11238

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BE/LSC/2015/0316**
Property	:	**225 Bellenden Road, London SE15 4DG**
Applicant	:	**Mr D Arnaud**
Representative	:	**In person**
Respondent	:	**The London Borough of Southwark**
Representative	:	**Mr Brutton – enforcement officer** **Mr Robert Mowatt – accountant** **Ms Turff – service charge consultant manager**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Mrs S O'Sullivan** **Mr M Mathews FRICS**
Date and venue of Hearing	:	**17 November 2015 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**5 February 2016**

DECISION

Decisions of the tribunal

(1) The tribunal makes the determinations as set out in this Decision.

(2) 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

(3) The tribunal determines that the Respondent shall pay the Applicant £280 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicant

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 a major works invoice. The disputed charges relate to the cost of replacement of twelve windows in the building in 2014. The total charge made to the Applicant was £3,990.73, this being his apportioned share. Of this amount the Applicant challenges only the sum of £762.86 being the proportion charged for "overheads".

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

The hearing

3. The Applicant appeared in person at the hearing and the Respondent was represented by Mr Brutton, an enforcement officer. Evidence was also given for the Respondent by Mr Robert Mowatt, an accountant, and Ms Turff, a service charge construction manager, both in the employ of the Respondent. Both had made witness statements.

The background

4. The property which is the subject of this application is a flat contained within a block..

5. Neither party requested an inspection and the tribunal did not consider that one was neceuld it have been relevant to the issue in dispute.

6. 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

7. At the start of the hearing it was confirmed that the only issue between the parties was the payability and reasonableness of the overhead charge of £795.

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 set out below.

9. Mr Mowatt began by explaining that the total overhead charge for the works was £2499.95. This had then been apportioned to the Applicant in accordance with the Respondent's bed weighting method, there being 22 points in the block the Applicant was liable for 7/22th. The overheads charge had been included in the overall service charge figure for responsive repairs rather than being itemised as a separate charge.

10. The tribunal heard that the overheads charge related to the costs of managing and providing the responsive repairs system to include staff payroll, office accommodation and infrastructure costs such as finance. The percentage charge for 2013/14 was 27% of the cost of the works. This could be compared to 17.28% in 2011/12, 19% in 2012/13 and 21% for 2014/15. The Respondent was not able to explain the variation in the charges to the tribunal. It had been introduced after an audit by Grant Thornton in an attempt to recover more of the Respondent's administration costs.

11. It became clear that the charges for the window repairs had been included in the responsive repairs rather than forming part of a capital major works project. We heard that the decision as to whether the costs should be included in the responsive repairs or the capital works programme was a matter for the capital works team. We heard also that the capital works programmes were not including window replacement works at the moment. It was conceded that had the works been included in the capital works programme they may well have been cheaper given the cost of the works would have been spread over a larger number of properties. Had the window works been included in the capital works programme we heard that the professional fees would likely to have been in the region of between 5-6 -15% depending on the contract in the case of works of this type. Mr Mowatt confirmed that he had not encountered the position previously where major works had been included in responsive repairs although Ms Turff said in her view it was a fairly common practice. It was, said Ms Turff, a judgement call and an element of luck as to whether the works were dealt with as responsive repairs or capital works.

12. Ms Turff also gave evidence for the Respondent. She explained that the window works had been raised as a works order and the technical officer in charge had worked in the repairs team. As a result she said

the works had properly been billed as general repairs. Capital projects were carried out by a different team. The works themselves had been carried out by Mears, the Respondent's long-term contractors. She confirmed that the total charges by Mears had been £8,879.79 and with overheads the total charge was £11,277,33, the amount attributable to the window works was £2,825.30. The Applicant's charge was £3588.24 which included an overheads charge of £762.86.

13. The Respondent relied on an Upper Tribunal decision in *London Borough of Southwark v Gary Paul & others UKUT 2013 0375* in which it was held that the administration charge and the charge for overheads were both recoverable in principle and that the overhead charges were reasonable. We noted that the years considered by the Upper Tribunal were 2003/04 to 2009/10 where the percentage overheads ranged from 2.65% to an average figure of 12.71% for 2009/10.

14. Mr Arnaud questioned whether he had previously been charged overheads charge on responsive repairs and was informed that in 2012/13 there had been a charge on block repairs which had been included in the total figure. Unless an enquiry had been made a leaseholder would not have been aware that there was such a charge.

15. Mr Arnaud also questioned why the overheads charge had not been included in the notice of proposal served under section 20 of the Act. The Respondent acknowledged this would have been good practice but that section 20 does not require notification of professional fees. Ms Turff also pointed out that the notes to the section 20 notice did refer to administrative and management charges. Mr Arnaud submitted that the purpose of section 20 was to inform the leaseholder of the likely costs which would surely include all costs such as professional fees.

16. Mr Arnaud also queried why the Respondent added a further 10% to the overhead charge to cover what it said was the cost of supervising the work carried out by Mears. Mr Arnaud submitted that he had never seen anyone from the Respondent present during or after the works in a supervisory capacity. Ms Turff submitted that there would have been an inspection from start to finish.

17. Mr Arnaud submitted the charge was unreasonable. Ms Turff in response said the charge represented the cost of providing the service and therefore reasonable pointing out that the Applicant had chosen to become a leaseholder.

The tribunal's decision

18. We allowed an overhead charge of 10% on the cost of the works and an administration fee of 10%.

19. Full consultation had been carried out under section 20 in relation to the works. We accept that under section 20 the landlord is not required to consult in relation to the professional fees. However given the purpose behind section 20 we would hope that in future the Respondent make its estimated charges clearer so that leaseholders can make proper provision.

20. It appears in this case for reasons unclear to us that the window works were dealt with as responsive repairs. The effect of this is that they attracted a standard overhead charge of 27% together with a separate administration fee of 10%. We accept that in accordance with the terms of the lease the Respondent was not precluded from recovering the costs through the general service charge.

21. The Respondent relied on the Upper Tribunal's decision in *London Borough of Southwark v Gary Paul & others UKUT 2013 0375*. This case related among other things to an appeal against the tribunal finding that an overheads charge on general service charges was not reasonable. In this decision of the Upper Tribunal it was held that an overhead charge could be recovered in addition to an administration charge.

22. We accept that an overhead charge is payable in principle on general service charges as per the decision in *Paul* and that the administration charge of 10% is recoverable as a separate item. However we noted that *Paul* was concerned with their application to general service charge whereas in this case the charge has been applied to major works albeit described as responsive repairs. In addition in *Paul* the Upper Tribunal in considering whether the amount of the overhead charges was reasonable had been concerned with service charges from 2001 to 2009 where the maximum percentage had been (on average) 12.61%. In contrast the overhead charge in 2013/14 before us today had stood at 27%, a considerable increase. In addition the overheads charge now included new categories of overheads which had not been before the Upper Tribunal. The Respondent was unable to satisfactorarily explain this spike in the charges in 2013/14. We did not therefore consider that we could place reliance on the decision in *Paul* in relation to the particular facts of this case.

23. We were also somewhat concerned at the stance taken by Ms Turff that if charges were incurred it followed they were reasonable and payable as the leaseholder had chosen to buy in local authority housing. Clearly to be recoverable any charges must not only be payable in accordance with the terms of the lease but reasonable in amount.

24. We had heard evidence from Ms Turff that had this been dealt with as part of the capital works programme a fee in the region of 5-10% was appropriate given that the works were straightforward. We had heard that it was a matter of poor luck that the project formed part of responsive repairs and thus attracted a larger overhead. However we accept that the Respondent was perfectly entitled to include the works as part of the responsive repairs.

25. We therefore concluded that a charge for overheads and an administration fee were in principle payable on the cost of the works. However we considered the rate of 27% to be unreasonable and allow a lower sum of 10%. This is in line with the fees which Ms Turff acknowledged would likely to have been payable had the works been charged as a capital project and also falls within the range of overhead charges the Upper Tribunal found reasonable in *Paul.* We also allow the administration fee of 10% in line with the decision in *Paul.*

26. As a general comment we would mention that the figure for overheads at 27% appears very high compared with previous years and the evidence from the Respondent suggested that this figure may well increase as more categories of charges are recovered. This is something the Respondent may wish to consider further.

Application under s.20C and refund of fees

27. At the end of the hearing, the Applicant made an application for a refund of the fees that he had paid in respect of the application/ hearing[1]. Having heard the submissions from the parties and taking into account the determinations above, the tribunal orders the Respondent to refund any fees paid by the Applicant within 28 days of the date of this decision.

28. The Applicant also applied for an order under section 20C of the 1985 Act. Although the Respondent 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 the tribunal through the service charge.

Name:
Sonya O'Sullivan **Date:** 5 February 2016

[1] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

Appendix of relevant legislation

Landlord and Tenant Act 1985

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 a leasehold valuation 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 a leasehold valuation 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) a leasehold valuation 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 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.

Leasehold Valuation Tribunals (Fees)(England) Regulations 2003

Regulation 9

(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to a leasehold valuation tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject matter of an application under sub-paragraph (1).

Schedule 12, paragraph 10

(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where—
(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—
(a) £500, or
(b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.