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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/OOAG/LSC/2018/0383**
Property	:	**Flats 2 & 5, The Old Well House, The Grove, Highgate, London N6 6LD**
Applicants	:	**Deborah Brown (flat 2) & Frederick Ronald Darby (flat 5) ("the tenants")**
Representative	:	**Deborah Brown**
Respondent:	:	**Consolidated Equities Limited ("the landlord")**
Representative	:	**Day and Bell Surveyors Ltd**
Type of application	:	**Liability to pay service charges**
Tribunal members	:	**Judge Angus Andrew** **Michael Mathews FRICS** **Alan Ring**
Date and venue of hearing	:	**18 and 19 March 2019** **10 Alfred Place, London WC1E 7LR**
Date of decision	:	**29 April 2019**

DECISION

In this decision numbers in [ ] are references to the bundle and page numbers of the three document bundles so that [2.30] refers to page 30 of bundle 2.

Decision

1. Both Ms Brown and Mr Darby are liable to pay one sixth of the cost of the window works through the service charge provisions of their leases.

2. The landlord is not estopped from recovering the cost of window works.

3. Mr Darby is not entitled to damages of £2,000 for the landlord's failure to repair a waste pipe.

4. The tenants together are not entitled to damages of £2,000 for historic neglect.

5. In principle the landlord may recover its costs reasonably incurred in these proceedings through the service charge.

6. We decline to make an order preventing the landlord from recovering the cost of these proceedings through the service charge.

7. We decline to order the landlord to reimburse the tenants with all or any part of the tribunal fees incurred in making their applications.

The application and the hearing

8. On 18 October 2018 the tribunal received the tenants' application under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for a determination of their liability to pay service charges in respect of the four years from 2015 to 2018. The application form also included applications under section 20C of the 1985 Act and under paragraph 5A of schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"). By their additional applications the tenants sought to limit the landlord's ability to recover the costs of these proceedings either through the service charge or as an administration charge under the terms of their leases. At the hearing we were asked to consider whether we should order the landlord to reimburse the tenants with the tribunal fees of £300 paid by them.

9. At the hearing the tenants appeared in person although their case was largely presented by Ms Brown who was on record as acting for both of them. Ms Brown is a solicitor specialising in non-contentious construction work. The landlord was represented by Howard Lederman, a barrister.

10. A number of witness statements were included in the document bundles. Both Ms Brown and Mr Darby gave oral evidence as did their expert witness, Frank Richard Gainsbury FRICS, MCIArb. For the landlord we heard oral evidence from Philip Setterington BSc MRICS, Telford Rice and Omursen Payne BSc. MRICS. Mr Setterington is a director of McCarthy Partnership Limited and was responsible for specifying the works of external repair and redecoration that are at the heart of this dispute. His firm also acted as the contract administrator under the contract for those works. Mr Rice is a director of the landlord company. Ms Payne is a director of Day and Bell Surveyors Ltd, who acted as managing agents until 1 June 2018 when the landlord instructed a new firm of managing agents nominated by the tenants.

Background

11. The Old Well House comprises five flats and was built in the 1920s. There is a large flat on the ground floor and two flats on both the first and second floors. A coloured photograph of the Old Well House is at [2.196]. Although of brick construction the second floor is covered with stucco as is the brickwork separating the bay windows on each of the three floors. There is a wide soffit on all four sides of the roof. To the rear a metal stair case provides a secondary means of access to the flats on the upper floors and it was presumably intended for use as a means of escape in the event of an emergency.

12. Although not entirely clear it seems that in the early 1970s the then freeholder, Crown Lodge (Chelsea) Properties Limited, sold the five flats on relatively long leases. Only the original leases of flats 4 and 5 remain in existence. They were granted in 1970 for terms of 80 and 85 years respectively from 25 December 1968. Mr Darby purchased flat 5 in 1985 and has lived there ever since.

13. On the basis of Ms Brown's evidence, it seems that the freehold reversion was acquired by Nedwab Finance & Property Limited in about 1990. Samuel Baldwin was the sole shareholder of that company.

14. On 1 June 2005 the then lessee of flat 2 extended the lease under the provisions of the Leasehold Reform and Housing and Urban Development 1983 ("the 1993 Act"). Reflecting the provisions of the 1993 Act the new extended lease incorporates the terms of the original lease subject to a small number of variations, one of which was of some significance. Ms Brown purchased flat 2 in January 2007 and has lived there ever since.

15. On 17 December 2006 the lease of Mr Darby's flat (flat 5) was varied by a deed of variation. The variations mirrored those included in the new extended lease of flat 2 so that the terms of both leases (other than the lease length and the reserved ground rent in the lease of flat 5) are identical.

16. On the basis of Mr Darby's evidence (that in this respect, was not seriously challenged) Mr Baldwin managed The Old Well House in a collaborative and consensual manner. There were fairly regular meetings and a common approach was generally agreed before Mr Baldwin let any contracts for the redecoration and repair of the exterior and common parts. Having let those contracts, Mr

Darby told us that Mr Baldwin then recovered the cost from the lessees in the following year. Mr Baldwin arranged for the external redecoration including the windows from scaffolding in 2005 and recovered the cost from the lessees in the following year.

17. Mr Darby told us that the lessees had agreed to the external redecorations of the property in 2011. Regrettably Mr Baldwin died on 14 March 2011 shortly before the work was due to start. His estate was administered by his solicitors. His executors said that there were no funds to complete the work and indeed some of the other lessees had to lend money to the estate to ensure that the building was insured and that essential repairs to the telephone entry system were completed.

18. In the years following Mr Baldwin's death the landlord acquired the leases of flats 1, 3 and 4. In March 2012 the landlord acquired what appear to have been recently extended leases of flats 1 and 3. Finally in June 2015 the landlord acquired the original lease for flat 4. It is apparent that by that time the exterior had fallen into disrepair, which was no doubt exacerbated by the failure to complete the external redecoration in 2011. For a time the tenants and the landlord had common interest. Between them they owned all five flats. They were concerned about the deteriorating state of the exterior and all three of them wanted it remedied.

19. On 26 November 2015 the landlord purchased the freehold reversion from Mr Baldwin's executors for £210,000 although legal title was presumably transferred by Nedwab Finance & Property Limited. Mr Rice told us that the landlord purchased the freehold reversion not so much as an investment but to enable it to remedy the disrepair in particular by redecorating the exterior.

20. Regrettably the landlord's proposals for completing the outstanding work provoked a bitter dispute with the tenants: 26 pages of the tenants 76 page closely typed statement of case deal with their complaints about the conduct of the landlord's managing agents. Those complaints eventually resulted in the service of a notice under section 22 of the Landlord and Tenant Act 1987. Upon receipt of a copy of the notice the managing agents (who continue to represent the landlord both in these proceedings and in the management of other properties) resigned and the landlord very sensibly appointed managing agents proposed by the tenants so that it became unnecessary for the tenants to apply to this tribunal for the appointment of a manager.

21. The landlord conceded that it would not seek to recover the managing agents' fees through the service charge prior to the appointment of the new managing agents on 1 June 2018. That pragmatic concession, made without any admission of the underlying fact, means that it is unnecessary for us to make any findings of fact about the previous managing agents' conduct prior to 1 June 2018 and we decline to do so. We simply repeat our observations made at the hearing that this dispute could and should have been resolved by a pragmatic agreement rather than by these proceedings not least because the tenants dispute neither the necessity of the work nor its cost.

22. The landlord, through its managing agents, consulted on the proposed works and the tenants do not suggest that there was any breach of the statutory consultation

requirements. The tenants objected to various elements of the proposed works. In doing so they raised the issue that is now before us. They asserted that their flat windows were within the demises of their flats and that they and not the landlord, were responsible for their external decoration and repair. Negotiations between the tenants and the managing agents continued over a considerable period of time and are documented in the large quantity of emails included in the three document bundles.

23. The landlord through its managing agent appears to have adopted, at least in the early stages of the negotiations, a pragmatic approach rather than relying on what it considered to be the legal niceties of the situation. The scaffolding was up and the landlord considered that the sensible approach was to get the work completed and then reach some accommodation with the tenants on the cost. It is apparent that at one stage the tenants, at least by implication, agreed to the landlord completing the window works. On 6 July 2017 Ms Brown returned a copy of the priced specifications with her objections endorsed in red [2.269-274]: no objection was taken to the window works.

24. Nevertheless, the negotiations ultimately broke down. The tipping point was an e-mail from Ms Brown to the managing agents of 4 October 2017 [3.377] that includes the following passage: -

"Further to your e-mail below, and my e-mail to Omur of 15.49 on 2/10, I note that you have continued to behave aggressively towards Fred and I regarding the fire doors. Accordingly, and in line with my e-mail, I will not be paying, as part of any service charge demand or otherwise, the cost of works to the areas to the building which I am not legally obliged to pay for under my lease. This includes any work currently being carried out to windows, which are demised to individual leaseholders, including myself".

25. On the basis of Ms Payne's evidence, she then sought instructions from Mr Rice who decided to complete the works and if necessary to argue about the tenants' contributions at a later date.

26. Before moving on reference needs to be made to one element of the window works. The lower sash of the small window of the flank wall of Mr Darby's flat was rotten and beyond repair and had to be replaced. It is agreed that the cost of replacing the sash was £460. By the time that this issue arose Ms Payne had given greater consideration to the terms of the leases. She concluded that the sash was within Mr Darby's demise and that he was responsible for its replacement (although not its external decoration). She reached this conclusion without the benefit of legal advice and Mr Lederman did not agree with it. In an email to both tenants on 11 October 2017 [3.385] she accepted that *"any structural repair above normal redecoration is the responsibility of the leaseholders"*. She continued by suggesting that it would be more sensible for the landlord to replace the sash on the basis that Mr Darby would pay £460 directly to the contractor. Mr Darby agreed to this suggestion although the £460 has never been demanded from him.

27. The external works started on 24 August 2017 and were completed by 6 December 2017. The cost of the works spans both the 2017 and 2018 service

charge years. For reasons that are outwith this decision the landlord must fund the work before recovering any cost through the service charge provisions of the tenants' leases. The service charge accounts for 2017 are at [2.169-176] and the statements are at [2.154F and 2.165]. The sum of £12,420.51 was demanded from each of the tenants. They each declined to pay £11,062.19 that was attributable to the cost of the external decorations that had been incurred in 2017.

28. The 2017 service charge account included an estimate of £22,493.68 for the cost of the outstanding work. The tenants appear to have assumed that this estimate equated to actual cost and they applied to the tribunal for a determination of their liability for the total cost of the works, before the final account had been issued. This misunderstanding caused considerable confusion during the first morning of the hearing.

29. The final account is however now available and is at [3.493]. The total cost of the work exclusive of VAT and professional fees is £57,400.19. The professional fees had been agreed at 11% of the final account and the total cost of the works inclusive of the professional fees and VAT was therefore agreed at £76,457.02. It was equally agreed during the first morning of the hearing that the final cost of the disputed window works was £13,160.87. The tenants also disputed their liability for a pro-rata proportion of the cost of the preliminaries that was agreed at £3,804.80. Thus, of the total cost the tenants disputed £16,965.68.

Relevant lease provisions

30. This case essentially turns on four provisions. The first is the demise, the second is the lessee's covenant to redecorate and repair, the third is the lessor's covenant to redecorate and repair and the fourth is the lessee's covenant to contribute to the lessor's costs. Given the importance of these provisions we recite them below, taken from the lease of flat 5: -

The demise

> *All those the premises comprising the residential Flat situate on the Second Floor of the Building and numbered 5 as the same are for the purpose of identification shown on the plan annexed hereto and thereon edged red which demise includes the floor and ceilings of the premises and half the depth of the beams or joints supporting the same (except in the case of a basement floor when the demise extends to the full depth of the floor of the premises and the beams supporting the floor thereto and in the case of a top floor flat when the demise extends to the top of the joints supporting the ceiling of the premises) and including the interior faces of the boundary walls of the premises and the window doors and door frame of such boundary walls.*

It should be noted that Mr Lederman accepted that the use of the word "window" in the singular was a mistake and that it should have read as "windows" as in Ms Brown's lease.

The lessee's covenants to redecorate and repair

2 (3) Throughout the said term to keep the premises and every part thereof all fixtures and fittings therein (including all ceilings ceilings joists floors joists beams cisterns tanks sewers drains pipes wires ducts and conduits therein) and all additions thereto in a good and substantial state of repair decoration and condition fair wear and tear excepted.

2 (4) Once in every seventh year of the said term to paint in good and workmanlike manner with two coats at least of good quality paint or other proper coating approved by the Lessor all the wood iron and other work in and about the premises previously or usually painted or which ought to be painted and to re-paper and varnish al such parts as have previously been papered or varnished.

The lessor's covenants to redecorate and repair

3 (a) At all times during the term to maintain and keep the exterior of the Building and the roof or roofs and main walls and timbers and drains thereof also the entrance hall staircases and passages intended for common use of the Lessee and the other occupiers of the Building in good and tenantable repair and condition and where necessary or requisite properly painted (excluding interior main walls) and to keep the said entrance hall stairs and passages well and lighted during the hours of dusk darkness and dawn and cleaned at all times

(d) Once in every four years to paint in a good and workmanlike manner with two coats of good quality paint all the outside wood iron and stucco work of the Building previously or usually painted.

The lessee's covenant to contribute to the lessors' costs

5 (1) The Lessee hereby covenants with the lessor to pay to the lessor throughout the term thereby granted one sixth part (thereinafter called "the service charge") of the costs expense and outgoings and other matters specified in the next following sub-clause hereof

5 (2) The said costs expenses outgoing and other matters are: -

(a) The expense of maintaining repairing redecorating and renewing

(1) The main structure [and exterior] of the Building including (but without prejudice to the generality of the foregoing) the roofs chimney stacks gutters rainwater pipes and main drains

In respect of Mr Darby's lease, the words *"and exterior"* were added by the deed of variation of 17 December 2006. In respect of Ms Brown's lease, the words were incorporated in the new extended lease granted on 1st June 2005.

ISSUES IN DISPUTE

31. During the course of the hearing each party made concessions that served to narrow the issues in dispute or at least the legal the argument in relation to those issues. The concessions can be summarised as follows:

    (a) Having already agreed or conceded the managing agent's fees to 31 December 2017 the landlord conceded the fees prior to the appointment of a new managing agent on 1 June 2018. For avoidance of doubt both tenants are entitled to a credit in respect of those fees.

    (b) As observed above the total cost of the major works completed during 2017 and 2018 were agreed at £76,457.02 and the cost of the window works including a pro-rata proportion of the preliminary costs were agreed at £16,965.68.

    (c) Upon hearing Ms Payne's evidence, the tenants withdrew their objection to the accountancy fees of £498 in 2016 and £510 in 2017 [2.138 and 2.172].

    (d) Ms Brown conceded that the landlord could not be responsible for any disrepair occurring before it purchased the freehold reversion on 26 November 2015.

    (e) On behalf of the landlord Mr Lederman conceded that there were no provisions in either lease that would enable the landlord to recover the cost of these proceedings from the tenants as an administration charge.

32. The remaining issues that fell to be decided can be encapsulated in the following questions:

    a. Could the landlord recover the cost of window works from the tenants under the service charge provisions of their leases?

    b. Was the landlord estopped from recovering the cost of the window work by reason of representations made to the tenants?

    c. Was Mr Darby entitled to damages of £2,000 for the landlord's failure to repair a waste pipe, such loss to be set off against his service charge liability if any?

    d. Were the tenants together entitled to damages of £2,000 for the historic neglect of the rear metal staircase, such loss to be set off against their service charge liability if any?

e. Is the landlord entitled to recover the cost of these proceedings through the service charge and if so, should we make an order preventing or limiting that recovery?

f. Should we order the landlord to reimburse the tenants with all or part of the tribunal fees of £300 paid by them?

Reasons for our decisions

That Ms Brown and Mr Darby are liable to pay one sixth of the cost of the window works through the service charge provisions of their leases

33. This is an issue of lease interpretation: does the obligation to repair and redecorate the exterior of the flat windows fall within the lessee's or the lessor's covenant to redecorate and repair? If it falls within the lessee's obligation, the landlord may not recover the cost of the window work through the service charge: if the lessor's obligation, it may.

34. Our attention was drawn to a number of authorities all of which largely turn on their own facts and lease provisions. We do not consider that it necessary to go beyond the guidance of Lord Neuberger contained in his judgement in Arnold v Britten [2015] UKSC 36 when he said: -

"That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but disregarding subjective evidence of any party's intentions."

35. In the passage that follows Lord Neuberger warns of the dangers of relying on commercial common sense save in very unusual circumstances and it is a warning to which we have had regard.

36. As observed above the lease of Ms Brown's flat had been extended in 2005 under the provisions of the 1993 Act and Mr Darby's lease had been varied in 2006. This raised a subsidiary question: should the leases be interpreted by reference to the facts and circumstances known or assumed by the parties in 1970 (when the original leases were granted) or in 2005 when a new extended lease of Ms Brown's flat was granted and in 2006 when the lease of Mr Darby's flat was varied?

37. Mr Lederman said that we should have regard to the facts and circumstances in 1970 whilst Ms Brown was not sure and left it to us. Ultimately our decision does not rest on this point but as it was raised we deal with it. In doing so we observe that the new lease that comes into effect on a lease extension is little more than a legal fiction. Our conclusion is that one must have regard to the facts and circumstances in 1970 save that when considering the effect of the inclusion of

the words *"and exterior"* one must have regard to facts and circumstances in 2005 or 2006, as the case may be.

38. We hope we do not do Ms Brown an injustice if we briefly paraphrase the main thrust of her argument. The *"windows"* are included in the demise and as the lessee covenants to redecorate and repair the demised premises the lessee must have the primary obligation. Express words would be required to "push" the obligation into the lessor's covenant. She submitted that her lease contained no such express words. Consequently, she was responsible for the redecoration and repair of the windows and the landlord could not therefore recover the cost of the work through the service charge.

39. However, if that is the high point of the Ms Brown's argument everything else in her lease points in the opposite direction.

40. In the last phrase of the demise the repetition of the words *"boundary walls"* indicates that the words *"interior faces"* applies not only to the *"boundary walls"* but also to the *"windows doors and door frames of such boundary walls"*. The use of the word *"of"* indicates that the windows are part of the boundary walls. Thus, the structure and exterior of the windows do not form part of the demise and the tenants' case falls at the first hurdle.

41. The lessee's repairing covenant at clause 2(3) is qualified by the exclusion of *"fair wear and tear"*. That qualification is generally associated with an internal repairing covenant and may be contrasted with the lessor's absolute repairing obligation that applies to the exterior and main structures.

42. At clause 2 (4) the lessee is required to redecorate in every seventh year whilst at clause 3(d) the lessor is required to redecorate in every fourth year. When the original leases were granted in 1970 a seven-year redecorating cycle was consistent with an internal redecorating obligation whilst a three or four-year cycle was consistent with an external redecorating obligation. The reason for that is self-evident.

43. The lessor's repairing covenant at clause 3(a) extends to the *"exterior of the Building"*, which would logically include the exterior of the windows. Equally the lessor's redecorating covenant at clause 3 (d) extends to *"all the outside wood.... of the Building previously or usually painted"*, which would again logically include the outside or exterior of the wooden windows.

44. Turning to the lessee's obligation to contribute at clause 5 Mr Lederman, perhaps surprisingly, did not suggest that the windows formed part of *"the main structure....of the Building"*. We nevertheless agree with his argument that the words *"and exterior"* were included in 2005 and 2006 to rectify a perceived defect in the original leases. Their inclusion was consistent with Mr Darby's evidence that in 2005 Mr Baldwin had completed the external redecoration of the building including the windows from scaffolding and had recovered the cost from the lessees in the following year.

45. We now turn to lord Neuberger's fourth criteria: *"the facts and circumstances known or assumed by the parties at the time that the document was executed".*

46. We asked Ms Brown how the lessee could repair and redecorate the exterior of the flat windows in the absence of any right to erect external scaffolding. In answer, she said that she would expect to repair and redecorate all her windows from the inside of her flat. She suggested that that could be achieved by a contractor such as a jobbing carpenter either leaning out of the windows *"or physically bringing the windows into the room".*

47. Even allowing for the fact that in 1970 Health and Safety regulation was far laxer that it is now, we do not accept that the parties to the original lessees can have either contemplated or intended the scenarios suggested by Ms Brown. The inherent risk involved in leaning out of a second-floor window to complete external repairs to the frame would have been just as apparent in 1970 as it is now. Equally, whilst we accept that it may be possible to dismantle a window and bring it inside the flat it seems unlikely that the parties to the original leases would have contemplated such a possibility. They are far more likely to have contemplated and intended that the lessor would retain responsibility for all external repairs and decorations so that they could be completed simultaneously from scaffolding, thereby maintaining a uniform external appearance to the building.

48. For each of the above reasons we find that the lessee is responsible for the repair and redecoration of the windows and consequently Ms Brown and Mr Darby are liable to pay one sixth of the cost of the window works through the service charge provisions of their leases.

<u>The landlord is not estopped from recovering the cost of the window works</u>

49. In answer to Mr Lederman's questions Ms Brown said that the tenant's case was based on Ms Payne's e-mail of 11 October 2017 [3.305] referred to in paragraph 26 above. It will be recalled that in that e-mail Ms Payne accepted that *"any structural repair above normal decoration is the responsibility of the leaseholders".*

50. The e-mail does not in any event assist the tenants because it relates only to structural repairs and the sash issue aside the costs in dispute relate to the repair and redecoration of the exterior of the windows. That apart the e-mail was simply one of a large number of e-mails passing between the parties in which they were attempting to find common ground and negotiate a satisfactory outcome. If this e-mail could be regarded as a representation giving rise to an estoppel then so could Ms Brown's failure to object to the cost of the window works when returning the priced specification with her objections endorsed in red [2.269-274].

51. We agree with Mr Lederman's submission that if the tenants are to succeed under this head the representation relied on must be *"clear and unequivocal"*. In the

context of the negotiations that were taking place between the parties we do not consider that Ms Payne's e-mail of 11 October 2017 meets that test and we reject the tenant's case.

Mr Darby is not entitled to damages of £2,000 for the landlord's failure to repair a waste pipe

52. In February 2012 Mr Darby discovered that the external waste pipe from his bathroom sink was leaking. As contractors were working below he discontinued the use of his bathroom sink and instead used the kitchen sink. The waste pipe was not finally repaired until about November 2017. Mr Darby claimed damages of £2,000 for loss of amenity that Ms Brown suggested could be set off against Mr Darby's service charge liability. In pursuing that argument Ms Brown relied on Continental Properties Ventures Inc v White and Another [2006] 1EGLR 85. In that case Judge Rich QC accepted that this tribunal may consider a claim of loss of amenity but he cautioned restraint in the exercise of that jurisdiction.

53. Mr Darby's case is largely undermined by Ms Brown's concession that the landlord could not be responsible for disrepair occurring prior to its purchase on 26 November 2015. To the extent that Mr Darby may have a residual claim in respect of the 2 years from 26 November 2015 no explanation was given for the assessment of the claimed damages. The claim is not adequately pleaded and we reject it.

The tenants together are not entitled to damages of £2,000 for historic neglect

54. The tenants claim related to the historic neglect of the rear fire escape that resulted in *"cutting out and replacing rusted steel members and repairing welded joints"*. The total cost of the fire escape work was £4,000. Mr Gainsbury assessed the cost of the increased work at £2,000.

55. In answer to our question Mr Gainsbury accepted that he had assessed the increased cost on the understanding that the landlord was responsible for the disrepair of the rear fire escape since it was last repaired and redecorated in about 2005. Upon being informed of Ms Brown's concession that the landlord was only responsible for any disrepair after it purchased the freehold reversion on 26 November 2015 he said that he would have to qualify his assessment of the increased cost but he was unable to say by how much.

56. The landlord purchased the property in November 2015 and given the extent of the contracted work it cannot be criticised for the two years that it took to complete the work in particular given the need for prior consultation. It is impossible to identify the extent of any disrepair that resulted from the landlord's period of ownership. In any event the cost saving resulting from the previous lessors' failure to repair and redecorate the fire escape must be taken into account. On the basis of Mr Gainsbury's evidence it seems likely that the saving would offset any increased cost resulting from the historic neglect.

57. Although we accept that this claim falls squarely within the ambit of Continental Ventures Inc it is nevertheless not sufficiently made out and we reject it.

In principle the landlord may recover its costs reasonably incurred in these proceedings through the service charge

58. In submitting that the landlord was entitled to recover the costs of these proceedings through the service charge Mr Lederman relied upon clause 5(e) of the leases. It is unnecessary to recite that clause in full because Ms Brown's only objection to Mr Lederman's submission was that the cost of these proceedings could not be said to have been incurred *"for the benefit of the Building as a whole or of the Lessee and other lessees as a class"* as required by that clause.

59. If this case was concerned with the reasonableness of the incurred costs or the quality of the work undertaken we can see some force in Ms Brown's argument. However, the central issue related to the interpretation of two old leases that are very much products of their time. There had already been one variation of the original leases in an apparent attempt to clarify the extent of the parties repairing and redecorating obligations that had only been partially successful. As Ms Brown herself appeared to acknowledge it was in everyone's interest that the parties' respective obligations relating to the windows were put beyond doubt. Consequently, we are satisfied that the proceedings were brought for the benefit of all the lessees, including the tenants *"as a class"*. It could equally be said that the clarification of the parties' obligations for the windows was also for the benefit *"of the building"*. It will avoid the possibility of the windows falling into disrepair because of a future dispute between the parties or their successors in title.

60. Consequently, and for each of these reasons we consider that the landlord can in principle recover the cost of these proceedings through the service charge. That said we emphasise that the landlord may only recover any costs reasonably incurred. If, on the publication of the 2019 service charge accounts, the tenants consider that the claimed costs are unreasonable they are entitled to challenge those costs before this tribunal by making a further application under section 27A of the 1985 Act.

Section 20C and reimbursement of fees

61. The right to recover costs under a lease is a property right that should not be lightly disregarded. Section 20C provides that a tribunal may *"make such order on the application as it considers just and equitable in the circumstances"*. Those words permit us to take into account the conduct of the parties in deciding whether to make an order.

62. In this case the tenants have been wholly unsuccessful in the proceedings. We can see no good reason to deprive the landlord of its right to recover its costs and we decline to make the order sought by the tenants. For essentially the same reason we also decline to order the landlord to reimburse the tribunal fees of £300 paid by the tenants.

Name: Angus Andrew **Date: 29 April 2019**

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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

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.

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

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).