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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AH/LSC/2016/0214**
Property	:	**Flats 2 & 3, 99 Outram Road, Croydon CR0 6XJ**
Applicant	:	**Southern Land Securities Limited**
Representative	:	**Ms K Evans, Accounts Manager at Hamilton King Management (Applicant's managing agents)**
Respondent	:	**Mr M Heard**
Representative	:	**In person (by telephone)**
Type of Application	:	**For the determination of the liability to pay a service charge**
Tribunal Members	:	**Judge P Korn** **Mrs E Flint DMS FRICS IRRV**
Date and venue of Hearing	:	**31st August 2016 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**8th September 2016**

DECISION

Decision of the Tribunal

(1) The Respondent's share of the cost of the roof and lintel replacement works is payable in full. The proportion payable by the Respondent is 18% per flat and 36% in total, and therefore the amount payable by the Respondent in aggregate is £3,133.18.

(2) No cost applications have been made.

Introduction

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 as to the reasonableness and payability of a specific service charge which it has charged to the Respondent.

2. The charge is for the Respondent's share of roof and lintel replacement works. The total cost was £8,703.25, of which the Respondent has been charged £3,133.18, this being 18% per flat of the total cost (36% in aggregate for the Respondent).

3. The relevant statutory provisions are set out in the Appendix to this decision. The lease of Flat 2 is dated 29th March 1988 and was originally made between Exo Metochi Estates Limited (1) and A.J. Bales & M.K. Lovell (2), and the lease of Flat 3 is dated 18th March 1988 and was originally made between Exo Metochi Estates Limited (1) and L.J. Farrow & F.E. Brown (2). The Applicant is the current landlord and the Respondent is the current leaseholder in respect of both flats.

Preliminary points

4. For reasons explained in correspondence the Respondent was unable to attend the hearing in person. Taking into account the specific circumstances, and with the Applicant's representative's agreement, the Tribunal decided to allow the Respondent to join the hearing by telephone to make his oral submissions and to hear the Applicant's representative's summary of her own submissions.

5. The dispute between the parties in this case essentially comes down to the question of whether the repair of this roof falls within the service charge.

Applicant's case

6. The Applicant's position is that the roof works have been carried and that under the service charge provisions of each of the Respondent's leases the Respondent is obliged to pay 18% of the cost of those works.

7. The background to the carrying out of the works is that the roof over Flat 1 started leaking in 2014 and the Applicant's managing agents sent a contractor to investigate. It was decided that the roof needed replacing, section 20 notices were served on leaseholders and the work was subsequently carried out.

8. The roof works were billed as part of the service charge for the period 30th September 2014 to 29th September 2015. In response to the Respondent receiving a demand for payment, the Respondent's solicitors wrote to the Applicant's managing agents on 23rd October 2014 disputing his liability to pay any part of the cost of these works. Their argument was that the Respondent's leases were granted in March 1988 whereas planning permission was granted for an extension to be built to Flat 1 on 5th December 1988. The conclusion drawn by the Respondent's solicitors was that the extension was built after the Respondent's leases were entered into, that the roof works in question relate to the extension referred to in the planning permission, and therefore that the Respondent was not liable to contribute towards the cost of the works.

9. There was subsequent correspondence between the Respondent's solicitors and the Applicant's managing agents, but the Applicant took the view that the Respondent's solicitors had failed to make their case.

10. In the Applicant's submission, the Respondent's objection relies on the planning permission referred to above but the Applicant does not accept that the planning permission relates to the structure in respect of which the roof works have been carried out.

11. The Applicant further notes that the lease of Flat 1 (copy in the hearing bundle) does not include the roof, and the lease was not varied to include any new extension.

12. At the hearing Ms Evans referred the Tribunal to relevant photographs, plans and correspondence and to the planning permission. She also made the point that according to her interpretation of the plans the footprint of the lease plan for Flat 1 was the same as the title plan. In answer to a question from the Tribunal she said that no issues had been raised in relation to this roof in the 18 years during which the Applicant had been the freeholder.

Respondent's response

13. The Respondent states that his leases were completed several months before the owner of Flat 1 applied for planning permission to build "the disputed extension". Therefore, in his submission, the cost of works to the roof of that extension should not have been charged to him as the extension did not exist when his lease was granted.

14. The previous owner of Flat 1, Mr Keith Wilkins, applied for planning permission and arranged for the construction of the disputed extension without first seeking the then freeholder's permission, and therefore the leaseholder of Flat 1 must be solely responsible for the cost of the works. The Respondent believes that the freeholder later imposed sanctions on Mr Wilkins for his unauthorised actions by increasing his ground rent.

15. In the Respondent's view, all of the leases should have been updated to reflect the existence of the new extension as soon as the freeholder found out about it, in order for all leaseholders to share responsibility for its upkeep, but this did not happen. Furthermore, the leaseholder of Flat 1 is the sole beneficiary of the extension and therefore should bear the cost of its maintenance for that reason as well.

16. The Respondent also states that in 2004 the Applicant's managing agents tried to charge all leaseholders for basement damp repairs in Flat 1 but then withdrew the relevant demands. The Respondent submits that this set a precedent for how to deal with the cost of works relating to Flat 1. In addition, the Respondent states that according to the leases all monies required for major works must be paid before works begin.

17. At the hearing the Respondent (by telephone) reiterated some of the above points. He also said that he had been the leaseholder of Flats 2 & 3 since 2000.

Tribunal's analysis and determination

18. This case relates to a single item, namely the cost of roof and lintel replacement works in respect of the roof over Flat 1. Although the application has been made by the Applicant, it is the Respondent who is refusing to pay a share of the cost of these works and therefore it is relevant to establish the basis for his objections to paying towards the cost of these works.

19. His objections are in the main based on the proposition that the roof in question was – together with the structure of which it forms part – constructed after the Respondent's leases were entered into. The Respondent does not object to the cost or the quality of the works and nor does he argue that the Applicant failed to go through a proper consultation process or that any other technical points arise which might cause the cost to be irrecoverable.

20. The Respondent submits that the then leasehold owner of Flat 1 did not merely add something to his flat within the existing boundaries of Flat 1 as shown on the Flat 1 lease plan but instead erected a new structure outside the boundaries of the demise.

21. On comparing the original Flat 1 lease plan with the Land Registry title plan for Flat 1 in the hearing bundle, the boundaries of Flat 1 on these two plans look very similar. Whilst the title plan is not dated, it is clear from information on the plan that it is no older than 2013. Therefore, if the leaseholder of Flat 1 had lawfully built on land adjacent to the original Flat 1 this should have been reflected by a variation of the lease (or a surrender and re-grant) which would have been registered at the Land Registry and the new boundaries shown on the title plan.

22. The Respondent submits that the extension was built without the then freeholder's knowledge or consent. The extension to which he refers is one that he suggests was built in 1989. Whilst we accept that it is possible that a leaseholder could build such a structure without the knowledge of the freeholder, we consider it unlikely. One would have thought that the freeholder might make periodic visits to the property and/or that someone (perhaps another leaseholder) might have complained or at least alerted the freeholder to the fact that such significant works were taking place. In any event, the claim is that the works took place 27 years ago, this being 11 years prior to the Respondent acquiring the leases of Flats 2 & 3, and the Respondent has no personal knowledge of the position. There is no evidence in front of the Tribunal to indicate that he knew the then freeholder or that he knew the then leaseholder of Flat 1 at the time or that he has spoken to either of them since. There is no witness evidence in front of the Tribunal from anyone who lived in the building at the relevant time, or from anyone who owned a flat in the building at the relevant time or from anyone who had any other involvement with the building at the relevant time.

23. As regards the suggestion that the increase in the ground rent for Flat 1 was a sanction to reflect the unauthorised nature of the extension, this seems to be mere speculation as no evidence has been presented to support this assertion. On the contrary, there are two copy Deeds of Variation in the hearing bundle dated 24th March 2000 and 30th April 2004 respectively, one dealing with unauthorised replacement of windows and the other dealing with a dispute as to whether the cellar is included in Flat 1's title. In both cases the ground rent was increased and there is nothing to indicate that the same happened in relation to the alleged extension referred to by the Respondent. Furthermore, if there had been an unauthorised extension and if the then freeholder had agreed to regularise the position this would be reflected on the title plan and the Respondent would able to show the Tribunal the position on the title register.

24. As regards the copy planning permission itself, in correspondence the Applicant's managing agents claimed at one point that it related to a mere change of use, but we do not accept this as it refers to "erection of ground floor side extension to form bedroom". However, only a copy of the bare planning permission has been provided; there is no accompanying plan and nor have we been provided with a copy of the

planning application. The mere fact that planning permission was granted does not by itself show that the planning permission was implemented. Even if the planning permission was implemented it is unclear exactly what was built, where it was built, whether the planning permission was retrospective and whether it was a wholly new structure or replaced an existing structure.

25. We also note that the hearing bundle contains a copy of a lease plan for Flat 3 signed on behalf of both parties to the lease. That plan seems to show that as at 18th March 1988 (the date of the Flat 3 lease) there was no break in the line of buildings from one end to the other. The Respondent's position appears to be that there was previously a gap between the garage and Flat 1 onto which the then leaseholder of Flat 1 erected a new structure, but that is not supported by this plan.

26. As regards the wording of the leases, in both the Flat 2 and Flat 3 leases the tenant (leaseholder) covenants in clause 2(C)(i) *"to contribute and pay 18% of the total costs expenses outgoings and matters mentioned in the Ninth Schedule hereto"*. The Ninth Schedule lists the items in respect of which a service charge is payable, including *"The expenses of maintaining repairing redecorating renewing ... (a) The main structure and in particular the foundations external walls roofs and gutters of the building"*.

27. In the Flat 1 lease, the tenant covenants in paragraph 6 of the Sixth Schedule *"... to keep in good and substantial repair and condition ... the demised premises ..."*, and the "demised premises" are defined as *"ALL THAT FLAT on the first floor of the Building ... TOGETHER WITH the garden and bin store..."*. The definition of "Flat" in the Flat 1 lease is quite long but it includes *"the plaster or other covering and skirting boards on the inner side of all walls enclosing the Flat" and "the plaster or other coverings of the ceilings (but no other part of the ceilings)"*. The definition of a Flat in the Flat 1 lease is therefore confined to the interior of the flat and does not include the roof (or the structure or the foundations).

28. In our view, therefore, the Flat 1 lease does not place on the tenant (leaseholder) of Flat 1 responsibility for maintenance of the roof over Flat 1, as the tenant is only responsible for the "demised premises" which in turn is defined by reference to the definition of "Flat". The tenant (leaseholder) of Flats 2 & 3 is responsible for contributing towards the cost of maintaining, repairing, redecorating and renewing the roofs of the building (including the roof over Flat 1) through the service charge by virtue of the provisions of clause 2(C)(i) and the Ninth Schedule to each of the Flat 2 and Flat 3 leases quoted above. The Respondent has not sought to argue that the works carried out do not fall within the words *"maintaining repairing redecorating renewing"*.

29. As regards the basement damp repairs referred to by the Respondent, we have not been given much by way of detail but in any event it does not follow that the other leaseholders should be exempt from contributing towards the cost of roof repairs simply because it was agreed 12 years ago – for whatever reason – that they did not have to contribute towards the cost of certain basement damp repairs. As regards the Respondent's assertion that according to the leases all monies required for major works must be paid before works begin, he has not quoted a specific clause and this assertion does not appear to be borne out by the wording of the leases themselves.

30. For all of the above reasons we consider that the Respondent is liable to contribute the relevant service charge percentage (18% per lease) towards the costs incurred by Applicant in carrying out the works which are the subject of this application.

Cost Applications

31. No cost applications have been made.

Name: Judge P Korn **Date:** 8th September 2016

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

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 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.