12496

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AN/LSC/2017/0354**
Property	:	**Flat 10 Market Studios, 43a Goldhawk Road, London W12 8QP**
Applicant	:	**Trustees of Boroplex Holdings Pension Scheme (Landlord)**
Representatives	:	**Mr S Green (Adepto Real Estate Advisers)(Managing Agents)**
Respondent	:	**Ms N. Miklin**
Representative	:	**In person**
Type of application	:	**Reasonableness of and liability to pay service charges – Section 27A Landlord and Tenant Act 1985**
Tribunal members	:	**Judge Lancelot Robson** **Mr W R Shaw FRICS**
Date and venue of hearing	:	**15th November 2017** **10 Alfred Place, London WC1E 7LR**
Date of decision	:	**29th November 2017**

DECISION

Decisions of the Tribunal

The Tribunal determines that:

(1) The service charges demanded by the Applicant for the service charge years 2013, 2014, 2015 and 2016 were properly demanded and payable. The outstanding balance is to be paid by the Respondent to the Applicant on or before 27th December 2017.

(2) The estimated service charge demanded for the service charge year 2017 was also properly demanded and payable, and is to be paid by the same date.

(3) The Tribunal made the detailed decisions noted below.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 (the 1985 Act) as to the amount of service charges payable by the Applicant in respect of the service charge years commencing on 1st January 2013, 2014, 2015, and 2016, and the estimated service charge for the year commencing on 1st January 2017 under a lease (the Lease) dated 8th October 1982.

2. Extracts of the relevant legal provisions are set out in the Appendix to this decision.

Background

3. The property is a one bedroomed flat in a 4 storey block of thirteen flats above commercial premises. The Application was dated 13th September 2017. Directions were issued by the Tribunal on 21st September 2017. The parties made written submissions, although they had made multiple submissions, beyond the Directions given.

Agreed matters

4. The Respondent confirmed that she was not disputing the general service charges for the years in question, but only those relating to the Major Works carried out in 2014. She also agreed the figures for service charge demanded and payments made in the period, as set out in the Application, were accurate.

Matters Remaining in Dispute

5. For the Applicant, Mr Green made oral submissions following the Applicant's statements of case dated 12th October 2017 and 26th October 2017. The Tribunal notes that the Statement of 26th October 2017 was not in fact permitted by the Directions, but the Applicant presumably made the same mistake as the Respondent (see below) and misunderstood the effect of Direction. The net result is that both parties have made two submissions when in fact only one was necessary. This has considerably complicated the Tribunal's task, as many additional matters which the Tribunal cannot decide in this application appear to have been added.

6. At the request of the Tribunal at the hearing, Mr Green also outlined the relevant service charge provisions, and submitted that the Lease gave power to carry out the works done (some of which was described as improvements). He referred to clauses 2(13), 2(29), 3(2), 3(3) - 3(6) in support of this point. The Respondent stated at the hearing that she had no legal knowledge, and would rely on the Tribunal's interpretation of the Lease. The Tribunal indicated to the parties that it was satisfied that the Lease contained the necessary powers to charge for the work in dispute.

Applicant's case

7. Mr Green submitted that the work was done as the result of advice received following a survey report in 2012. The notice of intention pursuant to Section 20 of the Landlord and Tenant Act 1985 was dated 24th July 2013, and the notice of estimates was dated 11th November 2013. The Applicant considered the notices complied with statute and were properly served. No comments had been received from the leaseholders within the time limits set out in the notices. After the time limit had expired on 14th December 2013, the Respondent had raised certain issues. A meeting had been held to discuss the work on 31st January 2014, which had been attended by the supervising surveyor, Mr Jim Whiteman. A number of queries were raised at the meeting. The notes of the meeting were circulated to all leaseholders.

8. The lowest tender received was from CFES Ltd. The contract sum was £24,612.91 plus VAT. This was accepted by the Applicant on 2nd February 2014. Work commenced on 24th February 2014. The final certificate for payment was issued on 28th March 2014, noting the final cost at £24,729.91 plus VAT. During the contract certain items had been deleted from the schedule of work, and others had increased, but the work and cost had been signed off by the supervising surveyor. The Applicant considered that the work had been been reasonably done, and to a reasonable cost and standard.

9. Dealing with points raised in the Respondent's statement of 17th October 2017, Mr Green submitted that the points should have been raised within the Section 20 consultation, and the period for doing so had expired on 14th December 2013 . However the Applicant wished to be transparent about the matters raised.

a) Mediation - the Tribunal decided to exclude this item, since mediation negotiations should not influence its decision.

b) The undisputed balance of the charges demanded should be paid as soon as possible.

c) Cost of fire doors - the fire doors were specified by a chartered surveyor and procured as part of a larger contract. An explanation had also been given at the meeting on 31st January 2014.

d) Service charge concerns of other leaseholders - the emails relied upon by the Respondent had not been brought to the Applicant's attention at the time and no comments were received by the landlord during the Section 20 notice consultation periods.

e) Painted bannisters - the Respondent had misquoted the Schedule of Works; it provided for "the existing stained banisters to be prepared for a gloss paint finish as with upper areas". The bannisters had been painted in white gloss to match the upper floors of the stairwell. At the hearing Mr Green was also of the opinion that all things considered, the gloss paint was a more effective covering, and would last until the next scheduled cyclical redecoration.

f) Vinyl vs Lining paper - the use of lining paper was consistent with the specification. An appropriate lining paper or similar surface preparation had been used prior to decoration. Mr Green was of the opinion that it was a more cost effective covering for areas where damage was likely to occur.

g) Cause of the 2013 leak - this occurred in September 2013 due to water escape behind the tiles in Flat 9. The work was done as part of the Major Works and the cost was recovered in the insurance claim. This was referred to in the Applicant's bundle at p.86 onwards.

h) Leak in 2017 - this item had no relevance to the work in question. However the leak was due to a concealed soil pipe between the first and second floors, which had been difficult to locate. The relevant areas had been repaired and redecorated and there was an ongoing insurance claim.

i) size and description of the flats - the residential leases of the flats split the service charge equally between the 13 flats.

j) Respondent's share of the costs - all figures are quoted gross of VAT as it is not recoverable. The Respondent's calculation assumptions on page 30 of her statement were not applicable.

k) Contingency query - this was answered in the email in the bundle from Mr R. Doubtfire dated 9th November 2017. The contingency sum was used towards the work to cure the 2013 leak, which was reimbursed by the insurance claim

l) Insurance claim for Redecorations - the claim was based on a single quote from CFES attached in the bundle. The cost was £1,496 plus VAT (£1,797). The insurer had not required a second quote. The receipt of the claim money was recorded in the Service Charge accounts for the year ending December 2014, as shown on p.84 of the Applicant's bundle.

m) Underpayment of £34. 54 - the Applicant could not find what this item was and had asked the Respondent to identify it.

Respondent's case

10. The Respondent's submissions were quite difficult to follow. The initial submissions were made on 3rd October 2017, followed by further submissions dated 17th October 2017. Contrary to the Respondent's understanding, paragraph 8 of the Directions of 21st September did not allow a further submission, but the production of the Respondent's bundle. Both submissions were made by reference to paragraphs in other documents. It appeared that fresh matters were raised in the statement of 17th October 2017, but the Tribunal considers that the Applicant had taken the opportunity to deal with these items in its statement of 26th October 2017, and was thus not prejudiced.

11. The Respondent's submissions are summarised below. The Tribunal has followed the Applicant's list of points, as it considered that the numerous points and comments made by the Respondent tended to obscure her own arguments.

a) Mediation - as noted above, the Tribunal decided to exclude this item, since mediation negotiations should not influence its decision.

b) The Respondent was only querying the cost and standard of the Major Works.

c) Cost of fire doors - the Respondent was only querying the costs, not the work. The cost was too high.

d) Service charge concerns of other leaseholders - some other lessees had concerns about the costs as noted in emails in the Respondent's bundle

e) Painted bannisters - the Schedule of Works specified that the existing stained bannisters were to be "stained to match existing". This had not been done. In the Respondent's opinion the painted rails would mark, stain,soil and wear far quicker, and therefore they should have been decorated "like for like".

f) Vinyl vs Lining paper - The previously vinyl paper had been replaced with lining paper and painted. In the Respondent's view the materials used were cheaper and less hard wearing.

g) Cause of the 2013 leak - No information had been given as to the diagnosis.

h) Leak in 2017 - the Respondent wanted to know if there had there been a an investigation into the cause of the leak.

i) size and description of the flats - the two and three bedroomed flats should pay more of the cost of the work. The Applicant's method of apportionment was in error.

j) Respondent's share of the costs - the Applicant had stated that the actual cost of the work had been £28,934 inclusive of VAT. The Respondent considered that the actual cost was only £22,801.30 exclusive of VAT, and produced calculations, which neither the Respondent nor the Tribunal could follow. The Tribunal noted that the problems complained of seemed to be related to the supervising surveyor's costs, the contingency allowed for in the contractor's tender, treatment of the insurance claim received, and how VAT was applied.

k) Contingency query - the contingency sum had apparently been used up in the works, but there was no explanation as to how it had been used.

l) Insurance claim for Redecorations - the amount reclaimed from the insurer seemed too small, the claim for the leak in 2017 was £4,188. The insurer would have replaced the vinyl wallpaper on a like for like basis.

m) Underpayment of £34. 54 - there was an underpayment for the invoice received in July 2017.

12. Generally, the Respondent complained at the hearing that the Applicant's agent failed to answer correspondence, the Section 20 notices had not been received, and much correspondence went missing. She considered that the Applicant should take her instructions when it was spending her money. She believed that they had lied to her about the accounts.

13. At the hearing the Respondent produced a note of her submissions, but much of this note raised further fresh matters. The Applicant attempted to answer some of them, but the Tribunal has excluded these items, as they were produced much too late in the proceedings to be considered.

Decision

14. The Tribunal considered the evidence and the submissions. The Tribunal considered that the following items, which were in effect requests for information only in the Respondent's initial submission, appeared to have been satisfactorily answered by the Applicant; 2013 leak (item 11(g) , 2017 leak (item 11(h), and the contingency sum (item 11k)

15. The Tribunal found that clause 2(29)(a) proviso (ii) of the Lease imposes a service charge contribution on the lessee of this property of one thirteenth of the total annual service charge cost. regardless of its size (disposing of Item 11(i) above). All parties are contractually obliged to abide by that figure, in the absence of any application to vary the Lease.

16. The Tribunal considered that as matter of common sense which is also well settled in this jurisdiction relating to effect of Section 27A, when examining tenders, particularly the lowest tender received, that a lessee is not entitled to trawl through a successful tender after the work has been done and "cherry pick" individual items where costs may be regarded as high. The tender must be considered as a whole. In this case the lowest tender was accepted. (Cost of the tender - Item 11(b)(part), 11(c) and 11(e).

17. The Respondent's argument relating to the inadequacy of the 2013 insurance claim appeared to be that it should have been higher, to allow for vinyl wallpaper instead of lining paper and paint. However, it is also well settled that the person with the obligation to do work (in this case the Applicant) has discretion to decide how that work is carried out (and see the *Ultraworth* case noted below). A reasonable explanation was given as to the landlord's choice by the Applicant, which the Tribunal accepted (items 11 (b)(part), 11(f) and 11(l).

18. The Tribunal considered that the Respondent's calculation of the total cost of the work as explained in her submissions produced at the hearing appeared to be based on remarks made by the supervising surveyor, Mr Wiseman, in answering questions raised at the meeting of 31st January 2014. However at that stage, the figures could only be estimates, as the work had not yet started. It also appears from the evidence and submissions of the Respondent, even at the end of the hearing, that she did not understand the position and responsibilities of the supervising surveyor in a building contract. In summary, the surveyor is an independent professional who (although paid by the customer) authorises and values work done by the contractor. It is in the nature of most building contracts that the specification and tender based upon it can only be an estimate of the work required. Only when the contractor examines a particular item at close quarters (which may have been previously inaccessible or hidden from view) can the true state of such item be discovered. Thus more work or less work may need to be done. In such a case, the supervising surveyor will give instructions, and then value the over or under costs at the end of the work. It is part of the surveyor's duty (as part of his contract) to act fairly and reasonably as between the customer and the contractor. Both parties are bound by his decision. In building contracts of any significant value, it is unlikely that any contractor will give a fixed price, or would only do so with a significant uplift in the price against possible eventualities. The uplift would reflect the increased risk for the contractor, and would normally be significant.

19. In this case, (see pages 86-87 of the Applicant's bundle) the Tribunal found that the surveyor's Certificate for Payment issued at the end of the works dated 28th March 2014 (after a number of under and over costs had been taken into consideration as noted in Mr Doubtfire's email dated 9th November 2017, quoting an earlier email dated

2nd February 2014) stated that the final value of the work was £24,729.91. A 2.5% retention (£618.25) was to be withheld for 12 months. Thus at that time £24,111.66 was payable to the contractor plus VAT at 20% on the sum payable (£4,822.33) so the final total due on 28th March 2014 was £28,933.99. The certificate is contractually conclusive for the parties. At paragraph 27 of the Applicant's statement dated 12th October 2017, it was noted that £3,439 (including VAT) was recovered from the commercial tenants, and £1,496 was recovered from the insurance claim. The balance due from the residential lessees was thus £23,999 (divided by 13); thus £1,846 per unit. The Tribunal prefers the Applicant's submission on this point which tallies with the Certificate for Payment to within a few pence. (This decision deals with Item 11(j)).

20. The Tribunal accepted that the contingency sum had been used up by additional works, which had been certified by the supervising surveyor. As noted above, the supervising surveyor is obliged to act fairly as between the contractor and the client. (Mathematics of the works done in respect of the four items at (11(j)).

21. The Tribunal agreed with the Applicant that the Respondent's figures relating to the underpayment had been insufficiently explained. Also the sum concerned appeared so small as to be insignificant. Therefore the Tribunal declined to make a finding that an underpayment had occurred, and decided that the matter came under the principle of De Minimis (Item 11(m).

22. The Tribunal considered that the root of the problem in this case was that the Respondent had an erroneous view of the landlord's rights and responsibilities, both generally and particularly relating to the Section 20 procedure. There was also the problem of the inaccurate assumptions made by the Respondent in her calculations. In this case the Applicant and its agent dealt with 13 lessees whose views, we heard in this case, were so far apart that some (not the Respondent it should be noted) were prepared to offer blows at the meeting called to discuss the major works. The Applicant's duty imposed by the Lease and the general law of trusts is to act in the best interests of the lessees collectively, often when the lessees have significantly differing views. The landlord's duty under Section 20, is to consult, and then decide on an appropriate course of action, acting reasonably. The Respondent seemed to have unrealistic expectations of the Applicant in that she effectively submitted at the hearing that the landlord should accept her instructions. Section 20 acts as a safeguard for landlords as well as tenants. If the landlord correctly carries out the Section 20 procedure, the lessees have no enforceable right to challenge the landlord's method of carrying out the work so long as it is a reasonable one. Generally it is for the person liable to do the work who chooses the method of doing it (see e.g. *Ultraworth Ltd v General Accident Fire and Life Assurance Corporation plc [2000] L&TR 495*). In this case it was uncontested that neither the Respondent nor any other lessee made observations within the time limits imposed by the Section 20 notices pursuant to Section 20 (which effectively disposed of Item 11(d). The landlord may accept late observations, but is not obliged to do so. In this case the landlord called a meeting, and accepted representations requesting that some doors should not be painted, to keep costs down.

23. Dealing with the Respondent's points at paragraph 12 above, The question of undelivered correspondence was troubling, but the Respondent was only challenging the cost and standard of the Section 20 procedure (see item 11(b) above), not the process of it. It appeared from the evidence that there was some problem with the postal service which had affected both parties, but this is not a matter on which the Tribunal can decide.

24. Although not forming part of its decision, the Tribunal did not agree with the Respondent's view of the Applicant and its agent. The evidence showed that much correspondence from the Respondent was complex and demanding, and even over-demanding on occasions (possibly because she misunderstood the parties' respective rights and responsibilities). The Tribunal considered that in all the circumstances the agent had acted as well as could be expected. There was no evidence before the Tribunal that the Applicant or its agent had lied or had otherwise been dishonest.

Tribunal Judge: Lancelot Robson Dated 29th November 2017

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.