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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/00HN/LSC/2015/0031**
Property	:	**Surrey Lodge, 19 Surrey Road, Bournemouth, BH4 9HN**
Applicant	:	**Surrey Lodge Residents Association Ltd**
Representative	:	**Foxes Property Management Ltd**
Respondent	:	**Mr Dean Leber**
Representative	:	**-**
Type of Application	:	**Service Charges : Sections 27A and 20C of the Landlord and Tenant Act 1985 ("the 1985 Act")**
Tribunal Members	:	**Judge P R Boardman (Chairman) and Mr J Mills**
Date and venue of Hearing	:	**Decided on the papers**
Date of Decision	:	**6 July 2015**

DECISION

Introduction

1. This application is for the Tribunal to decide whether the Applicant is within its rights to re-instate two brick pillars and walls which are said to be original features of the property

2. The application form stated that Mr Leber was against the re-instatement of the original brick pillars and walls which he said had never been there in the 10 years he had owned flats at the property. He also said that the lease did not allow for it

3. The application form also stated that the directors had stated that the walls and pillars were in fact demolished in 2007 on the instruction of Mr Leber, without notice to, or the consent of, the Surrey Lodge leaseholders. At the time, Bournemouth Council issued an injunction to stop the work as it affected trees covered by TPOs. However, the walls had already been knocked down

4. The Tribunal has decided the application on the papers before it, without an oral hearing, pursuant to rule 31 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules"), and the Tribunal's directions dated 1 May 2015, neither party having requested a hearing in the meantime

Documents

5. The documents before the Tribunal are as follows:
    a. a bundle of papers comprising the application form dated 21 April 2015, a copy of the lease of Flat 7 dated 24 June 1968, a document entitled "General Regulations", a copy of the lease of Flat 1, and the Tribunal's directions dated 1 May 2015
    b. a letter from Mr Leber dated 14 May 2015 and enclosures
    c. a letter from Foxes Property Management dated 11 June 2015 and enclosures

The letter from Mr Leber dated 14 May 2015

6. Mr Leber stated that he wished to apply for an order under section 20C of the 1985 Act

7. His issues were with the ongoing negligence of the building, and the section 20 consultation process, as this had not been correctly followed, and there were numerous issues throughout with descriptions of works being intentionally vague and misleading :

a. the section 20 description was for "drives and forecourts" and certainly not for new boundary walls, brick pillars, new fences and fence panels and parking prevention post measures
b. new capital expenditure for these unwanted items was not permissible
c. these works would prevent them from using and accessing the driveways which were part of the reserved property
d. the Applicant was also refusing to re-instate the drive and forecourt area fully and correctly (turf was still laid over the middle part of this, leaving just two short driveways instead of the full in/out driveway shown on the title plans
e. Mr Leber also believed that the planned work would directly breach the lease (item 4.5) as installing parking posts would deny leaseholders "the right to use in common with the owners and occupiers of all other flats and their visitors the gardens drives paths and forecourts"

8. Mr Leber stated that he had two flats at the Property, namely Flats 5 and 7, and gave examples of what he described as "serious structural defects and damp issues blighting the building, communal areas and the individual flats"

9. Mr Leber attached to his letter documents which he described as follows :
   a. *" "driveways and forecourts" notice – no reference to other works*
   b. *quotes showing the quote they actually obtained is actually made up of non "drive and forecourt" items such as new brick pillars, boundary fence posts and panels which are entirely unrelated and new capital expenses*
   c. *copy of service charge demands showing the county court charges and administration charges already demanded and levied on my accounts*
   d. *correspondence questioning the s20 and the items not related to drives and forecourts*
   e. *photographs showing the leak and damage in Flat 5 that we have waited over a year for repairs*
   f. *photographs and email showing that the same issues are impacting Flat 7 and again we are still waiting for any action to be taken*
   g. *photos showing damp in communal hallways and communal electrics which has again been ignored to date despite the health and safety concerns"*

10. The documents attached to Mr Leber's letter included a quotation from C.W. Stanley dated 22 September 2014, which included the following items [*with manuscript comments*]:
    a. [*] excavate and set new strip foundations for brick piers and 225mm brickwork to be rebuilt on both driveway entrances, style of brickwork to match existing [*new expense?]*
    b. excavate concrete driveway

c. set new pre-cast concrete edgings
d. cover area with geotextile membrane and re-instate limestone sub-base material
e. vibrate consolidate
f. surface limestone
g. [*] set concrete post against boundary fence, approximately 2 panels from bottom of fence line and erect a piece of close board fencing 4ft long 5ft high at right angles to existing fence line
h. [*] repeat this again along fence line leaving a space of 4 fence panels to offer enough room for all the bins
i. [*] leave a space beneath fence panels to allow surface water to escape
j. prepare ground here and surface up to existing tarmac surface level
k. remove old path edgings to adjacent side of driveway and set new path edgings in concrete
l. prepare surface of driveway and apply bitumen emulsion tack coat
m. re-surface this and other driveway
n. £8990.00 excluding VAT

The letter from Foxes Property Management dated 11 June 2015

11. Foxes Property Management stated that as part of the driveway resurfacing works the directors of the Applicant had decided that two small sections of walls and brick pillars, which were demolished in 2007, at a time when Mr Leber was a director of the company, should be rebuilt. They had also decided that parking posts should be installed on the entrance to the driveway, as the driveway was not intended for parking as it was too small. The driveway was intended for use by one vehicle at eith[illegible] for the purpose of loading and unloading only

12. The directors intended to undertake this work on the basis that all matters were within the landlord's obligation to repair under item 4 of the seventh schedule to the lease :

> *"The Less[illegible]hall keep the reserved property and all fixtures and fittings therein and additions thereto in a good and tenantable state of repair decoration and condition including the renewal and replacement of all worn or damaged parts providing that nothing herein contained shall prejudice the Lessor's right to recover from the Lessee or any other person the amount or value of any loss or damage caused to the Lessor or the reserved property by the negligence or other wrongful act or default of such person"*

13. On this basis, the Applicant contended that the brick pillars and small walls, which were demolished in 2007, were part of the reserved property

14. The first section 20 notice was sent on 10 June 2014 in respect of resurfacing the driveways

15. The cost of re-building the walls and pillars was considered separate work and under the section 20 threshold. The budget for that work was £820 plus VAT

16. On 30 June 2014 Mr Leber sent Foxes Property Management a letter setting out his objections to works to the driveways and forecourts, but did still propose two contractors who should be approached to undertake the planned work

17. As part of the tender process, Foxes Property Management approached CW Stanley and the two contractors recommended by Mr Leber, namely Steve Collins Surfacing and First Choice Driveways

18. On 23 September 2014 Foxes Property Management sent the second section 20 notice and statement of estimates, namely CW Stanley £8990 plus VAT and Steve Collins Surfacing £5860 plus VAT. First Choice Driveways did not tender. The Steve Collins quotation was as follows :
    a. excavate and remove existing surface
    b. supply lay and consolidate new sub base
    c. supply and build on a new concrete footing 2 no 1.5m high "pilers" [sic] with matching 0.6m high walls approx. 3.m long in total
    d. supply and lay 2 no 1.8m high close board panels with concrete posts and weatherboards supply and fit 2 no drop down posts
    e. supply and lay concrete edgings
    f. supply lay and consolidate surface course
    g. all for the sum of £5860 plus VAT

19. In an e-mail dated 26 September 2014 Mr Leber stated that when he looked at the detail behind the quotes they were not for repair and maintenance of the communal driveways as he would reasonably expect, but were also for new and unplanned expenditure namely huge brick piers and new boundary walls too. He questioned where in the lease there were allowances for block money to be spent on "new and unwanted capital items", and stated that the directors were responsible for the repair and maintenance of existing facilities and were not permitted to undertake random new expenditure without the consent of leaseholders and without changes to the lease

20. In an e-mail dated 30 September 2014 and timed at 11.25 Foxes Property Management stated that the directors had requested that rebuilding the sections of front wall which had for some reason been taken down in the past and also parking pillars should be included in the quotes for re-surfacing the driveways. These were not improvements or new items but re-instating original features of the property

21. In an e-mail dated 30 September 2014 and timed at 16.13 Mr Leber stated that he was strongly opposed to new expenditure on these walls and pillars, but not the driveway itself. Having been resident and owned property in the building for over 10 years he could not remember these ever having been a feature, nor was it the responsibility of the managing

agent or directors to start re-instating features in a building of this age that had not existed for many years as he did not believe the lease allowed for new expenditure like this. However, if he was wrong, and the lease did allow this, then in order to re-instate the original features the early plans showed that the property actually had an in and out driveway all across the front, instead of just a lawn area, so this too should also be in scope for reinstatement if that was the case. It would be a very dangerous area if the directors pushed for re-instatement of random former features, but excluded others. Should they rip out double glazing and re-instate old sash windows ? Downgrade the lift system to the original, or re-instate the original boiler system and lighting ? Mr Leber's preference was simply to make good the driveways and refrain from capital expenditure and the increased future liabilities they incurred as per the constraints in the lease

22. In an e-mail dated 2 October 2014, Vanessa Jones of Flat 2 stated that she was attaching some photos showing the original pillars and wall in situ. They were demolished (along with long-established trees and shrubs) on the instruction of Mr Leber and a fellow director in 2007, without consent from Surrey Lodge leaseholders, and without any prior notice, a couple of weeks before the AGM when Mr Leber and Ken Daisley were replaced as directors of the block. At that time Bournemouth Borough Council issued an injunction to stop the destruction in view of the TPOs in place, but the walls had already been knocked down. They would therefore be re-instating what was illegally removed at the time, and hopefully this was allowed under the terms of the lease

23. In an e-mail dated 28 November 2014 Mr Leber stated that

"I have now spoken to LEASE and a solicitor and both advise me that you and the directors are not actually legally allowed to approve and then demand moneys from leaseholders for new capital projects that are not permitted in the current lease nor wanted by many residents due to the excessive cost and non-urgent nature of the work

As I have previously communicated, for the resurfacing works to the driveway I have no issues here at all but I am strongly opposed to a new wasteful capital expenditure project on new walls and pillars that you have also snuck into a "driveway levy" item

Having been a resident in the building for well over 10 years I can never recall these ever being a feature during any of my time owning multiple flats here indeed I have photos across the duration of my ownership and this was never a feature here. It is also certainly not the responsibility of the managing agent or directors to start inventing and creating new "features" in a building of this age nor spending communal moneys on them

If you could as a matter of urgency please :
1 Kindly advise what proportion of this incorrect demand for "driveways" actually relates to the resurfacing of the driveway and

reissue me a demand for this piece only – then of course I will then get this part of your demand paid immediately

2 Please advise me why you and the directors believe that the lease (please provide specific language and part number(s)) allows you to randomly incur new capital expenditure that is not asked for and to our belief is also not permitted within the terms of the lease by which you are all bound to operate

3 If we are all wrong and the lease does indeed have this language within it then please can you also immediately reinstate the in and out driveways and parking all across the entire front gardens too as this should also be in scope for reinstatement too if that is the case. You will see from any street plans that this was the original layout/"feature" when these buildings were first built. We cannot have a situation where some unwanted historic features are being included for reinstatement but other much needed, requested and capital enhancing features are simply ignored for reinstatement against peoples wishes"

24. In an e-mail dated 4 December 2015 Foxes Property Management replied that their instructions from the directors were that the brick pillars were not a new feature, but that the originals had been demolished in 2007, when Mr Leber was a director. Foxes Property Management referred to attached photos, and stated that their instructions were to proceed with the works, and that the full amount requested in respect of this item was payable

25. In an e-mail dated 8 December 2014 and timed at 12.45 Mr Leber stated that

"Thank you for your response to my enquiry, sadly though you don't seem to have answered my question re the lease. Simply saying that you are instructed to proceed with the works is obviously wrong as you surely as managing agent still have to abide by the terms within our leases when making decisions and also advise the directors to ensure compliance with the rules do you not?

Wow you do have good record keeping. I was indeed a director back then if I remember correctly and this is exactly why I raised the question re the lease allowing capital expenditure for new items. I recall this was raised repeatedly in the past when there were numerous requests for new items at Surrey Lodge and rightly the lease did not permit these upon further investigation

Can you therefore explain how/why you think this new expenditure is now allowable and explain which part of my lease obligates me to contribute towards these new costs as I cannot see this? Clearly features/items that are not currently at the property nor have been there in the past are of course new items of capital expenditure – indeed they were certainly not present at the weekend when I and the lettings agent inspected the development (more on this later)

I am also unsure what the photos you kindly attach have to do with my request or indeed what they show me at all? If memory serves me the work being done here was to do with the trees, the cutting of the overhanging branches at eye level and the levelling and reshaping of the driveways due to tree roots coming through the pathways and causing a health and safety risk that resulted in one resident tripping and taking legal action against the block

To be clear I am not questioning the need for the driveway to be resurfaced (I have already asked you repeatedly to itemise this expense separately so that I can make my contribution towards this) as we had to do back then too but I am questioning the new capital expenditure on unnecessary new walls/pillars etc which are not wanted, needed or permissible under the lease"

26. Mr Leber also listed "several other more important structural items that still need your urgent attention"

27. In an e-mail dated 8 December 2014 and timed at 15.25 Foxes Property Management stated that the walls and pillars were not new items. They were there when the property was built until 2007 when they were taken down and their footprint was clearly visible. The walls and pillars formed part of the reserved property. In the seventh schedule to the lease under item 4 it stated as follows:

"The Lessor shall keep the reserved property and all fixtures and fittings therein and additions thereto in a good and tenantable state of repair decoration and condition including the renewal and replacement of all worn or damaged parts providing that nothing herein contained shall prejudice the Lessor's right to recover from the Lessee or any other person the amount or value of any loss or damage suffered or caused to the Lessor or the reserved property by the negligence or other wrongful act or default of such person"

28. Foxes Property Management stated that the Applicant felt that it was empowered to undertake the work based on that clause

29. In an e-mail dated 8 December 2014 and timed at 16.55 Mr Leber stated that :

"I still believe that this is a huge error, attempting to force through the unwanted reinstatement of some (but not all) cosmetic features that were removed years if not decades ago and yet at the same time denying leaseholders our repeated requests to reinstate the in/out parking facility and driveway (urgently needed in order to alleviate the dreadful parking situation there) is both unacceptable, against the majority of leaseholders' wishes and hugely inconsistent

Either you have no right to new capital expenditure projects or if as

you mention you do have power to undertake this type of work then there should be reinstatement of ALL of the fixtures and fittings previously evident at the development which as you highlight were perhaps wrongly removed in the past. This includes the driveways and car parking that was previously grassed over without consent (please see any site plan of the development for the previous parking arrangements)

Given the huge damp problems with the buildings structure though I would however appreciate it if more of your time was spent on that rather than these unwanted nice-to-have items that are now randomly and incoherently being reinstated simply on the whim of a director"

30. In their letter dated 11 June 2015 Foxes Property Management stated that Mr Leber's objections were the only objections the Applicant had received, and all other leaseholders had paid their share of the cost of this work, which the Applicant was holding until the Tribunal had approved the works as permissible under the terms of the lease

31. The Applicant regarded the cost of re-building the walls and pillars as separate work, and under the limit for the section 20 threshold. The budget for the work was £820 plus VAT

32. The Applicant had applied for a determination by the Tribunal only because of Mr Leber's objections, and felt that this was a reasonable approach by the Applicant. The Applicant therefore objected to Mr Leber seeking to avoid paying his share of the costs involved in this application. The Applicant therefore requested the Tribunal to refuse Mr Leber's application under section 20C

33. The Applicant refuted Mr Leber's allegations that he had been discriminated against or bullied. He had raised issues about damp and a leak, but those issues were not relevant to this application to the Tribunal and were being dealt with separately

34. The Applicant also refuted Mr Leber's allegations that the Applicant had ignored his correspondence or failed to invite him to AGMs or residents' meetings. He had been sent the same correspondence as all leaseholders

The leases

35. For the purposes of these proceedings the material parts of the lease of Flat 5 are as follows :

Second schedule

FIRST ALL THOSE the gardens pleasure grounds drives paths and forecourts forming part of the Property which are used in common by the owners or occupiers of any two or more of the

flats AND SECONDLY ALL THOSE the main structural parts of the buildings forming part of the Property including the roofs foundations and external parts thereof.....

Fourth schedule
Rights included in the demise

5 The right to use in common with the owners and occupiers of all other flats and their visitors the gardens drives paths and forecourts forming part of the Reserved Property subject to such reasonable rules and regulations for the common enjoyment thereof as the Lessor may from time prescribe

Seventh schedule
Covenants on the part of the Lessor

4 The Lessor shall keep the reserved property and all fixtures and fittings therein and additions thereto in a good and tenantable state of repair decoration and condition including the renewal and replacement of all worn or damaged parts PROVIDED that nothing herein contained shall prejudice the Lessor's right to recover from the Lessee or any other person the amount or value of any loss or damage suffered or caused to the Lessor or the reserved property by the negligence or other wrongful act or default of such person

36. For the purposes of these proceedings the material parts of the lease of Flat 1 were in the same terms

Regulations

37. The parties have not drawn to the Tribunal's attention any of the regulations in the document entitled "General Regulations" as being of any relevance to the issues before the Tribunal

Inspection

38. The Tribunal inspected the property on the morning of 6 July 2015. Also present was Mr A J Bagshawe of Foxes Property Management

39. The property was a three-storey, brick faced building, with a mansard roof. There were two entrances from Surrey Road, one on the left-hand side, and one on the right. On the left was a short concrete driveway, and on the right a short tarmac driveway. There was a paved footpath linking the two, and leading to the front entrance of the building. There was a lawn between the paved footpath and the front boundary wall

40. On the left at the front of the left-hand entrance drive was the outline at ground level of what had clearly been a pillar and a wall leading to the left-hand boundary fence. The outline appeared to be of similar dimensions to

those of the pillar and front boundary wall in place on the right of the left-hand entrance

41. Similarly, on the right at the front of the right-hand entrance drive was the outline at ground level of what had clearly been a pillar and a wall leading to the right-hand boundary fence. The outline appeared to be of similar dimensions to those of the pillar and front boundary wall on the left of the right-hand entrance

42. **The Tribunal's findings**

43. The parties have not referred the Tribunal to any decided cases. However, the Tribunal has taken account of the following guidance and tests from decided cases as being helpful in approaching the question whether the proposed pillar and wall works come within the landlord's covenant in paragraph 4 of the seventh schedule to the lease :
    a. "the correct approach is to look at the particular building, to look at the state it is in *at the date of the lease*, to look at the precise terms of the lease, and then come to a conclusion as to whether on a fair interpretation of those terms in relation to that state, the requisite work can fairly be termed repair. However large the covenant it must not be looked at *in vacuo*" (per Sachs LJ in **Brew Brothers v Snax** [1970] 1 QB 612, CA)
    b. it is a question of degree whether work carried out to a building was a repair or work that so changed the character of the building as to give back to the landlord a wholly different building from that demised (per Forbes J in **Ravenseft Properties v Davstone (Holdings) Ltd** [1980] 1 QB 12)

44. The Tribunal finds that :
    a. it is clear from the Tribunal's inspection that there used to be a pillar and wall on the left-hand side of the left-hand entrance drive, and a pillar and wall on the right-hand side of the right-hand entrance drive
    b. the appearance of the outlines in each case is consistent with Vanessa Jones's account of the pillars and walls having been removed in 2007 and her accompanying photos.
    c. the wording of paragraph 4 of the seventh schedule of the lease is wide enough to make the Applicant responsible for the re-instatement of the pillars and walls, and, in making that finding, the Tribunal has taken account of :
        - the ordinary meaning, as the Tribunal finds, of that wording
        - the context of the wording of the lease as a whole, and
        - the decided cases
    d. although the Tribunal accepts Mr Leber's submission that the first notice served by the Applicant on 10 June 2014 under section 20 of the 1985 Act described the proposed works as "the resurfacing of the driveways and forecourts", and did not specifically mention the pillars and walls, the Tribunal finds that :

- the second notice served by the Applicant on 23 September 2014 under section 20 of the 1985 Act did refer to the two estimates from C W Stanley and Steve Collins Surfacing, which each referred to the proposed pillar and wall works
- in any event, there is no evidence before the Tribunal to suggest that Mr Leber has been prejudiced by the absence of any specific mention of the pillars and walls in the notice dated 10 June 2014, in that he has had, as the Tribunal finds, ample opportunity to present to the Applicant his views about the proposed works

e. the Tribunal has taken into account Mr Leber's submissions that :
   - if the pillars and walls are reinstated, then so should other former features of the property, such as the forecourt
   - other work to the property should be carried out in priority to the re-instatement of the pillars and walls
   - other work should be carried out to Flats 5 and 7

f. however, the Tribunal finds that :
   - each of those submissions is effectively a submission that the Applicant is in breach of the terms of the lease in each respect, which is a matter for the county court, not for the Tribunal
   - in any event, none of those submissions amounts to a reason why the Applicant should not comply with what the Tribunal has found to be its responsibility to carry out the re-instatement of the pillars and walls

g. the Applicant accordingly has a responsibility under paragraph 4 of the seventh schedule to the lease to re-instate the pillars and walls, and Mr Leber is liable to contribute to the reasonable cost of so doing by way of service charge

h. in their letter dated 11 June 2015, Foxes Property Management state that the budget for the proposed re-instatement of the pillars and walls is £820 plus VAT

i. although there is no estimate before the Tribunal from a contractor in that respect, the Tribunal finds from its collective knowledge and expertise in these matters that £820 plus VAT is a reasonable sum for the proposed works

45. Mr Leber's application under section 20C of the 1985 Act

46. The Tribunal finds that the Applicant has effectively succeeded in its application to the Tribunal, and that it was reasonable to make the application, and, having considered all the circumstances of this case in the round, the Tribunal refuses Mr Leber's application, and declines to make an order under section 20C of the 1985 Act

47. Appeals

48. A person wishing to appeal against this decision 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

49. 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

50. 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 admit the application for permission to appeal

51. 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 which the person is seeking

Dated 6 July 2015

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Judge P R Boardman
(Chairman)