11268

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

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| **Case Reference** | : | **CHI/43UE/LIS/2015/0045**<br>**CHI/43UE/LDC/2015/0044** |
| **Property** | : | **The Penthouse, Glenwood House, Glenwood, Dorking, Surrey, RH5 4BY** |
| **Applicant** | : | **Mr and Mrs Corbishley** |
| **Respondent** | : | **Mr and Mrs Carter-Shaw** |
| **Representative** | : | **Mr L Sefton-Smith (Counsel)** |
| **Type of Application** | : | **s27A and s20ZA LTA85** |
| **Tribunal Members** | : | **Judge D Dovar**<br>**Mrs H Bowers** |
| **Date and venue of Hearing** | : | **18th November 2015, Reigate** |
| **Date of Decision** | : | **9th December 2015** |

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**DECISION**

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1. These are two applications, the first under s27A of the Landlord and Tenant Act 1985 and the second under s20ZA of that Act. Both relate to the cost of redecoration works to the wooden window frames at the above Property.

2. The first application, gives rise to two issues:

    a. whether there has already been an agreement on the costs of the works so as to oust the Tribunal's jurisdiction; if not,

    b. whether the proper construction of the Applicants' lease requires them to contribute to the cost of redecoration when carried out by the Respondents as Landlord.

3. The second is an application for dispensation in respect of those (and other related works) to which the Applicants have consented. In those circumstances, the Tribunal gives dispensation from the statutory consultation requirements in respect of the works carried out to the exterior of the Property this year.

4. The Applicants attended in person and represented themselves. The Respondents attended and were represented by Counsel, Mr Sefton-Smith.

**Lease Terms**

5. The lease is dated 20th January 1972 and is for a term of 99 years from 25th December 1971. It contains the following material terms:

    a. The tenant covenants to 'to keep the demised premises including all walls and floors and ceilings ... and all window frames window glass and doors ... in good and substantial repair and condition provided always that structural repair of outside main walls roof and party walls ... and structural and decorative repair of all exterior parts shall be expressly excluded from the clause' (clause 2 (3));

b. By clause 2 (5) the tenant also covenanted to pay 'a rateable proportion (as hereinafter defined) of the cost to the Lessor of complying with clause 4 (2) ...'

c. Further by clause 2 (10) the tenant covenanted not to '... paint or otherwise treat any part of the exterior of the demised premises except as is hereinafter provided in Clause 3 (2).' Clause 3 (2) permitted the tenant to carry out works where the landlord had failed to do them;

d. The landlord covenanted at clause 4 (2) (a) 'to maintain and keep in structural repair the outside of the main walls ...' and at 4 (2) (b) 'to maintain and keep in good and substantial repair and condition all external parts of the building (except window frames window glass door and door frames balcony glass and balcony floors) ... and at 4 (2) (c) 'To paint in a colour to be chosen by the Lessor and in accordance with an estimate first approved by the Lessee the external woodwork and ironwork of the building and the adjacent premises ...'

**Statutory material**

6. Section 27A of the Landlord and Tenant Act 1985 states as follows:

27A Liability to pay service charges: jurisdiction

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable ...

(2) Subsection (1) applies whether or not any payment has been made. ...

(4) No application under subsection (1) or (3) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant ...

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

**Background**

7. The Property is a conversion of a large house into flats. The freehold originally comprised three separate dwellings, but in 2007 the freehold of one of the dwellings, the Northwing, was purchased by its then tenant. This left two remaining dwellings; one, the Penthouse, is occupied by the Applicants, the other, Glenwood House, by the Respondents. The Respondents also own the freehold and in that context are the landlord for the purposes of these proceedings.

8. The Property was originally constructed with wooden framed windows. In 2007, prior to the Applicants purchasing the lease, all the windows, but one,

9. to their flat were changed from wooden frames to uPVC. No documents have been provided as to any arrangements that were made at that time. The windows to the part that the Respondents reside in remain wooden framed.

10. As well the wooden frames, the whole building has significant decorative wood work on the exterior.

11. On purchasing their lease in 2014, the Applicants were given an estimate of future works for the following two years. This did not include a reference to any works to the window frames.

12. In early April 2015, the Respondents notified the Applicants of their intention to carry out some external works the cost of which was to be shared between them. Initially it was not made clear that this would include works to the wooden window frames of the lower property, and that it was intended to charge the Applicants a proportionate part of that cost.

13. The Applicants say it was not until 4th April, that they first understood that the windows frames were being redecorated and that the Respondents wanted them to contribute to the cost. From that point the Applicants raised an issue as to whether they had any liability to contribute to that work.

14. The correspondence at this time reflects a clear disagreement on this issue. It also reflects a desire to get a precise figure for all the works (including window frames) with the Applicants reserving their position as to whether they were liable to pay for them.

15. On 2nd May 2015, the Respondents provided a spreadsheet (version 1.2) setting out revised costs. The Respondents had inserted a comment on that spreadsheet that liability for the window frames remained in dispute.

16. On 3rd May 2015, the Applicants wrote to the Respondents saying

> *'We have discussed our position over the weekend and come to the conclusion that we have better things to do with our life than enter into a long and protracted dispute, if this can be avoided, although we continue to hold the view that there is an argument to be had that we are not responsible for painting your windows, if we cannot agree a resolution.*
>
> *In order to move things on, we have proposed that we will agree to the works on the last spreadsheet (version 1.2) going ahead, along with the painting of the first and ground floor windows. We have also advised that we will be putting aside £2,000 a year, towards future expense and you agree that this seems a realistic budget. In return for this compromise, you have agreed that you do not intend doing any further substantial works for five years ...'*

17. The Applicants then claimed that there was a telephone discussion in which it was agreed that they would pay for all the works, to enable them to be done, but reserved their rights. This was in response to concerns

about holding up the works or splitting them, as the Respondents had suggested, which was likely to incur further expense.

18. The Respondents maintain that the communication at this point was that the Applicants had agreed to pay for the costs on this occasion, but did not want to set any precedent on this issue for the future and so any payment was not to be taken as an admission that in the future they were liable to pay for similar costs.

19. On 8th May, the Respondents sent version 1.4 of the spreadsheet for the Applicant's approval and return. The note made on the previous spreadsheet about the window costs had been removed. A query was raised by the Applicants on a different issue which resulted in version 1.5 being produced. The Applicants signed and returned this version. They endorsed that document with a statement that they agreed to waive the consultation requirements for these works only, there was no comment made as to the window frame redecoration, the cost of which was included in the spreadsheet.

20. The Applicants state they did not make any express reference to the window frames as they thought they had already laboured this point and made it clear in a telephone call with the Respondents that they were still reserving their rights. They said they considered adding it, but that they didn't want to stir up the Respondents on this issue. The Respondents do not accept that that point was made in the course of the telephone call.

21. The works have been carried out and the Applicants have paid their proportionate part. By this application they seek a return of the costs they have paid in respect of the redecoration of the window frames.

**Sums in dispute already agreed: no jurisdiction**

22. The first issue is a matter of jurisdiction in that the Respondents maintain that the sums in dispute have already been agreed and that therefore the Tribunal has no jurisdiction in light of the limitation

provided by s27A (4) (a), namely, that an application for a determination of payability cannot be made in respect of sums that have been agreed.

23. In this regard the Respondents rely on the spreadsheet (version 1.5) of the proposed works dated 9th May 2015, which was signed at the bottom by the Applicants. That included the works to the window frames which are the subject of this application.

24. The Applicants maintain that it was their understanding when signing this spreadsheet that they would pay for the works but deal with arguments as to whether or not they were liable to do so afterwards and that they were not signing away that right. They stressed that they felt rushed into signing this document and made the point that they would not be giving money away to the Respondents if they did not have to; why would they? they queried.

25. The Respondents argued that the works could not proceed until an agreement had been reached as approval was needed under clause 4 (2)(c) from lessee as to the estimate for these works. They contended that signing schedule was an approval under the terms of the lease as well as resolving the issue between parties as to extent of works to be carried out and paid for.

26. Further they contended that in the context of the correspondence it was clear that agreement had been reached as to these works. The 3rd May 2015 email set out above was evidence of what had been agreed. That was in terms of paying for this round of works. That email sets out the terms of the agreement, namely that they will pay this time round on the basis that there will be no further substantial work for five years. This is confirmed by the signing of the schedule without any caveats being put in place with regard to the cost of redecorating the window frames.

27. In response to the Applicants query as to why they would give away money, the Respondents contend that it was a concession for good neighbourly behaviour and was an alternative to having to pay for solicitors to advise and resolve the issue.

28. The Tribunal considers that there was an agreement ousting their jurisdiction. Whilst the face of the schedule does not confirm an express agreement to pay, against the background of the terms of the lease, and in particular clause 4 (2) (c), it would appear that the Applicants had agreed to pay. The lease is a document against which the schedule should be considered. The inclusion of a caveat with regard to the consultation process, but not the liability to contribute to the costs of the window frame redecoration, is also a good indication that there was an agreement.

29. Further, it appears that agreement was reached prior to signing the schedule in that the email of 3rd May reflects an agreement that had already been made; i.e. to pay for the works, but no more major works for five years.

30. Whilst the Applicants may have inwardly intended that their rights would be reserved, by the time the schedule was signed, there was no outward expression of that view. Not only did they refrain from putting any caveat on the schedule (although they say they did consider adding something), but the correspondence leading up to the schedule indicates that on this occasion they were going to let the issue go, but that they wanted to reserve their right to take it up in terms of future works.

**Construction of the Lease**

31. Having concluded that there was an agreement, that is an end to this matter. However the Tribunal heard the parties' submissions on the proper lease construction and this was the issue that is at the heart of this dispute. The Tribunal therefore has decided to deal with this issue as well, in the event that the decision on jurisdiction is found to be wrong. Hopefully this will also provide some certainty for the benefit of the parties in terms of their future relations.

32. The issue is whether the Applicants are liable to contribute to the costs of redecorating the frames of the windows on the building, notwithstanding the fact that theirs have been replaced with uPVC and therefore do not

require redecorating. In essence, the issue arises because, if they are wrong, the Applicants will have to contribute to the cost of works which only directly benefit the Respondents in their capacity as occupiers of part of the building. Although at the outset it is worth noting that although this concerns the Respondents' windows, there is still some benefit to the Applicants from maintaining their appearance in that it makes the entire building look more attractive.

33. The Applicants stated that this issue first came to their attention on 4th April 2015. They contacted their conveyancing solicitors who considered that the Applicants were not liable. This view was supported by the Leasehold Advisory Service. However, regardless of these views, the Tribunal has to determine for itself the scope of the clause.

34. The Applicants' case on construction was as follows:

    a. Any obligation to pay was through clauses 2 (5) in respect of works carried out by the Respondent under clause 4 (2);

    b. Although clause 4 (2) (c) referred to exterior decoration and to the external woodwork, that did not include the wooden window frames, as:

        i. The building is not listed or in a conversation area. There is no requirement to keep window frames wooden in the lease. Therefore it was permissible to change them to a material that does not require decorating and this must have been appreciate when the lease was drafted. Accordingly, the lease must be construed so as to exclude the window frames from the redecorating obligation under clause 4 (2) (c);

        ii. The embargo on works to the exterior by the lessee under clause 2(10) is in relation to structural alterations and does not specifically refer to windows;

iii. The tenant has the repairing obligation for the frames, and in order to keep them in good condition, they have to ensure that are painted;

iv. The frames are excluded from clause 4 (2) (b);

v. It is possible to obtain estimates for decorations for different parts of the building;

vi. Even before their windows were changed, they would have been at a disadvantage given that they only have 25 windows compared to 76 for the Respondents;

35. The Respondents argue that the obligation is clearly on them to redecorate the window frames under clause 4 (2) (c) and that therefore the Applicants must pay their proportionate part. The fact the Applicants' windows are now uPVC does not alter their liability to contribute to the cost of redecorating those window frames which are still wooden.

36. Whilst they contend that clause 2 (10) did not permit the alternation to uPVC, they assert that in any event, just because it was a possibility that does not mean that the person drafting the lease was guarding against a perceived unfairness in the future. The provisions clearly show that it was the intention that the freeholder would retain control over the exterior.

37. They also point to the distinction between repair and condition in clause 4 (2) (b) and decoration in clause 4 (2) (c). The decoration of the exterior woodwork, which includes the window frames, falls within the latter and therefore within the Respondents' obligations.

38. The Tribunal considers that the construction is clear, the obligation for external redecoration falls with the Respondent as landlord. The window frames are 'woodwork' are therefore ostensibly fall within the covenant at clause 4 (2) (c) with the ensuing obligation on the Applicants to contribute to the cost of that work under clause 2 (5). The Tribunal

was not convinced that 'woodwork' in clause 4 (2) (c) should not include the window frames because there was a potential to change them in the future. That was too speculative an event to exclude the frames from the redecorating obligation. Further, it fails to deal with the embargo on the tenant redecorating the exterior in clause 2 (10). Finally, the lease does distinguish between repair and redecoration, most notably at clause 4 (2) (b) and (c) and for that reason the Tribunal did not consider that because the Applicant had the repairing obligation they also had the redecorating obligation.

39. There was also an issue as to the correct proportion of costs payable by the Applicants. The parties were agreed that the Applicant's share was 42.6%.

## Section 20C

40. The Respondents indicated that as they were not able to recover the costs of these proceedings under the terms of the lease, they would not be seeking to add them to the service charge.

## Conclusion

41. As there was an agreement for the purposes of s27A(4), the Tribunal does not have jurisdiction to determine this matter.

42. If it is wrong in that contention, the Tribunal considers that the construction of the lease is as contended for by the Respondents in that the Applicants remain liable to contribute to the costs of the redecoration of the frames to the wooden windows at the building.

Judge D Dovar

## 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.