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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/22UB/LSC/2014/0003**
Properties	:	**2, 6, 10, 12, 16, 18, 22 & 24 Chapel Court, Billericay, Essex CM12 9LX**
Applicants	:	**Nicholas Bull (2)** **Ian Irving (6)** **Ken Brett (10)** **David Marquis (12)** **Jacci Line (16)** **Anthony Whewell (18)** **Natalie Smith (22)** **Margaret Coleman (24)**
Respondent	:	**A C Butt Builders Ltd.**
Date of Application	:	**received 13th January 2014**
Type of Application	:	**To determine reasonableness and payability of service charges and administration fees**
The Tribunal	:	**Bruce Edgington (lawyer chair)** **Stephen Moll FRICS** **Cheryl St. Clair MBE BA**
Date and venue of hearing	:	**15th April 2014 at The Court House, Great Oaks Basildon, Essex SS14 1EH**

DECISION

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1. The Tribunal determines that the amounts presently demanded on account for service charges for the major works in advance in 2014 are unreasonable and not payable.

2. The Tribunal also determines that the administration charges by way of interest and legal fees claimed are unreasonable and not payable.

3. The Tribunal makes an order pursuant to Section 20C of the **Landlord and Tenant Act** 1985 ("the 1985 Act") preventing the Respondent from recovering its costs of representation before this Tribunal from any of the long leaseholders in this estate as part of any future service charge.

4. The Tribunal also orders the Respondent to refund the fees paid to the Tribunal by the Applicants of £630 by way of a payment to Natalie Smith on or before 16th May 2014 who shall, in turn, reimburse those applicants who contributed to those fees within 14 days of receipt.

Reasons

Introduction

5. Following a consultation pursuant to section 20 of the 1985 Act for the 'replacement of remaining timber windows and external doors, soffits fascias and rainwater pipes with pvcu' commenced on the 8th April 2013, the leaseholders of this block of flats and maisonettes received a notification dated 12th September 2013 that their shares of the estimated cost of this work would be £2,984 for flats and £4,476 for maisonettes. Demands were then sent on the 15th October 2013. The Tribunal has only seen that for a maisonette (no. 22) which was for £4,475.50 but it is assumed that the demands sent to the flats were similar amounts to their estimates.

6. On the 20th January 2014, solicitors instructed by the Respondent sent another demand for these amounts plus interest and legal costs, this application having been made a few days beforehand. The application challenges the amounts claimed on several grounds which are summarised as follows:-

   (a) The cost is too high as work to the front of the block can be undertaken without scaffolding
   (b) Some of the leaseholders have already replaced their windows and why should they have to contribute to the remainder?
   (c) As there are 3 separate blocks, it is unreasonable for all 3 blocks to be 'lumped' together for service charge purposes
   (d) There is no estimated start date or plan for the implementation of the programmes of works and no reasonable payment plan

7. The Tribunal issued a directions order on the 21st January 2014 requiring the Respondent to file with the Tribunal office and serve a statement of case by 14th February 2014 setting out its justification in principle and law for the demands. It also ordered that the statement should deal with 3 specific issues namely (a) what terms in the leases does it rely upon to seek to replace the windows (b) could it attach all section 20 notices and (c) why was it seeking the whole of the estimated cost of the works when the lease provides for any payments in advance to be made in 2 instalments during the year.

8. There is a letter in the bundle from the Respondent's managing agents to the

leaseholder of 22 Chapel Court. This letter says that in the past, the freeholder and its managing agent have received requests for permission from individual leaseholders to replace windows. They have taken the view that this was a landlord's responsibility with costs recoverable through the service charge. The letter then records that one of the comments raised in the consultation process was by leaseholders questioning why they have to contribute when they have paid for their own window replacements in the past. It also records that the lowest 'quote' was obtained from a contractor nominated by a leaseholder.

9. On the legality of the proposal to replace the windows, the letter records the fact that counsel's opinion is being obtained on the point. The section 20 letters are provided, as ordered. The question as to why all the cost of the works is being demanded in advance is that there is no sinking fund.

The Inspection

10. The members of the Tribunal inspected the outside of the Applicants' block which consisted of numbers 2-24 Chapel Court and also the blocks containing numbers 26-36 and 38-48 (all even numbers only) in the presence of the leaseholders Mr. Marquis, Ms. Line, Ms. Smith and Mr. Whewell. It is understood that Ms. Coleman was also looking on. Mr. John Pritchard from Homes and Watson Partnership Ltd. and the architect Mr. Paul Langford were there on behalf of the Respondent.

11. This is a small residential estate close to Billericay town centre, with its shops and facilities, and also with access to a busy commuter train station to both London and Southend.

12. The 3 blocks in question appeared to have been built in the 1970's or thereabouts of brick under tile with dormers under flat roofs. In the block from which the Applicants came, all except 2 flats had replaced their own windows and external doors. It was clear that those flats, i.e. 4 and 20 according to the other leaseholders, needed their windows replacing. Various of the facias, weatherboards, soffits, bargeboards and rainwater goods needed repair or replacement.

13. It was a bright spring morning. The members of the Tribunal walked the estate and were then given access to the rear of the block through number 18 before exiting via flat 16. It seemed that a higher proportion of properties in the other 2 blocks needed replacement windows and external doors.

The Lease

14. There are 2 copy leases in the bundle provided for the hearing namely for 22 (a maisonette) and 16 (a flat) and they are both leases for terms of 99 years from the 29th September 1972 with a ground rent which appears to be fixed but where a further amount is calculated on certain assignments and mortgages of the lease by what appears to be a very complex formula. At the hearing, it was confirmed by the Respondent's representative that these forms of leases are the same

throughout the estate.

15. Clause 3 of the leases is extremely unusual. It is a stand-alone clause which defines what is included in the leasehold title. It says:-

> *"FOR the avoidance of doubt this lease shall always be construed so that:-*
> *(1) The walls dividing the demised premises vertically from the adjoining premises shall be party walls---*
> *(2) The flooring dividing the first floor maisonette* (this is the ground floor flat in the lease relating to no. 22) *from the demised premises shall be a party structure---*
> *(3) All other walls and structures below* (above for no. 22) *the flooring mention in (2) above including the external walls but excluding the foundations are included in the demise to the Lessee who shall be responsible for the maintenance thereof All walls and structures above the flooring mentioned in (2) above but excluding the roof shall be included in the demise of the maisonettes* (flats for no. 22) *above the demises premises and the Lessees for the time being of such other maisonettes* (premises for no. 22) *shall be responsible for the maintenance thereof---"*

16. As to any amounts to be claimed on account of future service charges, these can only be claimed in 2 equal parts in March and September in the year.

17. As to the question of which building is subject to the management provisions, the 'building' comprises 12 maisonettes and 12 flats. These encompass the 3 separate buildings which means that a single management and charging regime for the 3 buildings is what the leases provide for.

18. Clause 5(iv) imposes an obligation on the Respondent landlord to *"well and substantially repair amend renew uphold support maintain paint grain varnish and cleanse the exterior of the building".*

The Law

19. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'.

20. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. This Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable and, if so, whether it is payable.

21. Paragraph 1 of Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the Schedule") defines an administration charge as being:-

"an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable... directly or indirectly in connection with a breach (or alleged breach) of a covenant or condition in his lease."

22. Paragraph 2 of the Schedule, which applies to amounts payable after 30th September 2003, then says:-

"a variable administration charge is payable only to the extent that the amount of the charge is reasonable"

Counsel's Opinion

23. Part of the hearing bundle consists of the opinion of Daniel Dovar of counsel. This was an opinion given to the Respondent but is attached to an open letter written by the managing agent to the leaseholder of no. 22 who has described herself as being the lead Applicant. It is copied to the other Applicants and to the Tribunal office. Such an opinion would normally be the subject of legal professional privilege which means that neither the other parties nor the Tribunal would be allowed to see it. However, its full disclosure with an open letter can only mean that privilege has been waived.

24. The opinion arises because the Respondent or its representatives have clearly become concerned that they may not have interpreted the leases correctly. This arose from a direction made by this Tribunal for there to be an explanation as to how the Respondent assumes that it is to replace the windows because of the wording of clause 3 (above) of the leases. Counsel concludes "*the window issue is not clear, but in my view it is likely to fall within the leaseholder's demise and within their repairing obligations*". He also concludes that the payments on account must be levied in 2 equal shares on account in March and September

The Hearing

25. The hearing was attended by those who were at the inspection, save for Ms. Coleman. However, the leaseholders Messrs. Irving and Brett also attended.

26. It has to be said from the outset that the atmosphere at the hearing was convivial with Mr. Pritchard, in particular, acknowledging on behalf of the Respondent that it had not, perhaps, understood the legal position very well. It was accepted that there would have to be a reconsideration of the financial position and new demands sent out acknowledging that those who had paid for the replacement of their windows and doors should not have to contribute towards new windows and doors for others.

27. Notwithstanding that position, he made it clear that the Respondent would still like the Tribunal to determine the issues so that matters could proceed on a sounder legal footing in the future.

28. The Applicants, in turn, acknowledged that various of the facias, weatherboards, soffits, bargeboards and rainwater goods needed replacing and it would be better

to do everything at the same time. The leaseholders of flats 4 and 20 were just awaiting the outcome of this hearing. These were the only properties to be sub-let.

29. On the question of whether the cost could be reduced by not making use of scaffolding, there was a useful discussion where the Tribunal did suggest that it was a matter for the contractor and, to a certain extent, for the landlord, as to whether scaffolding should be used because the regulations governing this subject did rely to a very great extent on the health and safety aspects of scaffolding as opposed to scaffold 'towers' or what are known as 'cherry pickers'.

30. The problem with this contract is that the blocks have dormers as part of the 3rd floors which will probably all have to be worked on and it would not be easy to use towers as the dormers are quite a way back from the vertical exterior walls of the blocks. In addition, the ground is somewhat uneven, particularly for this block, as it is on a hill. Getting cherry pickers close enough to the buildings to be of any practical benefit would also be a logistical problem.

31. Mr. Langford told the Tribunal that the specification had not stipulated scaffolding but asked for the contractors to estimate for "all appropriate means of access". It has been said that the chosen contractor was one nominated by a leaseholder.

Conclusions

32. The terms of these leases with regard to what is in the leasehold titles and what is to be maintained and repaired by the respective parties are unusual. The 'normal' arrangements would be for the leasehold titles not to include any part of the structure, foundations and roof. There would be a covenant on the part of the freeholder to maintain these items and to be able recover the cost from the leaseholders. Regrettably, many leases do not make it clear who is to replace the windows.

33. In this case, as the direction of the Tribunal indicates, and is confirmed by counsel instructed by the Respondent, whilst it is for the landlord to decorate and maintain the windows and external doors, it is for the leaseholders to replace them. Clauses 3 and 5 make this clear, in this Tribunal's view.

34. The result of this interpretation could well be unfortunate. There are benefits in having the 'usual' arrangement because if there is only one 'person', i.e. the freeholder, who is responsible for these things, there is only one 'person' to take to court in the event of default. With each leaseholder having the responsibility to replace windows and external doors, there is the potential for chaos. Because leaseholders have been permitted to renew windows and doors without it actually affecting the service charges of other leaseholders, has meant that those people feel, quite understandably, that they should not have to contribute to anyone else's windows and doors. Thus, it could be said that the 'chaos' has already started.

35. There is clearly an obligation on the part of the Respondent to keep the exterior surfaces of the building decorated and maintained. In a previous era, it could be said that if a landlord complied strictly with this covenant, there would be no need to replace windows. However, the standard of construction and the building materials used in the 1970's were not to the same long lasting quality. Even constant decoration would not prevent window frames rotting. More modern materials such as uPVC and aluminium have helped to redress that problem.

36. Thus, for these particular leases in this particular estate, the regime for keeping the properties in repair is not really adequate which has created the problem seen by this Tribunal. An application to this Tribunal to vary the leases, so that the obligation to renew everything to do with the structure and the windows was placed on the landlord, would be in the best interests of the leaseholders. As a counter-balance, it may be that the leaseholders would agree some more appropriate form of payment which would at least ensure the cash flow to allow the landlord to complete the works and pay for them. With such a small ground rent, there is not much other incentive on the landlord to carry out expensive works at its expense – at least initially.

37. Thus the conclusion of the Tribunal is that the Respondent landlord is not entitled to recover the monies it has demanded which are therefore deemed to be unreasonable and not payable. The interest and costs claimed by the solicitors are also unreasonable and not payable.

Costs and fees

38. The leaseholders asked for an order that no part of the landlord's costs of representation before this Tribunal should form part of any future service charge demand. At the hearing they confirmed that and also asked that this order was being sought on behalf of all leaseholders. Bearing in mind the result of the determination, the Tribunal does consider it just and equitable to make that order, which it does.

39. The Applicants have paid fees of £630 being the application fee and hearing fee. They asked for an order that this be paid by the Respondent. In the circumstances, the Tribunal agrees to make such an order. Even if the Respondent had been unaware of the provisions of the lease, it took legal advice and for the solicitors to just write the letters of claim without advising the Respondent of the potential legal problems of pursuing this, would have been unusual. It was clearly only this application which brought these problems into the open.

The Future

40. The Tribunal has been asked to give its view as to the points raised by the Applicants and also an additional point raised on behalf of the landlord i.e. what is the legal liability to repair/replace facias etc. It determines these issues as

follows:-

(a) The cost is too high because of the use of scaffolding. The Tribunal has not seen the specification or the full estimates. However, in view of the height of the dormers in particular, it would suggest that scaffolding is probably the safest and most reasonable option.

(b) Who should replace windows and external doors? As is clear from the reasons above, the Tribunal takes the view that on a strict interpretation of the lease, it is the individual leaseholders who are not only responsible for, but they are liable to the landlord for this. Each leaseholder whose windows need replacing will have to be asked when they propose to do the work and whether they want the present contractors to do it whilst the scaffolding is up. This will hopefully create agreement although that cost cannot be part of the general service charge. They must understand their legal responsibilities and the power that the landlord has to commence the forfeiture process which could prove very costly for those leaseholders.

(c) Do all 3 blocks have to be managed as one unit? This is the regime in the leases to which each leaseholder has 'signed up'.

(d) There is no programme of works. In view of the decision of the Tribunal, this rather falls by the wayside. However, if the contract for the other works is to proceed, there must be some liaison and assurances given that the contract will be placed by a certain date.

(e) What is the legal liability to replace facias etc? As these are not structural matters, it seems to this Tribunal that they are covered by clause 5(iv) of the lease (see above) which means that the landlord shall replace facias, weatherboards, soffits, bargeboards and rainwater goods. This is subject, of course, to recovery from the leaseholders in the proportions set down by the leases.

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Bruce Edgington
Regional Judge
16th April 2014