CHI/00ML/LSC/2010/0033

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL

FLAT 41, LEAHURST COURT, LEAHURST COURT ROAD, BRIGHTON BN1 6UN

Applicant: Leahurst Court Ltd (Landlord)

Represented by: Mr P Ward (Chairman)

Respondent: Manoj Kumar Agrawal (Lessee)

Represented by: in person

Date of transfer: 16 March 2010

Date of hearing: 17 June 2010

Members of the Leasehold Valuation Tribunal:

MA Loveday BA Hons MCI Arb

Mr N Robinson FRICS

Ms JK Morris

INTRODUCTION

1. This dispute relates to a charge of £138 claimed by the landlord of a flat in Brighton from a lessee. A claim was issued by the landlord against the lessee in Brighton County Court on 14 January 2010 and the question of liability for the charge was referred to the Tribunal by order of District Judge Pollard dated 16 March 2010. The sum has been paid by the lessee, albeit under protest. At a preliminary hearing held on 20 April 2010, another Tribunal determined that the Tribunal had jurisdiction to determine the issue, notwithstanding payment. A full hearing was held on 17 June 2010.

2. From the brief chronology above, it is clear that the parties have pursued a dispute involving £138 (which has been paid) through both the County Court and this Tribunal. So far, the matter has involved a District Judge, two separately constituted Tribunals, two hearings, an inspection, two sets of full written reasons and over two hundred pages of documents. Moreover, for the reasons which appear below, the basis of the dispute was not even clarified by the parties until the hearing held on 17 June 2010. The public costs involved are in excess of twenty times the sums at stake, and they are plainly disproportionate. This point was stressed to both parties at the start of the hearing and the Tribunal directs that these comments should be brought to the attention of any judge determining costs in the County Court proceedings.

3. The matter relates to 41 Leahurst Court, Leahurst Court Road, Brighton BN1 6UN. The applicant is the landlord. The lessees are the respondents.

INSPECTION

4. The Tribunal inspected the property before the hearing in the presence of both parties. Leahurst Court comprises an estate of five purpose built blocks totalling 88 flats with associated garages, car parking and gardens all on the west side of the A23 London Road approximately one mile north of Preston Park. The blocks are of brick faced construction, with rendered and painted infill panels between some windows, under tiled roofs. The estate was built in the early 1960s and from the inspection it generally appeared to be well maintained. It is understood that all the flats originally

had timber single glazed windows although it was noted that most have now been replaced with PVCu double glazed units.

5. Flat 41 is at the southern end of the ground floor in an east west leg in the third main block back from London Road and comprises an entrance hallway, living room, kitchen, bathroom and two bedrooms. The inspection concentrated on the windows as these were to be the subject of the hearing. Flat 41 still has the original windows. These, with their aspects, were noted to be as follows:

(a) Entrance Hallway (south): Centre pivot window.

(b) Living Room (south): Two windows being one centre pivot window and one larger window comprising opening casement, fixed light and centre pivot, at lower level and three panes above a transom, two being fixed lights and one an opening fanlight.

(c) Kitchen (north): One larger window comprising centre pivot, opening casement with opening fanlight and fixed pane containing extractor fan above transom.

(d) Bathroom (north) : Centre pivot with opening fanlight above transom.

(e) Bedroom Two (north): As bathroom.

(f) Bedroom One (south): As Kitchen but without extractor fan.

At the time of the inspection, all the centre pivot windows had been screwed shut although the screws to the entrance hallway window had been loosened and this window was operating. Each window was inspected from inside and from outside. The centre pivot hinges to these windows could be seen from outside and none were noted to be obviously defective. The pivot windows also have a restrictor type mechanism to stop the windows opening wide other than for cleaning and this mechanism was not inspected. Most pivot windows were missing their security catches. All the fanlights and opening casements were noted to be operational. A non-invasive inspection of the timber to the windows generally was undertaken and there were no major signs of defect noted internally. The main bedroom window was showing some softening to timber in the left hand bottom corner and to the decorative quadrant between the window frame and the internal sill indicative of

deterioration but both areas appeared treatable. Mention was made of condensation problems but there were no great signs of condensation on the windows. Marking indicative of condensation could be identified at skirting level on the east walls of both the bedrooms. These walls are actually a continuation of each other and both external walls although neither contains a window. Given the intended usage of these rooms and the nature of the construction, signs of condensation are not entirely surprising.

6. Externally, it could be seen that all the windows had been decorated in the recent past and other than some deterioration to paintwork on one window to the north elevation, all appeared satisfactory. It could be seen that the pivot windows had mostly been painted shut and that a filler type repair had been undertaken to the main bedroom window in a matching position to where the softening had been noted internally. Whilst the windows were obviously old, they generally appeared to remain serviceable. It was noted that the living room main window frame extended below the internal sill level externally, creating two blank white panels. The tribunal was advised that these panels contain asbestos and had been overclad by the management company at the time of the redecoration to avoid the need to disturb and risk the release of asbestos fibres into the atmosphere.

THE LEASE

7. By a lease dated 16 October 2000, the flat was demised by the applicant to the respondents for a term of 162 years from 24 June 1988. The following are the material terms of the lease:
   (a) By para 5 of the particulars that "the Premises" means the Ground Floor Flat number 41 Leahurst Court, Leahurst Court Road Brighton East Sussex being edged red on the Plan.
   (b) By paragraph 7 of the Particulars that 'the maintenance contribution' was "one eighty eighth of the expenses incurred by the Lessor in complying with its obligations set out in clauses 5.1 and 6.1".

(c) By clause 1.2 that the 'The Premises' means "the premises referred to in paragraph 5 of the Particulars and more particularly described in the first schedule."

(d) By clause 3.2 that the lessee would "pay the maintenance contribution stated in paragraph 7 of the Particulars."

(e) By clause 3.5 that the lessee would "repair the premises and keep them in repair excepting damage caused by the Insured Risks unless the insurance money is irrecoverable in consequence of any default of the Lessee or anyone at the Premises expressly or by implication with the Lessee's authority."

(f) By clause 3.24 that the lessee would "permit the Lessor on prior notice to the Lessee except in case of emergency

3.24.1 To enter upon the Premises for the purpose of ascertaining that the covenants and conditions of this lease have been observed and performed.

...

3.24.3 To give to the Lessee (or leave upon the Premises) notice specifying repairs cleaning or painting that the Lessee has failed to execute in breach of the terms of this lease and requesting the Lessee immediately to execute the same including the making good of such opening-up (if any) provided that the Lessor shall make good any opening-up if it reveals no breaches of the terms of this lease.

(g) By clause 3.25 that the lessee will "immediately ... repair clean maintain and paint the Premises as required by any notice under clause 3.24.3 PROVIDED that if within two months of the service of such notice the Lessee has not commenced and is not proceeding diligently with the execution of the work referred to in the notice the Lessor may enter the Premises to execute such work as may be necessary to comply wit the notice and the Lessee shall pay to the Lessor the cost of so doing and all expenses incurred by the Lessor (including legal costs and surveyors' fees) within 28 days of a written demand being made.

(h) By clause 6.1.1 that the lessor would "maintain repair decorate and renew ... The main structure and in particular the foundations roofs load bearing walls external windows gutters and rainwater pipes of the Buildings ..."

(i) By the first Schedule that 'the premises' included the flat including at S1.1 "the plasterwork of the boundary walls of the Premises and the doors door frames windows window fastenings window frames window sills and glass fitted in such window frames.

(j) By proviso S1.7 to the First Schedule that the premises excluded "any part of the Buildings not referred to as specifically included in the Premises and any of the walls or partitions (whether internal or external) except such of the internal walls and partitions and the plastered surfaces windows window frames doors and door frames as are expressly included in this demise."

THE ISSUES

8. The Particulars of Claim in the County Court is not clear about what the sum of £138 comprises. There is a reference to a "Gladstone invoice" for this sum (see paragraph 1 of the prayer) and a statement that Gladstone was the applicant's painting contractor (see page 2). The contention was that the applicant had asked a Mr Goodwin (Gladstone's foreman) to carry out filling and repairs to the windows to flat 41 and that it was unfair for the other 87 lessees at Leahurst Court to pay for this work.

9. During the course of the hearing, the Tribunal was referred to an invoice from Gladstone dated 9 June 2009 which was addressed to the respondents personally. This invoice was for the sum of £120 plus VAT and described the works as "to prepare timber windows and apply 2 pack filler and rub down in readiness for redecoration" and "to strip white gloss paint from hardwood cills in readiness for wood stain". The parties agreed that this invoice had been sent directly to the respondents by the managing agents Ellman Henderson and that the respondents refused to pay it (see letter from respondents to the agents dated 22 June 2009). Following this refusal, the contractor's invoice was discharged from funds held in the general service charge account. However, the entire sum of £138 was then debited from the applicant's individual service charge account and periodically demanded from the respondents in addition to the regular demands for service charge contributions and ground rents (see for example "application for payment" dated 13 May 2010).

10. Hitherto, the parties have proceeded upon the basis that the sum of £138 is a "service charge", and this assumption has continued in the judge's directions of 16 March 2010 and the decision of this Tribunal dated 7 May 2010. However, on closer analysis the sum of £138 cannot be said to "vary according to the relevant costs" incurred by the landlord as is required by the definition of a "service charge" in s.18 of the Landlord and Tenant Act 1985. When this was explored with the parties during the course of the hearing, they both accepted that the moneys demanded from and paid by the respondents were more properly characterised as an "administration charge" under Schedule 11 to the Commonhold and Leasehold Reform Act 2002. The Tribunal' jurisdiction is under paragraph 5 of Schedule 11 to the 2002 Act (rather than under s.27A of the 1985 Act). In practical terms, little turns on this distinction (although the wording of the reasonableness test in s.19(1) of the 1985 Act is a little different from the wording of paragraph 2 of Schedule 11 to the 2002 Act) and the parties were happy to proceed on the basis that this was an administration charge.

11. On this basis, it was agreed that the issues were twofold. First, was the sum of £138 recoverable under the terms of the lease? Secondly, was the charge of £138 "reasonable" under paragraph 2 of Schedule 11 to the 2002 Act?

THE APPLICANT'S CASE

12. The applicant appeared by its director and Chairman Mr Patrick Ward. Mr Ward relied on a bundle of documents and a summary of claim dated 2010

13. <u>Was the sum recoverable under the lease?</u> Mr Ward submitted that it had always been his understanding that any works over and above the main painting contract would be charged to individual lessees. The lease was not well written, but clause 6.1.1 required the landlord to "maintain repair decorate and renew ... external windows". The landlord could then recover this cost from the respondents under paragraph 7 of the Particulars and clause 3.2. Alternatively, Mr Ward relied on clauses 3.24 and 3.25. Although the landlord had not served a specific notice under clause 3.24.3, he referred to letters dated 20 August 2004, 10 April 2005, 31 July 2006, 15

September 2008 and 27 November 2008 which Mr Ward submitted were sufficient to comply with clause 3.24.3.

14. Reasonableness. The applicant called evidence from Mr Sean Goodwin, a self employed decorator from Brighton. Mr Goodwin had not provided a witness statement, but the respondents did not object to his evidence. Mr Godwin stated that he had been employed as a subcontractor by Gladstone, the main contractor carrying out works to the estate. When he started on site, he checked all the windows and told Mr Ward that the windows to Flat 41 were rotten. He asked for a site meeting with the owner of Flat 41, but had been unable to get one. As a result, he left the windows to Flat 41 until last. The window frames had, however, been scraped down at the start of the contract and the rotted woodwork could be seen throughout the work. Since there was no site meeting, he went ahead with preparing and decorating the windows. The pivot windows to the flat had not been screwed shut for security reasons because they already had restrictors which prevented burglars. He removed the screws from the windows and found that the windows did not work and attempted to free them. He made sure that all fanlights and side windows opened but the pivot windows were impossible. In any event, a burglar could more easily force one of the side windows. He did attempt to free the hinges, and to avoid time wasting he taped over handles and screws. He was instructed to paint the pivot windows shut. To summarise, he painted the windows to Flat 41 because the contract was about to end and he made sure all the windows were operable apart from the pivot windows. When cross –examined by the first respondent, Mr Godwin accepted that he had dealt with Mr Ward only and did not try to contact the respondents himself. He was unable to say whether the respondents attended a site meeting with Mr Ward, but one of his trainees was given a set of keys fairly quickly and access to the interior of the flat was never a problem. He described the trainee called Craig who had worked in the flat and he admitted it was possible that Craig spoke to the first respondent. However, Craig would not have made any commitments or mentioned things like rot without discussing them with him. The cill repair mentioned in the Gladstone invoice was to the panel under the windows. The 2 pack repair was to a rotten frame where the damage was still evident today. Had he taken a bradel to it, the frame would have

revealed rot underneath. He had also applied some new quadrant trim in the main bedroom (to the internal sill on the right hand side) and he believed that further rot would be found underneath it. As to the cost of the works, Gladstone had originally allowed a figure of £650 per flat for decorating and had not tried to estimate for each flat and that would include 2 undercoats and a gloss topcoat. In effect, the £650 per flat had been a pc sum and any further work would be charged for extra on top. When questioned by the Tribunal, Mr Godwin stated that the invoice was for repairs to two uprights of a window frame (30mm) and a repair using 2 pack filler (approx 1 ft long). He had not replaced any section of cill. He accepted that the invoice mentioned preparation for decoration and that such preparatory work had been included in the original tender specification for the works to the estate prepared by Gladstone. However, if one found rotted woodwork, there would be additional preparation and that was what the invoice meant.

15. Mr Ward submitted that it would be grossly unfair for the remaining lessees to add the £138 charge to the general maintenance account for the other 87 lessees to pay. The invoice was paid by the managing agent for work carried out to the respondents' flat. The reference to staining and preparatory work was as mistake in the invoice. The work was to remedy rot in the window frames. 82 out of 88 lessees had replaced their wooden windows with upvc ones because the wooden windows were at the end of their useful life. The applicant painted 3 blocks each year and served s.20 notices on each lessee. No-one had ever objected or even nominated a contractor. The respondents were given every opportunity to have site meeting, and they were given notice of the works, they simply chose not to turn up. The applicant had not neglected things over the years; it had carried out works to a high quality specification. The fact that the respondents' window frames were in poor condition was evidenced by the fact that the windows were screwed shut.

THE RESPONDENTS' CASE

16. The first respondent appeared in person and relied on a statement dated 25 May 2010.

17. Was the sum recoverable under the lease? The respondents first submitted that the works comprising the £138 charge were not his individual responsibility under the lease. The first respondent referred to clause 6.1.1 of the lease, which stated that the landlord must repair the windows, and to paragraph 7 of the Particulars, which stated that the cost of such works should be part of the service charge shared between all the lessees. Secondly, the landlord was not required to carry out works to the windows by clause 6.1.1, and it could therefore not recover the cost through Paragraph 7 of the Particulars and clause 3.2. The reason for this was that the obligation to repair the "external windows" in clause 6.1.1 was an obligation to repair the external windows of the "Buildings". By contrast, the obligation to repair the windows of the demised flat expressly fell on the lessees. Clause 3.5 of the lease required the respondents to repair "The Premises" which included the "windows window fastenings window frames and window sills and glass fitted in such window frames": see paragraph 5 of the Particulars, clause 1.2 and the First Schedule paragraphs S1.1 and S1.7. Thirdly, if the landlord could rely on clauses 3.24 and 3.25, it had a legal and a commonsense obligation to notify the respondents in advance. The landlord had first to tell the lessee and explain what was involved, and the applicant had not done this.

18. Reasonableness. The first respondent called evidence from Mr Nick Alford, a carpenter from Southwick. Mr Alford had not provided a witness statement, but the applicant did not object to his evidence. Mr Alford stated that his experience of Mr Ward (they had met on site the previous week) was that he had very high expectations. He had seen the windows about four weeks before the hearing, and he did not consider that the windows would have been dangerous in 2009. They looked quite sound. Moreover, he had visited the flat before the works were carried out in 2009, and at that time he had not noticed any rot. Had there been anything requiring work to the woodwork, he would have noticed as a carpenter, but he accepted he had not been asked to look at the windows.

19. The first respondent accepted that the sum set out in the Gladstone invoice was not excessive for the work purportedly carried out. However, he submitted that it was

unreasonable to incur the cost of works for three reasons. First, any defects were caused by the landlord's neglect over the years. The applicant was obliged to repair the windows under clause 6.1.1 of the lease. Secondly, he should have been given prior written notice. It was also unreasonable to incur the cost after the landlord had written to say it would not do so. Thirdly, the general condition of the windows was reasonable. Whether he wanted to screw the windows closed was a matter for him. In the end, the landlord was just trying to force the respondents to install upvc window units by its nominated suppliers.

THE TRIBUNAL'S DECISION

20. Was the sum recoverable under the lease? The first way in which this is put is that the landlord can recover the sum of £138 under the ordinary service charge provisions at clause 3.2 and paragraph 7 of the Particulars. The Tribunal considers that there is an insurmountable obstacle to this approach. As stated above, the charge which the landlord seeks to impose in this case is not technically a "service charge" at all, and this is reflected in paragraph 7 of the Particulars to the lease. Even if the landlord is right that it is obliged to repair the window under clause 6.1.1 of the lease (and there are plainly arguments to the contrary), such a cost does not give the landlord the right to recover the entirety of the cost from the lessees. Paragraph 7 of the Particulars permit the landlord to recover from the respondents "one eighty eighth part" of the expenses incurred in complying with clause 6.1.1 and not 100% of those costs. The maximum liability of the respondents under clause 3.2 of the lease was therefore £1.57 – but the applicant quite sensibly did not advance an alternative case that the Tribunal should determine that such a trivial figure was payable.

21. The more likely route to impose individual liability for an administration charge is under clauses 3.24 and 3.25 of the lease (provisions which are sometimes called a "Jervis v Harris clause" after the commercial case of ***Jervis v Harris*** [1996] Ch 195). The respondents concede (indeed, they advance the argument) that they are liable to repair the windows to the flat under clause 3.5 and the First Schedule. If they have failed to do this, a landlord may rely on such a breach in any notice under clause 3.24.3. Failure to comply with the notice under clause 3.25 then entitles the applicant

to execute works in default and the respondents are then liable to pay all the costs of the works (including legal and surveyor's costs) rather than those costs being added to the service charge payable by all the lessees on the estate. However, the Tribunal finds that the landlord's obligation to first "give a notice specifying any repairs" in clause 3.24.3 is a condition precedent to the right to recover the cost of those repairs. The respondents' submission that this is both a legal and a commonsense requirement is a sound one. The potential consequences of clause 3.24.3 are such that the parties must have intended the landlord to first serve notice. Indeed, Mr Ward did not really dispute this.

22. This issue therefore mainly turns on whether the landlord gave notice specifying the works which were eventually carried out. Those works appear in the invoice from Gladstone dated 9 June 2009, which essentially refers to minor patch repairs and preparation for decoration of the frames and cills. Five letters are relied on as "notice" under clause 3.24.3. The letter of 20 August 2004 "urged" the respondents "to replace your windows during this contract making use of the scaffolding required". The letter of 10 April 2005 asked whether the relevant lessees were interested in replacing the windows with upvc , the letter of 31 July 2006 "strongly" recommended replacement. It went on to say that "should you not have your windows replaced, then the Board reserve the right not to spend any further moneys on them when the next decoration takes place in 2009." The letter of 15 September 2008 again urged relevant lessees to replace the window units and stated "I would remind you that the contractor will not paint rotten wood and that any repairs to the window frames or their hinges remain your responsibility". The letter of 27 November 2008 stated that "I am writing to remind you that these windows will not be painted during the exterior redecorations of blocks 6, 7 and 8 next spring. You must either replace the windows or arrange for them to be painted."

23. The Tribunal has no hesitation in finding that none of these letters amounts to a notice "specifying" the breaches or requesting the respondents to execute the works. The respondents were repeatedly required to replace the window units rather than repair them. Moreover, on three occasions the landlord specifically stated that it

would not carry out any works in default. In these circumstances the applicant cannot recover the cost of the works under clause 3.24.3 and 3.25 of the lease. Furthermore, there is no evidence that the windows did require replacement. The relatively minor nature of the patch repairs which were carried out suggests that the windows did not require replacement with upvc ones and this was confirmed on inspection. Replacement may have been understandable from a maintenance point of view, but this did not mean the lessees were in breach of a repairing covenant for failing to replace wooden window units which could be mended with minor patch repairs.

24. Whether the landlord can recover £138 as damages for breach of the tenant's repairing covenant is not a matter for this Tribunal. Insofar as that sum is an administration charge within the meaning of Schedule 11 to the 2002 Act, we determine that it is not payable under the terms of the lease.

25. Reasonableness. The finding above means that it is not strictly necessary to determine the reasonableness of the administration charge. However, in case the matter proceeds further, the Tribunal must determines whether the charge was reasonable under paragraph 2 of Schedule 11 to the 2002 Act. It was accepted that the sum of £138 is not excessive for the work carried out, and the cost was not challenged by either the first respondent or his witness.

26. Dealing with the first submission made by the respondents, it appears that the lease provides for both parties to repair the windows (the obligation on the landlord is under clause 6.1.1 and the obligation on the lessee is as set out above). Unsatisfactory though this may be, any defects in the windows which arose over time would be at least in part the fault of the lessee. More significantly, there was no evidence of significant long-term neglect over the years. The inspection suggests that the estate has been maintained to a very high standard over the years, an observation supported to some extent by Mr Alford's comments about Mr Ward's expectations. The Tribunal does not consider it is unreasonable to incur the charge on this ground.

27. As far as the respondents' third submission is concerned, the windows were not generally in a seriously bad condition. However, the Tribunal finds as a fact that the windows required some work in 2009 and we prefer the evidence of Mr Godwin on this point to that of Mr Alford (who was not asked to look at the windows in 2009). This is also consistent with the Tribunal's inspection, which suggested some historic rot to the window frames. The screwing shut of the window frames is not determinative either way, since this appears to have been a security measure – whether necessary or not. Again, the charge is not unreasonable on this ground.

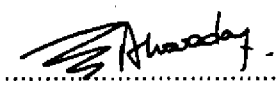
28. However, the respondents' second submission has more substance. The Tribunal accepts that lack of actual notice by the landlord does not necessarily render an administration charge unreasonable. The reasonableness of the landlord's actions will depend on the nature and amount of the charge involved. It would not be unreasonable to make a charge of £1 without any prior warning, whereas, a charge of £1,000 could seldom be made without giving express written notice. In this case, we accept that efforts were made to meet the respondents while Mr Godwin was on site. It appears that these efforts failed, and the person on site (Craig) was too junior to enter into discussions about the works. However, given the sums involved, and the fact that previously the landlord had written on three occasions to suggest that no works were to be carried out to no.41, it was incumbent on the landlord to give some notice that it would proposing to incur a cost of £138, and to invite the respondents' comments. Indeed, Mr Godwin suggested that the windows had been left exposed for some weeks so there was little urgency. A simple letter to the respondents would have sufficed, but the applicant never wrote such a letter. The landlord appears to have dropped its earlier requirement to replace the upvc windows, and it was satisfied that patch repairs would suffice,. However, this was not communicated to the lessee. The Tribunal does not therefore consider that the charge was reasonable on this basis.

29. Under paragraph 2 of Schedule 11, an administration charge is payable "only to the extent" that the amount of the charge is reasonable. The Tribunal does not consider that any part of the charge is reasonable.

CONCLUSIONS

30. The administration charge of £138 is not recoverable under the terms of the lease.

31. No part of the charge is "reasonable" within the meaning of paragraph 2 of Schedule 11 to the Commonhold and Leasehold, Reform Act 2002.



Mark Loveday BA(Hons) MCIArb
Chairman
7 July 2010