

Eastern Leasehold Valuation Tribunal File Ref No.

CAM/22UC/LSC/2007/0001

Leasehold Valuation Tribunal: reasons

Landlord and Tenant Act 1985 section 27A

Address of Premises

The Committee members were

7 & 8 The Causeway,

Mr Adrian Jack

Finchingfield,

Mr Raymond Humphrys FRICS

Baintree, Essex CM7 4JU

Miss Marina Krisko BSc (Est Man)
FRICS

The Landlord: Braintree District Council

The Tenants: Ms Deborah Quigley (No 7) and Dr Robin Rice (No 8)

Background

1. The tenants each hold 125 year leases from 21st February 1983 of their respective properties. By an application dated 15th November 2006 the landlord sought a determination from the Tribunal of the tenants' liability to pay for a proposed replacement of the existing wooden windows at the property with UPVC windows.
2. The lease in para 2 of the Fourth Schedule provides for the landlord to "keep in repair... (e) the exterior of the Flat..." The tenants of Nos 7 and 8 are liable for the whole of the cost of maintenance and repair of their respective flats.

Description

3. Finchingfield is one of the prettiest villages in England. At its heart is a stream running through the green. A stone's throw from the stream is the current property. It forms the end of a terrace, built by the landlord in about 1969 around two sides of a grassed area. No 8 is a studio flat on the ground floor. No 7 is a one bedroom flat, part to the side of No 8 and part over No 8. All windows in Nos 7 and 8 are wood. In other parts of the terrace some of the windows have been replaced by UPVC windows.
4. Although the property is comparatively recently built, it is in a style in keeping with the rest of the village. The windows at the front of Nos 7 and 8 are in a Georgian style. The roofs of the houses in the terrace have been laid with old or old-looking tiles.

5. The Tribunal inspected the properties on the morning of 19th April 2007. This was a fine day. The landlord was represented by Mr Brian Cooke, Ms Sarah Stockings and Ms Andrea Bennett. Ms Quigley, the tenant of No 7, was present, but Dr Rice, the tenant of No 8, was not. Ms Quigley was able to give access to No 8 for the inspection. No party wanted a hearing so none was held.
6. The Tribunal's findings on its inspection are set out below, but the Tribunal wishes to emphasise that it is not giving a formal report. The inspection was necessarily of limited duration. No ladders were used. Access to some windows was restricted by vegetation. Accordingly this decision should not be relied on as a schedule of works or anything of that nature.
7. The wood in the windows of Nos 7 and 8 is, save as noted below, in generally satisfactory condition, but they need painting throughout. The windows at the back of the property face the prevailing wind and are in a poorer condition than those at the front and the side. The Tribunal noted some poor repairs, for example a replacement window cill without a drip and crudely applied filler.
8. The entrance to No 7 is at the rear of the property. On the ground floor there is the bathroom/WC at the front. The stairs to the upper floor are at the back. The window on the stairs shows a little rot but is largely in satisfactory condition. At the top of the stairs is a small box room with windows to the side. The windows have some rot. The living room is at the front of the upper floor. There are two windows. Both are in reasonable condition. The bedroom is at the back. It has a small window, which is showing some signs of rot, and a large pivoting window, which is in need of painting but was not rotten. The kitchen is also at the back. The window was satisfactory.
9. In No 8 entrance is gained from the front into a small lobby. The studio room is to the left and runs the depth of the property. There is a large window at the front in generally reasonable condition, although one cross-strut is coming away. At the back of the studio room there is a small window and a large pivoting window, matching those immediately above in No 7. The small window was in reasonable condition, but the pivoting window was rotting and had a crack in the glass. At the front of No 8, leading off from the lobby, is the bathroom/WC. There was no evidence of decay in the window, but it needs internal painting. The window to the kitchen at the back was rotten.

Parties' submissions and evidence

10. The main issue between the parties is whether the landlord is entitled to replace the current single glazed wooden windows with new double-glazed UPVC windows. The landlord considers that UPVC will be cheaper than wood over the life of the windows. The landlord obtained a quotation for installing plain replacement UPVC windows at a cost of £1,352 to No 7 and £1675 to No 8. The landlord also obtained a quotation for installing UPVC windows with a "Georgian bar" at a cost of £1,662 plus VAT for No 7 and £2,040 plus VAT for No 8.
11. The tenants do not agree to the landlord's proposals. They object to UPVC on aesthetic grounds. They want the landlord to repair and renew the existing wooden windows. UPVC windows are likely to reduce the value of their respective flats. They further complain that the current cost of repainting and repair will have been increased by reason of the landlord's delay in carrying out repair works.
12. There has been a long history of correspondence on the issue. In an effort to move matters forward, on 16th March 2006 the landlord agreed to have a detailed survey carry out on the windows. In fact, however, the "survey" was carried out by a firm called Turner Maintenance Ltd, who effectively just provided a quote for renewing the existing wooden windows.
13. Turners provided reports on each flat, each dated 31st March 2006. In its report on No 7, it allowed a provisional sum of £150 for the front lounge windows, because its surveyor (like us) had not been able to obtain access to the front. He recommended replacement of the windows in and next to the box room, replacement of the window on the stairs and the replacement of the windows in the bedroom. The cost quoted for repairs and renewals was £2,931 plus VAT, for painting £590 plus VAT and for scaffolding £375 plus VAT.
14. In its report on No 8, it recommended replacement of the front lounge window in its entirety, replacement of the kitchen window and the pivoting window at the back. It recommended splicing repairs on small window at the back. The report recommended some minor repairs to the outhouse, but the Tribunal was not shown this building. The total cost for repairs was £1,894 plus VAT and £347 plus VAT for painting.
15. The landlord also adduced in evidence a "life cycle costing report". This compared the cost of UPVC windows to wooden windows over a 40 year period, discounting future costs of painting and repair to give a present day value. These sort of calculations are very sensitive to the discount rate adopted, but the cost of UPVC was very much cheaper than that of wood.

In particular wood requires regular repainting, whereas UPVC is much lower maintenance.

16. Ellodie Gibbons of counsel made written submissions on the landlord's behalf. These are considered below.

The law

17. Section 27A of the Landlord and Tenant Act 1985 provides that an application may be made to the 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 so, by whom, to whom, when, how and in what sum.
18. Section 19(1) of that Act provides that "[r]elevant 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..."

The questions

19. The landlord sought determination of three issues:
- a. Do the service charge provisions in the leases permit the landlord to charge service charges for the cost of installing replacement UPVC windows at a cost of £1,352 to No 7 and £1675 to No 8?
 - b. If not, do the service charge provisions permit the landlord to charge service charges for the costs of repairs to the existing windows at a cost of £3,896 to No 7 and £2,241 to No 8?
 - a. If not, do the service charge provisions permit the landlord to charge service charges for the cost of installation of Georgian Bar UPVC windows at a cost of £1,662 plus VAT for No 7 and £2,040 plus VAT for No 8?

Decision

20. Ms Ellodie submitted that a landlord under its repairing obligation was entitled to replace old windows with modern equivalents, where this was more cost-effective than replacing the original. She cited *Minja Properties v Cussins Property Group* [1988] 2 EGLR 52 and *Wandsworth LBC v Griffin* [2000] 2 EGLR 105 as well as para 12-34 of *Dowding and Reynolds on Delapidations* (3rd Ed, 2004).
21. The Tribunal agrees that replacement of old single glazed windows with new falls is justifiable under the terms of the leases. However, this is

subject to the landlord's duty to consult with the tenants and to act reasonably.

22. In this case the two tenants are responsible for the whole of the cost of repairs and maintenance. No cost falls on the landlord, unless the landlord is in default of its obligations. If the tenants unanimously want a more expensive option and are willing to pay for it and are not otherwise acting unreasonably, a landlord in our judgment is acting unreasonably in refusing to adopt the more expensive option. There may be special circumstances which might justify the landlord's refusal, for example if it were essential that all the properties on an estate looked the same. However no such special circumstances exist in this case.
23. The tenants are in our judgment acting reasonably in seeking replacement wooden windows. Such windows are more in keeping with and compliment the general character of the village. Those windows in the area which have been replaced with UPVC often have large panes of glass. In the Tribunal's opinion these detract from the appearance of the cottages and do not sit comfortably in this setting. The Tribunal agrees with the tenants that replacement UPVC windows may well reduce the value of the flats.
24. Accordingly the answer to the first question is that the service charge provisions in the leases do permit the landlord to charge service charges for the cost of installing replacement UPVC windows. The tenants currently say unanimously that they want a more expensive option, are willing to pay for and are not otherwise acting unreasonably and because there are no other special circumstances. Whilst they hold that view, the landlord would be incurring the cost of UPVC windows unreasonably. Of course, if the course of the consultation under section 20 of the 1985 Act the tenants change their mind, then the position will be different.
25. So far as the cost, put at £1,352 for No 7 and £1675 for No 8, is concerned, no full consultation process has been undertaken in accordance with section 20 of the 1985 Act, so those sums are not yet recoverable. There has in any event been only one quote obtained and that quote is now out-of-date.
26. There is a suggestion in the papers that the landlord may have entered into some long term contract for the maintenance of UPVC windows, but we have heard no evidence about such a contract or about what consultation may have occurred. The issue does not appear to arise on the current application.
27. The second question asks whether the service charge provisions permit the landlord to charge service charges for the costs of repairs to the existing windows at a cost of £3,896 to No 7 and £2,241 to No 8. As is apparent from the above discussion, the provisions do entitle the landlord

to charge for repairs and replacement of the existing windows, like for like. However, in the absence of any section 20 consultation, the sums are not yet recoverable.

28. Having regard to the nature of the dispute the Tribunal are surprised that the landlord has not obtained a report and specification setting out the alternatives from repair to replacement which can go to tender or more probably estimates which when obtained will hopefully lead to an agreed way forward. In this respect the landlord will need to obtain at least two for each course of action.
29. The third question asks whether the landlord can charge service charges for the cost of installation of Georgian Bar UPVC windows at a cost of £1,662 plus VAT for No 7 and £2,040 plus VAT for No 8. The answer is the same as that to the first question: the service charge provisions in the leases do permit the landlord to charge service charges for the cost of installing replacement Georgian Bar UPVC windows, but that in this case the landlord will incur that cost unreasonably, because the tenants unanimously want a more expensive option, are willing to pay for it and are not otherwise acting unreasonably and because there are no other special circumstances. Again there has been no section 20 consultation in respect of the sums claimed, only one quote was obtained and that quote is out-of-date.
30. The tenants complain that the current cost of repainting and repair will have been increased by reason of the landlord's delay in carrying out repair works. The Tribunal has no jurisdiction to entertain a free-standing claim for disrepair or a claim for specific performance of a repairing covenant. The Tribunal has a limited jurisdiction to allow a tenant to set-off a damages claim for disrepair against a service charge claim by a landlord: *Continental Property Ventures v White* [2006] 1 EGLR 85.
31. In this case, however, the Tribunal has determined that unless and until a section 20 consultation has been carried out (or a waiver has been granted under section 20ZA of the 1985 Act), no monies are payable by the tenants. The question of set-off is thus hypothetical. Moreover it would in any event be impossible to fix a final figure for the damage caused the tenants by any default by the landlord until the work was actually done. This is because any damage is likely to be progressive.
32. The Tribunal, without determining the matter, however, notes that the tenants' case on damage caused by the landlord's default faces grave difficulties at least as at the time of the Tribunal's inspection. The landlord had admittedly delayed repainting, but its delay had of course benefited the tenants insofar as they did not need to pay for the repainting. The tenants would need to give the landlord credit for this.

33. Although there is some rot in some of the windows, it cannot be assumed that that rot was caused by the landlord's failure timeously to paint the windows. Rot is a natural hazard of wooden windows. Even with regular painting, it requires only the slightest fissure in the wood for water to gain ingress and rot to occur. In the Tribunal's experience wooden windows from the 1960's and 1970's often had a poor record of longevity, even with regular repair and maintenance. The parties may wish to seek advice concerning modern timber windows and their longevity when considering the alternatives.
34. Without any evidence from the tenants on causation, the Tribunal would have found it impossible to determine what the cause of the rot was. These are, however, matters for determination once the landlord has carried its works.

Costs

35. There is no application under section 20C of the 1985 Act, so the Tribunal can make no order thereunder. There appears, however, to be no provision in the lease permitting the landlord to recharge its costs of these proceedings to the tenants, so the issue is probably academic.
36. The Tribunal has a discretion as to who should bear the cost of the fees payable to the Tribunal. Since the applicant landlord has substantially lost, we make no order in respect of those costs.

DECISION

37. The Committee accordingly determines:

- a. **that the service charge provisions in the leases do permit the landlord to charge service charges for the cost of installing replacement UPVC windows, but that in this case the landlord will incur that cost unreasonably, because the tenants currently unanimously want a more expensive option, are willing to pay for it and are not otherwise acting unreasonably and because there are no other special circumstances to justify the landlord installing such windows;**
- b. **that the provisions in the leases do entitle the landlord to charge for repairs and replacement of the existing windows, like for like;**
- c. **that the provisions in the leases do permit the landlord to charge service charges for the cost of installing replacement Georgian Bar UPVC windows, but that in this case the landlord will incur that cost unreasonably, because the tenants currently unanimously want a more expensive option, are willing to pay for it and are not otherwise acting unreasonably and because there are no other special circumstances;**

- d. that in the absence of any consultation under section 20 of the Landlord and Tenant Act 1985 or a dispensation under section 20ZA thereof the sums claimed are not recoverable from the tenants; and
- e. that there be no order in respect of the fees payable to the Tribunal.

Adrian Jack

Adrian Jack, chairman

21 May 2007