8996

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AY/LSC/2013/0179**
Property	:	**19 FOXLEY ROAD, LONDON SW9 6ET**
Applicant	:	**MR GAVIN CHALLAND**
Representative	:	**NONE**
Respondent	:	**LONDON BOROUGH OF LAMBETH**
Representative	:	**MRS F WILDMAN, LAMBETH LIVING**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**MS L SMITH (LEGAL CHAIR)** **MR I THOMPSON BSc FRICS** **MRS L WALTER**
Date and venue of Hearing	:	**15 July 2013** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**2 August 2013**

DECISION

Decisions of the tribunal

(1) The Tribunal determines that the sum of £602.61 is payable by the Applicant in respect of the repair and maintenance and management charges for the service charge year 2011/12. The management charge should also be adjusted by the Respondent to remove the 10% charge on all sums conceded in these proceedings.

(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

(4) The Tribunal determines that the Respondent shall pay the Applicant £250 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 the service charge years 2007/8 to 2011/12.

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

The hearing

3. The Applicant appeared in person at the hearing and the Respondent was represented by Mr Campbell of Counsel, Mrs F Wildman (from Lambeth Living) and Mr A Lloyd (building surveyor within the Respondent authority).

The background

4. The property which is the subject of this application (hereafter "the Property") is a one bedroom flat on the raised ground floor and first floor of a converted period property.

5. 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.

6. The Applicant holds a long lease of the property dated 8 January 2001 ("the Lease") which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service

charge. The relevant provisions of the Lease are referred to below and set out in Appendix B to this decision.

The issues

7. At the start of the hearing the Tribunal identified with the parties the relevant issues for determination. These initially comprised the following:

   (i) Communal electricity charges for the years 2007/8, 2008/9, 2009/10, 2010/11 and 2011/12

   (ii) The cost (incurred by the Applicant) of unblocking a common drain in the year 2008/9 (in the sum of £68.24)

   (iii) The cost (incurred by the Applicant) of clearing leaves from a flat roof and carrying out a temporary repair to the roof in the year 2009/10 (claimed as £80) as well as the cost claimed by the Respondent of clearing leaves from the same flat roof on 6 November 2009 in the sum of £16.79 which work the Applicant said had not been carried out.

   (iv) Charge for repairs and maintenance for the year 2010/11 in the sum of £34.82.

   (v) Charge for repairs and maintenance for the year 2011/12 in the sum of £1975.97.

   (vi) Management charge for 2011/12 in the sum of £272.57.

8. As a result of a large number of concessions made by the Respondent in its written evidence and correspondence, the only issues remaining for the Tribunal's determination were in relation to the repairs and maintenance for the year 2011/12 and management charge for the same year.

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.

Repairs and maintenance for the year 2011/12

10. This dispute relates to major works consisting of roof repairs and other associated works ("the Works") which were the subject of a Notice of Intention for Qualifying Works under Schedule 3 of the Service Charges (Consultation Requirements) (England) Regulations 2003 dated 16 January 2010. The quotation for the Works was in the sum of £4355.44. The final account was said to be £6368.50 of which the Applicant's proportion was calculated to be £1975.97. As a result of a

number of concessions by the Respondent in Mr Lloyd's witness statement, the charges for the Works were recalculated as £3620.97. At the outset of the hearing, the Tribunal pointed out to Mr Campbell that the recalculation did not match the concessions made in Mr Lloyd's statement and that the figure should be £2660.72. That was agreed to be the correct starting figure. The Applicant did not dispute the Respondent's entitlement to claim 10% of the cost of the Works for administering the contract.

The tribunal's decision

11. The tribunal determines that the amount payable in respect of the Works is £1540.72. The Applicant's lease percentage is 31.027% and his contribution therefore amounts to £478.04. Against that, the Tribunal agrees that the Applicant is entitled to set off the cost of clearing leaves from the flat roof and for carrying out a patch repair to the flat roof and considers that the sum claimed of £80 is reasonable. Accordingly, the amount which is reasonable and payable is £398.04.

Reasons for the tribunal's decision

12. The disputes between the parties were as to measurement of the flat roof, whether certain works had actually been carried out and whether certain charges had been incurred by the contractor.

13. As to measurements, Mr Lloyd gave evidence to the Tribunal that he had measured the roof from ground level and then double checked the measurements against an ordnance survey plan. The Applicant, who is a qualified chartered architect experienced in carrying out measurements, gave evidence that he had actually been on to the flat roof and carried out an exact measurement of the roof surface which he said measured 19m². As such, the Applicant argued that the measurements for plywood boarding and solar reflective paint of 24m² were incorrect. Mr Lloyd accepted that his measurements may not have been as accurate as the Applicant's but still maintained that the measurement should be 21.5m² as there would be an upstand. The Applicant accepted that there would be some overlapping in relation to the asphalt covering (the measurement of which had been accepted as 21.5m² by the Respondent) but disputed that the plywood boarding would be put in as upstand nor was there any evidence that it had been. Mr Lloyd had conceded that the solar reflective paint should be measured on the basis of the 21.5m² as measured by the Applicant. The Tribunal accepts the Applicant's case that plywood would not be put as upstand under the asphalt covering and that the measurement should therefore be 19m² for that item. This reduces the figure claimed by the Respondent from £615.98 to £544.35 for the plywood boarding. The figures for the asphalt covering had already been agreed at £673.60 and for solar reflective paint at £150.72.

14. The Applicant also disputed the charge for installing rigid insulation under the asphalt covering for this flat roof. He insisted that no insulation had been installed. He was living in the Property at the time

and had seen no evidence of any insulation boards (and the contractor had left a lot of rubbish around the site so he would have seen this either before it was installed or would have seen the remnants of the insulation boards in the debris following the installation). The Applicant also pointed to the photographs which he had produced for the hearing which were taken after the Works and which showed no discernible change in level of the roof which there would have been if insulation had been installed. Mr Lloyd had not seen the insulation being installed for himself and had only the contractor's word that the insulation had in fact been installed. The Tribunal noted that it had no direct evidence from the contractor. Accordingly, and having seen the photographs for itself, the Tribunal agrees with the Applicant that it seems unlikely that any insulation was actually installed as this would be seen in the photographs by a change in level of the roof when viewed against the brick courses on the upstand wall. Accordingly, the Tribunal finds that the £541.37 for this work is not reasonable or payable. The £541.37 is the adjusted figure following the concession on measurement.

15. The parties disputed the extent of the Works as related to 2 small areas of flat roof above 2 bay windows, the measurement of which was – according to the specification - 10m². The Applicant said that no work had been carried out to these areas and accordingly that nothing should be charged as it had been for recovering those roofs and applying solar reflective paint. The Respondent had already conceded that work had not been carried out to recover those areas and having seen the photographs produced by the Applicant, Mr Lloyd conceded in evidence that no solar reflective paint had been applied either. Accordingly, the figure of £42.06 was not reasonable or payable.

16. There had appeared to be a dispute about the amounts charged for scaffolding. The breakdown of the calculation for the Works showed initially a charge for 3 scaffolding towers of 9m-18m high and one scaffolding tower not exceeding 9m high. Mr Lloyd had conceded in his statement that the charge for the one scaffolding tower not exceeding 9m high should not still be included as this was the one for the planned works to the bay window roofs which had not been carried out. He continued to assert however in that statement that the charge for the other scaffolding was reasonable as a fixed scaffold tower was required for the asphalt renewal and this was the lowest available. It was pointed out to Mr Lloyd at the hearing that the quotation for the Works included not just one scaffolding tower but 3. He accepted that only 1 such tower had been used and accordingly the figure reasonably payable for that is accepted as £172.05.

17. The final area of dispute in relation to the cost of the Works was for refixing and renewing roof slates on the pitched roof. The Applicant disputed that any such work had been carried out. The scaffolding had not allowed access to the main roof except to the areas immediately adjacent to the flat roof. The Applicant produced photographs of that

area before and after the Works. The Tribunal noted that some of the slates which a contractor would have noted as needing replacing (because they were cracked) still remained after the Works. Whilst it was difficult as the Applicant candidly accepted to know for certain whether slates had been re-fixed, in circumstances where it was quite clear that works which the contractor said had been carried out to renew slates had not been done, the Tribunal was not prepared to accept that the work to re-fix slates in that area had been carried out either. Accordingly, the sums of £41.30 and £79.54 are not payable.

18. For the avoidance of any doubt, the Tribunal sets out below its findings on the disputed items in relation to the cost of Works (by reference to bill item and brief description):-

RF0019A	REFIX SLATES	NIL PAYABLE
RF0020A	RENEW SLATES	NIL PAYABLE
CA0019A	PLYWOOD BOARDING	£544.35 (19M² ONLY)
SF0002A	SCAFFOLDING 9-18M	£172.05 (1 ONLY)
RF0043A	SOLAR PAINT (BAYS)	NIL PAYABLE
RF0071A	INSULATION (FLAT ROOF)	NIL PAYABLE

19. The Applicant also sought to raise a set off both for his costs of clearing leaves from the flat roof and carrying out a temporary repair, in November 2009 and for the cost of remedying the damage to the ceiling in the Property which had been damaged by water leaking into it from the flat roof. In relation to clearing leaves and carrying out of the patch repairs to the flat roof, the Applicant put his costs at £80 (2 hours at £25 per hour plus £30 for materials). In relation to the ceiling damage, he asserted that the Works had taken far too long from when he first reported the problem in November 2009 to May 2010 when they had started. The consultation notice was not issued until January 2010. The Applicant had contacted his insurers and those of the Respondent. Both had said that if the landlord did not act quickly to minimise the damage any insurance claim might be invalidated. He also claimed a sum of £125 for plants which were damaged by the contractor crushing them with debris from the Works.

20. Mr Campbell disputed that the Applicant was entitled to claim a set off in this way. The Tribunal pointed him to the case of *Continental Property Ventures Inc v White [LRX/60/2005]* which might enable the Applicant to sustain such a claim by way of a set off. Mr Lloyd indicated that if the Applicant were to obtain 2 quotations for the work to repair the damage to the Property, the Council would arrange for

payment of the work. The Tribunal does not therefore allow any set off for the cost of repairing the ceiling and any other associated damage to paintwork. The Tribunal does though accept that the Applicant did carry out work to clear leaves from the flat roof and, although no receipts are produced to substantiate the cost claimed, the Tribunal accepts that the cost claimed is reasonable and the Applicant should be entitled to set off the amount due to the Respondent's failure to carry out the work via its own contractor. In relation to the plant damage, the Tribunal is not prepared to allow a set off in circumstances where there was no evidence of the cause or the cost of remedying any breach by the Respondent. All that the Tribunal had was a photograph showing that some plants had been damaged by the dumping of building debris on them (presumably by the roofing contractor) but there was no evidence of who owned those plants, what had been damaged or the cost of replacing them nor any argument as to why this should be considered to be due to any default on the part of the Respondent.

Management charges for the year 2011/12

21. The Applicant disputed the management charge claimed of £272.57. He did not dispute that 10% was a reasonable charge for management. The Respondent indicated in its statement of case that the figure actually charged would be reduced as a result of the amounts conceded and found to be reasonable in these proceedings. The Applicant's challenge was to the figure of £68 which was not explained. The Respondent indicated in the statement of Mrs Wildman that this figure was the cost of auditing and certifying the Respondent's account of service charges pursuant to clause 4.1.1 of the Lease.

The tribunal's decision

22. The Tribunal determines that the amount payable in respect of management charges is £204.57 (which amount should also be adjusted to remove the 10% of management charge on the sums conceded or found not to be payable as a result of these proceedings).

Reasons for the tribunal's decision

23. Mrs Wildman gave evidence to the Tribunal that the £68 was the cost of employing external auditors to audit and certify the service charge accounts across the Respondent's estate. She was unable to show the Tribunal an invoice for this service nor explain what this charge covered as she was not in the calculations team. She was able to say that it would cover the time it took for the calculations to be carried out the time it took for the auditors to carry out the audit – they were generally in the office for about 2 weeks. The charge was a flat fee for each of the Respondent's properties.

24. The Tribunal accepts in principle that the Lease allows the Respondent to charge an amount for auditing of accounts and that the basis of the charge ie a flat fee per property is not an unreasonable method of

calculation. However, in this case, the Tribunal has been unimpressed with the basis of the Respondent's claim from the Applicant for service charges. Much of the cost of the Works has been either conceded by the Respondent or found not to be payable by the Tribunal (including on the basis that works which have presumably been paid for by the Respondent were not carried out by the contractor). Other sums such as the electricity have been conceded by the Respondent on the basis that the Lease did not permit those charges to be calculated on the basis that they were calculated. The figures which were charged by the Respondent were therefore patently inaccurate – a matter which should have been picked up by the external auditors. The Tribunal also observes that, if the Applicant had not been prepared to concede that 10% was reasonable as a management charge, the Tribunal might have been minded to find that too was unreasonable given the shoddy accounting of the Respondent in relation to the Property.

Application under s.20C and refund of fees

25. 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 and hearing[1]. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal orders the Respondent to refund the fees paid by the Applicant in the sum of £250 within 28 days of the date of this decision.

26. In the application form and at the hearing, the Applicant applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the tribunal 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: Ms L Smith **Date:** 2 August 2013

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

APPENDIX A

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 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).

APPENDIX B

Relevant provisions of the Lease

Clause 1

....the Council hereby demises unto the Tenant ALL THAT Flat known as 19 Foxley Road ... for a term of 125 years from the 8th January 2001 ...yielding and paying.....FIFTHLY the service charges at the time and in the manner specified in clause 4 hereof.

Clause 3
The Council hereby covenants with the Tenant as follows:
3.5 To maintain repair and keep in good order and condition the exterior walls joists and ceilings and floors of the building of which the demised premises form part (but excluding such parts thereof as are included in the demised premises) and the whole of the structure roof chimney and stacks gutters and rainwater pipes balconies window frames foundations and main drains of the building of which the demised premises form part and the walls rails fences common access ways and gates appurtenant thereto (apart from such walls rails fences and gates as the Tenant has covenanted to maintain) and any water tank which does not exclusively serve the demised premises and the service and other pipes appurtenant thereto in good repair and condition

Clause 4
4.1 The Tenant hereby further covenants with the Council to contribute and pay on demand a rateable proportion of the costs expenses outgoings and matters referred to in Clause 3 hereof and any other works or matters affecting the demised premises and the building of which the demised premises form part that the Council in its discretion considers it reasonable or appropriate to carry out which shall include not only those expenses outgoings and other expenditure hereinbefore described which have actually been disbursed incurred or made by the Council during the year in question but also such reasonable part of all such expenses outgoings and other expenditure hereinbefore described which are of a periodically recurring nature (whether recurring by regular or irregular periods) whenever disbursed incurred or made including a sum or sums of money for anticipated expenditure in respect thereof as the Council may in its discretion allocate to the year in question as being fair and reasonable in the circumstances and if required by the Council to pay to the Council such sum in advance and on account of the said costs expenses outgoings and matters referred to in Clause 3 hereof as the Council shall specify at their discretion to be a fair and reasonable payment..... and also
4.1.1 The reasonable fees and disbursements paid to or cost of employment of any accountant solicitor or other professional person in relation to the preparation auditing or certification of any accounts of the costs expenses outgoings and matters referred to in Clause 3 or in this clause
4.2 IT IS HEREBY AGREED between the parties:

4.2.1.3 That the Council shall be entitled to add a reasonable sum for general administration expenses such sum being 10% of the total costs incurred by the Council and payable by the Tenant in respect of Clauses 3 and 4 hereof