FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BE/LSC/2020/0188** **V:CVPREMOTE**
Property	**:**	**106 Bushey Hill Road, London SE58QQ**
Applicant	**:**	**Paul Harding**
Representative	**:**	-
Respondent	**:**	**Rosenewgroup**
Representative	**:**	-
Type of application	**:**	**Landlord & Tenant Act 1985 S27a Service charge determination**
Tribunal members	**:**	**Judge Jim Shepherd** **Evelyn Flint FRICS** **Mark Taylor FRICS**
Date of decision	**:**	**23rd February 2021**

DECISION

Decision

The cost of the wall works are payable by the leaseholders save that the repair of the section of the wall within the demise of Flat A is not so recoverable.

The Applicant's application under section 20 C Landlord and Tenant Act 1985 is allowed.

Reasons

1. In this application the Applicant Paul Harding who is a lessee at flat D 106 Bushy Hill Road London SE5 8QQ [the premises] seeks a determination as to the payability and reasonableness of service charges. The freeholder is Rosenewgroup Limited. They are seeking to recover service charges for works carried out in 2020 at a cost of £28100 in respect of repair works to a wall ("the wall works") at the rear of the premises.

2. The premises are located on the top floor of a street property. The Applicant has no access to the rear land in which the subject wall is located. The basement flat, flat A, is occupied by leaseholders Matthew Rose and Susan Doyon . The ground floor flat, flat B is occupied by Colleen Melanophy and flat C, the First floor flat by Kerry McDermott, who also has no access to the rear land. None of these leaseholders took part in the proceedings but were referred to by the applicant in his application made pursuant to section 20 of the Landlord and Tenant Act 1985.

3. In the application the Applicant asks the tribunal to decide whether all or part of the wall is demised and to whom. The Applicant also asked whether the wooden access stairs from flat B, the ground floor flat, to the garden is demised to flat B. As the hearing went on it became clear that that second issue was no longer at large because the freeholder

gave a clear indication that they were not seeking to recover costs for remedial works to the wooden access stairs via the service charge.

4. The matter was heard at a virtual hearing on 13th January 2021 . The tribunal had not had the benefit of an inspection of the premises due to the lockdown currently in force . We did however have the benefit of photographs and plans relevant to the leases.

Background

5. The building in which the premises are located is a late Victorian semi - detached house converted into flats in the mid - 1980s . The individual flats were sold as leasehold properties in 1988. There are four flats as described above. The original leases are largely identical apart from the plans. These plans play a significant role in this application.

6. The land at the rear of the property is on 2 levels, a lower level at the height of the basement flat, and a higher level of raised garden approximately 1.4 metres higher. The garden land adjacent to the basement flat is concreted to form a passageway, and a wall of concrete blocks have been constructed. On the 20th of July 2017 the leaseholders in the building were sent a section 20 notice by the then freeholders to repair the wall. At this stage it was asserted that all of the leaseholders were liable to pay a proportion of these costs. The Applicant disputed this and dispute resolution was sought in accordance with the lease. A chartered surveyor was commissioned to report on the wall and liability. The report did not conclude the issue and it was suggested that the matter should be brought to the First Tier Tribunal for resolution.

7. On the 9th of October 2019 the Common Estate Limited transferred its interest to Rosenewgroup Limited who appointed Naka Estates as

managing agent. Rosenewgroup issued a new section 20 notice in respect of the wall works on the 30th of October 2019. The Applicant indicated his intention to seek a determination of liability for the garden wall repairs from the tribunal and an application was made in March 2020. Thereafter Rosenewgroup went ahead and demolished the garden wall and replaced it in the week commencing the 10th of August 2020 and thereafter issued an invoice for payment on the 24th of August 2020 .

8. The works to the wall were fairly substantial. It was replaced by a similar but stronger structure of concrete block construction which runs in a North South direction.

9. It is the Applicant's contention that the wall is not part of the structure of the building. Furthermore he argues that the plans attached to the leases of the various flats in the building indicate the demise of the wall.

The lease of Flat D

10. The Applicant's lease is dated the 25th of March 1988. Under clause 1(d) of the lease the premises is defined as *the flat or maisonette and (if applicable) gardens hereby demised as described in the 1st schedule hereto*. The common parts are defined as *those parts of the building not included in this demise and not demised to any other lessee of the lessor and the appurtenant land intended for common use*. Under clause 5(ii) (b)the lessee is required to pay an contribution in relation to cost and expenses as detailed in the 5th schedule. Under clause 1 (i) of the Fifth Schedule the lessee is required to pay the reasonable expenses of maintaining cleansing repairing and renewing the main structure and in particular the roof chimney stacks gutters and rainwater pipes exterior walls foundations and any walls of the building *not demised by this lease or a lease of any other parts of the building*.

11. In interpreting these lease provisions it can be seen that the demise of each of the flats in the building are important. If a part of the building

falls within the demise of one of the lessees the others can't be required to contribute for its repair. It is the Applicant's contention that the wall in question was within the demise of the basement flat Flat A. The Applicant relied upon the case of *Holland v Hodgson* (1872) LR 7 CP 328 to support his argument that the wall was constructed on land which is demised to the basement flat or in the alternative the wall is affixed to the land demised to flat A and flat B.

12. A report on the condition of the retaining wall was carried out by Robert Horn FRICS dated the 18th of July 2018. This is helpful but unfortunately inconclusive in relation to the demise of the wall this is the reason why the Tribunal have become involved. The Applicant had also received advice from a barrister Errol Topal of Lamb Chambers dated the 19th of September 2018 . It is unfortunate that the Respondents took it upon themselves to share this advice with the tribunal. This is a confidential document which should not have been shared. It is not clear how the Respondents obtained the document . In any event the tribunal pay no regard to the contents of the advice and we have reached our own view in relation to the issue at hand.

13. The Respondents submitted a statement dated the 14th of December 2020 from Mr Rosenburg . He said that the liability to pay for the wall works was resolved in 2018. This patently wasn't the case because there had been a reference to the Tribunal for the matter to be resolved. The Respondent stated that the garden wall was a retaining wall between the ground floor level to the basement flat level. He said it was essential for the foundations of the building and for the water to drain away from the building. He said that the basement of the property forms part of the main structure of the building. Neighbouring properties have the same configuration. He said the coloured plan shows two clear lines between the boundary of the demised gardens. The space between the two lines is the garden wall itself which is the wall between the two levels and is not demised to any of the flats.

14. Regrettably the only real documentary evidence that the Tribunal could rely on in this case were the lease plans. It is well known that these plans are not always reliable .

15. The lease plan to flat A, the basement flat, seems clear in showing that the horizontal section of the wall is within the demised garden area of that flat. The remaining section of the wall after the horizontal section is not within the demise of flat A.

16. Of course it is not sufficient for the wall to be within the demised area it has to form part of the demise. In that regard the case of *Holland v Hodgson* is instructive. That was a case about whether looms nailed to the floor in a mill were part of the demise. Blackburn J stated the following from page 334 onwards:

There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land ; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating 'the intention, viz., the degree of annexation and the object of the annexation. When the article in question is no further attached to the land, then by its own weight it is generally to be considered a mere chattel; see Wiltshear v. Cottrell (4), and the cases there cited. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land: see D'Eyncourt v. Gregory. (1) Thus blocks of stone placed „one on the top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels. On

the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to shew that it was never intended to be part of the land, and then it does not become part of the land. The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that the shipowner was also the owner of the fee of the spot where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land. Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such, as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to beconsidered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel.

17. Applying these principles in the present case , it would be impossible to refer to the wall as a chattel. The dry stone wall analogy is apposite. The wall within the demise in the present case was clearly intended to form part of the land. It was not akin to stones deposited in the builder's yard , it was akin to a permanent or semi - permanent wall built on land.

18. Unfortunately this leaves the parties with an unsatisfactory but unavoidable situation in which part of the wall is within the demise of Flat A (the horizontal section at the front of that flat) meaning the cost of repair of that section of wall is not recoverable under the service charge and therefore the cost of repair to the remainder of the wall is recoverable via the service charge . It would make sense for the wall to be measured and the cost apportioned accordingly. It is open to either party to come back to the Tribunal if the apportionment is not agreed.

19. The Applicant is successful in part of his application. He was justified in bringing the application as resolution was undoubtedly required. It would not be reasonable for the Respondents to recover any sums from the leaseholders in relation to the application and therefore the application under s.20C of the Landlord and Tenant Act 1985 is allowed.

Judge Shepherd
23rd February 2021

Rights of Appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case. The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit. The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking. If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).