is "the appropriate tribunal" for this purpose, and it has jurisdiction to make a determination under section 27A of the 1985 Act whether or not any payment has been made.

8.3 The meaning of the expression "service charge" is set out in section 18(1) of the 1985 Act. It 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.

8.4 In making any determination under section 27A, the Tribunal must have regard to section 19 of the 1985 Act, subsection (1) of which provides:

> *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.*

8.5 "Relevant costs" are defined for these purposes by section 18(2) of the 1985 Act as:

> *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.*

8.6 There is no presumption for or against the reasonableness of the standard of works or services, or of the reasonableness of the amount of costs as regards service charges. If a tenant argues that the standard or the costs of the service are unreasonable, he will need to specify the item complained of and the general nature of his case. However, the tenant need only put forward sufficient evidence to show that the question of reasonableness is arguable. Then it is for the landlord to meet the tenant's case with evidence of its own. The Tribunal then decides on the basis of the evidence put before it.

8.7 Section 20C of the 1985 Act permits the Tribunal to order that all or any of the costs incurred by the landlord in connection with these 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 by any other person specified in the application for the order. The Tribunal may make such order as it considers just and equitable in the circumstances.

EVIDENCE

9. A preliminary issue was raised by the Tribunal at the outset of the hearing as to the correct identity of the Respondent or Respondents. The Application had cited Town & City Management Limited, ("Town & City"), as the Respondent and also named Lindsay Park Properties Limited as the Landlord. On receipt of the parties' written evidence, it had become apparent to the Tribunal that Town & City were managing agents and that the correct Respondent was either Carrington Hall Management Limited, or Lindsay Park Properties Limited, or both.

10. Initially, Counsel and Mr.Bigge were adamant that Town & City were acting as agents only for the Second Respondent and that the Second Respondent should therefore be the Respondent to the Application. In response to this, the Applicant requested that the hearing of the Application be adjourned on the basis that, as the main thrust of his argument involved the alleged liability of the freeholder for the works carried out/to be carried out to the Building, he would be prejudiced if the First Respondent was not a party to the Application. Counsel stated that, if the hearing were to be adjourned, she would seek an order for wasted costs.

11. The hearing was then adjourned from 12:15pm until 1:40pm. On resumption, the Applicant reiterated that if the First Respondent was not a party to the Application, then it rendered irrelevant many of his arguments which supported his claim.

12. Counsel said that Town & City were agents for the Second Respondent, and that they had demanded the service charge in that capacity. They did not consider that adding the First Respondent as a party would advance the matter, and that if the matter was adjourned, then the First Respondent would simply defer to the Second Respondent and Town & City to explain how the demand for £650 had come about.

13. The Tribunal referred Counsel and Mr.Bigge to the wording on the service charge demand (Appendix 15) ("As agents for the landlord..."), and also to paragraph 20 of the Second Respondent's Reply where they state, "The Respondent, as agent of LPPL..." Counsel was invited to seek further instructions from her Instructing Solicitors.

14. After a further short adjournment, Counsel confirmed Instructing Solicitors had agreed that both the First Respondent and the Second Respondent should be confirmed as the Respondents to the Application.

15. The hearing then continued to deal with the Application.

16. The Applicant's submissions are summarised as follows:

    16.1 the Applicant stated that there should be no liability upon him to contribute by way of service charge towards the cost of the works carried out to the roof and for the damp-proofing works to be carried out as these were works which should have been carried out at the time when the original refurbishment and conversion of the Building into apartments was done;

    16.2 when the First Respondent acquired the freehold, it appears they had not carried out any surveys which would have revealed these problems;

    16.3 the Applicant questioned the process by which the annual service charge was determined, and, in particular, the lack of any meeting at which expenditure was discussed and agreed with leaseholders: this contrasted with the development in which the Applicant currently lived where there was an annual meeting;

16.4 the Applicant also questioned the legitimacy of the making of a "one-off" demand for the amount of £650 which he suggested had been imposed "unilaterally" and without his consent or knowledge of the full facts behind the incurring of the expenditure. (The Respondents had clarified that there was only one demand for £650 not two, as stated by the Applicant in the Application.);

16.5 the Applicant stated that there had been no annual meetings of leaseholders of the Building at which such matters would be discussed and that, in his opinion, not only had the facts concerning this expenditure not been disclosed, they had been deliberately withheld by the Respondents;

16.6 the Applicant stated that there was no justification in the Lease for carrying out these works and that there was no justification for charging this one-off levy without consent or information. He did acknowledge that he had received the section 20 consultation correspondence and that he was both aware that the works were planned and of the costs;

16.7 the Applicant considered that the expenditure on the roof repairs was unreasonable because they were repairs which would not have been required if the Respondents had ensured that the appropriate works had been carried out at the time of the conversion of the Building into flats. These works were not "maintenance" but "construction" which should have been carried out at the outset. As a result, the leaseholders were now being asked to "bail out" the Respondents to cover the costs of works they should have done.

17. In response, Counsel for the Respondents made the following submissions:

17.1 the relevant provisions of the lease dated 3 May 2005 made between Dreaming Spires Limited (1), the Second Respondent (2) and the Applicant (3), ("the Lease"), (which is attached as Appendix 4 to the Second Respondent's Statement), which provide the authority for the Respondents to carry out the works and to charge these costs as Service Charge expenditure are set out in paragraphs 9-15 of the Second Respondent's Statement, and are as follows:

(i) Schedule 4, Part II, paragraph 37: Lessor's covenant to pay the Service Charge

(ii) Schedule 8: charging of the Service Charge

(iii) Schedule 5: covenants on the part of the Lessor and the Management Company, and, specifically in relation to the roof and basement works, the obligation in paragraph 4 " to keep the Building...in a good and substantial state of repair and condition...including...:-

the main structure and exterior...roof...,(para. 4.1);

....any parts of the Building enjoyed or used by the Lessee in common with others, (para. 4.3); and,

all other parts of the Building not included in the foregoing sub-paragraphs and not included in the Apartments", (para. 4.6);

(iv) Schedule 6, paragraphs 1, 2 and 5: Service Costs;

17.2 the 2015 Service Charge year ended on 31 May 2015 and the service charge accounts are not, as yet, available;

17.3 a s20 consultation process was carried out in relation to these works and the Applicant has confirmed that he has no issue with this;

17.4 the Respondents have selected the cheapest quotes from those obtained during the s20 consultation. The Applicant has not produced any evidence that the works could be carried out at a lesser cost/to the same standard;

17.5 the Lease entitles the Respondents to demand "one off" service charge levies. Schedule 8 of the Lease requires the service of an estimate of costs for the following service charge year. The 2014/15 budget did not contain any costs in relation to these works as the s20 consultation was still in process at the time the budget was issued. The s20 consultation process itself constitutes written notice of relevant expenditure in accordance with paragraph 2 of Schedule 8;

17.6 it is clear from s19(2) of the 1985 Act that a payment on account of estimated works can constitute "relevant costs";

17.7 the payment of £650 is based on the invoiced costs of the roof works and the quotation for the basement works;

17.8 the Applicant has not produced any evidence as to the state of the Building when acquired by the Respondents, no evidence as to when the defects first required work to be done and/or how they were allowed to get worse.

18. Mr.Bigge confirmed that Town & City had assumed responsibility for the management of the Building in September 2013. He explained that monthly inspections were carried out, following which any apparent defects would be logged. He confirmed that any inspection of the roof by them had been from ground level. Leaseholders were encouraged to log defects/problems with them.

19. On 18 December 2013, they received reports of water ingress through the roof. Initially, they submitted a claim to the insurers for storm damage but the claim was refused on the ground that the damage was basic wear and tear/age. At that point, they started the s20 consultation.

20. In conclusion, Counsel stated that whilst the Applicant had made several allegations about the reasons why the roof and basement repairs were needed, none of these were supported by the evidence. Town & City, as agents for the Respondents, have acted reasonably in discharging their repair and maintenance obligations under the Lease, effecting repairs to the roof when required and then seeking to recover costs; further, they have sought to discharge those obligations in a proportionate way: specifically, with regard to the roof, they have repaired rather than replaced the roof.

21. In response to the Applicant's s20C application, Counsel for the Respondents made the following points:

    21.1 there had been a s20 consultation in respect of these works, which the Applicant acknowledges has taken place, but to which the Applicant had not responded. It was suggested that, if he had done so, the Application might not have been necessary;

    21.2 if the Tribunal determines in favour of the Respondents, it would be unfair to other leaseholders who had paid their service charges to grant the Applicant's s20C application, as the Respondents could still recover their costs from them.

22. Counsel for the Respondents then advised the Tribunal and the Applicant that they wished to make an application under Rule 13 (1) of the Rules for an order for costs against the Applicant. The Tribunal issued Directions in respect of this application as follows:

    22.1 the Respondents to submit their grounds for the application within 7 days of the date of the hearing;

    22.2 the Applicant to respond within 21 days from the date of receipt of the Respondents' application;

    22.3 the matter to be determined as a paper determination.

23. The Respondents' submissions are summarised as follows:

    23.1 the right to recover their costs as service charge is contained in paragraph 10 of Schedule 6 of the Lease;

    23.2 the right to recover their costs from the Applicant is contained in paragraph 29.3 of Schedule 4 of the Lease;

    23.3 the Applicant's request for there to be a hearing where the Tribunal had indicated in its Directions that it could be determined as a paper determination was unreasonable;

23.4 the Applicant had raised issues in respect of which the Tribunal had no jurisdiction – "...vague submissions that centered around alleged negligence of the Landlord..." – and against the wrong parties;

23.5 the Applicant had not availed himself of the opportunity presented by the s20 consultation process to raise these issues which, had he done so, would, in the Respondents' opinion, "...have removed the need for the Applicant to issue this application and the Respondents to subsequently incur costs." The Respondents noted that the Applicant did not dispute the validity of the s20 procedure, the level of the costs to be incurred on the works or the need for the works to be done;

23.6 if the Applicant is unsuccessful in the Application but the Respondents are unsuccessful in their costs' application under Rule 13, then the Respondents will seek to recover their costs as service charge from other leaseholders who have paid their service charges (including in respect of these works). It is submitted that this is "unfair and unreasonable" when the liability for these costs should lie with the Applicant.

24. The Applicant's submissions are summarised as follows:

24.1 with regard to paragraph 10 of Schedule 6 of the Lease, there is no evidence that the Second Respondent has used "all reasonable endeavours to obtain such costs from the party in default". The Respondents have behaved unreasonably;

24.2 the Applicant had exercised his right to request a hearing and, so far as he was aware, had fully complied with the Directions with regard to the submission of evidence to the Tribunal;

24.3 the Respondents had chosen to instruct Counsel (thereby inflating costs) on what the Applicant regarded as a "relatively simple" matter;

24.4 the Applicant's allegations as to negligence were not "vague" as suggested by the Respondents, but specific. The Respondents "invited" the Applicant to pursue his complaints through the Tribunal apparently in the knowledge that it was the incorrect forum. The discussions at the hearing illustrated that it was not only the Applicant, but also Counsel and the Town & City representative, who were confused as to the correct parties to the Application;

24.5 the Applicant reiterated that he had no issue with the s20 consultation procedure itself;

24.6 there are 6 points under the heading "Summary regarding Respondents failure to fulfil obligations under the lease";

24.7 the Applicant sets out a number of examples of what is categorised as "Matters of conduct and bad behaviour" which, in the Applicant's submission, disentitle the Respondents from any award under Rule 13. The examples include "Use of insulting and demeaning language by the Respondent";

24.8 the Applicant summarised the events at the hearing (including 2 adjournments) following on from the Tribunal's request for the parties to confirm the identity of the Respondent(s), as a result of which it is submitted that it is "...a moot point whether the incompetence and disruption of the Respondent may have hindered a more effective presentation [by the Applicant], and as such could be considered prejudicial".

REASONS

25. In making the Order set out in paragraph 1 of this Decision, the Tribunal had regard to the following matters:

25.1 the Tribunal was satisfied that in carrying out the works to the roof and in proposing to carry out the damp-proofing works, the Respondents were discharging their contractual duty under the Lease as set out in paragraph 4.1 of Schedule 5 " [T]o keep the Building...in a good and substantial state of repair and condition...including the renewal and replacement of all worn and damaged parts...";

25.2 there was no evidence before the Tribunal to support the Applicant's claim that the roof and/or the basement areas were in a defective state of condition/repair at the commencement of the Lease;

25.3 the Tribunal's limited inspection of the roof (visual from ground level) did not indicate that the roof was other than in the state of repair and condition than could reasonably be expected having regard to the age of the Building;

25.4 the Tribunal was satisfied that, in effecting the works, the Respondents had sought to repair the roof in a proportionate manner, eg by repairing rather than replacing the roof;

25.5 whilst it was apparent at the inspection that there was a problem with damp in the basement areas of the Building, it was not reasonable for the Tribunal to assume that this problem pre-dated the conversion works or that damp-proofing work had not been carried out at the time of the conversion;

25.6 the Tribunal considered that the commonsense interpretation of paragraph 2 of Schedule 8 of the Lease permitted only one demand to be made in each service charge year for a payment on account of the service charge for the following year. The position where costs actually incurred in a service charge year are greater than the estimated amount/payment on account is dealt with in paragraph 5 of Schedule 8. In this case, the Respondents should have sought to recover the shortfall from the leaseholders attributable to the roof works' expenditure on issue of the Certificate referred to in paragraph 5. The costs of the damp-proofing works should have been included in the payment on account for the 2015/16 service charge year;

25.7 in view of the orders made in paragraphs 1.1 and 1.2 of this Decision, the Tribunal considered that it was fair and equitable in all the circumstances not to grant the Applicant's s20C application in respect of the Respondents' costs incurred in the proceedings before the Tribunal;

25.8 the Tribunal rejected the Respondents' application for a costs' order to be made against the Applicant on the ground that they had not established that the Applicant had acted unreasonably in bringing the Application. The fact that a party is unsuccessful in their claim is not sufficient on its own to establish unreasonable behaviour. With regard to the specific grounds claimed by the Respondents as evidencing such unreasonable behaviour, the Tribunal states as follows:

(i) any party is entitled to request a hearing, even where the Tribunal may have indicated that it was a matter that could be determined by written submissions. To request a hearing in such circumstances is not unreasonable per se as suggested by the Respondents;

(ii) contrary to the Respondents' submissions, the Tribunal does have jurisdiction to determine an equitable set-off arising by reason of breach of contract or tort against the liability of a leaseholder to pay service charge. Nonetheless, in reaching its determination in this matter, the Tribunal did not rely on that jurisdiction but on the Respondents' rights under the Lease to charge, as service charge, costs incurred, or to be incurred, in respect of the roofing and damp-proofing works. Whilst the Applicant's submissions may not have had the clarity of legal expression that the Tribunal would expect from a legally represented party, nonetheless it was clear from his submissions that the essence of his claim was that he was not liable to pay for these works as service charge because, in his words, they were not costs for "maintenance" but for "construction" and should have been carried out at the time of the original conversion of the Building into flats. This is a question as to the liability to pay and is a matter properly for determination by the Tribunal under s27A of the 1985 Act;

(iii) with regard to the s20 consultation, it is apparent to the Tribunal that this was not the appropriate forum for him to raise his concerns. As set out in the Applicant's submissions, he did not dispute the need for the works or the level of costs to be incurred. His dispute concerned the liability to pay for those works. It is unclear to the Tribunal how raising this during the s20 consultation would have avoided the need for the Applicant to make the Application;

(iv) with regard to the Respondents' stated intention to recover its costs through the service charge should it fail in its application for a costs' order against the Applicant, and the effect of that upon other leaseholders, is a statement of the limited application of the Tribunal's orders;

25.9 as detailed by the Applicant in his submissions in response to the Respondents' costs' application, and as set out in paragraphs 10 – 14 of this Decision, the Tribunal considered that the hearing had been unnecessarily prolonged by the Respondents' representatives' apparent confusion as to whom they were representing.

25.10 Instructing Solicitors for the Respondents were not present at the hearing. The Tribunal reiterates the comments made at the hearing about the lack of respect shown by Instructing Solicitors to the Applicant in some of the comments contained in the Second Respondent's Reply. The Tribunal considered that such remarks were unlikely to progress the matter in any constructive way. The Tribunal accepts that Counsel had already raised this point with Instructing Solicitors.