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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00CM/ LSC /2018 /0015**
Property	:	**32 & 34 Haildon Road Hillview Estate Sunderland Tyne & Wear SR2 9JW**
Applicants	:	**Mr J Freeman – No. 32** **Mr W M Kettle – No. 34**
Respondent	:	**Gentoo Group**
Type of Application	:	**Landlord and Tenant Act 1985 – Section 27A(1) and 20(C)**
Tribunal Members	:	**Judge W.L. Brown** **Mr I D Jefferson TD BA BSc FRICS**
Date of Decision	:	**18 October 2018**

DECISION

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(1) The service charge cost in 2017 for the major works to replace the roof covering and repointing to the Property is not reasonably incurred.

(2) In respect of other elements reasonably incurred there was a failure of statutory consultation, as admitted by the Respondent. Therefore, in accordance with Section 20 of the Act the sum determined as recoverable by the Respondent from each Applicant in respect of all of the Works is limited to £250.

(3) Order made under Section 20(C) of the Act

Background

1. The estate in which the Property is located was built by the local authority and following right to buy is of mixed tenure and ownership.

2. The Property is within the estate and comprises a pair of self-contained flats, one ground floor and one first floor in a two storey building comprising four flats (the "Block") of brick construction under a pitched tile roof. The Applicants are respectively the leaseholders of No. 32 (Mr Freeman) and No.34 (Mr Kettle). The Applicants do not currently reside in their flats which are held as investments and are let out. The Respondent is the freeholder and it manages the all of those properties still held and occupied by their tenants, plus the external repairs for which they have responsibility under the right to buy leases, including the Properties.

3. By Application dated 7 March 2018 (the "Application") the Tribunal was requested to make a determination under Section 27A of the Landlord & Tenant Act 1985 (the 1985 Act) as to the reasonableness of service charges for the Property for the service charge year 2017, specifically regarding the cost of replacing the roof covering, flashings, replacement cavity wall ties and pointing of all elevations at the Property (the "Works") undertaken in 2016. Credit against part of the cost of the Works came from money in the sinking fund for each flat. The sums credited were not in dispute, nor was the apportionment (25%) of the cost of the Works between each of the four flats in the Block.

4. Directions were made by the Tribunal on 27 April 2018.

5. The Tribunal inspected the exterior of the Property on 22 August 2018 in the presence of the Applicants and from the Respondent Mr Brett Nicolson, Leasehold Manager, Mr Adam Pollard BSc, Tech Assoc RICS, Project Building Surveyor at the time of the Works and Mr Kevin Donaldson, Asset Project Manager. The Tribunal's inspection also included other nearby properties to see what works of repair had been undertaken by the leaseholders.

6. The hearing took place on 22 August 2018 at Sunderland Magistrates Court, Gillbridge Avenue, Sunderland SR1 3AP. The Applicants appeared in person; the Respondent was represented by Mr Nicholson and the main witness was Mr Pollard.

The Lease

7. The parties referred the Tribunal to the leases for the Property. The Tribunal was informed that the leases were largely in similar form. The lease records an obligation upon the Respondent for "Category B Repairs", being for the structure of the Block.

8. Clause 6.2 describes the structure to include the roofs of the Block.

9. The Applicants' liability to pay service charge is set out in their respective leases at clause 4.2 and it includes an apportioned sum for Category B Repairs.

The Law

10. Section 19 of the 1985 Act states

Limitation of service charges: reasonableness

(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 provision of services or the carrying out of works, only for the services or works or are of a reasonable standard: and the amount payable should be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than as reasonable as so payable, and after the relevant costs have been incurred any necessary adjustments shall be made by repayment, reduction or subsequent charges or otherwise.

11. Section 20 of the Act states:

Limitation of service charges: consultation requirements

(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) a First-tier tribunal.

The relevant contribution is limited to £250.00.

The Section 20 consultation process generally has three stages:

A notice of intention

Notification of estimates

Notification of award of contract

12. Section 27A of the Act states

Liability to pay service charges: jurisdiction

(1) An application may be made to the appropriate tribunal for a determination whether 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 service, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the cost and, if it would, -

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.

The Issues

13. Whether any of the cost incurred by the Respondent arising from the Works were recoverable from the Applicants as service charge and if so, in what amounts. Relevant to this matter are the requirements of Section 20 of the Act as to consultation. The Applicants applied also for an order under Section 20(C) that the costs incurred, or to be incurred, by the Respondent in connection with the proceedings before the Tribunal should not be regarded as relevant costs to be taken into account in determining the amount of the service charge payable by the Applicants for a future year or years.

The Evidence and Submissions

14. The Applicants disputed the need for the Works and claimed that the Works were undertaken without fair consultation and despite protest that a preliminary independent investigative survey should have been undertaken before deciding to proceed with the Works.

15. The Applicants were unclear as to the amount of contribution they had to pay, having understood that the original estimate was about £4,000 for each Applicant's share but in a letter dated 18 January 2018 the Respondent stated that the charges for roofing and scaffolding were reduced to £250 because the consultation was not done properly.

16. It was accepted that neither Applicant had made any observations or nominated a contractor for the Works by 10 June 2016, being the deadline imposed by the Respondent.

17. The Respondent stated that the need for the Works was identified first in 2015 from an in-house desktop review of electronic records identifying that the lifespan of original roof coverings may be approaching the end of their useful life. It was understood that the wall ties had also reached the end of their life. As the Block and surrounding properties were built in around 1949 this concurred with paperwork referring to a 60 year roof renewal requirement. Its position was that repair works to the roof of the Block (in common with the

whole of the estate) were needed under the Respondent's maintenance responsibilities under the Lease and for health and safety reasons. The Respondent had been concerned by gable wall collapses at other properties in its stock in Sunderland.

18. An idiciative survey of the 249 properties on the estate under the supervision of Mr Pollard of the Respondent, acting as surveyor, was completed in November 2015, to establish if generally the roofs to properties on the estate were coming to the end of their lifespan as suggested by electronic records. This was an on-site check that items actually existed and that works had not taken place previously. It also identified general trends for works and sufficient quantities, including any leaning gables, to justify putting together a contract to carry out the works. Individual properties were not looked at to identify the works required for each one, but a general picture of the scope and extent of works for the estate was created. The survey revealed evidence of physical delamination of the roof tiles and perished mortar to ridge tiles. Additionally, leaning gables and perished brickwork mortar was identified, which was evidence of wall tie failure to gables estate-wide. Asbestos inspection of each property, including the interior, was included.

19. The Respondent set out its understanding of its consultation process followed before the Works commenced beginning with letters dated 10 May 2016 notifying of intention to undertake the Works. Leaseholders were invited to make observations and nominate contactors by 10 June 2016.

20. It was stated that leaseholders were consulted on the estimates received from external contactors for the Works by letters 17 August 2016 and they were given the opportunity to view the tenders and make observations on the estimates by 15 September 2016. No observations were received.

21. No charge was made for replacement of TV aerials on the Block, which were removed during the Works.

22. The Respondent acknowledged in writing in its statement of case that there had been two failures in the consultation process in respect of roof coverings and scaffolding. In addition there was no mention of the TV aerial removal and replacement on roofs – for which no charge was subsequently raised of the Applicants. In addition it recorded in letters dated 19 January 2018 that, "The estimated tendered costs received from the roofing and scaffolding contractors included as part of the consultation notice dated August 2016 were issued too late.....The charge for each of the scaffolding works was therefore reduced to £250 because of this failure to consult at the correct time." Preliminary costs for both elements were removed. However, the Respondent stated that the cheapest bidding contractor had been engaged. While consultation may not have been ".....to the letter....." (noted by the Tribunal in the Respondent's oral closing submissions at the hearing) the Respondent had acted in the best interests of the Applicants, achieving decent works at a best price.

23. Inspection for asbestos materials in the properties on the estate was commissioned by the Respondent from Apec Environmental. That work also was not mentioned in the consultation exercise.

24. There was some confusion about the total actual charge for the Works. No charge was made for the cost of works on fascias, soffits, and rainwater goods. The Respondent noted incorrect measuring undertaken by the contractor. The cost of "preliminaries" was removed. In billing the Applicants the Respondent omitted to include its cost of management of the Works at 10% of the contract price. VAT was also applied incorrectly at 16% across all services under preliminaries and contractor invoices as an average. Each service should have had the relevant VAT applied to it when calculating the final bill. The original bills were for £4,312.68 (No.32) and £3,991.32 (No.34).

25. In the proceedings the Respondent stated that the true cost of the Works, including management fee, per flat was £7,632.76. Before any reductions were made, the final charge for the Works after taking into account sinking funds held, for each Applicant, would have been £6,748 (No.32) and £6,426.64 (No.34)

26. The amounts involved and at issue for each property for the Works plus management fee for the Works of 10% and after crediting of sinking fund sums, were:

No.32 £6,748.00

No.34 £6,426.64.

THE TRIBUNAL'S FINDINGS AND DECISION

27. The Tribunal was first satisfied that the Applicants' leases provide for recovery of the cost of works at issue in the Application. The liability for roof repairs and other structural and external repairs lies on the Respondent (see paragraph 7) and the basis of the Applicants' potential liability to pay for the costs of the Works is recorded in paragraph 8.

28. The Lease provides for apportionment between the flats in the Block by rateable value, or with a default option to floor areas, but the parties had operated a one-quarter arrangement throughout the Respondent's ownership of the freehold and in reality the Tribunal considers that the relative rateable values would be similar and 25% share was not disputed by either of the Applicants.

29. Regarding the need for the Works, the Respondent produced no contemporaneous survey notes or photographs of the Property (or other properties on the estate), or at the hearing. Therefore the Tribunal was being asked by the Respondent to accept the evidence of Mr Pollard that the entire roof covering to the Block needed replacing, that wall-ties needed replacing and full repointing of all four elevations was required for the Block. The Tribunal found that the evidence for need for works of that extent was not persuasive.

30. The Tribunal saw at inspection that the roofs of properties in the vicinity of the Block which appear to be in private ownership had not been replaced. There were signs of patch repointing, possibly wall-tie replacement and re-fixing of a few slipped tiles. The Tribunal was satisfied that the work of a similar nature may have been necessary to the Block.

31. The evidence from the other propeties on the estate was that the condition of the state of repair of the roof of the Block did not require wholescale replacement of the entre roof covering at this time.

32. Similarly, while the Tribunal accepted that it was prudent to renew the wall ties, there was no necessity for 100% repointing.

33. Having found that only some works were reasonably incurred the Tribunal then had to consider reasonableness of cost for those works. Using its own expertise it was apparent that the cost would exceed £250 for each flat, therefore requiring Section 20 consultation.

34. The Applicants also queried the adequacy of the Section 20 consultation. The Tribunal considered whether the Works were within one contract costing in excess of £250 for each leaseholder, or was each element of the Works attributable to separate contracts, any of which may have exceeded £250 for each leaseholder? If the Tribunal found the Works comprised one contract and if there was a failure of Section 20 consultation and in the absence of any application for exemption under Section 20ZA from the consultation requirement (nor was there before the Tribunal such an application or to adjourn these proceedings to permit one to be made) the most that the Respondent is able to recover from each Applicant for the major works is £250.

35. The Tribunal found that the Respondent understood itself to be the principal contractor for the Works. In its initial letter in this matter of 10 May 2016 the Respondent referred to works cost "...likely to be over £250 per leaseholder.....". In its Notice of Intention to carry out works covered by Section 20 consultation the Respondent expressed the planned works to be:

> "External refurbishment programme which may include:
>
> Roof Strengthening
>
> Roof Alignment
>
> Loft Insulation
>
> Pitched Roof Coverings
>
> Brick Chimney Stack and party walls – repointing, repairs or rebuild
>
> Roofline replacement and downpipes
>
> Remedial wall ties and repointing to external walls"

The leaseholders were informed by letter of 17 August 2016 from the Respondent, "I have not yet been advised who the contract has been awarded too (sic) or what work is required too *(sic)* your block".

In time, the Works were undertaken simultaneously.

The Tribunal found these points to be persuasive evidence that the elements of the Works were not divisible.

36. Relevant to this matter is the Court of Appeal decision in Phillips v Francis [2014] EWCA Civ 1395, overruling the earlier decision of Sir Andrew Morritt, and disapproving his reasoning to the effect that the qualifying works were to be identified by aggregating all works done over the accounting period in question. The Tribunal has to consider, as a matter of fact and degree, whether works said to be qualifying works are properly to be treated as a single set of works or one or more sets of works. This is a question of fact to be determined objectively. For the reasons in the preceding paragraph the Tribunal determined that it was a single contract.

37. With reference to the elements of the Works listed in paragraph 35 the Respondent admitted that there was a failure in the Section 20 consultation process in all but the remedial wall ties and repointing to external walls elements. It follows that the statutory cap on the sum recoverable for the Works from each leaseholder is £250 per Applicant.

38. The Tribunal finds that in accordance with Section 20 the sum determined as recoverable by the Respondent from each Applicant is limited to £250.

As to Section 20C and Costs

39. The Applicants made application under Section 20C of the Act that an Order be made that the costs incurred, or to be incurred, by the Respondent in connection with the proceedings before the Tribunal should not be regarded as relevant costs to be taken into account in determining the amount of the service charge payable by the Applicant for a future year or years.

40. The Respondent stated that it had no intention to recover such costs. For that reason and because the Applicants have been successful in these proceedings the Tribunal determines that it should make an order under Section 20C of the Act.

41. There was no application regarding fees paid to the Tribunal.

Judge Leslie Brown
18 October 2018