CHI/00ML/LAC/2009/0156

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL

LANDLORD AND TENANT ACT 1985 S.27A

28A NORWAY STREET, PORTSLADE, EAST SUSSEX BN41 1GN

Applicant: Keepsafe Enterprises Ltd (Landlord)

Represented by: Mr Marcus Staples MRICS of Deacon & Co, Managing Agents

First Respondent: Trenbridge Estates Ltd (First Floor Flat 28A)

Represented by: Mr Graham Hughes, Director

Second Respondent: Ms Marlene Pettit (Ground Floor Garden Flat)

Represented by: In person

Date of Application: 27 October 2009

Date of hearing: 22 April 2010

Members of the Leasehold Valuation Tribunal:

MA Loveday BA Hons MCI Arb

Mr AO McKay FRICS

Ms JK Morris

INTRODUCTION

1. This is an application relating to service charges payable in respect of two flats in Portslade. The application dated 27 October 2009 is made by the landlord and seeks a determination under section 27A of the Landlord and Tenant Act 1987of liability to window works on the first floor.

2. Directions were given on 18 January 2010 and a hearing took place on 21 April 2010. The applicant landlord was represented by Mr Marcus Staples MRICS of the managing agents Deacon & Co. The first respondent (Trenbridge Estates Ltd) is the lessee of the upper flat and appeared by its director Mr Graham Hughes. The second respondent (Ms Marlene Pettit) is the lessee of the ground floor flat (also known as the garden flat) and appeared in person.

INSPECTION

3. The Tribunal inspected the property before the hearing.

4. The property comprises a two storey corner house c.1900 in a residential area of Portslade. The property has been converted into two flats, both with separate street entrances on the side elevation. On the front elevation is a full height bay window and there is a small single storey addition to the rear. At first floor level the original bay windows, window frames and cills have been replaced with sealed double glazed UPVC units as have the three windows, frames and cills to the side elevation and the small rear bathroom window. These appeared to be very new. At ground floor level the bay windows, frames and cills had been replaced with similar units as had the three windows on the side elevation. However, the units were plainly of an older vintage. The side elevation also had a doorway leading from the street to stairs to the upper flat. The door itself and the frame and threshold had been replaced with a glazed UPVC unit in the recent past to match the new windows to the upper flat.

THE LEASE

5. The Tribunal was provided with a copy of a lease of the first floor flat dated 31 March 1987 which was said to be in similar form to the lease of the ground floor flat. The

material clauses are set out below. First, there is the service charge provision. By clause 2(17) the lessee was required to:

> *"(17) To keep the Lessor indemnified from and against 50 per cent of all costs charges and expenses incurred by the Lessor* ***in carrying out obligations under the covenant contained in Clause 3*** *or otherwise in managing the property."*

6. In turn, the "obligations under ... clause 3" included the following:

> *"(4) To keep the* ***Reserved Property*** *and all fixtures and fittings therein and additions thereto in a good and tenantable state of repair decoration and condition including the renewal and replacement of all worn or damaged parts and for this purpose may establish reserve or sinking funds or take out sinking fund policies and any payment so made shall be considered to have been properly incurred hereunder ..."*

7. The definition of the "Reserved Property" is in the Sixth Schedule:

> *"<u>FIRST ALL THOSE</u> the grounds paths forecourts walls and fences forming part of the Property together with all party walls and fences bounding the same and the halls staircases landings passages and other parts of the building forming part of the Property which are used in common by the tenants or occupiers of the Flat <u>AND SECONDLY ALL THOSE</u> the main structural parts of the building forming part of the Property* ***including the exterior faces of the entrance doors to the Flats*** *and the Roofs foundations and external parts of the Property* ***(but not the glass of the windows of the Flats*** *nor the interior faces of such of the external walls or the inferior faces of the main structural parts of the said building as bound the Flats) and all cisterns tanks boilers radiators sewers drains pipes wires ducts and conduits not used solely for the purpose of one alone of the Flats ..."*

8. This is mirrored in the definition of the demised premises in the First Schedule. This defines *"the Flat"* as *"forming part of the Property and being First Floor Flat 28a Norway Street Portslade"*. That definition is extended as follows:

> *"<u>TOGETHER</u> with the ceilings and floors of the said Flat and the joists beams suspension timbers on which the floors are laid and to which the ceilings of the flat below (if any) are attached but not the joists or beams to which the ceilings of the Flat are attached <u>AND TOGETHER</u> with all cisterns tanks boilers radiators sewers drains pipes wires ducts and conduits used solely for the purpose of the said Flat but no others* ***<u>EXCEPTING</u> from the demise the main structural parts of the buildings*** *of which the Flat forms part including the roofs chimneys foundations* ***and external parts thereof*** *and the soil thereunder* ***but not the glass of the windows of the Flat*** *nor the interior faces*

of such of the exterior walls or the interior faces of such of the external walls ***or the interior faces of the main structural parts of the said building as bound the Flat***".

FACTS

9. None of the facts appear to be in dispute. Ms Pettit explained that approximately 10 years ago she had had the windows replaced in the ground floor flat. The windows had been in a bad way and there was a lot of traffic noise. She had not asked permission because she thought she was well within her rights to do so. The applicant was the freeholder and Deacon & Co were managing agents at that stage, and they were aware of the work. They had not said "no" and there had been no argument. Mr Hughes explained that the second respondent acquired the upper flat after it had been re-possessed. By 2003 the windows of the upper flat were in a poor state. The first respondent took advice from solicitors Dean Wilson Laing and in an email dated 14 January 2003 they advised that the terms of the lease required the landlord to repair the window frames "by implication". He also referred to a letter dated 6 February 2003 from the Mr Brian Lowe (who was a director of the landlord and a solicitor) agreed with this advice. Mr Staples's predecessor at Deakin & Co (Mr Smith) agreed with this view in later correspondence.

10. The first respondent acted on the advice and replacement of the first floor bay windows was arranged. The landlord served an initial notice of intention to carry out works under s.20 Landlord and Tenant Act 1985 in respect of these works on 8 March 2004 and a statement of estimates on 14 April 2004. The second respondent replied on 25 April 2004 stating that:

    "As far as I am aware lessees are responsible for replacement of their own windows. I had a similar problem myself a few years ago due to wear and tear over the years and therefore had my windows replaced which I paid for myself. I do not feel I should be made to pay towards replacement of the first floor flats' windows."

11. These works were not carried out and by 2006 the first floor windows and the door had deteriorated further. Mr Hughes described their condition. The windows were timber framed sash windows and the frames had rotted. The ground floor door to the

upper flat consisted of a painted timber panel door with a small glazed panel. The frame and threshold were also painted timber. Nothing had been painted for years and damp had penetrated under the sill. This caused the cill and frame to rot as well as the floorboards in the lobby area inside the door. In 2009, a member of staff from Brighton & Hove Council inspected and fell through a hole in the floorboards. The Council took enforcement action.

12. Estimates were obtained from a contractor for replacing the windows and door with UPVC units. Although the estimates were not produced to the Tribunal, Mr Staples stated that details of the estimate were repeated in a demand for service charges served on the first respondent dated 30 October 2009. The works were described as follows:

"This is an invoice for the monies due to take place at the above property.

Total cost of replacement of windows on first floor in upvc £2912.15 (incl of vat).
Glass element 15% due to be paid by first floor flat. £436.82.
Sum due from first floor flat = £2912.15
Less £436.82 = £2475.33 ÷ 2 flats = £1237.67
Plus £436.82 *£1674.49*

Total cost of replacement front door in upvc £610.59 (inc of vat)
Glass element 15% due to be paid by first floor flat £91.59.
Sum due to be paid by first floor flat = £610.69
less £91.59 = £519.00 ÷ 2 flats = £259.50
plus £91.59 = *£351.09*

External Redecoration of 28A Norway Street.
Total cost £1900.00 ÷ 2 flats = *£950.00*

£2975.58"

13. The parties agreed that a similar demand had been sent to the second respondent, although the figures excluded the contribution of £436.82 for the "glass element" of the windows and £91.59 for the "glass element" of the front door. The works described in the invoices had now been completed.

THE ISSUES

14. The application itself related to the 2009/10 service charge year. It asked the question *"are the leaseholders responsible for maintaining the windows or should the freeholder deal with them as service charge items?"* At the hearing, the applicant relied on the interim service charge dated 30 October 2009 which (as stated above) referred to replacement of the windows and also replacement of a door. The parties agreed that the matters to be determined by the Tribunal related to both these costs and that the issues were limited to construction of the terms of the respondents' leases.

15. The Tribunal is satisfied that it has jurisdiction to deal with the application under s.27A(1) and/or s.27A(3) of the 1985 Act. It will deal with the issues raised under six separate headings.

WINDOW FRAMES AND SILLS

16. The landlord seeks to recover the cost of the UPVC window frames and window cills by way of the service charge provision in the lease. Mr Staples adopted a relatively neutral stance on the basis that the lease terms were unclear, but invited the Tribunal to determine the issue one way or another. Mr Hughes contended that the window frames and cills must be an "external part" of the building within the meaning of the sixth schedule. Furthermore, the first and sixth schedules both expressly excluded the glass in the windows from the areas demised to the lessee. This would only be necessary if the remainder of the windows (i.e. the frames and sills) were intended to be retained by the landlord as "Reserved Property". He therefore contended that the landlord was obliged to repair the window frames and cills and that these costs were recoverable under clause 2(17) of the lease.

17. Ms Pettit submitted that it was unfair that she had paid for her own upvc windows and was now being asked to contribute 50% of the cost of the windows for the upper floor flat. Her position had remained as stated in the letter of 24 April 2004. As for interpretation of the lease, the Sixth Schedule made no sense. One could not in practice separate the glass panes in a window from the frames and cills (particularly in

the case of sealed double glazed upvc window units). The "glass of the windows of the Flats" therefore included the frames of the windows as well.

18. The Tribunal finds that the landlord is entitled to recover the cost of repairing, renewing and replacing the window frames and cills to the first floor flat under the service charges. On balance, the Tribunal considers that the cills and frames are part of the "structure" in that they have some load bearing function. This is particularly the case with the bay windows, where the frames are substantial. In any event, the "Reserved Property" (as defined in the Sixth Schedule) is not simply limited to structural parts of the property. The Schedule extends the definition to "external parts", and these include non-structural parts which are on the exterior of the building. The window frames and cills are on the exterior of the property. This interpretation is put beyond doubt by the qualifying words in parenthesis which follow (*"but not the glass of the windows of the Flats not the internal faces of such of the external walls or the interior faces of the main structural parts of the said building as bound the Flats"*). The exclusory words plainly indicate that the *"windows"*, *"external walls"* and *"main structural parts as bound the Flats"* would otherwise be within the definition of *"Reserved Property"*. Furthermore, the Tribunal does not accept that the reference to the *"glass in the windows"* includes the frames. The word *"glass"* is an ordinary English word (and it does not mean a wooden, metal or plastic frame) and the fact that it is described as being *"in"* the windows further suggest that the non-glass elements of the windows are not within the proviso to this paragraph It follows that under clause 3(4) of the leases the landlord is obliged to repair, renew and replace the window frames and cills and that it is entitled to recover 50% of the costs of doing so from each lessee under clause 2(17).

WINDOW GLASS

19. The Sixth Schedule to the lease is explicit that the Reserved Property does not include window glass. The cost of repairing renewing and replacing window glass is therefore not a recoverable cost under the clause 3(4) and 2(17) of the leases. However, in this instance, the issue arises whether the landlord may recover the cost of window glass

which forms part of the window units as incidental to the cost of replacing the window frames.

20. Mr Hughes submitted that there was no separate cost for replacing glass since the upvc window units were manufactured as a single item. However, it was noted that the landlord's service charge demand of 30 October 2009 did deduct an "*element*" of 15% for glass in the window units which were installed. In this instance, the Tribunal considers that an element of the costs was for replacement of "*window glass*" which was not part of any works to the 'Reserved Property and that element is therefore not recoverable under clause 3(4) and 2(17) of the leases.

WINDOW GLASS PERCENTAGE

21. The appropriate apportionment between the cost of the frames cills and glass are a question whether the relevant costs have been reasonably incurred under s.19(1) and (insofar as they rate to the charges already made) a question of reasonableness under s.19(2) of the Landlord and Tenant Act 1985. The landlord in this case has deducted 15% for the cost of window glass. Mr Staples stated that this figure was as a result of a request to the window contractor to identify the element of the costs which related simply to glass. Ms Pettit submitted that an appropriate figure might well be as high as 50%. The glass itself covered an extensive part of the bay windows. She left it to the Tribunal's experience to say what element was appropriate.

22. The Tribunal accepts the landlord's figure of 15%. Although there is only indirect evidence of this it does not seem to be disputed that the landlord's procedure for allocating the window element was to ask a professional contractor to give a figure. This is a reasonable approach given the modest sums involved. There is no evidence that the cost itself is excessive.

THE DOOR FRAME AND THRESHOLD

23. The issue is whether replacement of the doorframe and threshold falls within the definition of the 'Reserved Property' in the Sixth Schedule.

24. Ms Pettit submitted that the Sixth Schedule dealt with the external doors to the upper flat in a different way to the windows. There was a specific inclusion of the external faces of the entrance doors to the flat which suggested that other parts of the door unit – including the frame and threshold – were demised to the lessee and which were not subject to the landlord's obligation to repair.

25. Mr Hughes argued that this was an artificial distinction. One could not distinguish between the frames and threshold and the outer "face" of the door. More significantly, the replacement was needed because of failures in the structural parts to the property rather than the door itself. Water had seeped underneath the timber threshold and this was the cause of the rot to the threshold and frame. He therefore contended that the landlord was obliged to repair the threshold and door frame and that these costs were recoverable under clause 2(17) of the lease.

26. The Tribunals agrees with Ms Pettit that the Sixth Schedule does deal with the doors in a different way to the window glass. However, the Tribunal finds that the landlord is entitled to recover the cost of repairing, renewing and replacing the threshold and frame. These are again part of the "structure" of the building and the "external parts" in a similar way to the windows and frames.

THE INTERIOR FACES OF THE DOORS

27. The real difference between the treatment of doors and windows in the Sixth Schedule is that in that provision the external faces of the doors are specifically included in the "Reserved Property". Ms Pettit suggested that this indicated that at least some of the door parts referred to in October 2009 service charge demand were not properly part of the works the landlord was required to carry out.

28. The Tribunal accepts that the express reference to the external faces of the doors suggests the internal faces of the same doors are demised to the lessees (although this is not expressly stated in the First Schedule). However, the word *"face"* is apt to describe the door itself (i.e. the vertical panel in the door aperture) rather than the

frame, threshold, hinge mechanism and other parts which do not have any obvious "*external*" face. This is particularly the case with the threshold.

29. That point does not apply to the new upvc door itself. As stated above, the internal face of the door is demised to the lessee of the upper floor flat.

BETTERMENT

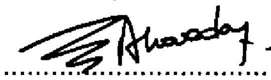
30. Following from this last point, Ms Pettit suggested that perhaps 50% of the cost of the door replacement should be apportioned to the lessee. The lease divided liability for repairs down a vertical plane through the door and this should be reflected in the service charge.

31. Again, the Tribunal treats this as an issue under s.19 of the 1985 Act. Is it reasonable to apportion 100% of the cost of the door assembly replacement to the service charge when liability to repair the door itself is divided 50/50%? On this point, we note that the landlord has not in fact allocated 100% of the costs to the service charge account. 15% of the cost is allocated to the lessee in respect of the "window element", even though only a relatively small element of the entire cost of the door assembly would relate to the window glass. Secondly, the cause of the damage to the door assemble was the damp ingress under the threshold. The replacement of the door was a consequential matter rather than any betterment for the lessee of the upper flat. Finally, much of the cost (namely the cost of replacing the frames and threshold) is not susceptible to any 'vertical division' argument.

32. For these reasons, the Tribunal is therefore satisfied that the 15% allowance for "window glass" in the door unit is sufficient to cover any additional cost of repairing and replacing the internal face of the entrance door to the upper flat. It does not discount the cost of replacing the door by more than the figure allowed by the landlord.

CONCLUSIONS

33. The Tribunal therefore concludes that the cost of the window and door works set out in the service charge demands dated 30 October 2009 are recoverable under the terms of the lease.



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Mark Loveday BA(Hons) MCIArb
Chairman
23 April 2010