HM Courts & Tribunals Service

Leasehold Valuation Tribunal
Case Number: CAM/00MD/LSC/2013/0002

Property	:	**1-11 Duncansby House, Stratfield Road, Slough, Berks SL1 1UD**
Applicant	:	**Catalyst Housing Limited**
Respondent	:	**(1) Dolores Frances Dear (also Delores Frances Goodey) (2) Reann Camacho (3) Mark Clive Bailey (4) Rozalind Alexandra Jones (5) Anthony Bryan Salkey**
Date of Application	:	**21st December 2012**
Type of Application	:	**Application for a determination of liability to pay a service charge, pursuant to section 27A of the Landlord and Tenant Act 1985 ("1985 Act")**
Dates of Hearings	:	**22nd April and 30th May 2013**

Tribunal:

Mrs. J. Oxlade	**Lawyer Chairman**
Mr. D. Banfield FRICS	**Valuer Member**
Mr. P. Tunley	**Non-Legal Member**

Attendees:

Applicant	*Respondents*
Mr. J. Browne, Counsel for Applicant	**none**
Mr. S. Chapman, Housing Manager for Applicant	
Mr. J. Cowan, Surveyor	
Ms. D. Ibrahim, Observer	
Ms. M. Hanrahan, Observer	
Ms. S. Bedi, Observer	

DECISION

For the following reasons, the Tribunal finds that the estimated costs which the Applicant proposes to incur in the service charge year 2013/14 for works detailed in the notice of estimates to carry out works dated 22nd August 2012 are reasonable and payable, subject to the limitations arising (a) from the Tribunals interpretation of the terms of the leases as set out in paragraph 42 to 45 herein and (b) as provided in paragraph 46 to 50 inclusive herein

REASONS FOR DECISION

Background

1. The Applicant is the freeholder of the premises consisting of 11 flats, of which flats 1 to 5 inclusive are in private ownership (on a shared equity basis) under long leases to the Respondents, and flats 6 to 11 inclusive are let to social tenants as assured tenants.

2. The Applicant intended to do works to the exterior and common parts, and so pursuant to section 20 of the 1985 Act, as amended, served notices of intention on the lessees of flats 1 to 5 in notices dated 30th May 2012. The notice said that cyclical external decorations were necessary, together with the following works:

   (a) to carry out roof repairs,
   (b) to attend to all gutters and rainwater pipes,
   (c) brickwork repairs and cleaning,
   (d) decorate previously painted surfaces,
   (e) repairs and decorations to timber double glazed units,
   (f) decoration of communal areas,
   (g) to attend to boundaries/fences and landscapes.

3. The lessee of flat 1 ("the First Respondent") responded with observations dated 5th June 2012. She took issue with the period of time allowed within which to make representations – 40 days instead of 30 days – and said that the lessees had not been told (i) why the works were necessary, (ii) what work was to be done, (iii) whether the works were of repair or improvement, and (iv) whether the works were covered by warranty (the building being only 7 years old). The lessee went through the works listed in the notice (and referred to above as 2(a) to (g)) and made comments, which can be summarised as the

lessee saying that as there was nothing which could be seen from a visual inspection suggesting that works were needed. The lessee considered that insufficient detail and insufficient justification had been given to enable the lessees to obtain quotes. The lessee said that in the absence of a response she would not hesitate to apply to the LVT.

4. On 22nd August 2013 the Applicant issued to the Respondents notices of estimates to carry out work, saying that four contractors had provided estimates ranging from £33,349.80 to £61,558.20 including VAT, and responding in detail to the observations referred to in paragraph 3, as follows:

(a) the Applicant was seeking to be helpful in giving 40 days, not 30, but in doing so had not breached the statutory requirements – as more time, rather than less, had been given,
(b) the Applicant was not obliged in the first notice to say how long the contract would last, but it would be approximately 10 weeks,
(c) the works were needed, as work was needed regularly to keep a building well maintained,
(d) the Applicant agreed that from ground level there was no evidence that roof repairs were needed, but once scaffolding was up this would be checked; a provisional sum would be included in the contract in case works were necessary,
(e) the Applicant agreed that from ground level there was no evidence of problems with the gutters, hoppers, and down pipes, but these would be checked and overhauled, jointing would take place and any missing brackets would be replaced,
(f) (i) there was evidence of defective pointing: a small amount to the main structure, a small amount to the front elevation which projects above the roof line, and a large amount to the front boundary wall on the side elevation facing the main road (ii) several courses of brick at the top appear to be leaning towards the roof. This would be inspected and a provisional sum allowed in the contract for the works,
(g) there is staining on most elevations from rainwater and pollution, which are in need of decoration, and some efflorescence staining on the brick boundary walls,
(h) walls would be washed down preparatory to cleaning, which are not part of the general cleaning of the common parts,
(i) the Applicant dealt with the remaining point about railings and landscaping.

5. By letter dated 3rd September 2012 the First Respondent said that as yet there was no evidence to show that the repairs were needed and she was concerned that the Applicant had not explained why the work was not covered within general maintenance, insurance or under warranty.

6. Further, the First Respondent was concerned to note that works which were proposed to the adjoining building containing flats 6 to 11, were

being included as part of the works to the building containing flats 1 to 5. She asked for disclosure of the following documentation, on the basis that she considered that the matter would go to Tribunal; namely, a surveyor's report indicating the need for repairs, copies of estimates, insurance policies, and warranties. She wanted to know why it was that the Respondents were to be made responsible for the building containing the Applicants' flats 6-11. In a letter dated 28th September 2012 further questions were asked of the Applicant.

7. The Applicant and First Respondent continued to correspond on these points by letters dated 17th and 31st October, 10th December by the Applicant and 19th November on the First Respondent's part.

8. The correspondence reveals that the First Respondent challenged (a) the Applicant's claim that the Respondents were responsible for discharging service charges incurred in maintaining the building in which flats 6-11 were located, (b) that the proposed works were necessary, in the absence of evidence that this was so; her position was to rely on the age of the building, the assumption of the existence of warranties, and the absence of visual evidence.

9. When pressed, the First Respondent declined to confirm that she was content with the arrangements, and though repeatedly referred to the possibility of an application being made to the LVT, did not do so.

Application

10. Accordingly, on 21st December 2012 the Applicant made an application pursuant to section 27A(3) of the 1985 Act for a finding that if costs were to be incurred in respect of these works and then charged to the Respondents by way of service charge in the service charge year 2013/14, that they would be reasonable and payable.

11. Directions were made on 17th January 2013, for the filing of evidence, noting that:

"these proceedings are not a replacement or substitution for the statutory consultation procedure, but they enable the Housing Association to have a clearer idea of what works the Tribunal will find to be reasonable, necessary and recoverable under the terms of the lease.

The following Directions are made with a view to enabling the Tribunal to have a clear idea of what is planned, what process has been followed so far, and what the costs are. It is an opportunity for the Respondent to ventilate issues or concerns about the works and the costs".

12. The Applicant complied with the Directions, but the Respondents did not, and the Respondents played no part in the proceedings. The

Directions invited the Applicant to file any available condition survey which details the works to be done, but none was filed.

13. The application was listed for hearing on 22nd April 2013 in preparation for which a bundle was filed with the Tribunal.

Inspection

14. Prior to the hearing on 22nd April 2013 the Tribunal inspected the premises in the company of Mr. Browne, Mr. Chapman, and several other observers from the Applicants.

15. The Tribunal noted the configuration and layout of the premises, ground conditions and access, and specifically noted the following:

- flats 1-5 are located in a four storey building, with flat 5 being positioned over flat 8,
- the ground conditions were variable, and access for workmen affected by a boundary wall on the Wexham Road side, and glass canopy entrances to flats 1-5 and 6-11 on the Stratfield Road side,
- the pointing of the parapet wall on the Wexham road side and at 2nd/3rd floor level appeared to poor,
- there was damp penetration to the lintel above the entrance to flats 1-5,
- the render to each surface was grubby,
- the railings outside flats 1-5 were in poor decorative repair,
- the damaged railings outside flats 6-11.

Hearing 22nd April 2013

16. At the hearing on 22nd April 2013 Mr. Browne said in opening that the Applicant had taken a prudent approach, by making the application in light of the points made by the First Respondent. As to the sharing of costs, the proposal would be 5/11th by the Respondents and 6/11th by the Applicant, so an even split based on the number of flats in the building. This split would not be detrimental to the Respondents, as most of the works were needed in the part of the building in which flats 1-5 were located, and flats 1-5 were larger than flats 6-11. It was acknowledged that the Tribunal's function at this hearing was not to determine the propriety of the section 20 procedure.

17. Mr. Chapman attended to give oral evidence. It was apparent from his witness statement dated 3rd April 2013 and oral evidence that he was not a witness who could comment on the necessity of works, the details of the works, or the possible alternatives to the work and the means of access. This was because the Applicant had relied on the expertise of Mr. John Cowan of Consul Chartered Surveyors.

18. Accordingly, the application was adjourned for the Applicant to consider its position. The Applicant elected to proceed with the application and the evidence of Mr. Cowan. A date was set with expedition as the Tribunal was told that the contractor who had been selected as the most competitive quote would hold his prices if the "go ahead" was given by the end of June 2013.

Hearing 30th May 2013

19. The Tribunal resumed the hearing at 10am on 30th May 2013, by which time the evidence bundle had been supplemented with the report of Mr. Cowan dated May 2013. A further inspection by the Tribunal was not considered necessary by either the Tribunal or the Applicant, although the surveyor member attended early on the morning of the hearing to clarify one point in light of the photographs in Mr. Cowan's report, which in the end did not prove material.

Mr. Cowan's evidence

20. He had undertaken a survey of this and a number of other properties of the landlord in relation to a sinking fund calculation. He prepared the specification of works in 2012. Since the earlier LVT hearing he had visited the property again and prepared a report dated May 2013 with a number of recently taken photographs.

21. Mr. Cowan commented on specific items:

- there is dampness in the render on the Stratfield Road side of the building, which may be because (unlike the four-storey part) there is no overhang on the three-storey side part of the building — nor coping or throat to stop the staining,
- the pale blue render to the Wexham Road side of the building was particularly badly stained by traffic pollution,
- there is no need to do anything with the metal cladding,
- the wooden doors referred to in the specification are in the bin areas, which is mainly treated timber, and so there is a provisional sum for this.

22. When considering the question of scaffolding or other means of access, a moveable tower was not feasible, as the levels change on the site, the access areas are narrowing, and it would limit how many people could work on site at any one time. A cherry picker would be more expensive, and they would need a pavement licence and a banksman. They had to think about the safety of residents and workers too. Double-boarded scaffolding was the best option, and there was no realistic alternative. Health and Safety was the most important consideration. Any suggestion that a pole and roller could be used to re-paint the render was devoid of commonsense, and made by someone used to watching t.v. and treating the industry with no respect.

23. In answer to questions posed by the Tribunal Mr. Cowan answered questions about the following:

Render – damp staining

He said that the damp staining of the render shown in photograph A (annotated "front elevation: Stratfield Road) could be caused by inadequate overhang, but to be sure he would need to get up and have a look at it. There was no problem with damp staining on the four-storey section, where there was an overhang. They would wait until they got up to have a look and to see when it dries out, but they may need to hack this off, and there was a provisional figure for this. It did not warrant erection of a tower at pre-contract stage to establish what were the problems; all it needed was the erection of scaffolding to pick up the details, and then to get on with it. He rejected as unlikely the possibility that this could give rise to substantial costs.

Render – decoration

The render needed decoration because it is dirty from the continuous traffic, which affects the whole render. The worst side is shown in photograph B (annotated "Wexham side"). The render is self-coloured, but his view was that it was a good idea to paint it, as this would be good for two decorating cycles. The manufacturer talks of 5 years, but they thought it will be good for 7. The paint should repel the dirt – this is what he has been told. He agreed that whoever thought it was a good idea must have thought that the render in this location would work, but it is not a natural product for this country. When asked to be clear why painting the render (which would then be liable to being re-painted thereafter) would be preferable to cleaning he said that is because they were advised that it should repel pollution, and so dirt will not sink in; if the alternative was cleaning, then this could be patchy (although they could do a test). He would not know if the dirt was penetrating the render until they got up and had a look, and by jet washing a few panels. There was visual evidence of problems, but because of the non-traditional build they would not know the problems until they started.

Failed Detail around Projections

Mr. Cowan had not noted in his report that there was any failed detail about the protections at 2nd/3rd floor levels.

Brick upstand over Four-storey part

There is poor brickwork which stands above the four-storey building; there are no copingstones, and poor detailing; they would only assess the extent of the problem and the remedy when the scaffolding goes up. They have a provision of £3500 for the roof and a 10%

contingency, which should cover it. That should cover all unseens – they had made a judgement call, and it should cover it.

Staining/Dampness to Entrances

He had not allowed for remedying the staining/dampness to entrances, which could come out of the contingency funds. They would normally put this as a provisional, but have not done so on this occasion. There was nothing in the tender document about how this might be dealt with, and it must just have been missed.

Dampness from Skylight

He conceded that there may be damp coming from the skylight outside the entrance doors to flats 4 and 5, which was not allowed for and this could be an ill-fitting skylight or problems with he roof. Again, they had a provisional sum of £5000 for that.

24. As to accessing the roof pre-contract to assess problems, by making use of a tower, he did not consider that it was necessary as the age of the building suggests that they should trust the roof. In any event they have a provisional in there if there is any expensive-type roof work needed. They would definitely need scaffolding if there was a need to adjust the inadequate detail on the three-story building. They would want full scaffolding whether the render was cleaned or re-painted. As for stitching of brickwork a cherry picker could be used for a single location. They could use a three meter tower, but he would prefer to leave it to the contractor, who have more expertise in temporary works.

25. As to managing the project, this would be done by the Applicant. Mr. Cowan would also be involved. Although a Catalyst logo appeared on Mr. Cowan's report, this was because people are logo-mad these days; there is no partnership between Consul and Catalyst. Consul works with other Housing Associations (QS and CDM) as well as Catalyst, on projects and partners on maintenance of non-leasehold premises.

26. In re-examination, Mr. Cowan said that he did not put a tower up to inspect, as they would need to put scaffolding up anyway. He did not know what a temporary tower would cost to erect for inspection purposes; he could not use the costs of £7500 for the whole building as a basis for working out the costs of the tower. He did not know what the costs would be in respect of the roof – they may need to get specialists involved which would not be as cheap as we might think.

Mr. Chapman's Evidence

27. Mr. Chapman outlined the management of the project. The Applicant's expectation is that they will rely on the expertise of Consul Chartered Surveyors to oversee what the contractor will do, and that the work will be done in accordance with the specification. Catalyst would expect

Consul to inspect once the scaffolding is in place; so the contractor would not just find problems and deal with them without Consul's say so; there would be a limit set on what could be spent so that costs would not spiral out of control. If costs were escalating they would need to make safe, look again and then go off to talk to the residents. They would not just press ahead. There is always a risk of things being uncovered in the process and it would be incumbent on Catalyst to re-engage with the lessees. If more extensive works were needed then they would need to go to tender. In view of the age of the building they had set a contingency and would not go over that. If Mr Cowan hears from the contractor that something needs doing then there will be liaison. If it is a small amount of money, then he would be expected to use his commonsense. Scaffolding would make it easy to look at the roof, which a tower would not necessarily bring.

28. It is the Applicant's intention of adding the costs of the proceedings to the service charge account, as the First Respondent had communicated her objections and so they thought that the matter should be clarified.

29. Mr. Chapman confirmed that there was no head lease.

Closing Submissions

30. Mr. Browne made submissions on the terms of the lease, and costs.

Interpretation of the Lease

31. The Applicant's position was that the building consisted of flats 1 to 11, so the flats in private ownership and those owned by the Applicant would contribute equally though service charges to all of the costs arising from the Applicant's discharge of its functions in respect of the whole of the building.

32. This arose from the terms of the lease, which should be read in light of the configuration of the flats. The configuration was an important factor, as flats 4 and 5 are located on the top floor of the four storey part of the building, and flat 5 sits over flat 10. If the leases were interpreted otherwise with flats 1-5 being the building then only flats 1-5 would be responsible for the roof which covered flats 4 and 5, yet flats 6, 8, and 10 would benefited from it, but would pay nothing. Conversely, flats 6-11 would be responsible for the foundations for the part of the block supporting flat 5, but 5 would not be making a contribution to it.

33. Mr. Browne turned to the terms of the lease for flat 1 ("the premises") which was identical to the leases of flats 1-5 in the building (save for the description of the demise of the premises). The building is defined as "the block of flats situate upon the property comprising flats numbers 1-5 Duncansby House, Stratfield Road, Slough as shown on the plan attached". The plan did not help as it was not delineated at all.

The "property" was all that land on the East side of Stratfield Road, Slough. The common parts were defined by Clause 1(2)(b) as "entrance entry phone ..... other part of the building and patio.... Access areas ... parking spaces within the property which are intended to be or are capable of being enjoyed or used by the occupiers of the building". The obligation was to pay a contribution to service charges and the landlord was obliged by Clause 5(3)(a) to maintain repair redecorate and renew the roof and foundations and the main structure of the building. Mr. Browne emphasised that the only way the landlord could discharge this obligation was to maintain the foundation of the whole building of 1-11, not 1-5.

34. Mr. Browne's submission was that the configuration of flats 1-5 meant that it could not be divided vertically from 6-11, and so the landlord could not meet its obligations to insure and maintain in any sensible fashion unless the building was to include flats 1-11.

35. The Tribunal asked what the significance was to the definition of each of flats 1-5 having responsibility for 20% of the costs as their specified service charge provision – which would on Mr. Browne's reading would be 9.09%. Mr. Browne said that the lease says what totality of works proposed can be applied to these five flats.

Costs

36. The Applicant should add its costs to the service charge account, as the First Respondent made clear repeatedly that she would not agree with the Applicant's position, despite the explanations given. The correspondence is littered with references to an application being made to the LVT, so the Applicant had little alternative. Mr. Browne said that he could not resist an argument that the costs of the first hearing could not be added to the service charge account, in view of the reasons for aborting the first hearing.

37. At the end of the hearing the Tribunal's determination was reserved.

Post-hearing Correspondence

38. The Tribunal asked the Applicant to clarify the status of a lease which had been filed with the application, dated 27th May 2005, between Ealing Family Housing Association and Keystart Housing Association in respect of Flats 1-5 Duncansby House. This appeared to be significant as whilst the "building" was defined as the block of flats comprising flats numbers 1-11, it defined "the premises" as flat numbers 1 to 5 and car parking subject to the definition in the First Schedule. The leaseholder (Keystart) was to insure the premises (i.e. flats 1-5) on a reinstatement basis (clause 3(3)) and repair, maintain and if necessary rebuild (clause 3(4)(a)-(b)).

39. By letter dated 13th June 2013 the Applicant's Solicitor said that Ealing and Keystart merged shortly after this lease dated 27th May 2005 was created, and the merged company is now incorporated within Catalyst Housing Limited. Mr. Chapman had therefore correctly stated that there was no head lease. However, the letter did not go onto address how the definition of premises in this lease sat with Mr. Browne's interpretation of the leases of flats 1-5.

Jurisdiction

40. The jurisdiction of the Tribunal is set out in section 27A(3) of the 1985 which provides that:

"An application may also be made to a leasehold valuation 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 it would as to:

(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

Discussion

41. It is expedient to interpret the lease, before moving onto assess whether - if costs are incurred as service charges - they would be payable.

Terms of the Lease

42. For the following reasons the Tribunal is satisfied that the building for which the lessees of flats 1-5 are liable to pay a service charge consists of flats 1-5; not flats 1-11.

43. The lease requires the lessees to make a contribution to the costs incurred in maintaining the building, paying insurance etc. The "building" is defined as "the block of flats situate upon the property comprising flat numbers 1-5 Duncansby House, Stratfield Road". The interpretation argued for by the Applicant would logically require the particulars to define the building as flat numbers 1-11, but it does not do so. Further, the service charge portion is said to be 20% for each flat 1-5, which together would provide 100% of the costs used to maintain flats 1-5 . The interpretation argued for by the Applicant would logically require the particulars to define the service charge portion as 9.09%.

44. The arguments advanced by the Applicant were that the wording of the lease must be overridden (i) as the building cannot be vertically divided using a straight line and (ii) it cannot be right for flats 1-5 to be responsible for the roof which offers indirect shelter to flats 6, 8, and 10, in the same way that it cannot be right for flats 6-11 to be responsible for the foundations which give indirect support for flat 5. The Tribunal does not accept these arguments as persuasive to override the clear terms of the lease. There is no requirement for there to be a straight vertical division; indeed it is not uncommon for buildings to be divided up in all sorts of ways. A case in point is the terms of the lease referred to at paragraph 37, which does indeed create discrete obligations for flats 1-5, in which it is treated as an identifiable unit in isolation to flats 6-11.

45. Accordingly, the Tribunal rejects the Applicant's interpretation of the lease.

Reasonableness of Service Charge costs

Limited by the definition of "building"

46. The Tribunal's interpretation of the Respondents' liability for payment of service charges being limited to expenditure in respect of flats 1-5, has implications for what is recoverable from them. Several obvious examples can be given:

> - there is damp staining to the render on the Stratfield Road side, and Mr. Cowen's opinion was that the lack of overhang on the three-storey part of the building, could be the cause - which would be investiaged when scaffolding is erected. In light of the interpretation of "building" the lessees of flats 1-5 would not be responsible for meeting the costs of any works associated with this item,
> - the specification of works provide for the replacement of damaged railings, but as these form part of the boundary of flats 6-11, the lessees of flats 1-5 would not be responsible for meeting the costs of any works associated with this.

47. In light of this interpretation, the Tribunal considers it inevitable that the Applicant will consider which works to proceed with and what can be recovered from the Respondents. At this stage it appears that the only works which have been identified as recoverable from the Respondents, would be as follows:

(a) works to the parapet wall at the rear of the building, on Wexham Road,
(b) cleaning a modest amount of render at the rear and front of the building,
(c) pointing to the main building and the boundary wall,
(d) repainting the internal face of the boundary wall,

(e) attending to the damp lintel over the entrance way to flats 1-5,
(f) repainting the railings outside flats 1-5.

Limited by Uncertainty over extent of works

48. The Applicant has provided copies of the preferred tender, in which a few of the individual items provided at 47(a) to (f) have been costed. In general, the Tribunal considers these costs are reasonable, save in respect of proposed painting of the render (which is considered below in paragraph 49.). However, most of the costs are provisional or estimated, being dependant on the identifying exactly what works are necessary once scaffolding has been erected to facilitate a thorough examination. Inevitably the Applicant will need to establish what the problems are, how they can be remedied and at what cost. Inevitably at this stage these costs cannot be otherwise that estimated sums, none of which are unreasonable as estimated sums.

Treatment of the Render

49. There is render to some parts of the building, which is self-coloured. The Applicant proposes to paint over this to (a) provide a clean finish and (b) repel future dirt and pollution. This option was chosen over cleaning the existing render. The Tribunal does not find that costs would be reasonably incurred if the Applicant proceeds to paint the render. The render contains pigment, and the very point of the product is to avoid the need to paint it. Although it was said that in the long run painting this would cost less than cleaning, no costings were made available to the Tribunal; further, the evidence that re-painting would repell the dirt was vague and not well-sourced.

Scaffolding

50. The Tribunal considers that the Applicant will need to erect scaffolding to be able to attend to works identified in 47(a), (b), and possibly (c) and (e) to that part of the building known as flats 1-5. The Tribunal estimates that the building comprising flats 1-5 will be liable for 50% of the costs of scaffolding quoted at £7,500.

Summary

51. It will be apparent from the above, that subject to the limitations specified herein, the Tribunal finds that the estimated costs incurred in respect of items identified as necessary at paragraph 47(a) to (f) and 50 of this decision are reasonable and payable.

Costs

52. The Applicant expressed an intention to add costs to the service charge account (save in respect of the first hearing). The Tribunal has not received from the Respondents an application made under section

20C of the 1985 Act, and until received cannot proceed to consider making any Order in respect of costs.

.....

Joanne Oxlade
(Chairman)

26th June 2013