11069

First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/22UJ/LSC/2015/0046**
Property	:	**21 Glebelands,** **Harlow,** **Essex CM20 2PA**
Applicant **Represented by**	:	**Harlow District Council** **Denise Westwood (Legal Dept.)**
Respondent **Represented by**	:	**Elizabeth Rwagasore** **self representing with assistance from Ralston Wesley**
Date of transfer from the county court at Chelmsford	:	**15th May 2015**
Type of Application	:	**To determine reasonableness and payability of service charges**
The Tribunal	:	**Bruce Edgington (lawyer chair)** **Roland Thomas MRICS** **Nat Miller BSc**
Date and venue of hearing	:	**10th August 2015, Park Inn by Radisson Harlow, Southern Way, Harlow, Essex CM18 7BA**

DECISION

---

1. In respect of the amount claimed by the Applicant from the Respondent in the County Court sitting at Chelmsford under claim no. A36YP837, the decision of the Tribunal is as follows:-

	Claim(£)	Decision(£)
Cost of major works	7,610.96	£1,569.22 is payable
Interest	909.21	matter for the court
Court fee and costs	555.00	matter for the court
	9,075.17	

Thus, the amount which is reasonable and payable in respect of the service

charges only is £1,569.22 of which £250.00 has been paid leaving a balance payable of £1,319.22.

2. This claim is now transferred back to the County Court sitting at Chelmsford under claim no. A36YP837 to enable either party to apply for any further order dealing with those matters which are not within the jurisdiction of this Tribunal or any other matter not covered by this decision including interest, costs and enforcement, if appropriate.

Reasons

Introduction

3. This is a claim by a landlord against a long leaseholder for one item of service charge, namely the cost of major works undertaken in early 2012 with an invoice for £7,610.96 being sent to the Respondent on the 8th February 2013. The question as to whether the service charge is due and payable has been transferred to this Tribunal by the county court for determination as being a matter within its jurisdiction.

4. The Respondent has been the long leaseholder of the property for the last 10 years and there do not appear to be any other unpaid service charge demands. The major works involved a general refurbishment of the building in which the property is situated (no's 12-29 Glebelands) including replacing the surfaces and balustrades of the balconies, renewing all existing external uPVC windows and balcony doors with double glazed units, installation of fire resistant loft hatches, some work to the bin area etc.

5. The defence made a number of allegations which can be summarised as follows:-

   (a) The balcony surfaces were only painted, not re-asphalted and were then sprinkled with sand
   (b) The balcony balustrade was only re-painted, not replaced
   (c) The dampness on the balcony has not been reduced as the drain hole is blocked
   (d) The bin store area has had very little work done to it
   (e) The front balcony door was changed in error as the previous one was double glazed. Two other windows were not changed.

   The Respondent makes it clear that she is willing to pay for work that is done properly.

6. Two statements were filed by the Applicant namely from Kathy Conway who describes herself as 'Major Works and Resolution Officer of the Applicants Home Ownership Team' and Bob Purton who is the Principal Building Surveyor employed by Kier Harlow Ltd. They explain about what has happened in some detail and, in particular, that the complaint over the replacement of windows has been dealt with to the Respondent's satisfaction. With regard to the suggestion that they replaced the Respondent's double glazed door, a letter written to the

Respondent by a Home Ownership Officer from Harlow Council on the 15th April 2014 says, at page 96 in the bundle provided for the Tribunal, "*residents sometimes believe a window/door is double glazed because it is uPVC already, when in fact it is single glazed*".

7. The Respondent was ordered to file a statement which, having considered the Applicant's evidence was to set out exactly what was being challenged and why. If a claim was being challenged, what would the Respondent consider to be a reasonable amount to pay? This was not filed but one explanation may be that the Applicant's evidence was very late. Their evidence was ordered to be served and filed by the 3rd July 2015. The statements are dated 17th and 14th July respectively.

The Law

8. Section 18 of the 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'.

9. 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.

10. Any service charge which involves a payment by an individual leaseholder of more than £250 for a particular contract requires a consultation to be undertaken by a landlord. As there is evidence in the bundle of the consultation letters and there is no dispute that there was a consultation, the full details of this process will not be set out here.

The Lease

11. The Tribunal was shown a copy of the counterpart lease of this flat. It is dated 31st July 2000 and is for a term of 125 years from the 20th July 1987 with a ground rent of £10 per annum. As the Tribunal often finds, leases which are drawn up under the right to buy provisions are designed to cover all types of property and all eventualities. They are therefore extremely complex and, it is suggested, almost incomprehensible to the average leaseholder.

12. The demise is described in Schedule A, paragraph 4 which says that "*The Flat (excluding any garden or other external area) is shown for illustrative purposes coloured pink on Plans 1 1A (on the First Floor level only) and 3 which also indicate the structural features excluded from the demise of the Flat*". There are plans in the copy lease supplied and they do have some colouring but it is rather confusing. Of relevance is plan 3 from which it appears clear that the 2 balconies are coloured pink and therefore appear to be demised. However as the clause says 'excluding' any external area, one wonders why the balconies are coloured pink unless it was intended to demise them.

13. A combination of paragraphs (1)(a) and (2) of the same Schedule show that the window frames are not demised to the tenant except the glass in the windows, which is. The balcony doors are not mentioned.

14. There are the usual covenants on the part of the landlord to maintain the common parts and structure of the property and to insure it and the Respondent is liable to pay a reasonable proportion of the cost.

15. What service charges are is set out in Schedule G which includes "*maintenance (not amounting to repair) by the Council pursuant to its obligations under this Lease of.....(b) the structure and exterior of the Property (including the Flat)*". These last few words seem to include routine maintenance of the balconies even though they may be included in the demise because they would clearly come within the definition of the exterior of the building. There is also a covenant (7) on the part of Harlow Council to maintain the exterior of the building and the Flat including drains gutters and external pipes.

16. As far as improvements are concerned, clause 8 enables the Council to undertake improvements and clause 4(e)(i) requires the leaseholder to contribute to such improvements. This should cover the cost of replacing single glazed windows with double glazed ones although this particular lease raises a question about that because the glass in the windows is specifically part of the demise and cannot, therefore, in theory be interfered with by the Council. If challenged in the county court, it is the Tribunal's belief that the interpretation to be implied is that the glazing as well as the frames could be 'improved'.

The Inspection

17. The members of the Tribunal inspected this estate in the presence of the witnesses Kathy Conway and Bob Purton. Also present were Denise Westwood from the Applicant's legal department, Ralston Wesley, a friend of the Respondent and, finally, the Respondent herself arrived after the inspection had commenced.

18. The property is one of 18 flats in a purpose built block of brick construction under a pitched roof built probably in the 1960's. Some of the flats, including the subject property have balconies and some do not. There are 12 out of the 18 with balconies but all leaseholders have to pay one eighteenth of maintenance costs for the building, including the balconies.

19. The subject property is on the 1st floor of the middle section of the building. The members of the Tribunal were shown the 2 balconies which were quite small and appear to have been re-asphalted with new balustrades. These were metal uprights on top of which was a wooden hand rail which was clearly in need of varnishing/painting or oil treatment. The measurements according to the tender document (page 158 in the bundle) were that there was 4.2 metres in total for the 2 balustrades which were 900 millimetres high. The size of the balconies is important because there was little room for chairs on them and footfall would be

minimal. The drain holes were, in the Tribunal's view, too small and the re-asphalting may well have made them smaller.

20. The original uPVC door was still there and the Tribunal could see that it was single glazed which Mr. Wesley accepted in Ms. Rwagasore's absence at that point in time. She did arrive later and when asked what she wanted the Tribunal to see, she pointed out that the central section of the lounge window had water marks on the inside of the double glazed unit and the circular vent just had large slats in it which were obviously going to be draughty in the winter and had rather ugly cellotape over the slats. She said that the bedroom one was the same although there was someone asleep in the bedroom and the Tribunal did not see it.

21. The witness Bob Purton said that these windows had not been replaced at the time of the original work and did not form part of this claim. The Respondent accepted this.

The Hearing

22. The hearing was attended by those who were at the inspection. The Tribunal chair asked at the outset whether the issues now were really confined to the re-asphalting of the balconies and the fitting of balustrades. This was agreed by both parties.

23. As far as the re-asphalting was concerned, the evidence of Ms. Rwagasore and Mr. Wesley was that the surface of the balconies had not been removed and they had only been painted over. When asked whether they had been present throughout, they originally said that they were but then started saying things like 'when I returned, I could see that the balcony had only been painted'. In other words, it became clear during their evidence that they had not been there all the time whilst the work was being done.

24. However, of more importance was their evidence about the state of the balcony and balustrades before this work had been undertaken. They said that the balcony above had shown no signs of leaking onto their balcony and they had received no complaints from the flat below that theirs was leaking. There was no rust staining or other sign that water was penetrating the reinforced concrete structure of the balcony.

25. As far as the balustrades were concerned they said that those there before were of metal construction with a metal handrail and were set into the concrete. They were in good condition. They showed no signs of rust and the uprights were the same distance apart as the new ones. Because the new handrail is made of wood, it has to be maintained regularly whereas the old one was metal and did not need attention so often.

26. When asked about these matters, Mr. Purton said that he was not involved at the time of the contract and was not able to give evidence about the condition of the

balconies or the balustrades before the contract was undertaken but he did say, interestingly, that the Applicants policy on works was more proactive than reactive. In other words, the policy was to avoid problems in the future rather than deal with problems as they arose.

27. When asked why there had been an increase in price of the balustrades from £3,942.67 to £5,014.65 between the awarding of the contract based on the tender and the final bill (page 82 in the bundle), he said that this was because the contractor had quoted for industrial balustrades which did not comply with Building Regulations. These require a maximum of 100 millimetres between uprights. It was put to him that this was really incompetence on the part of the contractor which the leaseholder should not be liable for. It was also put to him that over £5,000 for supplying and fitting 4.2 metres of simple balustrades, excluding the cost of scaffolding, may be considered excessive by any home owner paying for them him or herself. Mr. Purton was unable to comment on either question.

Discussion

28. The Tribunal is satisfied that the balconies have been re-asphalted and new balustrades have been fitted. However, it is concerned about whether this work was necessary or reasonable. This whole issue is a matter of some concern when one has a block of local authority flats, some of which have been made the subject of long leases under the right to buy provisions. Housing authorities do plan ahead with programmes for maintenance and improvements for years in advance, whether the work is actually necessary at the time or not.

29. Items such as asphalt covered balconies and balustrades have a life expectancy and housing authorities plan for maintenance and replacement accordingly. The difficulty is that leases only require lessees to pay what is reasonable for works which are reasonable. The test is objective and not necessarily what the landlord wants to do to keep up with a planned programme of maintenance work over a large portfolio of properties. The considerations there are as much to do with affordability and ensuring that the total cost in one finance year is not too great when compared with adjoining financial years, as any other consideration.

30. This lease provides that the landlord must 'maintain and keep in repair' and 'make good any defects' in the structure etc. There is the provision in the lease for making improvements. As far as the evidence in this case is concerned, it shows that there was no actual defect, want of repair or sign that there was about to be. And the works undertaken were not 'improvements' in the sense that they merely appeared to be works to replace existing asphalt and balustrades without making any 'improvement'.

31. In the original letter to the Respondent dated 14th January 2011 (page 53 onwards in the bundle), the Applicant gave its reasons for the re-asphalting as providing for "*a longer material and workmanship guarantee and more comprehensively protect the structure and appearance of the building*". The reason for replacing

the balustrades was that it would "*eliminate the uncertainty in the reliability of the fixings and enhance the edge protection the railings offer*". There is no mention of any existing defect or immediate requirement for maintenance work.

32. In response to the consultation, 2 residents said that the balconies did not need to have replacement asphalt and the council's reply was that this would not be done if it was not necessary. 1 resident objected to the replacement balustrades and the reply was that the comment had been noted and passed on to Kier Harlow. It appears to this Tribunal that these were not really appropriate responses to what appeared to be quite reasonable objections. In those circumstances, the value of a consultation process is brought into question.

33. 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. 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."*

34. In this case, the Applicant is the claimant in the court proceedings and the burden of proof lies on it to show that the service charges in question are reasonable. However, even if that were not the case, Harlow Council has been aware for some time that the work to the balconies was being challenged. A total cost of almost £5,500 for these 2 items of work would appear to this Tribunal to be very high indeed. That, together with the evidence both from this Respondent and from other residents during the consultation process leads the Tribunal to determine that whoever had the burden of proof at the outset, it had shifted to the Applicant to show that the work and the cost thereof was reasonable.

35. The fact is that the Applicant was unable to produce evidence that there was any defect or sign of a possible defect in the balcony surfaces or balustrades. It was also unable to explain the extremely high cost of installing 4.2 metres of balustrade or the reason why the cost was increased by a quarter when the contractor had made the mistake of included balustrades which did not comply with Building Regulations. That seems to the Tribunal to be a straightforward matter of breach of contract and the Applicant should have treated it as such.

Conclusions

36. The Tribunal is not satisfied, on the basis of the evidence put to it by the Applicant, that the work to the asphalt or the balustrades was reasonable in any

objective sense. There is no evidence that any of the flats had balcony surfaces or balustrades which were in any way defective or in need of the sort of substantial work undertaken. Indeed, it seems that the new balustrades will require more maintenance than the old ones to the handrails.

37. It is, of course, possible that there is evidence available to the Applicant about the pre-existing condition of the balconies and balustrades. It may be that the small areas of the balconies mean that they are not used as much as one could expect which means that the wear and tear is less. However, in this case, the Tribunal must make its determination on the basis of the evidence placed before it and on its own observations, all of which are described above. It also uses its own expertise from years of experience dealing with disputes over service charges.

38. As far as the amount due is concerned, the claim is for £6,919.06 plus a 10% contract administration fee making a total of £7,610.96. Removing the cost of the re-asphalting and the balustrade reduces the net figure to £1,426.56. Adding a 10% contract administration charge (£142.66) brings the figure up to £1,569.22 which is what the Tribunal considers to be reasonable, less the £250 which has been paid.

.....

Bruce Edgington
Regional Judge
13th August 2015