



**First-tier Tribunal
Property Chamber
(Residential Property)**

Case reference : CAM/22UB/LSC/2014/0071

Property : 50 Mistle Path,
Basildon,
Essex SS16 4AN

Applicant : Kane Fredericks

Respondent : Basildon Borough Council
Represented by Liam Sullivan of counsel

Date of Applicant : 26th June 2014

Type of Application : To determine reasonableness and
payability of service charges

The Tribunal : Bruce Edgington (lawyer chair)
Gerard Smith FRICS FAAV
John Francis QPM

Date and venue of hearing : 15th September 2014 at the Holiday Inn,
Festival Leisure Park, Basildon,
Essex SS14 3DG

DECISION

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1. In respect of the amount claimed by the Respondent from the Applicant in respect of the emergency work to replace the water tanks on the roof of the building in which this property is situated, the Tribunal grants dispensation from the consultation requirements imposed by section 20 of the **Landlord and Tenant Act 1985** ("the Act") subject to the condition that the cost of such works is reduced by 20% so that the net cost for such works which is reasonable and payable is £1,676.96
2. In respect of the amount claimed by the Respondent from the Applicant in respect of the work to renew the cold water pipes, the Tribunal considers that a reasonable sum for the work is £2,011.81.
3. From these claims, a total of £512.19 has been taken from reserves and the Applicant has paid £800.88 (12 x £66.74) making a net balance now due of £2,375.70.

4. The Tribunal refuses to make any order in respect of costs and Tribunal fees.

Reasons

Introduction

5. This is an application by the leaseholder of the property which was made the subject of a long lease under the right to buy provisions. The first claim which he challenges is for the cost of some emergency works to replace 2 water tanks on the roof of the building in which the subject flat is situated. It is said by the witness Clint Borley in his written statement dated 7th August 2014 that the work was undertaken following a "*dispensation notice under section 20 of the Landlord and Tenant Act 1985*" dated 30th January 2012 which is at page 82 in the bundle of documents supplied for the Tribunal. This letter said that an estimate had been obtained for £18,031.47 and the Applicant's share was 1/9th i.e. £2,003.50. The work was commenced in February 2012 and the scope was "*to replace the communal water storage tanks as a result of a severe leak from the tanks located on the roof of the block in which the property was located*".
6. The bill sent to the Applicant is at page 85 in the bundle. It requires payment in the sum of £2,011.81 less an amount of £410.08 which it describes as being 'non-recoverable'. In fact this was simply an amount taken out of the sinking fund. The net amount payable is £1,601.73.
7. Mr. Borley goes on to say "*during the completion of the tank replacement works it was realised that the mains water and down service pipe work supplying the tanks and the residential properties were found to be deteriorated, pitted and leaking. Unlike the immediate danger of 100's of litres of water potentially escaping the storage tanks the problems with the pipe work was more manageable and a less immediate threat*".
8. In respect of this second set of works, the section 20 consultation started with a 2 part exercise i.e. a letter sent on the 24th May 2012 describing the works (page 122) and a further initial notice dated 19th June 2012 (page 124). The second stage in the consultation process was a letter dated 25th July 2012 (page 125) setting out the 3 estimates received ranging from £67,069.47 to £127,450.08. It was said that the estimates could be inspected at the Respondent's offices. A specification, of sorts, was sent on the 8th November at page 139. There is a 'tender report' document and copies of the estimates commencing at page 94. The cheapest estimate was chosen.
9. On the 27th June 2013, a demand (page 132) was sent to the Applicant for £4,019.79 for this second set of works. The factual position with regard to what is presently owed was not set out in the bundle which was far from helpful. The Respondent has made certain concessions – including a credit for £2,025.70 set out on page 30 of an additional bundle filed – and the Applicant has made some payments although it has to be said that these payments were clearly made 'under protest' and will not be taken as an admission or agreement.
10. In the 'summary' of his case at page 52 in the bundle, the Applicant says that he "*fully appreciate that the water tank and pipework did need replacing (despite the leaks not affecting me directly), due to their age, and I completely understand that I use the water tank also and as such should contribute SOME*

cost towards the replacement of it. However the amount that Basildon Council are asking for is an extortionate amount, and I feel a more than acceptable amount to pay would be £1000."

11. His main statement of case is some 11 pages long and of single space print excluding attachments which sets out many complaints most of which do not seem to have been raised before.

The Inspection

12. The members of the Tribunal inspected the property in the presence of the Applicant, his partner Sara Adams together with Ms. Joanne Clements and Clint Borley from the Respondent council. Another council employee also attended to allow the Tribunal members access to the roof and to the room in which the water tanks were situated.
13. The subject flat is in a block of 9 flats built in the late 1950's of brick construction under a flat roof with 3 sides of the building being built round a squared off 'C' shaped well. Each flat has a front door onto an exterior concrete pathway on each of the 3 storeys with outside concrete stairs between each floor. There are small panels in the brick which appear to be of uPVC.
14. On the top floor is also situated a relatively new fixed vertical metal stepladder with circular metal safety struts at stages to protect anyone going up the ladder and a squared off metal security cage around that which can only be accessed via lock and key. It is not a particularly attractive addition, particularly for the occupiers of the flats facing it.
15. The block is in quite a pleasant landscaped area with grass, trees and shrubs although difficult to access unless you know where it is.

The Lease

16. The bundle contained no less than 3 copies of the lease dated 10th May 1999 for a term of 125 years from that date with a ground rent of £10 per annum. The flat is described and the important parts of the lease are in the schedules. The 2nd Schedule sets out the 'reserved' parts of the building which includes "*all cisterns, tanks, sewers, drains, pipes, wires, ducts and conduits not used solely for the purpose of one Flat...*".
17. In Part 1 of the 7th Schedule, the Respondent covenants to keep the "*structure and exterior of the Premises and the Reserved Property*" in repair i.e. to include the pipes and tanks. In clause 18 of the 6th Schedule the Applicant covenants to pay not only a 'reasonable part' of the costs incurred by the Respondent in doing these works but, crucially, to pay a 'reasonable part' of any improvements. It is not disputed that such 'reasonable' part is 1/9th of the total cost for the building.
18. There is no provision for the leaseholder to pay any legal costs save for those incurred incidental to the preparation of a notice under section 146 of the **Law of Property Act 1925** or in connection with the service of what used to be referred to as a schedule of dilapidations. There is no indication that the Respondent is even contemplating either of those things.

The Law

19. Section 18 of the Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'.
20. Section 19 of the Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. This Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable and, if so, whether it is payable.
21. For all service charges incurred for particular works involving a cost of over £250 per flat, section 20 of the Act requires the carrying out of a consultation process or an order for dispensation from that process by this Tribunal. This clearly applies to both contracts in this case.
22. Rule 13 of **The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013** enables a Tribunal to make an order that one party pay the legal costs and/or expenses of another if that party "*has acted unreasonably in bringing, defending or conducting proceedings*" such as these. However, this does not change the basic rule that proceedings before this Tribunal are 'no costs' proceedings i.e. a costs order will only be made if that high hurdle is crossed. The Tribunal can also order repayment of any fee paid to the Tribunal itself.

The Hearing

23. The hearing was attended by those who had attended the inspection except the additional council employee who had attended with the keys to access the water tanks on the roof. In addition, Liam Sullivan, counsel for the Respondent attended as did the Applicant's father.
24. The Tribunal made it clear at the outset that it wanted to clarify one or two matters which had not been covered in the bundle submitted. Firstly it was difficult for the Tribunal to see what was actually being claimed from the Applicant and what had been paid and credited to his account in respect of the 2 items of service charge in question. Ms. Clements helpfully obtained this and the agreed position was:-

	£
<u>Amount claimed for the replacement of the tanks</u>	4,121.90
Less:- credit	<u>2,025.70</u>
	2,096.20
 <u>Amount claimed for replacement of pipe-work</u>	 <u>2,011.81</u>
	4,108.01

From this, a total of £512.19 had been taken from reserves and the Applicant has paid £800.88 (12 x £66.74) making a net balance now claimed of £2,794.25.

25. The next issue was the provision of any reports or other documents relating to the replacement of the water tanks which had been obtained or considered prior to the work commencing. It was said that there was no doubt some documentation but it became clear that this could not be obtained immediately. The Tribunal expressed the view that it intended to limit the claim to £250 for that work unless

it was being suggested that the Respondent council was going to apply for dispensation from the consultation requirements.

26. There then ensued a discussion about this because Mr. Borley appeared to be under the impression that such dispensation had already been obtained. That was clearly not the case. The Tribunal then pushed the Respondent to say whether it was going to apply. It pointed out to the Applicant that this issue really needed to be resolved because if the Tribunal limited the claim to £250, the Respondent would undoubtedly apply for retrospective permission to dispense and litigation would therefore continue. He sensibly agreed that this issue should be determined now. Counsel then confirmed that the Respondent was applying for dispensation.
27. The hearing then continued with Mr. Borley giving evidence and both the Tribunal and the Applicant asking him questions. Whilst he did the best he could it became clear that many of the questions raised such as whether a temporary repair to the tanks could have been undertaken to hold the position until a full consultation could be carried out, had been the subject of decisions by others.
28. For example, it came as somewhat of a surprise to him that a letter had been written to the Applicant on the 25th April 2011 (page 1 in the additional bundle) i.e. 9 months before the 'emergency', wherein it was clear that the Respondent was starting a consultation in respect of '*Water Hygiene & Service Pipework*'. This letter specifically mentioned the replacement of pipe-work as in the 2nd contract and, arguably, impliedly mentioned the replacement of the water tanks which, it had been established, were made of pitch fibre cement i.e. asbestos.
29. The Applicant then raised a number of questions with Mr. Borley on the list of works for the contract to replace the tanks at page 136 in the bundle. These were mostly matters of detail some of which will not be repeated here but which will be taken into account in the decision made. Some of the points raised were:-
 - Mr. Borley confirmed from his own observations that there were 2 tanks in the room on the roof despite the impression obtained by the Applicant from the initial section 20 letter that there was only 1
 - He did not know who had put the rubbish in the tank room but it was there and had to be removed
 - He agreed that most contractors quote an hourly or daily rate which includes the provision of equipment such as saw blades etc. but in this case the cutting materials, skip hire and puddle sucker hire were charged on top
 - The electrical supplies consisted of a lighting circuit and a circuit for sockets. The wiring had to be placed in steel armoured cabling tubes
 - The council had considered alternatives to the steel platform and cage, such as erecting scaffolding on each occasion that access was required but, on balance, they had decided that the platform and cage were the best and most cost effective alternative. They would need access for regular checking of the water and it would also provide access for such things as repairing the roof

30. As the hearing went on it became clear that the main issue to be determined first was whether dispensation from the consultation requirements should be granted. There has been much litigation over the years about the matters to be determined by a Tribunal dealing with this issue which culminated with the recent Supreme Court decision of **Daejan Investments Ltd. v Benson** [2013] UKSC 14. That decision made it clear that a Tribunal is only really concerned with any actual prejudice which may have been suffered by the lessees or, perhaps put another way, what would they have done in the circumstances?
31. The problem with this case is that if the replacement of the tanks was not a real emergency, then the prejudice suffered by the Applicant was that the cost of having one contract to cover all the work with full consultation was likely, on the balance of probabilities, to be substantially less than the total cost of 2 contracts. This takes into account that at least half the money asked for was for cost incurred in an alleged emergency situation. The contractor appeared to have no competition and in the 'real world' such contractors often charge more anyway because, amongst other reasons often given, other contracts they are engaged in have to be put back.
32. Thus, the documentation available at the time of the 'emergency' was essential and, as has been said, it was not in the bundle. After a discussion, it was agreed that (a) there would be a short 7 day adjournment to enable the Respondent to come up with the documentation about this issue and also a breakdown of the costs in the 2nd contract (b) there would be time for the Applicant to comment and (c) the Tribunal would then make its decision on the basis of the evidence, submissions and documents already given to the Tribunal plus the documents and submissions to be filed.
33. Such order was discussed at the hearing and confirmed by a print version dated 15th September 2014 which was e-mailed to the parties the following day.

Discussion

34. In **Schilling v Canary Riverside Development PTD Ltd** LRX/26/2005; LRX/31/2005 & LRX/47/2005, His Honour Judge Rich QC had to consider upon whom lay the burden of proof in service charges cases such as this. At paragraph 15 he stated :

“If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the Yorkbrook4 case make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard.”

35. It was for this reason that the Tribunal directions were made for the parties to

state exactly what their cases were. It was a great pity that the Respondent did not seem to understand the significance of the consultation requirements. The lack of important evidence at the hearing together with the substantial credit already allowed by the Respondent, mostly for double charging, was clear evidence that the Applicant's efforts had unearthed at least one substantial defect in the Respondent's procedures.

36. Further evidence of the failings on the part of the Respondent was that the Tribunal had to point out to them that they had failed to include the VAT in their claim for the second contract. Ms. Clements said, quite properly, that if this had happened, then the council would not feel it appropriate to start claiming any extra monies at this stage.
37. The documents subsequently provided by the Respondent were far from helpful. There was actually very little documentation emanating from what must have been detailed discussions at the time as to whether the replacement of the tanks was such an emergency that it had to be undertaken without delay.
38. There is a significant e-mail from the Respondent's consultants, Calford Seaden dated 24th January 2012 to Mr. Borley and others recording an "*agreed way forward*" following a meeting at the Respondent's offices. It says "*It has been decided to carry out the tank replacement work at 56-58 Fremnells, where there is a known and urgent problem, and then to plan for tank replacement in the other 3 blocks during 2012 using the knowledge gained from 56-58 Fremnells*". There is then discussion about obtaining advice from an asbestos expert but as the letter to the Applicant telling him about the works went out only 6 days' later, it is inferred that a decision was taken to undertake all the tank replacement work in any event.
39. One reason for this inference is the next e-mail in the bundle which is dated 26th January from EMS Engineering Maintenance Services Ltd. to Mr. Borley which says "*therefore, in order to get all the works done and invoiced before the end of your financial year they would have to have an order really by the end of the week*". Thus it appears that financial accounting considerations were being given prominence.
40. One final matter which puzzled the Tribunal concerned the use of scaffolding. The Applicant, his partner, his father and other residents seem convinced that there was no scaffolding used to deal with the pipework and yet scaffolding seems to have been claimed for. Despite the Tribunal's order, the Respondent did not in fact supply a full and detailed tender document or specification for the works.

Conclusions

41. It is clear that the Applicant has been rightly suspicious of the accuracy of some of the Respondent's accounting procedures and some of its assertions about the works undertaken and the reasons for those works. Having said that, he clearly accepts that the work was necessary and he has made some effort to make some payments under protest.
42. This Tribunal is satisfied, on the balance of probabilities, that the work to the tanks was not as urgent as stated and that the plan was to replace the tanks on

56-58 Fremnells only as an urgent piece of work. The plan seems to have been to undertake the work to the other buildings in an ordered fashion during 2012. It was already known that the pipework need doing.

43. Thus, the Tribunal considers that the work to the tanks and the work to the pipes should have been undertaken following proper consultation as one contract. This was bound to have produced savings for the Applicant.
44. The Tribunal appreciates that it would appear to be very easy to criticise local authorities where there have been right to buy sales. The considerations are often different when looked at from the point of view of a large social housing landlord letting to weekly tenants as compared to a commercial landlord of private dwellings let on long leases. Having to consult the long leaseholders on large contracts and give them an opportunity to take part in the decision making process is something which a large social landlord does not have to do. Unfortunately from this Respondent's point of view, it is the test for long leaseholders which has to lead this decision.
45. As far as the scaffolding and other detailed matters raised by the Applicant are concerned, the Tribunal simply has too little information upon which to base a decision that would involve the council tax payers of Basildon having to pay more towards these contracts. The only matter which is clear is that there should have been consultation for the first contract and there wasn't. The Tribunal's view, based on years of experience dealing with this type of case and applying its joint expertise, is that if there had been a proper tender process and only one contract rather than two, then the saving on the first contract would have been in the region of 20% and that is the Tribunal's decision.
46. Of necessity, this has had to be very much a summary judgment based on restricted evidence. However, it is the best the Tribunal can do based on the limited information available to it. The mathematics is set out in the decision. The Applicant may not be particularly happy about this, but the Tribunal can only investigate the evidence put before it by the parties. It does not have the power to go off and investigate matters on its own. This is what is known as an 'adversarial' system as opposed to an 'inquisitorial' one.
47. As far as costs and fees are concerned, the Tribunal noted the costs schedule dated 4th September filed by the Respondent. As this whole process has revealed several failings on the part of the Respondent, no costs order is made. The lease does not allow for costs to be claimed as part of a service charge or administration charge in any event.
48. The Tribunal appreciates that the Applicant has had to pay fees. However, the Tribunal has unearthed the fact that he has been substantially undercharged by the VAT element on the second contract. That, together with the overall result leads this Tribunal to the view that the just and equitable decision should be no refund of fees.

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Bruce Edgington
Regional Judge
9th October 2014