11692

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AU/LVT/2016/0002**
Property	:	**Flats A-E 388 Caledonian Road London N1 1DN**
Applicant	:	**Callum Lumsden (Flat A) Gordon Conroy (Flat B) Malcolm Allen & Paula Barkay (Flat C) Justin James & Jocelyn James (Flat D) Tracey O'Beirne & David O'Beirne (Flat E)**
Representative	:	**Shoosmiths LLP**
Respondent	:	**Ronald Lear & Susan Lear**
Representative	:	**Seddons**
Type of Application	:	**Variation of lease, ss35-40 Landlord and Tenant Act 1987 and service charges s27A Landlord and Tenant Act 1985.**
Tribunal Members	:	**Mrs F J Silverman Dip Fr LLM Mr M Cartwright JP FRICS**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR 1 August 2016**
Date of Decision	:	**1 August 2016**

DECISION

© CROWN COPYRIGHT 2016

The Tribunal refuses the Applicant's application under section 35 Landlord and Tenant Act 1987 for the reasons set out below.
In relation to service charges the Tribunal finds that the works to doors and windows disputed by the Applicants do not form part of the items for which they are liable under service charge provisions of the lease and thus the Respondents are not entitled to charge for them in the service charge account. The Tribunal finds that the Respondents' proposed substitution of granite in place of a wooden column is an improvement and not a repair the cost of which the Respondents are not entitled to charge to the Applicants.
The Tribunal makes no order under s20C Landlord and Tenant Act 1985.
The Tribunal declines to make an order for costs under Rule 13 of the Tribunal Rules of Procedure.

REASONS

1 The Applicants are the tenants of the five flats forming the upper floors of the building known as 388 Caledonian Road London N1 1DN. The Respondents are the landlords in relation to the Applicants' leases and are the freeholders of the entire building carrying on a business from the commercial premises on the ground floor.

2 The Applicants leases are variously dated but are substantially all in the same form.

3 The current application, brought under s 35 Landlord and Tenant Act 1987, seeks to vary the provisions in the Applicants' leases so that the service charge proportions borne by the Applicant tenants is reduced to reflect their share of liability for the maintenance of the building (as defined in the lease). The current position is that the occupier of the commercial premises (whether landlord or tenant for the time being) pays no contribution to the upkeep of any part of the building .

4 The current application also asks the Tribunal to determine the reasonableness of the service charges demanded by the landlords in relation to maintenance works carried out or to be carried out on the building following service of a s20 notice (the validity of that notice is not disputed).

5 The Applicants also seek an order under s20C Landlord and Tenant Act 1985 and an order for costs under Rule 13 of the Tribunal Rules of Procedure.

6 The Applicants' application to the Tribunal was filed on 30 March 2016 with Directions being issued by the Tribunal on 14 April 2016.

7 The Tribunal had the benefit of a volume of paperwork presented by both parties and of large scale plans of the building and its lay out. In the light of this documentation and the nature of the issues to be decided the Tribunal did not consider it necessary to inspect the property .

8 A bundle of documents was presented to the Tribunal for its consideration.

9 The provisions set out in section 36 Landlord and Tenant Act 1987 permit a party to apply for a lease to be varied where, inter alia, the lease fails

to make satisfactory provision for the repair or maintenance of the flat or building of which it forms part. In the present case the lease contains perfectly adequate provisions for the landlord to repair and maintain the structure and common parts of the building. What is unsatisfactory in the eyes of the tenants , but not of the landlord, is that the tenants are being asked to pay a higher proportion of the maintenance of the building than they think they should because the lease draftsman chose to place the entire burden of paying for the maintenance of the building, including the ground floor commercial premises, on the tenants rather than share it between landlord and tenant. The division of this liability would have been a matter of commercial negotiation at the time when the various leases were entered into and is not a matter for later complaint that the tenants failed to obtain a good bargain. The tenants application does not meet the threshold standard required by the statute for variation of their leases.

10 The Tribunal therefore declines to grant the application to vary the leases.

11 In relation to the tenants' s27A application, which relates to the current year (2016) the Applicants ask the Tribunal to determine whether items relating to 'carpentry works to the windows and doors to the ground floor' and 'repair to the column in Offord Road elevation at ground floor level and fitting of granite slab' are within the remit of the items recoverable by the landlord under the service charge provisions and if so whether the charges are reasonable and have been reasonably incurred.

12 As far as the carpentry etc works are concerned, the liability rests on whether the ground floor repairs are included within the definition of the 'main structure' in the lease itself. The main structure is part of the area defined in the lease in respect of which the tenants incur service charge liability and carries a different definition to that of the word 'building'. Although the Respondents argue that by implication the main structure of the building must include the ground floor windows and doors, the Tribunal prefers the Applicants' interpretation of the phrase. In the Tribunal's view the phrase 'main structure' is clearly defined in the lease itself specifying that it refers to the roof and foundations of the building together with the external half of the load bearing walls. Had the draftsman intended to include doors and windows (s)he would have done so and the express omission of these items is significant . The Tribunal therefore finds that these items do not form part of the service charge for which the Applicants are responsible.

13 As far as the work to the exterior ground floor column is concerned, this does form part of the main structure and therefore repairs to it will fall within the remit of the liability imposed by the service charge. However, the Applicant tenants are liable only to pay for the reasonable cost of reasonable repairs effected to a reasonable standard. The column is currently clad in wood and the Applicants do not dispute that some repair is necessary. They do however object to the Respondents' proposals to replace the wooden exterior with granite . The Respondents say their intention is to repair the column in order to match it with the other granite columns flanking the ground floor of the exterior wall of the building. The cost of the proposed granite replacement is likely to be substantially greater than the cost of wood. The Applicants argue that the Respondents' proposal is an improvement and not a repair and should not be permitted. The Respondents argue that their proposal is merely a restoration to the column's original condition. The

Applicants' evidence, which is not refuted by the Respondents is that the column in question was damaged by being hit by a vehicle several years ago but has at all times since the leases were granted been wooden clad and not made of granite. The Respondents concede that the damage to the column occurred several years ago but have not provided specific evidence of the date. Having considered both parties' representations in relation to this matter the Tribunal concludes that the Respondents' proposals amount to an improvement and not a repair and therefore the cost of the granite column cannot be passed on to the Applicants by way of service charge.

14 The Applicants made an application for an order under s20C Landlord and Tenant Act 1985. Since the Applicants' substantive application has failed (variation of leases) the Tribunal is not inclined to grant their application.

15 The Applicants also made an application for costs under Rule 13 Tribunal Rules of Procedure. An award of costs under Rule 13 of the Tribunal Rules of Procedure is not made as a matter of course. The Tribunal has no evidence that the Respondent has acted vexatiously or unreasonably and therefore does not find that the grounds on which such an award could be made have been established. The request for such an award is declined.

16 The Law

Section 36 Landlord and Tenant Act 1987. Application by party to lease for variation of lease.

(1)Any party to a long lease of a flat may make an application to the court for an order varying the lease in such manner as is specified in the application.

(2)The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely—

(a)the repair or maintenance of—

(i)the flat in question, or

(ii)the building containing the flat, or

(iii) any land or building which is let to the tenant under the lease or in respect of which rights are conferred on him under it;

(b)the insurance of the building containing the flat or of any such land or building as is mentioned in paragraph (a)(iii);

(c)the repair or maintenance of any installations (whether they are in the same building as the flat or not) which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation;

(d)the provision or maintenance of any services which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation (whether they are services connected with any such installations or not, and whether they are services provided for the benefit of those occupiers or services provided for the benefit of the occupiers of a number of flats including that flat);

(e) the recovery by one party to the lease from another party to it of expenditure incurred or to be incurred by him, or on his behalf, for the benefit of that other party or of a number of persons who include that other party;

(f)the computation of a service charge payable under the lease.

(g)such other matters as may be prescribed by regulations made by the Secretary of State.

(3)For the purposes of subsection (2)(c) and (d) the factors for determining, in relation to the occupiers of a flat, what is a reasonable standard of

accommodation may include—
(a)factors relating to the safety and security of the flat and its occupiers and of any common parts of the building containing the flat; and
(b)other factors relating to the condition of any such common parts.
(3A)For the purposes of subsection (2)(e) the factors for determining, in relation to a service charge payable under a lease, whether the lease makes satisfactory provision include whether it makes provision for an amount to be payable (by way of interest or otherwise) in respect of a failure to pay the service charge by the due date.
(4)For the purposes of subsection (2)(f) a lease fails to make satisfactory provision with respect to the computation of a service charge payable under it if—
(a)it provides for any such charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord or a superior landlord; and
(b)other tenants of the landlord are also liable under their leases to pay by way of service charges proportions of any such expenditure; and
(c)the aggregate of the amounts that would, in any particular case, be payable by reference to the proportions referred to in paragraphs (a) and (b) would either exceed or be less than the whole of any such expenditure.
(5)Rules of court shall make provision—
(a)for requiring notice of any application under this Part to be served by the person making the application, and by any respondent to the application, on any person who the applicant, or (as the case may be) the respondent, knows or has reason to believe is likely to be affected by any variation specified in the application, and
(b)for enabling persons served with any such notice to be joined as parties to the proceedings.
(6)For the purposes of this Part a long lease shall not be regarded as a long lease of a flat if—
(a)the demised premises consist of or include three or more flats contained in the same building; or
(b)the lease constitutes a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.
(8)In this section "service charge" has the meaning given by section 18(1) of the 1985 Act.

Section 36 Landlord and Tenant Act 1987
Application by respondent for variation of other leases.
(1)Where an application ("the original application") is made under section 35 by any party to a lease, any other party to the lease may make an application to the court asking it, in the event of its deciding to make an order effecting any variation of the lease in pursuance of the original application, to make an order which effects a corresponding variation of each of such one or more other leases as are specified in the application.
(2)Any lease so specified—
(a)must be a long lease of a flat under which the landlord is the same person as the landlord under the lease specified in the original application; but
(b)need not be a lease of a flat which is in the same building as the flat let under that lease, nor a lease drafted in terms identical to those of that lease.
(3)The grounds on which an application may be made under this section are—
(a)that each of the leases specified in the application fails to make satisfactory

provision with respect to the matter or matters specified in the original application; and
(b)that, if any variation is effected in pursuance of the original application, it would be in the interests of the person making the application under this section, or in the interests of the other persons who are parties to the leases specified in that application, to have all of the leases in question (that is to say, the ones specified in that application together with the one specified in the original application) varied to the same effect.

Section 37 Landlord and Tenant Act 1987
Application by majority of parties for variation of leases.
(1)Subject to the following provisions of this section, an application may be made to the court in respect of two or more leases for an order varying each of those leases in such manner as is specified in the application.
(2)Those leases must be long leases of flats under which the landlord is the same person, but they need not be leases of flats which are in the same building, nor leases which are drafted in identical terms.
(3)The grounds on which an application may be made under this section are that the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect.
(4)An application under this section in respect of any leases may be made by the landlord or any of the tenants under the leases.
(5)Any such application shall only be made if—
(a)in a case where the application is in respect of less than nine leases, all, or all but one, of the parties concerned consent to it; or
(b)in a case where the application is in respect of more than eight leases, it is not opposed for any reason by more than 10 per cent. of the total number of the parties concerned and at least 75 per cent. of that number consent to it.
(6)For the purposes of subsection (5)—
(a)in the case of each lease in respect of which the application is made, the tenant under the lease shall constitute one of the parties concerned (so that in determining the total number of the parties concerned a person who is the tenant under a number of such leases shall be regarded as constituting a corresponding number of the parties concerned); and
(b)the landlord shall also constitute one of the parties concerned.

Section 38 Landlord and Tenant Act 1987
Orders by the court varying leases.
(1)If, on an application under section 35, the grounds on which the application was made are established to the satisfaction of the court, the court may (subject to subsections (6) and (7)) make an order varying the lease specified in the application in such manner as is specified in the order.
(2)If—(a)
an application under section 36 was made in connection with that application, and(b)the grounds set out in subsection (3) of that section are established to the satisfaction of the court with respect to the leases specified in the application under section 36,
the court may (subject to subsections (6) and (7)) also make an order varying each of those leases in such manner as is specified in the order.
(3)If, on an application under section 37, the grounds set out in subsection (3) of that section are established to the satisfaction of the court with respect to

the leases specified in the application, the court may (subject to subsections (6) and (7)) make an order varying each of those leases in such manner as is specified in the order.
(4)The variation specified in an order under subsection (1) or (2) may be either the variation specified in the relevant application under section 35 or 36 or such other variation as the court thinks fit.
(5)If the grounds referred to in subsection (2) or (3) (as the case may be) are established to the satisfaction of the court with respect to some but not all of the leases specified in the application, the power to make an order under that subsection shall extend to those leases only.
(6)The court shall not make an order under this section effecting any variation of a lease if it appears to the court—
(a)that the variation would be likely substantially to prejudice—
(i)any respondent to the application, or
(ii)any person who is not a party to the application,
and that an award under subsection (10) would not afford him adequate compensation, or
(b)that for any other reason it would not be reasonable in the circumstances for the variation to be effected.
(7)The court shall not, on an application relating to the provision to be made by a lease with respect to insurance, make an order under this section effecting any variation of the lease—
(a)which terminates any existing right of the landlord under its terms to nominate an insurer for insurance purposes; or
(b)which requires the landlord to nominate a number of insurers from which the tenant would be entitled to select an insurer for those purposes; or
(c)which, in a case where the lease requires the tenant to effect insurance with a specified insurer, requires the tenant to effect insurance otherwise than with another specified insurer.
(8)The court may, instead of making an order varying a lease in such manner as is specified in the order, make an order directing the parties to the lease to vary it in such manner as is so specified; and accordingly any reference in this Part (however expressed) to an order which effects any variation of a lease or to any variation effected by an order shall include a reference to an order which directs the parties to a lease to effect a variation of it or (as the case may be) a reference to any variation effected in pursuance of such an order.
(9)The court may by order direct that a memorandum of any variation of a lease effected by an order under this section shall be endorsed on such documents as are specified in the order.
(10)Where the court makes an order under this section varying a lease the court may, if it thinks fit, make an order providing for any party to the lease to pay, to any other party to the lease or to any other person, compensation in respect of any loss or disadvantage that the court considers he is likely to suffer as a result of the variation.

Section 39 Landlord and Tenant Act 1987
Effect of orders varying leases: applications by third parties.
(1)Any variation effected by an order under section 38 shall be binding not only on the parties to the lease for the time being but also on other persons (including any predecessors in title of those parties), whether or not they were parties to the proceedings in which the order was made or were served with a

notice by virtue of section 35(5).
(2)Without prejudice to the generality of subsection (1), any variation effected by any such order shall be binding on any surety who has guaranteed the performance of any obligation varied by the order; and the surety shall accordingly be taken to have guaranteed the performance of that obligation as so varied.
(3)Where any such order has been made and a person was, by virtue of section 35(5), required to be served with a notice relating to the proceedings in which it was made, but he was not so served, he may—
(a)bring an action for damages for breach of statutory duty against the person by whom any such notice was so required to be served in respect of that person's failure to serve it;
(b)apply to the court for the cancellation or modification of the variation in question.
(4)The court may, on an application under subsection (3)(b) with respect to any variation of a lease—
(a)by order cancel that variation or modify it in such manner as is specified in the order, or
(b)make such an order as is mentioned in section 38(10) in favour of the person making the application,
as it thinks fit.
(5)Where a variation is cancelled or modified under paragraph (a) of subsection (4)—
(a)the cancellation or modification shall take effect as from the date of the making of the order under that paragraph or as from such later date as may be specified in the order, and
(b)the court may by order direct that a memorandum of the cancellation or modification shall be endorsed on such documents as are specified in the order;
and, in a case where a variation is so modified, subsections (1) and (2) above shall, as from the date when the modification takes effect, apply to the variation as modified.

<u>Section 27A Landlord and Teannt Act 1985.</u>

(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.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;
(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
(c) in the case of proceedings before the Upper Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

<u>Commonhold and Leasehold Reform Act 2002</u>

<u>Schedule 11, paragraph 1</u>

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

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

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,
   (d) the date at or by which it is payable, and
   (e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
   (a) has been agreed or admitted by the tenant,
   (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
   (c) has been the subject of determination by a court, or
   (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
   (a) in a particular manner, or
   (b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).

Orders for costs, reimbursement of fees and interest on costs
Rule 13. Tribunal Rules of Procedure

13(1) The Tribunal may make an order in respect of costs only—

(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—
(i) an agricultural land and drainage case,
(ii) a residential property case, or
(iii) a leasehold case; or
(c) in a land registration case.

Judge F J Silverman as Chairman
Date 1 August 2016

Note:
Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) 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.

2. 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.

3. 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 allow the application for permission to appeal to proceed.

4. 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 the party making the application is seeking