9992

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AW/LSC/2014/0044**
Property	:	**1-162 Marlborough, 61 Walton Street, London SW3 2JU**
Applicant	:	**Marlborough Knightsbridge Management Ltd (MKML)**
Representative	:	**Smith Waters LLP**
Respondent	:	**Various Leaseholders**
Representative	:	**In person**
Type of Application	:	**For the determination of the liability to pay a service charge**
Tribunal Members	:	**Ruth Wayte** **Mrs Redmond MRICS**
Date and venue of Hearing	:	**7 May 2014** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**6 June 2014**

DECISION

Decision of the tribunal

The tribunal determines that the cost of the proposed refurbishment works to the shared courtyard of the property is in principle recoverable from the leaseholders as a service charge.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") in advance of expenditure in relation to proposed refurbishment works to the shared courtyard of the property.

2. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

3. The Applicant had originally requested that this matter be dealt with on the papers, although a hearing had subsequently been requested by two of the three objectors: Savannah Henley and Sally Blackburn. Ms Blackburn withdrew her objections to the proposed works before the hearing and Ms Henley had requested an adjournment, which was refused. At the hearing the Applicant was represented by Ms Waters of Smith Waters LLP and Ms Henley appeared in person.

4. In addition to the bundle of documents prepared in accordance with the directions, the tribunal had sight of the detailed letters of objection from Ms Henley, Sally Blackburn and Bjorg Thorsteinsson summarised in the bundle and a previous decision of this tribunal in relation to earlier works at the property, reference LON/00AW/LSC/2011/0410.

The background

5. The property which is the subject of this application comprises two blocks of 168 flats, built in 1890. The building is owned by the Applicant, a leasehold management company owned by the 122 lessees with 999 year leases. These proposed works are the last in a five year plan, which has covered internal and external redecoration, and now seeks to refurbish the internal courtyard area and drainage system.

6. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute. The bundle included clear photographs of the area in question, together with plans showing the proposed works.

7. The Respondent holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease will be referred to below, where appropriate.

The issues

8. At the start of the hearing Ms Henley referred to her request to postpone the hearing as she considered the Applicant had not properly attended to the formalities required by the management company's procedures, including full disclosure of plans to all the leaseholders. The tribunal explained that the application was focussed solely on the question of recoverability of the cost of the proposed works under the provisions of the leases for Marlborough. The Applicant also confirmed that formal consultation would follow the tribunal's decision and the tribunal advised Ms Henley that this would provide the opportunity to make observations about the works and their proposed cost.

9. With this in mind, the parties agreed to consider whether the proposed works fell within the appropriate provisions of the lease under the following headings:

   (i) Repair or replace the drainage system;

   (ii) Resurface the courtyard;

   (iii) Replace the existing lighting with energy efficient units;

   (iv) Carry out general planting and

   (v) Provide trees and grilles.

10. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various items as follows.

The Lease

11. The tribunal was provided with a specimen lease made in 1981. The actual date was unclear on the copy provided. The tribunal was advised that whereas some of the lease provisions differed in relation to the actual demise, the provisions in respect of the service charge and the Lessors' repairing covenants were identical. Those provisions defined the Basic Service Charge as the annual sum of money specified in Part 5 of the Fourth Schedule which refers to charges incurred by the Lessors in carrying out their obligations under Clause 5.

12. The following parts of Clause 5 were identified as relevant to the issues:

> *"(a) Throughout the said term to maintain and keep in good and substantial repair and condition:-*
>
> *(i) the main structure of Marlborough including the principal internal timbers and the exterior walls and the foundations and the roof thereof with its main water tanks main drains gutters and rain water pipes (other than those included in this demise or in the demise of any other flat in Marlborough) and the water tanks and the chimney stacks on the roof of Marlborough.*
>
> *(ii) all such gas and water mains and pipes drains waste water and sewage ducts and electric cables and wires in under and upon Marlborough as may by virtue of the terms of this Lease be enjoyed or used by the Tenant in common with the owners or tenants of the other flats in Marlborough.*
>
> *(iii) all such main entrances passages landings and staircases (internal and external) gardens gates and access yards of Marlborough as may by virtue of the terms of this Lease be enjoyed or used by the Tenant in common with the owners or tenants of the other flats in Marlborough.*
>
> *(f) To keep clean and properly lighted the passages landings staircases and other parts of Marlborough which may by virtue of the terms of this lease be enjoyed or used by the Tenant in common with the owners or tenants of the other flats in Marlborough to keep clean the windows of and to furnish such parts as aforesaid in such style and manner as Regalian shall from time to time in its absolute discretion think fit.*
>
> *(m) Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as in the absolute discretion of Regalian may be considered necessary or advisable for the proper maintenance safety and administration of Marlborough."*

Repair or replace the drainage system

13. The tribunal heard evidence from the Applicant's architect, Mr Dyson, that concern about the drainage prompted the works, in particular pooling of water following heavy rainfall, which indicated that there was failure in the system. The internal courtyard is the entrance and exit to the property and therefore subject to fairly heavy foot traffic, requiring safe and convenient passage. The tribunal was referred to an undated summary report by the Drain Doctor, a plumbing company,

which indicated that the existing drains were in a poor state of repair, with the majority of defects identified as requiring either urgent or short terms repairs to avoid potential structural failure and risks to public health.

14. Ms Waters relied upon clause 5 (a)(i) and/or (ii) which she submitted clearly covered the proposed works, in the light of the evidence about the current state of the drainage system. The proposed works included replacement of the original system with modern slot drainage, which Mr Dyson confirmed was the appropriate method to be used today and easier to maintain in the future. Ms Henley made no objection to this item at the hearing.

The tribunal's decision

15. The tribunal determines that this item is recoverable under the lease. Clause 5(a)(i) and/or (ii) clearly covers such work to the drainage system as is required to keep it in good and substantial repair and condition, with the need for repair clear from the summary report. Furthermore, the sweeping up provision in 5(m) gives the Applicant absolute discretion to do such work as may be considered necessary or advisable for the proper maintenance safety and administration of Marlborough. The proposed works to replace the existing failed drainage with the modern equivalent are a reasonable method of repair and within the provisions of the lease.

Resurface the courtyard

16. Ms Waters confirmed that the last refurbishment of the courtyard was some 40 years ago, with the existing paving slabs largely dating from those works. Many had become uneven or even broken, which had exacerbated the problems with the drainage and was considered to be a risk to the health and safety of the residents and their visitors. There were also concerns of an acoustic nature, particularly to the residents of flats near the ground level. Since many of the slabs would need to be disturbed for the works to the drainage system, the proposed works planned to replace the slabs with a cost effective replacement, in this case resin bonded gravel. Ms Waters relied on clauses 5(a)(iii), (f) and (m) as covering the works in question, including any element of improvement.

17. Mr Dyson gave evidence for the Applicant that the chosen product was affordable, freely available and relatively easy to repair. From a health and safety perspective, as a monolithic surface, any risk to residents from the current uneven surface would be eliminated and the acoustic improvement would also be considerable.

18. Ms Henley raised some concerns that the proposed surface would be harder to repair than the replacement of paving stones, although made no objection in terms of the lease.

The tribunal's decision

19. The tribunal determines that the cost of the proposed works in relation to resurfacing is recoverable as a service charge, as provided in clause 5(a)(iii), as supplemented by (f) and (m). To the extent that the works go beyond the standard repairing obligations, given that the internal courtyard is the communal entrance and exit for the flats, the tribunal considered that clause 5(f) could be applied and would therefore provide absolute discretion to the Applicant in terms of the choice of surfacing material, in the same way that it would to carpeting in the internal common parts. In addition, clause 5 (m) provides absolute discretion to the landlord in relation to any works considered necessary or advisable for the proper maintenance safety and administration of Marlborough. Given the safety concerns expressed by the Applicant, this clause would also cover the proposed works.

Replacement lighting

20. The tribunal heard evidence from Mr Dyson that the existing lighting was for non-energy efficient lightbulbs and replacement of the fittings with LED lighting would be the most cost effective solution in the long term. The opportunity to redesign the existing arrangements by having up-lighters around the trees (see below) in place of some of the existing spotlights would also reduce light pollution to the residents. Ms Waters confirmed that the cabling required replacement due to its age. Ms Henley made no objections to this item at the hearing.

The tribunal's decision

22. In terms of repairing obligations, the relevant clauses of the lease are 5(a)(ii) and (iii), as above. To the extent that the works go beyond maintaining and keeping the lighting in good and substantial repair and condition, clause 5(f) provides the landlord with absolute discretion in terms of how the external common parts are "*furnished*". As with the resurfacing works, the tribunal considers that this clause has equal application to the provision of lighting. In addition, clause 5 (m) provides absolute discretion to the landlord in relation to any works considered necessary or advisable for the proper maintenance safety and administration of Marlborough. Again, this is a widely drawn clause and the tribunal considers that it provides ample authority to include the cost of the works to replace the lighting in the service charge.

General planting

23. This, together with the trees below, was the main method by which the Applicant hoped to redirect the flow of foot traffic away from the ground floor windows of residents' flats, towards the centre of the courtyard. Mrs Fairlamb gave evidence that the current planting scheme, in a variety of pots clustered around the existing water feature and the centre of the courtyard, forced people to walk along the railings, directly outside the flats. As all 14 doors to the property opened onto the courtyard, this could be a significant issue in terms of noise and disruption.

24. The new scheme was intended to instil calm and provide better facilities for socialising, while minimising disruption to the residents. The plan was to provide flowerbeds directly in front of each block, providing a physical and acoustic barrier. This arrangement would be easier to maintain than the current "chaotic" collection of planters. Again, Ms Henley made no specific objection to this item.

Tribunal's decision

25. The specific clause in the lease providing for the repair and maintenance of the planting is 5(a) (iii) above. The tribunal heard evidence that some of the existing planters were damaged and therefore a replacement was required. To the extent that the works go beyond this clause, again the clause 5(f) allows the landlord to *"furnish"* the common parts in such style and manner as they think fit, in their absolute discretion. Again, the tribunal considers that *"furnish"* can be applied both to planting and the provision of flower beds.

26. Furthermore, clause 5(m) provides absolute discretion to the landlord in relation to *"all such works installations acts matters and things"* as *"may be considered necessary or advisable for the proper maintenance safety and administration of Marlborough"*. The tribunal considers that *"administration"* in this context means management and therefore this clause provides considerable discretion to the landlord. The tribunal accepted that the main driver of the new planting scheme was to improve the usage of the courtyard for the benefit of the residents and therefore the cost of the works is recoverable under the lease.

Trees and Grilles

27. Again, this was a new feature, replacing the planters and water feature as the main design element in the courtyard. Mr Dyson gave evidence that again, the main purpose was to channel foot traffic down the centre of the courtyard away from the flats. The new lighting was an integral part of the design and the silver birches were proposed due to their suitability for urban planting and their light leaf cover. Mrs Fairlamb also confirmed that seating around the trees was proposed to replace the existing seating with better facilities for the residents to

enjoy the courtyard, while minimising disruption to the ground floor flats in particular.

28. Ms Henley expressed some concern as to the cost and potential light pollution to the flats as the trees matured. She felt the roof was a greater priority. Again, she made no objection in terms of the lease.

The tribunal's decision

29. The tribunal does not consider that this item falls under the general repairing covenants in 5(a) above, the proposal for trees and grilles is a new feature to the courtyard. However, as set out above, under clause 5(f) the landlord is given absolute discretion to "*furnish*" the common parts "*in such style and manner*" as they think fit and under clause 5(m), absolute discretion to carry out "*all such works installations acts matters and things*" they consider advisable for the proper administration of Marlborough.

30. For the reasons set out under the headings above, the tribunal considers that these provisions are wide enough to cover the installation of trees and grilles in the external courtyard, together with the street furniture and lighting which are an integral feature of the design. As set out above, this tribunal is not concerned with the reasonableness of the cost of the works, the Applicant had confirmed that a formal consultation will follow this determination and the leaseholders will be able to take part in that consultation process and take advantage of their rights under the 1985 Act to challenge any costs they consider to be unreasonable.

Costs of the hearing

31. At the end of the hearing, the Applicant made an application for a determination that the cost of the hearing could be recovered as a service charge. Ms Henley made no objection. The tribunal was not referred to any specific clauses of the lease.

The tribunal's decision

32. The tribunal noted that clause 5(j) of the lease reads:

> "*To employ managing agents to manage Marlborough and discharge all proper fees charges and expenses payable to such agents in connection therewith including the cost of computing and collecting the rents hereby reserved.*"

That said, the Applicant only raised this issue at the hearing and the tribunal is mindful of the fact that none of the leaseholders will have

had notice of the application or a chance to make representations. In the circumstances and bearing in mind that no service charge has yet been levied, the tribunal declines to make a determination in relation to this issue.

Name: Ruth Wayte **Date:** 6 June 2014

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 27A

(1) An application may be made to the appropriate 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 the appropriate 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.