11597

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	: CHI/21UC/LSC/2016/0074
Property	: 1-6 Westhill Court, 20 Rattan Road, Eastbourne BN21 2LS & 7-20 St Helena Court, 7 Mill Road, Eastbourne BN21 2LY
Applicant	: Charles Bramly (tribunal appointed manager)
Representative	: KDL Law
Respondent	: The leaseholders
Type of Application	: Payability of service charges under s.27A Landlord and Tenant Act 1985
Tribunal Members	: Judge A Johns QC (Chairman) Mr R Wilkey FRICS (Surveyor Member)
Date of inspection	: 20 October 2016
Date of Decision	: 28 October 2016

PAPER DETERMINATION

Introduction

1. This is an application dated 5 July 2016 to determine the payability of service charges. The key question it raises is this: Do the leases place the responsibility for repair and redecoration of the balconies to the flats on the landlord or the individual leaseholders.

2. The leases are of a total of 20 flats in 2 blocks known as 1-6 Westhill Court and 7-20 St Helena Court on a site formerly known as 7 Mill Road, Eastbourne ("the Property"). The application is made by Charles Bramly, a manager appointed by the Tribunal by way of an order of 21 June 2013 varying an earlier management order. Mr Bramly is charged with managing the Property in accordance with the obligations of the landlord under the leases of the flats including as to repair and decoration.

3. A significant programme of exterior works is underway and Mr Bramly seeks a determination that the costs of those works are recoverable as service charge. The costs are in the sum of £87,886.52 plus fees and VAT for external repairs and redecoration excluding works to the balconies. The tendered cost of the balcony works is a further sum of £16,005.23 plus fees and VAT.

Procedure

4. Directions were given on 9 August 2016. Those provided for a determination on the papers without a hearing in the absence of an objection to that course. There was no such objection. Any leaseholders opposing the application were directed to make a statement in response by 1 September 2016. There was one such statement, being from the leaseholders of 16 St Helena Court. It opposed any contribution to the costs of works to garages at the Property, and to the balconies and windows of the flats on the basis that these parts of the Property are not used in common.

Inspection

5. The Tribunal inspected the Property on the morning of 20 October 2016 in the company of Mr Bramly as well as Mr. Bargioni of Stiles Harold Williams, managing agents. None of the leaseholders attended.

6. The development, comprising two adjacent blocks of flats known as Westhill Court and St. Helena Court as well as 20 lock up garages, was probably constructed between 1965 and 1970. The blocks of flats are of traditional brick and tile construction. Many of the original windows have been replaced with uPVC double glazed casements. The garages are of brick construction with flat mineral felt roofs.

7. At the time of the inspection, full height scaffolding and protective screening was in place on part of the outside of Westhill Court. This restricted inspection from ground level. But it could be seen that many of the flats, including those on the upper floors of Westhill Court, had projecting concrete balconies with iron railings. No internal inspection was made of either block as no work is currently proposed to the interior. All present walked the outside of both blocks and attention was drawn in particular to the condition of certain balcony railings which were rusting badly.

Jurisdiction and law

8. By s.27A of the Landlord and Tenant Act 1985 (as amended by the Transfer of Tribunal Functions Order 2013) the Tribunal may determine whether service charge is payable and in what amount. It may also under that provision determine whether, if costs were incurred for items such as works or insurance, a service charge would be payable.

Leases and factual background

9. It is plain from the schedule of notices of leases on the registered title to the Property that the leases of the flats were all granted at around the same time, namely in the period 1969 – 1971, and are all for a 999 year term from 29 September 1968.

10. Subject to three points referred to below, each lease of a flat is in the same form. One of the sample leases in the papers submitted to the Tribunal is of Flat 1, Westhill Court.

11. Clause 1 of the lease contains the demise: "*... firstly all that the second floor flat (hereinafter called "the flat") situate and being at and known as Flat Number 1 Westhill Court ... forming part of the building (hereinafter called "the Building") formerly known as 7 Mill Road Eastbourne aforesaid which second floor flat is for the purpose of identification only delineated and edged pink on the plan annexed hereto and secondly all that garage numbered 1 and coloured green on the plan annexed hereto...*".

12. The plan attached to the lease does not show the balconies on Westhill Court at all. It follows that the line delineating the flat does not indicate a balcony.

13. The lessee's repairing and decorating obligations are in clauses 2(3) and 2(9); the leaseholder covenanting as follows:
"*2(3) Will from time to time and at all times during the said term well and substantially repair cleanse maintain amend support uphold and keep such parts of the said flat and all new buildings which may at any time during the said term be erected on and all additions made to the said flat and the fixtures therein and the walls drains appurtenances thereof as are exclusively used or enjoyed by the owner or occupier for the time being of the flat with all necessary reparations cleansing and amendments whatsoever*
2(9) In the year One thousand Nine hundred and Seventy-six and thereafter once in every seven years of the said term and also during the last year thereof to paint grain varnish and colour all the inside wood and ironwork usually painted grained varnished or coloured of the said flat and of any additions thereto with three coats of good oil and whitelead paint or other suitable materials approved by the Lessors Surveyor in a proper and workmanlike manner".

14. It will be seen that these obligations are stated to relate to "the flat". There is no mention of the garage in these obligations.

15. The lessor's repairing and decorating obligations are in clause 3(a) and are to:
"*Keep in good repair and condition the roof and outside walls and entrance doors and other outside parts of the said Building the foundations and main timbers and*

all the main drains and gas and water pipes electric cables and wires and sanitary and water apparatus thereof (except as regards damage caused by or resulting from any act or default or negligence wilful or otherwise of the Lessee his servants agents or licensees to any pipes or sanitary or water apparatus within the flat) and the entrance hall staircases passages and landings together with furnishing thereof and to paint grain varnish and colour all the outside wood and iron and stucco or cement work and parts usually painted grained varnished and coloured of the Building and when necessary".

16. The reservation of rent in the lease includes service charge of one-twentieth part of the total cost to the lessor of fulfilling its obligations in clause 3 and therefore obliges the leaseholder to pay such proportion of the landlord's costs of repairing and decorating in accordance with clause 3(a).

17. One other provision should be mentioned, being clause 5(1) which gives some help as to the extent of the flat: "*All walls (not being main walls) separating the flat from the adjoining parts of the Building shall be deemed to be party walls and to be maintained and repaired at the joint expense of the Lessor or the Lessee or the tenants occupiers or owners for the time being of the other part of the Building thereby separated as the case may be*".

18. Before turning to the works, we should identify the 3 qualifications to the point that all the leases of the flats are in the same form:

18.1 Not all of the leases demise a garage as well as the flat. There are some separate garage leases.

18.2 Not all of the leases have been found. For some of the flats, no copy lease is now available.

18.3 At least two of the leases have a purported alteration to the service charge provisions in clause 1 of the lease. But such is immaterial to the issues before the Tribunal. These leases nevertheless include the requirement to pay one-twentieth of the lessor's costs incurred under clause 3. That provision is the basis of recovery put forward by Mr Bramly in these proceedings.

19. It is unnecessary to list all the items of work carried out or to be carried out to the Property for the sums already mentioned. It is sufficient to observe that they all relate to the exterior of the blocks of flats. The works to the balconies have been separately costed as already noted and the statement in support of Mr Bramly's application indicates that those works are on hold pending the Tribunal's determination.

20. It had previously been the intention to carry out repair works to the garages at the Property but those have been excluded from the current programme of works to reduce the overall cost and will instead be carried out in the future.

The parties' cases

21. Mr Bramly's application states the question for the Tribunal as being whether the costs of the works required to the buildings are recoverable as service charge. In particular:

21.1 Are the proposed works to the exterior of the buildings matters required to be undertaken by Mr Bramly for the lessor rather than the leaseholders?

21.2 Are the proposed works to the balconies including the railings matters required to be undertaken by Mr Bramly for the lessor rather than the leaseholders?

21.3 Are the costs of the works for both the exterior of the buildings and the balconies recoverable from the leaseholders under the service charge provisions of the leases?

22. Mr Bramly says that those questions should be answered in the affirmative. His case is that on the true interpretation of the lease it is the landlord that is responsible under clause 3(a) for works to the exterior of the buildings and that such includes the balconies.

23. The grounds in support of Mr Bramly's application also ranged over some other points unrelated to the current programme of works including insurance, legal costs, and responsibility for some suggested internal components of the buildings. The Tribunal will turn to those points towards the end of this decision.

24. The one statement in opposition was from the leaseholders of flat 16. Their case is that works to the garages, balconies and windows should not form part of service charge. In support of that case they make the following points:
24.1 Some of the leases cannot be located so it cannot be known that such leases contained the same terms.
24.2 They do not, as leaseholders of flat 16, have use of a garage. They should not therefore contribute to the costs of maintaining the garages.
24.3 The balconies are not communal. Each balcony can only be used by the relevant flat's owner.
24.4 Likewise, the windows are not communal. And some leaseholders have replaced the windows to their flat at their own cost.

25. There is no suggestion that the proposed costs are unreasonable in amount.

Discussion and conclusion

26. Starting with the works to the exterior of the blocks of flats other than to the balconies, it is plain to the Tribunal that these works are the responsibility of the lessor and the cost recoverable as service charge.

27. Indeed, the leaseholders of flat 16 did not, save as to the windows, contend for a different conclusion.

28. They were right not to do so. The obligation for repair and decoration of the exterior is placed on the landlord by clause 3(a). That reflects the extent of "the flat" under the leases which, as the Tribunal reads clause 5(1), excludes the main walls.

29. It also seems to the Tribunal that this responsibility for the exterior must extend to the window frames. They are part of the exterior, are set in the main wall which is not part of the flat, and the limiting of the leaseholder's painting obligation to the inside points strongly to works to the exterior of the windows being within the landlord's obligation.

30. The question of the balconies is more difficult. There is no sign that the draftsman of the lease had the balconies in mind. But the Tribunal believes it is tolerably clear, and has reached the conclusion, that repair and decoration of the balconies including the railings is the responsibility of the landlord under the leases. It has arrived at that view for the following reasons.

31. First, the balconies fall squarely into the language of clause 3(a). They are an outside part of the Building.

32. Second and by contrast, the definition of the flat in the leases provides no clear indication that the balconies form part of the flat for the purposes of the repairing obligation in clause 2(3). They do not feature on the plan by reference to which the flat is delineated, albeit for identification purposes only.

33. Third, there are indicators that, on the contrary, the balconies are not within the leaseholder's repairing and decorating obligations. The exclusion of the main wall from the extent of the flat, being the effect of clause 5(1), and the decorating obligation in clause 2(9) referring only to inside wood and ironwork point to the leaseholder's responsibilities for repair and decoration not extending out onto the balconies.

34. If, as the Tribunal determines, the works to the balconies are the responsibility of the landlord under clause 3(a) it follows that the cost of such works are recoverable as service charge given the terms of the leases which require a one-twentieth contribution to the costs of the lessor complying with clause 3.

35. The above deals with all the works either carried out or already scheduled to be carried out.

36. While works of repair and decoration to the garages at the Property have been excluded from the current programme works, it appears that they will be carried out in the relatively near future. Given that, and that the question as to whether such works are the responsibility of the landlord and the costs recovered as service charge has been tackled by both Mr Bramly's statement of case and that from the leaseholders of flat 16, it is right for the Tribunal to give a decision on that question.

37. In the judgment of the Tribunal, the works required to the garages are the responsibility of the landlord under clause 3(a).

38. While, as the leaseholders of flat 16 point out, the garages are not used in common, the scope of the landlord's obligation in clause 3(a) is not limited to areas used in common. Rather, it extends to all outside parts of "the Building" where the Building as defined by the leases means the whole of the Property and so includes all the garages.

39. There is nothing in the leaseholder's obligations under the lease that points to the garages being excluded from the scope of clause 3(a). On the contrary, the leaseholder's obligation is confined by clause 2(3) to "the flat" even though the demise includes the garage as well as the flat.

40. It is noted that two garage leases, namely those of garages 8 and 18, place the responsibility for repair as between lessor and lessee on the lessee. But those cannot affect the interpretation of the leases of the flats under which service charge is recoverable, being dated a number of years later (in 1973 and 1983). Further, those garage leases which are contemporary with the flat leases, such as that of garage number 13 in the bundle, provide for the lessee to repair and paint only the interior of the garage and so are consistent with and provide some further support for the view the Tribunal has reached on this question.

41. We should make clear that our conclusions are unaffected by the fact that some copy leases are not available. It is plain from the schedule of notice of leases in the office copy entries for the Property that all the flat leases were granted at around the same time and for the same term. In the absence of any evidence to the contrary and given that the leases which are available are in like form, the Tribunal draws the inference that all the flat leases contain the same provisions so far as material to these proceedings.

42. As to the other matters touched on in the statement of case supporting the application, the Tribunal considers that, save on the topic of insurance, it is both unnecessary and undesirable to give some decision on those.

43. Those matters included the questions whether works to joists in the blocks of flats or to conduits exclusively serving one flat but not being within the flat would be the responsibility of the lessor. Those questions are entirely hypothetical. No such works are proposed, whether as part of the current programme or otherwise. Further, the questions may have no basis in fact. The blocks of flats are concrete-framed and so it is likely that there are no joists. Certainly none have been shown to exist. Nor have any conduits of the type described. The most that could be said of such conduits is that they may or may not exist. Finally, no leaseholders addressed these questions; understandably, as they do not arise on the works currently proposed and with which the leaseholders are therefore currently concerned.

44. The extra matters also included costs; Mr Bramly asking for the Tribunal's confirmation that the costs of these proceedings and any other proceedings reasonably required will be recoverable under the terms of the leases. But not only has no charge for costs yet been raised but this is not a service charge question at all; the covenant in the flat leases for payment of legal costs being outside the service charge provisions and being in these terms:
"*2(19) To pay all costs charges and expenses (including legal costs and fees payable to a surveyor) which may be incurred by the lessor*
(a) incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 notwithstanding forfeiture is avoided otherwise than by relief granted by the Court and/or
(b) in or in contemplation of any proceedings under Sections 146 and 147 of the Law of Property Act 1925 and/or

(c) in connection with any work done under any reference to the lessors surveyor under any clause of this lease".

45. The Tribunal does observe that there is no indication as to which part of this clause the costs of these proceedings are said to come under and, at least without argument, the Tribunal finds it hard to see that the costs would come within the covenant at all. There is no evidence that proceedings under s.146 are contemplated. And there has not been a reference to the landlords surveyor say, for example, to approve materials under clause 2(9).

46. Finally, the application seeks a decision that the costs of insurance for the blocks of flats and garages including garages 8 and 18 are recoverable as service charge under the flat leases; each flat paying a one-twentieth contribution. That is not opposed by any of the leaseholders and flows, in the judgment of the Tribunal, from the fact that clause 3 includes at 3(e) an obligation on the lessor to insure "the Building", being the whole of the Property as already noted.

Summary of decision

47. From the above, the Tribunal decides that:

47.1 The cost of the proposed works of repair and decoration to the exterior of the Property including works to the balconies and the garages will be recoverable as service charge when properly demanded.

47.2 The cost of insuring the whole of the Property including the garages will be recoverable as service charge when properly demanded.

Appeal

48. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

49. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

50. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit. The Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

51. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Judge A Johns QC (Chairman)

Dated 28 October 2016