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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00/AJ/LSC/2016/0181**
Property	:	**Flat 2, 42 Birch Grove Acton, London W3 9SS**
Applicant	:	**Southern Land Securities Ltd**
Representative	:	**Mr B Maitz of Counsel**
Respondent	:	**Mr M Poole**
Representative	:	**None**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Mr N Martindale FRICS** **Mr P Roberts Dip Arch RIBA**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of decision	:	**5 October 2017**

DECISION

Decision

(1) The Tribunal determines that the sum of £4,163.54 including VAT is payable by the Respondent in respect of the service charges disputed.

(2) The Tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

Application

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

2. Proceedings were originally issued in the County Court under claim No.C12YJ904. The claim was transferred to the Chester County Court and then in turn transferred to this Tribunal, by order of District Judge Waschkuhn on 20 April 2016.

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

4. The application was originally determined by this Tribunal in a decision dated 5 September 2016. However this decision was subsequently appealed by the applicant. The decision of the Upper Tribunal was published on 18 July 2017. The Upper Tribunal referred some, but not all of the matters before it, back to this Tribunal to be considered by a differently constituted panel.

5. Directions were issued on 29 August 2017, by Deputy Regional Judge Andrew. These narrowed the issues down to a single one: Being a determination of the proper service charge contribution to be paid by the respondent in respect of the major works carried out in 2014 at the building, of which the property forms part.

6. The application for this Tribunal to determine was therefore reduced to a question of the amount of service charge to be paid by the respondent in respect of the major works and accompanying fees.

Hearing

7. The hearing finally started at 11am to enable the panel time beforehand to read through the lengthy bundle. The bundles were created internally as they were the same ones submitted to the former hearing panel in 2016.

8. The Applicant was represented by Mr Maitz of counsel with Mrs Young in attendance, the office manager for Together Property Management, a property management company, formerly known as Hamilton King. This company is the managing agent for the applicant (landlord).

9. The Respondent Mr Poole, was unrepresented and appeared in person.

10. Although neither party sought to introduce any late documents at the start, during the course of the hearing the panel was invited to view the copies of the four tenders submitted to the surveyor for the applicant for the scheme of works. The invitation to view these was made by the respondent, the applicant's representative did not object, since they had originally provided these to the respondent, but they had been omitted from the bundle. The panel viewed these tenders.

Background

11. The property which is the subject of this application is part of a large Edwardian house, since divided for many years into a range of flats.

12. Neither party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

13. 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.

Issues

14. The case having been the subject of a previous hearing; of an appeal and subsequently of a referral back, this Tribunal took care to raise with both parties, those issues which the panel had now been asked to deal with, arising from the original directions in 2016 and from the later Upper Tribunal decision.

15. It was confirmed by the applicant that the previous need to determine an application under S.20C (recovery of landlord's costs) was not required as the applicant had accepted that the lease did not provide for recovery of such under the service charge provisions.

Applicant's Case

16. Counsel for the applicant confirmed to the tribunal that the amount sought, was £4163.54. This was a lesser sum than the contribution originally sought from the respondent at £5470.42 which had been

based on the accepted tender price for the major works. The completed works had turned out to cost less than that accepted tender.

17. Counsel for the applicant identified three main concerns which the respondent had raised with the applicant in connection with the commissioning, management of and payment for, the works. The works had concerned the decoration and associated repairs and preparation to the exterior of the building, within which the property is located.

18. The applicant confirmed that there had been five potential contractors for the work. Of these, four had been identified by the applicant, by their surveyor or by their managing agent and a fifth contractor had been suggested by another leaseholder in the building. Although all five had been invited to tender for the work, the leaseholder nominated contractor did not submit a valid tender and was ruled out.

19. The applicant identified that the respondent was concerned about the financial viability of at least two of the contractors and the fact that all four were very small firms. The respondent having undertaken searches on the contractors had apparently variously concluded that at least two of them were financially unviable, having virtually no assets and/ or had falsely claimed membership of a variety of trade related bodies. The third – First Choice, were not said to work in the trades required for the job and therefore also unsuitable. The respondent had concluded that this meant that besides the appointed contractor Forward Management (FM), the other three were 'make weights' and were there simply to justify the cheapest, albeit inflated tender price received from FM in order to support their selection by the surveyor to the applicant. Even then the respondent was reportedly concerned at the fact that FM's website was out of date.

20. The applicant noted that the respondent had been disappointed that Acorn, the contractor suggested by the other leaseholder, had not provided a tender and that this was because the work was largely decorative rather than a repairing nature, the firm being roofing contractors.

21. The applicant identified that the respondent had in addition or alternatively asserted that the surveyor for the applicant had in some way 'rigged' the bidding process to ensure that FM were appointed. The applicant was concerned that FM were known to a director of the landlord's company and had done work for them but that they were conversely not known to the surveyor for the applicant landlord. Either way, the applicant reported that the respondent was concerned about their appointment and the tender price submitted as being excessive.

22. Counsel for the applicant went through the two detailed sets of notes of site meetings, largely and subsequently that the surveyor had attended

with representatives of contractor FM. The Tribunal noted that these described the items of work in some detail, what had been completed; what was outstanding.

23. Counsel for the applicant strenuously denied that there had been any suspicious or otherwise underhand activity by the landlord, by their agent, by their surveyor or by the appointed contractor and that the four contracting firms invited were all viable, capable bidders, any one of which could have satisfactorily completed the works.

Respondent's Case

24. The respondent largely re-iterated and clarified some of the material which the applicant had set out as the series of allegations.

25. The respondent made some fairly outspoken but essentially unsupported statements about the applicant, agent, surveyor and the contractor, however there was all but nothing produced in evidence to begin to support any of it.

26. The respondent instead referred the Tribunal to web based material concerning the alleged shortcomings in other unrelated property or construction activity elsewhere by the applicant, their agent, their surveyor and/or by the appointed contractor. Whilst the material was received by the Tribunal, much of it was hearsay based and could accordingly be given little weight.

27. The respondent made no criticisms of the quality of the work, or that any work had not been done for which payment had been sought.

28. Although critical of the tendering process and of the final price levied on completion of the works, the respondent did not provide the Tribunal with any reports on the extent, nature, level, or comparable cost of the works carried out, nor of the accompanying management and surveyors fees, nor of the tendering process itself.

Decision

29. Having heard evidence and submissions from the parties and considered all of the documents provided, the Tribunal has made determination on the issue.

30. The Tribunal determines that the sum of £4,163.54 including VAT is payable by the Respondent in respect of the service charges disputed.

Reasons

31. The Tribunal having heard the evidence and submissions from both parties, preferred the account provided by the applicant. From the materials available to it, it concluded that the repairs and decorations had been investigated, the works specified, tendered, managed and paid for in an acceptable and competent manner. Consequently the due proportion of those costs, which fell to the respondent, were reasonable and payable.

Application under S.20C

32. For reasons set out above, no application was made for an order under S.20C, nor was one required to be determined by the Tribunal. The Tribunal therefore made no order.

Next steps

33. The Tribunal has no jurisdiction over county court costs nor the enforcement of any recovery of this determination or of those costs. This matter should now be returned to the Chester County Court.

Name: N Martindale **Date: 5 October 2017**

Rights of appeal

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

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

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

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

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

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

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

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

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

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

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

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

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

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

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

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

Section 20B

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

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

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
- (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

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

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

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

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

Schedule 11, paragraph 2

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

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
  (a) the person by whom it is payable,
  (b) the person to whom it is payable,
  (c) the amount which is payable,
  (d) the date at or by which it is payable, and
  (e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

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

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
  (a) has been agreed or admitted by the tenant,
  (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  (c) has been the subject of determination by a court, or
  (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

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

(b) on particular evidence,

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