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Residential
Property
TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Ref:LON/00BK/LIS/2010/0016

LANDLORD AND TENANT ACT 1985, SECTION 27A ('the Act')

Premises	40 St George's Drive, Pimlico, London SW1 4BP
Applicant	Kendlelynn Limited (freeholder and landlord)
Representation	Mr DG Richards (Director)
Respondents	Mr and Mrs R Saire (joint leaseholders Flat 3)
Representation	Mr Saire
Date of Hearing	31 August 2010
Date of Inspection	None
Date of Decision	22 October 2010
The Tribunal	James Driscoll (Lawyer Chair),and Christopher Kane FRICS

DECISIONS SUMMARISED

1. The respondent conceded that the statutory consultation process required by section 20 of the Act and the regulations made under that provision had been properly carried out.
2. We conclude that most of the projected costs for the roof are within the landlord's repairing covenants. However, the costs of the works to the hatch in Flat 4 are not recoverable as they are the responsibility of that leaseholder.
3. Similarly we conclude that the projected costs for the balcony and the basement vaults are also within the landlord's repairing covenants.
4. No order is made under section 20C of the Act in relation to any costs incurred by the landlord in connection with this application.
5. The respondents are to reimburse the landlords in the sum of £350 in respect of the tribunal fees. They should pay this sum to the landlord within 14 days of the date of this decision.

INTRODUCTION

1. The applicant seeks a determination as to the recovery of service charges under section 27A of the Act. The applicant is the owner of the freehold of a building which has been converted into five flats over six floors. Each flat is held under a long lease of which the applicant is the landlord. We will call the applicant the 'landlord'. The respondents are the joint owners of a lease of Flat 3 which is on the second floor of the building. We will refer to the respondents as the 'leaseholders'. The leaseholders do not live in the flat.

2. The application has been made as the respondents have challenged the consultation process used prior to decorative works and certain repair works to the front and the rear of the building. The landlord seeks a determination as to whether the consultation was adequate under the requirements in section 20 of the Act and in the regulations made under that Act. In effect the landlord is applying for an advance determination under the provisions in section 27A (3) of the Act.

3. Directions were given at a pre-trial review held on 7 July 2010 and the application was heard by the tribunal on 31 August 2010. At the pre-trial review various directions were given. In the application the landlord seeks a determination whether repairs and redecoration of the front and rear elevations of the building are recoverable. The costs are £45,682.04 of which the leaseholders will have to contribute the sum of £7,309.13.

THE HEARING

4. Mr Richards, a director of the landlord company appeared along with Mr Saire on behalf of himself and his wife. We explained that one of the tribunal's members,Mr Kane has been an active member of the organisation ARMA which in the past has had some involvement with these premises. Mr Kane told the parties that he personally has had no dealings or other connection with these premises or this application. We saw no need for Mr Kane to withdraw from hearing this application. The parties agreed.

5. Mr Richards described the premises as a typical Victorian house which has been converted into five flats over the six floors of the building. He believes that the conversion took place in 1978. The company has owned the freehold of the building for some 30 years.

6. The building is divided in this way:

- There is a basement flat numbered 5 which is accessed from the street through a gate with stairs down to the external entrance to this flat. The flat enjoys the use of the rear garden. Also to be found in the basement is a vault part of which forms part of the demise of the flat; the other part is used in common with the other occupiers for meters and dust bins.
- Flat 1 is on the ground floor and accessed by the common front door from the street. There is a hall and an internal staircase leading the upper floors.
- Flat 2 is situated on the first floor and has the benefit of a balcony
- Flat 3 is situated on the second floor.
- Flat 4 occupies the third and fourth floors and includes the use of a roof terrace (on which there is a fire escape)

7. There are photographs of the building in the bundle. Flats 1 and 3 (that is the flat owned by the leaseholders) as well as Flat 4 are sublet so the owners of those leases do not live there.

8. In the statement of case signed by Mr Richards on 14 July 2010 he submits that the leaseholders objections are two in number: first, whether the costs of the decoration and repairs to the exterior balcony to Flat 2 are recoverable as service charges or are the sole responsibility of that leaseholder, and second, whether the costs of repairs and decorations to the exterior basement area and vaults are recoverable as service charges, or should be borne solely the leaseholder of the basement flat.

9. In his statement made in response dated 26 July 2010 Mr Saire submitted that the issues are broader than this. He and his wife consider it unfair that they bear such a large proportion of the costs considering that their flat is the smallest in the building. He also referred to a number of service charge matters which had arisen over the years. Mr Saire also expressed views on the roof terrace for which he considers the leaseholders should not be responsible. Later in this statement he confirms that the leaseholders do not consider that they should contribute to the costs of balcony on the first floor of the building nor that part of the basement vault which is demised under the lease to the basement flat.

10.Mr Richards replied in a statement dated 4 August. He submits that the leaseholders comments about past service charges are irrelevant to this application; that the landlords validly granted the roof space to the leaseholder of flat 4 but this does not absolve the leaseholder's liabilities towards the costs of the actual roof itself. Mr Richards reiterates the landlord's position on the proposed works to the balcony and the basement which he submits fall within the service charges.

11. He also included in the bundle of documents a report prepared by Anyards Designers & Surveyors dated 3 March 2010 which summarised the results of the tendering process for the projected works and recommended employing Style Property Management Limited in the sum of £31,880. This is followed in the bundle by a detailed specification of the projected works. Elsewhere in the bundle are copies of the consultation process undertaken under section 20 of the Act. In the course of an exchange of correspondence between Mr Richards and Mr Saire , the former reiterated the view that the grant of rights for a roof terrace does not affect the liabilities of all the leaseholders for the landlord's costs in maintaining the roof, that on a fair reading of the leases that the costs of the balcony, which is of little practical use and is primarily ornamental and enhances both the aesthetics of the building and ultimately the value of each flat. He also stated that the vault which is demised under the lease of the basement flat remains a communal responsibility.

12. Mr Richards told us that flats 1, 3 and 4 are not occupied by their leaseholders but have been sublet. In answer to our questions on the extent of the demise of flat 4, Mr Richards told us that there is an internal hatch from which access to the roof can be gained. It is the practice of the leaseholders and their occupiers to use the roof terrace. He told us that a deed was executed on 10 July 1998 giving exclusive use of the roof terrace.

13. Turning to the service charge contributions in the five leases Mr Richards gave us the following information:

- Flat 1 18%
- Flat 2 16%
- Flat 3 16%
- Flat 4 28%
- Flat 5 22%

14. We then turned to the application and the issues between the parties. Mr Saire told us that he is not disputing the validity of the consultation process. The leaseholders, he told us, dispute certain items which they do not consider are within the landlord's repairing covenants and which should not therefore be included in the service charge demands. He referred to the specification on page 43 of the bundle and the tender report on page 41. They have particular concerns over the costs of scaffolding and the works to the roof.

15. The leaseholders do not consider that they should contribute to the costs of repairs to the hatch (£350 and £380). As the roof is now covered with promenade

tiles, this may have obscured the actual surface of the roof and could lead to damage internally from water leakage.

16. Responding to these complaints the landlord argued that the roof works were necessary and the costs are recoverable as service charges. However, it was conceded that the works to the roof hatch in flat 4 is not, in fact, recoverable as a service charge.

17. The leaseholders also challenge being charged for the costs of works to the balcony within Flat 2 and an area to the rear of the building which was erected and was not part of the original building. The landlord confirmed that no works were envisaged to the basement extension.

18. The leaseholders also questioned the management charges for the works (charged as 12% of the costs of the works).

19. We then turned to the consultation process. The relevant documents are contained on pages 52 to 82 of the bundle prepared by the landlords. Mr Richards told us that the consultation process is complete and that the other four leaseholders who support the works have consulted solicitors. There are particular concerns as the building has not been painted for some 14 years and there are concerns that this has rendered the building unattractive and may have affected the value of the flats. He added that the other leaseholders are threatening court proceedings for an order for specific performance of the landlord's repairing covenant. He told us that those leaseholders have consulted the firm of Field Seymour Parks.

20. We asked to see the leases of flats 5 and I, and the leaseholders asked if the landlord is entitled to seek their contribution to the costs as one single advance payment .

21. Mr Richards told us that he assumed that he is entitled to seek recovery of the costs of the works once the section 20 consultation has taken place. The leaseholders told us that they will pay once the tribunal has made a determination.

22. At the close of the hearing we indicated that we consider that most of the proposed works are within the landlord's covenants and were correctly dealt with in the consultation process. On the question of costs and section 20C Mr Richards told us that he seeks recovery of the tribunal fee of £350 and the sum of £50 for the photocopying.

23. 27A of the Act reads as follows:

(1) An application may be made to a leasehold valuation 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 a leasehold valuation 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.

(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 of an application under subsection (1) or (3).

(7) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.[...][2]

OUR DETERMINATIONS

24. We considered the copy of the respondent's lease. Paragraph 1(v) gives access to the basement area for access to the meters and the water stop cock and for refuse storage and collection. The leaseholders service charge contribution is fixed at 16% and for payments to be made by two equal instalments each year (the service charge year running from the 25th December to the 24th December the following year - see paragraph 3 of the lease). The landlord's covenants (Including the carrying out of works) are contained in paragraph 4.

25. The first schedule defines the main structure means the foundations and all exterior walls (and so on) and defines the maintenance obligations including decorative. We are satisfied that the proposed works are within the landlord's repairing and maintenance covenants . Mr Saire conceded that the statutory consultation process was correctly carried out. We disallow the cost of work to the hatch of £380 (as this is within the responsibilities of the lease for Flat 4, but the bulk of the proposed works and the costs we determine are recoverable from the leaseholders. We were told that the landlord will start works as soon as the leaseholders pay their contribution in advance. We were reminded that the other leaseholders have accepted that the works are necessary and they would like to seem carried out as soon as possible.

26.Each of the representatives addressed us on how we should exercise our discretion under section 20C of the Act. This provision reads as follows:

(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 leasehold valuation tribunal, or the Lands 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 a leasehold valuation tribunal;

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(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(c) in the case of proceedings before the Lands 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.[...][2]

27. Mr Richards pointed out that the landlord had to make the application as despite the full consultation processes the leaseholders (alone amongst the leaseholders in the premises) continued to raise issues about the scope of the works. In response Mr Saire suggested that the application could have been avoided by the parties negotiating an agreement.

28. On balance we prefer the landlord's arguments on this issue. It is hard to see what other course the landlords could take having undertaken a full consultation, having employed a firm to attend to the selection of the contractor and having engaged also in extensive correspondence with the leaseholders, the leaseholders remained opposed to the works. No order is made under section 20C of the Act. In reaching this conclusion we are not expressing a view on whether the landlord's costs in making this application are recoverable under the terms of the lease nor whether if such charges are made in future, as to the reasonableness of those charges. That said Mr Richards told us that the landlord's costs are limited to claiming £50 in respect of copying charges.

29. We also consider it reasonable that the respondents reimburse the landlord for the application and hearing fees which come to £350. This order is made under regulation 9 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003. This sum should be paid within 14 days of the date of this decision.

Signed: James Driscoll

(James Driscoll, Lawyer Chair)

Dated: 22 October 2010.