RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

S.27A Landlord & Tenant Act 1985 (as amended)

Residential Property
TRIBUNAL SERVICE

DECISION

Case Number:	CHI/34UF/LSC/2007/0001
Property:	Wordsworth Mead Redhill Surrey RH1 1AL
Applicants:	Chaucer Mead (Redhill) Management Co Ltd
Respondents:	The Lessees
Application:	5 January 2007
Directions:	19 January 2007
Hearing:	5 April 2007
Appearances:	Mrs M Wildman, Mrs C Minter, Mr A Gibbins Directors of the Applicant company Various Lessees in attendance as observers
Decision:	20 April 2007
Tribunal Members:	Ms J A Talbot MA Mr N J Cleverton FRICS Ms J Dalal

Case No. CHI/43UF/LSC/2007/0001

Wordsworth Mead, Redhill, Surrey RH1 1AL

Application

1. This was an Application dated 5 January 2007, made by Mrs Wildman, Miss Minter and Mr Gibbins, 3 Directors of the Applicant, Chaucer Mead (Redhill) Management Company Limited ("the Management Company"). It was made pursuant to Section 27A of the Landlord and Tenant Act 1985 for a determination on the payability of future service charges in relation to proposed window replacement works at the property, Wordsworth Mead.

2. Directions were issued on 19 January 2007 and provided for the Applicants to produce a Statement of Case together will all relevant documents, and for the Respondents to produce a Statement in reply. The Applicants complied with the Directions. Various lessees responded to the Application by letter to the Tribunal office but there was no Statement of Case. None of the lessees who responded opposed the Application.

Jurisdiction

3. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord's costs of management, under the terms of the lease (S.18 LTA 1985). The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.

Lease

4. The Tribunal had a copy of the lease of Unit 192 of the Chaucer Mead Development. It is dated 30 April 1992 and is for a term of 999 years from 1 January 1991 at a ground rent of a peppercorn. The lease was granted at the time that the new development was under construction and was a tri-partite lease with the developer, Crest, as the first party, the Company as the second party, and lessee Adrian Paul Holland as the third party.

5. Under the Definitions at the beginning of the lease, the Common Parts are stated to be: "*the Management Land and the main structure of the Buildings (including window frames and glass and sills on all external walls) and all other parts of the Buildings not comprised or intended to be comprised in the Leases*".

6. The Sixth Schedule, at paragraph 1.0, requires the Management Company, amongst other things: "*to keep in a good state of repair and condition the Common Parts*".

7. The provisions relating to the calculation and payment of the service charge are to be found in the Seventh Schedule. At Paragraph 1.2 the lessee is to pay a

monthly on account to the Management Company as follows: "*after receiving a notice pursuant to paragraph 2.0 a revised sum equal to one twelfth of the total amount specified in such notice divided by the number of dwellings within the Buildings*".

8. The notice referred to at Paragraph 2.0 must be served by the Management Company "*as soon as reasonably practicable after the first day of January in every year*" and contains "*an estimate of the sums to be spent by it in such year on the matters specified in the Eighth Schedule*".

9. In turn the Eighth Schedule describes "*the expenditure to be recovered by means of the Maintenance Charge*" and includes at Paragraph 1.0: "*All sums spent by the Management Company in and incidental to the observance and performance of the obligations on the part of the Management Company pursuant to the Sixth and Seventh Schedules*".

10. At Paragraph 11.0 of that Schedule provides for a reserve fund as follows: "*such sum as the Management Company shall determine as desirable to be set aside in any year towards a reserve fund to make provision for expected future substantial capital expenditure which it anticipates including (but not limited to) the external decoration of the Buildings*".

Inspection

11. The Tribunal members inspected the property before the hearing. It comprised a purpose built development of 60 flats constructed in 1991 in a close of mixed units of houses and flats. There were 3 x 3 storey blocks in all, with the largest in the middle and 2 smaller symmetrical blocks on either side, all of brick construction, part rendered, under a pitched and tiled roof, surrounded by lawns and car parking spaces.

12. The windows were the original timber framed casement windows painted brown. 15 flats had original double glazed units but the rest were single glazed. The window frames had not been decorated externally for about 5 or 6 years, so the paintwork was flaking and bare timber was exposed in some areas. There was no sign of rot externally, but condensation was visible in some windows.

13. Internally the shared hallways were in good condition. The Tribunal members inspected 2 flats internally. No.121 on the ground floor had single glazed windows with evidence of condensation and pooling water especially in the bedroom and bathroom. No.183 on the first floor had good quality replacement double glazed UPVC windows installed by the lessee.

Issues before the Tribunal

14. The Applicants asked the Tribunal to consider the following 5 issues:
    (i) Are the window frames and glazing part of the Common Parts?
    (ii) If so, is the cost of works recoverable as service charges (subject to the statutory consultation procedure being correctly followed)?
    (iii) Would it be reasonable to recover the cost of window replacement?
    (iv) What authority does the Management Company have to build up a reserve fund?
    (v) Can the service charge proportions be varied in this instance?

Hearing

15. The hearing took place in Redhill on 5 April 2007. It was attended by Mrs M Wilding, Mrs C Minter and Mr A Gibbins, Directors of the Management Company, who had made the Application. There were no Respondents opposing the Application. 4 other lessees attended as observers: Mrs Mason, Mrs Hayler, Mrs Colebrook-Hutchens and Mrs Packman. Some were owner-occupiers and some were buy-to-let landlords.

Facts

16. On the basis of its inspection, the documents produced and submissions made by the parties at the hearing, the Tribunal found the following facts:

    (a) Crest was the company that originally constructed the development. Some 6 months after completion the freehold was transferred to the Management Company, which was responsible for the repair and maintenance of the exterior and common parts under the terms of the lease. Of the 60 flats in question, over half were occupied by sub-tenants and the rest by owner-occupiers.
    (b) At the time of construction, only about 15 flats had double glazed windows and the rest were single glazed. Over the years several of the flats had experienced significant problems with condensation. The Applicants had not obtained a surveyor's report on the condition of the windows (despite being recommended to do so by their solicitors). Their builders, Saxons, commented in a brief report dated 31 January 2007 based on an external inspection: "*despite the fact that many of the windows have bare areas of timber ... the timber is actually still structurally sound and showing very little sign of rot or serious water penetration*".
    (c) The lessees present at the hearing reported that in the flats affected by condensation the internal window frames were in poor condition and starting to rot. Water penetration was also a problem. This was not evident externally.
    (d) Correspondence and Minutes of meetings showed that the former company Directors and the managing agents appointed by the Management Company, Peverel, had been aware of the problems for some years. However, no long term solution had been agreed. By letter dated 22 March 2002 Peverel stated: "*the money currently being collected in the reserve fund scheme is for replacement of the communal windows only and does not cover individual apartment windows ... any resident wishing to replace their apartment windows may do so at their own cost*". Relying on this permission 4 lessees had done just that and had not suffered condensation or water penetration problems since.
    (e) The present 3 Directors, elected in October 2006, were keen to resolve the issue and preferred replacement of all the windows in the blocks (except the 4 flats mentioned above) with UPVC type double glazing. In their view this would be a sensible long-term investment with cost savings as regular re-painting would not be needed.
    (f) The Directors had obtained a quotation from Everest dated 14 February 2007 for replacement of all windows for £80,475.39 plus VAT (this was in fact lower than a previous quotation). The total cost would be £104,014.44 inclusive of VAT and managing agents fees. Saxons estimate dated 30 January 2007 for redecorating the existing timber window frames was £20,300.
    (g) The lessees present were all in approval of the proposal and no objections to the Application had been received. All lessees would be aware as they had received minutes of meetings going back several years discussing the issues

and had all been sent copies of the Application and supporting documentation.

Decision

17. In making its decision the Tribunal addressed the issues in the order raised in the Application. First of all, however, the Tribunal reminded itself – as it had explained to the parties – that it was governed by its statutory jurisdiction as to the extent of the determination it could give. In this case, the Tribunal was not being asked to determine the payability or reasonableness of a specific amount of service charges as these had not yet been demanded and the statutory consultation procedure under Section 20 of the 1985 Act (as amended) had not yet commenced. With this in mind the Tribunal carried out its deliberations in the hope of being of some assistance to the parties.

Are the window frames and glazing part of the common parts?

18. It was clear to the Tribunal that the answer to this question was yes. The terms of the lease are clear (albeit that the terminology is a little confusing). The window frames, glass and external sills are included in the common parts under the definitions in the lease. This includes all the windows in the development, not just those in the shared hallways (which would usually be called the common parts). This point appears not to have been grasped by the former Directors or by Peverel in their letter mentioned above (at 15(d)).

Is the cost of works to the windows recoverable as service charges?

19. Again, the short answer is yes. The Management Company is obliged to repair and maintain the common parts by its covenants set out in the Sixth Schedule, and the costs of complying with these obligations is chargeable to the service charge under the Seventh and Eighth Schedules. As all the windows are comprised in the Common Parts, it follows in accordance with the lease terms that the cost of works to the windows amounting to keeping them "*in a good state of repair or condition*" is recoverable.

Would it be reasonable to recover the cost of window replacement?

20. This was the most important question before the Tribunal. The Management Company's covenant did not, on the face of it, extend to renewal or improvement of the common parts. The first issue was whether or not the windows, in their current condition, were in a state of disrepair. It is settled law that a repair only becomes necessary if the premises concerned are out of repair, that is, they have deteriorated from an earlier better physical condition.

21. The Tribunal concluded, on balance, that the windows in this case were in a state of disrepair. The Applicants were not assisted by Saxon's comments that the window frames were in surprisingly good condition – as also noted by the Tribunal at its brief external inspection. However, the Tribunal accepted that this was not an in-depth report and that a builder might have a vested interest in recommending re-decoration rather than maintenance-free replacement. The Tribunal gave weight to the severity of the condensation and water penetration problems and accepted the oral evidence from some of the lessees that some internal window frames were rotting, a problem that was likely to worsen over time.

22. Having accepted that repairs were needed, the Tribunal considered whether it would be reasonable for the windows to be replaced rather than repaired and re-decorated, or whether this would amount to an improvement and therefore be beyond the scope of the lease terms. It took account of legal principles that repair can include replacement of parts of a building, including windows, which have deteriorated, and that the party responsible for repairs may elect, within reason, to replace rather than patch up damaged parts.

23. The Tribunal accepted the Applicants' argument that window replacement with better quality units would be a sensible long term solution and investment. It therefore decided in principle that replacement was permissible under the terms of the lease and reasonable in all the circumstances. However, the Tribunal did not determine specifically that £104,014.44 was the sum that would be payable, as this was not put before it. The Applicants wished for guidance in principle following which they indicated that they would follow the statutory consultation procedure and obtain more estimates. That said, the Tribunal observed that the Everest quote was from a specialist contractor and did not appear unreasonable given the nature and extent of the replacement work.

Does the Management Company have authority to build up a reserve?

24. The lease clearly provides, at Paragraph 11.0 of the Eighth Schedule, for the service charge to include a contribution towards a reserve fund. The provision is widely drawn and the Management Company can decide on whatever sum it considers "*desirable*". Such a reserve is to be for "*expected future substantial capital expenditure which it anticipates*" and is not limited to external decoration. It could therefore encompass the window replacement project. It is entirely a matter for the Management Company to decide and it is not obliged to take into account individual lessee preferences or financial circumstances. The Tribunal noted from the accounts provided that a healthy reserve fund already existed, to the tune of £103,000 by the end of the year.

Can the service charge proportions be varied?

25. The short answer to this question is no. The lease terms are clear and unambiguous: each lessee is to contribute one sixtieth of the total cost of service charge items, there being 60 flats in the 3 blocks, and the contributions are payable monthly in advance. Leases can be permanently varied, either by consent or by application to the LVT under certain limited statutory criteria, but this is not appropriate in these circumstances.

26. The Tribunal acknowledged that the Applicants were trying to achieve faimess by proposing not to charge the full cost of replacement to the 4 lessees who had already replaced their own windows, having relied on permission from Peverel and the former Directors. It was suggested that those 4 could contribute only towards the cost of replacement windows to the shared hallways. However it was beyond the scope of the Tribunal's powers to approve any such proposals. The Tribunal reminded the Applicants that it was necessary to distinguish between their rights and responsibilities as landlords, lessees and company directors and that it was a matter for them to run the Management Company in accordance with its memorandum and articles, and to observe the terms of the lease. Any changes to take into account these particular circumstances would have to be by agreement and not by the Tribunal.

Determination

27. The Tribunal determined in accordance with Section 27A(3) of the 1985 Act that if costs were incurred for window replacement at the property, a service charge would be payable by the lessees to the Management Company. The Tribunal did not specifically determine the amount to be paid but decided that such costs would be reasonably incurred by the Management Company, and that window replacement would be reasonable and within the terms of the repairing obligations under the lease.

Dated 20 April 2007

J Talbot

Ms J A Talbot
Chairman