10758

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	**CHI/00HB/LSC/2014/0118**
Property:	**2 Maple Court, Westover Gardens, Bristol BS9 3LD**
Applicant: **Represented by:**	**Dr Susan Durbin** **Richard Jackson, Solicitor**
Respondent: **Represented By:**	**Falconside Management Ltd** **Adam Church, Managing Agent and Company Secretary**
Interested parties:	**Leaseholders of Maple Court**
Type of Application:	**Service Charges – s27A Landlord and Tenant Act 1985** **Limitation of Costs – s20C Landlord and Tenant Act 1985**
Tribunal:	**Judge Professor David Clarke, Solicitor** **Mr Jan Reichel BSc MRICS** **Dr DF Johnson**
Date of Hearing:	**20 February 2015**
Venue of hearing:	**Bristol Magistrates Court, Marlborough Street, Bristol BS 1 3 NU**

DECISION and STATEMENT OF REASONS

Determination

1. The Tribunal determines that for the financial year 2014, the Respondent is not entitled to demand that part of the service charge which relates to the reserve or sinking fund established by the Respondent for the Property.

2. The Tribunal further determines that the replacement uPVC windows and patio door fitted in the Property (except the glass) remain part of the Reserved Property as described in the Lease. Consequently, if costs were to be incurred by the Respondent in repair of these windows and door, a service charge would be payable for such costs.

Statement of Reasons

Background to the Application

3. Maple Court is a block of 8 flats on four floors constructed in about 1971 which, together with two similar blocks (Cedar Court and Raven Court) on a common site, is administered by Falconside Management Ltd ("the Respondent"), a head lessee of the whole site and lessor of all 24 flats. Number 2 is one of the two ground floor flats in Maple Court. It was purchased by the Applicant, Dr Durbin, in 2012 as an investment property and is currently occupied by a tenant. The Applicant did not attend the hearing but her solicitor, Mr Jackson, presented her case and was assisted by Mr Tim Plummer RICS, the Applicant's spouse.

4. The Tribunal heard that, following construction of the flats in about 1971, all were purchased by owner occupiers. In more recent years, nearly half have come to be occupied not by the leaseholder(s) but by tenants of those leaseholders. In some cases, owners have left but not sold, choosing to rent; others, such as Flat 2, have been purchased as investments for letting.

5. The lease (an underlease) of the Property, which the Tribunal understood was on standard terms applicable for all the 24 flats, is dated 2 July 1971 for a term of 999 years less one day from 25 March 1970 ("the Lease"). The head lease is for a term of 999 years, from the same date, and is vested in the Respondent Managing Company. This company is a leaseholder controlled company; each leaseholder is a director. Day to day affairs are in the hands of block representatives appointed by the Annual General Meeting who work with an appointed managing agent, Adam Church Ltd. Mr Adam Church is company secretary. Two of those representatives and directors, Mr Stephen Rogers and Ms Kathryn Wight attended the hearing and gave evidence.

6. The terms of the Lease, as relevant to this application, are, sadly, not untypical of the time they were granted. In other words, the Lease lacks clauses which would today be considered to be good and standard, perhaps vital, provisions in leases providing for the management of residential leasehold flats. The following in particular are of relevance to this application:

1. The Respondent as Lessor covenants to keep the Property in good repair but there is no power to make improvements;
2. The service charge is not reserved as rent;
3. There is no provision for payment of service charge on account in advance, which if strictly observed might well mean that the Respondent, as a tenant controlled company, had no means to undertake its obligations;
4. The Applicant's obligation under the Lease is to pay one twenty fourth part of the amount due for the past accounting period once an account has been taken and audited and written notice of the amount due been given to the leaseholder.
5. The Lease omits many provisions now found in well drawn leases; of particular relevance is the omission of a power to raise reserve funds, or a sinking fund, to cover future anticipated expenditure.

7. Notwithstanding the lack of express provision, about ten years ago all 24 leaseholders agreed (or did not demur and complied) to set up a reserve fund. The amounts involved are relatively modest; the 2014 accounts show a reserve fund of £29,665. This is, we were told, intended for the future cost of re-roofing these flat-roofed buildings. A recent survey suggested they had only about 5 year's life left and that re-roofing could exceed £70,000 at current prices.

8. The Tribunal inspected the Property prior to the hearing. We could see, as pointed out in the paperwork, that all 24 flats now had the benefit of uPVC double glazed windows and patio or balcony doors. The two ground floor flats in each block had similar replacement uPVC external doors at the front, opening directly onto the outside pathway (whereas the other six upper floor flats had the original internal doors opening into a communal hall and stairway). Evidence was given that the flats had been constructed with sliding metal windows which were draughty and, in the case of the ground floor flats, a major security problem. We were told that, long before these windows might have required repair, leaseholders requested permission to replace these windows with uPVC double glazed units. The Respondent agreed on the basis that the cost was borne by individual leaseholders and that future maintenance and repair of such windows was undertaken by each leaseholder. While this evidence was not contradicted, there was nothing in writing produced to us to this effect as the Respondent could not find anything in its files. Apparently, most windows were replaced a long time ago and all subsequent maintenance has since been undertaken by each leaseholder. Ms Wight recalled that she purchased her flat 20 or so years ago, when it still had metal windows. She described how unsatisfactory they were. She was orally told by other leaseholders of the policy on replacement and how she was free to choose a contractor provided the basic style of the windows were compatible with those already in place. She then proceeded to replace her windows.

Issues for determination

9. Two issues were posed by the Applicant for the Tribunal to decide. These were whether the Respondent can demand reserve fund service charge payments for the current financial year ending 31 March 2015; and whether the Respondent is liable for the repair of windows and the patio doors.

10. In the application, the Applicant also sought an order for the reimbursement of monies paid into the reserve fund in previous years and for reimbursement of the monies expended on repairs to the windows and patio door. In the event, these issues do not fall for our determination. In respect of previous payments into the reserve fund, the application did not in terms ask for a ruling on any financial year before 2014; but, in any event, the Applicant, through her representatives, indicated at the hearing that she did not wish to pursue a claim for any reimbursement or open the service charge accounts for previous years. In respect of reimbursement of sums paid by the Applicant for repairs to her windows, the Tribunal's jurisdiction under section 27A is limited to determining liability to pay service charges. No clear evidence was, in any event, presented to us that the windows were in disrepair and even if such evidence was available, our jurisdiction under a section 27A application does not extend to a determination of whether the Respondent as lessor was in breach of covenant. Additionally, we certainly have no jurisdiction to order payment of money from one party to another. That is a matter for the courts. But we trust our determination under section 27A (3) will enable the parties to agree a way forward for the future.

Ability to require payments into a reserve fund

11. Through Mr Jackson, the Applicant contended that, while provision for a reserve fund was a common and good clause in many leases, such a facility was not available for Maple Court. The Lease provided for an 'historic' service charge set-up. He stressed the Applicant was not opposed to a reserve fund in principle but the present arrangements did not provide for a proper planned maintenance programme and there was no protection for leaseholders. There was nothing in the Lease to permit the Respondent to demand payments into a reserve fund.

12 For the Respondent, Mr Church valiantly argued for the benefits a reserve fund brings; that all previous leaseholders were in favour of the present arrangements; that roofing works would be needed in the near future; that many leaseholders would not be able to afford large levies for major works all at once; that 'consensus' had operated well over the years; but in the end conceded, as he had to, that there was no express provision in the Lease. He was forced to contend that the Lease did not prevent it and the Respondent's Memorandum and Articles permitted it to establish such a fund.

13. Sadly for the Respondent, the law is clear that such provisions must be expressly provided for. If the Lease is silent, a lessor cannot require payments where the Lease does not permit them to be made. This is for the protection of leaseholders in those many situations where the lessor is not a resident's management company; and to protect purchasers, who must be able to know from the terms of the Lease what is required of them.

14. The Tribunal therefore determines under Section 27A (1) that provision for contributions to a reserve fund is not a charge that it is permitted to include in in its books of account under Schedule 7, paragraph 9 of the Lease for the financial year ending 31 March 2015.

15. The Tribunal comments that it agrees with both parties that an agreed or enforceable reserve fund provision is highly desirable. This might be by agreement between those leaseholders who wish to do so setting up provision by agreement between them for the future; if all 24 such leaseholders agreed that would be for the best. But, unless they agreed to join in, no such agreement could bind future purchasers of flats. To achieve that result, a variation of all the leases of all 24 flats, either by agreement or by application to a Tribunal, would be needed. The expense of the process would be significant but should bring long term benefits.

Liability to maintain and repair the windows and doors

16. This issue resolves into a question of whether the window frames and doors (the case concerned the patio door but the principle applies also to the external doors of the ground floors flats) are part of the demised premises within the lease or are part of the 'Reserved Property' which remains vested in the Respondent as Lessor. In simple English, are the windows and doors part of the flat or not?

17. The Applicant submitted that the wording of the Lease was clear. Schedule 3 of the Lease states that the premises exclude the main structural parts of the building (but not the glass in the windows of the flat). The Second Schedule, which describes the Reserved Property, uses the same wording to include all external parts of the building – but not the glass of the windows of the flat. We agree that this can only mean that, as constructed, the metal window frames were not included in the premises demised by the Lease and so were the responsibility of the lessor to repair.

18. The Respondent did not dissent from this interpretation but argued that there had been an agreement to change when each leaseholder paid for the uPVC replacement windows. The strongest point was that there was no power for the lessor to make such changes as it amounted to an improvement. The lessor had no power to act and could, in theory, have refused permission for the leaseholder to do it themselves. So, it was argued, the agreement for future maintenance and repair to be with the leaseholder should be enforced. The Applicant argued, and the Respondent conceded, that this arrangement had not been revealed to the Applicant when she purchased so how could she have known the position?

19. In finding that the terms of the Lease must prevail, and that the lessor remains responsible for the repair and maintenance of the window frames (but not the glass - and, in this context, 'windows' probably includes the modern patio doors so that the patio door glass is also excluded), the Tribunal considers that the position as set out in the Lease could only be changed as between the parties for the time being by an enforceable contract or an estoppel; and that any such contractual arrangement would not be enforceable against purchasers unless by deed and noting on the registered title to the flat. In the absence of such registration, even express notice to a purchaser would be unlikely to suffice unless there was some fresh novation by the flat purchaser of the contract between lessor and former lessee. It was clear from the evidence of Ms Wight about the position in relation to her flat that the agreement between the Respondent and its leaseholders concerning replacement and future maintenance of uPVC windows was one of oral agreement and common understanding - described to us as consensus in a residential community. However admirable such consensus operation may have been in the past, it is not an arrangement binding on the Applicant.

20. The Tribunal therefore determines, under section 27A of the Landlord and Tenant Act, that if the Respondent were to incur costs for repair and maintenance of any uPVC windows or doors which have been installed at the cost of the leaseholder then those costs can be recovered as part of the annual service charge from the leaseholders of Maple, Cedar and Raven Courts.

Section 20C

21. The Applicant included an application under section 20C of the Landlord and Tenant Act 1985 requesting that the costs incurred by the Respondent be not charged to her service charge. However, this application was expressly withdrawn by the Applicant's representatives at the conclusion of the hearing which the Tribunal regards as a commendable approach as, otherwise, costs of advice would have fallen on the other 23 leaseholders.

22. Neither party wished us to make an order for costs under Rule 13 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013.

Concluding remarks

23. It is not necessary for the Tribunal to comment upon evidence given in relation to other matters which do not fall for our determination, such as the dispute about repair of an internally constructed downpipe which gave rise to considerable unhappiness on both sides. What is clear is that the Respondent and the leaseholders face major expenditure in the not too distant future. It is to be hoped that they will be able to find the way forward by mutual agreement rather than further confrontation.

Prof Judge David Clarke
23 February 2015

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.