11341

First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/00KF/LSC/2015/0080**
Property	:	**22 Seaforth Road, Westcliff-on-Sea, Essex SS0 7SN**
Applicant	:	**Ian Maynard (self representing)**
Respondent	:	**David Lombard (self representing)**
Date of application	:	**2nd October 2015**
Type of Application	:	**To determine reasonableness and payability of service charges and administration charges**
The Tribunal	:	**Bruce Edgington (lawyer chair)** **Evelyn Flint DMS FRICS IRRV** **John Francis QPM**
Date and venue for Hearing	:	**8th December 2015 at The Court House, 80 Victoria Avenue, Southend-on-Sea, SS2 6EU**

DECISION

---

1. In respect of the amount claimed by the Respondent from the Applicant for 2015 the Tribunal determines that £1,442.00 is payable and reasonable.

2. No order as to costs save that the Tribunal makes an order pursuant to section 20C of the **Landlord and Tenant Act 1985** ("the 1985 Act") preventing the Respondent from claiming any amount for representation within these proceedings as part of any future service charge.

Reasons

Introduction

3. The building in which this property is situated was converted into 3 flats some years ago. The Respondent is the freehold owner but appears to have retained possession of the first floor flat and also has a long leasehold interest. He has sublet his flat. The Applicant has a long leasehold interest in the second floor flat which is sub-let. A Mr. and Mrs. Hills are said to be the long leaseholders of the ground floor flat which they occupy.

4. In accordance with the Tribunal's directions, a bundle of documents has been supplied, much of which appears to consist of correspondence and e-mails which show a very poor relationship between both the Applicant and Mr. and Mrs. Hills on the one hand and the Respondent on the other. Some of the letters and statements involving Mr. and Mrs. Hills and the Respondent contain what can only be described as vitriolic abuse with descriptions of alleged assaults, dishonesty and threats.

5. The Respondent says that he has owned and managed the building for 28 years. He lives about 300 miles away from the property in Wales. He says that the first he knew of any serious problem with the building affecting the current service charge demands was on the 4th October 2014 when he received a text from his 'rental tenant' with photographs attached showing an outbreak of 'mushrooms' growing out of the top of the skirting board in the lounge. A survey was arranged and he says that it was clear that it was dry rot and that the structure of the building had been damaged.

6. Following an application to the Tribunal dated 10th November 2014 to dispense with the consultation process in view of the urgency of undertaking investigative and remedial works, there was a hearing on the 27th November 2014 during which Mr. Hills made it clear that he did not want the Respondent to do the remedial work. The Respondent acknowledges that this was made clear. The remedial work started in mid January 2015 after the Respondent's tenant and Mr. and Mrs. Hills had moved out. Despite the protestations of Mr. Hills, the Respondent did undertake some of the work and it took 16 weeks. The Tribunal is also concerned to see that these 'urgent' works were discovered in early October 2014 but did not commence for over 3 months during which time there could have been a full consultation.

7. It seems that some work was carried out to the property by the Respondent's building business to resolve a subsidence issue in 2011 and it was Mr. and Mrs. Hills' experience at that time which led to the hostility.

8. In March 2015, the Respondent wrote to the tenants saying that he wanted to redecorate the exterior of the building. He awarded the contract to his building business, Decorum. On the 18th July 2015, the Respondent wrote to the Applicant saying that he had discovered some wet rot in the joists dividing the first floor from the ground floor. There are a number of copy invoices at the end of the bundle which appear to show amounts being claimed from the Applicant for all these various works but the Tribunal could not really follow them. At the hearing, the Applicant said that he had paid £6,500.00 towards the demands which had been made of him and there was £4,844.00 outstanding.

9. The application asks the Tribunal do determine a number of matters i.e.

"Dry rot

(i) Deciding whether I'm liable for the full cost on the grounds that the original problems were avoidable

(ii) Deciding whether the extent of the dry rot had developed into such a large problem, (and cost), due to negligence

(iii) Adjudicate on whether the landlord acted appropriately

awarding all the work to himself without informing me and whether all the costs submitted are acceptable and justifiable

Decorating costs

(iv) Decide whether there has been duplicated costs and whether it was acceptable for the landlord to produce no other quotes other than his own"

10. It is clear from the Respondent's statements filed that he does not accept that he has done anything wrong.

The Inspection

11. The Tribunal members inspected the property in the presence of the Applicant, the Respondent and Mr. Hills. It was originally a 2 storey terraced house said to have been built around 1910 and judging by the date of the lease, had a roof extension and was converted into 3 flats in the late 1980's. It is of rendered brick construction under a tile clad pitched roof with bay windows at ground and first floor levels.

12. The property appeared to be in good decorative order externally. The Tribunal were shown into the entrance on the ground floor and into the front of Mr. Hills' ground floor flat and they appeared to be in good order also.

13. There were no particular matters arising from the inspection save that the Tribunal noted that the guttering was joined to the guttering on the adjoining terraced house at number 24. It has been said that this is one of the reasons for the dry rot problem as the gutter on the subject property was overloaded by this extra water as number 24 did not seem to have any downpipe to assist with the transfer of rain water down into the drains save for one on the other side of its bay window.

The Lease

14. The lease is dated 7th February 1989 and is for a term of 199 years from that date with a ground rent of £75 per annum. The Respondent is the landlord.

15. Unusually, the various parts of the structure are demised to the long lessees. However, the landlord covenants to maintain the common parts and structure of the property and to insure it with the proviso that one third of the cost can be recovered from each of the long lessees.

The Law

16. Section 18 of the **Landlord and Tenant Act 1985** ("1985 Act") defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'.

17. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. This Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable and, if so, whether it is payable.

18. Paragraph 1 of Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the Schedule") defines an administration charge as being:-

> *"an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable... in connection with a breach (or alleged breach) of a covenant or condition in his lease."*

19. Paragraph 2 of the Schedule, which applies to amounts payable after 30th September 2003, then says:-

> *"a variable administration charge is payable only to the extent that the amount of the charge is reasonable"*

20. It is relevant here to set out some of the provisions relating to the need to consult with lessees when major works are undertaken i.e. works involving more than £250 per flat. In this case, the Respondent sought and obtained this Tribunal's permission to dispense with the consultation requirements in November 2014 "*in respect of works to investigate and treat dry rot at the property*". That work was undertaken and completed. However, in the spring of2015, the Respondent seems to have attempted a consultation in respect of exterior decoration work.

21. The **Service Charges (Consultation Requirements) (England) Regulations 2003** set out what is required for a consultation. The first letter has to set out what is proposed and why. It "*shall also invite each tenant....to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works*". The first letter in the bundle relating to external decoration works appears to be dated 18th March 2015 at page 127 in the bundle. This does not comply with this requirement.

22. The next step is for the landlord to obtain estimates and then write again to the tenants setting out the amount of at least 2 of the estimates. The estimates must be made available for inspection and "*at least one of the estimates must be that of a person wholly unconnected with the landlord*". This letter appears to be dated 10th May 2015 at page 129 in the bundle. It does not set out the amount of any estimate but merely says that the amount will be 'verified' by a quantity surveyor. There is actually no reference to any estimate, let alone one from someone unconnected with the landlord.

The Hearing

23. The hearing was attended by those who were at the inspection plus a Mr. Swift who was a witness although it was not necessary for him to be called. In view of the bad feeling between the various people there, this was a difficult hearing. Whenever anyone tried to say something there was an almost inevitable interruption. What became clear during the hearing is that the Respondent claimed not to appreciate that this is an expert Tribunal whose task was to determine the reasonableness of the service charges. This is despite the heading on the application form and the directions order made by the Tribunal on the 22nd October 2015 making this absolutely clear. At one point, despite the surveyor member of the Tribunal having been introduced at the outset of the

hearing as a chartered surveyor, he said that he had not brought his surveyor along as the Tribunal had no expertise and he assumed that it would just adopt the figures in his expert's report.

24. The Tribunal's role and expertise was explained to him. He did not ask for an adjournment.

25. The Tribunal chair started the hearing by asking for clarification on one or two points arising from the documents in the bundle and a further document handed in by the Respondent on the morning of the hearing. These points can be categorised as follows:-

(a) The Respondent had said in his written case that he had used a specialist company to eradicate the dry rot but there was no guarantee or proof of this in the bundle. The Respondent said that the company was Essex & Anglia Preservation Ltd. whose estimate was in the bundle. He said that he had not produced the guarantee on the advice of his solicitor who had apparently advised him not to produce it until payment had been made.
(b) The Respondent was then asked about the cost of the dry rot eradication and other remedial works. He said that he relied upon the schedules to the expert's reports which set out the claim in detail. It was pointed out to him that this was just the view of the writer of the reports about what he thought the costs should be. The Tribunal wanted to know what it had actually cost to do the works. The building business was, effectively, Mr. Lombard and he used subcontractors throughout. Where were their invoices? They could not be produced and Mr. Lombard was simply unable to say what the job had cost.
(c) The chair then went through the 'consultation' process for the exterior decoration works resulting in a charge of £1,000 per flat. The Respondent could not add anything to the documents in the bundle and, for the reasons set out above, he was told that the consultation process had not been undertaken properly. He had no response.
(d) The Respondent was asked about any insurance claim for the dry rot works. At first he said that no claim had been made. Later in the hearing he changed that to saying that there had been a claim or at least a discussion during which it was said that the insurance company would pay for water damage but not dry rot.

26. The remainder of the hearing consisted of Mr. Maynard, Mr. Lombard and Mr. Hills expressing views about previous evidence of damp and whether there had been negligence on Mr. Lombard's part for not spotting that water was penetrating the building. He accepted that the gutter at the front of the building was 'slumped' but continued t allege that the occupants had been negligent in not informing him of any water penetration problems.

27. As was pointed out to them, whilst there was the evidence of the photographs, the only expert evidence was lacking in any detail about the cause or the source of the dry rot or any remedial works need to avoid the problem in the future. Mr. Burradge's involvement is set out in the discussion below.

28. It became clear that agreement could not be reached about what had gone on in

the past. Mr. Maynard said that he was simply unaware of any water penetration and everyone agreed that even though the gutters overflowed when it rained hard there was no marking on the walls to show that something might be amiss when it was not raining. The expert's report referred to the damp penetration in Mr. Lombard's flat as being behind the kitchen units i.e. out of sight. Mr. Hills said that he had mentioned damp problems in the past but Mr. Lombard had not acted – he denied that.

29. The Tribunal decided that before matters degenerated further the parties should be asked if they had anything to add to the evidence in the bundles or the evidence which had been given. They were, and no one said that there was anything to add.

Discussion

30. In **Schilling v Canary Riverside Development PTD Ltd** LRX/26/2005; LRX/31/2005 & LRX/47/2005 His Honour Judge Rich QC had to consider upon whom lay the burden of proof in service charge cases. At paragraph 15 he stated :

> *"If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the Yorkbrook4 case make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard."*

31. In this case, the Applicant says that he is an experienced landlord and then sets out facts and draws his own conclusions without any supporting expert opinion.

32. In fact, the only expert's reports are from Calfordseaden LLP. The Respondent consulted with them in January 2015. They do not explain what they do although they say that they are regulated by the Royal Institution of Chartered Surveyors. The first report is dated 2nd February 2015 but does not say who wrote it. It seems to be addressed to the Respondent, describes the property and refers to inspections by their David Burrage BSc on the 14th, 20th and 27th January 2015. There is no description of the experience of Mr. Burrage. He describes substantial dry rot in the ground floor and first floor and then sets out a list of remedial works with 'budget' prices against each item making a total of £26,341.00 to include 'contractor's overheads and profit and VAT'.

33. There is then a second report dated 10th March 2015 which is said to have been prepared by Mr. Burrage and describes a further inspection on the 24th February 2015 after more of the structure had been exposed. This said that the dry rot infestation was more serious than had been thought and then set out a further list of work with a new total of £30,021.00 with the same inclusions as before.

34. Oddly, the two reports only make one comment about the possible cause of the dry rot. It is clear that the dry rot to the ground floor appears to be quite

separate to the first floor. They are described as being 'two apparently un-associated outbreaks of dry rot'. The only mention of a possible cause is 'quite certainly associated with escape of water from' a broken front rainwater gulley hopper alongside the porch. It is suggested that the break is of 'long standing'.

35. As to the cost of remedial works, the Tribunal did have the benefit of a written assessment from a company called Qube Developments Ltd. which belongs to Mr. Maynard's brother, Mark Maynard, as was acknowledged by Mr. Lombard. This company says that it has a team of 6 'trades' plus subcontractors. The assessment was said have been prepared as a result of seeing the expert's reports and photographs supplied by the Respondent. It is said that whilst the assessment is not an independent quotation, the company would expect the estimate to be typical of any company similar in size to that one.

36. The assessment says that it would expect the work to take them about 4 weeks with a labour cost of £14,400 plus VAT plus materials of £5,000, plumbing of £750, dry rot treatment of £1,500, coving of £1,866 and survey fees of £1,000.

37. Mr. Lombard's description of his expert varied from being a surveyor to being a quantity surveyor. As had been said, his reports did not set out what his experience or expertise was. A bachelor of science could have any number of specialties. It was clear that none of the reports were 'expert's reports' in the sense that they expressed any duty to the Tribunal and, as been said, it is very odd that the reports give no real indication as to the cause of the major problem. Whether this was a purposeful omission on Mr. Lombard's part is not known.

38. Mr. Lombard did not seem to understand the point being made i.e. that his expert's assessment of what the job might cost, did not amount to a commitment about what a contractor would expect for the work. The Tribunal thought this to be odd, as Mr. Lombard is presumably aware of the tendering process or at least a customer asking a number of potential contractors for quotations. He must surely know that contractors' estimates or quotations can be very far apart. Having said that, he acknowledged that he is effectively a 'one man band' and uses subcontractors. He is not registered for VAT purposes.

Conclusions

39. There can be no doubt that the problems in this case have been exacerbated by the ill feeling between the participants. Dry rot is a particularly nasty problem which is often not discovered until it has a hold on the structure of a building. Whether Mr. Lombard could have prevented or should have detected the problem earlier is impossible for this Tribunal to determine on the evidence presented to it. Even Mr. Maynard and Mr. Hills confirm that there were no obvious signs visible from outside the building e.g. staining of the walls etc.

40. On the other hand, once the problem had been discovered, it was incumbent on Mr. Lombard, as the landlord, to rectify the problem. He obtained the Tribunal's consent to avoid the necessity of a full consultation in respect of the identification and remedying of the dry rot. Technically, this did not cover all the consequential work but, as the Upper Tribunal has said on a number of occasions recently, these are adversarial proceedings. Mr. Maynard did not raise the point and the Tribunal decided not to raise it either. Mr. Maynard may have taken the

very sensible view that raising the issue would only add to the litigation.

41. Mr. Lombard clearly lost some rental income. However, as has been said, the Tribunal has not been impressed by the time it took him to complete matters or his failure to comply with the Tribunal's directions to "justify in principle and in law the disputed service charge demands made". He accepts that he has not produced any real evidence of the actual cost of the works or proof that the dry rot removal is supported by a guarantee.

42. As to the cost of works, the Tribunal was impressed by the assessment by Qube Developments Ltd. which, certainly in terms of the cost of labour and materials, rang true with the Tribunals' considerable experience in these matters. Every 'estimate' includes some sort of contingency. Also, Mr. Lombard's smaller business would have less overheads. The Tribunal has therefore decided to adopt those figure subject to a reduction of 10% of the labour cost to reflect those matters.

43. As to the 'consultation' for the external decoration work, this was clearly and seriously defective and the service charge for this item is therefore reduced to £250 per flat for this item.

44. As to costs, Mr. Lombard seeks £200 as his costs for being involved in this application. The lease does not actually provide for the recovery of costs within litigation but in order to avoid any doubt an order is made pursuant to section 20 of the 1985 Act. If there had been a right of recovery, the Tribunal would have determined that such an order was just and equitable bearing in mind the result of the proceedings.

45. Therefore the cost to Mr. Maynard which is determined as being reasonable is £1,442.00 which is made up as follows:

	£
Labour cost	14,400.00
Less 10%	1,440.00
	12,960.00
Materials	5,000.00
Plumbing	750.00
Dry rot treatment	1,500.00
Coving	1,866.00
Survey fees	1,000.00
	23,076.00
One third	7,692.00
Less paid	6,500.00
	1,192.00
External decoration	250.00
Balance due	1,442.00

46. The only post script to this decision is that some effort should be made to see if the insurance does cover dry rot. As solicitors seem to be instructed, they may care to look at the policy, which was not available to the Tribunal. It would also

be sensible to reduce tension by disclosing a copy of the guarantee for the elimination of the dry rot. If there is litigation, it will have to be disclosed anyway and as it is presumably addressed to Mr. Lombard, it is hardly giving anything away.

.....
Bruce Edgington
Regional Judge
10th December 2015

ANNEX - RIGHTS OF APPEAL

i. 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.

ii. 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.

iii. 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.

iv. 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.