

CHI/43UK/LSC/2007/0106

CHI/43UK/LSC/2007/0107

**DECISION OF THE LEASEHOLD VALUATION
TRIBUNAL ON APPLICATIONS UNDER THE LANDLORD
AND TENANT ACT 1985: SECTION 27A, AS AMENDED**

Address: 1-21 Alpha Court & 1-131 Hillside Park, Hillside
Road, Whyteleafe, Surrey, CR3 0BS

Applicant: Hillside Park Residents Co. Ltd.

Respondents: The Lessees

Application: 15 November 2007

Inspection: 31 March 2008

Hearing: N/A

Members of the Tribunal: Mr I Mohabir LLB (Hons)
Mr J N Cleverton FRICS

IN THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL

CHI/43UK/LSC/2007/0106 & CHI/43UK/LSC/2007/0107

**IN THE MATTER OF SECTION 27A OF THE LANDLORD & TENANT ACT
1985**

**AND IN THE MATTER OF 1-21 ALPHA COURT & 1-131 HILLSIDE PARK,
HILLSIDE ROAD, WHYTELEAFE, SURREY, CR3 0BS**

BETWEEN:

HILLSIDE PARK RESIDENTS COMPANY LIMITED

Applicant

-and-

THE LESSEES

Respondents

THE TRIBUNAL'S DECISION

Introduction

1. This application is made by the Applicant pursuant to section 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") for a determination of the Respondents' liability to pay proposed service charges in the 2007/08 service charge year.
2. The application is limited to the issue of the Respondents' liability to pay the proposed cost of replacing external fascias, soffits, doors and windows to the common parts of the subject properties with uPVC and also the cost of replacing the timber windows to the flats with uPVC. The tribunal is told that at present the lessees of 41 flats have replaced all of their windows, 17 lessees have replaced some of their windows and 29 lessees still retain the original

timber framed windows. It seems that 40% of the lessees are in favour of replacing the timber framed windows with uPVC double glazed windows.

3. The specific issues upon which the Applicant seeks a determination in this application are:
 - (a) whether the Applicant can demand payment in advance from all the lessees in relation to the proposed works to the common parts of the subject properties ("the common parts costs").
 - (b) whether the Applicant can demand payment in advance from the lessees in relation to the proposed works to replace the remaining timber framed windows of the relevant flats in the subject properties ("the flat costs").
 - (c) whether the lessees who have already replaced their windows with uPVC windows are not liable to pay a service charge contribution for the replacement of the remaining timber framed windows and that the cost of doing so should be equally borne by those lessees whose windows are replaced.

Each of these issues is considered in turn by the Tribunal below.

The Relevant Lease Terms

4. The Tribunal was provided with a specimen lease of Flat 1 Alpha Court dated 10 June 1971 and Flat 24 Hillside Park dated 3 October 1986 ("the leases"). Both leases appear to have been granted in the same terms. The original parties to the leases are the lessor, lessee and the Applicant management company. The service charge liability in those leases arises in the following way.
5. Somewhat unusually, by clause 2 (4) of the leases the lessee covenanted *inter alia* to:

"to keep in good and substantial repair and condition throughout the said term the demised premises both as to the interior and exterior thereof (but excluding the roof (if any) and the main structure thereof) and every part thereof....."

6. The leases do not impose a repairing obligation at all on the lessor.

7. By clause 4 the leases, the Applicant management company covenanted *inter alia* with the lessee, and conditional upon payment of the sums to be paid to it under clause 5, to:

"from time to time throughout the said term and as often as occasion shall require inspect the main walls roofs floors and ceilings and the common parts of the said building and will perform and observe on behalf of the Lessee the obligations on his behalf contained in paragraphs 1, ...4, ... of the said Second Schedule..."

8. By clause 5(1) of the leases, the lessee covenanted *inter alia* with the management company to pay a:

"...contribution of (£45 and £35 respectively in the leases) towards the expenses which may be incurred by the Management Company... by virtue of its obligations under clause 4 here of in relation to the covenants contained in the.. Second Schedule"

Although the contribution varies slightly under the leases, the effect of the clause is the same in both. Hereafter, the clause references are to the same clauses in the leases even though the service charge contribution varies slightly, as indicated above. For ease of reference, where in this Decision reference is made to a service charge contribution of £45 it is intended that this should be read as being £35 in those leases where this lesser contribution is payable.

9. Under clause 5 (2) the lessee further covenants to pay:

" On the twenty-fourth day of June one thousand nine hundred seventy-one to pay to the Management Company in advanced for the year up to the twenty-fourth day of June one thousand nine hundred seventy-two

the sum of forty five pounds (£45) as a contribution towards the expenses which may be incurred by the Management Company..... and on every subsequent twenty-fourth day of June during the said term to pay a like sum to the Management Company as a contribution towards the said expenses arising during the year then the next ensuing.....”.

Importantly, clause 5 (2) goes on to provide that:

“... where in any year of the said term the total expenses of the Management Company by virtue of its said obligations... shall exceed the expenses prevailing at the date hereof an adjustment shall be made to the sum to be paid on the next twenty-fourth day of June under this sub-clause so that the Lessee shall for each completed year of the said term... pay a due proportion of the additional expenses incurred by the Management Company... in complying with its said obligations.....”.

10. In paragraph 1 the Second Schedule of the leases, the lessee covenanted *inter alia* to:

“..... keep in good and substantial repair and whenever necessary to rebuild or reinstate:-

(a) the roof and main structure of the said building..... including all foundations or external walls and all walls timbers joists floors and ceilings dividing one flat or garage from another flat or garage or from the common parts of any such building and the common entrance halls landings and passages and staircases and the walls bounding the same.....”.

11. Paragraph 4 of the Second Schedule requires the lessee to:

“In every seventh year of the said term..... to paint..... all such parts of the said common entrance halls landings and passages and staircases of all such buildings as aforesaid as are now..... painted..... and whitened... and..... all such parts of the exterior of all such buildings as are now and should be painted.....”.

Inspection

12. The Tribunal inspected the subject properties on 31 March 2008. The estate is comprised of several 3/4 storey blocks of flats constructed of brick in the late 1960s/early 1970s. The Tribunal noted that the condition of the external decoration of the original wooden framed windows and external parts varied throughout the estate.

Decision

13. To determine the issues in this application, it was necessary first of all for the Tribunal to construe the lease terms set out above in relation to the repairing obligations and service charge liability for the common parts and the windows of the subject properties.

The Service Charge Liability

14. The leases in this instance are unusual to the extent that clause 2 (4) imposes a repairing obligation on the lessee, but not limited to, the interior and exterior of the demised premises but excluding the roof and the main structure. It also requires the lessee to decorate all structural or exterior walls.
15. By paragraph 1 (a) of the Second Schedule, the lessee also covenanted to keep in repair the roof and main structure of the building and the foundations, external walls and common parts. Paragraph 4 of the same Schedule imposes an obligation on the lessee to decorate not only the common parts but also the exterior of the relevant building.
16. However, under clause 4 of the leases, the lessee covenanted with the management Company that it would undertake the repairing obligations, on the lessee's behalf, the repairing and decorating obligations imposed by the Second Schedule. This was conditional upon the lessee paying the service charge contribution to it pursuant to clause 5.
17. Clause 5 set out how the lessee's service charge liability arises. A proper construction of clause 5 (2) reveals that the management company is only entitled, as a matter of contract, to an advance service charge contribution

payment of £45 in any given service charge year, being from 24 June in each year until 24 June of the following year. This payment is a payment on account towards the expenses that *may be incurred* by the management company during the subsequent service charge year pursuant to clause 4. In other words, the leases appear to limit the lessee's contractual liability for this service charge contribution in advance to £45.

18. Clause 5 (2) goes on to include a reconciliation provision where if the management company's service charge expenditure in any given year exceeds the total advance service charge contribution collected, it is entitled to collect the shortfall from the lessees on 24 June in respect of each completed service charge year. Materially, under this clause, the management company may only collect by way of a service charge contribution those costs or expenses that it had already incurred in the preceding service charge year.
19. The practical effect of clause 5 (2) is that the management company may only collect from each of the lessees, as an advance service charge contribution, the sum of £45 in any given service charge year. The management company is not, as a matter of contract, entitled to any greater sum by way of a payment on account. The management company is only entitled to recover from the lessees the shortfall, if any, in the total service charge expenditure at the conclusion of any given service charge year.
20. The answer, therefore, to the question posed by the Applicant as to whether it is entitled to a payment in advance for the common parts and flat costs from the lessees for the proposed works is yes, but it is limited to £45 from each of them. The management company's entitlement to recover any shortfall in expenditure for the cost of the proposed works only arises once it has been incurred and the relevant service charge year has ended. The leases contain no sinking fund provision.

The Repairing Obligation

21. The Tribunal then considered whether the proposed works to replace the windows in the common parts and the flats fell within the lessee's individual

repairing obligations, for which there was no service charge liability, or the repairing obligations imposed by the Second Schedule, which created such a liability.

22. The individual lessee's repairing obligation in relation to the demised premises or arises under clause 2 (4) of the leases. The repairing obligation in relation to the roof, main structure and common parts of the building arises under paragraph 1 of the Second Schedule.

23. It is beyond doubt that the external fascias, soffits and doors fall within the latter. As to the windows in the common parts, they are expressly referred to in paragraph 1 (a) of the Second Schedule and as such, the Applicant was obliged to maintain them under clause 4 of the leases. It follows from this that the Applicant could demand an advance service charge contribution (limited to £45) from the lessees for the cost of replacing these with uPVC double glazed windows.

24. As to the windows in the individual flats, the position was far from clear. The difficulty was that there is no express reference to windows *per se* in either of repairing obligations created by the leases. It was, therefore, necessary for the Tribunal to construe the leases in this regard. If the obligation to maintain these fell within the lessee's individual repairing obligation then the Applicant had no obligation to do so and no service charge liability accrued to the lessee. If the obligation to maintain the windows ultimately fell on the management company it could only collect advanced service charge contribution limited to £45 per lessee. However, this would leave the lessees who had already replaced their own windows in the invidious position of having done so at their own cost.

25. The Tribunal concluded, on balance, that the liability to repair and maintain and, where necessary, to replace the windows in the individual flats ultimately fell to the management company and not the individual lessees. Although, clause 2 (4), somewhat ambiguously, obliges the lessee to repair and maintain the interior and exterior of the demised premises, it could not have been the

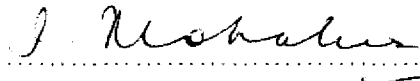
intention of the draftsman of the leases to include the windows. This is to be inferred from a proper reading and construction of the Second Schedule. This Schedule generally creates an obligation on the lessee, and ultimately the management company, to repair and maintain the roof and external structure of the buildings. Paragraph 4 in the Schedule also creates an obligation to decorate the common parts and exterior of the buildings. The only express reference made to windows frames is to the brickwork around them. Nevertheless, reference is also made to the decoration of such exterior parts of the buildings that *are now* painted. It is a matter of common ground that the original and existing timber framed windows are or were painted. By extension, it must follow that the obligation to repair and maintain the windows in the individual flats fell to the management company and not to the individual lessees.

26. Accordingly, the management company is obliged to maintain or replace the windows of the individual flats. However, in the event that it proposes to replace the windows with uPVC double glazed units, it may only collect an advance service charge contribution of £45.

Windows Already Replaced

27. From the Tribunal's analysis of the relevant service charge provisions in the leases, it is clear that the lessees who have already replaced their windows at their own cost are not relieved from the liability to contribute to the cost of replacing the windows of those flats that have not done so.
28. In the light of the Tribunal's findings, it may well be that the Applicant should seek independent legal advice as to what steps, if any, should be taken to remedy what appears to be defective leases.

Dated the 9 day of May 2008

CHAIRMAN.....

Mr. I. Mohabir LLB (Hons)