12387

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AY/LSC/2017/0149**
Property	:	**Flat 1, 168 Knights Hill RTM Company**
Applicant	:	**Ms Olga Ward, Director of RTM Company and Lessee of Flat 1.**
Representative	:	**In Person**
Respondent	:	**168 Knights Hill RTM Company**
Representative	:	**Ms Binka, Director of the RTM and Lessee Flat of 2 and Ms Czenczek, Director of the RTM Company and Lessee of Flat 3**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Judge Evis Samupfonda** **Mr Michael Mathews FRICS**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of decision	:	**21.8.2017**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the Applicant's share of the total amount claimed by the Respondent is payable by the Applicant in respect of the service charges for the year 2016/17.

(2) The tribunal makes the determinations as set out under the various headings in this Decision

(3) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985 so that the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

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 2016/17.

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

The hearing

3. The hearing was held on 3 August 2017. The applicant, Ms Ward, Lessee of Flat 1 appeared in person. Ms, Binka, Lessee of Flat 2 and Ms Czenczek, Lessee of Flat 3 represented the RTM Company. All three are directors of the RTM Company.

4. Immediately prior to the hearing the applicant handed in a bundle of documents and requested the tribunal consider them privately in the absence of the parties as they contained confidential matters about her health. The tribunal declined to do so in the interest of justice and transparency. However, the tribunal enquired with the applicant whether any adjustments needed to be made in order to ensure that she was able to continue with the hearing comfortably. The applicant assured the tribunal that adjustments were not necessary.

5. The applicant also made an application under section 20ZA of the Act requesting that the tribunal dispenses with the consultation requirements and compel the respondent to carry out repairs causing damp to her flat. Ms Czenczek explained that the respondent has asked the applicant to pursue the repairs through the guarantee provided when the previous lessee carried out damp work. The tribunal

explained that it did not have jurisdiction to compel the respondent to carry out repairs.

The background

6. The property which is the subject of this application is a ground floor flat in a converted two storey late Victorian/Edwardian end of terrace house. There is a first floor flat and a further flat in the roof space.

7. The tribunal did not inspect the property. Photographs were provided in the hearing bundle. Neither party requested an inspection and the tribunal did not consider that one was necessary, in light of the nature of the dispute.

8. The applicant holds a long lease of the property, which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

The issues

9. At the start of the hearing the parties identified the relevant issues for determination as follows:

   (i) The payability and/or reasonableness of service charges for the year 2016/17 relating to

   (ii) Invoice No. 5164460- £159.60- Rightio Limited

   (iii) Invoice No. 344762 -Aspect & Co, (Aspect) £1,050,

   (iv) Invoice No. 364747 - £1,350.00 Aspect

   (v) Invoice No. 2016/1006-01 - £1,305- A Reid Building & Refurbishments

   (vi) Invoice No. 0092 -£ £1,500 KSC Scaffolding

   (vii) Invoice No. 1008 £500- David Bird

   (viii) General Building Budget

10. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

Rightio and Aspect Invoices

11. The tribunal was told that a leak occurred affecting flat 1. Ms Ward called Rightio to affect the repair. Three photographs of the soil stack responsible for the leak were shown to the tribunal, one before the repair and two-post repair. The invoice from Rightio stated "engineer attended: Temp repair to stat pipe-applied silicon...." Ms Czenczek said that the temporary repair was to apply mastic seal around the soil stack. Ms Ward disputed that but could not say what the temporary repair entailed.

12. The repair proved to be ineffective and further works were commissioned by Ms Ward for a Company called Aspect to carry out repairs. Aspect conducted repairs to the soil stack and produced invoice number 344762. Ms Ward challenged the invoice with Aspect because in her view, the description of the work carried out did not accurately reflect what she considered had been done. Ms Ward therefore requested an amended invoice. Aspect then produced Invoice No 364747. Photographs of the soil stack were produced.

13. The work undertaken under the initial Aspect invoice was described as follows, " Found there was a leak on soil stack in ceiling void as it comes into ground floor flat, had to remove boxing and cut out pipe work in both flats. Have renewed all pipe work including inlets from two flats above....."

14. The amended invoice stated, " We have found there was a leak on the soil stack observable from the ceiling void of the Flat No 1, the ground floor flat. In addition, we have found a water stain on the ceiling of the hallway area of Flat No 1(the ground floor flat). .... To gain access to the pipe work we had to further dismantle the boxing in the Flat No. 2 and cut out the upper section of the pipe work that runs through the ground floor flat (Flat no. 1). Have renewed a section of the pipe branching into Flat No 2 including inlets leading to Flat 2. A second engineer has been called to help provide assistance to make connections between flats."

15. Ms Ward challenged liability to contribute towards the cost of the invoices on the basis that the work to the soil stack was carried out on behalf of the RTM Company to the section of the pipe branching into Flat 2. The replaced inlets belong to and are solely enjoyed by Flat 2. Therefore, the cost of all the work undertaken should be borne solely by Flat 2. Ms Ward relied on paragraph 2 to the Seventh Schedule and paragraph 6 to the Second Schedule of the Lease.

16. The Second Schedule – The Demised Premises, paragraph 6 defines the demised to the lessee as "all conduits....." which are situate in any part

of the Property and serve exclusively The Demised Premises.." Paragraph 2 to the Seventh Schedule provides "The Lessor shall not be liable or responsible for any damage suffered by the Lessee.....through any defect in any fixture conduit.....in or upon The Property or any part thereof (including The Demised Premises)....."

17. Ms Binka and Ms Czenczek disagreed. They argued that the cost should be recovered through the service charge and divided between the lessees for three reasons. Firstly, they said that the work was carried out to a soil stack. This soil stack is shared by Flat 2 and 3 and is therefore communal. Secondly, they relied on paragraph 13 of the First Schedule and Paragraph 2 of the Third Schedule of the Lease. Paragraph 13 defines the common parts "means all those parts of the Property not exclusively enjoyed by lease licence or otherwise by the occupiers of the Demised Premises or Other Demised Parts of the Property."

18. Paragraph 2 to the Third Schedule –The Included Rights provides; "The right in common with all other persons entitled to the right to the free and uninterrupted passage and running of gas electricity water and soil and all other services to and from The Demised Premises in through and along The Conduits."

19. Thirdly that it was unreasonable for the applicant to refuse to contribute towards the cost of work that she commissioned.

The tribunal's decision and reasons

20. The tribunal determines that the applicant is liable to pay her share of the amounts claimed in the Rightio and Aspect invoices. The tribunal studied the photographs and invoices. The photographs helpfully showed the condition of the pipe before and after the repairs were carried out. The tribunal concluded that the temporary repair was to apply a mastic seal around the soil stack. There is evidence of encrustation around the pipe and there is a white substance around the pipe that appears to be new which is consistent with the application of a mastic seal. Therefore the tribunal concluded that Rightio applied mastic seal around the soil pipe.

21. With regards to the Aspect invoices, Ms Ward took issue with the statement that the engineer had to remove boxing and cut out pipe work in both flats because she herself had removed the boxing in her flat. She also took issue with the statement "renewed all pipe work" because no new pipe work was renewed in her section of the pipe. Ms Ward told the tribunal that she did not share this soil stack because her bathroom is situated at the opposite side of the building, she therefore asked Aspect to amend the description and issue a new invoice.

22. The tribunal then considered the provisions of the Lease and came to the following conclusions. The Lessor is under an obligation pursuant to the Sixth Schedule to keep in good repair the soil stack. The Lessee is under an obligation pursuant to the Fifth Schedule to pay to the Lessor a "Maintenance Charge" in relation to expenses which the Lessor reasonably incurs in each Maintenance year and which are authorised by the Eight Schedule. The Eight Schedule defines the Cost and Expenses charged upon the Maintenance Fund and authorises that the said cost and expenses are those that are according to sub-clause (1) "The cost incurred by the Lessor in complying with his obligation in Part 1 of the Sixth Schedule." Part 1 of the Sixth Schedule contains the Lessors' Covenants and provides that the Lessor shall keep in good repair the soil pipe and the common parts. The common parts are defined by the First Schedule as: all those parts of the Property not exclusively enjoyed by lease licence or otherwise by the occupiers of the Demised Premises or Other Demised Parts of the property."

23. From the photographs, the tribunal concluded that they clearly indicate that prior to the work being carried out, there was some concern with the soil pipe with encrustations and there are photos of the new pipe. The soil and waste inlets of flat 2 to the stack were replaced as well as the elbow. The tribunal accepted the evidence that the soil stack serves Flats 2 and 3 given the description of the bathroom layout in the building. As such the tribunal concluded that it forms part of the common parts as defined by paragraph 13 of the First Schedule because it is not exclusively enjoyed by the occupiers of the Demised Premises. For these reasons the applicant is therefore liable under the terms f the Lease to contribute towards the cost incurred in repairing the soil stack.

A Reid, KSC Scaffolding and David Bird Invoices

24. The tribunal was told that the previous managing agent identified extensive major works and issued a stage 1 Notice under section 20 of the Act. The RTM Company continued the discussions informally. Ms Ward raised concerns regarding complying with the consultation requirements under section 20. The RTM decided to repair the roof as a priority. Ms Ward was concerned about the damp affecting her Flat and the brickwork. Ms Czenczek took the lead in researching contractors feeding information to the other leaseholders and asking for feedback and suggestions of other contractors. Ms Czenczek selected Tomlinson and when he came to inspect the site, he withdrew. Ms Binka suggested KSC Scaffolding because she had previous experience of their work. Ms Ward offered a general builder who came and inspected the building but did not provide a quote.

25. The Budget for the roof and scaffolding was agreed at £3,500. However, Ms Ward's agreement was conditional on getting certain work done including the damp. She provided a quote for that work in the region of £3-4,000.

26. The scaffolding was erected and roof repairs carried out. It was not due to come down for another 3 weeks and there was money left over. Ms Czenczek consulted others and the decision was then taken to have additional work carried out by Antony Reid and David Bird.

27. Ms Ward challenged liability to contribute towards the total cost incurred on the basis that the work had been conducted without compliance with the consultation requirements. Therefore her contribution should be limited to £250 in accordance with s20 of the Act.

28. When asked by the tribunal to explain what prejudice if any she had suffered as a result of the failure to consult she said that the scope of the work was not enough which would now mean that they would have to erect scaffolding again in order to do the work and further roof work. The delay will result in any future work costing more. She also said that the standard of work carried out was poor. She gave the example of her window was painted shut

29. The respondent admitted that the section 20 consultation requirements were not complied with. Ms Binka said that at the time of the works, the applicant was and still is a Director of the RTM and she was actively involved in arranging the work and was included in all the correspondence. She had the opportunity to recommend contractors. The decision was taken to undertake roof works because the applicant was advised to check the existing guarantee for the damp work to the Flat. They invited the tribunal to dispense with the consultation requirements because Ms Ward had not demonstrated how she has been prejudiced by the failure to consult.

The tribunal's decision and reasons

30. The tribunal decided to exercise its powers under Section 20ZA of the Act and determines that it is satisfied that it is reasonable to dispense with the consultation requirements.

31. The tribunal determines that the applicant's liability is not limited to £250. The applicant is liable to pay her share of the total costs incurred in the invoices of KSC Scaffolding, A Reid and David Bird.

32. When considering how to exercise our jurisdiction under s20ZA, the tribunal considered to what extent if any Ms Ward was prejudiced by the failure to consult. The reasons given for the prejudice Ms Ward said she had suffered do not negate the fact that she was actively involved in the informal discussions. She had the opportunity to express what work she wanted done but they did not proceed with her request. She also had the opportunity to identify potential contractors. She told the

tribunal that she offered a contractor to carry out the works but he declined.

33. The correspondence provided clearly demonstrates that although Ms Ward raised queries regarding compliance with the section 20 consultation process, she never the less continued to actively participate in the informal discussions. In an email dated 2 September 2015, Ms Ward said "Following my email consultation with Stephen Charles (our new manager from UO), in order for us to start this work in November we have to collect quotes and agree on the scope. This way we can skip formalities over Section 20 and a consultation process itself as estimated cost will be more than £250." In an email dated 27 July 2016, Ms Ward said, " Aleks, I am fine with the scaffolding and roofing quote and I think it would be sensible to have some other work done while the scaffolding is up."

34. Ms Ward was unhappy with the scope of work as what she had requested was refused on the basis that enquiries should be made of the guarantee for the damp work that had been carried out by the former lessee of Flat 1. There was no evidence put before the tribunal to demonstrate that the work in fact carried out was inappropriate. It was common ground that the roof work was necessary as confirmed by the survey provided. It was not argued that the cost incurred was unreasonable.

35. Ms Ward was dissatisfied with the standard of work because her windows were painted shut. Ms Ward explained that as she lives on the ground floor she did not feel comfortable in complying with the builder's request to leave her windows open whilst at work and she could not take time off. An email from the builder dated October 6 2016 indicates his willingness to return and rectify any issues. Ms Ward did not avail herself of the opportunity.

36. Ms Ward is a Director and member of the RTM Company. If the respondent had decided to comply with the consultation process she would have been party to that decision making in her role as Director. She would then have been in precisely the same position as she is in now because voting to carry out the consultation process would have resulted in her being given exactly the same opportunity of being consulted but in her role as a leaseholder.

37. In circumstances where the applicant actively participated in the informal discussions, agreed to forego the consultation process, agreed the scope of work (albeit on a conditional basis) and in the absence of any evidence to demonstrate that the work carried out was inappropriate and cost unreasonable it is hard to see how Miss Ward has been prejudiced by the failure to consult as she would have been in the same position that the legislation intended her to be.

Budget £500

38. Ms Ward confirmed that she was not querying the reasonableness of this cost but rather was seeking clarification of the scope of work any work and items covered. It was explained to her by Ms Czenczek that this was an interim service charge demand.

Application under s.20C and refund of fees

39. At the end of the hearing, the applicant applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties, the tribunal determines that it is just and equitable in the circumstances for an order not to be made under section 20C of the 1985 Act, so that the respondent may pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge. The tribunal took into account the leaseholders' conduct. It was clear that the relationship between them had broken down. There are real concerns about the damp affecting flat 1 that appear not to have been addressed or progressed. Communication between the leaseholders is strained. Therefore, it was not unreasonable for Ms Ward to seek redress by raising her issues with the tribunal

Name: Judge Evis Samupfonda **Date:** 21.8.2017

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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

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.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such

reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

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.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

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.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
- (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
- (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
- (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
  (a) specified in his lease, nor
  (b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
  (a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).