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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/00KF/LSC/2014/0051**
Property	:	**86 Lovelace Gardens, Southend-on-Sea, Essex SS2 4NU**
Applicant **Represented by**	:	**Nigel Richard Prevost** **Terence Hair BSc MRICS**
Respondent **Represented by**	:	**Audrey Murphy** **Lorraine Green (from Family Mosaic)**
Date of Application	:	**24th April 2014**
Type of Application	:	**To determine reasonableness and payability of service charges**
The Tribunal	:	**Bruce Edgington (lawyer chair)** **Roland Thomas MRICS** **John Francis QPM**
Date and venue of hearing	:	**15th July 2014 at The Court House, 80 Victoria Avenue, Southend-on-Sea, Essex SS2 6EU**

DECISION

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1. The Tribunal determines the amount claimed by the Applicant from the Respondent in respect of renewal of the roof in the sum of £2,622.19 is reasonable and payable.

2. It is also determined that the amount claimed by the Applicant from the Respondent in respect of buildings insurance for 2014 in the sum of £316.35 is reasonable and payable.

Reasons

Introduction

3. This is an application by Hair & Son LLP, who are local chartered surveyors and

managing agents for the freehold owner of the building of which the subject property forms part, to determine whether the amounts referred to in the decision (above) are both reasonable and payable.

4. The first item of expenditure is for the replacement of the roof and follows an earlier decision by a differently constituted Leasehold Valuation Tribunal (before it became the First-tier Tribunal) under case number CAM/00KF/LSC/2008/0026 ("the earlier decision"). That case was between the same parties and was heard on the 4th July 2008. It determined that:-

   (a) The Applicant may re-roof the building as recommended in a report dated 1st May 2008 from Mr. D. Plaskow FRICS to the specification in the estimate of Holmes Roofing of 20th July 2007
   (b) The cost of such re-roofing would be recoverable from the Respondent as a service charge
   (c) If the cost of the works exceeded £6,500 plus VAT and the fees of Hair & Son of 7%, the Respondent should apply to this Tribunal for a determination as to the reasonableness of the cost.

5. After this decision, the roof was in fact replaced by Holmes Roofing and the total cost was originally claimed at £5,546.99, which figure was subsequently reduced to £5,244.39. Both figures included VAT and Hair & Son's fees. The figure now claimed is one half i.e. £2,622.19.

6. The Respondent's position in the papers submitted to the Tribunal before the hearing is not entirely clear. There is an undated statement from her at pages E4 and E5 in the bundle. As to the roofing cost, she says that this is statute barred; that the roof does not belong to her; that she was unable to use her own nominated contractor and that a roof repair was undertaken in 2003 "*yet not one penny has been returned to me*".

7. As far as the insurance is concerned, the Tribunal saw some correspondence in which the Respondent asserted that a quarter of her flat, i.e. the bathroom, is not covered under the policy. A letter was written to her on the 17th February 2014 by Hair & Son explaining that they had put this assertion to the insurance brokers who had said that "*the policy covers the whole of the building and they confirm that there has been no previous indication given either by the insurers or the loss adjusters that the bathroom is excluded from the policy coverage*". In fact the letters goes on to say that the insurers have accepted a claim for internal repairs to the utility and bathrooms.

8. The only other point made by the Respondent in her written statement is that she supplied Hair & Son with an insurance quote which was £100 cheaper but they had responded that this was for contents insurance. She refers to being refused access to the insurance policy but the Tribunal notes that a copy is included in the hearing bundle.

The Inspection

9. The members of the Tribunal inspected the outside of building in which the property is situated in the presence of Mr. Terence Hair, Ms. Green and the Respondent. It is a mid terraced house of brick construction under what is now a concrete interlocking tiled pitched roof. Its original construction date, so far as is relevant, is the early part of the 20th century and the building consists of 2 flats.

10. Viewed from the rear, the Tribunal could see 2 Velux type windows in the main roof, one larger than the other. The ground floor has a semi-detached building at the rear and from the lease plan this would appear to house the bathroom. It is of brick/block construction with a tiled pitched roof. This may have been an original outhouse converted into a bathroom or an extension built afterwards, some considerable time ago.

The Lease

11. The relevant parts of the lease are recited in the earlier decision which both parties have. They will not be repeated here save for the insurance provisions which did not form part of the earlier decision. It is the landlord's responsibility under clause 4(2) to insure the building for the full value upon the usual comprehensive policy terms with Municipal Mutual Insurance Ltd. "*...or such other office as the Landlord shall determine...*".

The Law

12. Section 18 of the **Landlord and Tenant Act 1985** ("the 1985 Act") defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'.

13. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. This Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable and, if so, whether it is payable.

14. In *Schilling v Canary Riverside Development PTD Ltd* LRX/26/2005; LRX/31/2005 & LRX/47/2005 His Honour Judge Rich QC had to consider upon whom lay the burden of proof. At paragraph 15 he stated :

> *"If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the Yorkbrook4 case make clear the necessity for the LVT to ensure that the parties know the case which each has to meet...."*

15. As far as insurance is concerned, there are many previous cases decided at all levels of Tribunal and court up to the Court of Appeal which have decided that a landlord must insure in an office of repute 'in the normal course of business' without having to search out the cheapest quote.

16. As to being statute barred, the relevant limitation periods are 6 years for rent and 12 years for any other amount payable under a deed. In this case, the lease is a deed and the service charges are not described as 'rent'. The commencement dates in each case are the dates when the relevant amounts became payable i.e. March 2009 as far as the roof cost is concerned.

The Hearing

17. The hearing was attended by those who had attended the inspection plus 2 other members of staff from Hair & Son LLP. The Tribunal chair, after introducing himself and the other members, pointed out to the Respondent that a previous Tribunal had determined that the replacement of the roof was reasonable and it had also given an approximate cost which had not been exceeded. The work had been undertaken and the claim was made within the limitation period. It was therefore difficult to see the basis of her present opposition.

18. She then said that if the Tribunal were to find against her, it would be extremely detrimental to her county court action against the Applicant. The Tribunal attempted to find out what, exactly, was being contested in the county court. Mr. Hair produced a copy of the claim form. This was a claim of more than £15,000 and less than £50,000 for compensation arising from the conversion works undertaken to the 1st floor flat above her after the roof replacement. It was alleged that there had been leaks. General and special damages are claimed. One of the issues being raised in support of the claim was that there had been an alteration to the lease of the 1st floor which had happened without the Respondent's consent.

19. The Tribunal did not have sight of the remaining pleadings in the case but it seemed clear that the decision of this Tribunal was not likely to prejudice the court proceedings. The Respondent said that the 1st floor tenant should have paid for the roof because the deed of variation of the 1st floor flat should have been entered into in 2008 before the work was done rather than 2010 which is the date on the document. She said that the roof was renewed in the March 2009 and within a few months the 1st floor tenant's builder started work on the conversion. The 1st floor tenant had not even told the landlord what she was doing.

20. As far as insurance was concerned, Mr. Hair firstly said that the rooms in the roof should not affect the insurance which meant that the premium would not be affected. When asked if the insurance company had been notified about the alteration, he could not say.

21. Both parties were then asked if they had anything to add. The Respondent pointed out that her solicitors had a great deal of evidence which could have helped. She was asked whether she had asked the solicitors to at least put any relevant issues to the Tribunal in the form of a letter. She said that she could not afford the £250 this would cost. The Tribunal was exceedingly surprised by this and said that they could not imagine that such a letter would cost that much.

22. Mr. Hair said that he had nothing to add. The Respondent did not ask for an adjournment to enable her to put further documents to the Tribunal.

Conclusions

23. The Tribunal's decision in this case is that a previous Tribunal has decided that the replacement of the roof as opposed to any other alternative was reasonable and it even gave what it considered to be a reasonable cost. This was to avoid any further application such as this one. The work was finished in about March 2009 when the roofer's invoice was prepared and a demand was then sent to the Respondent for her share which was less than anticipated by the previous Tribunal in the earlier decision.

24. It is true that a deed of variation was completed (see below) which changed the liability for roof repairs but this was not until 2010. In 2009, the Respondent was legally responsible for one half of the cost of the roof replacement.

25. It will therefore not surprise anyone that this Tribunal finds that both the work and the cost is reasonable and payable by the Respondent. The claim has been brought within the 12 year limitation period – or even the 6 year one, if that were applicable. There is no merit in the suggestion that the cost of an earlier repair should be refunded. As to whether the Respondent could have nominated her own contractor, the evidence from the Applicant was that the full section 20 (of the 1985 Act) consultation process had been undertaken which would have allowed the Respondent to nominate a contractor. She did not contest that evidence.

26. As to the insurance premium, the amount claimed is £316.35. This is at the high end of what would be reasonable. However, it is within the 'reasonable' range and as no evidence to the contrary has actually been produced, the Tribunal concludes that it is reasonable. However, the Tribunal would be very concerned if the insurance company has not been told about the extension into the roof void. The increase in the cost of remedial works in the event of, for example, a fire or storm damage to the building is likely to be fairly substantial with the additional living area. A failure to notify insurers may provoke a refusal to meet the cost for non-disclosure. This matter should be checked as soon as possible.

27. The other point on insurance raised by the Respondent was that the insurer had refused to cover her bathroom to the rear of the ground floor. When asked to produce evidence of this she could only say that it was with her solicitors. The Applicant produced clear written evidence that the insurer's broker asserts that

the policy did cover the whole building including the Respondent's bathroom and in fact the insurer was going to pay a claim relating to interior damage to that room.

The Leases

28. The Tribunal feels compelled to mention what is potentially an extremely serious conflict between the terms of the leases of the ground and 1st floors. This issue was ventilated at the hearing. In the hearing bundle of documents were copies of the lease to the ground floor, now in the name of the Respondent, an unreadable copy of the lease to the 1st floor and a copy of a document described as a 'Licence for Alterations' for the 1st floor flat between the Applicant and Michele Denise Frost dated 9th March 2010.

29. This document says that it is a licence but the recitals say that *"THIS deed is supplemental to a Lease ("the Lease")..."*. On the assumption that the lease of the 1st floor is in very similar terms to the lease of the ground floor, there is the usual covenant on the part of the tenant not to make any structural alterations or additions nor to erect any new buildings without the previous consent in writing of the landlord. There is no requirement for a Deed of consent.

30. When going through the 2010 deed, it becomes clear why it is a deed. It purports to vary the lease of the 1st floor flat substantially. There is correspondence in the bundle to suggest that the deed is not registered. If that is the case, the solicitors involved will know the serious consequences e.g. of trying to enforce a deed varying a registered title document which is not, itself, registered.

31. Again, assuming that the 2 leases are in similar terms, the effect of the variations can be described, in brief, as follows:-

(a) The lease to the 1st floor now demises "the roof and roof space" to the tenant. There are in fact 2 roofs i.e. the main one covering the 1st floor and another one over the bathroom of the ground floor. Does this amendment include both or only one?
(b) There is now an obligation on the part of the 1st floor tenant to keep in repair "the roof, roof timbers and the joists and beams of the roof". Again does this mean both roofs or only one? Is the insurance company prepared to accept an insurable risk which has now transferred from the insured to a 3rd party i.e. the 1st floor tenant?
(c) There is an additional obligation for the 1st floor tenant to pay any additional insurance premium resulting from her using the roof and roof space for living accommodation. The obligation on the ground floor tenant is to pay half the insurance premium for insuring the building. If, as the Tribunal believes, there is going to be an additional premium, there is clear conflict between the 2 leases.
(d) In the landlord's obligations in clause 4(4) of the lease, the landlord covenants to maintain and repair the roof. The deed deletes the word "roof" from those obligations in the 1st floor lease which means that according to the ground

floor lease the landlord covenants to maintain the roof and in the 1st floor lease he has no such obligation.

32. The deed expressly states that it is to vary the lease itself. The licence may be to Ms. Frost personally but the amendments to the title specifically do not relate just to Ms. Frost personally. Even if it did say that, the effect is to create a deed which purports to vary one lease and bring it into conflict with the other. If the reason for not registering is to keep the deed a 'secret' so that it is not mentioned in the title, then this, in itself is going to cause all sorts of problems in future sales because the consent to the alterations to the building and the changes to the legal title are inextricably entwined. You cannot have one without the other.

33. Any potential buyer of either flat or the freehold will want to see the consent to the alteration as the registered lease to the first floor presumably only covers the first floor and not the roof void. The insurance company will want to know who is responsible for maintaining the structure, the foundations and the roof. Will it accept these conflicting responsibilities for the roof? Does the current insurer know about them? In other words, who has the insurable risk?

34. There is the additional problem if damage is caused to the ground floor because the roof has not been maintained. The ground floor tenant's only recourse is an application to the court to enforce the covenant in the lease for the landlord to keep the roof in repair i.e. for specific performance and a mandatory injunction. A claim for damages will not be of much use if the cause of action is continuing and there is no contractual relationship between the 2 tenants.

35. The landlord may then seek to enforce the lease against the 1st floor tenant. However, the problem with this is that he has now demised the roof to that tenant without a power for him to enter upon the demised premises to undertake repair work himself. There is a purported power of entry but not for the express purpose of undertaking repair work. A power of entry must be specific as to what the power extends to. This will have the possible effect that the only cause of action is to claim in damages against the 1st floor tenant. That will not help the ground floor tenant.

36. The landlord will no doubt say that he can forfeit the lease but with a long residential lease, this is not an easy or speedy task, and if the ground floor tenant's cause of action is continuing, this is likely to create quite unnecessary suffering.

37. The Respondent says that she should have been able to give consent to the alterations and to the lease. That is a matter for the county court. All this Tribunal will say is that as the extension into the main roof has actually happened, it is clear that both leases should be amended to ensure that all parties and potential purchasers will know who is responsible for what, and these amendments should be registered. Perhaps one solution would be to just amend the 1st floor lease to make the main roof void part of the demise but for the

landlord to retain ownership and responsibility for the maintenance of the main roof itself. There would have to be agreement about who maintains the roof supports. Proper apportionment of the insurance cost would also have to be dealt with. Leaving aside the claim for damages for ingress of water, this solution would appear to give both tenants what they want.

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Bruce Edgington
Regional Judge
16th July 2014