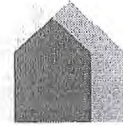




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LONDON RENT ASSESSMENT PANEL

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION
UNDER SECTIONS 27A & 20C OF THE LANDLORD AND TENANT ACT 1985**

Case Reference: LON/00BE/LSC/2011/0689

Premises: 83 LEONTINE CLOSE, PECKHAM, LONDON
SE15 1UH

Applicant(s): BONIFACE ONWUBIKO AND GLADYS
ONWUBIKO

Representative: SANDOM ROBINSON SOLICITORS

Respondent(s): LONDON BOROUGH OF SOUTHWARK

Representative: LB SOUTHWARK LEGAL SERVICES

Date of hearing: 7 March 2012

Appearance for Applicant(s): Mr N Robinson, solicitor
Mr S Robinson
Mr B Onwubiko

Appearance for Respondent(s): Miss E Bennett
Mr J Sheehey
Mr M Fang

Leasehold Valuation Tribunal: Ms L Smith
Mr T Johnson FRICS
Mrs R Turner JP

Date of decision: 8 March 2012

Decisions of the Tribunal

- (1) The Tribunal determines that the Applicants should pay a proportion of the cost of window replacement works of 4/610ths rather than 7/610ths as currently estimated (to include also the same proportion of professional and management fees relating to that part of the overall works).
- (2) The Tribunal makes the determinations as set out under the various headings in this Decision
- (3) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the Tribunal proceedings may be passed to the lessees through any service charge

The application

1. The Applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act"), as to the amount of estimated service charges payable by the Applicants in respect of works carried out by the Respondent in 2010 for replacement of windows to the block of flats at 1-99 Leontine Close ("the Building"). The window replacement works formed part of an overall refurbishment project to the Building.
2. The application was made on 9 October 2011. The amount in dispute was said to be the sum of £16,433.48.
3. The relevant legal provisions are set out in Appendix 1 to this decision.

The hearing

4. The Applicants were represented at the hearing by Mr Robinson, their solicitor, and the Respondent was represented by Miss Bennett, a litigation officer of the Respondent local authority.

The background

5. The Property is a 3 bedroom flat on the ground and first floor of a purpose built block of flats known as 1-99 Leontine Close ("the Building").
6. Neither party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.
7. The Applicants hold a long lease of the Property dated 22 November 1999 and made between the Applicants and the Mayor and Burgesses of the London Borough of Southwark for a term of 125 years from 22 November 1999 ("the Lease"). The Lease requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the Lease which are relevant to this application and referred to below are set out in Appendix 2 to this determination.

The issues

8. At the start of the hearing the parties identified the relevant issues for determination as follows:
- (i) The payability and/or reasonableness of estimated service charges in relation to major works carried out by the Respondent which included the replacement of windows to the Building of which the Property forms part. The windows to the Property were not replaced and the Applicants contend that they should not therefore have to contribute at all to the cost of the window replacement works. The Applicants fairly conceded however that the amount stated in the application was the total cost of the major works and not just the cost of the works to replace the windows. The parties informed the Tribunal that the window replacement costs totalled £586,906.84 of which the Applicants' proportion as estimated by the Respondent (including professional and administration fees) was £6734.99.
 - (ii) Insofar as the Applicants are obliged to contribute to the costs of the window replacement works, they contend that the basis on which the costs were apportioned was unfair and unreasonable.
9. Having heard evidence and submissions from the parties and considered all of the documents provided, the Tribunal has made determinations on the two issues as follows. It appeared to the Tribunal that in fact the two issues were inextricably linked and fall for determination together.

Whether the Applicants are obliged to contribute to the cost of the window replacement works and if so what proportion would be fair and reasonable

10. From about 2003 onwards, the Respondent notified the Applicants of its intention to carry out major works in relation to the Building. This period of consultation culminated in a notice of intention under s20 of the Landlord and Tenant Act 1985 dated 3 February 2010 which notified the Applicants of the intention to carry out the major works, the basis of apportionment of the cost of the works (based on "bed-weighting" of 4 plus the number of bedrooms) and the apportioned figure, together with notice of the professional and administration charges which would be levied in relation to the cost of the works. The notice invited the Applicants to make any observations in relation to the works or the cost of the works. The Applicants do not therefore contend that the Respondent failed to carry out proper consultation with them in relation to the Works.
11. On 1 October 2010, the Respondent invoiced the Applicants for the cost of the Works. The invoice complied with the relevant legislative requirements and required payment by equal instalments over 12 months on the due date for payment of the service charge. The amount invoiced was £14,807.82 for the estimated cost of the Works as apportioned, professional fees of £993.60 and administration fees of £632.06. The total amount of the invoice was therefore £16,433.48. As indicated above, the total which related to the cost of replacement of the windows is £6734.99 which represents 7/610ths of the total cost of those works.

12. The Applicants have refused to pay any of this invoice, contending that they are not liable to pay it and/or that the contribution they are being required to pay is unreasonable.
13. The Applicants in fact paid to replace the windows of the Property in 2003 at a personal cost to them of £3480 (to replace 5 windows). Mr Onwubiko gave evidence to the Tribunal. He explained that his son suffered from sickle cell anaemia and the doctors had advised that the heating to the Property where they then lived should be improved. Mr Onwubiko said that he spoke with a representative of the Respondent Council at the time and obtained verbal permission from the Respondent to replace the windows. He could not recall who he spoke to nor did he take any note of the conversation as he did not realise that this might be important many years on. Although the Respondent Council could not find any record of this conversation and says that this would have been too important a matter for someone to agree verbally, the Tribunal accepts Mr Onwubiko's evidence on this matter.
14. Mr Onwubiko also says that he did not take legal advice at the time and nor did he consult the Lease which was then in the hands of his solicitors. Again, he did not recognise that it might be important for him to do so.
15. When it came to the works, in 2010, Mr Onwubiko, in response to the s20 notice, informed the Respondent of the replacement of the windows of the Property and contended that they did not need to be replaced. The windows of the Property were inspected by the Respondent's surveyor and were found to be of a suitable standard and they were not therefore replaced as part of the works. The Applicants say therefore that they should not be obliged to pay for the window replacement works; alternatively that their contribution should reflect the fact that their windows were not replaced and the cost of their outlay to install the windows at their own expense.
16. The Applicants have sought to resolve this issue via the Respondent's complaints scheme and the Local Authority Ombudsman but the Respondent remains adamant that they are obliged to pay their contribution to the cost of the works as calculated and therefore the matter has not been capable of resolution.
17. The Respondent points to the fact that the definition of the Property in the Lease and the demise does not include the windows. These therefore remain part of the Building and the property of the Respondent. As such, the Respondent is obliged to repair or replace them under clause 4 of the Lease. If that is right, then the Applicants are obliged by clause 2(3)(a) of the Lease to pay for the cost of repair by way of Service Charge contributions as set out in the Third Schedule to the Lease. Further, the Applicants have covenanted specifically in clause 7(9)(i) of the Third Schedule to the Lease to pay for the installation (by way of improvement) of the windows not just of the Property but also other flats and premises in the Building.

18. The Respondent also gave evidence via Mr Sheehey, the Capital Works Cost and Consultation Officer in the Respondent's Capital Works Group and Mr Fang, contract manager for the works. Mr Sheehey gave evidence that the Respondent, if asked for permission to carry out works to the windows of the Property would most likely have refused and certainly would not have treated the request lightly. If accepted, this would probably have led to a need to vary the Lease because of important considerations flowing from the consent such as the need for the Respondent thereafter to maintain the windows and the risk that if not properly installed the windows might have caused injury to the public, exposing the Respondent to a potential claim.
19. The Respondent says that if consent had been given or a variation permitted that would have notified the Applicants that the window replacement would be carried out at their own personal cost but that this did not affect their liability to pay for a replacement of other windows to the Building under clause 7(9)(i) of the Lease. The Respondent was unable however to point to any document which had been issued in a similar situation to evidence this. In any event, since the Applicants accepted that they had not sought or obtained written consent the point was irrelevant as it was clear that the Applicants had not understood that this would not impact on their liability to pay for other windows in the Building.
20. Miss Bennett made much of the fact that the Applicants had not obtained the necessary consent to replace the windows of the Property in 2003. However, the Respondent's remedy if it objected to that replacement would have been to replace the windows of the Property in 2010 at the same time as replacing other windows in the Building, in which event the Applicants could have had no objection to paying for them. Indeed, the Tribunal was told by Mr Onwubiko that this was what had occurred in relation to another flat where the owner had replaced the windows without consent.
21. Mr Robinson argued that the crux of the matter was whether the proportion sought from the Applicants towards the window replacement works which was exactly the same as for others whose windows had been replaced, was fair and reasonable. He pointed to clause 6(1) of the Third Schedule in support of that argument. There was some debate before the Tribunal about whether the windows which were replaced were only those in other flats in the Building or included also communal windows. Although the exact number of communal windows was unclear, it was clear that some communal windows had been replaced.
22. As no final invoice had yet been produced for the works, the Tribunal indicated that it would base its decision on the proportion of the cost of the window replacement works for which the Applicants were liable rather than a sum of money. It was accepted by both parties that the total costs of the window replacement works should of course exclude the cost of the windows to the Property which were replaced in 2003.

The Tribunal's decision

23. The Tribunal determines that the Applicants should pay a proportion of the cost of window replacement works of 4/610ths rather than 7/610ths as currently estimated (to include also the same proportion of professional and management fees relating to that part of the overall works).

Reasons for the Tribunal's decision

24. The Tribunal accepts that the Respondent is correct in its legal interpretation of the Lease. The demise of the Property does not include the windows which remain the property of the Respondent. The Respondent was and remains liable to repair and replace those windows under clause 4 of the Lease. The Applicants are therefore obliged to contribute by way of service charge under clause 2(3)(a) of the Lease to the repair and replacement of the windows, not just of the Property but, expressly, by virtue of clause 7(9)(i) of the Third Schedule to the cost of replacement of other windows of the Building.
25. It is also clear from the Lease that the Applicants should not have replaced the windows of the Property without consent in writing by clause 2(7) of the Lease.
26. However, clause 6(1) of the Third Schedule requires the Applicants only to pay what is a fair proportion of the total service charge and by clause 6(2) the Respondent may adopt any reasonable method of ascertaining that proportion but crucially may adopt a different method in relation to different items of costs and expenses.
27. The Respondent here has applied precisely the same apportionment of the total cost of the window replacement to the Applicants as the Council applied to any other owner of a 3 bedroomed flat in the Building and as Mr Robinson put it that was unfair. This effectively sought to punish the Applicants for replacing the windows at their own expense without consent which was also unfair given that the Applicants had understood that they had the necessary consent to go ahead with replacement.
28. The Respondent does not appear to have applied its mind at all to whether simply applying the standard basis of apportionment was fair in the circumstances of this case. Miss Bennett argued that the Applicants had derived a benefit from the Works. However, it seems to the Tribunal that it is in fact the owners and tenants of other flats in the Building who have derived the benefit from the fact that the Applicants have had to pay the standard contribution to the replacement of the windows in the other properties whilst having had no such replacement works done to their own property.
29. Accordingly, the Tribunal has decided that the proportion of the cost which the Applicants should pay should be reduced to reflect the cost of their personal outlay but whilst recognising that the Applicants should pay something towards the cost of replacing communal windows and also to reflect the fact that the Respondent will continue to bear the responsibility to repair and renew the windows of the Property in the future. The Tribunal emphasises that this determination is based on the particular facts and circumstances of this case

which turned on fairness of apportionment in this particular case and is not intended to lay down any general point of principle.

30. Having regard to the estimated figures, the Tribunal determines that the proportion payable by the Applicants should be reduced from 7/610ths to 4/610ths.

Application under s.20C

31. In the application form, the Applicants applied for an order under section 20C of the Landlord and Tenant 1985. Although the Respondent indicated that no costs would be passed through the service charge, for the avoidance of doubt, the Tribunal determines, having heard the submissions from the parties and taking into account the determinations above that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Respondent may not pass any of its costs incurred in connection with the proceedings before the Tribunal through the service charge.

Chairman:



Lesley Smith

Date:

8 March 2012

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

- (1) In the following provisions of this Act "service charge" 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 the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the Landlord, or a superior Landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose –
 - (a) "costs" includes overheads, and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

- (1) 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 provisions 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.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

- (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 by whom it is payable,
 - (b) the person to 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) An application may also be made to a Leasehold valuation tribunal for a determination 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 and, if it would, as to -
- (a) the person by whom it would be payable,
 - (b) the person to whom it would be payable,
 - (c) the amount which would be payable,
 - (d) the date at or by which it would be payable, and
 - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
- (a) has been agreed or admitted by the Tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the Tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the Tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20C

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to 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.
- (2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (b) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;
 - (c) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;
 - (d) in the case of proceedings before the Upper Tribunal, to the tribunal;
 - (e) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

APPENDIX 2
RELEVANT CLAUSES OF THE LEASE

Definitions

"the building" means the building known as 1-99 Leontine Close including any grounds outbuildings gardens yards or other property appertaining exclusively thereto

"the flat" means the flat and land (if any) shown colour pink on the plan or plans attached hereto and known as Number 83 on the ground and first floors of the building and including the ceiling and floors of the flat the internal plaster and faces of the exterior walls of the flat and the internal walls of the flat (and internal walls bounding the flat shall be party walls severed medially) but excluding all external windows and doors and window and door frames the exterior walls roof foundations and other main structural parts of the building

Clause 2(3)(a)

THE Lessee hereby covenants with the Council:

(3)(a) To pay the Service Charge contributions set out in the Third Schedule hereto at the times and in the manner there set out

Clause 2(7)

THE Lessee hereby covenants with the Council:

(7) Not to make any structural alterations or structural additions to the flat or remove any of the Landlord's fixtures and fittings without the previous consent in writing of the Council

Clause 4(2)

THE Council hereby covenants with the Lessee:-

(2) To keep in repair the structure and exterior of the flat and of the building (including drains gutters and external pipes) and to make good any defect affecting that structure

THIRD SCHEDULE

Clause 6(1) and (2)

(1) The Service Charge payable by the Lessee shall be a fair proportion of the costs and expenses set out in paragraph 7 of this Schedule incurred in the year

(2) The Council may adopt any reasonable method of ascertaining the said proportion and may adopt different methods in relation to different items of costs and expenses

Clause 7

The said costs and expenses are all costs and expenses of or incidental to

(1) The carrying out of all works required by sub-clause (2) to (4) inclusive of Clause 4 of this lease

.....

(7) The employment of any managing agents appointed by the Council in respect of the building or the estate or any part thereof PROVIDED that if no managing agents are so employed then the Council may add the sum of 10% to any of the above items for administration

.....

(9) The installation (by way of improvement) of:

(i) double-glazed windows (including associated frames and sills) in replacement of any or all of the existing windows of the flat and of the other flats and premises in the building and in common areas of the building....

should the Council in its absolute discretion (and without being under any obligation) decide to install the same or either of them