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FIRST-TIER TRIBUNAL

PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BE/LSC/2015/0110**
Property	:	**15 Mitcham House, Crawford Road, London SE5 9NN**
Applicant	:	**London Borough of Southwark**
Representative	:	**Southwark Home Ownership Services**
Respondent	:	**Esther Oluwamayowa Titilayomi Ajoke Olaiya**
Representative	:	**In person**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Judge Dickie** **Mr A Manson, FRICS**
Date and venue of Hearing	:	**29 June 2015, 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**19 August 2015**

DECISION

Decisions of the tribunal

(1) The tribunal determines that there was a failure to comply with the statutory consultation requirements in relation to the window works (in respect of which the Respondent has been charged £3862.36). The statutory cap of £250 will apply in respect of the service charge representing the Council's expenditure.

(2) All other major works estimated service charges are reasonable and payable by the Respondent, and valid consultation took place in respect of them.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the Act") as to the amount of service charges payable by the Respondent in respect of the service charge years 2013/14 and 2014/15.

2. Proceedings were originally issued in the Lambeth County Court under Claim no. A84YM197. The claim was transferred to this tribunal, by order of Deputy District Judge Glen made on 19 February 2015. That order set out the issues transferred to the First Tier Tribunal for determination, and that "upon such determination being made, the claimant has permission to apply to lift to stay and seek a disposal hearing upon filing a copy of the Tribunal order and reasons for it at court."

3. The tribunal issued directions on the application on 31 March 2015 after an oral case management hearing attended by both parties.

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

The hearing

5. The Applicant was represented at the hearing in house by its Enforcement Officer and the Respondent appeared in person.

6. The start of the hearing was delayed because the Applicant's hearing bundle was incomplete. It did not contain the County Court pleadings or any of the Respondent's documents, including email correspondence with the Council in which she had raised some of her complaints. The bundles were amended by the Applicant before the hearing began.

The background

7. The property which is the subject of these proceedings is a self contained flat within a purpose built block. The tribunal did not consider that an inspection of the property was necessary, nor would it have been proportionate to the issues in dispute.

8. The Respondent 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. The dispute concerned major refurbishment works carried out to the property. At the start of the hearing the tribunal identified the relevant issues for determination, as set out in the order of DDJ Glen as follows:

(i) Whether section 20 noticed was served and if not, what consequences of that may be:
(ii) The reasonableness of the service charges: and
(iii) The standards of the works undertaken

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.

11. The tenant disputed that she had been served with a valid notice under s.20B of the Act. However, the tribunal observed that the present proceedings concern estimated charges only, and so the matter was not relevant. In any event, the Council advised that the project came in within budget. Where valid demands for on account payments were made which exceed the actual service charges, pursuant to the decision in *Gilje v Charlgrove Securities Ltd. [2003] EWHC 1284 (Ch),* section 20B of the Act is of no application as there is no demand for additional payment.

Section 20 Consultation

12. The tribunal is satisfied that the s.20 consultation notice dated 1 August 2013 was served on the Respondent. However, the s.20 consultation was defective. Accordingly, unless an order is made under s.20ZA of the Act dispensing with statutory consultation, the contribution of the Respondent towards the actual expenditure will be limited to the statutory cap.

Reasons

Service of the notice dated 1 August 2013

13. The works have been carried out under a qualifying long-term agreement. There was no dispute raised by the leaseholders as to the statutory consultation procedure prior to entering into that qualifying long term agreement in 2010. The tenant disputed that she had been served with the consultation notice of intention in respect of this major works project, dated 1 August 2013. It was the Council's case that it had been posted through the door to her flat.

14. The tribunal heard oral evidence from Mr S. Habib, employed by the Applicant as Capital Works Officer in its Home Ownership Services. He gave evidence that he personally served all of the statutory consultation notices on the leasehold properties at 1 to 20 Mitcham house, including

flat 15, by posting them through the letterbox of each flat door. He said if there had been any delivery issues with posting the notice through any flat door he would have made a note, and that there had been no delivery issues affecting flat 15. He further said his colleague Mr Shaun Nicholson was present when he delivered the letter. Mr Habib gave evidence that on their return to the office he prepared a statement of delivery, which he produced.

15. Mr Habib said he received no comments from the leaseholder concerning the works, the period for making observations having expired on to September 2013. Mr Habib said the first contact he received from this tenant was by email of the 25 February 2014.

16. The tenant in cross-examination sought to suggest that his reply by email to her 25 February 2014 enquiry by telephone and email, referring to the notice having been "sent", was inconsistent with his witness statement to the effect that the notice had been hand-delivered. Mr Habib did not agree, though he did concede he had used the wrong word in his email. He asserted that if requested he would have provided the certificate of service after his telephone conversation with the tenant.

17. The Respondent said that around the date of alleged service she was living in the flat, not working, and would have been at home. She considered it possible (and said it had been suggested by another Council officer not present at the hearing) that the notice could have been delivered to another nearby block with a similar name. The Respondent said she regularly had house guests, who would be given a key, but she did not have one at the time in question.

18. Nobody, the Respondent said, had mentioned anything about hand delivery until the matter came to the tribunal. She clarified in her evidence that she believed that the Council officers had fabricated their evidence, though this is not a matter she had put to Mr Habib for comment when questioning him.

19. On balance, the tribunal is persuaded that the Council's evidence as to service of the notice of 1 August 2013 is reliable, and that it is more likely that the tenant is for some reason mistaken (or unaware that the letter was delivered). The Council had employed a system for hand delivery, and produced first hand evidence of that delivery, supported by a document the tribunal is satisfied was contemporaneously created by that witness. The tribunal was not persuaded that the wording of any email exchanges suggested the contrary. This is sufficient in the view of the tribunal to overcome the Respondent's mere assertion of non receipt.

Validity of the statutory consultation process

20. However, the tribunal finds the notice itself did not comply with the statutory consultation requirements. The applicable consultation requirements are set out in Schedule 3 of the Service Charges (Consultation Requirements)(England) Regulations 2003 – *Consultation requirements for qualifying works under qualifying long term agreements and agreements to which regulation 7(3) applies.* Paragraph 1(2) requires (so far as is relevant) that the notice of intention to carry out qualifying works shall:

(a) describe, in general terms the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;

(b) state the landlord's reasons for considering it necessary to carry out the proposed works;

21. The notice of intention dated 1 August 2013 has four pages plus enclosures. The first page begins by advising leaseholders that the Council is proposing to carry out major refurbishment work to their block, and that the notice will provide details of what works are proposed and why, how much the work is estimated to cost and details of who to contact with any questions. Page 2 of the notice begins with a section headed "Statement of proposed works". That section lists "A general outline of the proposed works", but importantly there is no mention of works to the windows. The proposed works are listed as follows:

- Renewal of roof covering
- Renewal of asphalt covering on walkways and balconies
- Brick and concrete repair works
- Lateral mains upgrade
- Front entrance door upgrade / renewal
- External decorations
- Associated works such as the removal of asbestos
- Various repair and refurbishment works inside tenanted properties (cost not recharged to leaseholder).

22. On page two the next section of the letter begins with the heading "Why is the council proposing these works?". Its reasons are then set out for the works in eight bullet points, which continue on page three with (as the 6th bullet point:

"The windows to the dwellings are of a timber single glazed type and are in very poor condition. During inspection, some residents have reported the windows are difficult to operate due to swelling in colder / wetter months and some windows are completely rotten or missing. After a life-cycle cost comparison review by the Council's quantity surveyor (QS), it is recommended that replacement of the existing

windows with new double-glazed uPVC is more cost effective, in the long run, than retaining and extensively repairing and decorating the existing windows."

23. On the last page of the letter, underneath information about making observations and the deadline of 2 September 2013 for making them, and under the heading "Further Information", the letter advises that the detailed estimates for these works are available for inspection, and arrangements for such inspection are explained.

24. On the last page of the enclosures to the letter is a Calculation Sheet which sets out in 18 columns a breakdown of the items of expenditure. One of those columns is headed Windows, and breaks down a cost of £104,372.34.

25. The Council produced a letter dated 3 September 2013 also from Mr Habib to the Respondent, and said to have been issued to all leaseholders in the block, which observed that the notice of intention dated 1 August 2013 did not include the description for window renewal works. The letter goes on:

"This is incorrect. As can be seen later in the notice, and in the "calculation sheet" that was attached, the Council does intend to undertake window renewal works to your building. The cost of the window renewal is already included in the estimated contribution amount quoted in your Notice of Intention.

Due to the above omission from your Notice of Intention we are extending the observation period until Friday, 13th September 2013 so that any leaseholders who wish to make observation about the intended window renewal may still do so. Full details of the intended works, as well as how to make observations can be found on your Notice of Intention. A more detailed description and justification for the intended works was also enclosed. The letter ends with an apology for any inconvenience this omission may have caused.

26. However, this letter had not been produced in Mr Habib's witness statement, and the Council did not produce evidence as to the method of its service. Receipt of the letter by the Respondent was disputed.

27. It was the Council's position that the statutory consultation procedure had been valid. However, the tribunal is unable to accept that contention. The statutory requirement is to describe the works in general terms or specify how the description may be inspected. The tribunal finds that the letter of 1 August 2013 did neither. The window works were not described in general terms, and a reference in the "Reasons" section of the letter to window replacement being "recommended" did not amount to a description of "proposed" works.

28. A statement of the landlord's reasons for carrying out the proposed work in the manner set out in this letter cannot reasonably be interpreted to have also served the purpose of describing the works themselves. Furthermore, the inclusion of window works in the calculation of the service charge, within a complex schedule, did not remedy the omission to describe the window works proposed in general terms.

29. The Applicant did not argue that specifying in the notice of intention the inspection arrangements for the detailed estimates amounted to compliance with Paragraph 1(2)(a), and in any event the tribunal does not consider this to be the case. The invitation was to inspect detailed estimates, not a description of the works, and in any event where the landlord has opted to provide a general description of the works in the notice, but that description is wrong and misleading, arrangements to allow inspection of a document from which a description might be extrapolated does not constitute compliance.

30. The purpose of the consultation requirements must be to provide clear notice to the leaseholder as to the matters prescribed, and the notice of 1 August 2013 was the opposite of clear concerning the proposed window works. It required too much analysis and investigation by the leaseholder to deduce a description of the window works. Indeed, the Council acknowledged as much by producing its letter of 3 September 2013.

31. The tribunal finds that only upon receipt of that letter would notice have been given to the leaseholders under Paragraph 1(2)(a) of the Regulation. However, service of that letter on this Respondent has not been proved. In any event, the consultation period thereafter was only until 13 September 2013, which plainly did not comply with the statutory requirement. The Council argued that the reference to windows in the letter of 3 September corrected the omission in the notice of 1 August, which did not stand on its own because it did not contain clear reference to a proposal to carry out window works. If both are read together, it was submitted, the tenants have however had more than a 30 day consultation period and the statutory consultation requirements have in effect been met. The Applicant did not refer the tribunal to any authorities in support of its argument. The tribunal rejects this argument, since in respect of the window works a 30 day consultation period was not given after compliance with the requirements of Paragraph 1(2)(a).

32. In respect of this particular leaseholder, the Council failed to produce satisfactory evidence that the letter of 3 September 2013 was served on her, and the tribunal finds that it was not. However, this does not prejudice the Council's position to prove service of it in the future on any other leaseholder, since they have not been a party to these proceedings.

33. Accordingly, the statutory consultation procedure has not been complied with. The statutory cap of £250 will apply unless dispensation is applied for and granted. The tribunal has not considered it proper to proceed to consider whether to dispense with statutory consultation since there are other leaseholders with an interest in the matter who must be notified that the tribunal may consider this matter.

The reasonableness of the service charges and the standards of the works undertaken

34. The tribunal also heard evidence on behalf of the Council from Diana Lupulesc, Revenue Service Charge Officer, concerning the apportionment of insurance charges. However the tenant confirmed that now she has had the Council's explanation of this apportionment she was happy with it and that the revenue service charge was not in dispute.

35. The tribunal's directions had required the parties to complete a schedule of issues in dispute. The Respondent did not in that schedule refer to her disputes over the quality of the works carried out. In her Defence to the County Court claim, the Respondent had referred to unfinished work, but her complaints were not particularised. She had however set out her concerns by email to the Council dated 29 May 2014. The Respondent's concerns over the quality of the works carried out amounted to two principal issues:

(i) Her front door was difficult to close. She suffers from arthritis and this causes her problems as the handle has to be jammed upwards to lock it.

(ii) The Council did not install ventilation, as it did to leasehold properties.

36. The Respondent's concerns had not been adequately particularised and evidenced in these proceedings, and she thus did not establish to the tribunal's satisfaction that the quality of the works carried out required a discount from the cost to her. However, Mr Bagley was given an opportunity to look over these documents at lunch in order to give evidence in relation to them. He did confirm he was willing to send an operative to look at the door to see if it needed to be changed or adjusted. The tribunal was advised by Mr Bagley that the defects liability period would end on 29 August 2015. The leaseholder has an opportunity, under a future application under s.27A of the Act, to challenge the reasonableness of the final cost of the works if all defects are not remedied within the defects liability period.

37. Mr Habib explained that the Council had not installed ventilation into the leasehold properties as this would be an improvement for which it could not recharge under the terms of the lease.

38. Paragraph 7 of the Third Schedule sets out the costs and expenses which can be recovered through the service charge. These include the costs and expenses of carrying out the works required by Clause 4(2)-(4) (not set out herein), which relate to repairs and maintenance but not improvements and (at Paragraph 7(9)) those of installing (by way of improvement) double glazed windows and an entry-phone system. The tribunal concludes that the Council is correct to observe that the cost of installation extract ventilation (other than within double glazed windows) would not be recoverable through the service charge and the Council had no duty to instal it into leasehold flats. The Respondent has not, the tribunal is satisfied on the evidence, been charged through the service charge for the installation of ventilation into tenanted properties.

Application under s.20C and refund of fees

39. In view of the outcome of the proceedings, the tribunal did not consider it appropriate to order the Respondent to refund to the Applicant the tribunal fees it had paid.

40. The council confirming that it did not intend to add its costs in these proceedings to the service charge, the tenant was not invited to make an application under s.20C of the Act.

Name: F. Dickie **Date:** 19 August 2015

Appendix of relevant legislation

Landlord and Tenant Act 1985

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 a leasehold valuation 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 a leasehold valuation 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) a leasehold valuation 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.