11284

FIRST-TIER TRIBUNAL

PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BE/LSC/2015/0341**
Property	:	**62 Crane House, Pelican Estate, London SE15 5NG**
Applicant	:	**Ms L. Nyaga (Leaseholder)**
Representative	:	**In person**
Respondent	:	**London Borough of Southwark**
Representative	:	**Ms C. Dowding; Enforcement Officer, Southwark**
Type of Application	:	**Service Charges (Major Works) – Section 27A and 20C Landlord & Tenant Act 1985**
Tribunal Members	:	**Judge Lancelot Robson Mr M. C. Taylor FRICS Ms S. Wilby**
Date and venue of Hearing	:	**19th November 2015 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**7th December 2015**

DECISION

Decision Summary

The Tribunal decided:

(1) That there was insufficient evidence that the Respondent's contractors had damaged the roof, therefore the costs of the roof repairs were reasonable (as subsequently reduced by negotiation with the contractor);

(2) The costs demanded for repairing the windows of the subject property were reasonable;

(3) The costs of the heating and hot water were reasonable;

(4) The costs of the safety doors and attendant works were reasonable;

(5) The Tribunal made an order under Section 20C of the Landlord and Tenant Act 1985 to limit the Landlord's costs in connection with this application;

(6) The Tribunal did not make an order under Rule 13(1) for reimbursement of the fees charged by the Tribunal

(7) The Tribunal made the other determinations as set out under the various headings in this decision.

The application

1. By an application dated 30th July 2015, the Applicant seeks a determination pursuant to Sections 20, 27A, and 20C of the Landlord and Tenant Act 1985 (the Act), relating to service charges demanded for the service charge year commencing on 1st April 2013 pursuant to a lease (the Lease) dated 9th June 2003.

2. A case management conference was held on 25th August 2015 at which the Tribunal identified the following issues in dispute;
   a) the cost of roof repairs which the Applicant contended were the result of damage by contractors, (which should have been covered by insurance)
   b) the cost of specific invoices for window repairs
   c) the cost of heating and hot water, which was unreasonably high
   d) whether the final account in respect of fire safety works had been correctly calculated, (elaborated later to include the reasonableness of those costs relating to safety doors and professional fees)
   e) whether orders under Section 20C of the Act, or under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 should be made

3. Extracts of the relevant legislation are contained in the Appendix to this decision.

Hearing

4. The Applicant made written submissions in the original application, in a Statement dated 24th September 2015 and her Reply dated 25th October 2015. The Respondent made submissions in its statement of case dated 16th October 2015. The Applicant, a chartered surveyor, submitted her own survey report dated 6th November 2015. The Respondent relied on statements of fact from Ms A Wallington, Mr C. Ayton, Mr P. Skelly, Ms A. Blackburn, Mr J. Hall, Ms D. Lupulesc, and Mr J. Boas. The Applicant, Mr Hall, Ms Blackburn, Mr Skelly, and Ms Lupulesc gave oral evidence and were examined on their statements. The Tribunal has summarised the parties' submissions on each of the items noted in paragraph 2 above, with the Tribunal's findings and decision immediately following those submissions.

5. The Applicant who is a quantity surveyor of some years standing, and qualified as an MRICS, submitted a surveyor's report prepared by herself dated 6th November 2015, and oral submissions at the hearing generally following her report.

Roof repairs

6. The Applicant stated that in 2012 when insulation works were being carried out to the block walls she had observed that her satellite TV aerial located on the side of the building stopped working while contractors were abseiling down the building to certain points to inject the insulation. The contractors carried out a temporary repair at her request. The Applicant reported the matter to the site manager and the Respondent, but no action was taken. Some months later the Applicant noticed small bubbles forming on the (internal) ceiling finish in her (top floor) property which, in her view, was directly below the area of the roof the contractors must have used to anchor their abseiling ropes. The water damage increased in size, so she contacted the Respondent's repair team in June 2013. After being contacted by the resident of No 61 on several occasions, the repair team carried out repairs to the roof and the internal ceiling of No 61 in July 2013. In the Applicant's professional opinion the damage to the ceiling finish had resulted from a leak in the roof. Southwark failed to repair her ceiling, and she was informed that the repairs could only be done under insurance, as she was a leaseholder. She contacted the insurer but both the insurer and the Respondent eventually declined to do the work and she had to do it herself, as no contractor was willing to quote and seek payment from the Respondent. Recently she had noticed that the repaired area was apparently suffering further damage.

7. The Applicant submitted that the roof repairs were the result of damage done to the roof covering by the abseiling contractors, and these sums should not be paid from the service charge account. Further, the Respondent should compensate her for the work she had had to do her ceiling.

8. At the hearing, the Applicant gave evidence that the position of the abseiling ropes she saw, indicated that the ropes had been fixed to the building on the flat roof area immediately above Nos 61 and 62 and submitted that the contractors

must have damaged the roof covering at that point. She agreed that she had not been able to inspect the roof area herself.

9. The Respondent submitted that any external aerials needed the Respondent's permission, but such items did not become the property of the Respondent, they belonged to either the service provider or the leaseholder. Any complaint should have been made to the contractor or the service provider. The Respondent had heard nothing further from the Applicant since 2012 relating to the satellite dish. Relating to damage to the structure of the roof, neither the contractor, Avalon, nor the residents had reported any damage at the time the insulation works was carried out, nor had the Respondent received a letter from the Applicant in reply to its letter of 15th March 2013 (copied at p.22 of the Application) requesting any defects be reported prior to the end of the defects period. The plant room on the roof had securing eyes for the ropes, and these then went across the roof and over the parapet. There was thus no need to secure the ropes to any other part of the roof structure. Avalon had provided a letter dated 8th October 2015 from a Director, Mr D. Peacock, confirming the procedure which would have been used, and that the work had been overseen by POD Partnership. The individuals doing the work in 2012 were now no longer employed due to the downturn in the industry.

10. The Respondent considered that the burden of proof relating to the damage lay with the Applicant. However in its Statement of Case it confirmed that the four Work Orders in dispute had been the subject of a renegotiation with Mears, and the costs had been reduced from £5,187.17 to £3,865.57. This renegotiation stemmed from other issues with Mears, relating to ongoing reviews of prices under the contract, where Mears had not provided monthly valuations of work done in a timely manner, nor other satisfactory evidence to support its invoices. The Respondent had decided not to pay certain sums, resulting in the reduction noted above. The renegotiated prices were not yet final, but on completion of this process the Respondent expected to make the necessary credits to Crane House or individual leaseholders accordingly, very soon.

11. Ms Blackburn, Lead Designer for the Respondent, gave evidence in her witness statement dated 6th November 2015 and confirmed that from the Respondent's records no major works had been carried out on this roof for at least 12 years. A flat roof of this nature should have a life span of 30 – 50 years if correctly maintained. In her statement she stated that she had been unable to inspect the roof, but at the hearing gave evidence that she had inspected the roof the day prior to the hearing. The flat roof covering was asphalt constructed by using a "felt torched-on" system. It was not in good condition. There were cable trays lying on the roof, (but not fixed). The central heating ducting was in very poor condition. She had seen nothing attached through the roof. In answer to questions she confirmed there were securing eyes attached to the plant room. There were guide eyes through the parapet, but these were not intended for attaching ropes. She had not noticed the telephone mast on the roof, although Ms Nyaga pointed it out to her on a photograph of the building. She stated that the roof needed further inspection. There were no satellite dishes on the roof; they were attached to the side of the building. She thought the roof covering was probably about 40 years old (by inspection) but agreed that the building was about 50 years old. The roof covering was generally crazed, and was at the end of

its useful life. There was no indication that the roof had been renewed, apart from the repairs above Nos 61 and 62. There were cable trays in that area, but they did not appear to have been lifted to do the repairs.

12. The Tribunal considered the evidence and submissions. The Tribunal noted that the Lease (which was not in dispute) demised the internal plaster and ceiling to the lessee, but the roof structure and external coating was retained by the Respondent. The Tribunal considered that there was insufficient evidence of the damage alleged by the Applicant. Ms Blackburn's evidence was that the roof covering was generally very old and needed replacement. The Tribunal decided that, on balance, it was reasonable for the Respondent to charge the cost of the roof repairs above Nos 61 and 62 to the service charge. The Applicant had not challenged the cost of the work, only whether it was the result of damage done by the contractor, which should have been repaired at the contractor's or its insurer's cost. There was some doubt as to whether the repairs had been successful, but that was a different issue which might result in another application. The Applicant had apparently also been given inaccurate information by members of the Respondent's staff about the responsibility for the cost of, and the procedure for dealing with the consequential damage to her ceiling. Again however, this was a separate issue, which the parties are still able to address, and might form the basis of a set-off application if the matter cannot be agreed. The Tribunal did not consider that the consequential damage issue had been put to it or answered in this application, and there was some evidence of further ongoing damage. That issue needed further specific consideration and investigation before properly being pleaded before the Tribunal or the Court.

13. In the light of the Respondent's submission above relating to the renegotiation of the price of the works, the Tribunal confirms that it has found that the reduced sum of £3,865.57 for this work to be reasonable, and is based on an estimate. If the finally agreed figure is different, the parties may make a further application if the figure cannot be agreed.

Window repairs

14. The Applicant gave evidence that her kitchen window was a tilt and turn window. In 2013 she opened the window, but when attempting to close it the hinge broke and it stuck in the open position. She contacted the Repairs Team from Mears who attended. The contractors closed the window by attaching a suction pump to it and pulling it shut as a temporary measure, but informed her that the hinge could not be repaired as the parts were no longer available. She objected but the contractor insisted that nothing else could be done and required her to sign a job sheet confirming that the contractor had attended. When the matter was raised with Southwark she was advised that it was an insurance matter. She again objected as the Lease cast the responsibility for repairing the windows on the Respondent. The insurance company eventually formally declined to fund the repair. Finally, Southwark sent a repairs contractor back to finish the repair in 2015. The contractor repaired the hinge, but not the rubber seal which was loose.

15. The Applicant submitted that the work had been duplicated, and that the cost of the three call-outs in 2013 of £112 (under named Work Orders) should be removed from the service charge, as the work had not been completed. She disputed that the photographs produced by the Respondent relating to the work

showed the work was complete. The window was shown shut and, in particular the defective seal could not be seen.

16. The Respondent called Mr Hall to be examined on his statement and give oral evidence. He gave evidence that the first Work Order concerned was 6108377/1 and cost £35.30. A copy was produced which showed that the contractor responded to a report that the window seal required repair. The contractor had provided before and after photographs showing that the repair had been completed. The work ticket showed that time and date of the repair and the tenant's signature showing that the work had been completed. The second Work Order 5801277/1 dated 05/08/13 cost £38.69 and related to a hinge repair. A copy was produced with similar details, and again the Applicant's signature confirming the work had been completed. The third Work Order dated 02/07/2013 cost £38.69. It related to another property within Crane House. The Respondent confirmed at the hearing that under the works contract concerned, the cost to it of two visits relating to the same item was the same as two visits relating to different items.

17. The Tribunal considered the evidence and submissions. At the hearing there had been a discussion between the parties. The Applicant had considered that she was obliged to sign the Job Tickets if the contractors had turned up. The Respondent's staff stated that there was no obligation on a leaseholder to sign the ticket at all. The Applicant also noted that the Job Ticket made no provision for confirming that further work was required, which she considered was a necessary provision, otherwise the job would be closed. The Respondent's staff stated that if a contractor attended and carried out work, whether or not the job had been finally completed, it was entitled to payment. It was accepted that the Applicant's point on the need for a provision that further work was required, had some validity.

18. The Tribunal decided that if some item of work had been completed then the relevant call-out charges in dispute were reasonable and payable under the service charge, even if the work done did not complete the work required. It appeared to the Tribunal that it would be unreasonable to expect a contractor to be prepared for each and every circumstance it might find. It could only do what was reasonable in the short time available to it, and that might well include a decision that no repair could be done at all with the parts and time available to it, and make only a report and request to the client for further instructions. The Tribunal decided that the two relevant call-outs in this case appeared reasonable and done at a reasonable cost.

Heating/Hot water costs

19. The Applicant submitted that these costs were excessive in the service charge year 2013/14. The actual cost had increased from the estimated amount of £999.94 (apparently based on previous years' consumption) to £1,534.99. The Applicant would have expected to see a reduction due to economy and energy efficiency measures taken from 2012 onwards. The boiler serving Crane House was inefficient and possibly well past the end of its economic life. It broke down frequently and the Applicant had to use extra electricity to heat the flat. The Respondent was obliged to comply with the Heat Network (Metering and Billing) Regulations 2014 to improve the efficiency of such systems. Additionally the

Respondent had admitted that the charges made had been calculated by reference to the costs of bothCrane House and Heron House, rather than Crane House alone, and that it would recalculate the cost by reference to the Crane House alone, but to date it had produced no such recalculation. In answer to questions, the Applicant stated that she considered that the reasonable heating costs payable should be not more than £770 per annum, based on the "Which" article on District Heating systems "Turning Up The Heat: Getting a fair deal for District Heating users" dated March 2015.

20. The Respondent called Ms Lupulesc to be examined on her statement and give oral evidence. Ms Lupulesc stated that the charges for gas were made on the basis of gas actually used. The final account charge for gas in 2013/2014 related to an 18 month period, rather than a 12 month period, and the main element of the charge related to fuel. Subsequent investigations after the application had been made revealed that Crane House and Heron House were supplied from two separate boiler houses, but these were both on one meter. Ms Dowding submitted that the "Which" article relied upon by the Applicant only took into account heating costs, but did not include maintenance. The Respondent had no objection to recalculating the charges by reference to the costs of Crane House alone, although due to an error in the original calculation in the apportionment of maintenance costs it appeared that the cost to the Applicant would in fact be higher than the cost previously billed, i.e. £1,583.65 rather than £1,534.99. With the consequent small increase in the administration charge, the total final service charge demanded for the year 2013/14 would be £3,124.57. It had put in hand a feasibility study in compliance with the 2014 Regulations, but this was only due in December 2016, 31st December 2016, being the relevant date for compliance with the 2014 Regulations..

21. The Tribunal considered the evidence and submissions. The "Which" article relied upon by the Applicant was interesting and informative, but dealt with averages and could not be reasonably used as a comparable, which the Applicant apparently accepted in answers to questions. The Respondent had taken action to use the correct basis for calculating the heating costs in response to this application. The costs of the heating system apparently seemed to reflect its age, and the fact that the gas being charged for related to an 18 month period, apparently due to delayed billing by the supplier (as shown in the bundle), rather than the Respondent. The Tribunal decided that the (revised) heating and hot water charges were reasonable, and reasonably incurred.

Fire Safety works (Loan also discussed)

22. The Applicant submitted that these works were carried out pursuant to a Section 20 Notice, but at the final account stage the tendered prices for some items, (notably fire doors) were substituted with much higher rates. The final account for the work was settled between the contractor and the consultants at £395,476.16, which included adjusted rates for which there was no contractual basis. For example there was no evidence of any Instruction from the Employer to the Contractor relating to this matter. The leaseholders had been recharged for this amount which was incorrect. In the Applicant's view, the correct final account based on tendered rates should total £321,665.84. For the Applicant's contribution, her account should be reduced from £8,391.39 to £4,544.23.

Further the professional fees were too high. As a result, the loan taken out to pay for the works by the Applicant with the Respondent should be reduced and interest already paid on the excess should be refunded. The Applicant looked to the Tribunal to deal with this item.

23. Mr Skelly, giving evidence for the Respondent, stated in his witness statement and oral examination that the tendering process had been completed in 2010 and work started in 2011. There were 3 items which showed increased prices, the largest two of which related to fire doors. Others had been reduced. The main reason for the change in the increased prices related to two types of fire doors specified in the Tender. This was the result of serious safety concerns after a serious fire in another block belonging to the Respondent during the execution of the work on this block. It had been discovered that the fire resistance specification for the doors in this contract was inadequate. The Respondent had therefore adopted a much more stringent specification to comply with their safety responsibilities towards residents, which only two qualified door manufacturers could reach. The new specification approximately doubled the price of the relevant doors, as noted by the Applicant.

24. Another problem for the Respondent had been that Morrisons, the successful tenderer, had gone into liquidation after the work was completed, but before expiry of the defects period. However, taking into account the forfeiture of the retention, and underspends on other Provisional Costs items, the total price of the contract had in fact fallen, with a resultant saving to the Applicant of about 20%. Copies of the relevant Contract Administrator's Instructions for the new doors were provided at the hearing. Answering questions, Mr Skelly considered that the change in the contract prices for the doors was within acceptable limits and did not invalidate the tender process. The cost of retendering for the doors (as suggested by the Applicant) would be uneconomic. In the view of the Respondent, the original specification for the doors would now be illegal, although the matter was complex.

25. The Respondent submitted that the professional fees were not excessive, when compared with the original tender price. The fees were a fixed price, so the percentage cost, when measured against the reduced price of the contract, would appear to have increased. However the actual fee had remained the same.

26. The Respondent considered the loan issue was not within the Tribunal's jurisdiction, but confirmed to the Tribunal that it would credit the Applicant's account with any sum found by the Tribunal to be overpaid, and refund the interest paid on that sum.

27. The Tribunal considered the evidence and submissions. The evidence showed that the Respondent was in an invidious position relating both to the doors and the problems with the contractor. Doors conforming to the original specification had been found wanting due to an event which post-dated start of the contract. The doors which had the necessary testing and certification were much more expensive. The measures adopted by the Respondent did not seem unreasonable, particularly when, in the end, they resulted in a reduction in the price of the overall contract. The Tribunal did not consider it was appropriate for the Applicant to effectively "cherry-pick" price increases within the overall cost of the

contract, and ignore reductions in the circumstances which had occurred. Retendering costs and delay would have been very great in the Tribunal's view. The Tribunal decided that the major works relating to Fire Safety were reasonably done, and at a reasonable cost.

28. The Tribunal decided that the professional fees were also reasonable in the circumstances of this case. They were contractually fixed. Also, it seemed to the Tribunal that a lot of additional time and effort by the professionals concerned would have gone into completing this contract for no extra remuneration.

29. The Tribunal agreed that the loan issues raised by the Applicant were outside its jurisdiction under Section 27A. Nevertheless it noted that the Respondent's open statement of intent relating to this matter appeared to be a satisfactory way of dealing with any overpayments.

Costs - Section 20C and Rule 13

30. The Respondent volunteered at the hearing that it would not seek to add its costs in connection with this application to the service charge. Based on this concession, the Tribunal made an order under Section 20C that none of the costs incurred by the Respondent in connection with this application shall be considered relevant costs to be added to the service charge of this property.

31. The Applicant applied under Rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 for reimbursement of her application and hearing fees paid to the Tribunal. The Respondent resisted this application.

32. The Tribunal noted that its powers under Rule 13 are discretionary. The Tribunal also noted that the Respondent had been largely successful in its defence of the items in dispute, albeit with some concessions as a result of this application. On balance, the Tribunal decided to make NO order under Rule 13.

Lancelot Robson **7th December 2015**

Appendix

Landlord & 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 leasehold valuation 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 a leasehold valuation tribunal;
   (b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation 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.

The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013

Rules 13(1) - (3)

13.-(1) The Tribunal may make an order in respect of costs only-

(a) under Section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

(b) if a person has acted unreasonably in bringing, defending, or conducting proceedings in-

(i) an agricultural land and drainage case,

(ii) a residential property case, or

(iii) a leasehold case; or

(c) in a land registration case.

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on application or on its own initiative.

(4) – (9)...
