10752

FIRST TIER TRIBUNAL
(PROPERTY CHAMBER)
RESIDENTIAL PROPERTY

Case Reference:	:	MAN/OOBR/LSC/2014/0100
Property:	:	Flat 8 Cheviot Close, Salford, M6 8QZ
Applicant:	:	Mr M Haber and Mr G Cohen
Respondent	:	Salford City Council
Representatives	:	City Solicitors Town Hall Manchester
Type of Applications:	:	(1) Service charge: section 27A Landlord and Tenant Act 1985 (2) Section 20C Landlord and Tenant Act 1985
Appearances:	:	For the respondent: Mr Keeling-Roberts of Counsel
Tribunal Members:	:	Judge M. Davey (Chairman) Mr W.T. M. Roberts FRICS Mr L Bottomley
Date and venue of Hearing:	:	28 January 2015 at Alexandra House, Manchester
Date of decision:	:	9 March 2015
Date of reasons:	:	9 March 2015

Decision

1. Section 27A Landlord and Tenant Act 1985

The costs incurred by the respondent for the works carried out to the property were reasonably incurred and reasonable in amount and the adjusted estimated sum demanded from the applicants by way of service charge in respect of the same is reasonable and payable.

2. Section 20C of the Landlord and Tenant Act 1985

Order granted.

Reasons for Decision

The Applications

1. These are the reasons for the decision of the First-tier Tribunal (Property Chamber) ("the tribunal") on two applications made to the tribunal by Messrs Michael Haber and Gavriel Cohen ("the applicants"), who are joint registered proprietors of a leasehold term ("the lease") in respect of flat 8 Cheviot Close Salford M6 8QZ ("the property"). The lease was originally granted on 28 February 1983 by Salford City Council ("the landlord") to Edna Mitchell for a term of 125 years from that date. The applicants were registered as proprietors of the lease by assignment on 22 March 2013.

2. The first application, dated 11 August 2014, was made under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for a determination as to the payability and reasonableness of a service charge to be levied under the applicants' lease of the property in respect of major works carried out by the respondent landlord in 2014 on the development of which the property forms a part. The second application, of the same date, is made under section 20C of the 1985 Act and seeks an order that the costs incurred by the landlord in connection with the proceedings before the tribunal should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant.

3. The respondent to both applications is Salford City Council (the landlord of the property) whose housing stock is managed by Salix Homes ("Salix") under the Decent Homes and Investment Scheme to property blocks in Salford during a four year period commencing in 2011/2012.

The property

4. The tribunal inspected the exterior of the property, and the estate of which it forms a part, on the morning of 28 January 2014. Neither party was present or represented at the inspection. Flat 8 Cheviot Close is a two bedroom maisonette in a purpose built development comprising 3 three storey blocks containing 22 flats in total. The block, constructed in 1960, which contains flat 8, comprises 8 flats and maisonettes. Flat 8 is the only property in the block which is held on a long lease

The leases

5. By clause 3(a)(i) of the lease the lessee covenants "to pay on demand to the Lessor such annual sum as may be notified to him as representing the due proportion of the amount of annual costs incurred by the Lessor in each financial year in carrying out the functions mentioned in this Clause and clauses 4 and 5 hereof and in the covenants set out in the Eighth Schedule hereto (such costs and expenses being hereafter called "the management charges")."

6. Clause 1 of the Eighth Schedule (in so far as relevant to this application) obliges the Lessor "to keep in good and substantial repair and condition (and whenever necessary rebuild and reinstate and renew and replace all worn or damaged parts)

   (i) the main structure of the Development including.....all...windows in the development (but excluding....the windows...inside any individual flat for which the Owner thereof is responsible under any provisions in his Lease corresponding to paragraph 5 of the Sixth Schedule hereto) ...and including all roofs...above the level of the top floor ceilings."

7. Paragraph 5 of the Sixth Schedule obliges the Lessee "to keep in good and substantial repair and condition.....the demised premises... including.....all....windows...SAVE THAT in the case of all exterior walls....the obligations of the Lessee .....shall be limited to keeping the ....glass in any windows or doors.....in such repair and condition as aforesaid."

The law

8. The relevant law is set out in the Annex to these reasons

The hearing and submissions

9. A hearing was held on 27 January 2015 at which the respondent was represented by Mr Keeling-Roberts of counsel. The applicants did not attend the hearing but made written submissions.

The facts

10. The evidence revealed the following facts which were undisputed save where stated otherwise.

    (1) That Salix entered into a qualifying long term agreement (as defined in sections 20 and 20ZA of the Landlord and Tenant Act 1985) with five bidding contractors subject to a procurement and consultation process. Work to be carried out under these qualifying long term agreements included window replacement and roofing works on the respondent's housing stock including Cheviot Close.

    (2) That the applicants received a notice under schedule 3 of the Service Charges Consultation Requirements (England) Regulations 2003, from Salix, together with a covering letter dated 11 October 2013 specifying its intention to carry out qualifying works to the block containing the subject property. The works referred to were "Windows, Fascias, Soffits, Gutters, Barge Boards, Gutters and Rain water Pipes. Along with any associated works and services" The notice estimated that the tenants' required contribution would be £4,275.30 and invited comments by no later than 10 November. No year was specified but it was clear that the notice meant 2013.

    (3) There was a dispute between the parties as to when that notice was received. The applicants state that it was received in an envelope postmarked 08 November 2013, of which postmark they supplied a copy. The respondent says that it has no evidence as to when the notice was posted.

    (4) Mr Haber replied to the notice on 11 November 2013 stating that "Our observations are that the cost of the proposed works (which have not been properly detailed, and mention gutters twice) is above what would reasonably be expected of maintenance works to these elements, and we therefore invite you to provide a schedule of works as well as a tender analysis from at least 3 competent contractors in order to demonstrate a competitive approach. Although we have not undertaken a thorough inspection of the premises yet, it is our opinion that there is very little maintenance work to be undertaken to the external fabric of the building."

    (5) By a further schedule 3 notice dated 14 January 2014 the respondent gave notice to the applicants of proposed roof works to the block, in respect of which the estimated contribution by the applicants would be £6,535.41, and invited comments by 13 February 2014.

(6) Mr Haber made observations on that notice by an email and letters dated 26 January 2014 and emails of 6 and 24 February 2014.

(7) The works were carried out in May 2014.

The applicants' case

11. The applicants disputed the service charge contribution which they were being required to make as a result of the works carried out at the property in 2014.They submit that based on an internal inspection in flat 8 and an external inspection (of which photographic evidence was provided) by Mr Haber nothing more than minor maintenance to the roof was required in order to ensure it became wind and watertight.

12. In his emails of 6 and 24 February 2014 to Ms Jo Rogan, of Salix, Mr Haber had stated that from his inspection the roof appeared to be structurally sound and in need only of minor maintenance. There had been no water ingress in his flat. He disputed therefore that the roof was near the end of its life. Indeed he submitted that the respondent's surveyor's report dated 7 February 2014, which post-dated the schedule 3 notice regarding the roof works, indicated the same and that the matters relied on in that report hardly justified roof replacement. He said that no technical evidence as to the porosity of the concrete tiles leading to their failure had been provided by the surveyor; the reasons for tile drop on this roof should have been investigated; moss should have been removed by regular maintenance and in any event replacement of the underlying roof structure was not being recommended by the respondent so no gain would be achieved by the roofing works as far as this alleged defect was concerned.

13. The applicants also submit that the notice of 11 October 2013, which made no reference to the roof "provided overestimated costs of minor repair works, of which no procurement information, bill of quantities or specification of works was provided to the tenants." The applicants say that the costs were "extortionate" and therefore unreasonable.

14. The applicants therefore submitted that the costs of these works and the roof works were not reasonably incurred for the purposes of section 19 of the Landlord and Tenant Act 1985.

15. The applicants also submit that under the terms of the lease the windows are the tenants' responsibility and all in their apartment were fine. The applicants further submit that there had been a failure on the part of the respondent to comply with the consultation requirements prescribed by section 20 of the 1985 Act and the 2003 regulations. They stated that the landlord's agents had served "improper notices for unnecessary work."

The respondent's case

16. At the hearing Mr Keeling-Roberts invited the tribunal to prefer the evidence of the respondent to that of the applicants who, he submitted, had not produced any expert's report, albeit that Mr Haber is a building surveyor. He said that the respondent had the benefit of having inspected the whole building and other nearby blocks in the scheme and having had access to necessary repair works carried out by Salix to flats and the other buildings in the scheme whereas Mr Haber's submissions were based on knowledge of his own flat and what could be seen from ground level or his own flat.

17. The case for the respondents is that the concrete tiled roof of Cheviot Close was over fifty years old, which is the normal lifespan of concrete tiles. It was likely that repairs requiring expensive scaffolding would become more frequent in the very near future. A key factor was that there were three blocks in the development all constructed at the same time and work on the other two blocks indicated that roof renewal on the block in which 8 Cheviot Close is situated was necessary because of its age and apparent condition. Salix had taken the decision that whilst scaffolding was erected to carry out work to the renewal of fascias, soffits and gutters and windows covered by the first notice it would be prudent and cost effective to carry out roof replacement works at the same time. An independent stock survey report commissioned in 2010 had advised renewal of the roof in 2017.

18. Mr Keeling-Roberts said that the decision was explained further in a surveyor's report, written by Mr John Darroch for his employer, Salix and dated 7 February 2014, which concluded that:

    (a) repairs had been carried out to the roof in the past with tiles having been replaced;
    (b) there was missing mortar in the ridge tiles between 4 and 8 Cheviot Close;
    (c) there was a build up of water holding moss on the roof placing weight on the roof timbers;
    (d) the tiles were presumed to be porous from their appearance and from examination of tiles removed from neighbouring blocks;
    (e) tiles had dropped at eaves level in various places which would indicate rotten timbers causing them to dip (as had happened recently on another part of the estate);
    (f) a tenant in the block had had ongoing problems with roof leaks into their bedroom.

19. With regard to the window replacement Mr Keeling-Roberts submitted that the lease is clear that (save for glass) repair and maintenance of the external windows are the landlord's responsibility and it was impossible to replace those windows without renewing the glass.

20. Mr Keeling-Roberts also submitted that the respondent had fully complied with the notice requirements of section 20 of the Landlord and Tenant Act 1985 and in so far as there might have been non-compliance requested the tribunal to dispense with such non-compliance on the basis that the tenants have not been prejudiced by any such failure.

Discussion and decision

21. The function of the tribunal is to determine whether the costs of the roof replacement and other works carried out by the respondent and to be re-charged to the tenant at 8 Cheviot Close were reasonably incurred and reasonable in amount and payable.

22. With regard to the works on the fascias, soffits, gutters, rainwater pipes and windows the tribunal has no evidence to persuade it that the sums requested of the applicants were unreasonably incurred or otherwise unreasonable in amount. The applicants queried these costs and asked for a schedule of works and 3 competitive quotes. However, they did not lead evidence as to why the costs were considered to be unreasonable or unreasonably incurred. The suggestion by the applicants that, because the window glass was the responsibility of the lessees, the lessor does not have power to replace the windows is clearly wrong. Maintenance and repair of the external window frames and other elements other than the glass is clearly within the lessor's covenant under clause 1 of the eighth schedule.

23. The lease obliges the lessor to keep in good and substantial repair and condition the main structure of the property including the roof. In 2010 the respondent had commissioned a stock survey by a surveying firm, Penningtons. That firm advised that the roof at Cheviot Close would need renewing by 2017. Because of the continuing need for running repairs to the roof and because scaffolding would be in place for other external works in 2014 the respondent decided to renew the roof at that point. This was clearly a cost effective decision open to it and the tribunal finds that it was a reasonable decision. The applicants, one of whom is a qualified chartered surveyor, say that renewal of the roof was not necessary and that repairs should simply be carried out as and when necessary. However, as the respondent submitted, the applicants had not been in a position to carry out an inspection of the roof (other than a visual inspection). The respondent had carried out a number of running repairs to the roofs at Cheviot Close and had received advice that those roofs were in need of replacement very soon. They were carrying out other necessary works in 2014 which required scaffolding and deemed it reasonable to do the roof works at that time. The tribunal, from a ground floor inspection and the evidence submitted, accepts that the roof was more than 50 years old and replacement was required. Tiles become porous at this stage, moss will force tiles up, the roof felt breaks down and water damage becomes likely. Roof replacement also improves insulation.

24. Section 20 of the Landlord and Tenant Act 1985 provides that where the relevant costs incurred on the carrying out of the works in question would exceed the specified limit of £250 the consultation provisions in that section will apply. Regulation 7(1) of the Service Charges (Consultation Requirements)(England) Regulations 2003 provides that where qualifying works are the subject of a qualifying long term agreement to which section 20 applies the relevant consultation requirements as regards those works are those specified in Schedule 3. That schedule requires the landlord to give the tenant a notice of intention to carry out qualifying works, specifying both the reasons for the same and an estimate of the likely expenditure in connection with the proposed works. It must also invite observations in relation to the works or proposed expenditure within 30 days. The landlord must have regard to any such observations and state his response thereto.

25. The respondent entered into a qualifying long term agreement for estate wide works of repair, through a competitive tendering process. The relevant notice procedure appears to have been complied with, albeit before the applicants acquired 8 Cheviot Close. The respondent sent a schedule 3 notice to the applicants, under a covering letter dated 13 October 2013 with regard to the works later carried out, other than the roof works. The tribunal is satisfied on the balance of probabilities that that notice was not posted to the applicants until 8 November 2013. It thus failed to give the applicants a 30 day period in which to respond with their observations and was accordingly non-compliant with the regulations. The letter had required observations to be made no later than 10 November 2013. In its submission the respondent says "As there may have been an unexplained delay in posting the [notice] to the applicants a further notice was sent dated 14 January 2014 which gave a time limit until 13 February 2014 to make representations in part this was because additional works were added in respect of the roof."

26. That description of events is not quite accurate. The schedule 3 notice dated 14 January 2014 relates solely to the roof and not the other works. Furthermore it says that the applicants' estimated contribution to the costs was £6,535.00. It is not clear whether this sum relates to the roof works alone or the total works carried out. The latter seems to be intended because the respondent seems, albeit wrongly, to have intended the 14 January notice to be effective in relation to all of the works. However, that notice is effective with regard to the roof works.

27. It follows that the maximum sum recoverable from the applicants in respect of the works other than the roof works is £250 unless the tribunal were to grant dispensation under section 20ZA of the 1985 Act which says that the tribunal may grant dispensation from compliance with section 20 "if satisfied that it is reasonable to do so." The respondent did not complete an application form under section 20ZA. However it was clear from its written submissions that an application for dispensation was being made. Neither party addressed the matter in

their submissions save that the applicants stated that because they had sought to rectify the problem with the giving of the first schedule 3 notice they ought to be granted dispensation. The leading case on the matter of dispensation is the decision of the Supreme Court in *Daejan Investments Ltd. v Benson and others* [2013] UKSC 14. The test is whether, if at all and to what extent, the tenants were prejudiced by the failure of the landlord to comply with the consultation requirements. With regard to the issue of prejudice the court held that the only disadvantage of which the tenant could legitimately complain is one which they would not have suffered had the landlord fully complied with the consultation requirements.

28. The first failure in the present case was to give only one day to make observations on the content of the first Schedule 3 notice. However, it is clear that the tenants were able to and did make observations. Mr Haber wrote to the respondent on 11 November 2013 seeking a breakdown of the costs to which the respondent replied on 25 November 2013 and Mr Haber commented further on 26 January 2014. It seems that the parties were content to make and receive observations outside the 30 day consultation period. In the circumstances it is clear that despite the invalid notice, the applicants were not prejudiced because they were able to make observations. The second schedule 3 notice could also be criticised for its minimal content but the tribunal finds that a notice stating that works will be carried out to the roof just meets the requirement that the notice describe "in general terms" the proposed works.

29. However, the tribunal would comment that the section 20 notices served by the respondent are less than clear and it was reasonable for the applicants to have taken the point as to compliance with section 20.

30. In the circumstances the tribunal is willing to grant dispensation on condition that the respondent reimburses the applicants their tribunal fees and that the respondent's costs incurred in connection with the tribunal proceedings should not be added to any future service charge demanded of the applicants. The tribunal accordingly grants an order to the applicants under section 20C of the Landlord and Tenant Act 1985.

Annex

The Law

1. Section 27A(1) of the 1985 Act provides:

"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. Section 27A(3) of the 1985 Act provides:

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

3. A "service charge" is defined in section 18(1) of the 1985 Act as:

"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."

4. Section 19(1) of the 1985 Act, provides that:

"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 provision 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."

5. "Relevant costs" are defined for these purposes by section 18(2) of the 1985 Act as "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.

6. Section 20C of the 1985 Act provides that a tenant may apply to...the First-tier Tribunal for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before [the 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.