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**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **LON/00BG/LSC/2013/0136**

Property : **49 Jamaica Street, Exmouth Estate,
London E1 OPD**

Applicant : **Mr Samuel Sofaer**

Representative : **None**

Respondent : **Swan Housing Association Ltd**

Representative : **Devonshires Solicitors**

Type of Application : **For the determination of the
reasonableness of and the liability
to pay a service charge**

Tribunal Members : **Judge O'Sullivan
Mr M Cartwright FRICS
Ms R Emblin**

**Date and venue of
Hearing** : **19 June 2013, reconvened hearing
on 27 November 2013
10 Alfred Place, London WC1E 7LR**

Date of Decision : **6 December 2013**

DECISION

Decisions of the tribunal

- (1) The tribunal determines that the sum of £954.70 is payable by the Applicant in respect of the preliminaries invoiced to him on 3 May 2011.
- (2) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985, the landlord having consented to the same.
- (3) The tribunal determines that the Respondent shall pay the Applicant £125, representing half of the costs incurred within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicant.

The application

1. This is an application brought by Mr Samuel Sofaer (the "Applicant") in respect of a leasehold property known as 49 Jamaica Street, Exmouth Estate London E1 OPD (the "Property"). The Respondent is the freehold owner of the Property and estate upon which it is situated. 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 an invoice dated in respect of major works dated 3 May 2011 in the total sum of £6,028.78. This application is limited however to the payability and reasonableness of the amount of preliminaries payable by the Applicant, the Applicant having been invoiced the sum of £954.70.
2. The tribunal has previously considered the payability and reasonableness of the major works themselves under case reference LON/OOBG/LSC/2012/0132 and issued its decision in this regard on 28 August 2012.
3. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

4. The first hearing in the present application took place on 19 June 2013. The Applicant appeared in person and was accompanied by Mr Parker and Ms Bennett, who are also leaseholders on the estate. The Respondent was represented by Mr Pearce, a home ownership property manager and Ms Yeo, a leasehold services officer, both in the employ of the Respondent.

The background

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 which requires the landlord to provide services and the tenant to contribute towards their costs. No issues arose as to the terms of the lease during the hearing.
7. 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.

The issues

8. In his statement of case dated 7 April 2013 the Applicant set out his challenges to two items, the cost of the preliminaries and the cost of scaffolding.
9. The tribunal first considered whether it had jurisdiction to consider his challenge to the cost of the scaffolding. The tribunal considered the previous tribunal's decision in relation to major works at paragraph 8 from which it was clear that the issue of scaffolding had been raised and a determination made by the tribunal. The Applicant acknowledged this but said that he now wished to raise a different challenge to the scaffolding costs which he said arose from the tribunal's finding in that case. The tribunal took a brief adjournment in which to consider whether it had jurisdiction to consider the issue of the scaffolding. The tribunal concluded it did not as the issue of scaffolding had been considered in a previous hearing. The tribunal cannot re-consider a matter which has already been the subject of a determination. The tribunal's decision and the reasons for the decision were given orally to the parties at the hearing on 19 June 2013.
10. The Applicant's second challenge was to the reasonableness of the cost of preliminaries invoiced to him as part of the same contract in the sum of £954.70. The Applicant's position was that the issue of the preliminaries had not formed part of his previous challenge and that he had expressly reserved his position in relation to this item as he said correspondence had been ongoing with the Respondent. Mr Pearce confirmed that he accepted that the tribunal had jurisdiction to consider the issue of the preliminaries.
11. The tribunal therefore went on to consider the issue of the preliminaries.

12. The Applicant's main concern appeared to relate to what he thought were constantly changing figures for the cost of the preliminaries. He submitted that the Respondent had in effect kept an amount in reserve which it had described as preliminaries but which in reality could be used to pay for other items. He also suggested that the difference was an amount kept in reserve as a "*slush fund*" to deal with more troublesome leaseholders.
13. Mr Pearce for the Respondent explained that what in fact had happened was that the original estimated preliminaries figure had been adjusted to take account of works which the Respondent had decided would be non chargeable. As a result the cost of the preliminaries had reduced substantially. With the major works invoice dated 3 May 2011 the Respondent had enclosed a copy of a substantial spreadsheet detailing line by line the various categories of works included in the major works contract. This spreadsheet showed the total cost of the originally estimated preliminaries and did not contain any information as to how that figure had been adjusted to take into account the non chargeable preliminaries. In effect some 15 lines from the bottom of the original spreadsheet detailing the non chargeable preliminaries had been omitted. The tribunal heard that the landlord had tried hard to explain the preliminaries. At the hearing on 19 June 2013 however the Respondent was unable to provide a copy of the final certified account supporting the figures used in its various spreadsheets and explanatory documentation.
14. The tribunal therefore made further directions dated 19 June 2013 which provided for a copy of the final account to be served and for the parties to make submissions in relation to this further documentation.
15. Further to those directions the Respondent filed a letter and enclosures on 25 June 2013 and the Applicant responded by a submission dated 10 July 2013. On receipt of the papers filed by the parties the tribunal directed that a further short hearing should take place. The Respondent submitted a further bundle containing various documents including a witness statement of Mr Pearce on 21 November 2013. After liaison with the parties as to their availability the reconvened hearing took place on 27 November 2013.
16. At the hearing on 27 November 2012 the Applicant again appeared in person and was accompanied by Mr Parker and Ms Bennett. The Respondent was represented by Mr Grundy of Counsel. Mr Pearce and Ms Yeo appeared to give further evidence. Also for the Respondent were Mr Howarth, assistant director, Ms Gonatra, trainee solicitor and Ms Thorogood, leasehold services manager.
17. Mr Pearce, Homeownership Project Manager in the employment of the Respondent, gave evidence on the major works. A copy of his witness statement was included in the bundle. The tribunal heard that he was

well acquainted with the Exmouth Estate having been involved in leasehold management matters for 8 years including the major works project in question. The major works contract related to new roofing, asphaltting the private balconies, lift refurbishment and repairs to the external and common parts carried out under the Decent Homes and Estate refurbishment.

18. In his statement dated 10 July 2013 and at the hearing the Applicant set out his further challenges to the major works invoice in the light of the further correspondence provided. Both Mr Pearce and Ms Yeo gave evidence to the tribunal. The challenges raised and the responses given by the witnesses for the Respondent are set out below;

- i. The applicant says a proper final account had not been produced by the Respondent.

Mr Pearce' evidence was that that the final account and supporting documentation has been certified and a copy of the certificate provided in the bundle at HH5 and HH5A.

- ii. The Applicant requested that the original of document HH5A should be produced

The original was said not to be available but authenticated copies of the valuations and practical completion certificates are provided. These confirmed the figures provided in HH5A.

- iii. He requested that the information in documents HH8 and HH9 (being the two calculations of preliminary costs from Potter Raper) be authenticated by being put on headed paper and signed by Robert Humphrey and David Spiller.

Copies of these are included in the bundle. Issues were raised by the Applicant about some differences between the version of HH8 which had originally been provided and the copy on headed paper. Ms Yeo explained that she had asked Potter Raper to provide an explanation rather than provide a copy of the letter and this was the reason the letters were not identical. As far as the HH9 was concerned the Applicant questioned why the letter from Potter Raper was now signed by a different partner. Ms Yeo explained that Mr Humphreys had not been available and that one of his partners had therefore provided the confirmation requested.

- iv. The Applicant requested the disclosure of spreadsheet HH7 to include the additional 15 lines which give an explanation and breakdown of the scheme's preliminary costs into rechargeable and non-rechargeable items of expenditure and an explanation

as to why this was substituted for the original spreadsheet disclosed earlier in the proceedings.

It was accepted by Mr Pearce that the spreadsheet originally sent to leaseholders was missing the last 15 lines which indicated which of the preliminaries were non rechargeable. However irrespective of this Mr Pearce submitted that the preliminaries have always been properly charged calculated by reference to the works which were considered to be chargeable or non-chargeable. The difference between the two spreadsheets has not affected how the preliminaries have been calculated. The original spreadsheet was however produced at the hearing by Counsel for the Respondent.

- v. Criticisms were made of the landlord's failure to bring crucial documents to the hearing on 19 June 2013.

The Respondent says that the issue in relation to the non-rechargeable preliminaries only became clear during the hearing. It is also submitted that the landlord has undertaken not to recharge any of its costs in relation to these proceedings through the service charge.

- vi. Criticism was made that the Applicant was not provided with an itemised breakdown of costs with his final invoice.

This is denied. The Respondent produces a copy of the invoice and enclosures sent to the Applicant which shows the breakdown of the cost of works and the service charge invoice calculation. Further information was provided following a telephone conversation and confirmed the calculations.

- vii. The percentage of costs billed in relation to the preliminaries was challenged as excessive.

The Applicant's contribution to preliminary costs is £954.70 as against a total bill of £6,028.78. This equates to a percentage of 15.82%. The Respondent says this is reasonable.

- 19. The Applicant asked that the tribunal disallow the full cost of the preliminaries as compensation as the dispute could have been resolved without an application to the tribunal, the Applicant believes he has been misled, the landlord has failed to provide documents in a timely fashion.

The tribunal's decision

20. The tribunal allowed the cost of the preliminaries in full as reasonable.

Reasons for the tribunal's decision

21. The tribunal first considered the invoice in respect of the major works which was served on the Applicant on 3 May 2011 for works completed on 7 July 2010. A full copy of this was included in the bundle and it was accompanied by an explanation of the deferred payment options available, a summary of tenants rights and obligations, a list of frequently asked questions, a document described as a service charge invoice calculation which showed administration fees, management fees and chargeable works and a copy of a spreadsheet. The spreadsheet was the final account for the whole of the estate, one column represented Jamaica Street and the works were divided by 16 different sections which were subdivided into different elements.
22. In this tribunal's view the spreadsheet was an unnecessarily complex way of advising tenants of the cost of the works to their block. It did not include the 15 items which were not charged to leaseholders and as a consequence it was difficult for the leaseholders to follow the figures and their relation to their actual invoice. The applicant criticised the spreadsheet as it did not deal with individual properties but rather block by block and he was therefore forced to carry out calculations to work out his contribution. The landlord explained that it has done this for transparency.
23. The landlord also provided a copy of the final valuation marked as HH5 dated 30 July 2010 together with a signed copy of the contractor's acceptance of the final account marked as HH5A. In addition Grant Thornton provided a qualified report on the account in a letter dated 31 October 2013.
24. We were handed at the hearing a full copy of the original spreadsheet that included the 15 items of non chargeable works. The tribunal heard that due to conflicts between the terms of the different leases across the estate the Respondent took the view not to charge some of the items.
25. We have a copy of the final account which has been certified by the contract administrator Potter Raper dated 5 August 2010. The works were subsequently signed off by Jamie Smith, group finance director of the landlord.
26. Potter Raper provided an explanation as to how they had calculated the preliminaries attributable to each property at HH10. The Applicant pointed out discrepancies in Potter Raper's explanations. However we were satisfied that the differences in the amounts of £2.00 were due to

a mathematical error in adding together two numbers. We accepted Potter Raper's evidence.

27. The Applicant also raised a challenge as to the percentage rate of the preliminaries. We accept that preliminaries would ordinarily be in the range of 10-15% of the value of the contract. The preliminaries in this case are 15.8%. The exact amount of any preliminaries depends on the way contractors price their tender, some choosing to price prelims within items of work. We consider that the rate of 15.8% at the top of the range but not unreasonable.
28. We therefore determined that the preliminaries are reasonable.
29. We would mention that throughout the hearing the Applicant made a number of allegations. He suggested that Mr Pearce had perjured himself giving evidence, made allegations about fraudulent activity of the landlord and suggested that the tribunal exercised bias when its professional member intervened to explain the workings of a final certification. Many of these allegations were serious. We would confirm that we saw no evidence to support what were very serious allegations.

Application under s.20C and refund of fees

30. The Applicant applied for an order under section 20C of the 1985 Act. The Respondent consented to an order being made under section 20C as it did not intend to pass any of its costs through the service charge. The tribunal therefore determines for the avoidance of doubt 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.
31. 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 hearing¹. The total cost is £250. The tribunal has allowed the preliminaries. However we consider that the Respondent was slow to produce the evidence required to support its charges and even after the hearing of 19 June 2013 was required to make directions for further disclosure. Had it provided this evidence at an early stage this application may not have been necessary. Having heard the submissions from the parties and taking into account the determinations above, the tribunal orders the Respondent to refund the sum of £125, being half of the costs paid by the Applicant, within 28 days of the date of this decision.

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

A handwritten signature in black ink, appearing to be 'S O Sullivan', written in a cursive style.

Name: S O'Sullivan

Date: 6 December 2013

Appendix of relevant legislation

Landlord and Tenant Act 1985

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).