12278

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AP/LSC/2017/0155**
Property	:	**Flats 1-64 Seymour Court, Colney Hatch Lane, London N10 1EB**
Applicant	:	**Fordale Limited**
Respondents	:	**The leaseholders of the flats within the Property**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Judge P Korn** **Mr T Sennett**
Date of decision	:	**17th July 2017**

DECISION

Decision of the Tribunal

The Tribunal does not confirm that the works to the windows are recoverable under the service charge provisions of the Respondents' leases.

The application

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 that the cost of works proposed to the windows at the Property is recoverable under the service charge provisions of the Respondents' leases.

2. The relevant legal provisions are set out in the Appendix to this decision.

Paper determination

3. In its directions the Tribunal stated that the application was to be determined without a hearing unless either party requested a hearing prior to the determination. No such request has been made, and accordingly the application is being determined on the papers alone without a hearing.

The background

4. The Property comprises two purpose-built blocks of 64 flats in aggregate. The Applicant has supplied a copy of the lease of Flat 43 ("**the Lease**"), which appears to be dated 9th April 1978 and was made between Banrom Company Limited (1) and Robin Clive Marks and Adrienne Susan Cowan (2). Having received no evidence to the contrary, the Tribunal's default assumption is that the other leases are in the same form as the Lease for all relevant purposes.

5. The Applicant proposes to execute the works set out in a specification of works dated July 2015 attached to its application. It has gone through the statutory consultation process and no leaseholder has objected to the proposed works. The works include certain works to the windows and the Applicant seeks confirmation that the cost of the works to the windows is recoverable under the service charge provisions of the Lease (and the other leases).

Applicant's case

6. In its brief statement of case the Applicant states that whilst perusing the leases it observed that although the decoration of the exterior of the window sills and frames fall under the landlord's repairing responsibilities, the wording with respect to the repair and

maintenance of the windows *"is ambiguous as to whether this falls under the landlords' obligations or the lessees' obligations"*. The Applicant draws our attention to the provisions of clauses 2(3), 4(2)(a) and 5(3) of the Lease in this regard.

7. The Applicant goes on to argue that for reasons of practicality it would not be logistically sensible or possible for each leaseholder to arrange for their own scaffold and/or window repair team to carry out the works of repair to the windows, frames and sills on their behalf. The Applicant believes that these works should be part of the landlord's obligation and the cost recoverable under the service charge.

8. The Applicant also draws the Tribunal's attention to two previous First-tier Tribunal decisions relating to other properties and which deal with the issue of recovery of the cost of window works in similar circumstances (Reference: LON/00AP/2011/0848 and LON/00AP/LSC/2015/0206).

Respondents' position

9. Thirteen of the leaseholders have signed letters agreeing to the works. The Applicant states that it has not received negative feedback from any of the other leaseholders. The Tribunal has not received any representations from any of the Respondents apart from copies of the abovementioned signed letters.

Tribunal's analysis

10. The application is brief in its description of the window works. Looking at the specification of works, it seems that the works include easing and adjusting all opening casements, removing build-up of paint finishes, easing hinges, removing and replacing broken handles, cutting out all joints and applying repair seal to timber sub-frames, cutting out rotten sections of timber sub-frames and applying hardener and primer and form resin repair and renewing sills.

11. Turning to the Lease, the Applicant appears at least in part to have quoted the wrong clause numbers. Clause 3(3) of the Lease would seem to be the best starting point as it contains a lessee's covenant to *"repair maintain uphold and keep the demised premises (other than the parts thereof comprised and referred to in paragraph (2) (3) and (4) of Clause 5 hereof) and (subject to Clause 10(1) hereof) including all windows glass doors ... in good and substantial repair and condition..."*.

12. The "demised premises" are themselves defined as including *"the ceilings and the floor thereof and the joists and beams ... including*

also the windows window frames and window sills and the interior faces of such of the external walls as bound the flat".

13. Clause 4(2)(a) of the Lease contains an obligation on the part of the lessee to pay a service charge in respect of *"the expenditure incurred by the Lessors in carrying out their obligations as set out in Clause 5 hereof"*. Clause 5 sets out the lessor's obligations in respect of which service charge is payable, although most are not relevant to the issue in this case. Clause 5(2)(i) contains an obligation to maintain and keep *"the main structure of the Building including the principal internal timbers (other than those included in this demise or in the demise of any other flat in the Building) and the exterior walls ..."*. Clause 5(3) contains an obligation *"wherever necessary to paint the whole of the outside wood iron and other work ..."*. Clause 5(15) contains an obligation *"without prejudice to the foregoing [to] do or cause to be done all such works installations acts matters and things as in the absolute discretion of the Lessors be necessary or advisable for the proper maintenance safety and administration of the Building"*.

14. Clause 10(1) of the Lease, which is referred to in clause 3(3), states that *"every wall separating the demised premises from any other part of the Building shall be a party wall severed medially ..."*.

15. Considering the abovementioned provisions of the Lease, in particular clause 3(3) and the definition of "demised premises", it seems clear that the lessee is responsible at its own cost for the repair and maintenance of the windows, possibly including the outside of the window frames and the external window sills (although this latter point is less clear). There is nothing contained in the lessor's repairing covenants or the service charge provisions to contradict this, and therefore it seems to us that – at the very least – the repair and maintenance of the windows themselves (plus the interior of the frames and the internal sills) is the responsibility of the individual lessees and is not a service charge item.

16. We note the sweeper provision in clause 5(15), but in our view this covers (at most) items which are not clearly covered elsewhere, and the windows are clearly the responsibility of the individual lessees.

17. As regards the two cases referred to us by the Applicant, in the one relating to Cedar Court the FTT expressly declined to make a determination on this particular point. In the decision relating to St Ivian Court, the FTT did decide that clause 5(15) of the relevant lease was wide enough to permit the landlord to carry out works that were necessary and advisable for the proper maintenance safety and administration of the building. However, the decision in that case does not contain sufficient detail for it to be clear whether the works concerned were analogous to the works in the present case, nor is it clear whether clause 5(15) of that lease is broadly identical to clause 5(15) of our lease nor why clause 5(15) was considered to be sufficient

and nor is it clear whether the lease in that case is generally identical to our lease for all relevant purposes. In any event, we are not bound by previous FTT decisions.

18. Having stated all of the above, we accept that there is likely to be a logic to the Applicant carrying out all of the works as if they were all items which are recoverable through the service charge and (to that end) seeking the Respondents' agreement to the works being treated in this way. Whilst we do not accept that it is "not possible" for individual leaseholders to carry out their own works we do accept that there are logistical difficulties and that it is likely to result in cost savings for the Applicant to carry out all of the works. It is noted that the Applicant has received many letters of support and has received no objections, and therefore the likelihood of one or more leaseholders raising an objection at a later stage and of that objection being legally sustainable is arguably small.

19. However, to determine that an item forms part of the service charge when it clearly forms part of individual leaseholders' own obligations is not in our view appropriate, and it could lead for example to a situation in which a leaseholder who has maintained his or her windows in good condition would be required to contribute through the service charge to the maintenance of the windows of other leaseholders who have neglected theirs. If the Applicant wishes to change the contractual position the proper way to do this is to seek a variation of the leases.

20. In conclusion, therefore, we do not confirm that the cost of the works to the windows would be recoverable under the service charge provisions of the Respondents' leases.

Costs

21. There were no cost applications.

Name: Judge P Korn **Date:** 17th July 2017

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

APPENDIX

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

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 the appropriate 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 the appropriate 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.