11910

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BG/LSC/2016/0021**
Property	:	**445a and 447a Bethnal Green Road, London E2 9QH**
Applicants	:	**(1) Mr & Mrs Scholes** **(2)Ms Cross**
Representative	:	**In person**
Respondent	:	**Richard David Manning, Karen Jeanne Gale and NSS Trustees Limited**
Representative	:	**Stockton Bradley Chartered Surveyors**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Judge L Rahman** **Mr Mathews FRICS**
Date and venue of Hearing	:	**8/4/16 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**7/6/16**

DECISION

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Decisions of the tribunal

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

(2) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

The application

1. The applicants seek 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 them in respect of the service charge year 2016.

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

The hearing

3. The applicants appeared in person and the respondent was represented by Mr Martin Kirvan (solicitor) and Mr Jack Bradley (surveyor).

The background

4. The property which is the subject of this application is a three storey block comprised of a commercial unit on the ground level and two one bedroom flats above. Both flats have identical leases. Ms Cross purchased the leasehold interest in flat 445a in 1988. Her property has been unoccupied for the last 10 years but she visits the flat every other day. Mr and Mrs Scholes purchased the leasehold interest in flat 447a in 1988. Their flat is tenanted and is managed by an agent.

5. A photograph of the building was provided at the hearing. 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.

6. The relevant leases require 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. Since the applicants have purchased their leasehold interest, the respondent has never requested any service charge.

The issues

7. The parties identified the relevant issues for determination as set out under each of the sub-headings below.

8. 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.

Reasonableness and apportionment of the total costs of the proposed works

9. The cost summary is set out on page 198 and includes preliminary costs, main roof, rear lower roof, rear elevation, rear grounds, ground access floor corridor, front elevation, ancillary, and contingency. The total contract cost is £38,921.00. The professional fees, including the service of the Notices, is £7,558.28. The total VAT is £9,295.86. The total cost is in the sum of £55,775.13.

10. The respondent stated that the contract specification is set out on page 86 of the bundle and amongst other things it makes the following provisions; close supervision by Mr Bradley (an independent chartered surveyor of more than 10 years experience and a building surveyor of 20 years experience), for the properties to be occupied whilst the works are carried out and provides protection for the occupiers, it provides a 12 month defects liability period, it stipulates the quality of the materials to be used and that the works must be to the satisfaction of the surveyor, that the contractor must obtain all the necessary permits for the scaffolding and for the scaffolding to be hoarded to protect the public as the scaffolding would be erected on a public highway, for an alarm to be fitted on the scaffolding to stop people entering the flats via the scaffolding, the contractor is to clear away all rubbish, for the contractor to have the correct insurance, and the contractor is encouraged to offer value for money. The respondent explained that the works specification provides for a "provisional sum" for works to the roof in the sum of £5,000 as it was not possible to access the roof. The roof was replaced in 1999 and therefore it was not likely that the roof would need repairing but it was likely that some localised repairs may be needed, which would become clear once scaffolding was erected and works were underway. Works may include localised re-pointing of parapet walls, chimneys, coping stones, and localised repairs of gutters and roof weathering's generally. The respondent stated it was better to collect the monies in advance rather than collecting monies after the works have begun as it will cause delays.

11. The respondent states that under the terms of the lease the applicants are liable to pay £14,067.98 for each flat and the first instalment is due in the sum of £7,033.99. The respondent stated that the commercial unit is liable to pay £12,314.53 and the balance of the sum, £15,324.63, is to be paid by the respondent. The respondent stated that it was

therefore in the respondents' interest also to get the best price for the proposed works.

12. Both parties agree that under clause 16(b) of Part 1 of the Third Schedule each flat is liable to pay a quarter of the total cost.

13. The applicants queried whether they were liable to pay any professional fees. The respondent referred the applicants to clause (8) of the Fourth Schedule which states that the landlord is entitled to "...*employ a professional managing agent surveyor ...or other professional staff...for the performance of its obligations hereunder as it shall think fit*". Having read the relevant clause, the applicants stated that they agreed that professional fees were recoverable.

14. In view of the specified works, for which the respondent is also liable and is therefore likely to want to achieve the best value for money, the respondent having chosen the lower of two competitive tenders (page 118), and in the absence of any alternative quotes from the applicants, the tribunal found the overall costs to be reasonable in amount.

15. Both parties agree that the amount payable by each of the flats is a quarter of the costs. The tribunal therefore found the apportionment of the total cost to be in accordance with the terms of the lease.

Consultation

16. Mr Bradley stated that the first stage notice was served by him on 15/12/14 (copy on page 76 of the bundle) with a copy of the specification of works describing in detail the proposed works.

17. The tribunal notes the notice stated the respondents intention to carry out works, specified the works to be carried out, the need for such works, invited observations, and explained the relevant legal requirements. The notice also stated that the enclosed tender documents including the works specification would be sent to two independent contractors for competitive pricing and that one of the contractors would be the most competitive tender generated from the formal process in 2011 and that the applicants may nominate any additional contractor.

18. Mr Bradley stated that observations were received from both the applicants (pages 80-82). Mr and Mrs Scholes had agreed to the proposed works outside the property but disagreed with the works to the fence. In view of the observations made, the respondent agreed to not proceed with the proposed works to the fence.

19. Mr Bradley stated that the respondent obtained two tenders, both of whom had been consulted in 2011. He explained that the original quote

from Dennis B Building Contractors Ltd appears on page 116 (dated 11/7/11 in the sum of £36,925.00 plus VAT). Their revised quote in an email dated 17/2/15 with an "attached amended estimate" (page 106) quotes a sum of £49,848.75 plus VAT (page 107 (the estimate is incorrectly dated 11/7/11)).

20. Mr Bradley stated that the second stage notices were sent by him on 20/3/15 (pages 118-123). However, it was felt that the notice may not have given the full 30 days for observations to be made (the notice stated that any observations must be received within 30 days from the date of the notice and that the consultation period would end on 19/4/15) and the notice stated that the respondent had decided to award the contract to the lower of the two tenders before further observations were made.

21. The respondent therefore decided to re-serve the second stage notice on 16/11/15 (page 151).

22. The applicants stated at the hearing that the first stage notice should have included the price of the proposed works and that they believed that the price would be similar to the 2011 price. The applicants further stated that after receiving the 2015 prices, they intended to get their own quotes but were told by the respondent in a letter dated 16/4/15 that they could not get further quotes as there would be legal consequences (page 136 of the bundle). The tribunal notes the relevant part of the letter states "*In regards to Mrs Scholes obtaining a further quotation...the works were tendered by independent contractors...All lessees were invited to nominate any contractor they wished to price these works however none were proposed; any new contractor will not have the full set of tender documentation and cannot provide an independent price now that details of the most competitive quotation have been circulated through the consultation process. This would put the freehold at risk of legal action from the tenderers to date on the basis any future tendering contractor would have an unfair advantage*". The applicants further stated that they made observations about Steel & Co in a letter dated 8/4/15 (page 139), the relevant parts of which states "*I would also like some assurance that the firm(s) you would like to use are reputable. I can see no endorsements of Steel & Co online. I realise that builders do not have to be wordsmiths but this is all I could find re their online presence: '**STEEL & CO About**: We are a building constructors, we do all types of varied work, and have a lot of contracts. We do not provide private work'. This hardly inspires confidence*". The applicants stated that they had nothing more to add on the issue concerning the consultation process.

23. The tribunal found the first stage notice complied with the relevant Regulations. It was not a requirement that prices for any proposed works be provided at that stage. The tribunal further notes that the first stage notice invited the applicants to nominate any contractor of their

choice but they failed to nominate any contractor. The applicants' subsequent decision to obtain quotes, after the respondent had already obtained two estimates through a competitive tendering process, was too late. Any contractor the applicants wanted to provide a quote should have been nominated in reply to the first stage notice. The respondent correctly set out the legal position in its letter dated 16/4/15.

24. The further concerns raised about Steel & Co were dealt with by the respondent in its letter dated 16/4/15 in which Mr Bradley stated that Steel & Co have experience in works of this nature, they do not have a website, the majority of their works is via managing agents and portfolio holders, he had worked with them a number of times over the past years and was satisfied that they were an appropriate contractor, and that he would oversee the works to ensure that the works were done to the specification. The tribunal further notes that to allay any fears, Mr Bradley suggested a meeting at the property with Steel & Co. Mr and Mrs Scholes did not respond to the email and Ms Cross declined the offer (emails on pages 129-130).

25. The tribunal is satisfied that the respondent had complied with the relevant consultation requirements.

Advance payments

26. Clause 16(c) of Part 1 of the Third Schedule to the lease stipulates that the contribution for each year shall be estimated by the lessor as soon as practicable after the beginning of each calendar year and the lessee shall pay such estimated contribution by two equal instalments on the 1st of January and the 1st of July in that year.

27. The applicants stated at the hearing that they accept that the respondent is entitled to request payment in advance.

Are the following proposed works necessary

Roof

28. The applicants stated the roof is only 15 years old and there were no reports of any leaks or damp patches. Therefore, the provisional sum of £5,000 is not warranted.

29. Mr Bradley stated that without full access to the roof it was difficult to state what works would be required, if any. The roof is 15 years old therefore tiles could have become loose, gutter joints can open, pointing to the parapet walls or the lead flashings can fall out and cause water ingress. If any such faults were found, they could be repaired whilst scaffolding was in situ, therefore saving on costs in the long term. The

south and front elevations were very exposed and it was difficult to state what works may be required without full access as it was difficult to inspect from street level. The respondent did not know whether the gutters were previously replaced.

30. The tribunal notes the provisional sum is not simply related to the tiles, which were replaced approximately 16 years ago, but also relates to pointing works to the parapet and chimney, which would not necessarily have been part of the roof replacement work in 1999. Although there are no leaks at present, it is sensible to have a contingent sum to deal with works that may become necessary once full access is gained. This would avoid any further consultation and delays if further works are identified. Furthermore, any unused sum would be credited to the lessees at some stage after the actual accounts are completed. The tribunal found the "provisional sum" for works to the roof in the sum of £5,000 to be reasonable.

Intercom

31. The applicants stated that nothing had been done to the intercom for 28 years, it is working, and therefore there is no need to fix what is not broken.

32. Mr Bradley stated there is a charge of £225 for an electrical test and service to make sure it is in full working order. It is the landlord's fixture and the landlord is responsible to make sure that it is in working order.

33. The tribunal notes that no checks have been carried out in the last 28 years or so. Given that a surveyor and contractors are on site, it is reasonable to carry out checks, for a modest sum, to ensure it is in working order. The tribunal found the relevant work necessary and reasonable.

Outside lighting

34. The applicants stated that all the switches and lights are working. Nothing is broken. They did not know whether an electrical certificate exists or whether it is required by law.

35. Mr Bradley stated that it was the landlord's responsibility to check and maintain the outside lighting and to ensure that they have been tested and serviced to current regulations. There was no record of when they had last been tested. The landlord was required to have electrical test certificates. Mr Bradley stated that he had seen some broken lenses.

36. The tribunal is aware that electrical certificates are required. The respondent states there is no record of when they were last tested. The

tribunal notes that in response to the 1st Stage Notice, which listed the proposed works concerning the lighting, neither of the applicants disputed that the works were necessary. The tribunal also notes that the works will be supervised, therefore, if it is found that some works are not required, those works and the costs would be omitted. The tribunal found the proposed work necessary and reasonable.

"Unclaimed items"

37. This involved the proposed removal of items on the flat roof. The applicants stated that they had now removed the items. Both parties agreed that this was no longer an issue and there would no longer be a charge.

£2,500 contingency

38. Mr Bradley stated that all contracts, especially those that involve works without carrying out a full and detailed inspection, have a contingency sum to allow for any unforeseen works. The property is old and therefore may need works that have not been identified yet. The report is already a year old and therefore what work had been identified may have increased, for example, additional pointing work may be needed. The general rule is to allow 10% for contingency but he has reduced it to about 5%.

39. The applicants stated there was no need for any contingency fee. It is all based on speculation and there is no need to fix what is not broken.

40. The tribunal agrees that it is reasonable to have a contingency sum for the reasons put forward by Mr Bradley.

Gardening / weeding

41. Mr Bradley stated he had inspected the garden in 2011, 2014, and in the spring of 2015. He stated that the garden was overgrown and the proposed work was, as a one off, to cut the overgrown vegetation.

42. The applicants stated there was no point in simply cutting back the grass and weed. They cut the grass now and then but the weed grows back.

43. The tribunal noted that the respondent had not previously maintained the garden and did not plan to regularly maintain the garden after this one off gardening / weeding exercise. When asked 'what was the point in spending money when the weed will only grow back', Mr Bradley agreed that the proposed work was not reasonable. The tribunal accordingly found the gardening / weeding to be unnecessary.

Boundary fence

44. Both parties agreed that no works will be done and therefore no costs will be incurred.

Front door lock

45. This was no longer an issue between the parties as the applicants had already changed the lock therefore no further works were needed and no costs would be incurred.

Are the costs for the following items reasonable in amount?

Weeding

46. The tribunal found the cost to be irrelevant given the tribunal has already determined that the work is not necessary.

Door Mat (£234)

47. The applicants state that they have a quote for £80 to supply and fit.

48. Mr Bradley stated that the contract was competitively tendered and that individual prices on certain items may be cheaper but the overall contract price was the cheaper of the two quotes. It is a fixed price contract therefore the contractor may have allowed other items at a lower price.

49. The tribunal agrees that as a matter of principle, when it is a fixed price tender, it is not possible to pick and choose individual items. The contract was tendered competitively and the lowest tender was accepted. The tribunal therefore finds the cost reasonable in amount.

Work to rear elevation (£8,934)

50. Mr Bradley stated that the work specifications were listed on page 99-100 at paragraphs 3.3-3.3.10. The work covers overhauling the doors, windows, mastic works, and the joinery.

51. The applicants relied upon a quote they obtained from a builder (page 225). They stated that their quote was not individually itemised but was in relation to the same works proposed by the respondent for the total sum of £4,200.00 plus VAT in the sum of £840.00. They did not ask the builder whether the quote provided for any defect period, whether it covered health and safety guarantees, whether it specified the quality of the material to be used, or whether it would be subject to a surveyor's approval.

52. Mr Bradley stated that the quote was not "like for like". The appellants could have shown the builder the respondent's detailed specification but did not. The respondents quote has terms and conditions built into the contract. The respondent needs to comply with the Construction Management Regulations 2015 which sets out welfare needs that must be complied with. The appellants quote does not provide a detailed specification or the extent of the works or the provisional sums or any contingency items.

53. The tribunal notes that the respondents quote provides a detailed specification and complies with all relevant Regulations. The applicants quote is not sufficiently detailed to show whether it covers the same works proposed by the respondent and whether it includes any provisional quantities or sums. There is no evidence that it complies with relevant Regulations. There is no evidence that it would allow for a surveyor to oversee the quality of the works or that it provides a 12 month defect period. The tribunal did not find the quote obtained by the applicants to be a "like for like" comparison. The tribunal notes that the respondents quote was obtained after a competitive tendering process and therefore finds the respondents cost reasonable in amount.

Should the proposed works be spread?

54. The applicants stated that the scaffolding was only needed for the works to the front of the property and therefore those works could be done separately. Scaffolding was not required for the rear ground work or the works in the corridor. The rear works could be done this year, the front next year, and the corridor the year after.

55. Mr Bradley stated that the works would need scaffolding to the rear elevation also as work could not be carried out on a ladder placed on the flat roof at the rear as it would not be compliant with current relevant Regulations. The works cannot be split as dividing the works would need larger welfare facilities and possible multiple contractors, which would add to the overall cost. Or the same contractors would need to attend once for the front and then attend again for the rear, therefore, there would be an increase in costs. The price given by the contractor is as a single project. If the work is subdivided, the respondent may need to re-tender. Mr Kirvan stated that the landlord was entitled to choose, within reason, the method used. If the works were staggered as suggested by the applicants, three separate consultations would be needed instead of one. If the works were spread as suggested, the ownership of the flats may change and new lessees may have different expectations.

56. The tribunal found the arguments put forward on behalf of the respondent to be detailed, practical, and sensible. The argument put forward by the applicants was lacking in detail, in particular their argument that the scaffolding was only required for the works to the

front of the property. The tribunal found it reasonable for the respondent to carry out the proposed works in one go.

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

57. The respondent has substantially won its case and had acted reasonably and in compliance with the lease. The tribunal therefore does not order the respondent to refund any fees paid by the applicant. For the same reasons, the tribunal decline to make an order under section 20C. The tribunal did however note that the respondent did not intend to recover legal costs as the respondent believes the lease does not allow it.

Name: Mr L Rahman **Date:** 7/6/16

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not

complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

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 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

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.