10594

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/21UD/LIS/2014/0043**
Property	:	**Flat 4, Howard House, 10 Terrace Road, St Leonards on Sea, East Sussex TN37 6UF**
Applicant	:	**Howard House RTM Company Limited**
Representative	:	**Mr G Okines, Arko Property Management**
Respondent	:	**Ms Maria McErlane**
Representative	:	**In person**
Type of Application	:	**Determination of service charges under section 27A Landlord and Tenant Act 1985**
Tribunal Members	:	**Judge E Morrison (Chairman)** **Mr N I Robinson FRICS (Valuer Member)** **Miss J Dalal (Lay Member)**
Date and venue of Hearing	:	**3 December 2014 at Royal Victoria Hotel, St Leonards**
Date of decision	:	**16 December 2014**

DECISION

The Application

1. By an application dated 27 August 2014 the Applicant RTM company applied under section 27A of the Landlord and Tenant Act 1985 ("the Act") for a determination of the service charges payable by the Respondent lessee of Flat 4 for service charge years ending 24 June 2013, 24 June 2014 and 24 June 2015.

2. At the conclusion of the hearing the Respondent lessee made an application under section 20C of the Act that the Applicant's costs of these proceedings should not be recoverable through future service charges.

Summary of Decision

3. The service charges payable by the Respondent are as follows:

Year ending	£
24 June 2013	5703.87
24 June 2014	1720.79
24 June 2015	2278.22 (on account service charge)

4. No order is made under section 20C of the Act.

5. The Respondent is ordered to reimburse the Applicant for the application fee of £250.00, to be paid by 3 January 2015.

The Inspection

6. The Tribunal inspected the exterior of Howard House on the morning of 3 December 2014, immediately before the hearing, accompanied by Ms McErlane and Mr Okines. The Tribunal found a mid terrace six storey property, including ground floor and basement. Scaffold was erected to the front elevation in connection with ongoing external redecoration and repair. The internal common parts were not entered or inspected and the Tribunal accessed and inspected the rear of the property from Warrior Square Gardens to the south, which had clearly been redecorated recently and generally appeared in good condition. Flat 4 is at ground level and has its own garden and access from the south. The Tribunal's attention was drawn to decorative stone scrolls (or corbels) on the underside of the first floor projecting balcony, a small crack to the underside of this balcony, a small amount of flaking paint to the step leading from the Gardens into the garden demised with Flat 4 and further flaking to the first step from the garden into the flat itself. The Tribunal was asked to note two rainwater outlets from the balcony which discharge into the patio area of the basement flat, that there used to be a third outlet discharging over the steps leading

into Flat 4, and a very small downpipe serving the north east corner of the balcony. Finally, the Tribunal noted the walls bounding the garden serving flat 4.

The Lease

7. The Tribunal had before it a copy of the lease for Flat 4 dated 9 May 2003. It is for a term of 125 years at a yearly ground rent of £100.00 for the first 25 years and rising thereafter.

8. The relevant provisions in the lease may be summarised as follows:

   (a) The property demised to the tenant is "the Flat", defined in clause 1 as "the Ground Floor Flat and garden edged red on the plan attached hereto and described in the Fourth Schedule"

   (b) The Fourth Schedule specifies that the Flat includes "All walls enclosing the flat (but in the case of any external wall of the said building and any wall between the said flat and any part of the said building used in common with the other lessees or occupiers of the building only the interior face of such wall) ..."

   (c) The tenant covenants to keep the Flat in repair (Ninth Schedule, paragraph 5).

   (d) The tenant is liable to pay 11% of the service charge (referred to in the lease as "the maintenance charge") for each year ending 30 June

   (e) An on account payment being an estimate for the whole year is to be paid on 1 September in each year and any balance is to be paid once accounts are prepared following the year end

   (f) The service charge includes the costs to the landlord of complying with its repairing and insuring obligations as set out in the Tenth Schedule and various other expenses referred to in the Twelfth Schedule, which includes an annual contribution to a reserve fund to cover accruing and anticipated expenditure

   (g) By paragraph 2 of the Tenth Schedule the Landlord covenants as follows:

   To keep in good and substantial repair and condition:
   (a) The roof and outside walls and foundations and structures gutters and drainpipes chimneys and chimney stacks of the Building and all pipes sewers drains cables and wires in under or upon the Building and all pipes sewers drains cables and wires in under or upon the Building serving the Flat in common with other parts of the Building

(b) The porch(if any) hall and stairs in the Building retained by the Landlord
(c) The footpaths at the Building
(d) The boundary walls or fences of the Building.

(h) By paragraph 3 of the Tenth Schedule the Landlord is responsible for painting all outside surfaces of the Building usually painted at least once every five years

The Law and Jurisdiction

9. The tribunal has power under section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when a service charge is payable.

10. By section 19 of the Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard.

11. Under section 20C a tenant may apply for an order that all or any of the costs incurred by a landlord in connection with proceedings before a tribunal 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.

12. Under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal has a general discretion whether to make an order for reimbursement of tribunal fees.

Representation and Evidence at the Hearing

13. The Applicant company was represented by Mr Okines of Arko Property Management, who have acted as managing agents since the RTM company took over management functions on 27 June 2009. Mr Okines had prepared a written statement of case with supporting documents, and also gave oral evidence.

14. The Respondent Ms McErlane represented herself. She had submitted various documents in response to the application, all of which were considered by the Tribunal, and she also gave oral evidence.

The Issues

15. Ms McErlane pursued only one minor challenge to the service charges. This apart, it was only necessary to ascertain what those charges were

and that they had been properly demanded in order to determine what those charges should be.

16. Whether Ms McErlane's defence to the application, namely that she had spent £4000.00 of her own money on works that she said the Applicant should have undertaken, establishes a set-off in her favour against the service charges

The Service Charges

17. Mr Okines accepted that service charges were not being demanded precisely in the manner prescribed by the lease. He said this was because the lessees had agreed that they would prefer to receive demands twice a year (in June and December) rather than one larger demand once a year. It was also apparent the accounts were made up to 24 June rather than 30 June. These matters do not affect the substance of the Applicant's case.

Year ending 24 June 2013

18. The service charge accounts for this year show general expenditure (other than that funded by the reserve) of £9,309.00 and a reserve provision of £4000.00. Ms McErlane's 11% share amounts to £1463.99. Of this total £1265.00 was demanded on account and the balance of £198.99 was demanded after the year end.

19. In addition a further demand for £4239.88 from Ms McErlane was made during the year, being her 11% contribution towards the estimated cost of major works on the building. Although the major works did not commence until the following year this was a sum payable as an on account service charge during the year to 24 June 2013. None of these figures were disputed by Ms McErlane. Accordingly it is determined that the total service charge payable by Flat 4 for the year is **£5703.87**.

Year ending 24 June 2014

20. During this year £12,977.00 was spent on major works, namely refurbishment of the southern elevation, funded by the demand of the previous year. Ms McErlane was unhappy that the works were protracted and was not confident that they had been carried out to a reasonable standard as required by section 19. However the only specific complaint which could possibly have a bearing on the service charge relating to some flaking paint on two of the stone steps in her garden. These steps had been painted as part of the major works, seemingly pursuant to para. 3 of the Tenth Schedule of the lease. She contended that if the paint had flaked only 6 months after it had been applied, the work could not have been done right.

21. Mr Okines said the steps had been painted only because they had been painted previously, but as they were stone and sea-facing it would probably be better if they were not painted at all. Hardwearing Pliotec paint had been used on all the exterior surfaces. However he did not expect the paint on the steps to last, because of the exposed position and the possibility of lateral water pressure. Repainting the steps now might cost £35.00 - £40.00 but again would not last.

22. There was no evidence before the Tribunal from a suitably qualified person as to whether or not the painting of the steps had been done to a reasonable standard. Given that the steps are stone and in a very exposed position, the Tribunal is not prepared to assume that the work was defective just because the paint has begun to flake, and therefore makes no adjustment to the service charge on this ground.

23. The service charge accounts for this year show general expenditure (other than that funded by the reserve) of £11,644.00 and a reserve provision of £4000.00. Ms McErlane's 11% share amounts to £1720.84 (the Applicant has used a figure £1720.79). Of this total £1430.00 was demanded on account and the balance of £290.70 was demanded after the year end. None of these figures were disputed by Ms McErlane. Accordingly it is determined that the service charge payable by Flat 4 for this year is **£1720.79.**

Year ending 24 June 2015

24. As this year is the current year, the Tribunal's determination is limited to the payability on monies demanded on account. The Respondent will remain at liberty to challenge any actual expenditure (including major works funded by the reserve) once it is ascertained after the year end.

25. Ms McErlane has received two demands for on account sums, each for £644.11 towards general expenditure and £495.00 reserve provision (although the second demand does not require payment until 25 December 2014). Thus the total sum demanded is £2278.22. These figures are derived from a budget for the year of £11,711.00 for general expenditure, which is in line with monies spent in the previous year. Mr Okines explained that the reserve provision had been increased in anticipation of work to the internal common parts, an expense not covered by the previous major works demand which covered exterior work only.

26. Ms McErlane made no objection to these figures, and the Tribunal determines that the total sum demanded of **£2278.22** is reasonable and payable on account of the service charge for this year.

The set-off claim

27. The Tribunal's jurisdiction under section 27A to determine whether a service charge is payable extends to determining a claim for damages for breach of a landlord's covenant which constitutes a defence to a service charge: *Continental Property Ventures Inc. v White* [2006] 1 EGLR 85 (Lands Tribunal). Such a claim is one of equitable set-off, and the Tribunal has a discretion whether to allow such a claim even if it is established: *Bluestorm v Portvale Holdings Ltd* [2004] EWCA Civ 289.

28. The Respondent's written submissions were somewhat unclear, but Ms McErlane clarified that she considered that £4000.00 should be deducted from her service charge bill by virtue of set-off. She relied on two purported invoices reflecting money she had spent. However she accepted that the cost of repairing her windows was irrelevant (window repair being her responsibility) and the balance of the invoices totalled only £2450.00. When this was pointed out to her, she reduced her set-off claim to that figure. Each invoice will be considered in turn.

Mark Roberts work - £1800.00

29. Ms McErlane claimed to have paid a local contractor named Mark Roberts the sum of £1800.00 in cash for work to rebuild two of the stone steps and the flat walkway at the top of the steps leading up to her flat from the garden, following a collapse of these areas. She said that the Applicant should have carried out this work as the steps etc. were part of the structure of the building and thus within the landlord's repairing obligation. She said that the Applicant had initially recognised this by putting in place temporary planking to allow her access pending the repair work.

30. Mr Okines referred to the lease and said that the Applicant had no responsibility to repair the steps or walkway because they were part of Ms McErlane's demise. The temporary planking had been erected simply as a health and safety measure, to make the area safe. He also contended that even if the Applicant was liable to repair the steps, Ms McErlane had no right to carry out the work herself without first submitting estimates and without permission.

31. Ms McErlane could not clearly recall when the steps collapsed or when the work was carried out, but Mr Okines's records showed the collapse was reported on 12 November 2009 and there had been a request to remove the wooden scaffold on 21 December 2009 so the repair work could be done. Mr Okines had not seen any invoice until January 2012 at the earliest.

Decision

32. The lease describes Flat 4 as including the garden. The lease plan clearly shows the garden as being within the demise and even marks

the position of the steps. The Respondent has exclusive possession of the steps and walkway; no-one else has the right to use them. Under para. 9 of the Fifth Schedule of the lease, the tenant is responsible for keeping the flat in repair. The landlord's repairing obligations as set out in the Tenth Schedule can only sensibly be read as applying to areas which are not demised to a lessee. Accordingly the Tribunal is in no doubt whatsoever that any repair (including renewal or replacement) of the steps and walkway is Ms McErlane's responsibility, and that the Applicant has no liability to pay for this work. This aspect of the set-of claim therefore fails.

Other work: £650.00

33. Ms McErlane claimed to have paid another local contractor sums for various works, including a total of £450.00 for work on the balcony above her flat, and £200.00 for work on the garden wall forming the boundary with Warrior Square Gardens to the south. She said these works should have been paid for by the Applicant as they fell within the landlord's repairing obligation. The balcony was part of the common structure of the building and the boundary wall was also expressly a landlord responsibility under para. 2 of the Tenth Schedule. Mr Okines accepted that the balcony and wall were the Applicant's responsibility to repair and maintain, but said the lease did not permit the Respondent to carry out these works herself without permission.

34. The document relied on by Ms McErlane to establish she had expended this money was referred to as an invoice, but it had not been prepared by the contractor. It consisted of an email dated 11 January 2012 from the Applicant herself to Mr Okines, the body of which was headed "INVOICE FROM [blank] TO [blank]". The work done was briefly set out, and the document ended with the words Many Thanks. On the printed copy of this email was a handwritten signature "D Donnes" and a date which was difficult to decipher, but possibly said "Jan 2010". There was no note of an address or other contact information for Mr Donnes. Ms McErlane accepted this document had not been produced contemporaneously with the work being done. She said it had been typed up by her after speaking to the contractor at a later date so that she could verify her expenditure to Mr Okines. She had no other proof of her outlay, such as bank statements. It was noted that the individual sums noted in this document did not correspond with those set out in an earlier email sent by Ms McErlane to Mr Okines on 7 September 2010 which listed sums she had paid for what appeared to be the same work "in the last year". This was the only clue as to when the work had been carried out, as Ms McErlane could not recollect dates with any reliability. Mr Okines had not seen the invoice until January 2012 at the earliest.

35. Ms McErlane wished to set-off the sum of £450.00 she said she had paid for repair work to the balcony of Flat 6, directly above Flat 4. Her case was that a decorative corbel had fallen off, although she could not

recall when, and that she had then noticed cracks on the underside of the balcony. She had discussed the situation with Mr Okines, who had told her that repairs would be carried out as part of the planned major works on the south elevation. She had no confidence that the major works would proceed and wanted to be sure the area was safe, so she decided to find her own contractor. She did not obtain competing quotes or any written estimates. As well as repairing the corbel and filling in cracks, the contractor blocked off the middle of three drainage outlets from the balcony to avoid rainwater spilling onto her steps.

36. She also wished to set-off £200.00 said to have been paid for a repair to a boundary wall. She said the wall had become unsafe, so her contractor had repaired it. Ms McErlane accepted she had not obtained the Applicant's permission for the work. She could not recall when the work was done.

37. Mr Okines said that the Respondent had no contractual right to carry out repairs to the structure or other areas which were the landlord's responsibility, at least without proper advance notification giving the Applicant an opportunity to do it, and obtaining proper estimates. None of this had occurred. The Applicant had been presented with a fait accompli. An email from another lessee established that the corbel had fallen off as long ago as September 2008. After his company became the managing agents he inspected and was content that the area was safe. It needed repair, but so did the whole building and if Ms McErlane had not got the work done, it would have been included in the major works. As far as blocking the drain hole was concerned, this meant the three outlet pipes specifically drilled into the balcony to assist with water escape off the stone slab of the balcony had been reduced to two in number, again without permission. As to the boundary wall, it needed repair along with the rest of the building but he had never seen it in an unsafe condition or been notified of this. As to the claimed cost of the works, Mr Okines said the sums mostly seemed reasonable, assuming the work had been done to a proper standard.

Decision

38. The Tribunal accepts that some work was carried out by a contractor instructed by Ms McErlane, and that this work was on areas of the building that fall within the Applicant's repairing obligation. However Ms McErlane's claim for a set-off is rejected, for a number of reasons.

39. Firstly, the Tribunal cannot be satisfied on the evidence before it that the Applicant was necessarily in breach of its repairing obligations at the time the work was done. It only became responsible for the building in June 2009 and the corbel fell off prior to this. There was no cogent evidence as to when any disrepair to the boundary wall arose. According to Ms McErlane's email of 7 September 2010, the contractor carried out his work sometime during the previous 12 months. It may therefore have been carried out very shortly after the Applicant took

over the management functions and before it had had any opportunity to embark on the section 20 consultation and collection of funds which were required ahead of extensive refurbishment of this long-neglected building.

40. Secondly and more fundamentally, anyone claiming damages for a breach of covenant must, on normal contractual principles, show they have suffered loss or damage as a result and that they have taken reasonable steps to mitigate such loss. There was no evidence that the alleged disrepair actually caused Ms McErlane any loss or damage whatsoever, or that it was reasonable to embark on the work when she did. There was no reliable evidence that any of the work was urgent or needed to be done in advance of the major works that were planned, and it appears to the Tribunal that the work was carried out only to satisfy Ms McErlane's aesthetic wishes as to the external appearance of her flat and garden. Even if the disrepair had caused her loss or damage, Ms McErlane should, at a minimum, and by way of mitigation, have notified the Applicant in writing specifying precisely what she alleged was a breach of covenant and then given the Applicant an opportunity to carry out any remedial work required before embarking on it herself. She did not do so. Furthermore, blocking up the water outlet without a proper investigation of the possible consequences was irresponsible; it could have had serious results.

41. Thirdly, the Tribunal is not satisfied that Ms McErlane actually spent the precise sums set out in the purported invoice. That is a document created by her retrospectively for the purposes of her claim, and the figures in it do not match other figures given by Ms McErlane in her email of 7 September 2010. It is not a document upon which the Tribunal feels able to place much reliance, and there is no other corroboration of her actual expenditure.

42. For all these reasons, the Tribunal therefore finds that the set-off is not established. It is therefore unnecessary to consider whether it would have been just and equitable to allow it in any event.

Section 20C Application

43. In deciding whether to make an order under section 20C a Tribunal must consider what is just and equitable in the circumstances. The circumstances include the outcome of the proceedings. In this case the Applicant has been wholly successful. Furthermore the Applicant is an RTM company owned and run by the lessees; it is not a commercial landlord. Any costs incurred in connection with this application will have to be borne, one way or the other, by the members of the company. It would be inequitable for the Respondent to be exempted from any requirement to contribute to those costs, insofar as they might be recoverable through a future service charge, while leaving her fellow lessees to foot the bill. For these reasons, it would not be just and equitable to make an order under section 20C limiting recovery of the

Applicant's costs through future service charges. In so deciding we are not making any determination as to the reasonableness of such charges, nor is the Tribunal making any finding as to whether the lease permits recovery.

Reimbursement of Fee

44. For the same reasons as outlines in the previous paragraph the Tribunal orders the Respondent to reimburse the Applicant for the application fee of £250.00 by 7 January 2015.

Dated: 16 December 2014

Judge E Morrison (Chairman)

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.