



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/21UC/LSC/2015/0034

Property : 10-22 Antigua Close, Quay West, Eastbourne, East Sussex BN23 5SZ

Applicant : Elmbirch Properties plc

Representative : Remus Management

Respondents : Mr A R Elms, Ms P C Power, Mr S A Crossley, Mr R Robinson & Ms A Forbes, Ms D A Harley, Salmon Real Estate Ltd, Mr B R & Mrs A L Stone, Mr D & Mrs S Gibbs, Mr & Mrs P O'Hea, Mr & Mrs C Hart, Mr R Keeling, and Mr A C & Mrs R C Sams

Representatives : Mr R Robinson and Ms P C Power

Type of Application : Payability of service charges under s.27A Landlord and Tenant Act 1985

Tribunal Members : Judge A Johns (Chairman)
Mr A O Mackay FRICS (Surveyor Member)

Date and venue of Hearing : 15 July 2015, Eastbourne Magistrates Court, Old Orchard Road, Eastbourne, East Sussex BN21 4UN

Date of Decision : 24 July 2015

DECISION

Introduction

1. Elmbirch Properties plc applies as landlord for a determination of the payability of service charges relating to works to the exterior of 10-22 Antigua Close, Eastbourne, East Sussex, BN23 5SZ (“the Building”). The first set of works, being principally to the front elevation, were carried out in the 2014/2015 service charge year at a cost of £29,179.75 plus surveyors’ fees of £1989.04. The second set of works, being to the rear and side elevations, have yet to be carried out and Elmbirch has demanded the sum of £19,000 plus £3700 for surveyors’ fees on account for the 2015/2016 service charge year. The respondents, being the lessees of the 12 flats in the Building, dispute the reasonableness of the charges and complain of a breach of the leases by the landlord.

Jurisdiction and law

2. By s.27A of the Landlord and Tenant Act 1985 (as amended by the Transfer of Tribunal Functions Order 2013) the Tribunal may determine whether service charge is payable and in what amount. S.19(1) of the Act provides that costs shall be taken into account in determining the amount of a service charge only to the extent that they are reasonably incurred and only if the works or services are of a reasonable standard. S.19(2) of the Act provides that where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable.

Leases and factual background

3. The Building was newly constructed as part of the Sovereign Harbour development at Eastbourne in around 2002/2003 and 999 year leases granted of the flats in the Building. The leases are in like form and the sample lease in the hearing bundle included the following material provisions:

3.1 A covenant by the lessee at clause 2.3 to pay service charge in accordance with the Fourth Schedule.

3.2 A maintenance obligation on the landlord at clause 5.1 including to decorate the external parts of the Building as reasonably required and appropriate in the interests of good estate management.

3.3 A covenant by the lessee at para.3 of the Fourth Schedule to pay such provisional sum on account of service charge as the landlord shall reasonably determine in respect of any accounting year.

4. The 2014 works were the first significant works to the exterior of the Building since its construction.

5. A maintenance inspection report was obtained in 2006. That report included a schedule of works which, under the heading “External Redecorations”, referred only to the front external cladding (as well as entrance porches and doors). Lessees were formally consulted in relation to those works during 2013/2014 (there had been an earlier consultation in 2010/2011 but the works did not then proceed and neither side relied on that consultation).

6. The consultations resulted in two estimates for the works. One was from Ian Williams in the sum of £21,137 plus VAT of £4227.40. The other was from a contractor nominated by the lessees, namely JL Timber, and was in the sum of

£33,620 on which no VAT would be payable; JL Timber not being registered for VAT. It is plain that JL Timber was somewhat unfamiliar with the tendering process; its estimate being sent under cover of a letter in which Mr Legate of JL Timber indicated that he had “filled out the provided paperwork as well as I could due to not having a lot of experience in this style of estimating”.

7. The landlord engaged Ian Williams and the works, being principally to the front elevation, were carried out during 2014.

8. The landlord has since sought on account payments of service charge in the sum of £19,000 plus surveyors' fees of £3700 to fund works to the rear and side elevations. But the lessees had been under the impression that the 2014 works for which Ian Williams had provided an estimate were to be to the whole of the Building. This request for further money has therefore come as an unpleasant surprise, resulting in a dispute which is now brought before the Tribunal by way of the landlord's application.

9. Since the application was made, estimates have been received by the landlord for this second set of works to the exterior. The prices range from, before any VAT, £23,626 from Novus to £35,529.50 from Mitie. JL Timber has provided an estimate within that range, namely in the sum of £26,110.

Inspection

10. The Tribunal inspected the Building immediately before the hearing. The inspection was attended by Mr Robinson and Ms Power, representatives of the lessees, and by Mr Taylor of the landlord's managing agents, Remus Management.

11. The Building was viewed from ground level. It comprises a detached purpose-built block of flats arranged over ground and two upper floors located about 4 miles east of Eastbourne town centre. The Building has a pitched roof covered with interlocking concrete tiles and elevations finished in either painted render or timber cladding. On the front elevation, the timber cladding is rough sawn whereas by comparison on the rear and side elevations the timber has a smoother planed finish.

12. The Tribunal's attention was drawn in particular to the state of the timber cladding following the recent works to the front elevation as well as the cills and was shown a similar nearby block in St Lucia Walk by way of comparison.

Hearing

13. The hearing followed the inspection. Mr Robinson and Ms Power appeared for the lessees. Mr Taylor appeared for the landlord and the Tribunal also heard from Mr Hearn of Ellis Sloane, the landlord's surveyors.

14. Mr Robinson and Ms Power made plain to the Tribunal their dissatisfaction with the appearance of the Building following the works already completed and at being asked for further service charge when they had believed that the 2014 prices were for the whole of the Building.

15. It became clear that they made 3 arguments as to why the service charges for the two years being considered were not reasonable.

15.1 First, that JL Timber's price of £33,620 was for the whole of the Building and that confusion over the extent of the works meant that the landlord lost the opportunity to get the works to the whole of the Building done for that sum.

15.2 Second, that the 2014 works resulted in a poor finish to the Building. In particular, the stain finish to the timber cladding was uneven, replacement cladding boards were too obvious and therefore unsightly, and what were referred to as stone cills remained dirty despite having undergone a cleaning process.

15.3 Third, that the landlord was in breach of its maintenance obligation given that no significant work had been done to the exterior prior to 2014.

16. Mr Taylor's response to those arguments can be summarised as follows:

16.1 Whether or not JL Timber's figure related to the whole Building, no real opportunity was lost. The landlord would not have proceeded with JL Timber given that it had no track record of carrying out such contracts, reflected in Mr Legate's letter and the fact that it was not VAT registered. Further, JL Timber had since quoted £26,110 for works to just the rear and side elevations.

16.2 That the 2014 works were carried out to a reasonable standard.

16.3 That whether or not the landlord was in breach, the lessees had not established that any loss had been suffered.

Discussion

17. While the Tribunal can understand the lessees' dissatisfaction, it accepts Mr Taylor's submissions.

18. Starting with JL Timber's quote of £33,620, even if that did relate to the whole of the Building, the Tribunal is satisfied that the necessary works to the whole of the Building would not in fact have been carried out at that price. The landlord would not have proceeded with JL Timber given Mr Taylor's concerns, and that would, in the Tribunal's view, have been a reasonable decision. Further, the Tribunal is not satisfied that JL Timber would have carried out a contract at that price. JL Timber's recent quote, being in the sum of £26,110 for just the rear and side elevations, points firmly against a contract at £33,620 for the whole being realistic. And it emerged from the lessee's submissions that JL Timber would have been dependent upon sub-contractors for much of the work; the contractor's name reflecting an expertise in timber including cladding but the necessary works extending also to render, cills and metalwork. Either JL Timber would not have entered into a contract, or if it did so it would not have been able to deliver the works at contract price.

19. While the lessees criticised the finish resulting from the 2014 works, they very fairly accepted during the hearing that the problem was not with the standard of works carried out. Rather, the problem was the Building. That matches the Tribunal's assessment. Having inspected the Building, the Tribunal does not find any fault with the works. The reality is that the materials used in the construction of the Building are not of the highest quality. The front elevation is faced in part with cheap timber cladding and the cills are not in fact stone but a form of reconstituted stone with concrete. Some unevenness in the finish to the cladding is a product of the uneven quality of the boards. The cills have benefited from the cleaning process but

have quickly picked up some staining again given the quality and design. And any more costly cleaning process would not have been justified given that the cills are not stone. The replacement boards are reasonable ones. That they are noticeable is just a product of the fact that they are planed and pre-treated, helping them fulfil their function of protecting the Building from weather. The Tribunal noted that replacement boards to the St Lucia Walk property were likewise planed and pre-treated and similarly noticeable as a result.

20. As to the failure by the landlord to carry out exterior works until 2014, such may well be a breach of the leases. If so, such would give rise to a claim for damages which could be set off by way of defence to the claim for service charge if loss resulting from the breach could be established. But no such loss was established here. The lessees were invited to identify a loss but were unable to do so. Indeed, they can be said to have been spared a cost in that there ought probably to have been at least 2 cycles of exterior maintenance works by 2014 whereas the cost of only one such cycle has been incurred.

21. Having dealt with the main arguments, a few further matters should be addressed before turning to a summary of our decision.

21.1 Mr Hearn volunteered during the hearing that the level of surveyors' fees forming part of the current on-account demand was too high. The figure sought and referred to in the landlord's application was £3700. His unchallenged suggestion, which the Tribunal accepts, is that £3000 would be a reasonable figure.

21.2 No submission was made by the lessees that the works planned to the rear and side elevations could now be carried out for less than the sum of £19,000 sought by the landlord as an on-account payment. Any such argument would have been unrealistic given the estimates now obtained for those works ranging, as already noted, from £23,626 to £35,529.50 before VAT.

21.3 Given the surprise to the tenants of the most recent demand for which they had not budgeted, the Tribunal enquired whether they were asking for the works to be delayed so that service charge could be accrued over a longer period, perhaps of 2 years. The lessees were very clear that that was no part of their case. The work needed doing and they did not wish for it to be delayed.

21.4 The tenants criticised the landlord for not getting an updated report on the Building before carrying out the 2014 works. But there was no evidence as to what difference any such report would have made. The tenants made no case as to different works that ought to have been done. It became clear they wish consideration to be given as to whether the current timber boards should be replaced with uPVC cladding. It may well be sensible to give consideration to that, but it is currently a matter of mere speculation as to whether such replacement would be the best course. Certainly, it cannot be said and was not said that the work done to the existing timbers was pointless. Such is reflected in the fact that the lessees are pressing for the works to the timber cladding on the south elevation to be carried out.

21.5 It should be made clear that the Tribunal's decision as to the reasonableness of the sum sought on account for 2015/2016 is no bar to the lessees challenging the costs once incurred or the standard of works carried out.

21.6 The lessees made an oral application at the end of the hearing under s.20C of the Act. Such provides that the Tribunal may make such order as it considers just and reasonable on an application that costs incurred by a landlord in connection with proceedings before it 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. There should

be no such order in this case. The lessees' service charge challenges have been unsuccessful and it would be wrong to deprive the landlord of any contractual right it may have to add the costs of these proceedings to service charge.

Summary of decision

22. From the above, the Tribunal decides that:

22.1 The sum of £29,179.75 plus surveyors' fees of £1989.04 is payable by way of service charge for 2014/2015; being costs that were reasonably incurred in carrying out works of a reasonable standard.

22.2 The sum of £19,000 is payable by way of service charge for 2015/2016; being a reasonable sum on account for the remaining necessary exterior works. Of the sum of £3700 sought towards surveyors' fees for 2015/2016, such is unreasonable to the extent of £700 so that the sum of £3000 is payable by way of further service charge for 2015/2016.

22.3 The application under s.20C of the Landlord and Tenant Act 1985 is dismissed.

Appeal

23. 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.

24. 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.

25. 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.

26. 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.

Judge A Johns (Chairman)

Dated 24 July 2015