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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00CG/LAC/2015/0013**
Property	:	**25A Brocco Bank, Sheffield, S11 8RQ**
Applicant	:	**Sarah Percival-Ward**
Representative	:	**Nigel Buxton**
Respondent	:	**Bradford Property Trust (a subsidiary of Grainger PLC).**
Type of Application	:	**Service charges, Section 27A of the Landlord and Tenant Act 1985.**
Tribunal Members	:	**Judge C. P. Tonge, LLB, BA.** **Mr M. C. W. Bennett BSc, MRICS.**
Date	:	**25 January 2016**

DECISION

The background to the application

1. This case comes before the Tribunal by way of an application received on 3 August 2015 from "the Applicant", Sarah Percival-Ward, the long leaseholder of flat 25A Brocco Bank, Sheffield, S11 8RQ, "the property".

2. "The complex" is a purpose built complex containing eight flats, four of which are contained within one building with addresses of 25A, 25B, 25C and 25D Brocco Bank. The remaining four flats are contained within a separate building a short distance away within the same grounds with addresses of 29A, 29B, 29C and 29D Botanical Road.

3. The Freeholder of "the complex" is Bradford Property Trust, which is now a subsidiary company of Grainger PLC.

4. The Applicant holds the remainder of a 99 year lease to the "the property", commencing on 25 March 2000.

5. The Applicant is represented by a gentleman with experience of the construction industry, Mr Buxton.

6. Directions were issued on 11 August 2015. As a result of these Directions a joint hearing bundle has been prepared that is not paginated, the Respondent preferring to group pages together behind various tabs.

7. The application relates to works carried out on the rainwater system of both buildings within "the complex" in 2009 that were, in the words of the Applicant "of a very poor standard and virtually useless". The application has been made because the Respondent now agrees that the work carried out in 2009 will have to be repeated during 2016, in relation to the Brocco Bank building. The Applicant contends that she should not be required to contribute to the cost of the 2016 works.

8. The Tribunal inspected "the complex" on 25 January 2015 with a hearing after the inspection. The hearing taking place at the Employment Tribunal Building, Sheffield.

The inspection

9. The Tribunal inspected "the complex", that inspection commencing at 10 am on 25 January 2016. Mr Buxton was present on behalf of the Applicant who was not present herself. The Respondent was not present, or represented. The inspection being centred upon the condition of the rainwater system.

10. The two blocks of flats have stone walls, pitched and slated roofs, they are two stories high and have timer gutters. Each building has five rainwater down pipes, with four situated at the corners or towards the corners of the building, the fifth being in the centre of the front aspect of the building. The down pipes are made out of PVC. The gables of the Botanical Road building are at separate heights.

11. Generally, the rainwater system on both buildings is in a very poor condition. The Tribunal inspected the condition by walking around both buildings and looking up. At most corners it was possible to see through what should have water tight gutter corners. It was evident that rain water would pass through these gaps and out of the rainwater system.

12. There are areas of stone wall that are clearly being inundated with water because on a dry day they were suffering from visibly wet areas. At one of these areas a baton of wood had been fixed to the top of the gutter, increasing the height of the gutter by about one inch. It was clear that this was intended to stop water escaping from the gutter and then cascading down the exterior of the building. It appeared that this had been at least partly effective because due to the wet building wall it was evident that rain water was now being forced from the inner side of the gutter directly onto the building wall.

13. The facias, underneath the gutters are also in a very poor condition, areas of wood in the process of falling off the wall, areas that have been patched and areas that are in urgent need of repair.

14. It is evident that the five rainwater down pipes of each building are not able to deal with the amount of water that is falling onto each roof.

15. The rain water systems are not dealing with the rain that is falling onto these buildings.

16. Upon looking at neighbouring properties the Tribunal noted that some rain water systems had been replaced with more modern alternatives than wood.

17. Generally, the whole of "the complex" is in a poor state of repair, paths require large amounts of moss moving off them, trip hazards need to be addressed and there is a very deep drop over a boundary retaining wall that is dangerous and should at the least be fenced off.

THE LAW

Landlord and Tenant Act 1985

Section 18, meaning of service charge and relevant costs.

Briefly this defines a service charge and associated costs as the variable cost of providing the service.

Section 27A, Liability to pay service charges: jurisdiction

(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.

Section 19, 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 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.

Relevant provisions of the lease

18. At clause 6 of the lease the Freeholder company covenants, amongst other things, to keep the rainwater system in good repair.

19. At clause 5.1 (b) of the lease the Applicant covenants to pay service charges, amongst other things, for rain water system repairs.

20. At clause 6.5 of the lease, the Freeholder is empowered to retain the services of surveyors, or staff as may be necessary for the reasonable supervision and performance of the Freeholders covenants.

21. At clause 12 of the lease, the Freeholder is released from liability for interruption of any Service Charge Obligation in the event of, amongst other things, any other reason that is beyond the Freeholders control.

Written evidence

Summary of the written case on behalf of the Applicant

22. The Applicant's case is that the renewal of the rain water system in "the complex" that was completed in 2009, commenced with consultation in 2006, 2007 and 2008. There is no allegation that this was not effective consultation under the terms of section 20 of the Landlord and Tenant Act 1985, but the Applicant points out that the procedure was permitted to take far too long.

23. The Applicant alleges that the work was carried out to a very poor standard and that the Freeholder is at fault for choosing the wrong contactor, not supervising this work, failing to adequately inspect the work once it was complete, paying for a defective installation and failure to put matters right afterwards. There were additional repairs that were charged for after the work was completed. The work is now to be done again and having paid for the work to have been done already, it is unreasonable for the long leaseholders to be required to pay for the same work a second time.

24. The 2009 work had cost £4530, this had been divided between the eight flats and so the Applicant's service charge had been £566.25.

25. The consultation document for the work in 2016 states that the work will cost £4450, but this is only in respect of work at the Applicant's block and therefore it is expected that the service charge that the Applicant will have to pay will be £1112.50. The Applicant's case is that she should not be required to pay this sum.

Summary of the written case on behalf of the Respondent

26. The Respondents' case is that although it is agreed that the 2009 installation of the replacement rain water system was carried out in a way that left "the complex" with ineffective gutters, this is not the Respondent's fault.

27. This was work carried out by a contractor who had been suggested by the long leaseholder of three out of the eight flats on the complex. There was an inspection and snagging work. The contractor was then paid. The contractor ADJ has become impossible to contact. Repairs have been required. It is necessary to again replace the parts of the rainwater system fitted in 2009. It is reasonable that the Long Leaseholders pay for this new contract of work through service charges.

28. Consultation is underway to enable the new works to take place and be paid for by the Long Leaseholders.

The hearing

29. The hearing commenced at 11.15 am on 25 January 2016, at the Sheffield Employment Tribunal building. Mr Buxton was present on behalf of the Applicant who was not present herself. Mr Gareth Feeney a property manager, employed by the Freeholder Respondent was present on behalf of the Respondent. The Tribunal permitted each parties statement of case to stand as their evidence in chief. Each party was then cross examined by the other party and questioned by the Tribunal.

30. It is an agreed fact the lease does provide for the Respondent to renew the rain water system, when that is necessary. Further, this can be charged for as service charge, provided subject to the cost being reasonable.

Oral evidence on behalf of the Respondent

31. On behalf of the Respondent Mr Feeney stated that the Respondent should not be held responsible for the poor workmanship of the contractor ADJ.

32. On behalf of the Respondent Mr Feeney stated that the rain water system work does have to be done again and that it is accepted by the freeholder that ADJ did a poor job in 2009. The extent of the poor craftsmanship was not evident immediately. There was some snagging work. The joints were a problem and water was coming over the top of the gutters. Later when more complaints were being made Mr Feeney found that he could not contact ADJ.

33. Mr Feeney made a judgement call and decided that it was better for the long leaseholders not to conduct legal action against ADJ. We decided that it was more cost effective to pay for repairs as problems were reported.

34. Mr Feeney said that Doctor Rosario had recommended ADJ to us, because they had done work for her. We consulted the other long leaseholders and decided to instruct ADJ. This was a minor job and we told ADJ to replace like with like, so they installed a new wooden gutter to both blocks.

35. Mr Feeney accepted that it would have been better to use a more modern material, such as PVC or aluminium gutters, but said that this, in his view, would have involved more cost.

36. Mr Feeney sought to rely upon the fact that before ADJ could be instructed to carry out the 2009 work, ADJ had to complete a new supplier pack, so that some effort had been made to check that ADJ were a competent business. Mr Feeney described this as a vetting and approval process.

37. Mr Feeney accepted that it took 18 months for ADJ to return the completed pack to the Freeholder. That ADJ appeared to be trading from a residential address, that the business was not registered for VAT. and that there was no employer's liability insurance (indicating that this was a sole contractor). The forms also raised a doubt as to whether ADJ were registered under the Contractors Health and Safety Scheme. None of these features had apparently caused concern, but in hind sight they should have. He had been frustrated by the 18 month delay in ADJ returning the pack, but thought that the company might have had difficulties with forms.

38. Mr Feeney added that during the time when ADJ were selected as the contractor to use, Doctor Rosario was negotiating with regard to buying the freehold of "the complex". Mr Feeney also pointed out that there were at this time chronic arrears of service charges, influencing his desire to spend as little as possible on the contract.

39. Mr Feeney accepted that replacing like for like was not the best way of dealing with this contract. He stated that when the work is done again in 2016, that PVC gutters will be used.

40. Mr Feeney agreed that the "Instructions of Quoted Works" that should contain instruction to ADJ on what the Respondent required them to do whilst completing the 2009 contract, did not have any such instructions. He sought to explain this by saying that he had been told that the instructions might be missing because of an error resulting in a different computer programme being used in his office.

41. Mr Feeney stated that the Freeholder had not supervised this contract, but MR Feeney had himself inspected the gutters before he had paid ADJ. It had not been raining at the time of his inspection and he had simply looked up at the guttering from the ground.

42. Mr Feeney considered the repairs that have been done to the rain water system at "the complex" between 14 March 2011 and 24 September 2014, the invoices total £1956. He stated that some of this expenditure would have been necessary as maintenance, but that some of it was as a result of the poor state of the rain water systems after the 2009 work. He added that in his opinion the gutters were now in a worse state than they had been before the work had been carried out.

43. Mr Feeney stated that the Freeholder should not be held responsible for the defective work that was carried out in 2009 because clause 12 of the lease operated so that the Freeholder was not liable because this had been a contract that was beyond the control of the Freeholder.

44. Mr Feeney had not carried out any other checks upon ADJ, before awarding them the contract. He was aware of the Royal Institute of Charted Surveyors Service Charge Residential Code, 2nd Edition. Mr Feeney was told that the Tribunal would take regard of the content of part 12 of the Code with regard to contractors.

45. Mr Feeney stated that he would not now be able to award a contract to anyone who was not C. H. A. S. registered. Mr Buxton sought to adduce oral evidence of a telephone conversation with an official at the Contractors Health and Safety Organisation, which had taken place this morning. Mr Feeney objected and the Tribunal refused to admit the evidence. It was hearsay upon which no notice had been provided before Mr Buxton sought to adduce it.

46. Mr Feeney indicated that it was not yet certain that the 2016 contract would in fact take place. This information took Mr Buxton and the Tribunal by surprise. There was nothing in the hearing bundle to suggest that the 2016 works might not go ahead. Mr Feeney indicated that the Freeholder was considering buying the long leasehold interests. Mr Feeney also confirmed that the 2016 contract was only to replace the rain water system on the Applicant's block of flats.

Oral evidence on behalf of the Applicant

47. Mr Feeney did not ask any questions of the Applicants representative.

48. Mr Buxton went through the Respondent's "Individual responses to the Applicant's Statement of Case" providing the Applicant's view where he thought it appropriate.

49. On behalf of the Applicant Mr Buxton asked the Tribunal to order that the Applicant should not be required to contribute to the cost of the 2016 works, these would not be needed if the Freeholder had not been negligent with regard to the 2009 works.

50. Mr Buxton also requested that the fees paid by the Applicant to the Tribunal be refunded to the Applicant by the Respondent.

51. Mr Buxton also asked that an order be made under section 20C of the Landlord and Tenant Act 1985, preventing the Landlord from recovering any costs involved in this case from the Applicant in a service charge.

The deliberations

52. The Tribunal notes that The Applicant has not at any stage suggested that the 2009 works were not necessary and it is clear that the Respondent thought that they were. Therefore the Tribunal concludes that it was reasonable for the Freeholder to have works done upon the rain water system at "the complex" in 2009.

53. The Tribunal finds that before the 2009 works were carried out there was an effective consultation exercise pursuant to section 20 of the Landlord and Tenant act 1985.

54. The Tribunal notes that during the consultation Doctor Rosario suggested ADJ as a contractor for this work. The Tribunal also notes that this long term leaseholder of three out of the eight flats on "the complex" was negotiating to buy the Freehold of "the complex". The Tribunal is satisfied that the Freeholder gave this suggestion of a contractor too much weight, such that he was willing to delay the work for an unreasonable time of 18 months waiting for ADJ to return the New Suppliers Pack.

55. The Tribunal notes that the Freeholder did not follow the guidance in the Royal Institute of Charted Surveyors Service Charge Residential Code, First Edition or 2nd Edition, both of which are approved by the Secretary of State for England under section 87 of the Leasehold Reform, housing and Urban Development act 1993. (The second edition became effective on 6 April 2009.)

56. Both Codes deal with contractors and both state that "Contractors should, where possible, be members of a relevant trade organisation, which has published a code of practice for the assessment of its members".

57. Both Codes state, "When you engage contactors for major work you should define their duties. You should take all reasonable steps to ensure that contractors carry out their duties promptly and to a reasonable minimum standard, e.g. by use of competitive tender, written contracts with detailed provisions...." (First Edition) or "written contacts with written provisions" (Second Edition).

58. The Freeholder is in breach of these requirements.

59. The Freeholders own vetting and approval procedure was fundamentally flawed. The Tribunal notes that in 2016 Mr Feeney would not be permitted to award a contract to anyone who is not C. H. A. S. registered. The Tribunal concludes that at the time ADJ completed the new supplier pack, they were not C. H. A. S. registered, but had only applied for registration. Further, the Tribunal has concluded that this was in fact a sole proprietor who was working from home, without a business address and he was not registered for VAT. This coupled with the fact that it took ADJ 18 months to return the completed forms would have put any reasonable enquirer on notice that he should not award the contract to ADJ or at the very least that further enquiries and checks were necessary.

60. The Respondent was negligent and unreasonable in the choice of ADJ as the contractor to appoint for the 2009 contract.

61. Clause 6.5 of the lease empowers the Freeholder to engage a professional to assist in specifying what needs to be done by the contractor to complete such works, to supervise the work and certify that the work has been properly completed. The 2009 contract was carried out without any of these important protections being used. The Freeholder was negligent and unreasonable in failing to do this.

62. The Freeholder was negligent and unreasonable in deciding to instruct any contractor to replace like for like. This resulted in wood guttering being taken down and replaced with wood guttering that is not capable of dealing with the rain water that falls onto these roofs. The specification should have included more modern materials, such as PVC or aluminium gutters that provide a great deal more capacity of rain water run-off and require less maintenance.

63. For all the above reasons the Tribunal finds that the Freeholder acted negligently and unreasonably in the conduct of the 2009 contract, such that the work done in 2009 left the rain water system in a worse state after the work had been done than it had been in before the work was done. The Tribunal concludes that the 2009 works, although costing £4530 had no value and should not have been paid for.

64. The Tribunal rejects the Freeholder's contention that he avoids liability for this negligence under clause 12 of the lease. This was a contract that at all times should have been under the Freeholders control.

65. Turning now to the 2016 works contract.

66. The Tribunal decides that an effective consultation is under way and that it is reasonable to repeat the work already done to the rain water system at the Applicant's block of flats.

67. The Tribunal is, however, concerned that on this occasion the Freeholder arranges and specifies an effective solution to the rain water problems at this building. The Tribunal concludes that the best way to proceed with this would be to appoint an appropriate person to design and specify an effective rain water system, to supervise the contract, to inspect the completed works and certify that they have been completed in a satisfactory manner. As a result of the above findings, the Tribunal then concludes that the fair and reasonable approach to take is that the sum of £566.25 be deducted from the service that would otherwise be payable by the Applicant in respect of service charges for this new contract (the 2016 works). This is fair and reasonable because the Applicant has already paid this figure in service charges for the negligent and unreasonable contract in 2009.

68. The Tribunal does not think that is fair or reasonable to make any further reduction of the new contract price in relation to the repair works that have been done to the rain water system at "the complex" between 14 March 2011 and 24 September 2014. The Tribunal accepts Mr Feeney's evidence that a proportion of this would have to have been spent in any event on maintenance of the system. The Tribunal concludes that when looking at the whole of the case, a fair result is obtained by following the formulae in paragraph 67.

69. The Tribunal is concerned that oral evidence has been given today that the 2016 works may not go ahead. The Tribunal therefore decides to put a time limit on completion of the 2016 contract of one year from today's date. If the 2016 contract has not been completed by 25 January 2017, then the service charge account of the Applicant must be credited with the sum of £566.25.

70. The Applicant has succeeded in her case and the Tribunal considers it to just and equitable to make an order pursuant to section 20C of the Landlord and Tenant act 1985 that the Landlord cannot regard any costs in connection with these proceedings as relevant costs to be taken into account in determining the amount of service charges to be payable by the Applicant.

71. The Tribunal concludes that it would be unfair to order that the Respondent reimburse all the fees paid by the Applicant in this case. However, the Tribunal notes that Mr Feeney on behalf of the Respondent did not ask any questions of the Applicant's representative and gave evidence that the rainwater system at "the complex" was in a worse state after the 2009 work had been done than before it was done.

72. As such it is clear that the Respondent could have dealt with this case as a paper determination, as the Applicant requested in the application form. The Tribunal orders that the hearing fee in this case of £190 be reimbursed to the Applicant by the Respondent. (Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013/1169).

The Decision

73. When a service charge demanded is calculated to demand payment from the Applicant to pay for replacement of the rain water system to the building containing "the property" (referred to above as the 2016 work) the Respondent must deduct £566.25 from that demand.

74. If the 2016 work has not been completed by 25 January 2017, then on that date the Respondent must repay the sum of £566.25 into the Applicant's service charge account.

75. The Landlord shall not consider any costs incurred in conducting this case as relevant costs when calculating a service charge in respect of the Applicant. (Section 20C of the Landlord and tenant act 1985)

76. The Respondent shall, as soon as is possible, reimburse to the Applicant the hearing cost of £190. (Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013/1169).