12810

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/45UE/LDC/2017/0072 CHI/45UE/LSC/2017/0092
Property	:	Flats 1,2 and 3, 5a High Street Crawley West Sussex RH10 1BH
Applicant	:	Mr A Hunt
Representative	:	Mr S Kinch
Respondent	:	Ms A Nevzorova
Representative	:	Mr P McCarthy
Type of Application	:	S20ZA and s 27A Landlord and Tenant Act 1985
Tribunal Members	:	Judge F J Silverman Dip Fr LLM Mr K Ridgeway FRICS
Date and venue of Hearing	:	Crawley Magistrates Court 13 July 2018
Date of Decision	:	23 July 2018

DECISION

1. **The Tribunal determines that no sums are payable by the Respondent in respect of the service charge year 2017-8 unless and until the Applicant serves on the Respondent demands which comply with s21B(1) Landlord and Tenant Act 1985 and with the contents of this Decision.**
2. **The Tribunal determines that the Applicant is not entitled to demand any sums from the Respondent in relation to the insurance of the property until he provides the Applicant with a valid insurance policy which specifically covers the flats and notes the Applicant's interest on the policy.**
3. **The Applicant was unable to satisfy the Tribunal that he had paid for the cleaning of the property and therefore the Tribunal declares that the Respondent is not liable to pay for that service.**
4. **The Tribunal declines to exercise its discretion under s20ZA Landlord and Tenant Act 1985.**
5. **The Tribunal declares that the Applicant has failed to comply with s20 Landlord and Tenant Act 1985 and is therefore restricted to claiming the sum of £250 per flat (total £750) in respect of the damp proofing of flat 4.**
6. **The Tribunal makes an order under s20C Landlord and Tenant Act 1985 and declines to order the reimbursement of the Applicant's application and hearing fees.**

REASONS

1 The Applicant is the landlord of the premises known as 5 High St Crawley West Sussex RH10 1BH (the property) which comprises an estate agent's business and separate flat (flat 4) on the ground floor and three flats (Flats 1-3 known as 5a High St) on the upper floors.

2 The Respondent is the tenant holding flats 1-3 under a long lease granted by the Applicant's then Receivers in 2014 under which the Applicant, as landlord, covenants to provide services, including the insurance of the flats, and carry out repairs and the Respondent, as tenant, covenants to pay a fair proportion of the costs of those services, including insurance, and repairs.

3 The Applicant issued two applications with the Tribunal on 22 September 2017 asking the Tribunal to determine the reasonableness of service charges for the service charge year 2017/8 and for a dispensation under s20ZA for non-compliance with the consultation procedures under s 20 Landlord and Tenant Act 1985.

4 Directions were issued on 10 November 2017 which ordered the two applications to be conjoined and heard together. The hearing took

place at Crawley Magistrates court on 13 July 2018. This decision relates to both applications.

5 A bundle of documents prepared for the hearing had been supplied to the Tribunal ahead of the oral hearing and the Tribunal, having perused the papers, directed the Applicant to bring specified additional documents to the hearing to confirm his ability to bring the actions (ie discharge of Receivers: this was done) and also the current insurance policy. He was also asked to supply further copies of bank statements to replace illegible copies contained in the original bundle. The Respondent was given time at the commencement of the hearing to read these documents which she had not previously seen.

6 At the start of the hearing it was established that the outstanding matters between the parties were payment for completed damp proofing works, the previous cleaning of common parts, insurance of the property and issues concerning advance payments and accounts. It was agreed that on the facts of this particular case the Tribunal would not benefit from inspecting the property and it was therefore agreed that an inspection would not be necessary.

7 The Respondent had concerns that the insurance policy taken out by the Applicant did not cover the flats and had not been told by the Applicant how he had arrived at a 60:40 split of the premium between the flats (60%) and the remainder of the property (40%). The policy which the Applicant produced to the Tribunal was a business insurance policy covering no.5 High St which was described as an estate agent's business, the contents of the premises and as a third element, the Applicant's personal professional indemnity insurance. It did not mention 5a High St, did not mention the flats, did not mention any residential element of cover and specifically did not note the interest of the Applicant as a leaseholder on the policy.

8 Having examined the policy the Tribunal concludes that it does not cover the flats at all. As a consequence any money paid by the Applicant for insurance should be refunded to her.

9 The Applicant had charged the Respondent the sum of £600 for the cleaning of the common parts of the part of the property in which the flats were situate. He was able to produce an annual invoice from the cleaner which referred to a weekly visit at the cost of £11.53 and a yearly charge of £600 (page 39) but there was no evidence that he had ever paid that invoice. The Respondent said that the common parts had never been cleaned and that recently an agreement had been reached with the Applicant that the Respondent would be responsible for the cleaning of that area thus removing it from future service charge bills. The Tribunal is not satisfied that the Applicant had ever paid the bill in question and in the light of the Respondent's evidence that the cleaning had not been carried out (a contention which was not contested by the Applicant) declares that the Applicant is not entitled to recover any sum in respect of this service and any money already paid by the Respondent should be repaid to her.

10 The contested bill for the damp proofing works related to the installation of a damp proof course in Flat 4 , a ground floor flat not part of this demise but described in the lease as part of the landlord's retained premises in respect of which the Respondent has an obligation under the lease to contribute to repairs.

11 The Applicant said that the work needed to be done as Flat 4 was damp and had no damp proof course. The local council had sent him a letter in September 2016 (page 57) saying that before the flat was re-occupied they would like him to carry out certain works including resolving a damp issue. The Applicant conceded that there was no urgency to the works other than his own commercial urgency of being able to re-let the flat.

12 He said he had obtained three estimates for the work and had proceeded with the least expensive quotation. The Respondent said she had not seen any of the estimates, had not been told of the intended works and did not know about them until after their completion. The works were primarily subject to the consultation procedures of s20 Landlord and Tenant Act 1985 because all of the estimates would have produced a charge in excess of £250 per flat.

13 The estimate which the Applicant chose to accept was from Kenwood plc (page 47 et seq) and is dated 22 May 2015 (prior to the Council's letter in 2016) and quoted a cost including VAT of £2,976. Both the other estimates are dated October 2016, neither identify the precise location of the premises where the work was to be carried out, neither offer a guarantee, both are more than £1,500 more expensive than Kenwood (no VAT is mentioned in either) neither is on headed notepaper and both use a similar form of wording. They do not appear to be professional and the Tribunal expresses concerns as to their veracity.

14 The Applicant conceded that he had made no attempt to follow the consultation procedures under s20 Landlord and Tenant Act 1985 before carrying out the works but relied on Daejean Investments v Benson [2013] UKSC 14 to put the onus on the Respondent to show prejudice in relation to the post-event application for dispensation under s20ZA.

15 Section 20ZA(1) of the Act provides:

> *Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works ... the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.*

16 Reference should be made to the Regulations themselves for full details of the applicable consultation requirements. In outline, however, they require a landlord (or management company) to:

- give written notice of its intention to carry out qualifying works, inviting leaseholders to make observations and to nominate contractors from whom an estimate for carrying out the works should be sought;

- obtain estimates for carrying out the works, and supply leaseholders with a statement setting out, as regards at least two of those estimates, the amount specified as the estimated cost of the proposed works, together with a summary of any initial observations made by leaseholders;

- make all the estimates available for inspection; invite leaseholders to make observations about them; and then to have regard to those observations;

- give written notice to the leaseholders within 21 days of entering into a contract for the works explaining why the contract was awarded to the preferred bidder if that is not the person who submitted the lowest estimate.

17. The Tribunal must decide whether it is reasonable for the works to have been carried out without the Applicant first complying with the Section 20 consultation requirements. These requirements ensure that tenants are provided with the opportunity to know about works, the reason for the works being undertaken, and the estimated cost of those works. Importantly, it also provides tenants with the opportunity to provide general observations and nominations for possible contractors. The landlord must have regard to those observations and nominations.

18. The consultation requirements are intended to ensure a degree of transparency and accountability when a landlord (or management company) decides to undertake qualifying works. It is reasonable that the consultation requirements should be complied with unless there are good reasons for dispensing with all or any of them on the facts of a particular case.

19 It follows that for the Tribunal to decide to dispense with the consultation requirements, there needs to be a good reason why the works cannot be delayed. In considering whether or not it is reasonable to do so, the Tribunal must consider the prejudice that would be caused to tenants by not undertaking the consultation while balancing this against the risks posed to tenants by not taking swift remedial action. The balance is likely to be tipped in favour of dispensation in a case in which there is or was an urgent need for remedial or preventative action, or where all the leaseholders consent to the grant of a dispensation. The prescribed procedures are not intended to act as an impediment when urgent works are required.

20 In the present case, the Applicant conceded that the works were not urgent and unless the property was to be occupied were not necessary. The Council's letter does not make it mandatory to carry out these works within a time limit or at all. There was no reason why the Applicant could not have consulted with the Respondent. Alternatively, he could have sought a dispensation prior to carrying out the works. He did neither and made no attempt whatsoever to comply with the legislation. That in itself causes prejudice to the Respondent by

imposing on her a burdensome bill for works of which she was not even aware.

21. For the above reasons, this is not a case where a s20 dispensation is appropriate and the Tribunal declines to grant it.

22 Since the Tribunal has refused the S20ZA application and the Applicant has failed to comply with s20, he is limited to recovering the sum of £250 per flat in respect of the damp proof works. The Tribunal understands that the sum of £750 representing payment for all three flats has already been tendered to the Applicant.

23 The Tribunal considered the Respondent's argument that the damp proof works were an improvement and not a repair. The latter but not the former is chargeable under the service charge clause of the lease. Although the distinction between improvement and repair is not always easily defined the Tribunal considers that in the present case the installation of damp proof course to cure a damp problem was an acceptable course of remedial work to undertake and as such could be classed as a repair falling within the service charge obligations under the lease.

24 The Respondent expressed concern that the money paid by her was not being held by the Applicant in a proper trust account but was simply placed in a bank account in the Applicant's business name. The Tribunal reminded the Applicant that the tenant's money must be held in a separate trust account and recommends that he complies with this obligation immediately.

25 There were also concerns about the Applicant's methods of accounting and communication. The lease provides for annual accounts and the Applicant had been demanding a fixed fee on account of presumed expenditure. The lease does not permit advance payments to be demanded neither does it permit the holding of a sinking or reserve fund.

26 Further, the Applicant's service charge demands/invoices do not comply with s21B(1) Landlord and Tenant Act 1985 in that they do not contain a statement of the tenant's rights and obligations. Until this defect is rectified the Applicant is unable to recover any sums demanded under a defective invoice. There is also no evidence that the Applicant has supplied the Respondent with estimates of future expenditure or accounts detailing past expenditure.

27 The Tribunal asked the Applicant whether he was aware of the RICS Service Charge Management Code. He said he was. The Tribunal recommends that he pays greater attention to its contents in future.

28 The Respondent asked the Tribunal to make an order under s20C of the Landlord and Tenant Act 1985. The Applicant opposed this application. A large part of the discord between the parties could have been avoided if the Applicant had followed conventional management practice in relation to the service charges and had familiarised himself with the lease terms. As a result, the Applicant has failed to succeed in his application. This is a situation in which the Respondent should not be further penalised by having to bear the landlord's costs of the proceedings as part of a future service charge bill. For that reason the Tribunal does make an order under s20C.

29 For the same reasons the Tribunal declines to order the reimbursement of the Applicant's application and hearing fees.

30 The Tribunal was only asked to consider the service charges for 2017-8 but the principles outlined above will be relevant also to subsequent years. The parties may need to consider whether those principles have application to charges demanded in earlier years.

31 The Law

Landlord and Tenant Act 1985 (as amended)

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 20ZA(1) of the Act provides:

Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works ... the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements

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 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) the appropriate 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

(3) A tenant may withhold payment of a service charge which has been demanded from him if sub-section (1) is not complied with in relation to the demand.
(4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

Judge F J Silverman as Chairman
Date 23 July 2018

Note:
Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking