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HM Courts & Tribunals Service

Leasehold Valuation Tribunal

S.27A Landlord & Tenant Act 1985

FINAL DECISION AND REASONS

Case Number:	CHI/00ML/LSC/2012/0012
Applicant:	Davis Properties Ltd
Represented by:	ODT Solicitors LLP
Respondents:	The Lessees: Mr J A Dodds (Flat1) Ms S M Browne (Flat 2) Cutler Holdings Ltd (Flats 3,4,5 &14) Miss D Clouttick (Flat 6) Miss J Bassett (Flat 7) Ms H L Woodruff (Flat 8) Mr N J Dickinson (Flat 9) Mr G B Harmer (Flat 10) Miss L I Alonso (Flat 11) Mr B Manchester (Flat 12)
Property:	3-4 Sillwood Place BRIGHTON East Sussex BN1 2LH
Date of Application:	09 January 2012
Tribunal Members:	Mr B H R Simms FRICS MCIArb (Surveyor Chairman) Mr N I Robinson FRICS (Surveyor member)
Date of this Decision:	31 May 2012

DECISION

1. If the damp proofing work to be carried out to the walls is within the structure and not within the demised premises and, if it is not a repair but it is an improvement, the works will not be qualifying works to be taken into account when calculating the service charge.

2. Whether or not the cost of the work can be recovered via the service charge, it is for the Landlord to keep the property, other than the demised premises, in repair in accordance with clause 4.(4).

3. The Tribunal makes no finding in respect of S.20 consultation or dispensation. This would have to be the subject of a separate application.

4. Questions 4 & 5 raised by the Applicant do not relate directly to service charges and no determination is made.

5. The Tribunal makes no determination in respect of costs.

REASONS

INTRODUCTION

6. The Applicant applied to the Tribunal under S.27A of the Landlord and Tenant Act 1985 (the Act) for a Determination of five questions relating to repairs at the property which are set out here verbatim:

    1. Is the Applicant liable to carry out the works referred to in the report of Messrs Bensleys dated 25 February 2011 pursuant to the terms of the lease i.e. would it be able to recover the cost as a service charge?

    2. Is the Applicant liable to carry out damp proofing works to the *external* parts of the retaining wall pursuant to the terms of the lease to abate / prevent future ingress i.e. would it be able to recover the cost as a service charge?

    3. In both cases if the Applicant is so liable, is it appropriate to dispense with the consultation requirements?

4. More generally, and to avoid future disputes, pursuant to clause 4.4 of the lease, were the Applicant to carry out *any works at all* to the external parts of the building (i.e as opposed to the internal common parts) would it be able to recover the cost i.e. what is meant by the words "*other than the Demised premises and the exterior of the building*" within that clause?

5. If so, which works would the cost be recoverable for?

7. Although the Respondent is stated to be all the lessees in the property it is only the lower ground floor flat that is affected by the dampness. The lessees of other flats will be affected by the amount included in the service charge but only the lessee of flat 2 in the lower ground floor, Ms Sarah Browne, made representations to the Tribunal.

8. Directions were issued dated 23 January 2012 giving Notice that the case would be decided on the paper track based on written representations and documents only without an oral hearing. Neither party objected to this procedure. The Directions set a timetable for the production of representations and documents.

9. The parties provided submissions and some documents in response to the Directions and the matter has been determined on the basis of these documents without an oral hearing.

10. There is no application in respect of costs.

LAW

11. Section 27A of the 1985 Act provides 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 –

a. the person to whom it is payable

b. the person by 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) Subsection (1) applies whether or not any payment has been made.

(3) Similar provisions as sub-section (1) apply to costs which have yet to be charged and it is this sub-section that applies in this case.

There are certain exceptions that limit the Tribunal's jurisdiction under section 27A but none of those exceptions are relevant to this case.

12. In order to interpret payability the Tribunal has also had regard to Ss.18 & 19 of the Act.

13. 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."

14. "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.

15. 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."

LEASE

16. The Tribunal was provided with a copy of lease dated 23 May 1985 in respect of the Lower Ground Floor Flat at 3-4 Sillwood Place BRIGHTON. It is for a term of 99 years from 25 March 1983. The participating Respondent is an Assignee of this lease.

17. The Tribunal has had regard to the entire document in coming to its decision but summarises here some of the clauses relevant to the case before it.

18. In addition to the ground rent the tenant is required to pay on demand in accordance with clause 3.(2)(a) "...a due proportion... of the expenditure incurred by the Lessor in the performance of the obligations contained in Clauses 4(2) and 4(4)..."

19. and in accordance with clause 3.(2)(b) to pay on the 24 June and 25 December each year "..the sum of £50 ... on account of the expenditure incurred or likely to be incurred by the Lessor in the performance of the obligations contained in Clauses 4(2) and 4(4)...". These payments we will refer to as "the service charge".

20. Clause 4.(2) relates to insurance but is not relevant to these proceedings.

21. Clause 4.(4) provides that the Lessor covenants with the Lessee "To keep the Building (other than the demised premises and the exterior of the Building) in good repair and condition including the foundations structure roof roof timbers gutters drains pipes and wires and when and as necessary to clean paint decorate and renew the same and to keep the common parts reasonably lit cleaned and carpeted.

22. The Tribunal also had copies of other leases in the building which are in a similar wording except that there has been a Deed of Variation relating to flat 6 dated 24 February 1999. This Deed omits the words "and the exterior of the Building" from the words in parenthesis in clause 4.(4) in that lease.

INSPECTION

23. The Tribunal members made a general inspection, in company with Ms Browne, of the exterior of the Building from the parking area on the East side of the buildings in Sillwood Place which gives access to flat 2. We also inspected the area outside flat 2 but only the kitchen in flat 2 itself. The Applicant did not attend and was not represented.

24. The Building comprises one of several Regency terrace properties fronting on to a private close. It has cement rendered elevations under a pitched, slate covered roof. There is a common entrance hall to the remaining 12 flats approached from ground level in Sillwood Place. Flat 2 is principally below ground level and is approached down steps from Sillwood Place to an external area and then to the flat's entrance. The Tribunal was shown the kitchen where it is apparent that the walls are affected by serious dampness.

HEARING

25. By formal Notice this case is being considered on documents only without an oral hearing. The Tribunal proceeded to consider all the documents submitted to it.

The Applicants Case

26. The Applicant included with its application a statement of case including the five questions set out at paragraph 6 herein. In response to Directions a bundle of documents was received in support of that Statement.

27. Ms Browne had reported serious water ingress within her flat and the Applicant is seeking clarification regarding the interpretation of the lease before embarking on any repair works.

28. The Applicant's managing agents commissioned a report from specialists, Messrs Bensleys, dated 25 February 2011 and the Tribunal had a copy. Bensleys conclusion was that the walls are visibly affected by dampness and their investigation indicated damp penetration laterally where the external ground levels are high in relation to the interior of flat 2.

29. In a supplemental report dated 23 May 2011 Bensleys indicated that the cause of the dampness is approximately 90% penetrating laterally and approximately 10% rising damp.

30. The Applicant believes that the cause of the damp is an inherent defect rather than an externally remediable defect. Having expressed that view the Applicant states that it is essentially neutral in this application and it simply is looking for guidance. However it then goes on to express an opinion on some of the various issues.

31. The applicant has difficulty in interpreting the lease and allocating any repairs to the Lessor or Lessee and whether *structure* includes *exterior.* It believes that any steps taken in relation to the damp proofing of the external part of the wall would constitute an improvement and quotes *Woodfall* in support, presumably following the consideration of a particular case which has not been put before the Tribunal.

32. At 13.035 of *Woodfall* it states: "a covenant to repair does not involve a duty to improve the property by the introduction of something different in kind from that which was demised however beneficial or even necessary that improvement may be by modern standards. So a landlord of old basement premises not constructed with a damp course or waterproofing for the outside walls was not bound by the repairing covenant to render the place dry by waterproofing the walls."

33. In conclusion the Applicant considers that "*it could never fall upon it to excavate and install damp proofing to the external fascia [here we think it means face] of the retaining wall as it would not fall within the Applicant's repair [sic] covenant to begin with.*"

The Respondent's Case

34. The only Respondent to make representations is Ms Browne. She provided a detailed written statement.

35. She is concerned that the question of dampness in her flat has been in existence for a long time and believes that the Applicant is seeking to avoid the problem by pointing to a particular clause in the lease, 4.(4). During the period of her ownership the landlord has carried out major works to the exterior and has charged the cost to the service charge.

36. Ms Browne explained the history of charges at the property and she believes that she has contributed £40,000 over 17 years. If the Landlord is not obliged to repair the property then this sum should be refunded.

37. Turning to the repairing clause 4.(4) she is satisfied that the damp walls are part of the structure and the clause provides for the repair of the structure. She can't see how the works can be an improvement. When she purchased in 1995 the flat was free from damp.

38. It must be preferable for the Landlord to have control of the exterior of the building and this has always been the case. Bensleys refer to previous damp proofing in 1996/97 and this damp proofing must be maintained.

39. She goes on to say that if the lease is defective the Landlord should have made a formal application to vary it and outlines the procedure.

CONSIDERATION AND DETERMINATION

40. Initially the Tribunal considered the extent of its jurisdiction. The application is made under S.27A which relates to service charges. In coming to any conclusion relating to service charges the Tribunal will have to construe the lease for that purpose. The Tribunal does not have jurisdiction to interpret the lease or to determine which or to what extent the Landlord is liable to carry out repairs. That would be a matter for the courts.

41. Question 3 relates to consultation in accordance with S20 of the 1985 Act. All the Tribunal can say is that if the works are qualifying works then S.20 consultation or dispensation under S.20ZA would be required. It cannot see why the damp problem should be treated in any different way.

42. For costs to be relevant costs in calculating the service charge they would have to be works carried out in accordance clause 4.(4). That clause is difficult to interpret because of the inclusion of the words "other than...the exterior of the building" in parenthesis. Without these words the general principle that the Landlord looks after the structure and exterior and the Tenant looks after the interior would apply. The definitions in the lease are clear if these additional qualifying words are ignored. They do not make sense. This approach is reinforced by the variation agreed in the lease for flat 6. The Tribunal therefore ignores these words when construing the lease.

43. If the walls that are now damp had been damp proofed at some time in the past then there may be a case for any repair of this damp proofing to be a repair. Otherwise, following *Woodfall* it would be an improvement and not qualifying works to be included in the service charge. Unfortunately the evidence in this area is not conclusive. The Tribunal has not seen any details of the work carried out by *Cox* in 1996 or 97 which is surprising as this was after Ms Browne purchased the flat. The Tribunal does not have evidence that there is any existing damp proofing within the structure.

44. It is possible and on the balance of probabilities more likely that any damp proofing work would have been within the plasterwork and therefore part of the Tenant's responsibility rather than in the structure so as to become the Landlord's responsibility. On this basis, and without further evidence, we find that any cost of works to damp proof the structure other than work to the demised premises could not be recovered as part of the service charge as the work would be an improvement. Whether or not the proposed work by Bensleys falls within this area we cannot say in the absence of any specialist surveyor's evidence.

45. In answer to question 2 the Tribunal considers that any additional work other than repair to existing building materials or structure would be an improvement and not recoverable as service charges. There may still be an obligation to repair.

46. In answer to questions 4 and 5 the detail is too hypothetical for the Tribunal to express a view here. It would be for another tribunal to consider any application on the merits of the case having considered the evidence presented to it.

47. Although it might be desirable for the lease to be clarified there is no obligation on the Landlord, or for that matter the Tenant, to apply for a variation of it.

COSTS

48. Neither party has made an application in respect of any costs.

Dated 31 May 2012

Brandon H R Simms FRICS MCIArb
Chairman