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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BE/LSC/2015/0223**
Property	:	**18 Harbledown House, Manciple Street, London SE1 4LN**
Applicant	:	**Susan-Joy Oyefolu**
Representative	:	**Dotun Oyefolu-Oke, her daughter**
Respondent	:	**London Borough of Southwark**
Representative	:	**Ms Kara, Enforcement Officer**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Ruth Wayte (Tribunal Judge)** **Peter Roberts DipArch RIBA**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of decision	:	**17 December 2015**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the sum of £11,229.02 is payable by the Applicant in respect of the major works.

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

(3) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

The application

1. The Applicant seeks 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 the Applicant in respect of the 2010 major works described by the Respondent as the 07/053 Harbledown and Rochester Refurbishments.

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

The hearing

3. The Applicant appeared in person with her daughter assisting her. The Respondent was represented by Ms Kara, enforcement officer and several witnesses: Clive Phillips (Lead Designer), Cheryl Phillips (Project Manager), Jenny Dawn (Consultation Manager), and Paul Skelly (Quantity Surveyor).

4. Immediately prior to the hearing the parties both handed in further documents, namely witnesses statements and exhibits. Neither objected to the new evidence which was considered by the Tribunal in addition to the trial bundles.

The background

5. The property which is the subject of this application is a two bedroom flat in a 4 storey block built in the late 1920s. The Applicant had paid the estimated charges for the major works in 2010 but on receipt of the final account in 2014 wished to challenge her liability.

6. Photographs of the building and relevant items in dispute were provided in the hearing bundle. 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.

7. The Applicant holds a long lease of the property which requires 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.

The issues

8. At the start of the hearing the parties identified the relevant issues for determination as follows:

   (i) The payability and/or reasonableness of service charges for the major works;

   (ii) Whether the costs are payable by reason of section 20B of the 1985 Act due to their being incurred more than 18 months before being demanded;

   (iii) Whether there should be an order under section 20C of the 1985 Act limiting the Respondent's ability to recover any costs by way of the service charge;

   (iv) Whether there should be a reimbursement of any fees paid by the Applicant.

9. 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.

Payability and reasonableness of charges for the major works

10. This item really broke down into three issues: firstly, whether historic neglect on the part of the Respondent had unreasonably increased the cost of the works; secondly, whether the timing of the works had led to an increased liability on the part of the Applicant due to the expiry of her section 125 notice and finally, the actual costs themselves – in particular in respect of the front entrance doors, preliminaries, scaffolding and prolongation costs.

Historic neglect and s125 notice

11. The tribunal heard evidence that Harbledown House had been managed by a Tenant's Management Organisation (TMO) from 1994 to 2005. After taking the management of the estate back, the Respondent carried out a Decent Homes Report in 2006 which eventually led to the

major works in dispute. The Applicant bought her property in or about 2002. At that time she received notification under section 125 of the Housing Act 1985 about the likely charges for repair costs for the following 5 years, limiting her liability to those items listed and the amount specified, plus an allowance for inflation. Unfortunately the section 125 notice was not produced for the tribunal and the Applicant had no memory of the items listed. She did recall an earlier works programme carried out by the TMO and indicated that she had not been liable for the costs of those works, presumably because at that time she was still the tenant, although that was unclear.

12. Her point was that very little maintenance had been carried out by the TMO and in particular that the earlier work programme had been limited to replacement of the windows due to lack of funds. This evidence was supported by statements to that effect by the Respondent in their statement of case and other documents, including the Decent Homes Report which described both the rainwater pipes and the balconies in poor repair. In those circumstances she submitted that she should not have to pay for the works carried out in 2010 and that in any event the cost of those works had been increased due to the lack of effective maintenance in the preceding years.

13. The Respondent stated that the earlier works dated back to 2003 at least and it was reasonable to undertake a 7 year cycle of repairs. There was no evidence that the 2010 costs were increased due to any failure to maintain the property, which in any event was denied – there had been maintenance between major works programmes. In terms of the section 125 notice, Ms Dawn pointed to the Major Works Final Account Summary in the Respondent's hearing bundle which confirmed that no reduction was due to the cost of the works to take into account the Applicant's section 125 notice.

The tribunal's decision

14. In the absence of more specific evidence from the Applicant, the tribunal determines that she has failed to establish that historic neglect has increased the cost of the major works or adversely affected her liability in terms of the section 125 limit on costs. The tribunal accepts the evidence of the Respondent as to the maintenance programme carried out and is satisfied that it is reasonable to carry out major works on a cyclical basis. In the absence of the actual section 125 notice, the Respondent's Major Works Final Account Summary is the best available evidence on that issue and confirmed that no reduction was due. In any event the Applicant would have been aware of the condition of the property when she exercised her right to buy and presumably the valuation would also have taken that into account.

The Major Works: doors and other disputed items

15. The Respondent produced a larger format of the final account which listed the works by heading and provided a comparison of estimated and final costs. Having gone through that information, the Applicant was able to confirm that the only items she disputed were the cost of the front entrance doors, preliminaries, scaffolding and prolongation costs.

Front entrance doors - £138, 255.02

16. This was the largest item on the account. A total of 38 new doors were provided, amounting to £3,638.29 per door. The Respondent had a practice of adding a proportion of the preliminaries, scaffolding and prolongation costs to each major works item, making the total claimed £153,718.97 and the charge to the Applicant £4,045.24, based on a 38th share.

17. The Applicant's case was that this was an excessive amount for a new front door. She had been unable to find alternative quotes but produced photographs of the original door and its replacement. The original door had a small window both above and to the right hand side as you face the property. The replacement also had a small window above (and within) the door but the window to the right had been filled with a wooden panel. The Applicant was unhappy about the finish and maintained that her upstairs neighbour had been given a side window, despite her being charged the same price.

18. The Respondent's statement of case had attempted to justify the cost of the door on the basis that "the front entrance doors have side lights that are integrated into the front entrance door frames which increase their manufacture and installation costs". It was unclear where that assertion came from but the Respondent accepted that it was not in fact true, it was clear from the photographs that the "side lights" or windows were separate from the door frames and that in the case of the Applicant no side window had been provided at all, as set out above.

19. Mr Paul Skelly then gave evidence for the Respondent. Unfortunately the original specification was unavailable but he was able to confirm that the tendered price was £51,435 or £1,353.55 per door. This had been increased as evidenced on the final account to £138,273.02 or £3,638.76 per door. The only explanation Mr Skelly was able to provide for more than double the original cost was that following a serious fire in one of its blocks, the Respondent had increased its fire safety requirements. That evidence was supported by the reference to a Fire Assessment Report on the final account. However, Mr Skelly was unable to confirm that those requirements would have accounted for the total increase in price. According to the final account, the new total was made up of two separate amounts, £68,560.22 and £69,712.80 – the first item specifically referred to doors and a change of specification but the second amount had a more opaque description, namely "plus

EO value as breakdown for type A-D units". Mr Skelly stated that he believed £68,560.22 to be the new price for the doors but had no explanation for the additional £69,712.80.

20. The Applicant stated that she would accept a total price of £68,560.22 was reasonable for the doors.

The tribunal's decision

21. The tribunal determines that the amount payable in respect of the front doors is £68,560.22 or £1,804.22 per door. The Respondent had no evidence to support a higher cost which in any event would be excessive given the photographic evidence provided by the Applicant. During the hearing the Respondent agreed to discuss with the Applicant the replacement of the wooden side panel with a window.

Preliminaries, scaffolding and prolongation costs

22. As stated above, the Respondent's practice was to add a proportion of these costs to each item of major work, this was apparently to ensure that the s125 limits were observed. In total, the cost for preliminaries had increased from £22,127.78 to £24,014.25; scaffolding from £11,417.95 to £13, 570.90 and the prolongation costs were a total of £32,040, with the rechargeable element for the service charges £8,174.85. The Respondent's main explanation for the increases and the prolongation costs was that the contract period was extended by 18 weeks.

23. The Applicant's specific objection in relation to the preliminaries related to the apparent recharge of the cost of a mobile office and lap top. This objection was withdrawn when the Respondent was able to establish that this cost had not been charged to the leaseholders. While Mr Skelly was not able to provide a breakdown of the preliminaries he submitted that the total cost was about 6% of the contract sum, compared to an average in his experience of 8-16%. In the light of this evidence, no further objection was made.

24. The Applicant's objection to the scaffolding costs was mainly based on her historic neglect/s125 notice arguments – namely, if the previous major works programme had been more extensive she would not have been liable for the cost – presumably because she would still have been the tenant. The Applicant made no objection in terms of the necessity or cost of the scaffolding. The Respondent relied on their previous evidence to support the costs claimed, in particular the need for a cyclical repair programme for major works.

25. In terms of the prolongation costs, the Applicant's objection was one of principle: the Respondent's own evidence was that the contract

extension was caused in part by their own late instructions but mainly delay caused by the tenants or third parties, such as the utility companies. In those circumstances the Applicant submitted it was unreasonable to pass any of that cost to the leaseholders. The Respondent confirmed that only a part of the total costs had been recharged to reflect the various reasons for the extension of time but that the charge made was reasonable in all the circumstances.

The tribunal's decision

26. The Applicant withdrew her objection to the preliminaries having heard the Respondent's evidence, which the tribunal accepts. For the reasons stated in paragraph 14 above, the tribunal also determines that the cost of the scaffolding is reasonable and payable – in particular, in blocks of this nature a cyclical repair programme for major works is reasonable. As before, the Applicant's s125 challenge fails for lack of evidence. In terms of the prolongation costs, the tribunal accepts that the apportionment of the costs to just over a quarter for the leaseholders was reasonable, it is not unusual for major works programmes to overrun and not all the delay was the fault of the Respondent.

27. That means that the only adjustment due is in relation to the apportionment of those charges to the reduced figure for the doors. After the hearing the tribunal wrote to the Respondent to ask them to confirm the basis on which the apportionment was made and to provide a figure. They replied with calculations to support an amount of £7,668.52, making a total of £76,228.74 for the front entrance doors and their share of the scaffolding, preliminaries and prolongation costs. The Applicant was sent this information and confirmed she had no further comment to make, save that she would like the wooden panel replaced with a side light. As mentioned above, the Respondent agreed to meet the Applicant to discuss that issue and the tribunal would expect them to honour that commitment, although we have no jurisdiction to make an order in that regard.

28. This makes the total charge for the major works programme £11,229.02. The Respondent has confirmed that this will result in a credit to the Applicant of £2,297.08.

Section 20B – limitation on costs incurred more than 18 months before demand

28. The Applicant's case was that having reviewed the payment certificates for the works, the Respondent had failed to comply with section 20B in relation to some of them. This was on the basis that the Applicant had received an estimated invoice on 1 October 2010, two section 20B notices dated 16 March 2012 and 13 December 2013 and the final account on 28 February 2014.

29. The Respondent had provided copies of three section 20B notices, dated 16 March 2012, 4 May 2012 and 13 December 2012. The Applicant did not object to those notices and in the circumstances the tribunal takes these dates as the relevant dates for calculation of the 18 month period. The Respondent also confirmed that their practice was to treat the date of the payment certificate as the date the costs were incurred. The first certificate was dated 23 June 2010. The Respondent, relying on the case of *Gilje v Charlegrove Securities* [2003] EWHC 1284, submitted that the estimated invoice covered this certificate and the next three as the Applicant's contribution of £12,238.37 which was paid in advance covered her share of those costs. Certificate number 5 was dated 28 October 2010 and was therefore within 18 months of the first section 20B notice referred to above. The other certificates were from 7 December 2010 to 26 June 2012 and the Respondent submitted that their notices provided the continuity between the date of the certificates and the final account dated 28 February 2014.

The tribunal's decision

30. As set out above and following *Gilje*, the Respondent has satisfied the requirements of section 20B. The estimated invoice covers the costs due under the first 4 certificates, and the section 20B notices operate as a demand for payment extending the limitation period to beyond the date of the final account.

Application under s.20C and refund of fees

31. At the hearing, the Applicant applied for an order under section 20C of the 1985 Act. Although the landlord indicated that no costs would be passed through the service charge, for the avoidance of doubt, the tribunal nonetheless determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Respondent may not pass any of its costs incurred in connection with the proceedings before this tribunal through the service charge. Although the Applicant was only successful in reducing the cost for the doors and associated expenses, that was one of her main grounds of objection and it could have been conceded by the Respondent at a much earlier stage, given their inability to justify the amount claimed. On further enquiry the Applicant had not paid any fees, due to her personal circumstances and therefore the question of a refund did not arise.

Name: Ruth Wayte **Date:** 17 December 2015

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

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 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

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.