

11449



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **CHI/29UQ/LSC/2015/0015**

Property : **8-18 Smarden Place, Maidstone
Road, Paddock Wood, Kent TN12 6BT**

Applicant : **Southern Land Securities Limited**

Representative : **Mr O Hinds, Solicitor**

Respondents : **Mr Stuart Tully
Eastway Estates Limited
Mr G and Mrs M Hendrick
Mr M Riley
Mr A McKinnon
Mr P and Mrs L Rodda**

Representative : **Miss Harriet Holmes, Counsel**

Type of Application : **Determination of service charges –
section 27(A) Landlord and Tenant
Act 1985 (“the Act”)**

Tribunal Members : **Judge E Morrison
Mr A O Mackay FRICS**

**Date and venue of
Hearing** : **8 July 2015 at Tunbridge Wells
County Court**

Date of decision : **16 July 2015**

DECISION

The Applications

1. Under the application dated 23 February 2015 the Applicant lessor applied under section 27A of the Act for a determination of the Respondent lessees' liability to pay a proposed service charge of £112,820.40 in respect of major works.
2. At the conclusion of the hearing the Respondents made an application under section 20C of the Act that the Applicant's costs of these proceedings should not be recoverable through future service charges.

Summary of Decision

3. If a demand is made in compliance with the leases for the sum of £112,820.40, being the estimated cost of proposed major works, this will be payable by the Respondents in the proportions specified in their leases
4. An order is made under section 20C of the Act with respect to all costs of these proceedings other than the application fee and the fee of the Applicant's solicitor for attendance at the hearing.

The Leases

5. The bundle prepared by the Applicant did not include a sample lease for the correct properties. At the hearing copy leases for Flats 16 and 18 were produced but no-one could confirm whether the leases for all six flats were in the same form. Accordingly it was not until the Applicant had provided the Tribunal with further copy leases after the hearing that the position could be verified. It transpired that while the leases for Flats 12, 16 and 18 were in similar form, those for Flats 8, 10, and 14, prepared at a later date, were in a different form although similar to each other.
6. The relevant provisions in the leases of Flats 12, 16 and 18 may be summarised as follows:
 - (a) Each lessee covenants to pay is liable to pay a specified percentage of a service charge (referred to in the lease as the "maintenance contribution");
 - (b) During the first quarter of each service charge year, which runs 1 January - 31 December, the lessor is to prepare a budget of projected expenditure, and on account payments calculated by reference to the budget are payable on 31 March and 30 September;
 - (c) The lessor is responsible, amongst other things, for maintenance of "the main structure of 10-18 Smarden Place and in particular the external walls roof chimney stacks gutters and rainwater

- pipes of the building” and for decoration of the exterior, and the cost of this is recoverable through the service charge;
- (d) The service charge may also cover “all other reasonable expenses (if any) incurred by the lessor in and about the maintenance and proper and convenient management and running of the property in accordance with the lessors covenants ...” and “the fees and disbursements paid by the lessor to any managing agents...”.
7. The relevant provisions in the leases of Flats 8,10 and 14 are as follows:
- (a) Each lessee covenants to pay is liable to pay a specified percentage of a service charge;
 - (b) On account payments are to be made on 31 March and 30 September in such sum as “the Auditors or the Managing Agents of the Lessor shall specify at their discretion to be a fair and reasonable payment”;
 - (c) The Lessor is responsible, amongst other things, for maintenance of “the main structure of the building including the foundations the roof thereof all gutters and rainwater pipes and all boundary walls and fences” and for external redecoration;
 - (d) The service charge may also cover costs reasonably and properly expended by the lessor in carrying out its maintenance and repairing obligations, and the “costs of administration professional and management fees...”.
 - (e) There a supplemental Deed with respect to Flat 8 which gives retrospective consent to the lessee’s replacement of the windows but confirms that the lessee of Flat 8 will nonetheless remain liable to contribute to the cost of external window redecoration.

The Inspection

8. The Tribunal inspected the subject property on the morning of the hearing, accompanied by Mr Fitch of the Applicant’s managing agents Hamilton King, Mr Tully, Mr Rodda and Mrs Hendrick. Smarden Place is an 19th century three-storey building of traditional construction. The external walls are solid masonry and the pitched roof, which has three distinct sections at right-angles to each other, is clad with interlocking concrete tiles. There are several chimney stacks with pots, most of which are uncapped. Most of the windows are traditional timber sash.
9. The building comprises six flats nos. 8-18 (even), two on each of storey. (A more modern addition to the side of the building houses Flat 18A, which is not part of this application). Flats 8 and 10 have their own ground floor entrances. The upper flats are accessed by a wide concrete partly-external stairway.
10. The Tribunal viewed the exterior of the property from ground level, and also viewed the interior of Flats 8, 10, 12 and 16. It was clear that areas of external brickwork required repair and that external repair and

re-decoration of windows, doors, cills etc. was overdue. Inside Flats 10, 12 and 16 there was clear evidence of damp.

The Law and Jurisdiction

11. The tribunal has power under section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when a service charge is payable. Section 27(A)(3) specifically provides that the tribunal may make a determination as to payability in respect of costs that have not yet been incurred.
12. By section 19 of the Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard. Where a service charge is payable before the costs are incurred, no greater amount than is reasonable is payable.
13. Section 20 of the Act and Regulations thereunder provide that where costs of more than £250.00 per lessee have been incurred on qualifying works or more than £100.00 per lessee under a qualifying long term agreement, the relevant contributions of tenants) will be limited to those sums unless the consultation requirements have been either complied with or dispensed with by the determination of a Tribunal.
14. Under section 20C a tenant may apply for an order that all or any of the costs incurred by a landlord in connection with proceedings before a tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

Procedural Background

15. Directions were issued on 17 March 2015 which provided for the parties to provide full statements of case, with any supporting witness statements. There was no permission for expert evidence, although the parties could apply for permission if they wished.

Representation and Evidence at the Hearing

16. The Applicant provided an unsigned statement of case with supporting documentation. There were no witness statements. At the hearing the Applicant was represented by Mr O Hinds, a solicitor who did not appear to have had any earlier involvement in the case. Mr Fitch, a member of the managing agents Hamilton King's surveying department, also attended. Although he had not provided a witness

statement, he was asked questions by the Tribunal in an attempt to clarify certain matters.

17. The Respondents also provided a joint unsigned statement of case, with supporting documentation, and again there were no supporting witness statements. Subsequently a very similar statement of case was submitted by solicitors acting for the lessees of Flat 18. The lessees were represented at the hearing by counsel, Miss Holmes. Mrs Hendrick and Mr Tully were permitted to give oral evidence, notwithstanding the lack of prior witness statements.
18. At the hearing Miss Holmes requested permission to call Mr D Cooper, a surveyor, to give oral evidence as an expert witness. Mr Cooper, instructed by the lessees, had carried out an inspection and prepared a report on dampness in January 2014. It was suggested that as he had firsthand knowledge and was the only person who had ever been into the roof void he would be able to assist the Tribunal. Mr Hinds opposed the request, stating that there had been no prior notice and the request was too late. The Tribunal refused permission to call Mr Cooper, agreeing with the points made by Mr Hinds, and noting the provisions of Rule 19 of the Tribunal Procedure Rules 2013 (SI 1169 of 2013). To allow Mr Cooper to give an expert opinion regarding the scope and price of the proposed works, without any like opportunity for the Applicant, would have been unfair. (It may be added that had an earlier reasoned application for permission to adduce expert evidence been made by either party, it is likely that both sides would have been given such permission. Expert evidence would have been of assistance. As it is, the Tribunal has had to do its best on the evidence available).

Matters not in dispute

19. The Applicant accepted that the Tribunal could not determine at this stage that any specific fixed sum was the recoverable cost of the proposed major works. It was simply asking the Tribunal to sanction the payability of a demand or demands for the estimated cost of £112,820.40. The actual cost would not be known until the works were carried out.
20. The Respondents accepted that the proposed works fell within the scope of the lessor's repairing covenants and therefore the cost (if otherwise reasonable) was potentially recoverable under the service charge provisions in the leases.
21. The documentation contained the bundle reveals the following undisputed sequence of events leading up to this application.
 - October 2012 - Following lessee complaints, the Applicant's managing agents Hamilton King instruct Lewis Berkeley surveyors to investigate and report. Surveyor inspects exterior from ground level, and the

interior of Flats 14, 16 and 18, and recommends further investigation and remedial work.

- November 2012 – Hamilton King issue two first stage section 20 notices for high level repairs, and external repair/decoration. Lessees of all but Flat 10 respond and state that exterior repair/decoration is not yet due. They also question whether high level works carried out previously were done properly. Section 20 consultation does not proceed further.
- October 2013 – Following a further report of damp issues, Hamilton King instruct Langley Byers Bennett (LBB) chartered surveyors to inspect and prepare a specification. Lessees of all but Flat 10 question the need for Hamilton King to appoint a further surveyor and state they will be appointing their own surveyor. Hamilton King then place LBB on hold.
- January 2014 – Instructed by the lessees, Mr Cooper of Real Surveys inspects and reports with recommendations for (unpriced) remedial work.
- April 2014 – the lessees' solicitors send Hamilton King an estimate for remedial works obtained from B & P Builders, which totals £36,290.00 ex. VAT (not £31,090.00 as stated by lessees). The Applicant replies stating that they are prepared to instruct Real Surveys as their surveyor in respect of the works and on the basis of their report to consult under section 20. The letter also asked for confirmation that the lessees agreed to Hamilton King approaching Real Surveys to arrange this. There was no reply to this letter from or on behalf of the lessees until the lessees complained about delays in July 2014.
- July 2014 – Real Surveys provide a fee estimate for preparing a specification, obtaining tenders and undertaking contract administration including CDM coordination. This was sent to the lessees who disputed that it was necessary for Real Surveys to oversee the work and suggested that any surveyors' fees should be paid by Hamilton King and not by them.
- October 2014 – Following preparation of a Specification by LBB Surveyors, a first stage section 20 notice is issued to the lessees. The lessees then nominated two contractors; these and three other contractors were invited to tender.
- January 2015 – The two lessee-nominated contractors having both declined to tender, Hamilton King give the lessees a further opportunity to nominate a further contractor. No such nomination was made.
- February 2015 – Hamilton King issue second stage section 20 notice with details of the estimates obtained from three contractors. They

recommended instruction of PA Finlay & Co, who had provided the lowest estimate at £81,400.00 + VAT. The lessees responded making it clear that they were unhappy with the cost. The Applicant subsequently applied to the Tribunal.

The Applicant's' case

22. The Applicant's case was put very simply. A specification had been prepared. Competitive tenders had been obtained from three contractors who had no connection with either the Applicant or Hamilton King. The Applicant intended to instruct the contractor who had provided the lowest estimate. Additional projected costs included surveyors' fees of 10% + VAT, and Hamilton King's own administration fee, calculated at 5% of the total of the contractor and surveying costs. This produced an overall projected cost of £112,840.40.
23. A budget for the 2015 service charge been prepared in December 2014 (before all tenders obtained) which assumed the works would cost only £54,180.00. This budget was not formally revised once all the tenders were to hand. On account demands based on the budget figure had been issued in March 2015. The balance had not yet been demanded.

The Respondents' case

24. The written statement of case and pre-application correspondence from the lessees indicated that they wished to pursue arguments based on allegations of historic neglect and/or that high level major works carried out in 2008 could not have been carried out to a reasonable standard if substantial further high level works were found to be necessary so soon afterwards. As to historic neglect, there was no evidence whatsoever as to increased costs or other damages, and as to the earlier works there was no evidence whatsoever as to their scope, price or standard. Ms Holmes accepted that the Respondents were not in a position to pursue either argument at the hearing, and accordingly those matters were not considered.
25. Instead the Respondents' main contention at the hearing was that the estimated costs sum of £112,820.40 was unreasonably high and therefore only a lower sum should be sanctioned by the Tribunal as payable by way of on account demand.
26. This argument had two strands. Firstly, it was submitted that the Specification prepared by LBB Surveyors could not be relied on as accurate because LBB had not carried out an inspection of the flats internally, and had not been into the roof void (loft space). It was said that the Specification was "inflated". If the Tribunal was concerned about the accuracy of the Specification, it could reduce the sum to be paid on account.

27. Mrs Hendrick gave evidence that she spent most of her time at home. The surveyor from Lewis Berkeley had viewed the roof only from ground level, using binoculars, compared with Mr Cooper who had gone into the roof void. Mr Tully gave evidence that he was at home when LBB Surveyors attended in autumn 2014. He saw the surveyor walk around the outside of the building taking notes, but did not see her go up the stairs which give access to the upper flats and (via the top floor flats) the roof void. She did not ask to inspect his ground floor flat.
28. Secondly, it was contended that even the lowest contractor's estimate of £81,400.00 was unreasonably high. B & P Builders had provided an estimate for less than half that figure. B & P were a two-man firm known to Mr Tully. They had prepared an estimate based on Mr Cooper's report and their own inspection, which Mrs Hendrick said included the roof void and the interior of every flat. While B & P had estimated a cost of £9700.00 for scaffolding, P A Finlay's figure for scaffolding and protection was £28,200.00. Mrs Hendrick queried the disparity in these figures. She also queried why P A Finlay were going to charge £7200.00 for management of the works, when it was also proposed to pay LBB Surveyors 10% for this, as well as to pay Hamilton King a 5% administration fee. She also queried specific charges in Finlay's tender for the brickwork and sealing of window joints, which she thought seemed too high.
29. Miss Holmes submitted for the Respondents that B & P's estimate should be considered along with the three other estimates in establishing a spectrum of cost for the proposed works. B & P's estimate was a sound alternative to the others. Lessees should not be required to pay on account any more than was reasonable and if one took B & P's estimate into consideration, the figure of £81,700.00 was too high.
30. The Tribunal asked Mrs Hendrick why B & P had not been nominated as a contractor by the lessees as part of the section 20 consultation. Mrs Hendrick said this was because one of the principals of B & P had broken his leg, which meant they couldn't take on the job. She also said that after the two lessee-nominated contractors had declined to tender, the lessees could not find any other contractors willing to put themselves forward.
31. Mr Fitch was asked by the Tribunal to address the points raised by the Respondents. He was not able to elucidate further on any of the specific figures in P A Finlay's tender, other than to say that the sum of £7,200.00 was for the services of a CDM Co-ordinator, which would be additional to LBB's functions.
32. The Tribunal had noted that of the three tenders, two were similarly priced: PA Finlay at £80,700.00 and Kier Construction Ltd at £82,303.00. However the third, from Oakcrest Builders Ltd, was much higher at £108,775.00, the difference being primarily due to its pricing for the decoration of exterior timber (Oakcrest's figure was £31,550.00

compared to PA Finlay's figure of £5,500.00 and Kier's figure of £8,342.00). Mr Fitch was unable to explain this discrepancy.

33. Mr Fitch was also asked to explain the proposed Hamilton King administration fee of 5%. He said this was payable pursuant to Paragraph 6 of the Fourth Schedule to the leases (see para 6 (d) above as regards the leases of flats 12,16 and 18) and that although Hamilton King usually charged 10%, they were proposing to charge only 5% on this occasion. This fee covered all section 20 consultation, correspondence and any other work associated with the major works, which work was not included in its standard management fee.

Discussion and Determination

34. Essentially the Respondents challenge the scope of the Specification and the proposed cost. As regards its scope, the Tribunal notes that prior to preparing the Specification, LBB Surveyors had available to it the report and supplementary correspondence prepared by Mr Cooper of Real Surveys, which the Respondents themselves describe as "the most thorough report ever done". The Respondents' argument that the Specification is unreliable does not sit comfortably with their assertion that LBB Surveyors used Mr Cooper's report in preparing it. Although the Respondents were concerned that LBB Surveyors did not inspect the interior roof void, there was no submission as to how this could have made any difference. The Tribunal is aware, using its own knowledge and experience, that specifications for external high level works are often prepared from inspection at ground level, due to lack of access for a detailed inspection until scaffolding is erected. That is why many specifications for high level works, as in this case, provide for a full inspection once the scaffold is up so that specific repairs can then be identified and agreed with the contract administrator.
35. Mr Cooper's report was a survey report. He too had no external access to the roof, chimneystacks etc. His recommendations for remedial works were in very general terms, and cannot in any sense be regarded as comparable with the detail of LBB's specification. In any event the Respondents did not identify anything specific in the scope of the Specification which might be said to conflict with or exceed Mr Cooper's findings or recommendations. Nor was there was any expert evidence challenging the reasonableness of the Specification.
36. The Tribunal notes that the copy Specification in the bundle was missing many of the preliminary pages, which might have cast more light on the general approach taken by LBB Surveyors. The pages provided were only those used by the tenders for noting the priced items.
37. The Tribunal has to reach a decision on the evidence before it. For the reasons stated there is no evidence that LBB Surveyor's Specification is

unreasonable or inflated as regards the scope of the works, and this plank of the Respondents' case cannot succeed.

38. Turning to the cost, there are three elements: the contractor's price, the surveyors' fees and the managing agents' fees.
39. With regard to the first item, the Applicant is proposing to instruct the contractor who provided the lowest estimate: PA Finlay, at £80,700.00 + VAT. There were three competitive tenders, all from contractors selected by Hamilton King, although the lessees were given more than the legally required opportunity to nominate contractors. Although one of the three tenders was far more expensive than the other two (due to the decoration item previously mentioned), the other two were close, only about £1600.00 apart.
40. The Respondents have queried in particular P A Finlay's cost of scaffolding at £28,200.00, and a figure of £7200.00 which appears next to item 1.36 of the Specification, falling under a general heading of "Management of the Works". Both these items are within Section One of the Specification which is headed "Preliminaries and General Conditions". Unfortunately yet again the bundle was deficient: it did not include a full copy of Section One or the specific items quoted in the other two tenders for either Item 1.36 or the scaffolding. However the bundle did contain an analysis comparing the figures in the three estimates, from which it is clear that the Preliminaries and General Conditions figures given by all three were very close, ranging from £35,223.00 to £36,700.00. There is therefore nothing to indicate that the specific figures challenged by Mrs Hendrick in PA Finlay's estimate are out of line.
41. With regard to the figure of £7200.00 within this total, the Tribunal does not accept Mr Fitch's explanation that this is for a CDM management fee. Such a figure would be extraordinarily high. Nor is the wording of Item 1.36 apt to refer to CDM work. It seems more likely that the figure represents the cost of a number of items appearing earlier in Section One. The Tribunal cannot speculate as to what these were. However the fact remains that all three tenders produced a very similar Section One costs figure.
42. The Tribunal has considered very carefully what weight should be attached to B & P's much lower estimate, prepared about 9 months earlier than the official tenders. It has concluded that it simply cannot be placed on the same footing as the priced tenders based on the Specification. B & P appear to have prepared their estimate simply on a reading of Mr Cooper's survey report and their own inspection (again with no external high level access). The recommendations in Mr Cooper's report are in very general terms, and are entirely silent as to quantification. There is no evidence as to how B & P interpreted Mr Cooper's report or arrived at quantities. The Tribunal cannot be satisfied that it represents a comparable for the purpose of evaluating a reasonable cost.

43. Given that the Respondents already had B & P's estimate, it is surprising that, armed with this, they did not make further efforts to nominate contractors who were prepared to tender. Furthermore, there is no reason why, in preparation for this hearing, the Respondents could not have obtained further estimates based on the Specification. However they did not do so.
44. It is also noted that many items in the Specification are provisional sums or provisional quantities. That is because the scope and extent of the work cannot be precisely ascertained until there is full access. Any estimate is therefore just that – an *estimate*. Consideration has been given as to whether there should be some reduction in the sum payable on account to reflect this uncertainty. However, given that there is no evidence that the Specification is excessive, and that costs may turn out to be higher or lower, the Tribunal's conclusion is that there should be no adjustment.
45. For all the above reasons, the Tribunal is satisfied on the evidence before it that the contractor's estimated cost of £81,700.00 is reasonable.
46. With respect to surveyors' fees, the proposed fee of 10% was not challenged by the Respondents.
47. Finally, the managing agents propose to charge an administration fee of 5%. Whether this level of fee is reasonable will ultimately depend on the amount of work done by Hamilton King and whether it has been carried out to a proper standard. At this stage it is difficult to predict how much work they will need to do, but as 5% was not challenged by the Respondents as too high, it is allowed.
48. The Tribunal's conclusion is therefore that the total sum of £112,820.40 will, if subject to a valid demand, be payable by the lessees in their respective proportions, being a reasonable estimate of the cost of the proposed major works. This determination at this stage does not prevent the lessees subsequently challenging the actual costs once those costs have been incurred.

Section 20C Application

49. In deciding whether to make an order under section 20C a Tribunal must consider what is just and equitable in the circumstances. The circumstances include the conduct of the parties and the outcome of the proceedings. The Applicant has been successful in its application, and the Tribunal accepts that the application was reasonably made and pursued. However the Tribunal does not consider that the application was prepared by the professional managing agents, Hamilton King, in a competent or acceptable manner. In particular : (i) the application made no reference whatsoever to the provisions of the lease(s), the only

copy lease initially provided was for a different property, and it was not until after the hearing that full copies were supplied - the Tribunal then discovered that the leases were not all drawn in similar form and had to conduct its own exercise of comparing them; (ii) it was particularly unhelpful that important documents, such as the Specification, were not provided in a complete form; (iii) the Applicant failed to provide any reliable information as to what demands had been made for the service charges in dispute; (iv) the Applicant's representative who attended the hearing knew very little about the property or the dispute and was unable to assist the Tribunal with reliable information on most matters put to him. The Respondent lessees should not have to pay for sub-standard work of the managing agents. For these reasons, it is just and equitable for an order to be made that, to such extent as they may otherwise be recoverable, the Applicant's costs in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondents, with the exception of the application fee and the fee of the Applicant's solicitor for his advocacy at the hearing.

50. Although it is unnecessary for the Tribunal to decide the point now, it may be added that it is far from clear that the leases of Flats 12, 16 and 18 would permit the costs of proceedings such as these to be recoverable through the service charge in any event.

Dated: 16 July 2015

Judge E Morrison (Chairman)

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.