12482

First-tier Tribunal
Property Chamber
(Residential Property)

Case Reference	:	CHI/29UG/LSC/2017/0058
Property	:	3 Glen View, Gravesend, DA12 1LP
Applicant Represented by	:	Together Property Management Adrian Cummings (lay representative)
Respondents Represented by	:	the leaseholders of the 7 flats in the building the lessees of flats 2, 3b, 4 & 4a
Date of Application	:	8th June 2017
Type of Application	:	to determine reasonableness and payability of service charges and administration charges
Tribunal	:	Bruce Edgington (lawyer chair) Roger Wilkey FRICS Peter Gammon MBE BA
Date and Venue of Hearing	:	12th October 2017 at Medway Magistrates' Court, The Brook, Chatham ME4 4JZ

DECISION

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1. It is the determination of the Tribunal that

   (a) The Respondents are not liable to pay for the replacement of the retaining wall on the rear boundary to the property, and
   (b) The Tribunal is unable to make any comment on the cost of these works as the actual cost is not yet known, and
   (c) The section 20 consultation process consisting of letters dated 6th April 2016 and 17th March 2017 has been complied with.

Reasons

Introduction

1. The property was built in about 1900 as a residence and is now split into 7 flats which are each the subject of long leases commencing in 1989. This dispute concerns a substantial retaining wall at the rear of the back garden which has fallen into disrepair because of tree roots and vegetation emanating from the rear garden of the property making the wall structure unstable.

2. Most, if not all, of the long leaseholders oppose the reasonableness of the works, the anticipated cost and the payability of any service charges which may be demanded after the repair works have been undertaken. The Applicant says that each long leaseholder will be asked to pay one seventh of a figure in the region of £120,000.

3. Thus, this case is unusual in the sense that the Tribunal has been asked to determine which service charges, when finally costed, will be recoverable from the Respondents in a situation when a demand for a payment on account is not permitted under the terms of the leases. The reason for the application is that it became clear, at the end of the section 20 (of the **Landlord and Tenant Act 1985** ("the 1985 Act")) consultation process that the Respondents objected to paying either the anticipated cost or, indeed, anything in some cases.

4. A procedural chair has determined that the points to be decided by this Tribunal are:-

   (a) Whether the cost of the works would be payable by the leaseholders under the terms of the leases
   (b) If so, whether the proposed cost of the works would be reasonable, in particular in relation to the nature of the works, the contract price and the supervision and management fee and
   (c) Whether the landlord has complied with the consultation requirements under section 20 of the 1985 Act

5. Whether the actual cost of the works is reasonable is not for this Tribunal in this application because neither the full extent of the works nor the final cost is known.

The Leases

6. The Tribunal has seen copies of the leases. The first in the bundle of documents provided to the Tribunal for the hearing at page 248 is described as a sample lease.

It is the counterpart lease of flat 3A which is dated 12th April 2002 and is for a term of 125 years from 1st January 1989 at an increasing ground rent.

7. By clause 4(d) the tenant covenants to pay one seventh of the expenses set out in the Fourth Schedule within 14 days of the expenditure being incurred, subject, of course, to a demand complying with the requirements of the 1985 Act being served.

8. Under clause 5(b) the landlord covenants to maintain, repair, clean, redecorate and renew the items mentioned in the Fourth Schedule.

9. The problem is that the rear retaining wall is simply not mentioned in the lease at all. The only references to the garden itself are in paragraph 5 of the Second Schedule which gives the tenant a right of way over the garden and then in paragraph 3 of the Fourth Schedule which, in effect, requires the landlord to maintain the garden and the shed and the tenant to pay a seventh share of the cost.

10. As the ground rents are nominal, it is the view of the Tribunal that it was the intention of the parties at the commencement of the leases that the landlord was to maintain the garden and grounds, to include any fences or walls which the landlord is liable to maintain, subject to the liability of the tenants to pay one seventh of the cost.

The Law

11. Any landlord of a long residential lease is bound by the provisions of the lease and sections 18-27A of the 1985 Act. A tenant only has to pay service charges if they have been or are to be reasonably incurred, and the services provided and the amount demanded are reasonable. Such tenant has usually paid a substantial capital sum for the right to occupy the flat and presumably Parliament intended that a landlord of such a person should understand that and not do unreasonable things.

12. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'.

13. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. Although it is irrelevant so far as this application is concerned, this Tribunal has jurisdiction to make a determination as to whether a claim for a payment on account of a service charge before it is incurred is reasonable and, if so, whether it is payable.

14. Section 20 of the 1985 Act requires consultation with the tenants when dealing with large anticipated service charges for qualifying works, as in this case. The tenants are invited to nominate contractors and the landlord would have to take heed of reasonable representations from tenants. If the landlord decides not to accept the lowest tender, a full explanation has to be given to the tenants.

The Inspection

15. The members of the Tribunal noted from page 173 in the bundle that it would have no access through the property at the rear – 9 Spring Grove – in order to see the wall. A site meeting held on the 25th August 2017 was minuted and confirmed that

the Tribunal members would not really be able to see very much at a site inspection. The minutes included some helpful photographs. In the circumstances, the usual pre-hearing inspection was cancelled.

The Hearing

16. The hearing was attended by Cathy and John Mantripp (flat 3b), Andrea Morrow (flat 2), Gaynor Farran (flat 4a) and Samantha Kilroy-Downs (flat 4). Mel Shepherd from flat 3(a) had also written to express her support. On behalf of the Applicant was Adrian Cummings together with Steven Pearson and Nick Barber from the structural engineers, Angell Thompson & Partners Ltd. ("Angell Thompson")

17. The Tribunal chair opened proceedings by seeking clarification on a number of matters. He concentrated on liability as this seemed to the Tribunal to be the most important issue. When asked whether the landlord had the property surveyed on purchase in 2005, the answer was vague. Mr. Cummings repeated several times that both he and his client were unaware of the existence of the retaining wall, let alone any damage being caused to it until at least 2010. He denied that the landlord had any obligation to fully understand the extent of the property and its boundary walls/fences etc.

18. As to the quantum of the claim, it was explained that the Tribunal was in some difficulty about this in view of the limitations imposed by section 19 and section 27A of the 1985 Act. Nothing was payable now and the proposed cost of the works could not be quantified with any accuracy.

19. As to the third question i.e. compliance with the section 20 consultation process, the only complaint about this was that Mrs. Morrow said that she did not receive the original letter of 6th April 2016. She was at the hearing and acknowledged that this was whilst she was in the process of purchasing and that she received a copy subsequently. She agreed, quite fairly and properly, that there was little point in continuing with any suggestion that the process had not been complied with as there were more serious issues to be determined. In the event, she had not suffered any prejudice as a result of any defect in process.

20. Both parties were then asked to set out their cases, which they did with some questions from the Tribunal. It must be said that all parties behaved reasonably and appropriately throughout the hearing.

21. On the question of ownership of the retaining wall, Mr. Cummings said that he did not accept the conclusion of Caxtons that the title to the wall had passed to the owner of 9 Spring Grove. There was no explanation for this conclusion in the report and he and his client had accepted that the landlord owned the wall. Regrettably, no one from Caxtons attended the hearing to explain.

22. It was also noted, with interest, that 2 of the leaseholders had been to see Mrs. Rozsahegyi, one of the owners of 9 Spring Grove. Regrettably her husband died in August 2017. She is 89 years of age. She indicated to the leaseholders that she would have no objection to a lean-to on the right hand side of her property (when looked at from the road) being dismantled so that works to the rear wall could be undertaken. It was estimated that an area of about 10 feet by 10 feet would be

available to give access on the basis that the lean-to was re-erected in an improved state when the work was finished.

23. One person from Angell Thompson explained he had been to see her beforehand and she had said that she would not agree to this. He wondered whether the full extent of the disruption had been fully explained. In any event, there was some suggestion that the property was now empty and that Mrs. Rozsahegyi may not return. The landlord may well note this as if the property is vacant or being sold, this may provide it with an opportunity to do the work with greater access and, thus, at less cost.

24. The final point of note to arise from the hearing was the comment from Angell Thompson that on further investigation, it has become clear that the rear garden of the property is all sandy soil and is unstable.

Discussion

25. The Respondents, understandably perhaps, only really started complaining when they received notification that they were likely to receive demands for just over £17,000 each. They have expressed a number of challenges to both their liability to pay and the amount of the charges. As the Tribunal understands it, the section 20 consultation process produced the names of potential contractors but no specific challenge to payability during the consultation process itself.

26. It is as well, perhaps, to set out a chronology in so far as one can from the evidence commencing, after general points, with a tree survey carried out at a time when someone realised that there was a potential problem with the wall:

Date	Event	Page no.
1897	3 Glen View and the wall exist	347
1950's	9 Spring Grove constructed	347
18.01.05	Southern Land Securities buy 3 Glen View	162
10.11.10	Treeventures Ltd. report indicating possible damage to the wall	71
07.03.13	AXA refuse claim	66
02.10.13	first section 20 notice – phase 1	1
26.10.13	sycamore trees felled	112
25.11.15	Angell Thompson report says that the wall has 'failed' and further investigations and removal of vegetation needed	132
April 16	vegetation removed	92
06.04.16	second section 20 notice – phase 1	2
15.08.16	specification of work	5
17.03.17	phase 2 section 20 notice with 'estimates'	20
08.06.17	this application made	227
06.07.17	third section 20 notice – phase 1	3

27. The Tribunal has seen the extensive cases put forward by the parties and has taken all points into account. A summary of some of the more salient points is as follows:

- 'No-one has proved ownership of the wall'. This is, indeed, the case but that would not be unusual. There is no 'magic' about ownership of fences and

walls. It is not automatically contained in title deeds. The latest report of Caxtons at page 347 suggests that ownership would have passed to the owners of 9 Spring Grove but 3 Glen View should pay 75% of the cost of repair (page 348). The Tribunal does not actually agree with the assumptions and inferences made by Caxtons which, to an extent, are legal matters. In any event, the chances of the owners of 9 Spring Grove agreeing to pay 25% is remote and the cost of litigation could be prohibitive for the Respondents as the Applicant does not appear minded to take that matter any further.

- 'Buyers of the flats were not warned about the problems with the retaining wall'. That may have been the case but that does not affect the Tribunal's decision.
- 'The property was inadequately insured as the freeholder did not tell AXA about the retaining wall'. The Tribunal does not accept that. The terms of the policy are clear and normal. Claims can be made in respect of subsidence, storm damage, accidents etc., but such a policy would not normally cover damage to a retaining garden wall caused by lack of attention to the vegetation pulling it apart.
- 'There is mention of an earlier estimate of £35,000 for repair works ('revealed in a letter of 23/09/15' – page 126)'. Although there is no specific evidence of how that estimate came into existence, it seems clear that it was at a time when the true extent of the damage was not known. Even in 2015, the structural engineer was saying that no definitive view could be given as to what was required. At the hearing mention was made of estimates in similar amounts, including the £35,000 one, obtained from two potential contractors i.e. Mr. Baynes and Mr. Warren, but these were verbal only and those contractors had not seen the reports.
- It is suggested that 'if the landlord had complied with the terms of the leases and had maintained the garden properly, these problems would not exist or, at the very least, the remedial cost would be much reduced'. This is a valid point.

28. As to ownership of the wall, this is, of course, a legal matter. It is not known why a firm of surveyors was asked to prepare a report on the issue. The conclusion reached by Caxtons is based on just one comment on page 347. After setting out the history of this case, reference is made to the set of steps from the garden of the property downwards and the following sentence then appears i.e. "*When these lower level gardens were sold for redevelopment, the ownership of the retaining wall should have passed to the new owners*". This comment is not supported by research or legal principle.

29. As far as the Tribunal is concerned, such a comment cannot stand up to scrutiny. It is saying, in effect, that when the land was sold, the then owner of the property was saying to the buyer words to the effect of 'I am selling you the land but I am also including ownership of a retaining wall so that you are now responsible for keeping the soil from my garden out of your garden'. This would be illogical and, it is suggested, no reasonable buyer would accept such a provision. No pre-registration deeds or copy agreement has been produced which would give any corroboration to such a statement.

Leaseholders' liability

30. Turning now to the most crucial issue, namely the contractual liability of the leaseholders, under the terms of the leases which started in 1989. Southern Land Securities bought in 2005 and the Applicant's case appears to be that no survey was undertaken or at least no effort was made to understand what was supporting the rear of the back garden which was obviously higher than the land behind.

31. The impression given is that the rear of the back garden was overgrown in 2005. If that is right, it should have raised questions in the mind of any surveyor about what was underneath the trees and what was keeping the earth from falling into the garden of the property behind. Obtaining access to the rear wall should not have been a problem as there is bound to have been an easement of necessity allowing access for repair purposes. If the garden was not then overgrown, the use of a mirror would have enabled anyone to see that there was a retaining wall there and give some idea of its state of repair.

32. The evidence was that the first the Applicant or the landlord knew of a wall was when the owner of 9 Spring Grove contacted them to point out a problem with the wall. Presumably that was in or about 2010 when the Treeventures report was obtained. From then on, the landlord appears to have obtained the appropriate expert assistance, albeit over a number of years.

33. The evidence from Caxtons (page 348 in the bundle) is that there is a similar retaining wall between 1 Glen View and the properties behind. The reports says "*That is also an old wall but it is in reasonable condition*". If one couples that with the evidence of the structural engineers who conclude (at page 132) that "*...the most likely cause of the failure is the close proximity of the several mature trees and shrubs, whose extensive root system has impacted on the gravity mass of the masonry resulting in defects to mortar joints*", one is drawn to the inevitable conclusion that the cause of this retaining wall failing is the lack of maintenance of both the garden and the wall.

34. Under the terms of the leases, the landlord covenants to maintain the garden. As has been said, it is the Tribunal's view that this would include the wall. The evidence is that this covenant has not been complied with. If it had been complied with, the evidence of the wall at the rear of 1 Glen Close being in reasonable condition, leads inevitably to the conclusion that these repairs would not have been necessary.

35. The case for the landlord, as put to the Tribunal by the Applicant, is that such landlord did not know the wall existed and therefore did not know that anything was amiss. It may be that this landlord is just an investment company and took the risk not to have a full inspection or survey undertaken. Such an inspection and/or survey would or should have revealed the problem.

36. It must be remembered that the leaseholders have no right to undertake repair work and they were therefore in no position to mitigate any loss. The problem may or may not have been severe in 1989 when the leases started. It matters not. It was and remains the landlord's responsibility to maintain and it simply did not do so, for whatever reason. That is a clear breach of covenant and the landlord should not expect the leaseholders to rectify such breach by paying for repairs resulting directly from the breach. If the problem was there in 2005, there may have been a claim

against the previous owner although that is probably not the case either because of *caveat emptor* or the Limitation Acts.

37. Having said that, the costs of removing the trees and vegetation were clearly maintenance matters and the cost was properly payable by the leaseholders. Similarly, if gardening work is needed after the wall has been repaired, then that will also have to be met by the leaseholders.

Conclusions

38. Referring back to the questions to be considered, the Tribunal has first looked at the issue of **whether the cost of work to the retaining wall would be payable under the terms of the leases**. The Tribunal's decision is that repair work is not payable by the leaseholders.

39. Next, there is the issue of **whether the works themselves or the proposed cost is reasonable**, but this now becomes irrelevant. Clearly the repair work must be done in order to avoid a continuation of the landlord's breach of covenant.

40. Finally, there is the issue of **whether the consultation requirements have been complied with**. As far as that is concerned, the letters of the 6th April 2016 and 17th March 2017 would appear to comply with the consultation requirements. There is some evidence that the notice of 6th April 2016 may not have been received by Mrs. Morrow. However, having taken all the evidence into account, and, in particular, the opinion expressed by Mrs. Morrow and the evidence that most of the tenants seem to have received the letters in question and that nominations of contractors were made, the Tribunal concludes that the notices were sent out. Thus, there has been compliance.

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Bruce Edgington
Regional Judge
13th October 2017

ANNEX - RIGHTS OF APPEAL

i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.