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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**BIR/00CR/LIS/2015/0053**
Properties	:	**Flats 2, 5, 7, 8 and 9, Bell Court, Bell Street South, Brierley Hill, West Midlands DY5 3EX**
Applicant	:	**Vantage Property Investments Limited**
Representative	:	**Mr M Wilkinson, counsel, instructed by Quality Solicitors Talbots, Solicitors**
Respondents	:	**Sheela Rani Mehmi (1)** **Ram Kishan Mehmi (2)**
Representative	:	**Mr N Clegg, counsel, instructed by Aspect Law, Solicitors**
Type of Application	:	**Transfer of proceedings from Dudley County Court concerning liability to pay and reasonableness of service charges under sections 27A and 19 of the Landlord and Tenant Act 1985**
Tribunal Member	:	**Judge C Goodall LLB** **Mr N Wint FRICS**
Date and venue of Hearing	:	**27 November 2015 at the First-tier Tribunal (Property Chamber) Hearing Centre, Centre City Tower, Birmingham**
Date of Decision	:	**10 February 2016**

DECISION

Background

1. The Applicant is the freeholder of land which is situate on the corner of Bell Street South and High Street in Brierley Hill, Birmingham. A building has been constructed on the land which comprises 17 residential flats and a number of ground floor commercial units ("the Complex"). Part of the Complex is known as Bell Court. The Respondents own flats in Bell Court.

2. The Applicant commenced proceedings against the Respondents in Dudley County Court in July 2013 (claim number 3YM60351) ("the County Court Proceedings") seeking recovery of service charges for the properties listed above ("the Flats") for the service charge year 27 May 2012 to 26 May 2013 in the sum of £3,878.35 plus interest and costs.

3. The First Respondent is the lessee of Flat 2, and the Second Respondent is the lessee of Flats 5, 7, 8, and 9 under long leases, the key terms of which appear below ("the Leases").

4. In the County Court proceedings, the Respondents have counter-claimed, alleging failure by the Applicant to comply with the lessors repairing covenants in the Leases. In connection with that counter-claim, an experts report ("the Report") was obtained jointly by the parties from Malone Associates Ltd. The Report is dated 22 January 2015.

5. By an order dated 8 September 2015 in the County Court Proceedings, District Judge Loyns referred the case to the First-tier Tribunal (i.e. this tribunal) "to determine the issues identified in the letter from Quality Solicitors Talbots dated 12 August 2015".

6. The letter of 12 August 2015 identified the issues in these paragraphs:

> "When the matter came before the Court for a Final Hearing on 26 November 2014, the District Judge commented on the expert's Report where it referred to the "cold slab effect" and the District Judge raised concerns about this statement and further ordered that the parties were to consider whether any issues should be dealt with before the First-tier Tribunal as being a more appropriate forum.
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> Having received a joint expert's Report from Mr Malone, ... it is clear that there are substantial works that need to be carried out at the property and the question arises as to which works fall to be paid by the Lessees under the service charge and which payments fall to be paid for by the Landlords (Claimants).
>
> Until this issue has been determined, we would suggest that the Court cannot produce any Order in respect of the Claimant's claim and the Defendant's counter-claim as to the amount, if any, payable by the Defendant to the Claimant in respect of its claim and/or the amount

payable by the Claimants to the Defendants in respect of their counter-claim.

...

We ... would ask that the matter be transferred by Court Order to enable the First-tier Tribunal to consider what elements of the repairs fall to be paid under the service charge provisions within the Lease."

7. The Tribunal therefore identifies its task in this application as determining which elements of the identified wants of repair set out in the Report fall to be paid for by the Respondents under their service charge payment obligations, and which (if any) fall to be paid for by the Applicant, as freeholder, without contribution from the Respondents.

The Law

8. The Tribunal has jurisdiction to determine this issue under the provisions of sections 18 to 30 of the Landlord & Tenant Act 1985 ("the Act").

9. Under Section 27A of the Act, the Tribunal has jurisdiction to decide whether a service charge is or would be payable and if it is or would be, the Tribunal may also decide:-
   a. The person by whom it is or would be payable
   b. The person to whom it is or would be payable
   c. The amount, which is or would be payable
   d. The date at or by which it is or would be payable; and
   e. The manner in which it is or would be payable

10. Section 19(1) of the Act provides that:

"Relevant costs shall be taken into account in determining the amount of the 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 and the carrying out of works, only if the services or works are of a reasonable standard:

and the amount payable shall be limited accordingly."

11. A service charge is only payable if the terms of the lease permit the lessor to charge for the specific service. The general rule is that service charge clauses in a lease are to be construed restrictively, and only those items clearly included in the Lease can be recovered as a charge (*Gilje v Charlgrove Securities [2002] 1EGLR41*).

12. The construction of the lease is a matter of law, whilst the reasonableness of the service charge is a matter of fact. On the question of burden of proof, there is no presumption either way in deciding the reasonableness of a service charge. Essentially the Tribunal will decide reasonableness on

the evidence presented to it (*Yorkbrook Investments Ltd v Batten [1985] 2EGLR100*).

13. This is a case to which section 27A of the Act applies. As part of the determination of payability, the Tribunal can consider whether the Leases require the Respondents to contribute towards the rectification of the repairs identified in the Report as being required, and if so whether it would be reasonable to incur costs in carrying out the repairs, under section 19 of the Act. The determination in this case, though, does not concern the actual amounts in financial terms that would reasonable.

Inspection and hearing

14. The Tribunal considered the application at a hearing in Birmingham on 27 November 2015.

15. Prior to the hearing, the Tribunal inspected the buildings constructed on the Applicant's land. Externally, the buildings are flat roofed, and of four storey construction at the western end and three storeys at the eastern end. The five flats the subject of this application are all at the western end and accessed from a yard area at the rear of the buildings. There are ground floor commercial retail premises along the frontage of the Complex to High Street. The whole site slopes downwards from north to south so that the retail units are set in to the slope. Bell Court consists of three floors which are constructed on top of the ground floor retail units at the western end of the Complex. There are a total of nine residential flats in Bell Court.

16. The whole Complex is in a poor state of repair, with soffits and fascia's requiring replacement or repair, and large areas of the rendering with which the Complex is faced being clearly "blown" and concrete sills requiring repair or replacement. The doors and windows of some of the flats were damaged and broken.

17. The Tribunal inspected flats 7 and 9 internally. They consist of one main room with a bedroom, small kitchen, and bathroom off. Each flat showed evidence of considerable areas of damp and neither was in good decorative order.

18. The hearing took place at the Tribunal Hearing Centre in Birmingham. Mr K Singh and Mrs B Kaur-Singh, who are both directors of the Applicant, were present. The Applicant was represented by Mr M Wilkinson of counsel. The Respondents were present and were represented by Mr N Clegg of counsel.

19. At the hearing, Mr Clegg applied for an adjournment as he said the case was not ready to try. He argued that:

    a. The county court pleadings do not address the works identified in the Report and the clauses in the Leases that are engaged;

b. The issue before the Tribunal is not one which is addressed by the relief sought in the Particulars of Claim;

c. The works that are necessary have not been adequately particularised;

d. It is unclear what dispute is resolved by the issue being tried before the Tribunal.

20. The Tribunal decided not to adjourn. Whilst having some sympathy with Mr Clegg's points, particularly in relation to understanding how the question the Tribunal had been asked to determine would resolve the dispute in the county court, the Tribunal took the view that the question it had been asked by the court to determine was clear, and capable of being determined at the hearing. It would not be in the interests of any party or the Tribunal to delay, and incur further cost and expense. All parties were present and knew the issues they needed to deal with in the Tribunal proceedings.

The Leases

21. The lessee of flat 2 is Sheela Rani Mehmi, the First Respondent in these proceedings. The other four flats the subject of these proceedings are leased to Ram Kishan Mehmi, the Second Respondent.

22. All of the Properties were originally leased (in fact by way of underlease) in the 1980's ("the Old Leases"). New leases were granted on 3 June 2009 of flats 5, 7, 8, and 9, and on 8 June 2009 of flat 2, all five new leases ("the New Leases") expiring on 26 May 2133. The New Leases were granted by reference to the terms of the Old Leases with some variations. The following provisions are relevant:

A. A covenant by the landlord at clause 6(1) of the Old Leases:

"(1) Subject to the payment by the Lessee of the rents and the service charge and provided that the Lessee has substantially complied with all the covenants agreements and obligations on his part to be performed and observed to maintain repair re-decorate renew amend repoint paint grain varnish whiten or colour:-

(a) the structure of the Building without prejudice to the generality thereof the roofs external stone and brickwork walls and internal walls of the Building and gutters rainwater and soil pipes thereof (but not the interior faces of such parts of external of internal walls and internal staircase(s) as bound the Flat or the Rooms therein) and timbers (including the timber joists and beams of the floors and ceiling thereof) and the gutters and rainwater and soil pipes thereof

(b) the sewers drains channels watercourses gas and water pipes electric cables and wires and supply lines in under and upon the Building party structures and party fences

(c) the passages landings and staircases and parts of the building enjoyed or used by the Lessee in common with others ..."

B. A covenant given by the lessees, arising by virtue of clause 2(b) and paragraph 3 of the Schedule to the New Leases,:

"To pay a service charge (hereinafter called the Service Charge) being the Lessee's fair proportion of the service costs incurred in connection with the lessor's expenses and outgoings as set out in the Fourth Schedule in advance on the 27th May each year and within 21 days of receiving the copy audited accounts the Lessee shall pay any balance due and in addition the Lessee will pay interest at 8% above Barclays Bank Limited base rate on the above payments when more than 14 days overdue and also pay within 14 days of demand any demand for a one off item of expenditure which does not form part of the normal service charge."

C. The terms of the Fourth Schedule of the Old Leases which sets out the expenses and outgoings in respect of which the lessees are to pay a proportionate part by way of service charge:

"1. The expenses of maintaining repairing redecorating and renewing amending cleaning repointing painting graining varnishing whitening or colouring the Building and all parts thereof and all the appurtenances apparatus and other things thereto belonging and more particularly described in Clause 6(1) hereof.

...

4. The cost of cleaning and repairing and renewing (as necessary) the passageway hallway driveway and other parts of the Building enjoyed or used by the lessee in common...

...

10. All other expenses (if any) incurred by the Lessor in and about the maintenance and proper and convenient management and running of the Building (including in particular but without prejudice to the generality of the foregoing any expenses incurred in rectifying or making good any inherent structural defect in the Building) ...

11. Any expenses costs and fees incurred by the Lessor under or in relation to the obligations imposed by the Housing Act 1980 (or any enactment modifying or replacing the same) ...

...

13. The cost of taking any steps deemed desirable or expedient by the Lessor for complying with ... the provisions of any legislation or order statutory requirements thereunder concerning ... public health highways street or other matter relating or alleged to relate to the Building for which the Lessee is not directly liable hereunder."

23. The definition of the Building is set out in clause 1 of the Old Leases, which is incorporated by reference into the New Leases. It is:

> "the Building now known as Bell Court Bell Street Brierley Hill in the County of West Midlands (which Building consists only of the First Second and Third Floors thereof) (hereinafter called "the Building")".

24. The effect of this definition is that the "Building" referred to in the Leases is the first second and third floors (but not the ground floor) of the western part of the Complex.

Discussion and determination

25. The issue is which elements of the identified wants of repair set out in the Report fall to be paid for by the Respondents under their service charge payment obligations, and which (if any) fall to be paid for by the Applicant, as freeholder, without contribution from the Respondents.

26. The Report is some 24 pages long. The items requiring repair were summarised by Mr Wilkinson in his skeleton argument as comprising ten items. The parties' representatives and the Tribunal accepted this summary as a basis from which to work in this determination, and thus the Tribunal will consider each of the items individually and determine who is responsible for paying the costs of remedial work to rectify these items. Nine items were agreed at the hearing.

27. The agreed items are:

a. <u>External concrete and render</u>

i. The Report refers to the "extremely poor condition" of the external concrete and render, allowing rainwater ingress (and creating a risk to passers-by). In several areas the concrete and render is cracked, spalled or is missing and sections of concrete are also suffering from carbonation. The concrete needs to be repaired as necessary, and anti-carbonation coatings need to be applied. The render needs to be hacked off and renewed as necessary.

ii. The parties agreed that the external concrete and render falls within the scope of paragraph 6(1) of the Leases so that it falls to the Applicant to repair (subject to compliance with

the pre-conditions in that clause) and for the Respondents to pay as part of their service charge.

b. Ventilation and central heating

i. The Report identifies that works are needed to provide adequate mechanical ventilation and fully-controllable central heating systems within the flats, to tackle condensation issues.

ii. It was agreed that these works are the Respondents' responsibility, not the Applicants. The ventilation and heating systems are part of the demise to the Respondents, not part of the Building for which the Applicants are responsible.

c. Associated work as a result of work to ventilation and heating

i. It is pointed out in the Report that there will be associated work to remove damp damaged internal plaster, non-functioning or inadequate ventilators and heaters, and subsequent redecoration.

ii. It was agreed that any associated work would be the responsibility of the Respondents, not the Applicant.

d. Fungicidal sprays

i. The Report said there will be the need to provide fungicidal sprays as necessary to kill mould spores.

ii. It was agreed that this would not be the responsibility of the Applicant.

e. Anti-blast cowls

i. The report recommended that anti-blast cowls should be fitted to the external walls of the flats to prevent water ingress, in place of the existing wall vents. This is a particular issue affecting flat 9.

ii. It was accepted and agreed that the existing vents are not in need of repair renewal or maintenance and this work was a recommendation not an obligation. If the Applicant decided to fit anti-blast cowls as part of its maintenance of the Building, or if legislation required that they be fitted, the cost would be recoverable under paragraphs 10 or 13 of the Fourth Schedule of the Old Leases.

f. Flat 2 door frame

i. The PVCu door frame of Flat 2 needs to be renewed and sealed, as it allows water ingress. The door appears to have been forced causing the damage.

ii. It was agreed that the door and frame are not part of the Building and so are not the responsibility of the Applicant.

g. Flat 7 door frame

i. The PVCu door/frame to Flat 7 has been smashed allowing water ingress, and needs renewal.

ii. Similarly to (f) above, it was agreed that the door frame is not part of the Building and so not the responsibility of the Applicant.

h. Leaking overflow pipes

i. There are leaking overflow pipes on the rear of the block that need to be repaired.

ii. It is not clear in the Report whether the leaking pipes are rainwater pipes or internal pipes within the Flats. It was agreed that if they are rainwater pipes, they fall within the Applicant's covenant to repair in paragraph 6(1) of the Leases subject to recovery under the service charge. If they are overflow pipes emanating from within the Flats, they are the responsibility of the individual Flat owners to repair.

i. External utility cupboards

i. There are some missing or damaged external utility cupboards, which are a potential source of water ingress, which should be repaired or replaced.

ii. It was agreed that these were the responsibility of the Respondents as lessees, not the Applicant under its repairing covenant.

28. One item was not agreed. This was summarised in Mr Wilkinson's skeleton argument as follows:

"Works are needed to provide adequate insulation to the external walls and roof (to prevent cold bridging). The recommendation is for External Wall Insulation (EWI). The alternative suggestion is internal wall insulation using insulated plasterboard inside the flats and

common parts. The "undercroft" requires over-boarding with a special insulated plasterboard."

29. The Report explained the need for insulation in the following two passages:

> "6.11 ... It is clear that the primary problem with these flats is the poor levels of thermal insulation and direct cold bridging from the concrete frame and infill cladding panels. This is further compounded by extremely poor heating and lack of functional or efficient mechanical ventilation ..."
>
> and
>
> "7.1 ... Given the problems with cold surface condensation caused by poor insulation it is fair to say that the building is technically obsolescent in that it falls well short of current standards of thermal comfort. Given the works required to the external envelope it may be prudent to consider the installation of External Wall Insulation (EWI) to improve the thermal value of the building envelope. This would resolve the problem of cold surface condensation to the walls, whilst the roof or top floor ceilings could also be insulated to resolve the issue of cold bridging through the concrete roof deck.
>
> 7.11 If EWI is not installed then the individual flats should be treated to internal wall insulation (IWI). This will involve lining all internal perimeter walls and ceilings with a layer of insulated plasterboard."

30. Mr Wilkinson argued that work to insulate the Building is not the responsibility of the Applicant as the structure itself is not in need of maintenance, repair or renewal. It is simply a matter of poor design that solid concrete and render has been used which have poor thermal insulation properties. He says that if he is wrong on this point, insulation work would be a cost falling within the Applicants responsibility to repair as defined in paragraph 1 of the Fourth Schedule and clause 6(1)(a) of the Leases, the cost of which would be recoverable under the service charge from the Respondents. He said paragraphs 10 and 13 of the Fourth Schedule were also potentially applicable to establish that the Respondents would have to pay through the service charge for any works which the Applicant was either obliged, or elected to do, to insulate the Building.

31. Mr Clegg did not accept that there was no obligation upon the Applicant to insulate the Building. Even if the need for insulation arose from an inherent defect, he said that in certain circumstances a landlord can be obliged to cure an inherent defect, citing as examples *Quick v Taff-Ely Borough Council ([1986] Q.B. 809)* and *Post Office v Aquarius Properties ([1985] 2 E.G.L.R. 105)*. Mr Clegg had not prepared a skeleton argument on this point, nor had he come to the hearing with copies of authorities, and without going into the detailed reasons, suffice it to say that the

Tribunal makes no criticism of him for this. Accordingly, at the end of the hearing the Tribunal directed that the Respondent should provide a written submission summarising its position on the inherent defect point, with a right for the Applicant to comment on the submission thereafter.

32. The submission received (which it does not appear was prepared by Mr Clegg) simply asserted that the Applicant is responsible for carrying out any work that is deemed necessary to insulate the building both externally and internally, and claimed that the responsibility derives from Clause 6(1) and 10 of the Leases. There is no further content in the submission explaining its assertion, providing any analysis of the nature of the defect, or making reference to any of the cases mentioned by Mr Clegg. There is an acceptance that the Respondents would be liable to pay a proportionate part of the costs of any work carried out to insulate the Building if insulation was provided. No response to this submission has been received from the Applicant.

33. On the question of whether the Applicant is obliged to insulate the Building (rather than permitted) the Tribunal accepts the absence of insulation is an inherent defect. The normal approach is that an inherent defect which does not cause damage to the property is not within the scope of a repairing covenant. If it does cause damage to the property, it is a question of fact and degree whether the rectification of the inherent defect itself is within the scope of the repairing covenant (see for example Woodfall para 13.031).

34. The Respondents have not adduced evidence that property damage has been caused by lack of insulation. The Report does not make that causal link. There is no question that the flats are suffering from damp and mould, but it is questionable whether that is property damage, as the physical manifestations of the damp and mould do not necessarily damage the property itself. The question of whether the absence of insulation has caused property damage is complicated by the fact that the external cladding to the Building is in poor condition. It is more likely, in the view of the Tribunal, that any damage which may have been caused will have been caused by the condition of the existing cladding rather than the absence of insulation.

35. The Respondents have also not provided the Tribunal with any rationale explaining the legal basis for challenging the Applicant's case as argued by Mr Wilkinson on this point.

36. The Tribunal therefore determines that the Applicant is not under an obligation to provide external wall insulation to the Building. If it chooses to do so (and the Respondents accept that it may under the provisions of paragraph 10 of the Fourth Schedule) the Respondents will be liable to contribute towards the cost of so doing via the service charge.

37. One final question relating to insulation requires consideration. In his skeleton argument, Mr Wilkinson argued that the Applicant might elect to fit EWI under the provisions of paragraph 13 of the Fourth Schedule, citing a passage in the Report where Mr Malone had stated that the chronic damp and black mould made the Flats unfit for habitation, and in breach of the requirements of the Housing Act 2004. Mr Malone stated in the Report that he had no doubt that a local authority environmental health office would consider the condition of the Flats a Category 1 hazard and would be likely to serve a Prohibition Order as a result. Mr Clegg did not concede this point and the Tribunal requested a further written submission (also giving the Respondent the right to reply). A further submission was received, drafted by Mr Wilkinson, in which he argued that the professional advice received from Mr Malone about what the local authority would do under the Housing Act 2004 was sufficient for it to be "desirable or expedient" to take the steps recommended by Mr Malone to eliminate the damp problem under paragraph 13.

38. It is not necessary for the Tribunal to make a definitive ruling on this point as the Respondents have already accepted that the steps to eliminate the problem (where they are actually taken by the Applicant) would be recoverable from them under the service charge provisions in the Leases because they fall within either clause 6(1) of paragraph 10 of the Fourth Schedule.

39. Paragraph 13 brings any costs of complying with legislation relating to the Building for which the Respondents are not directly liable within the scope of the service charge. The Housing Act 2004 does not set out obligations that apply to landlords; it provides local authorities with an enforcement mechanism if there is a hazard at a property. Without firstly an assessment (under section 4) and then a decision about what action to take (under section 5), there would be nothing for the Applicant to "comply" with.

40. In any event, costs incurred in complying with the Housing Act 2004 would only be recoverable if the local authority had pursued the Applicant rather than the Respondents. It is more likely, in the view of the Tribunal, that any Prohibition Order would be issued to the Respondents than the Applicant, making them directly liable, and therefore making any remedial work carried out by the Applicant outside the scope of paragraph 13. These uncertainties mean that the Tribunal is not able to determine at this stage that Mr Malone's comments would be sufficient to bring the costs of insulation within the scope of paragraph 13 of the Fourth Schedule to the Leases.

Appeal

41. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of

any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)