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**FIRST - TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case Reference** | : | **BIR/44UF/LSC/2014/0024** |
| **Property** | : | **Newbold Lawn, Newbold Terrace East, Leamington Spa CV32 4EU** |
| **Applicant** | : | **Newbold Lawn Tenants Association Limited** |
| **Respondent** | : | **Dr Torquil Ross-Martin** |
| **Type of Application** | : | **Application under sections 19 and 27A of the Landlord and Tenant Act 1985 for the determination of liability to pay and reasonableness of service charges** |
| **Tribunal Members** | : | **Judge Anthony Verduyn**<br>**Mr J Turner**<br>**Mr J. Arain** |
| **Date of Decision** | : | **23rd June 2015** |

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**DECISION**

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The Tribunal holds that (1) specified remedial works to the balconies are within the Landlord's obligations to repair, maintain, and renew as set out in the Fourth Schedule to each lease; (2) all lessees are obliged, in accordance with the terms of the Lease, to contribute one equal sixteenth towards such expenditure; (3) accordingly, the Lessees have an obligation to pay such service charges; and (4) the Applicant's decision to incur such expenditure is a reasonable decision within the meaning of Section 19 of the 1985 Act.
The Tribunal makes no determination as to the reasonableness of actual costs to be incurred within these obligations.

## REASONS

### Background

1. By an application dated 4th December 2014, and received at the Tribunal on 8th December 2014, Newbold Lawn Tenants' Association Limited, which manages the freehold of a development of 16 residential flats known as Newbold Lawn, Newbold Terrace East, Newbold Lane, Leamington Spa CV32 4EU (registered title number WK435793 with registered proprietor Newbold Lawn Freehold Management Limited), sought a determination of the following issues pursuant to Sections 19 and 27A of the Landlord and Tenant Act 1985 (the "1985 Act"), in summary: that proposed repairs to balconies at Newbold Lawn would constitute expenditure recoverable as service charges from the tenants of Newbold Lawn under the terms of their leases ("the Application"). In details the following determinations are sought from the Tribunal:
   (1) That specified remedial works to the balconies are within the Landlord's obligations to repair, maintain, and renew as set out in the Fourth Schedule to each lease;
   (2) That all lessees are obliged, in accordance with the terms of the Lease, to contribute one equal sixteenth towards such expenditure;
   (3) That, accordingly, the Lessees have an obligation to pay such service charges;
   (4) That the Applicant's decision to incur such expenditure is a reasonable decision within the meaning of Section 19 of the 1985 Act.

2. An application for dispensation from consultation under Section 20ZA of the 1985 Act was not pursued.

3. The Application has been opposed by Dr Torquil Ross-Martin, the leaseholder of No.2 Newbold Lawn, and the Tribunal extended time for the receipt of objection from Mr Martin Ashworth, the leaseholder of No.16 Newbold Lawn. Mr Ashworth failed to submit any representations and the Tribunal proceeded to consider the merits of the application with the benefit of Mr Ross-Martin's written submissions by way of sole response.

### Relevant Law

4. The relevant law is contained in Sections 19 and 27A of the 1985 Act:

***19.— Limitation of service charges: reasonableness.***

(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 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.
(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.

***27A Liability to pay service charges: jurisdiction***

[...] (3) An application may also be made to the appropriate 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.

5. Once the Tribunal has determined that a liability arises on the part of the tenant under the service charge provisions of the lease, it has been correctly stated by the Applicant in the application that the function of the Tribunal is one of review, citing a passage from Shersby v Greenhurst Park Management Ltd [2009] UKUT 214 (LC) per HHJ Huskinson:

> "[the] Tribunal's only function is to conclude whether the Respondent reached a lawful decision on the point, being a decision which was within the range of reasonable decisions (as opposed to being a perverse decision) and whether the Respondent took into consideration relevant matters and did not take into consideration irrelevant matters. The question is whether this was a *bona fide* decision being one within a range of reasonable decisions and being reached taking into account relent and ignoring irrelevant matters".

As expressed by HHJ Huskinson, there can plainly be cases where there is more than one reasonable decision. Since in most decisions a number of factors will be relevant, cost of itself may not be determinative, although it will almost always be relevant and must itself be reasonable in amount.

## Submissions of the Applicant

6. A detailed statement of case was submitted with the application setting out the law in uncontroversial terms and particular content of the leases.

7. Each lease is for a term of 999 years from 25th March 1961. Each one shares provision for the payment of service charges, under Clause 4:
"The Tenant hereby covenants with the Landlord and with the Tenants of the other flats comprised in the Building that the Tenant will at all times hereafter: - ... (ii) Contribute and pay ... an equal sixteenth part of the costs expenses outgoings and matters mentioned in the Fourth schedule hereto ...
THE FOURTH SCHEDULE ABOVE REFERRED TO
1. The expenses of maintaining repairing redecorating and renewing (a) the main structure and in particular the roof ventilating ducts and roof lights

gutters and rainwater pipes of the Building (b) the gas and water pipes drains and electric cables and wires in under or upon the Building and any other part of "Newbold Lawn" and enjoyed and used by the Tenant in common with the Tenants of the other flats in the Building (c) the main entrance passages staircases and lobbies to and in the Building so enjoyed and used by the Tenant in common as aforesaid and (d) the driveway forecourt entrance gates boundary fences and outbuildings (other than garages included in the demises of any flats in the Building) on or of "Newbold Lawn" ...
4. The cost of decorating and repainting the exterior of the Building"

8. The "Building" is defined as "comprising a building containing Sixteen flats known or to be known as "Newbold Lawn".

9. The Applicant states that there were 16 balconies of a cantilever type, one for each flat. These are stated to be in disrepair so that, when it rains, there is ingress of water into flats causing progressive damage.

10. A report from Mr Ralph Burnham, Consultant Structural Engineer, dated 24th February 2014 is relied upon. He noted that the flats were built in about 1970. He identified that the top surface of each of the 12 balconies he inspected was protected merely by paint, and the surfaces were cracking. Steel levers which retain the edges of the balconies were subject to flaking and rust. He identified 3 specific faults: low tapered finish to the concrete to throw water off; no flashing between the pebble-finish and the top of the slab; and the front edge of the concrete floor was inset from the front of the brickwork, thus creating a ledge on which water can gather. He proposed the stripping of all finishes to expose the full extent of the cracks and rusting, removal of all rust and application of new finishes, the sealing of cracks and application of surface finishes and reinstatement of soffits with cementitious finish over the exposed steel.

11. The report had been commissioned because of concern at the ingress of water and the matter was considered at various meetings involving the Applicant and lessees, including at the Applicant's AGM on 7th July 2014, before the current application was made.

12. A supplementary statement of case for the Applicant was filed under letter dated 7th April 2015, at the direction of the Tribunal and detailing the status of the Applicant. It may be observed that this appears uncontentious. Similarly it is contended that the works required are also undisputed, but that the issue with Dr Ross-Martin is one of construction of the lease: is the work required the responsibility of the individual lessee or of the lessor (the latter's expenditure being recoverable as service charge)?

## Submissions of the Respondent

13. Dr Ross-Martin filed submissions under letter of 8th April 2015, received by the Tribunal the next day. He challenges the case set out by the Applicant starting with the proposition that there are 16 balconies in need of repair: there are 12, because the ground floor flats have "patios" of similar dimensions to the balconies. Adopting his terminology, the patios are not in need of any

repair: "since any lack of water proofing of the top surface is of no consequence to the building since there is nothing but the ground underneath [t]hem."

14. Dr Ross-Martin then turns to the terms of the leases:

15. Clause 1 defines "the Flat" (using a first floor property lease) as "including one half part in depth of the joists between the floor of the Flat and the ceilings of the flat below it and one half part of the depths of the joist so the ceilings of the Flat and the floors of the flat above it and the internal and external walls between such levels ..."

16. From this, Dr Ross-Martin contends that, as the first floor and above flats have responsibility for half their floors, so too their balconies. It is the top surface of each that requires repair and this responsibility reposes with the lessees of the individual flats. He reinforces his contention by reference to Clause 4(i), by which the lessees covenant to "keep the flat ... and all party walls ... in good and tenantable repair and condition ... so as to support shelter and protect the parts of the building other than the flat", hence to prevent water ingress from the balcony into a flat below.

17. Developing his theme, Dr Ross-Martin then observes that under Clause 5(d) the landlord is to "maintain and repair redecorate and renew (a) the main structure ... of the Building (b) the gas and water pipes drains and electric cables and wires in under and upon the Building and enjoyed or used by the Tenant in common with the tenants of the other flats in the Building", in respect of which he observes that balconies are accessible only from individual flats and are not held in common. Clause 5(g) allows the landlord to enforce the covenants of the tenant (if so required), and he suggests this should be done to resolve the current problems. There is no need to treat the balconies as part of the common structure.

18. Finally, and in any event, Dr Ross-Martin objects to an equal division of cost between the lessees. Paragraph 7 of the Fourth Schedule allows the maintenance committee to determine the manner in which costs are divided, and that a fair and reasonable provision would be to divide the cost between the twelve flats with cantilever balconies.

19. This latter point can be disposed of shortly in that it appears to the Tribunal to be a clear misreading of the lease, as paragraph 7 allows the landlord or, when constituted, the management committee to determine what shall be added to service charges for "administration expenses" (in default set at 6.25%) and does not allow the proportion of service charges to be varied from flat to flat (defined at 1/16th in clause 4(ii)).

## The Applicant's Reply

20. The Applicant disputes Dr Ross-Martin's interpretation of the lease, suggesting that Clause 1 makes no reference to the balcony within the demise, but each remains part of the main structure of the Building. Hence, it is argued, it comes within the landlord's covenant to repair under clause 5(d)(a)

(which is differentiated from 5(b) which deals with services used by the tenants in common).

21. There was also a short witness statement submitted by Mrs Josie Lloyd. She describes the patios as "solid raft", but maintains that these and balconies "have capacity to compromise Newbold Lawn by means of allowing water ingress at ALL levels or other forms of degradation, such as crumbing surface." She maintains that the appearance of the balconies contributed to the appearance of the building as a whole, and that there is no history of objection to the maintenance of their appearance, rather than their structure.

## Inspections

22. No party sought an oral hearing and the Tribunal inspected on 5th May 2015. The inspection comprised the external appearance of the Building, the access and entrance lobby to its rear and Flat 11. Visual examination substantiated the content of the report of Mr Burnham concerning the degrading of surfaces, cracking and crumbling suffered by the balconies and the ingress of water, including penetration through the surface to the flat below. The balconies were cantilever, as described, and fully integrated structurally with the building.

## Decision

23. The Tribunal has carefully considered the rival submissions in this case. There is no dispute as to the need for the works, and the Tribunal finds that the works are entirely justified on the basis of the expert report corroborated by its own inspection. Similarly, costings thus far obtained have not been challenged in the materials before this Tribunal, although these will be the subject of notice and there is no dispensation sought, so there reasonableness *per se* are not in issue before us. The issues are accordingly matters of construction of the leases: by whom is the repair cost payable under the lease (the landlord, to be recouped from the lessees collectively, or individual lessees?) and, if the landlord, are the lessees to contribute equally between them. The latter point has already been addressed and it is plain from the lease that contribution to landlord expenditure is 1/16$^{th}$ per flat.

24. The Tribunal has come to the clear conclusion, on the basis of the construction or interpretation of the leases in their factual context (rather than witness evidence), that the landlord should carry out the repair under the leases and recover that 1/16th from each of the leaseholders. The arguments to the contrary set out by Dr Ross-Martin are rejected.

25. The Tribunal finds that the balconies are, and have been since the Building was completed and the leases granted, an integral part of the main structure. They could not be removed from it and form an external structural feature as much as the walls and roof. Each also affords some shelter to the flat beneath. It follows that the repair, redecorating or renewal of the balconies properly fall within paragraph 1(a) of the Fourth Schedule to the leases. The situation differs from the division of floors and ceilings in Clause 1, and it is notable that balconies and patios are not mentioned in this clause, nor is the reference to

"joists" apt. Clause 5(d) also differentiates the main structure at (a), from areas used and enjoyed by the tenants in common at (b). Plainly there will be parts of the main structure that benefit some tenants more than others, or even one tenant predominantly, but are properly part of the main structure none-the-less, and the lease anticipates this. The repair responsibility of each tenant for his or her own flat under Clause 4(i) is not engaged on such structural matters. Furthermore, although not strictly necessary for the Tribunal's reasoning, the Tribunal finds that there is a general common benefit to the maintenance of the structural integrity of the Building to all leaseholders, and so there is nothing iniquitous about an equal division of the costs of repairing the main structure between them. It follows that each of the questions raised of the Tribunal can and should be answered in the affirmative.

## Appeal

26. If any party is dissatisfied with this decision, application may be made for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be made within 28 days of this decision (Rule 52 (2)) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Judge Dr Anthony Verduyn

Dated 23rd June 2015