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Southern Rent Assessment Panel and Leasehold Valuation Tribunal

Case No. CHI/00ML/LSC/2005/0058

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL
ON APPLICATIONS UNDER Sections 27A & 20C of the LANDLORD AND TENANT ACT
1985 and Sections 22 & 24 of the LANDLORD AND TENANT ACT 1987**

Property: 60 Sackville Road, Hove BN3 3HA

Applicants: 60 Sackville Road Management Company Limited
(landlord)

Respondent: Karen Medina (1)
Mark Gargett (2)
(tenants of lower ground floor flat)

Appearances: For the Applicants:
Miss D J Spurgeon
Mrs J Wredden

For the Respondent:
Ms K Medina
Mr M Gargett
in person

Date of Application 2 May 2005

Directions: 27 October 2005

Hearing: 16 February 2006

Decision: 5 April 2006

Members of the Leasehold Valuation Tribunal

Ms J A Talbot MA
Mr R Potter FRICS
Ms J Dalal

Applications: Service Charges

- 1 This was an Application dated 2 May 2005, made by Miss D Spurgeon on behalf of 60 Sackville Road Management Limited, the landlord of 60 Sackville Road, Hove, BN3 3HA, pursuant to Section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for a determination as to whether a service charge is payable in respect of the property for the year 2005
- 2 On 1 July 2005 the Respondents made an Application under Section 20C of the 1985 Act for an order preventing the landlord from recovering costs incurred in connection with the proceedings before the Tribunal as part of the service charge

Application: Management Order

- 3 Subsequently, on 20 January 2006, Ms Medina (Respondent in the Service Charges application) in her capacity as tenant made an Application pursuant to Section 24 of the Landlord and Tenant Act 1987 ("the 1987 Act") for an order for the appointment of a manager.

Preliminary Decision

- 4 Ms Medina requested that the Tribunal should deal with both the service charges and appointment of manager applications at the hearing. The Tribunal took this as an application for dispensation of the requirement for the tenant to serve a preliminary notice on the landlord under Section 22 of the 1987 Act.
- 5 Section 22(1) provides that before an application for an order appointing a manager is made, the tenant must serve a notice on the landlord, specifying (amongst other things) the grounds on which a Tribunal would be asked to make an order, the matters relied on by the tenant, and a reasonable period in which the landlord could remedy such matters.
- 6 Section 22(3) provides that a Tribunal may dispense with the requirement to serve such a notice where it is satisfied that it would not be reasonably practicable to do so.
- 7 The Tribunal had no hesitation in deciding that, in this case where the parties were both tenants and members and directors of the freehold owning company, it was entirely practicable to serve the required notice. The purpose of Section 22(3) was to assist tenants where the whereabouts of the landlord was unknown, which was obviously not the case here.
8. The outcome therefore is that the Application for appointment of a manager cannot proceed unless or until the required notice is served.

Background

9. An oral Pre-Trial Review was held in Hove on 27 October 2005, and Directions were issued on that date. Miss Spurgeon and Mrs Wredde, directors of the Applicant company, attended in person. Ms Medina and Mr Gargett, the Respondents, appeared in person. The Directions provided for the parties to jointly instruct Mr S Radley, chartered surveyor, of Radley Associates, to provide a further expert report and then to provide a joint statement stating what matters, if any, they were able to agree in relation to proposed major works. In the event both parties provided several statements

Jurisdiction

10. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money payable by a tenant to a landlord for the costs of services, repairs, some improvements, maintenance or insurance or the landlord's costs of management, under the terms of the lease (S 18 LTA 1985). The Tribunal can decide by

whom, to whom, how much and when a service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges

Lease

11. The Tribunal had a copy of the lease of the lower ground floor flat. The lease is dated 5 September 1980 and is for a term of 99 years from 5 August 1980 at a ground rent of £30 per year for the first 25 years and rising thereafter
5. The provisions relating to the calculation and payment of the service charge are to be found at Clause 3(2) and the Fourth Schedule. The relevant definitions of the main structure and the flat are to be found at (1)(a) and (b) of the Recitals at the beginning of the lease.
6. At Clause 3(2) the tenant is to pay to the landlord one third of *"the annual costs expenses and outgoings incurred by the Landlord in complying with the obligations in the Fourth Schedule hereto and of the other matters ... set out in the Fifth Schedule"*. On 25 March and 29 September the tenant is to pay *"in advance ... such ... sum as the Lessor ... or its managing agents shall specify at their discretion"*, with the balance payable, or refund given, after the provision of certified accounts after 29 September each year. There was no specific provision for the establishment of a reserve fund.
7. The Fourth Schedule requires the landlord, amongst other things, to *"keep the main structural parts of the Building ... main walls and external parts thereof ... in good and tenable repair and condition"*, and *"to employ such persons as shall be reasonably necessary for the due performance of the covenants on its part and for the purpose of management of the building"*.
8. The Fifth Schedule requires the tenant to contribute to the cost of *"maintaining repairing and redecorating and renewing ... the main structure of the Building"*, and at paragraph 4, managing agents' fees, accountants' fees, surveyors' fees, and *"legal fees in connection with the management of the Building"*
9. At Clause 2(3) the tenant covenants to *"renew repair uphold support maintain cleanse amend and keep in good and substantial repair and condition the Flat and the walls of the garden at the rear of the Building"*.
10. Clause 7(4) of the lease provides that *"the Lessor shall not be liable or responsible for any inconvenience injury accident or damage which may at any time be suffered by the Lessee (either personally or in respect of the demised premises or any property of the Lessee therein) ... whether by act or default of the Lessor ... or through any defect in any fixture fitting pipe wire guttering drain cable staircase or other thing in or about the Building ... unless the Lessor shall have been given previous written notice of such defect by the Lessee and shall have failed to remedy the same within a reasonable period"*.
11. In the Recitals at 1(a) to (e), the Flat is defined to include the interior face of the walls, the ceilings and floors, and the windows *"including the internal and external frames ... but excluding the responsibility for painting, cleaning and decoration of the external surface of such window frames"*.

Issues in Dispute

12. At the Pre-Trial Review, the items in dispute were identified as:
 - a. whether a sum of £20,027 would be reasonably incurred if expended for the cost of certain works at the property the subject of a tender document provided; and

- b whether the sum of £3,746 for legal costs incurred by the Applicant is payable (if it is payable) by way of service charge by the Respondents or by all the lessees at 60 Sackville Road

Inspection

- 13 The Tribunal members inspected the property before the hearing. It comprised a substantial three-storey end of terrace Edwardian house of rendered brick construction under a pitched concrete tiled roof, with a rear extension and fire escape on the north flank wall. The property was situated on the corner of Sackville Road and Coleridge Street in a residential area of Hove, with all amenities close by. It has been converted into 3 flats on the lower ground floor, ground floor and first floor.
14. The rendering to the property was generally in fair condition for its age, with some cracks needing repair. There were 2 chimneys, the west one uncapped, with evidence of damp penetrating down through the stack. The plastic guttering was blocked at the rear, and the hopper head needed replacing. The original wooden sash windows to the ground floor flat were generally in poor condition, but there were replacement UPVC windows to the first floor and lower ground floor flats. The iron fire escape, although serviceable, was rusting. The front door was in need of repainting. Part of the rear section of the north boundary wall was leaning inwards.
15. The Tribunal inspected the interior of the flats. The first floor was a one-bedroomed flat in good condition, with a living room at the front, kitchen and bathroom in the rear addition, and bedroom at the rear. There was evidence of some damp on the ceiling and north-facing wall in the living room, in the kitchen by the window, and some old staining to the bedroom wall. Dampness in the bathroom was probably due to condensation.
16. The ground floor flat was a one-bedroomed flat in poor condition, with an unmodernised kitchen and bathroom. There had been some patch repairs to the plaster under the bay window in the living room but no evidence of current dampness. The bedroom had some condensation dampness. There was some crumbling plaster under the kitchen window but it was unlikely to indicate a damp problem and was consistent with lack of internal maintenance.
17. The lower ground floor flat, which had the benefit of a small patio garden, was in good condition internally with a modern kitchen and bathroom. Some extensive re-plastering and damp-proofing works had been carried out by the Respondents. There were two bedrooms, living room and open plan kitchen. There was a small area of condensation around the boiler.

Hearing

18. The hearing took place in Hove on 16 February 2006. It was attended by Miss Spurgeon and Mrs Wredde on behalf of the Applicant landlord, and Ms Medina and Mr Gargett, the Respondents, in person.

Facts

19. On the basis of its inspection, the documents produced and submissions made by the parties at the hearing, the Tribunal found the following facts:

Background

- (i) Then property was converted into flats around 1980/81. The former freeholder was Evergreen Properties Ltd. Jacksons were appointed as managing agents in September 2001. During this time service charges were demanded and some minor works carried out. Concerned about mounting costs, the parties discussed the possibility of purchasing the freehold.

- (ii) At the Pre-Trial Review it was identified that although Mr Gargett was named in the Application as a Respondent, he is not in fact a joint tenant of the lower ground floor flat. Ms Medina is the sole tenant.
- (iii) During the summer of 2002 negotiations began for the tenants to purchase the freehold. Eventually the tenants of all 3 flats joined in the purchase, which was completed in December 2002. A freehold management company, 60 Sackville Road Management Limited, was set up. All the tenants are directors and shareholders of the company as well as tenants, and therefore all share the rights and responsibilities of both landlord and tenant.

External Works

- (iv) A report and comprehensive Specification of Works dated August 2004 was prepared for the parties by Stuart Radley Associates. In October 2004 Mr Radley obtained tenders for the works and recommended the lowest from United Builders of £17,745 plus VAT.
- (v) These works had not yet been carried out. Accordingly, although the Application referred to service charges for the year 2005, the parties agreed that the Tribunal had to determine the costs to be reasonably incurred in respect of the works.
- (vi) The cost was higher than had been expected, but the recommended works were comprehensive and reflected the fact that the building had suffered from lack of routine maintenance over the years.
- (vii) Included in the Specification were internal works to the ground and first floor flats to remedy damp affected areas caused by external water penetration, by hacking off and replacing damaged plaster and decorations. £1,545 of the total cost related to internal works to the ground floor flat, and £900 to the top floor flat (both plus VAT).
- (viii) Thus the total sum attributable to the necessary external works was £17,745 less £2,445, making £15,300 plus VAT.
- (ix) Following the Pre Trial Review, Mr Radley prepared a further report in table form, to assess whether any of the works could reasonably be postponed, thus spreading the cost over time. The only items identified were relatively minor: the lower ground floor flat entrance steps, and below ground drainage check. At the hearing, the parties agreed that it would not be prudent to postpone these items. A further item was deleted because no longer required: main entrance steps.
- (x) At the hearing, Ms Medina accepted that the internal works were necessary, but argued that they should be paid for by Miss Spurgeon and Mrs Wredde in their capacity as tenants, and not through the service charge, to which she would have to contribute. Over the years she had arranged and paid for internal works to her flat rather than requiring the landlord to do it.
- (xi) Miss Spurgeon and Mrs Wredde argued that they should not be individually liable for the cost of these internal works because the problems had been caused by penetrating damp, as a result of the landlord's failure to repair and maintain the exterior. They became aware of this from Mr Radley's report. No action had been taken against the previous landlord.
- (xii) Although the need for the works was agreed, they had not been put in motion because of the disagreement about the cost of the internal works, and no notice had been served under Section 20 of the Landlord and Tenant Act 1985 (as amended).

Legal Costs

- (xiii) Legal costs of £3,746 from the firm Howlett Clarke Crowther Wood ("HCCW") had been incurred, from 5 February 2003 onwards. A dispute had arisen over who was liable to pay these fees. Unfortunately there was no detailed breakdown of the work to which the fees related.
- (xiv) Miss Spurgeon's case was that she originally instructed HCCW on behalf of the landlord company, to advise on the implications to the service charge account arising from Ms Medina's plans to build an extension. She argued that she had been taken by surprise at a meeting in January 2003 as to how far advanced these plans were, and felt it necessary to seek legal advice for the company, not on her own behalf.
- (xv) Unfortunately, the letter dated 5 February from HCCW setting out the firm's terms and conditions did not specify that the solicitors were acting for Miss Spurgeon in her capacity as director of 60 Sackville Road Management Company Limited. The letter of advice contained advice relevant to both the landlord's position and Miss Spurgeon's position as a tenant.
- (xvi) Once Ms Medina had instructed her own solicitors, Dean Wilson Laing ("DWL"), considerable correspondence took place, largely about who was liable for the escalating costs and whether the parties had acted unreasonably. HCCW confirmed in a letter dated 14 January 2004 that "we [act] for the freehold owning company of 60 Sackville Road". DWL's position appeared to change from asserting that HCCW were acting for Miss Spurgeon personally, to stating that although they were instructed on behalf of the company, she had no authority to do so.
- (xvii) Ms Medina's case was that she was unaware that Miss Spurgeon intended to get legal advice on behalf of the company and would not have agreed to it. She argued that the advice was unnecessary, as she had decided not to go ahead with the extension. However, it was clear to the Tribunal that this had not been communicated to Miss Spurgeon or Mrs Wredden because Ms Medina wanted to keep her options open.
- (xviii) It was apparent both at the hearing and from the correspondence that an unfortunate degree of mistrust had developed between Miss Spurgeon and Mrs Wredden on the one hand, and Ms Medina and Mr Gargett on the other, to the extent that company meetings had to be held at Jacksons offices and minuted by Mr Pickard. Even then, there was disagreement as to whether the minutes were an accurate record, and oral recollections of the meetings differed.

Decision

External Works

20. There was no difficulty in relation to the nature and extent of the external works. The parties agreed that all the works were necessary, that it would be sensible for the relatively minor items identified to be carried out at the same time as the major items, and that the costs as set out in the priced Specification from United Builders were reasonable.
21. The Tribunal considered the terms of the lease in order to arrive at a decision as to whether the cost of the internal works to the ground and first floor flats should be paid by the tenants of those flats individually, by all the tenants through the service charges, or by the landlord. In this case, of course, the parties had different rights and responsibilities both as tenants of their own flats and as members of the landlord company, so either way, the costs would have to be met.

22. First of all, at Clause 2(3), the lease provided that the tenant was responsible for repairing and maintaining the flat, which was defined to include internal walls. However, the Tribunal accepted Mr Radley's opinion that the internal damp problems had been caused by the landlord's failure over the years to adequately maintain the exterior.
23. This meant that the liability for the cost of putting right the consequential interior damage rested, prima facie, with the landlord. However, there was a further provision in the lease at Clause 7(4), whereby the landlord was exempt from liability for any losses caused by its default, in certain circumstances.
24. These were that the landlord would not be responsible for damage caused by any neglect or defect unless it has been given previous written notice and failed to remedy the problem within a reasonable time.
25. These provisions were intended, and obviously make more sense, where the landlord is completely independent from the tenants, who would be able to make a claim against him where the exemption did not apply. In this case, where the landlord and the tenants are the same people, they remain liable, either under the landlord's obligations or the tenants'.
26. The Tribunal found that the parties had been given written notice, in their capacity as landlord, by obtaining Mr Radley's report in August 2004. Because of the dispute, they had collectively failed to act on the report and carry out the repairs within a reasonable time, namely, between August 2004 and the hearing in February 2006.
27. Therefore, in legal terms, the landlord is in default of its obligation to remedy the defects and is thus liable for the cost of the remedial internal works. In practical terms, this means that Miss Spurgeon and Mrs Wredde are not liable individually as tenants, but it does not follow that the cost is payable through the service charge.
28. Because the landlord is in default, the outcome is that the landlord, namely 60 Sackville Road Management Company Limited, is liable for the costs of the internal works. The Tribunal however cannot determine the proportions in which the individual directors and members have to contribute, as it cannot interfere with the operation of the company. The Memorandum and Articles of the Company should set out the manner in which its liabilities are to be met.
29. Although it cannot determine the proportions in which all the company directors should contribute, the Tribunal would comment that, as Ms Medina and Mr Gargett have carried out extensive internal works to their flat over the years at their own expense, some of which had been required because of dampness and lack of exterior maintenance, it would be fair and reasonable in the Tribunal's view for Miss Spurgeon and Mrs Wredde to bear the cost of internal works to their own flats. It is hoped that this observation will be helpful to all the parties so that any ongoing dispute over this issue can be avoided.

Legal Costs

30. It was unfortunate in the Tribunal's view that this issue had become so contentious. It appeared that many of these costs had been incurred in arguing over who should pay. HCCW had argued that Ms Medina should pay because she had behaved unreasonably. DWL appeared to suggest either that Ms Spurgeon should pay or that the liability lay with the company.
31. The Tribunal first considered the basis upon which HCCW were acting, and found that Miss Spurgeon had instructed these solicitors on behalf of the company. Given the degree of confusion and breakdown of communication over Ms Medina's extension plans, it was reasonable to take this step. Clearly both Miss Spurgeon and Mrs Wredde approved this step, and as there were 3 company directors, it would not in any event have been possible for Ms Medina to prevent it.

- 32 The Tribunal then looked at the lease to identify whether the legal costs were recoverable as service charges. Paragraph 4(d) to the Fifth Schedule provides that the tenants must contribute one third of "legal fees in connection with the management of the building". The Tribunal concluded that this definition was limited to management relating to the building itself, such as items of maintenance and repair, insurance, and the items contained in the Fifth Schedule. It was not wide enough to cover the legal costs in issue, which related initially to the issues raised by the proposed extension, and then to the question of who should pay the legal costs.
- 33 The outcome therefore is that the company is liable for the legal costs. These costs are not recoverable by way of service charges. Again, the Tribunal has no power to determine how these costs should be shared between the parties, as this should be set out in the Memorandum and Articles of the company.
- 34 However, again in order to assist the parties and if possible avoid an ongoing dispute, the Tribunal would comment that in its view, it would be fair and reasonable for the company's legal costs to be shared equally between the 3 directors, as essentially through their behaviour, they share the responsibility for the incurring of these costs.

Section 20C and Reimbursement of fees

- 35 Ms Medina and Mr Gargett made a separate application for an Order under Section 20C of the 1985 Act preventing the landlord from passing any costs incurred in connection with the Application to the service charge account. Miss Spurgeon confirmed that there were no such costs apart from the application fee and hearing fee of £470.
- 36 It appeared to the Tribunal that it had unfortunately not been possible for the Application to be avoided, such was the regrettable breakdown of communication and trust between the parties. It was necessary to make the Application on behalf of the company, but as has already been explained, all parties are involved both as tenants and members and directors of the freehold owning company. It is therefore fair and reasonable for the fees to be shared equally between the 3 directors and the Tribunal so orders

Summary

37. The Tribunal determines that the sum of £15,300 plus VAT would be reasonably incurred in respect of major works to be carried out at the property.
38. The Tribunal makes no determination under Section 27A of the 1985 Act in respect of internal works to the ground and first floor flats, or in respect of legal costs incurred by the company, for each and every reason set out above.
39. The Tribunal orders that Miss Spurgeon should be re-imbursed by both Mrs Wredden and Ms Medina for one third each of the application and hearing fees, namely, £156 66 each.

Dated 5 April 2006



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Ms J A Talbot, Solicitor
Chairman