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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/29UG/LSC/2018/0020**
Property	:	**67 Darnley Road, Gravesend Kent, DA11 0SF**
Applicant	:	**(1) Annette Stone (2) Benjamin Stone**
Representative	:	**Mr Stephen Stone Grangeview Management Limited**
Respondents	:	**(1) Ms Chell (Flat 1) (2) Ms Brown (Flat 5)**
Representative	:	**In person**
Type of Application	:	**s.27A 1985 Act**
Tribunal Members	:	**Judge D Dovar Mr R Athow**
Date and venue of Hearing	:	**16th July 2018, Dartford**
Date of Decision	:	**9th August 2018**

DECISION

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1. This is an application under section 27A of the Landlord and Tenant Act 1985 to determine the payability of the costs of proposed damp treatment and associated remedial and reinstatement works.

2. Directions were given on 28th February 2018 by which any tenant who wished to take part was to serve a statement of case along with any witness statement or alternative quotes by 28th March 2018. Only Ms Chell (Flat 1) and Ms Brown (Flat 5) provided statements.

3. The Landlord has brought this application in order to obtain a determination as to whether the proposed works are service chargeable items. Ms Brown supports that contention, Ms Chell opposes it.

4. The application form states that the costs are for damp proofing for flat 5 and 6, with a cost of £11,080.80 including fees for flat 5 and with the cost for flat 6 not yet having been ascertained. The scope of work and cost has altered during the course of these proceedings.

5. Mr Stone, for the Applicant, clarified that there were three types of cost which the landlord sought to recover under the service charge and which were challenged by Ms Chell:

    a. the cost of tanking the inner surface of the external walls of Flat 5;

    b. The cost of providing an epoxy resin or other membrane to the floor of that flat;

c. Ancillary costs of making good damage to the flat occasioned by the works above.

6. The total costs now claimed in this application are £18,122.94, being:

a. £7,600 for Damp Works to Flat 5, both to walls and floor;

b. £4,830 for reinstatement costs to Flat 5;

c. Surveyor's fee (11.5%), £1,429.45;

d. Management fee, £1,243.

7. During the course of the hearing it was further clarified that no challenge was made to proposed works to the external wall of Flat 6. Further, that Ms Chell's only challenge to the items at paragraph 5 c. above was based on the fact that she considered that the principal works (being those identified at 5 a. and 5 b.) were not service charge items and therefore neither where any ancillary works.

8. At the end of the hearing, it became apparent that some of the costs originally claimed were no longer being pursued and short directions were given to clarify the parties position on those costs. These were duly clarified by the Applicant (and reflected at paragraph 6 above) and comments from both Ms Chell and Ms Brown were received. Ms Bleek of Flat 6 also corresponded, but on wider issues relating to her flat. She had not provided any documentation for the hearing itself in compliance with the original directions. Further, her correspondence related to costs that the either that Applicant did not propose to charge (and had not made part of this application) or for works to her flat which she

contended needed to be carried out. The Tribunal only has jurisdiction to deal with costs that the landlord has or proposes to charge, it cannot compel a landlord to carry out works. For all those reasons the Tribunal does not deal with the issues belatedly raised by Ms Bleek in this decision.

9. In support of the application, the Applicants' submitted:

   a. a report from Greenward Associates, Chartered Surveyors and Designers, showing damp in the Property and a need for tanking in the kitchen, bedroom and lounge of Flat 5 and the lounge of Flat 6;

   b. a schedule of building works for the external tanking to the left hand side of Flat 6 from Greenward Associates;

   c. a quote from Damp Works to carry out the necessary damp proof works to Flat 5 for £7,600 plus Vat. This includes £1,200 plus VAT for applying a liquid damp proof membrane to all floors;

   d. a quote from Steel and Co for the remedial works for Flat 5 of £11,200 plus VAT (which has subsequently been revised to £4,830 plus VAT in light of the works already undertaken by Ms Brown).

Property

10. The property is semi-detached and situated on a corner plot in a residential part of Gravesend, about ½ mile from the town centre. It

was built about 125 years ago and appears to be of solid wall construction, being brick faced. The front elevation and the lower part of the rear elevation has been rendered and colourwashed. The building is on three floors, the lower floor being at semi-basement level. The garden abuts the walls of most parts front and rear of the lower floor to a height of at least two feet, whilst the footpath in Arthur Street abuts to a height of about four feet. Consequently, a large portion of the structural walls are below natural ground level. The property has a slate roof.

11. Flat 5 has been stripped out in preparation for the impending works. Some of the internal plaster had been removed to the main structural walls, and it was noted that there appeared to be some form of bituminous (or similar) finish beneath the plaster. There were stains indicating dampness in the flat.

Lease terms

12. The following provisions are contained in the representative lease provided which is dated 5th February 1988 and for a term of 125 years from 1st November 1987:

    e. By clause 4 (b), the tenant covenanted to keep

        'the interior of the Maisonette ... in good and tenantable repair and condition ... and it hereby agreed and declared that there is included in this covenant as repairable by the Lessee (including replacement whenever such shall be necessary) the ceilings and floors

of and in the Maisonette and the joists and beams on which the said floors are laid ...'

f. By clause 4 (d) the tenant covenanted to pay

'one sixth of the expenses of managing the Property and maintaining cleaning repairing renewing and keeping tidy and in good order the items mentioned in the Fourth Schedule ...'

g. By clause 4 (e) the tenant covenanted to allow the landlord entry to the premises

'for the purpose of complying with any of their obligations as to repairs ...'

h. By clause 5 (b) the landlord covenanted to

'maintain repair clean and renew the items mentioned in the Fourth Schedule'.

i. By Clause 7 (a) it was declared that

'every wall separating the Maisonette from any other part of the Building shall be a party wall severed medially and shall be included in the Maisonette as far only as the medial plane thereof' and (b) the Lessor will be entitled to charge a reasonable Management Fee for managing the Property.'

j. The First Schedule which describes what is included in the demise, includes

> *'(a) the foundations of the building beneath the Maisonette ... (c) the internal and external walls of the building between the same levels.'*

k. Paragraph 4 of the Second schedule refers to the right of the tenant to set up a television aerial on the roof *'making good any damage caused'*;

l. The Fourth Schedule refers at paragraph 1 to the *'foundations and external walls of the Building.'*

Applicants' submissions

13. The Applicants rely on clause 4 (d) and the Fourth Schedule for the ability to recover the costs claimed as service charge items.

14. It was submitted that that covered the costs not only of directly maintaining the foundations and external walls of the building, but also the proposed works which were necessary to ensure that, by tanking, they remained in good order. Part of the proposed works related to the inner surfaces of the exterior walls and were therefore within this clause.

15. It was also suggested that bitumen found on the walls in Flat 5, was probably original to the construction and was now in need not only of replacement but also modernisation.

16. In order to carry out the necessary works the internal fixtures in Flat 5 need to be stripped out and replaced. The Applicants contended that as these were ancillary to their obligations to keep in good order, the costs also fell within the service charge.

Respondents' submissions

17. Ms Brown did not challenge these contentions.

18. Ms Chell did.

19. Firstly she queried whether any of the proposed works fell within clause 4 and the Fourth Schedule. She contended that when construing what was covered by the service charge provisions of the lease, it was important to bear in mind the date of the lease. It was relevant that 30 years ago, even though this was an old Victorian property, at the time the lease was executed, it was expected that the basement was suitable for habitation and that suitable protection would have been in place then; good building standards were in existence at that time. It was therefore not contemplated that a new damp proof course would be installed at a later date at the expense of all the leaseholders.

20. She stated that the proposed works were extensive and invasive. As a leaseholder and noting her obligations under the lease, she said she would never have imagined that the building was not constructed to a suitable standard to prevent the penetration of damp. If the proper materials and construction had not been used then, the cost should not be borne by the leaseholders now. Further that given that Flat 5 was

outside of her demise, she would not have had an opportunity to survey its condition when she was in the process of buying her flat.

21. She also challenged the fact that tanking to the face of the internal wall fell within the Fourth Schedule. This was not maintaining the external wall but going above and beyond what was already provided. If the Bitumen had been a form of damp proofing, then the proposed tanking would be an improvement and not permissible.

22. Insofar as the proposed works to the floor, she asserted that this was not works to either the external walls or the foundations. The foundations being under the external walls, it could not be said that this work fell within the Fourth Schedule.

23. Finally, she confirmed that her only objection to the making good costs for Flat 5 arose out of her objection to the damp proofing works which necessitated stripping out and making good.

24. She did not dispute the proposed works to the external parts of Flat 6.

Tribunal Determination

25. The Tribunal determines that the cost of the proposed works to the exterior walls are recoverable as service charges. Although the exterior walls are demised, the wording of the lease is tolerably clear in that the repairing obligation falls on the landlord. Further, whilst the proposed works do go beyond what is presently in situ, that does not prevent them falling within the repairing obligation. Firstly, an element of modernisation or improvement is permitted within that obligation. In

this case it would be a little absurd to restrict the works to applying Bitumen when better (and probably cheaper) products are available. Secondly, these works are necessary in order to protect and maintain the external walls, which is clearly within the Applicants' obligations.

26. The Tribunal reaches a different view with respect to the proposed work to the floor. This does not so obviously fall within the Fourth Schedule. As Ms Chell has pointed out, the floor is not the same as the foundations under the main structural walls and the repairing obligation in that regard would fall to the leaseholder rather than the landlord. For that reason the Tribunal determines that the costs of any works to the floor do not fall within the service charge and the costs of the same and any ancillary costs (such as surveyor's fees, management fees and making good) should not be charged to all the leaseholders if carried out by the Applicants. That would be a matter between Ms Brown and the Applicants to arrange.

27. Given that the cost of the works to the floor is £1,200 plus VAT, that sum should be deducted from any service charge.

28. However, it does follow from the above that the ancillary costs of the work to the walls is also a service charge item. In respect of those costs, the Tribunal allows the remedial works in full, being £1,950 for the skirtings, £600 for the architraves and door linings, £2,200 for the kitchen and £80 for radiators.

29. Finally in relation to professional fees, the Surveyor's fee, at 11.5% of total cost was not challenged; although this should be adjusted in light of

the removal of the cost of the floor works (i.e. to £1,291.45). There was an issue with regard to the Management fee at 10% of works. Given the input of a Surveyor, the Tribunal considers that that is excessive and that 5% is a reasonable sum to charge (i.e. £561.50).

Section 20C

30. Ms Chell requested the Tribunal to make an order under Section 20C of the Landlord and Tenant Act 1985 restricting the Applicants from claiming the costs of this application through the service charge.

31. Firstly, the Tribunal does not consider that the terms of the lease permit such costs to be recovered.

32. Secondly, even if the lease did permit such recovery, the Tribunal considers that they should not form part of the service charge. Ms Chell has been partly successful in her challenge. More significantly the scope of the application reduced during the course of the proceedings and the Tribunal does not consider that the Applicants made sufficient efforts to resolve the situation before issuing. They had arranged a meeting with the leaseholders to discuss it, but then cancelled it at the last minute and failed to arrange another.

Judge D Dovar

Appeals

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.

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.

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.

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.