SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL

Case Number CHI/221UC/LSC/2009/0054

In the matter of Section 27A of the Landlord & Tenant Act 1985 (as amended ("the Act")
and
In the matter of Priory Court, Granville Road, Eastbourne, East Sussex

Between:

Priory Court (Eastbourne) Limited **Applicant**

and

The lessees of the flats at Priory Court **Respondents**

Appearances:

Mrs C Pearce of Messrs Stredder Pearce for the Applicant

Mr E Pilkerton

Decision

Hearing: 19th August 2009

Date of Issue: 26th August 2009

Tribunal:
Mr R P Long LLB (Chairman)
Miss C D Barton BSc., MRICS,
Mrs J E S Herrington

Application

1. This was an application by Priory Court (Eastbourne) Limited ("the Company") made to the Tribunal pursuant to section 27A of the Landlord & Tenant Act 1985 (as amended) ("the Act") in order to determine whether, if costs were incurred for works that may be carried out by it to the balconies at Priory Court in the year 2009-10 (or possibly 2010 – 11), then service charges would be payable by the lessees of the flats at Priory Court, or some of them, as a result.

Decision

2. The Tribunal has determined that if the Company were to incur costs for works for the replacement of the balcony railings at Priory Court then a service charge would not be payable by the lessees of the flats at Priory Court to reimburse the cost of those works. The leases of the flats place no obligation upon the lessees to make such payments, nor any obligation upon the Company to undertake such works, and neither is it possible to infer any such obligations.

Inspection

3. The Tribunal inspected the exterior of Priory Court, and viewed the balcony of flat 7 from within that flat, on 19th August 2009 before the hearing took place. It saw that the great majority of the flats at Priory Court are provided with concrete balconies projecting beyond the walls of the building that appear to be of cantilevered construction. The balconies have railings that appear to be of steel containing reinforced glass panels within an outer frame. Flat 21 has a balcony formed by a part of the roof of the flats beneath, but is also supplied with a similar railing.

4. The railings have variously rusted to a greater or lesser degree, and the result has been that (at least in the case of flat 7) the pressure caused by the build-up of rust within the frames has caused a glass panel to crack. In many cases the steel frames are spalling, and in some cases the rust has affected the wooden handrail that is seated above the steel frames. The rust has caused some staining to the concrete beneath the frames, and in some cases the wire mesh within the reinforced glass panels shows signs of rust where water penetration has occurred.

5. Three of the flats that are on the southwest elevation of the building have balconies that do not project but are formed of open areas within the volume of the building itself. One of those, flat 9 on the ground floor, has with the consent of the Landlord enclosed that balcony area for security reasons.

The Law

6. The Tribunal prefaces its observations by pointing out that the law relevant to the determination of service charges is to be found primarily in sections 18, 19

and 27A of the Act. In brief summary, section 18 defines what is a service charge in terms that present no difficulty here and section 19 provides in the context of this case that a service charge must be reasonably incurred. Section 27A(3) allows the Tribunal to determine in this context 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. It is this latter provision that is particularly relevant to the present application.

The Leases

7. The Tribunal was supplied with sample copies of the leases of various types of flat at Priory Court. The counterpart leases (other than that for Flat 18, which seems to have been mislaid) were available at the hearing. For the purposes of the matters before the Tribunal all were in very similar form. The leases were granted in or about 1962 for terms of 99 years (less the last three days) commencing on 24th June 1961 at rents of either £25 or £30 per annum. The terms of all leases appear to have been extended in 2000 to 999 years from the same starting date and the rents were at the same time reduced to a nominal sum.

8. The relevant provisions of the leases appeared to be those set out below, namely:

8.1 "the Mansion" is defined in Clause 1(2) as "the blocks of flats erected on the site (which is shown on the site plan attached to the lease) and known as "Priory Court"

8.2 "the flat" is defined in clause 1(3) as "the suite of rooms situate on the ..... floor of the Mansion and shewn edged red on the other plan annexed hereto (that is to say the other plan than the block plan) and to be known as Flat Number ....."

8.3 It is appropriate here to say that the plans of the various flats indicate that the limit of the demise within the building itself is the inner surface of the walls bounding the flat in question, and that in the case of most of the flats having balconies the red line extends around the edge of the balconies, although its thickness means that it covers what would be an area a few inches wide around their edges.

8.4 However, in the case of three flats at least having balconies that protrude from the building, namely flats 4, 6 and 8, (the position in respect of flat 18 is not known), the red line does not extend around the balcony but appears to exclude the balcony from the definition of the flat. Neither, in those cases, does the lease appear to grant any right to the lessee of the flat to use the balcony, despite the fact that access to it can only be gained through the flat in question. A similar situation applies in the case of Flat 21, save that there the extensive balcony appears to be formed from part of the roof of the flat beneath. The word "Balcony" appears on each of the plans of the flats to indicate that this is what the area is. It appears nowhere else at all in the leases.

8.5 "The Service and Maintenance Charge" is defined in Clause 1(5) as "the amounts actually expended by the Landlord during the period ended 5th April in every year in performing the obligations specified in Clause 5 hereto and such other amounts as the Landlord shall be entitled to charge for the administration upkeep and maintenance of the Mansion and the site in accordance with the provisions hereinafter contained."

8.6 Clause 4(5) of the leases obliges the tenant "at all times to keep in repair the inside parts of the demised premises and all fixtures and fittings therein in good and substantial repair and condition and in particular will as occasion requires thoroughly clean all windows chimneys and flues and will keep all water electricity gas and other service pipes wires and drains and equipment in good order and condition". There follows a provision relating to things used in common with other tenants that is not relevant here.

8.7 Clause 4(6) of the leases requires the tenant "in every fifth year and also in the last year of the term completely and properly to redecorate all the inside parts of the demised premises and the outside of the doors in colours approved by the Landlord (so far as the said doors are concerned) painting with two coats at least of good quality paint those parts that are usually painted and treating all the other parts in an appropriate manner and to whiten all ceilings and repaper the walls usually so decorated"

8.8 Clauses 4(9), (10) and (11) contain provisions enabling the landlord to enforce covenants in a form usual at the time when the leases were granted.

8.9 The Landlord's obligations are set out in clause 5 of the lease. The repair covenant is in clause 5(1), and requires the Landlord:

"at all times during the term (to) keep in good and substantial repair and condition:

(a) all the roofs and all the outside walls of the Mansion (and the garage) including all drains gutters and downpipes
(b) all halls passages landings and staircases inside the Mansion (but outside the Flat) and all pipes wires and cables therein or thereunder
(c) all the roadways footpaths and gardens in and surrounding the buildings on the Site and all pipes wires and cables passing over through or under the same
(d) the boundary walls of the grounds of the site
(e) the lifts serving the Flat Provided that the Landlord shall be under no liability to the tenant his family servants guests or other persons for any failure stoppage or other defect whatever of or to the said lift however caused"

8.10 The decorating and common parts covenants are set out respectively in clauses 5(2) and 5(3) as follows:

5.2 "Will as often as shall be reasonably necessary paint all the outside parts of the Mansion (and the garage) usually painted"

5.3 Will at all times during the term keep all the halls passages landings and staircases above referred to properly cleaned and lighted and in reasonably decorative condition and will not cause any of the same to be obstructed."

Hearing

9. Following the usual introductions and explanations of procedure the Tribunal established two points. The first was that the issue which the Tribunal was asked to decide was whether, if costs were incurred for replacing the existing balcony railings in either 2009-10 or 2010-11 a service charge would be payable, whether by all or by any of the lessees. The second was that Mr Pilkerton appeared to present the arguments that he (and, he said, other lessees) wished to advance to counter the interpretation of the leases for which the landlord wished to contend.

10. Mrs Pearce said that Priory Court consisted of two blocks totalling 21 flats in all that had been built in the early 1960's. The Company had acquired the freehold reversion in respect of the whole of the site as a result of transactions in 1999 and 2001. All of the lessees were equal shareholders in the Company. Her firm had managed Priory Court since 1994.

11. The problem that had arisen resulted from the fact that the balconies at Priory Court were nowhere mentioned in the leases of the flats there. It had become apparent that the metal frames of the balcony railings had become heavily corroded over the years by the action of salt air. This resulted in the failure of paintwork shortly after redecoration, even when rust treatment had been applied, and the rusting of the metal was causing the glass screens that were set in it to crack. The Board of the Company took the view that it was no longer cost effective to continue simply to repair and redecorate the railings as the benefits of such work were of a short-term nature. Further, the condition of the railings, and the glass screens they supported, was beginning to present a safety risk.

12. Until now the Company had redecorated the railings and had carried out such minor repair work as may have been necessary from time to time. It had charged the cost both of redecoration and repair to the service charge account and there had until now been no complaint. A minority of the lessees now took the view that it was not proper for the cost of replacing the railings and the screens to be borne by the service charge account. They considered that individual owners were responsible for replacing their own railings and screens, subject to the fact that it appeared in any case to be for the Company to replace the railings and screens in the four flats whose demise did not include their balconies.

13. The difficulty arose because neither the term "balcony " nor "balcony railings" was mentioned in the leases. The matter had been referred to the Company's solicitors in February 2008. They had advised in a letter dated 7th February

2008 (page 127 in the Tribunal's bundle) that they considered it was not possible to give a definitive answer to a question asking them to define the responsibility for funding the replacement of the screens. The solicitors had initially concluded that the provisions of clauses 4(5) and 4(6) of the leases (set out above) were even then problematic because of their references to the "inside" of the premises. Whilst they suggested in a subsequent letter of 20th February (their attention having been drawn to the landlord's obligations to decorate the exterior in clause 5(2)) that it might be possible to construe the leases as obliging the landlord to replace the railings and screens, the solicitors nonetheless advised that the only safe course may be to vary the leases.

14. Other solicitors had advised one of the lessees (page 136-7 of the Tribunal's bundle) that there was no obligation on the part of the Landlord to undertake the redecoration and maintenance of the railings and screens.

15. Mrs Pearce produced history going back to 1983 to show that in the past glass screens had been replaced by the Landlord within the service charge regime. She accepted at the hearing, however, that there was no authority to which she could refer the Tribunal that would support the contention that such a practice in the past would override obligations contained in the leases. She explained that it was highly desirable that the work of replacing the screens should fall within the obligation of the Landlord and within the service charge regime. As well as minimising cost if the work were done at the same time, such a course would secure the external appearance of the building. If the matter were left to individual lessees it would be done in a piecemeal fashion over a period of time. Because similar parts may not be available over such a period, or regulations may change, it may be that the external appearance would be compromised by the use of parts that did not quite match or because different regulations, perhaps as to height or some other overt matter, required a different treatment.

16. Cases decided by other Leasehold Valuation Tribunals in the past that had placed obligations upon the landlord, whilst not binding on this Tribunal, provided a helpful background, said Mrs Pearce. She referred to Flagship Estates Limited v Albany Apartments Limited (CHI/OOHN/LSC/2005/0013) and to Fairhazel Mansions Limited v Ms Marsha Cummings (LON/OOAG/LSC/2005/0063), and provided copies of those decisions.

17. Mrs Pearce added at the hearing that in the past asphalt repairs to the balconies had been done by the Company as part of the service charge regime to prevent water ingress. It had retiled the balcony floors. If it was agreed that the floor was the responsibility of the Company then so also should be the railings. Whoever drafted the leases, she said, would have intended the property to look the same, and that may not be achieved if the railings were dealt with individually.

18. Her arguments over the desirability of the Company doing all the work went back to what must have been the intention of those preparing the leases originally. The balcony railings could not be an "inside" fitting the responsibility of the individual lessee. Since the balconies were projections

from the wall it may be possible to regard them as an extension of it and thus to fall within the Company's obligations. One of the dictionary definitions of a wall was a "protective or restrictive barrier" and another referred to "each of the sides and vertical divisions of a building". Since there was no proper definition it was reasonable that any interpretation of the lease should rest on what had happened historically.

19. In reply Mr Pilkerton accepted that the view before 2008 had been that the balconies were outside of the demised property and within the service charge regime. However, as an analogy he had paid for new window frames in his flat, but the windows were not within the demised property. He contended that the balcony rails and screens were inside "fixtures and fittings" that fell within the obligations placed upon the lessee in paragraph 4(5) of the leases. As such the landlord could use the provisions of clauses 4(9) –4(11) to compel the lessees to do the replacement work at the same time. The balconies were part of the structure of the building but the railings were "fixtures and fittings". The balconies and the railings were different items.

Decision

20. So far at least as regards the provisions relating to the maintenance of the balconies is concerned the leases at Priory Court are plainly defective. Apart from the reference to a balcony on the plans they make no further reference to them. In four cases at least the balcony has not even been included in the demise. It is difficult in the light of these very material discrepancies to conclude that the draftsman, or the parties who negotiated the leases, addressed his or their minds to the existence of the balconies. It is surprising that the problem now before the Tribunal seems not to have been raised during the numerous sale and purchase transactions at Priory Court that must have occurred since the leases were originally granted.

21. The hearing made very clear that the problem in the present case is that there is no reference to the balconies in the leases other than on the plans. Their existence seems entirely to have been ignored both by those who prepared the leases and by those who entered into them, so that it is difficult to find that they had any intention at all with regard to their maintenance and repair. Despite Mrs Pearce's argument concerning the intention of the draftsman with regard to external appearance, it is also difficult to conclude that he had any thought about the matter at all so far as the balconies were concerned, or even to conclude that that he bore in mind their existence in any way. It is equally difficult to regard the railings and their screens as being anything other than an integral part of the balcony to which, especially now that rust has taken hold, they appear almost welded. They certainly could not physically now be removed without being cut away, even if that has ever been the case.

22. In the Tribunal's judgement, the arguments that the parties have put forward require the wording of the lease to be stretched in one way or another beyond a meaning that it could reasonably be said to bear. Given that a part of the argument that Mr Pilkerton (himself a ground floor lessee) puts forward is that it would be unfair for ground floor lessees to contribute to the cost of

balconies from which they do not benefit, it is equally difficult to seek in the circumstances to try to give commercial effect to the leases by accepting the arguments of either party. The fact, mentioned at the hearing, that the ground floor lessees are responsible for contributing to the maintenance of lifts (for which they have little if any use) cannot in the Tribunal's judgement reasonably be said to be determinative in that respect.

23. Equally, as Mrs Pearce accepted, the history of previous dealings with the balconies has no effect upon the contractual arrangements that the parties made when they entered into the leases. The Tribunal has been referred to no authority to the contrary.

24. All of this being so, the Tribunal is driven to agree with the analysis of the Company's solicitors in their letter of 7th February 2008. They said there that they concluded that (except in the case of the four flats whose balconies are not included in their demise) the responsibility for the railings seems to rest with the lessees of the individual flats to whom balconies were demised. Even that view rests upon an assumption (which seems on an examination of the plans, but without a survey, much more likely to be true than not) that the railings are actually within those demises. If they were not then the obligation would be that of the Company, as it seems to be in the case of the four flats where the balcony is not included in the demise.

25. There is quite simply nothing in the leases that can, in the Tribunal's judgement, reasonably be construed as creating a contractual obligation either on behalf of the Company towards the lessees or in the other direction in respect of the maintenance and repair of the balcony railings. The responsibility that may rest as a result upon the individual lessees is not a contractual responsibility to the Company as Landlord, because there is no such agreement in the leases. It is a general responsibility of the sort that arises under the Occupier's Liability Acts. Equally, except so far as the Company may have an obligation to decorate at least the outer half of the railings, it is difficult to construe any further obligation in respect of them towards the lessees of the flats whose balconies are included in their demise, or any ability to recover any other cost as part of the service charge.

26. The conclusion that the Tribunal has reached is in many ways an unsatisfactory one from the point of view of most of the parties, although it may perhaps be acceptable to the ground floor lessees who wanted to avoid paying for other people's railings. The leases are plainly defective, at least in this particular, because they are drawn in such a way as to create a lack of any provision for the responsibility to maintain and repair the balcony railings. It would be helpful if they could all be amended following careful consideration and discussion (if need be using the mechanisms provided by the Landlord & Tenant Act 1987) in order to resolve the uncertainties they present.

27. The Tribunal adds its appreciation of the careful efforts that those appearing before it had made, although not themselves lawyers, to assist it in the manner in which they had prepared and then presented their cases.

Robert Long
Chairman