11335

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AW/LSC/2015/0281 & 0415**
Property	:	**4a Millwood Street** **London W10 6EH**
Applicant	:	**Alexander Ainley**
Representative	:	**Mr T Sherwin, counsel**
Respondent	:	**Kiri Bloore** **Jennifer Bloore**
Representative	:	**Mr P Angel, Noble solicitors**
Type of Application	:	**Liability to pay service charges**
Tribunal	:	**Judge Nicol** **Ms S Coughlin MCIEH**
Date and Venue of Hearing	:	**14th December 2015;** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**23rd December 2015**

DECISION

Decisions of the Tribunal

(1) The service charge of £3,180.40 demanded by the Applicant from the Respondents is reasonable and payable.

(2) There is no order in relation to costs.

The Proceedings

1. This case concerns a four-storey terraced property containing two flats. The Applicant is the freeholder of the whole building and the leaseholder and occupant of the upper flat. The Respondents are the leaseholders of the ground floor flat. The First Respondent has taken the more active role, both in dealing with the Applicant and in these proceedings, but the Respondents will be referred to together in the rest of this decision.

2. On 30th May 2015 the Applicant issued proceedings in the county court (claim no.B09YM276) for unpaid service charges of £3,180.40, plus interest and costs. By an application dated 5th July 2015 the Respondents sought to challenge the reasonableness and payability of the same service charge of £3,180.40 under section 27A of the Landlord and Tenant Act 1985. On 2nd September 2015 the county court proceedings were transferred to this Tribunal. On 13th October 2015 the Tribunal consolidated the two cases and made directions.

The Facts

3. The Respondents are a daughter and mother who bought the leasehold of flat 4A in 2010. They rent the flat out. Other than the disputed amount, they have never received a demand for service charges, let alone paid one.

4. The Applicant bought both the freehold and the leasehold of flat 4B in November 2013. He lives there with his family. In his opinion, the property was a "dump" when he bought it. He decided that work should be carried out both inside his property and outside. In relation to the exterior, responsibility for carrying out the works fell on him in his role as freeholder and the obligation to pay for the works fell on him and the Respondents in their respective roles as leaseholders. In particular, the Respondents' lease provides as follows:

   - Under clause 2 the Respondents covenanted to observe and perform their obligations in the Fourth and Sixth Schedules.

   - Under paragraph 2 of the Fourth Schedule, the Respondents covenanted to pay, by way of additional rent, 40% of the costs specified in the Seventh Schedule.

   - Under paragraph 2 of the Fourth Schedule, the Respondents covenanted not to decorate the exterior of the demised premises.

   - Under paragraph 1 of the Fifth Schedule, the Applicant covenanted to inspect, clean, maintain, repair, renew and redecorate the exterior of the building and areas not demised.

- Under paragraph 3 of the Fifth Schedule, the Applicant covenanted once every 3 years or such other period as he reasonably considers necessary to decorate the external parts with two coats of paint.

- Under paragraph 8 of the Fifth Schedule, the Applicant covenanted to provide the services referred to in the Seventh Schedule.

- The Seventh Schedule lists the Applicant's costs as landlord to which the Respondents must contribute, including:

    - Under paragraph 1, the costs of complying with the Fifth Schedule.

    - The costs of providing services or amenities for the benefit of tenants.

    - The costs of enforcing any covenants.

    - Professional costs such as solicitors.

5. On 1st September 2014 the Applicant sent an e-mail to the Respondents. He said the exterior was in disrepair and in need of redecoration. He enclosed various quotes.

6. The Respondents very sensibly took legal advice. However, they also asked their solicitors to represent them. They have been legally represented thereafter. This surprised and puzzled the Tribunal because, at least by now, if not some time ago, the Respondents must have paid more in legal costs than they could ever have contemplated they would save in service charge reductions.

7. In any event, by letter dated 8th September 2014, the Respondents' solicitors set out various objections, including that the Applicant should follow a specific procedure. Thereafter, the Applicant purported to proceed in accordance with the statutory consultation requirements under section 20 of the Landlord and Tenant Act 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003. (The Respondents' objections to the process are dealt with later in this decision).

8. By letter dated 10th September 2014 (there is reference to its being dated 12th September 2014 but that must have been when it was received), the Applicant set out the works to be carried out:

(a) The repair and re-paint of the external walls of the Property including but not limited to the repair of surface cracks and uneven surfaces;

(b) The repair and if necessary replacement of the windows and window sills/frames of the Property;

(c) The painting of the front doors and external railings of the Property;

(d) The repair, repaint and reseal of the refuse house attached to the Property; and

(e) The resealing of the roof of the Property.

9. The letter went on to state that scaffolding would be needed for 2-4 weeks and the reasons for the works were:

(a) The damage to the external walls is causing damp to seep into the top floor flat of the Property;

(b) The windows are rotten and damaged and in some instances do not properly close;

(c) The roof is of felt construction and is generally resealed every 10 years so as to ensure its proofing. This period is approaching and addressing the seal now in conjunction with the other works will reduce inevitable future costs; and

(d) The external parts of the Property are in a general state of disrepair and the works are intended to renew the building to a standard in keeping with the local neighbourhood.

10. In early October the Applicant happened to meet outside the property Mr Bernataviciene who the Respondents intended to nominate as a contractor for the works. According to the Applicant, they had a civil conversation but Mr Bernataviciene said he needed the Respondents' permission to provide a written quote. According to Ms Kiri Bloore, who also gave evidence to the Tribunal, she could hear their conversation over the phone. She did not give any details but asserted that Mr Bernataviciene did not want to provide a quote due to how he was treated.

11. Shortly after this meeting, in an e-mail dated 8th October 2014, Ms Kiri Bloore told the Applicant,

> Please reframe from contacting my Tennat people I employ and any work men I contract the services of. If you require information you will get it when the time is right and NOT before.

Ms Bloore told the Tribunal that this e-mail was about something other than the Applicant's meeting with Mr Bernataviciene but that is not the way he took it and the Tribunal can understand why. Ms Bloore in her evidence repeated several times to the Tribunal that the Applicant had behaved unreasonably and had harassed both her tenants and contractors but the only evidence before the Tribunal of unreasonable behaviour was this e-mail which threw a poor light on her, not on the Applicant.

12. The Applicant's letter of 10th September 2014 had invited observations within the requisite 30 days. By letter dated 9th October 2014 the Respondents' solicitors set out the following observations:

(a) It was not accepted that the works would require scaffolding and certainly not for 6 weeks.

(b) A photograph was enclosed showing some staining under the discharge pipe coming from the boiler in the Applicant's flat.

(c) The Respondents repaired and repainted their window frames in November 2013 so it was not accepted they needed further repair or repainting.

(d) Any glazing in the Applicant's windows would have to be replaced at his own expense in accordance with the terms of the lease.

(e) Painting of the front doors and railings does not require scaffolding. Also, it would be "arguable" that each flat should paint these.

(f) Repainting and repairs to the refuse house do not require scaffolding and are not urgent, there being no evidence they are not water-tight.

(g) According to their own contractor, the roof does not require resealing.

13. The letter also proposed an alternative contractor. The name, Danguole Bernataviciene, was presented in two bullet points which gave the impression that two separate names were being referred to but it turned out it was one person.

14. The letter also referred to a burst pipe incurred during internal works but it appears that this was a different contractor and it has no relation to the issues in these proceedings.

15. By e-mail dated 13th October 2014, Ms Bloore sent a further e-mail, the entirety of which stated,

> Danguole Bernataviciene quote for the same works:
> £6800 Scaffolding £1600
> Time 2 weeks
> No access is granted to 4A Millwood street for your request currently.

16. By letter dated 14th October 2014, the Applicant told the Respondents' solicitors that he had tried but failed to get an adequately detailed quote from Mr Bernataviciene and they should provide one. If the Respondents had genuinely wanted Mr Bernataviciene to be considered as a contractor, they would have responded properly to this request. Ms Bloore pointed out that it is, in general terms, not for her to obtain detailed quotes but, in the circumstances, the Applicant's request was reasonable and, since the Respondents' solicitors did not respond at all,

he was entitled not to take into account Mr Bernataviciene as a potential contractor for the proposed works.

17. The Applicant's letter of 14th October 2014 went on to set out the quotes he had obtained, copies of which were attached:

- Argyll Building Services £12,727.50 (inclusive of scaffolding)
- Bramach Builders £6,000 (excluding scaffolding)
- Alpha Scaffolding £1,900

18. The Applicant also gave in the letter his responses to the observations in the Respondents' solicitors' letter of 9th October 2014:

(a) He enclosed photographs showing external cracking and internal damage due to penetrating damp. He said it was not possible to carry out remedial works without scaffolding. He pointed out that the cracking cannot be the result of any discharge from his boiler.

(b) He enclosed photographs showing the poor current state of the Respondents' windows.

(c) He also enclosed photographs showing the doors to the refuse store were rotten and damaged so that more than a repaint was required.

(d) He enclosed a further photograph of the current state of the refuse shed and stated that it would be cheaper to replace these doors rather than repair them.

(e) He said the resealing of the roof was a simple task that was necessary and it was prudent to do it while the scaffolding was up.

19. As referred to above, the Respondents did not respond to this letter and so, by letter dated 14th November 2014, the Applicant confirmed he was going ahead with Bramach Builders and Alpha Scaffolding. The works started on or shortly after 17th November 2014. The scaffolding came down on 30th December 2014 and the works to the ground floor were completed in January 2015, save in one respect. The contractor needed the front door and the windows of the Respondents' flat to be open so he could complete the decoration of parts that would otherwise be obscured. Despite e-mail requests from the Applicant on 30th January and 6th February 2015, the Respondents did not arrange for access.

20. By letter dated 28th January 2015 the Applicant notified the Respondents that the final cost of the works was £7,951 and demanded payment of their share of £3,180.40. The Tribunal understands that the Respondents do not argue that this cost should be zero but, as well as not coming up with an alternative figure, they have not paid any part of it.

The Respondents' objections

21. The Respondents have a number of objections to the service charge which are dealt with in turn below. However, it appears to the Tribunal that there is one overriding objection. The exterior works coincided with the Applicant carrying out interior works to his flat. Ms Bloore stated to the Tribunal that she felt like she and her mother were paying for the decoration of the Applicant's flat.

22. In fact, the Respondents did not claim that any of the works related to the interior of the Applicant's flat and eschewed any claim that any of the works did not come within the terms of their lease as service chargeable items. There is nothing wrong with the Applicant doing interior and exterior works at the same time. Nor is there anything wrong with his being motivated to do the exterior works by a desire to improve his own flat. The Tribunal is satisfied that the Applicant at no time sought to take advantage of his position as freeholder to gain any illegitimate or disproportionate benefit from the Respondents.

23. The Respondents asserted in their Statement of Case that the works were not "necessary". Mr Sherwin, counsel for the Applicant, rightly pointed out that the test is not necessity but reasonableness. The lease requires the Applicant to maintain and decorate the exterior. The photographic evidence is clear that there was significant cracking to the exterior. Whether or not it was those cracks which allowed water to penetrate to the interior, the Tribunal is satisfied that it was entirely reasonable for the Applicant to conclude that he should execute remedial works.

24. In support of this submission, the Respondents pointed out that the Applicant had not obtained the opinion of a suitable expert, such as a surveyor, to justify the need for the works. Employing a surveyor is often a good idea but the Applicant acted reasonably in concluding that in this case any benefit would be disproportionate to the cost involved.

25. The Respondents pointed out that they had redecorated their own windows in 2013, just before the Applicant bought his interest in the property, and questioned why they should be addressed again one year later. Mr Sherwin responded that the Respondents' works were contrary to the terms of their lease which positively enjoined them not to carry out such works. However, more significant is the state of the windows. The uncontradicted photographic evidence is that, shortly before the works, the windows were in a poor decorative state. The Applicant acted reasonably in including them within the works.

26. The Respondents asserted that damage to be remedied by the works was the responsibility of the Applicant. They pointed to two items:

    (a) The Applicant had installed a door to his roof terrace. The Respondents suggested the cracking had arisen from this. They produced no evidence of this, expert or otherwise. The photographic evidence would

suggest that the cracks were far too extensive and too remote from the door to be directly connected.

(b) As already referred to, there was a stain on the wall underneath the discharge pipe for the Applicant's boiler. It is difficult to understand the Respondents' case on this point. The Applicant is required to redecorate the exterior periodically and, given that it had not been done for some time, was bound to do it soon. Such redecoration would cover up any such stain, thus dealing with it anyway. There is no reason to think that costs were or would have been increased as a result of the stain.

27. Mr Angel, the solicitor who represented the Respondents before the Tribunal, submitted that the Applicant could only justify the service charges by proving that none of the problems to be addressed by the works were caused by the Applicant. The Tribunal has no hesitation in rejecting this novel submission. There is no basis in law for requiring a landlord to go that far to justify charges. It is also unrealistic, impractical and unnecessary, requiring a party to prove a negative and almost certainly requiring disproportionate and unnecessary evidence.

28. Moreover, the cause of any problem to be addressed by remedial works is irrelevant to the reasonableness of a service charge. If the work needs to be done and the lease requires a landlord to do it, then it does not matter what the cause is. There might be a claim against anyone who caused the problem for an indemnity for the relevant costs but the Respondents did not raise such an issue.

29. The Respondents had two specific objections to the consultation process:

(a) The Respondents alleged that the Applicant had failed to take reasonable steps to obtain an estimate from their nominated contractor, Mr Bernataviciene. The Tribunal finds it difficult to understand why the Respondents or their solicitors thought this submission to be sustainable. Even if he had done nothing else right, in his letter of 14th October 2014 the Applicant asked for a quote from Mr Bernataviciene. Neither the Respondents nor their solicitors saw fit to respond. In any event, the Tribunal found the Applicant to be a credible witness and accept his evidence as to his interaction with Mr Bernataviciene. The Tribunal is satisfied that he did everything he could to obtain an estimate he could consider.

(b) The Respondents alleged that the quote from Bramach Builders was insufficiently detailed. The Tribunal disagrees. It fulfilled its purpose of conveying to both parties what the contractor intended to do. The Respondents did not identify any deficiencies in it other than that it did not refer to the roof. In the event, the work to the roof described by Mr Murphy, namely using mastic to seal the flashings, was minimal and he included it without any change to his price.

30. The Respondents identified that Bramach Builders intended to use three coats of paint whereas paragraph 3 of the Fifth Schedule to the lease referred to only two. The principal of the firm, Mr Peter Murphy, explained that he used two full coats and then a third only on and to the extent that areas needed additional patching.

31. The problem with the Respondents' submission is that the reference to two coats in the lease is a minimum, not a maximum. Moreover, there is a separate obligation to decorate in paragraph 1 of the Fifth Schedule which has no minimum or maximum. For both paragraphs, the upper limit to the number of coats of paint is provided by the requirement of reasonableness. The Tribunal is satisfied that the specification for three coats in this instance was reasonable.

32. The Respondents made a generalised allegation that work was undertaken exclusively for the benefit of the Applicant's flat. Of course, a substantial part of the works was only to the exterior of flat 4B but that is irrelevant to payability. It is in the nature of leasehold premises that lessees are commonly obliged to contribute to the cost of works to parts of the building from which they derive little or no benefit. If that is what their lease says, then that is their obligation. They freely entered into the contract and are bound by it. The other side of the coin is that the Applicant was obliged to meet 60% of the cost of works which exclusively benefited the exterior of the Respondents' flat.

33. The Respondents challenged the authenticity of the contractors' invoices and questioned whether they had been paid. This was a silly challenge which should never have been contemplated. There is no dispute the work was done. Even if payment had yet to be made, there can be no dispute that there would have been a liability to pay in due course. In any event, both the Applicant and Mr Murphy gave credible details of how Bramach Builders had been paid in instalments over the course of the works and the Respondents put forward no evidence whatsoever on the basis of which it could be possible to doubt them.

34. As referred to above, the Respondent questioned whether the scaffolding was needed, at all or for as long as six weeks. It is difficult to see how the Applicant could have ensured a safe working environment for his contractor without it. Further, the Applicant was told that the price did not change for between one and six weeks. The main cost of the scaffolding was striking it at the beginning and end of the hire, not the period of time in between. The Tribunal is satisfied that the cost would not have been less if the scaffolding had been up for a shorter period.

35. The Respondents challenged the standard of the works. Ms Bloore had taken some photos on her phone which appeared to show small patches of paint blistering on some of her window cills and some degraded paint patches on her front door. She said the photos had been taken in October 2015, some 10 months after the works. Mr Murphy was shown

the photos and admitted that the areas in question should not look as they were in the photos so soon after he had painted them.

36. Mr Sherwin pointed out that the photographs only showed small areas of the building compared with the areas covered by the entire works. Based on the Tribunal's knowledge and experience, remedying the patches on the cills might cost around £100 but also the entire contract was extremely cheap. The Applicant mentioned in the evidence that he thought the contract was too cheap and he would have preferred more extensive and expensive works but that he feared it would be too much trouble getting a more expensive programme past both the Respondents and a Tribunal.

37. The Respondents' photos are few, covering only a small part of the work, and not of the highest quality. The Applicant has not observed any such problems himself, despite living at the property. The Tribunal accepts that the patches identified do indicate poor quality work but is not satisfied that they are sufficient to doubt the quality of the entire contract. Moreover, even if the patches identified are as bad as they seem, the contract is so cheap and the patches so small relative to it, that the Tribunal remains satisfied that the total contract price is reasonable.

Costs

38. The Respondents sought an order under section 20C of the Landlord and Tenant Act 1985 that the Applicant's costs of the proceedings in the Tribunal should not be added to the service charge. In the light of the above findings, the Tribunal sees no basis for making such an order. The Respondents have failed in all their submissions. Moreover, if they had taken a more reasonable approach to the matters in dispute, the proceedings would have been more limited, if not settled by payment of the sum due.

39. The Applicant sought interest and costs under the lease. Those are matters for the county court and/or for separate proceedings, not for this Tribunal.

40. The Applicant also sought costs under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 on the basis that the Respondents had acted unreasonably in bringing their application and in defending the proceedings. Mr Sherwin particularly pointed to the insinuations in cross-examination, unsupported by any evidence or even clearly detailed allegations, that the Applicant had lied or misled deliberately.

41. As already described above, the Tribunal was unimpressed with the Respondents' case. Ms Bloore seemed to think she could rely on her assertions about the Applicant's conduct, as if her word by itself constituted sufficient evidence. It does not and cannot. Extraordinary claims require extraordinary proof, not mere assertion. Further, it is difficult to understand why the Respondents resisted this case so

strenuously given the legal costs when compared with the fact that using their own nominated contractor's quote would have resulted in a higher service charge, not a lower one.

42. Having said that, there was evidence to support the allegation that at least some the works had been poorly carried out. The test of acting unreasonably is a high one. Having a poor case is not enough by itself to justify an order under rule 13. The likelihood is that the Respondents will be held liable to interest and costs in the county court. In the circumstances, the Tribunal has decided that the Respondents have avoided a rule 13 costs order, albeit only just.

Name: NK Nicol **Date:** 23rd December 2015

Appendix of relevant legislation

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 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.

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.