11288

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/22UC/LSC/2015/0071**
Property	:	**Flat 2, Market Hill, Coggeshall, Essex CO6 1TS**
Applicant	:	**Mr Nicholas Franklin**
Representative	:	**Mr N Franklin In Person**
Respondent	:	**Mr Simon Kleyn**
Representative	:	**None**
Type of Application	:	**Section 27A Landlord and Tenant Act 1985 – determination of service charges payable**
Tribunal Members	:	**Judge John Hewitt** **Mr Gerard Smith FRICS FAAV REV** **Ms Cheryl St Clair MBE BA**
Date and venue of Hearing	:	**12 November 2015** **The White Hart Hotel** **Coggeshall CO6 1NH**
Date of Decision	:	**23 November 2015**

DECISION

Decisions of the tribunal

1. The tribunal determines that:

   1.1 The applicant is not liable to pay to the respondent the sum of £466.99 claimed by the respondent within the accounts for the year 2012;

   1.2 The respondent shall by **5pm Friday 11 December 2015 p**ay to the applicant the sum of £255.00 by way of reimbursement of the fees paid by the applicant to this tribunal in connection with these proceedings; and

   1.3 An order shall be made pursuant to section 20C Landlord and Tenant Act 1985 (the Act) that none of the costs incurred or to be incurred by the respondent in connection with these proceedings shall be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the applicant to the respondent.

2. The reasons for our decisions are set out below.

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the section number of the hearing file provided to us for use at the hearing.

Procedural background

3. On 24 August 2015 the tribunal received from the applicant an application under section 27A of the Act [1]. The principal issue raised in the application was whether the applicant was obliged to make a contribution to the respondent by way of a service charge in the sum of £466.99 towards the cost of works carried out at the property to replace glass in the window of one of the units and related making good works/redecoration.

   The application form also included a related application pursuant to section 20C of the Act in connection with any costs which the respondent might incur in connection with the proceedings.

4. Directions were given on 26 August 2015 [1].

5. The respondent has written two letters to the tribunal setting out his position on the substantive issue raised in the application. We shall revert to those letters shortly.

6. By letter dated 14 September 2015 the respondent was notified of the times and date of the inspection and the hearing, namely 12 November 2015, and that was re-confirmed by letter dated 16 September 2015. By letter dated 14 October 2015 the respondent acknowledged the earlier correspondence and sent his apologies for not being able to attend in person, but evidently the date was not suitable to him. No request for a postponement was made.

7. On the morning of 12 November 2015 the members of the tribunal had the benefit of an inspection of the subject building. The applicant was present and showed us around. The respondent was not present.

8. As will appear from the lease shortly the development known as 14/15 Market Hill comprises 6 residential units and two commercial units, both of which are on the ground floor. The buildings, which occupy a corner site, are historic, possibly Tudor in style. We were told the buildings are listed. We noted that 4 of the residential units are accessed by a street door, set between the two ground floor commercial units, leading to a small hallway and then stairs to the upper floors.

   The other two residential units are accessed at the rear of the buildings via an entrance way off East Street.

   We noted that one of the commercial units was operated as an optician's business and the other by a replacement windows firm.

The hearing

9. The applicant was present at the hearing and proposed to present his case in person. The respondent was not present.

10. The tribunal considered rule 34. We were satisfied that the respondent had been notified of the hearing because he acknowledged the tribunal's letters and stated in his letter dated 14 October 2015 that he was not proposing to attend in person. We were also satisfied that it was in the interests of justice to proceed with the hearing because the respondent had not requested a postponement and appeared content to make his points in his correspondence. We also had regard to the overriding objective and the due transaction of the tribunal's business and that a commercial venue had been booked for the hearing for the convenience of the parties.

11. The applicant presented his case and during the course of the hearing we considered the material documents in the trial bundle prepared for our use. The applicant answered a number of questions put to him by members of the tribunal and did so in a careful and measured way. We came to the conclusion that the applicant was a witness on whom we could rely with confidence.

The lease

12. A copy of the lease is at tab 1. It is dated 11 January 2002. It was prepared by Eversheds and was granted by Investamber Limited to Roger Simpson for a term of 999 years commencing on 1 January 1994.

13. The following are material to the issue before us:

Particulars:

The Development: *14 and 15 Market Hill, Coggeshall ...*

Number of units on the Development:	*Six residential units and two shops*
The Unit:	*Flat Number 2 in the Building as described in Part 1 of the First Schedule*
The Service Charge:	*the contribution equal to the Tenant's Proportion of the expenditure described in sub-clause 9.1 and in the Second Schedule*
The Tenant's Proportion:	*means such proportion of the expenditure described in sub-clause 9.1 and in the Second Schedule as the Landlord may from time to time determine or on the event of dispute ...*
Interest Rate:	*6% above the base rate of Lloyds Bank Plc from time to time or 10% whichever is the greater*

Definitions:

'the Plan'	*means the plan and drawings annexed to this Lease*
'the Building'	*means all buildings on the Development for the time being erected*
'the Retained Parts'	*means those parts of the Development including the Building and the Service Installations apparatus plant machinery and equipment ... serving the Retained Parts not included or intended to be included in the demise of a lease of any other part of the Development by a Lease in a similar form to this Lease*

Recitals

5. *The Landlord wishes to dispose of each of the units in the Development by means of a form of lease in substantially the form of this Lease or as near as circumstances admit and require to the intent that the tenant for the time being of any unit forming part of the Building may be able to enforce (as far as possible) the performance and observance of covenants and provisions contained in the Lease of any other unit so far as they affect the tenant or the unit to which the tenant is entitled*

Clauses

Covenants on the part of the tenant with the landlord

9.1 *to pay contributions by way of Service Charge to the Landlord equal to the Tenant's Contribution of the amount the Landlord may from time to time expend and as may reasonably be required on account of anticipated expenditure on ...services repairs or insurance being and including expenditure described in the Second Schedule and to pay the Service Charge not later than 28 days of being demanded...*

9.4.1 *to keep the Unit in good and tenantable repair and decorative condition (but not to decorate any part of the exterior of the Unit including the exterior of the external doors and windows of the Unit) and forthwith to replace all broken glass and to replace ad renew the Landlord's fixtures ...*

9.4.2 *to keep clean the windows of the Unit and ...*

Covenants on the part of the landlord with the tenant

10.2 *whenever so requested by the Tenant or by the tenant of any other unit in the Building or whenever the Landlord may think fit to take reasonable care to keep in good and substantial repair reinstate replace and renew the Retained Parts provided the Landlord shall not be liable ...*

10.3 *at the request of the Tenant ... as often as reasonably necessary or as often as the Landlord may think fit to decorate the exterior and the internal communal parts of the Building previously decorated ... and to keep all internal communal parts of the Building cleaned and lighted to a standard which the Landlord may consider from time to time to be adequate*

11. *that every long-term lease of each of the units in the Building granted by the Landlord before or after the date of this Lease is and will be in substantially the same form of this Lease or as near as the circumstances admit and require*

The First Schedule
Part 1
The Flat having the number and in the location described in the Particulars and ... which include:
(1) all cisterns ...
(2) all windows window frames doors door frames and all internal non-load bearing walls
(3) –(5) ...

The Second Schedule
The Service Charge Expenditure

1. *The expenditure (in this Schedule described as 'the Service Charge Expenditure') means expenditure:*

   (1) in the performance and observance of the covenants obligations and powers on the part of the Landlord contained in this Lease (not being in respect of covenants or obligations the cost of the performance and observance of which is expressly stated not to be recoverable from the Tenant through payment of the Service Charge) or with obligations relating to the Development or its occupation by operation of law
   (2) [expenses of management]
   (3) in the provision of services facilities amenities improvements and other works where the Landlord in the Landlord's absolute discretion from time to time considers the provision to be for the general benefit of the Development and the tenants of the units and whether or not the Landlord has covenanted to make provision
   (4) in the payment of bank charges and interest on and the cost of procuring any loan or loans raised to meet expenditure

There are then provisions relating to the keeping of accounts, on account interim payments, the issue of an annual statement of expenditure certified by a qualified accountant and for any balancing debits or credits as the case may be.

The sum in issue

14. In the accounts for 2012 [tab 2] there has been included £1,542.00 invoiced by K Jolley Property Maintenance in respect of:

> *"Re Coggeshall Eye Centre*
> *To, Repair window & replace glass wit centre*
> *bar for listed building needs.*
> *Includes external painting £1220.00*
> *To, Repainting inside of the above window £65.00*
> [sic]

Those sums have been totalled to £1,285.00. VAT of £257.00 has been added to arrive at an invoice total of £1,542.00.

15. Evidently the respondent has apportioned £466.99 of that sum to the applicant. That equates to 30.28%, approximately.

The gist of the case for the applicant

16. The gist of the case for the applicant was that the window is not within the Retained Parts, as defined in the lease, but forms part of the premises let to the Eye Centre.

17. The applicant also asserts that the respondent failed to carry out any consultation exercise as required by section 20 of the Act such that if, which was denied, he had a liability to contribute to that expenditure, his contribution was capped at £250.00.

The gist of the case for the respondent

18. The gist of the case for the respondent was set out in the two letters which he sent to the tribunal.

19. In the letter dated 7 September 2015 he said, so far as material:

"The optician's window was a large glass plate hanging loose off the lower window sill, moving with the slight breeze outside. This was adjacent to a busy pavement. I could not leave thus when I became aware of it.

I understand I am to notify tenants if there is a cost in excess of £250, but this was an emergency.

Window Repair: from the lease I understand that would be considered part of the fabric of the building and thus it is a shared expense.
Nothing to do with shared space, it is a shared building. So if the windows need to be replaced this would be a shared cost too, even in each individual leasehold property.

Shared building and all the repairs are shared, for example if there is a roof repair, or the outside of the building needs redecorating. Then all tenants contribute towards this. "

20. In the letter dated 14 October 2015 he said, so far as material:

"Section 10.2 of the lease states that 'the landlord may think fit ... to replace and renew the retained parts'.

Retained parts includes supporting walls, the outside wall is clearly a supporting wall.
Thus windows are included in the definition of retained parts.

In my view it was perfectly appropriate to repair the window as needed. The sensible course of action was to repair/replace some of the woodwork and replace the glass.

Some of the tenants may think it was done in haste. I was made aware of a large glass window pane with significant movement right next to a pavement. In my opinion this could not be made secure without boarding the whole window up. As it is a commercial unit I did not think that was reasonable as a repair/replacement was needed regardless.

Other than receiving rent from the unit with the window in dispute I have no commercial interest in the business.

9.4 in the lease say , they are not to decorate any part of the exterior unit inc windows and doors (but are to replace all broken glass).

In my view the above means that the window frame is part of the retained part, thus I can replace as needed. The old window frame was of a rather odd construction, if I remember correctly, and it was deemed easier and more economical to adjust the old frame to take a new window glass, rather than to continue with the previous set up. Obviously if only the window glass had broken or cracked the tenant would have been responsible.

There is a clause in the lease which states I can authorise a quick repair if there is an urgent need for this, in my view the loose window pane by the pavement was exactly that."

21. We note that in an email to a tenant, Ms Suzie Nott, dated 26 April 2013 [tab 10], the respondent stated:

"The repair of the window is a shared expense.
If you choose to replace a whole window in your flat, frame included that is your own cost and another leaseholder would not be expected to pay for that.
Some windows in the building are shared, e.g. on the landing and the front door. Future replacements of those are a shared cost."

Findings of fact

22. We find as a fact:

22.1 The window in question is not comprised with the Retained Parts as defined in the lease;
22.2 The window in question is not on a landing or other part of the Building shared by the lessees; and
22.3 The window is wholly within and is exclusive to that part of the Building let to the Eye Centre.

Discussion and decision

23. We prefer the submissions of the applicant.

24. The structure of the lease is plainly that the six residential units and the two shops were to be let on leases (or tenancies) in *'... substantially the same form as this Lease or as near as circumstances admit and require ...'*

25. The definition of the demise of flat 2 as set out in the sub-paragraph (2) of Part 1 of the First Schedule includes *"all windows window frames doors door frames and all internal non-load bearing walls".*

We infer that the leases or tenancies of all eight units should include a similar provision.

The respondent has told us that he has let the ground floor commercial unit to the Eye Centre and that he receives rent from the tenant, but he has not produced to us a copy of the lease or other tenancy agreement.

If the respondent was in compliance with his obligations as landlord the lease or tenancy agreement of the Eye Centre should have included a provision that the tenant is responsible to keep the windows and window frames *"in good and tenantable repair and decorative condition"*

26. The respondent has submitted that the subject window is part of the Retained Parts. Eye reject that submission. The definition of Retained Parts expressly refers to those parts *"not included or intended to be included in the demise of a lease of any other part of the Development by a Lease in a similar form to this Lease"*. The subject window is, or was intended to be, and should have been included in the demise of the unit let to the Eye Centre.

27. The leases oblige the tenant to keep the windows and window frames in repair. We accept the submission that the tenant is not to decorate the exterior of the window frame – that is an obligation reserved to the landlord. That is not an unusual provision. We infer it was included to ensure that the landlord controlled a uniform style or colour scheme for the exterior of a period listed building. Thus, what in practice we would expect to occur is that upon a lessee repairing or replacing a window frame it is then for the landlord to have exterior of the frame painted in accordance with the style adopted for the development as a whole.

28. The scheme of the lease is that the tenants of all eight units will contribute to the service charge as defined. Evidently the leases provide that the service charge expenditure shall be apportioned as the landlord may from time to time determine. It is to be implied into each of the leases that such apportionment shall be transparent, fair and reasonable across all eight units.

29. It was not in dispute that the respondent did not carry out a consultation process in conformity with section 20 of the Act.

30. The respondent has asserted that the window was repaired as an emergency but he has not provided any evidence to support that assertion.

31. The respondent has asserted that there is a clause in the lease permits him to *"authorise a quick repair if there is an urgent need for this"* but he has not identified the clause he relies upon. We have not seen a clause in the lease of flat 2 to that effect.

32. The respondent has not made an application pursuant to section 20ZA of the Act.

33. For the reasons set out above we find that the applicant is not obliged to contribute to the landlord the sum of £466.99 towards the costs of the repair to the subject window.

34. If it were to be held elsewhere that we were wrong in that conclusion we find that any contribution payable by the applicant shall be capped at £250, the respondent having failed to comply with the provisions of section 20 of the Act.

Section 20C order

35. The respondent did not file any representations against the application made pursuant to section 20C of the Act.

36. We are satisfied that, in the circumstances of this case and bearing in mind that the respondent has failed to make out any of the material submissions made by him, it is just and equitable to make an order under this section in connection with any costs which the respondent has or may incur in connection with these proceedings.

Repayment of fees.

37. The applicant has paid to the tribunal fees of £255 in connection with these proceedings. The applicant made an application under rule 13 (2) that we make an order requiring the respondent to reimburse him with that sum.

38. In support of the application the applicant took us to correspondence with the respondent concerning the issue. The applicant made his arguments very clearly. He sought to persuade the respondent and offered to meet with the respondent to discuss this (and other matters of mutual interest) but the respondent was adamant and obdurate and refused the offer of a meeting. The applicant said that in consequence he was forced to make an application to the tribunal in order to have the dispute determined.

39. We find the evidence and submissions of the applicant on this point compelling and we have thus made an order as requested.

Closing observation

40. The residential landlord and tenant sector is highly regulated. A number of documents issued by the respondent to the applicant and contained in the hearing file were not compliant with several statutory provisions. The applicant could legitimately have raised that non-compliance and it may have had an effect on the payability of service charges.

41. If the respondent proposes to continue to manage the development himself we recommend that he acquaint himself with the statutory requirements. In particular we draw his attention to:

- sections 20 and 21B Landlord and Tenant Act 1985
- section 47 Landlord and Tenant Act 1987

- section 166 Commonhold and Leasehold Reform Act 2002

The service charge demands should also be compliant with the terms of the leases. As mentioned previously the apportionment of the service charges between the eight units comprising the development must be clear, transparent and fair.

Judge John Hewitt
23 November 2015