10598

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	: CHI/00ML/LSC/2014/0034
Property	: Brittany Court, New Church Road, Hove BN3 4JT
Applicants	: Eden Consultants Limited Mr Angelo Rafaelle Cavello Mrs Jeanne Piercy by her litigation friend Jill Piercy Mrs Janice Parmenter Mrs Antoneitta Cernera Mr & Mrs Rosoman Mrs Victoria Jebbitt
Representative	: Mr Seb Oram, instructed by Dean Wilson LLP
Respondent	: Old Estates Limited
Representative	: Mr Jonathan O'Mahony, instructed by Gregsons LLP
Type of Application	: Payability of service charges under s.27A Landlord and Tenant Act 1985 Disregarding costs of proceedings under s.20C Landlord and Tenant Act 1985
Tribunal Members	: Judge A Johns (Chairman) Mr B H Simms FRICS (Surveyor Member)
Date and venue of	: 28 November 2014, Mercure Hotel, 149 Kings Road, Brighton
Date of Decision	: 10 December 2014

DECISION

Introduction

1. This is an application by several of the tenants in the mansion block known as Brittany Court in Hove ("the Building") challenging the reasonableness of service charges for the years ending 24 December 2011 and 24 December 2012 as well as an on account payment demanded as at 25 December 2013. Two principal issues remained by the end of the hearing. First, the reasonableness of the fees charged by Circle Residential Management Ltd ("Circle") as managing agents in the years 2011 and 2012. Second, whether the advance payment sought at the end of 2013 was unreasonable in view of it reflecting the anticipated cost of decorating the windows in the Building. That is a broad description of the second issue, because the precise case being made underwent a number of changes as we shall explain later.
2. The tenants also question their liability to contribute to lift maintenance costs given that the lifts simply did not work. Finally, they ask for an order that costs incurred by the landlord, Old Estates Ltd, in connection with these proceedings are not to be regarded as relevant costs for service charge purposes.
3. Both sides were represented by Counsel and the Tribunal is grateful for their assistance.

Inspection

4. The Tribunal inspected the Building immediately before the hearing.
5. The Building is a five-storey mansion block purpose built probably in the 1930s fronting New Church Road at the corner of Brittany Road. It is of traditional cavity brick walls with tile hung bay windows. The top floor is of mansard style with dormer windows in a tile hung roof behind parapet walls. The main and ancillary roofs are asphalt surfaced with wearing tiles on the pedestrian accessible surfaces. The windows are metal Crittall frames set in timber sub-frames. A sample of flats was inspected by the Tribunal. Externally it was clear that some of the Crittall windows are suffering from rust with rot to some timber sub-frames. Internally there was evidence of

condensation damage and water penetration. The Building is encased in scaffolding and redecoration work is proceeding.

Factual background

6. This Building has already been the subject of service charge proceedings in the leasehold valuation tribunal ("the LVT"). A group of tenants, including some of the current applicants, challenged the service charge for each of the years 2006 – 2010 including the level of managing agents' fees. It appears from the decision of the LVT, given on 8 March 2012, that Circle's fees for those years ranged from £268.91 to £406 inclusive of VAT per unit. The tribunal reduced those charges by 40 percent on the basis of poor service including a failure to provide service charge expenditure accounts.
7. Circle continued as managing agents until 1 March 2013, when they were replaced by Parsons Son & Basley. Circle did produce service charge expenditure accounts for the years following those with which the LVT was concerned at the previous hearing. The Tribunal was shown accounts signed by Circle for the years ending 24 December 2011 and 24 December 2012.
8. During 2011 and 2012 Circle were also in discussions with Mr Lee, one of the leaseholders by his company Eden Consultants Ltd, for major works to the Building. A number of notices were given by Circle pursuant to the consultation requirements of s.20 of the Landlord and Tenant Act 1985 but no works were carried out.
9. When Parsons Son & Basley took over, they instructed a building surveyor to prepare a specification for the works required to the Building. That specification was produced in May 2013. That same month, proceedings were commenced in the County Court at Brighton under claim number 3BN00295 ("the County Court proceedings") by a group of tenants, which now includes all the applicant tenants, claiming damages against the landlord for breach of its repairing and decorating obligations. By an amendment made on 30 July 2014 the claim includes increased costs said to flow from a failure by the landlord to decorate the windows.
10. The decorating obligation in the leases of the applicant tenants is in the following form:

"As often as the Landlord shall consider necessary and in any event in the year ending on the day prior to the fourth anniversary of the Commencement Date and in every fourth year of the said term thereafter in a suitable and workmanlike manner to wash and then paint varnish oil or distemper all wood cement and metal work of the exterior of the Building and all other buildings or structures and erections (where appropriate) at any time on or forming part of or comprised in the Development previously or usually so dealt with (including the external surfaces of (a) the windows and frames of the Demised Flat ...) with two coats at least of good quality paint varnish oil or distemper".

11. It is common ground that the effect of the leases is that repair of the windows is the responsibility of individual leaseholders and that the painting of them is the responsibility of the landlord.

12. Having followed the required consultation process in relation to the major works including the decoration of the windows, the landlord demanded an advance payment towards the cost of such works as provided for by the leases. Such was payable on 25 December 2013.

13. On behalf of the applicant tenants, Mr Lee obtained a report on the proposed works from a surveyor, Mr Markham of Stiles Harold Williams LLP. His report suggested an increased cost of decoration due to the current condition of the windows owing to a previous lack of decoration, such increase being in the sum of £6840.

14. This application to the Tribunal was made in April 2014.

Jurisdiction and law

15. 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. S.19(1) of the Act provides that costs shall be taken into account in determining the amount of a service charge only to the extent that they are reasonably incurred and only if the works or services are of a reasonable standard. So far as payments in advance are concerned, no greater amount than is reasonable is so payable – see s.19(2) of the Act.

16. The decision of the Lands Tribunal in *Continental Property Ventures Inc v White* [2006] 1 EGLR 85 was relied on by the landlord. That case decided that an allegation that historic neglect had led to increased costs was not a question of unreasonableness within s.19 of the Act. Rather, it was a claim for damages that could be set off by way of defence to a claim for service charge and that, while the Tribunal had jurisdiction to deal with such a defence under s.27A of the 1985 Act, the County Court may be a more appropriate forum for deciding such defences.

Hearing

17. The hearing followed the inspection. The applicant tenants were represented by Mr Seb Oram, and the landlord by Mr Jonathan O'Mahony.
18. Mr Oram began by making clear that he did not now pursue in these proceedings any case that the cost of the window works had increased as a result of previous failures to decorate. That was on the bases first that, as Mr O'Mahony had pointed out in helpful written submissions, such a case was not one of reasonableness under the 1985 Act, and second that he wished the question of a claim for damages to be heard in the County Court proceedings.
19. He did however make a different case on reasonableness in relation to the window works, which he formulated in this way: That it is not reasonable to decorate some of the windows in their current condition.
20. Mr O'Mahony objected to the tenants making that different case on reasonableness. Having heard argument, the Tribunal decided to permit that case to be made. We so decided for two reasons. First, such case could just about be said to emerge from the tenants' statement of case. Second, Mr O'Mahony very fairly indicated that he could deal with such case using the existing expert report of the landlord's surveyor, Mr Smith.
21. The Tribunal heard evidence from Mr Lee for the tenants and then from their surveyor, Mr Markham.
22. It then heard the evidence of Mr Smith, the surveyor engaged by the landlord, before hearing from the landlord's two witnesses of fact; Mr Holmwood of the landlord and Mrs Healy of Parsons Son & Basley.

Discussion

23. Starting with the reasonableness of costs forming part of the service charge for the years 2011 and 2012, a number of items which had been put in issue were conceded by the tenants at the hearing, namely the charges of (a) Cobb Electrical, (b) Complete Property Services, (c) James Burns, (d) Sussex Renovations, together with (e) accountancy fees.

24. There remained challenges to Circle's management fees and the costs of lift maintenance.

(i) Circle's fees

25. The tenants' case was that Circle's fees should be reduced by 40 percent, as they had been by the LVT's earlier decision. It was said there had been no improvement in service and criticism was made of repeated s.20 notices with no works being carried out.

26. In the judgment of the Tribunal, Circle was providing services to a reasonable standard so that the fees do not fall to be reduced.

27. Unlike in the period being considered by the LVT, Circle did carry out the work necessary to produce accounts. Further, Mrs Healy of the current managing agents, who received praise from Mr Lee, gave evidence that she had no reason to believe her predecessor Circle had not been carrying out proper management functions. She told the Tribunal that, at the time of the handover, Circle's management included the provision of cleaners, gardeners and a handyman on site. It was also plain on the evidence that Circle had been engaged in negotiations with Mr Lee for the carrying out of major works to the Building.

28. While there was criticism of the s.20 exercises carried out by Circle, they did not result in fees at an unreasonable level. Counsel were agreed that s.20 consultations would normally result in charges in addition to the overall rate sought by Circle in this case.

(ii) Lift maintenance costs

29. Turning to the lift maintenance costs, the question of reasonableness is not an easy one. A large part of such costs is made up of annual charges which, according to the evidence, were payable under a contract with NLC Nova Lift Co Ltd. There was an invoice in the sum of £1219.27 dated 9 July 2012 for "The routine annual service and maintenance of the lift installations at the above site in accordance with your service contract" and a similar invoice in the sum of £1178.04 dated 15 July 2011. But the evidence of Mr Lee was, and the Tribunal finds, that the lifts were permanently broken by around the start of 2011 and have never since operated.

30. There is force in the landlord's case that at least the annual charges must be reasonable as there was a contractual obligation to pay them, notwithstanding that the lifts were broken. And the Tribunal accepts that the landlord had not then ascertained that the lifts were not capable of being repaired. But the Tribunal has concluded, on balance, that the lift maintenance charges were not reasonably incurred. Having taken over management, Mrs Healy did ascertain that the lifts were not capable of repair, and she was then able to put an end to the lift maintenance contract with the agreement of NLC Nova Lift Co Ltd. In the Tribunal's judgement, that is what the landlord, acting reasonably, ought to have done around the start of 2011.

31. The annual maintenance and other lift charges in the service charge years 2011 and 2012 were not therefore reasonably incurred and the service charge payable by the tenants is to be reduced accordingly. That results in a deduction of £3695.04 from the service charge account for 2011 and of £1219.27 for 2012.

(iii) Decoration of the windows

32. As already noted, the tenants' case on the cost of decorating the windows as explained in opening was that it is not reasonable to decorate some of the windows in their current condition.

33. But Mr Markham, the surveyor for the tenants, did not support that case in his oral evidence. The evidence he gave to the Tribunal was to the effect that

simple decoration was unsuitable for these windows, whatever their condition. The benefits of simple decoration would be limited. Instead, at each decorating cycle, works to the windows should be carried out in accordance with BS 6150. Mr Markham described those works as involving the removal of all putties, removal of the glass, removal of all previous paint, and treating of the leading edges before renewing the putties and replacing the glass. Only then should decoration be applied.

34. Mr Markham having given that evidence, Mr Oram's case in closing became a different one. The Tribunal understood the two steps of that new case to be as follows:

34.1 That the landlord's obligation to decorate must be read as qualified by a proviso of reasonableness; that is, the landlord was obliged to decorate only if it was reasonable to carry out such decoration.

34.2 That it was not reasonable to decorate without the prior works described by Mr Markham having been carried out, given that the landlord had the ability under the leases to give notice to the tenants requiring any disrepair to be remedied; the sample lease before the Tribunal containing at clause 3(7) what is often referred to as a *Jervis v Harris* clause.

35. The Tribunal cannot accept either of those steps.

36. As to the first step, the obligation to decorate is clear. It is to do so every four years. Mr Oram pointed to the opening words of clause 2(13), the covenant to pay service charge, in support of his argument. They are: "*Subject to any statutory restriction on the recovery thereof ...*". But those words disclose, in our judgment, no intention to modify the obligation to decorate. They simply spell out an entirely different point, namely that the obligation to pay service charge is modified by statute.

37. Given our conclusion on the first step, the second does not arise. But decorating the windows is, the Tribunal finds, in any event reasonable.

37.1 First, simple decoration, rather than the more extensive works described by Mr Markham, is what the lease provides for (*"...to wash and then paint...the exterior of the Building...(including the external surfaces of (a) the windows and frames of the demised flat...) with two coats at least of good quality paint..."*), and the Building had these Crittall windows at the time of the leases; the windows being original. It is hard to characterise as unreasonable

that which the parties have expressly provided for unless accompanied by other works.

37.2 Second, it cannot be said to be unreasonable not to operate the *Jervis v Harris* clause in this instance. That clause is not really in point. Mr Markham's evidence was not that the works were necessary to remedy specific disrepair but that they should be undertaken before decoration whatever the state of the windows. Further, given that the tenants did not accept an invitation to replace their windows and have challenged the costs of decoration in a number of ways, there are good grounds for believing the *Jervis v Harris* process would have been contentious at the very least. It must be within the bounds of reasonableness not to embark on such a process.

37.3 Third, the Tribunal finds that the decoration of the windows is of real benefit. We accept the evidence of Mr Smith, the surveyor for the landlord, that for the windows which are in satisfactory condition, amounting to around 80 percent of the total, the decoration will last until the next decorating cycle, and for the remainder it can be expected to last for up to two years.

37.4 Fourth, the Tribunal is not persuaded that the works described by Mr Markham would bring additional benefits. The principal benefit he identified was that it would reveal any disrepair beneath the putties. But whether there is such disrepair is a matter of speculation. Mr Markham accepted that his suggestion that there would be disrepair that needed addressing was an assumption. It could not be known until the putties were removed.

38. There was discussion both in evidence and in submissions of the proportion of windows in serious disrepair. The Tribunal finds that such proportion is around 20 percent. That was the evidence of Mr Smith who had the benefit of inspecting each window using scaffolding, and Mr Markham did not seem to disagree with his conclusion. But the proportion is not important in the context of Mr Markham's view and the tenants' ultimate case which was that the need for the more extensive works was unrelated to condition.

39. The Tribunal's determination, in light of the above, is that the advance service charge sought as at 25 December 2013 is reasonable.

Section 20C

40. The tenants applied for an order under s.20C of the Act, which provides that the Tribunal may make such order as it considers just and reasonable on an application that costs incurred by a landlord in connection with proceedings before it 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.

41. There should be no such order in this case. The service charge challenges which were pursued to hearing have, save as to the costs of lift maintenance, been unsuccessful. While the proceedings did also include points as to the validity of demands by reason of naming the wrong landlord and the applying of credits on individual service charge accounts, those points were conceded very early by the landlord. The expert costs have been incurred in relation to the windows issue on which the tenants have failed. In all those circumstances, it would be wrong to deprive the landlord of any contractual right it may have to add the costs of these proceedings to service charge.

Summary of decision

42. From the above, the Tribunal determines that:

42.1 The costs of lift maintenance, being £3695.04 for 2011 and £1219.27 for 2012, were unreasonably incurred.

42.2 The service charge expenditure for the years ending 25 December 2011 and 25 December 2012 is otherwise reasonable.

42.3 The advance service charge sought as at 25 December 2013 is reasonable.

42.4 The application under s.20C of the Landlord and Tenant Act 1985 is dismissed.

43. We cannot determine payability as that will depend on the issues being litigated in the County Court proceedings.

Appeal

44. 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.

45. 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.

46. 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.

47. 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 (Chairman)

Dated 10 December 2014