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

Case Reference : **LON/00AC/LIS/2011/0005**

Property : **Flats 1-28 Southbourne Court, The
Hyde, London, NW9 5BP**

Applicant : **Hillfinch Properties Ltd**

Representative : **Comptons LLP, Solicitors**

Respondent : **The Lessees**

Representative : **Did not attend and were not
represented**

Type of Application : **For the determination of the
reasonableness of and the liability
to pay a service charge**

Tribunal Members : **Judge I Mohabir
Mr N Maloney**

**Date and venue of
Hearing** : **29 July 2013
10 Alfred Place, London WC1E 7LR**

Date of Decision : **9 September 2013**

DECISION

Introduction

1. This decision is supplemental to the Tribunal's earlier decision dated 12 December 2011 ("the earlier decision") in which it made a determination of the Respondents' liability to pay and/or the reasonableness of the cost of proposed major works, namely, external redecorations and repairs to the property known as Flats 1-28 Southbourne Court, The Hyde, London, NW9 5BP.
2. The Applicant subsequently sought and obtained permission to appeal the earlier decision. By a decision dated 26 February 2013, the Upper Tribunal allowed the appeal in part and remitted the affordability issue ("the Garside Point") and the question of costs ("the section 20C point") back to the Tribunal for determination.
3. On 28 May 2013, the Tribunal gave Directions, which included a direction that the matter proceed by way of a paper determination. A statement of case was filed and served by the Applicant. However, only statements of case were filed and served by two Respondents, Miss Pelides and Mrs Malde of 7 Southbourne Court. On 9 July 2013, the latter made a request that the matter be set down for an oral hearing, which was granted.

The Relevant Law

4. This is set out in the Appendix annexed hereto.

Decision

5. The hearing in this matter took place on 29 July 2013. Mr Gallagher of Counsel appeared for the Applicant. None of the Respondents appeared or were represented.

6. Unfortunately, the statements of case filed by Miss Pelides and Mrs Malde did not specifically deal with either of the issues that were remitted back to the Tribunal. The Tribunal, therefore, only heard submissions made by Mr Gallagher on the Applicant's behalf.

Garside Point

7. In broad terms, the Upper Tribunal in the case of ***Garside & Anson v RFYC Ltd & Maunder Taylor*** [2011] UKUT 367 (LC) decided when applying the statutory test of reasonableness under section 19 of the Landlord and Tenant Act 1985 (as amended) ("the Act"), a Tribunal is obliged to take into account the financial impact on tenants when deciding whether (in that case) major works should be phased. Essentially, the issue is one of affordability.
8. In the present case, the Upper Tribunal remitted the same point to be determined by the Tribunal.
9. Unfortunately, neither of the statements of case filed by Miss Pelides or Mrs Malde dealt with this point specifically. They raise other issues about the scope and quantum of the proposed major works.
10. The Tribunal accepted the submission made by Mr Gallagher that where a tenant raises the "Garside point", there is a reverse burden of proof on the tenant to establish a *prima facie* case of affordability. The Tribunal also accepted his submission that the Respondents had failed to do so here. They had merely alluded to affordability, but had provided no real evidence of this. Moreover, neither Miss Pelides nor Mrs Malde resided in their respective flats. They had in fact been sub-let by both lessees and Mr Gallagher submitted that the Tribunal could properly infer, and does infer, that they were of some means. In addition, the Tribunal had regard to the fact the major works had now been deferred for 2 years and

that the Respondents have had the opportunity to make financial provision to cover the cost of the works.

11. The Tribunal concluded that there was no basis upon which it could make a finding that, by the Applicant not phasing the proposed major works, there would be a significant adverse financial impact on the Respondents and could not be said to be unreasonable within the meaning of section 19 of the Act.

Costs-Section 20C

12. The Tribunal was obliged to revisit the matter as to whether an order under section 20C of the Act in relation to the Applicant's costs should be made.
13. Having regard to the reasoning in paragraphs 22 to 24 of the Upper Tribunal decision allowing the appeal on this point and the principles set out by HHJ Rich QC at paragraph 31 of the decision in ***Langford Court v Doren Ltd*** (LRX/37/2000) (which had not been argued by the Applicant at the initial hearing), the Tribunal decided that it was just and reasonable not to make an order under section 20C. The Applicant's position had materially altered from the initial hearing, as it had now succeeded on all of the substantive points in this case. Therefore, there was no basis upon which an order could to deprive the Applicant from being entitled to recover the cost of these proceedings through the service charge account. In so doing, the Tribunal bore in mind the statutory protection afforded to the Respondents by section 19 of the Act to challenge the amount of any such costs if and when the Applicant sought to recover them and if one or more of the Respondents considered them to be unreasonable.

Schedule 12, Paragraph 10

14. At the hearing the Applicant made a further application under Schedule 12, paragraph 10 of the Commonhold and Leasehold Reform Act 2002 (as amended) for an order that Mrs Malde pay a maximum contribution of £500 towards its costs.

15. The application was made on the basis that she had acted unreasonably by requesting an oral hearing and failing to attend. The matter was appropriate for a paper determination, as the Tribunal had directed. In addition, she had failed to file and serve any evidence.

16. The test of unreasonable conduct to be applied when considering an application such as this is a high one, which had not been satisfied in this instance. The Tribunal took full account of the reasons given by Mrs Malde for her non-attendance in her letter dated 22 July 2013, namely, that she is elderly and retired, has no legal training and could not afford the benefit of legal advice and representation. The Tribunal concluded that Mrs Malde's actions, whether by requesting an oral hearing or otherwise, could not be said to have been deliberately unreasonable. Accordingly, the Tribunal dismissed the Applicant's application for costs against her.

Judge I Mohabir

9 September 2013

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

- (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
 - (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
 - (b) the whole or part of which varies or may vary according to the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose -
 - (a) "costs" includes overheads, and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
 - (a) only to the extent that they are reasonably incurred, and
 - (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

- (1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -
 - (a) the person by whom it is payable,
 - (b) the person to whom it is payable,
 - (c) the amount which is payable,

- (d) the date at or by which it is payable, and
 - (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) 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.
- (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,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20C

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration 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 tenant or any other person or persons specified in the application.
- (2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
 - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
 - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Leasehold Valuation Tribunals (Fees)(England) Regulations 2003

Regulation 9

- (1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.
- (2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

- (1) In this Part of this Schedule “administration charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
 - (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
 - (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
 - (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.
- (2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

- (3) In this Part of this Schedule “variable administration charge” means an administration charge payable by a tenant which is neither—
- (a) specified in his lease, nor
 - (b) calculated in accordance with a formula specified in his lease.
- (4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

- (1) An application may be made to a leasehold valuation tribunal for a determination whether an administration charge is payable and, if it is, as to—
- (a) the person by whom it is payable,
 - (b) the person to whom it is payable,
 - (c) the amount which is payable,
 - (d) the date at or by which it is payable, and
 - (e) the manner in which it is payable.
- (2) Sub-paragraph (1) applies whether or not any payment has been made.
- (3) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
- (4) No application under sub-paragraph (1) may be made in respect of a matter which—
- (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.
- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
- (a) in a particular manner, or

(b) on particular evidence,
of any question which may be the subject matter of an application
under sub-paragraph (1).

Schedule 12, paragraph 10

- (1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).
- (2) The circumstances are where—
 - (a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
 - (b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.
- (3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—
 - (a) £500, or
 - (b) such other amount as may be specified in procedure regulations.
- (4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.