SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL

Case Number CHI/OOHA/LSC/2009/0033

In the matter of section 27A of the Landlord & Tenant Act 1985 (as amended) ("the Act")
and
In the matter of 28 Lower Oldfield Park, Bath, Somerset. ("the property")

BETWEEN

Andrea Oakes and Hannah Long — Applicants

and

Mrs Margaret Zatchij — Respondent

Decision

Hearing: 12th May 2009

Appearances: Ms Oakes and Mrs Long for the Applicants

Mr S Zatchij for the Respondent

Date of Issue: 1st June 2009

Tribunal:
Mr R P Long LLB (Chairman)
Mr J Reichel MRICS
Dr D F Johnson

Application

1. This is an application by Ms Andrea Oakes and Mrs Hannah Long pursuant to section 27A of the Landlord & Tenant Act 1985 (as amended) ("the Act") for a determination of service charges payable by them in respect of property at 28 Lower Oldfield Park Bath in the year 2008. As to service charge costs the application is limited in its terms to the cost of replacing roof window lights in the first floor flat at the property at a cost of £2546-33 in total. No other elements of service charge costs were in issue before the Tribunal. The application includes applications for limitation of service charge costs under section 20C of the Act and for refund of the application fee. The respondent is the freeholder, Mrs Margaret Zatchij, who was represented by her son Mr Steven Zatchij.

Decision

2. For the reasons set out below the Tribunal has determined that the costs of replacing the five roof lights in the top floor flat at the property are not recoverable from the Applicants as part of the service charges payable in respect of the property. It orders that the Respondent shall not be entitled to treat the costs of dealing with this application before this Tribunal as relevant costs for to be taken into account for the purpose of determining the amount of any service charge payable by the applicants. It further orders that the Respondent shall reimburse the amount of the fees paid by the Applicants to the Tribunal in connection with this application

Inspection

3. The Tribunal inspected the property on 12th May 2009 prior to the hearing in the presence of both applicants and of Mr Zatchij. It saw a late Victorian semi detached house of stone under a slate roof consisting of a ground and two upper floors. The house has been divided at some time in the past into three flats, one on each floor. The subject matter of the application consists of five roof lights that have been inserted in openings in the roof of the upper floor to form the windows to the flat there. These are new lights of Fakro manufacture, and are hinged at the upper end in each case to afford the opportunity of escape in the event of fire. The Tribunal was satisfied that as far as it could see upon a necessarily cursory inspection they appear to be of good quality and to have been installed competently. The writer made the point to the parties for the avoidance of doubt at the inspection that to the best of his knowledge he is not related in any way to Mrs Long or to her husband's family.

The Law

4. The statutory provisions primarily relevant to this application are to be found in section 18, 19, and 27A and in sections 20 and 20C of the Act. The Tribunal has of course had regard in making its decision to the whole of the relevant sections as they are set out in the Act, but here sets out what it intends shall be a sufficient extract (or a summary, as the case may be) from each to assist the parties in reading this decision.

5. Section 18 provides that the expression "service charge" for these purposes 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 relevant costs"

"Relevant costs" are the costs or estimated costs incurred or to be incurred by the landlord in connection with the matters for which the service charge is payable, and the expression "costs" includes overheads.

6. Section 19 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".

7. Subsection (1) and (2) of section 27A of the Act provide that:

" (1) An application may be made to a Leasehold Valuation Tribunal for a determination whether a service charge is payable and, if it is, as to –

i. the person to whom it is payable
ii. the person by whom it is payable,
iii. the amount which is payable,
iv. the date at or by which it is payable, and
v. the manner in which it is payable.

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

There are certain exceptions that limit the Tribunal's jurisdiction under section 27A, but none of those exceptions has been in issue in any way in this case.

8. To such extent (if at all) as the point is not implicit in the wording of the Act, the Court of Appeal laid down in *Finchbourne v Rodrigues [1976] 3 AER 581* CA that it could not have been intended for the landlord to have an unfettered discretion to adopt the highest possible standards of maintenance for the property in question and to charge the tenant accordingly. Therefore to give business efficacy to the lease there should be implied a term that the costs recoverable as service charges should be fair and reasonable.

9. Section 20 of the Act makes provision for the prior service of appropriate notices and provision of information, together with appropriate notices to and consultation with the lessees where a service charge cost is to be incurred that will result in a payment of more than £250 by a tenant towards the service charge. A landlord who does not follow these procedures (or who does not obtain a dispensation pursuant to the provisions in that respect contained in Section 20ZA of the Act) is limited to the recovery of £250 by reason of the provisions of section 20 of the Act and of regulation 6 of the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987).

10. Section 20C of the Act empowers the Tribunal to determine that the Respondent's costs in connection with the matter should not 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.

11. The Tribunal has jurisdiction to order one party to refund reimbursement by one party to the proceedings to another of the whole or any part of any fees paid by him in respect of the proceedings (subject to a qualification that is not relevant here) by virtue of the provisions of regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003 (SI 2003/2098).

The Leases

12. The Tribunal was shown copies of the leases relating to the ground floor flat belonging to Mrs Long and the first floor flat belonging to Ms Oakes. Other than those parts of the leases that are more appropriately described as part of the arguments advanced by solicitors for each party that are set out in paragraphs 17-20 below, the relevant portions for the purposes of the present application are that the term "the Services" is defined in Clause 1.10 of each lease as the services facilities and amenities described in the First Schedule. Clause 1.12 defines "Annual Expenditure" as all costs expenses and outgoings whatever reasonably incurred by the Landlord during a financial year in or incidental to providing all or any services and any VAT thereon, but excluding expenditure for which the tenant or any other tenant is responsible and expenditure recovered under any policy of insurance. Clause 1.13 makes the Lessee under each of the two leases responsible for payment by way of service charge of one third of the Annual Expenditure.

The Hearing

13. The uncontested facts at the hearing were that the Landlord had arranged to replace the five roof lights in the upper floor flat because the lights installed at the time of original conversion of the house into flats (Mr Zatchij said this was done about fifteen years ago) had deteriorated and were leaking. The original lights were replaced with Fakro lights. The Applicants accepted that the works were reasonably required, and did not take issue (save to the extent of some profit costs for Mr Zatchij mentioned below) over the reasonableness of the cost of the works or their standard.

14. The total cost of the work in accordance with accounts produced by Mr Zatchij to the lessees and included in the bundle that he produced to the Tribunal was £2522.79. The slight discrepancy between this figure and that stated in the application, which is some £23.50 greater, was not explained, and the Tribunal proceeded on the basis of the lower figure since the Landlord had produced it and from the papers before it has apparently used it in calculations throughout. The landlord then sought to recover one third of the stated cost from each of the two Applicants, a sum of £840-93.

15. On behalf of the Applicants Ms Oakes said that both Citizens Advice Bureau and their solicitors had advised the Applicants that they were not liable to pay these amounts. The issue in this respect arose because Mr Zatchij was advised by his solicitors that under the terms of the lease the roof lights that had been installed were part of the roof so that the cost of their replacement was recoverable as part of the service charge, whilst the Applicants were advised that the roof lights were windows, so that the cost of their replacement fell upon the Landlord.

16. It is convenient at this point to summarise the arguments advanced by the respective solicitors since the parties simply put them forward at the hearing without further comment. It does not appear from the papers before the Tribunal that the respective solicitors corresponded upon the point, or indeed that either saw the letter of advice given by the other. The Tribunal did not have the benefit of further argument upon the point at the hearing.

17. The Applicants' solicitors said that under clause 1.2.4 of the leases, windows and window frames formed part of the property demised, and so were the responsibility of the tenant. Under paragraph 1 of the First Schedule the Landlord was responsible for repairing the main structure and common parts. The definition of common parts in clause 1.20 did not include windows. Accordingly the Landlord could not recover part of the cost of replacing windows in a flat retained by her as part of the service charges for the property.

18. The Respondents' solicitors said that the responsibility for the repair of individual flats rested with the tenant of each in accordance with the provisions of clause 3.3 of the leases. The windows and window frames formed part of the property demised with each flat in accordance with Clause 1.2.4. On this basis the Applicants had assumed that there was a similar lease of the top flat and that the tenant of any such property should be responsible for such windows. They assumed, too, that 'window' includes a roof light. There was no lease of the top flat so that there was no responsibility for windows given to a tenant of that property.

19. The Respondent's solicitors continued by saying that the First Schedule of the leases imposed an obligation upon the Landlord to maintain the main structure and common parts that were not expressly made the responsibility of the Tenant or any other tenant in the building. Clause 1.4 of the leases defines the Main Structure as the roof and foundations of the Building (and includes the

main walls to the extent mentioned above). The Applicants were responsible for providing a one-third share of the cost of services. The roof lights in the top flat form a part of the roof. If the whole of the roof were made of glass this would not constitute a window. It would still be a roof. The fact that it was made of glass would be incidental. In addition, because there was no lease of the top flat there was no tenant who could contribute to the cost even if the roof light was a window and not part of the roof. Therefore the Applicants were liable to contribute to the maintenance of the roof including the roof light as part of their obligations to contribute towards services.

20. Miss Oakes added further points. First she said that even if the Applicants were liable for a share of the cost of the roof lights (which she did not admit) the Respondent had failed to follow the procedures set out in section 20 of the Act. Accordingly the Respondent was in any case limited to the recovery of £250. The Applicants had known nothing about the intention to replace the roof lights until the end of July 2008 when they were told that there was a leak and that the landlord's solicitors had said that the Applicants would have to contribute to its repair. The Respondent's tenants of the top floor flat had confirmed to the Applicants that there had been leakage of the old roof lights cine January 2008. There had been difficulties over the communal fund so that the Respondent had not known what was in it when the landlord sought to recover the cost of the works.

21. Mrs Long added that she had discussed the cost of the work with builders and as a result was satisfied that the cost, subject to certain elements that Mr Zatchij had added for profit, was reasonable. Ms Oakes said that she found some elements of the price puzzling, but was otherwise unable to comment upon the point.

22. Mr Zatchij said that he was one of the two attorneys appointed by his mother under an enduring power. He referred to the advice given by his mother's solicitors upon he issue of payability. He said that he had assumed that the cost of the new roof lights would fall upon his mother until her solicitors had advised otherwise, but since he had received that advice he had of course followed it. He had tried methods of repair of the old roof lights without success before replacing them.

23. Because the roof lights had to be top-hinged for fire precaution purposes the Fakro lights had been the only practical replacement unit. He considered that because of his involvement in the building trade he had got a good price. The item of £36 on page 14 of the bundle he had supplied was a delivery cost, but the sum of £119.51 on that page was a profit element of the sort he would usually seek when supplying through his business. He accepted that he did not follow the section 20 procedure (which the Tribunal outlined to him so that he was aware of what was being suggested and of its consequences) in respect of the works to replace the roof lights, but said that he had kept the Applicants properly informed about it. In questioning him they denied that this had been so.

24. The Tribunal drew the parties' attention to the rules relating to the construction of leases like those in this case where there was an ambiguity that could not be resolved, and explained that if that arose (and there was a possibility that it might do so here) the lease fell to be interpreted upon the point in question against the interests of the person who had originally put the form of lease forward, in this case the Respondent. It invited any comment upon the point but the parties offered none.

Determination

25. The primary issue for the Tribunal to determine was that of responsibility for payment of the cost of the installation of the new roof lights. There were five such lights and not just one as the observations of the landlord's solicitors might have implied. The arguments upon the matter before the Tribunal were those described above. The Tribunal did not have the benefit of argument by qualified lawyers upon the subject at the hearing. As set out by the solicitors, the issue appeared to the Tribunal to be that of whether the roof lights were to be regarded as a window or as a part of the roof. In the former case both solicitors appeared to accept that the wording used would produce the result that the costs of replacing them would fall to be borne by the freeholder, but in the latter that it would fall to be borne as a part of the service charge in the proportions set out in the leases of the two lower flats. The Tribunal accepted that this does indeed appear to be the position upon a reading of the leases as a whole.

26. In seeking to interpret the lease by means of the ordinary and natural meaning of the words used in it, the Tribunal was not convinced by the analogy made by the Respondent's solicitors concerning a roof wholly made of glass. The fact in this case is that the roof is of apparently normal construction, and apart from the openings filled by the roof lights in question is covered in slate. The roof lights certainly operate to make the holes in the roof that they fill weather tight, and in that sense they operate as a part of the roof. On the other hand they are the only sources of natural light to the flat on the top floor of the property, and in that sense they operate as windows. As will be apparent from the description of the observations of the solicitors and the description of what was said at the hearing, the Tribunal was referred to no authority that might assist it in construing the leases in this respect, although it accepts that such matters as these are in essence a question of the facts in the particular matter.

27. The Tribunal rather reluctantly came to the conclusion that in this case there is a clear ambiguity in the leases that other principles of construction applicable in a case like this do not assist it to resolve. It is not necessary to import any element to give the leases commercial effect for they are effective whichever interpretation is applied to them. The burden of the cost simply shifts one way or the other. For the reasons set out in the preceding paragraph the wording used in the relevant parts of the leases is capable of either of the alternative interpretations that have been advanced, but of no other interpretation than one of those.

28. Consequently the Tribunal concluded that it had no alternative but to apply the rule of construction described at paragraph 25 above, often known as the 'contra proferentem' rule, and to interpret the leases against the interest of the Respondent as the person who put them forward. This effectively means that it construes the leases as meaning that the roof lights are to be regarded as windows, so that the cost of their replacement does not fall upon the Applicants.

29. The Tribunal adds that in case it is wrong about that it makes two further findings that may avoid the need to return to it in that event and if the lease is to be construed in that respect in favour of the Respondent. First, it would in any case have been obliged to find that the maximum amount recoverable from the Applicants would be the sum of £250 per flat in the absence of any retrospective dispensation granted to the Respondent from the requirements of section 20 of the Act. Those requirements are (absent any such dispensation) absolute requirements, and Mr Zatchij fairly admitted that they had not been observed. The Tribunal comments that in the result the Applicants were denied the rights that the section confers upon them to nominate contractors who might have tendered for the work or to comment upon it.

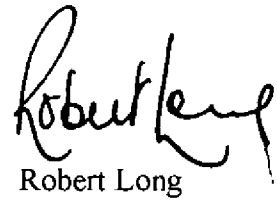
30. Secondly it finds that the cost of the work that was done was, subject to the question of profit element, reasonable. That arises in part from Mrs Long's admission upon the point, and in part from its assessment of her observations in the light of its collective knowledge and experience of such matters. It was able to find nothing in the leases that expressly authorised the landlord to recover a profit element so that the items of £119-51 on page 14 of Mr Zatchij's bundle and of £97-00 on page 15 which is also expressed to be a profit item, together with VAT on each fall to be excluded. They total £216-51 and VAT on that at 15% is a further £32-48. The total to be deducted from the invoice sum inclusive of VAT of £2522-79 is thus £248-97, leaving a sum of £2273-82 that would be chargeable to the service charge account in the circumstances described above.

31. There is an unusual aspect here in that Mr Zatchij is not himself the landlord but is the landlord's attorney (with another). The question of whether in those circumstances his firm is to have been regarded as an outside contractor to Mrs Zatchij, the actual landlord, rather than as an extension of the landlord was not canvassed before the Tribunal. Both the Applicants and Mr Zatchij proceeded before the Tribunal as if Mr Zatchij were for all practical purposes the landlord. Mr Zatchij certainly stated that he appeared for his mother as the freeholder, but the fact that he is an attorney is to be found only in a letter from him to Ms Oakes' solicitors in response to enquiries at the back of the Applicants' bundle. That letter points out that his firm takes a fee for managing the properties, and because it acts in that capacity for a fee the Tribunal took the view that, whatever it may say about management charges that were not in issue before it, the leases certainly did not appear to allow a manager a further profit element in any case.

32. As to the section 20C application and the application for the refund of fees, the Applicants have won on the interpretation point before this Tribunal, and

indeed would have won on the subsidiary section 20 point had it been material for the Tribunal formally to decide it. Whilst it is doubtful whether the lease would allow the Respondent to recover the costs of dealing with this matter as service charges, and Mr Zatchij confirmed that she will not seek to do so, the Tribunal should deal with the matter, and for the avoidance of any doubt orders that the Respondent shall not be entitled to treat the costs of dealing with this application before this Tribunal as relevant costs for to be taken into account for the purpose of determining the amount of any service charge payable by the applicants.

33. For the same reasons as are set out in the preceding paragraph the Tribunal orders that the Respondent shall reimburse the amount of the fees paid by the Applicants to the Tribunal in connection with this application.



Robert Long
Chairman

28th May 2009