Residential
Property
TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case Reference: LON/00AC/LDC/2006/0031

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 20ZA OF THE LANDLORD & TENANT ACT 1985

Applicant: BNI Management Limited – Flat 22
H R Iwanier, F Bude, S Vernick – Flat 22A

Respondent: Highstreet and Commercial Holdings Limited

Premises: 22/22A Temple Fortune Mansions, Temple Fortune Parade, London NW11 0QR

Date of Application: 09 May 2006

Date of Oral Pre-Trial Review: 14 June 2006

Appearances for Applicant: Mr G Cowen (Counsel)
Mr J Hannon (Solicitor)
Mr Taylor (Solicitor)
Mr B Turner

Appearances for Respondent: Mr S Cope (Counsel)
Mr S Pariente (Solicitor)

Members of Leasehold Valuation Tribunal: Ms H Carr (Chairman)
Mr M Mathews FRICS
Ms S Baum

Date of Tribunal's Directions: 09 October 2006

Property: Flats 22 & 22A, Temple Fortune Mansions Temple Fortune Parade London NW11 0QR

THE APPLICATION

1. The Tribunal was dealing with the following applications:
   (a) An application under section 27A of the Landlord and Tenant Act 1985, as amended, ('the 1985 Act') for a determination whether a service charge is payable and, if it is, as to
      i. the person by whom it is payable
      ii. the person to whom it is payable
      iii. the amount which is payable
      iv. the date at or by whom it is payable and
      v. the manner in which it is payable

   (b) An application under section 20ZA of the 1985 Act for dispensation with all or any of the consultation requirements contained in section 20 of the 1985 Act

   (c) An incidental application was also made for an order under section 20C of the 1985 Act to prevent the landlord from including any costs in connection with these proceedings as a future service charge

2. The Applicant, Highstreet and Commercial Holdings Ltd, Toby House, Shrubbs Hill Lane, Sunningdale Ascot Berkshire SLJ 0LD is the lessor of Flats 22 and 22A Temple Fortune Mansions, Temple Fortune Parade London NW11 0QR (the property)

3. The Respondents are
   (a) BNI Management Ltd which is the tenant of Flat 22 (the first Respondent) and
   (b) H.R. Iranier, F Bude and S Vernick, who are the tenants of Flat 22A (the second Respondents)

4. A pre-trial review was held on 14 June 2006. The Hearing took place on 13 and 14 of September 2006. The property was inspected by the tribunal on the morning of the first day of the hearing.

5. At the hearing the Applicant, Highstreet and Commercial Holdings Ltd , was represented by Mr George Cowan, of counsel. Mr Brian Turner, a chartered engineer, who was responsible for the management of the maintenance works at the property, gave evidence for the applicant.

6. The Respondents, BNI Management Ltd and H.R. Iranier, F Bude and S Vernick were represented by Ms Siri Cope of Counsel.

7. Although the parties were given an adjournment to allow them the opportunity to resolve their differences or narrow the issues this did not prove possible.

8. The Applicant produced an additional document at the Hearing which was an invoice from its solicitors in connection with legal charges relating to the maintenance work.

9. The matters in issue, and which required the determination of the Tribunal were as follows: -
   (a) whether the service charge provisions in the lease entitled the Applicant to charge the Respondents for some or all of the works it has carried out to the property
   (b) to the extent that it does so, whether the tribunal considers that it is reasonable to dispense with the consultation provisions in the 1985 Act
   (c) if so, whether the service charges demanded were reasonable
   (d) whether the Applicant is entitled to claim the cost of the hearing as part of a future service charge

10. The tribunal's decision is that

    (a) The service charge provision set out in clause 3(9) (a) of the lease does not entitle the Applicant to charge the Respondent for the works carried out to the windows and doors of the property because these works do not fall within the scope of the repairing and maintenance obligations set out in clause 4 of the lease. However the service charge provisions do cover the remaining work carried out to the property, which do fall within clause 4.

    (b) It is not reasonable to dispense with the consultation provisions of the 1985 Act and therefore the liability of the Respondents for the work which falls within the ambit of the service charge provision is limited to £250 per flat

    (c) The lease does not entitle the Applicant to charge the legal costs of the hearing to determine its applications to the service charge and therefore the tribunal did not make a determination under section 20C of the 1985 Act.

11. The salient parts of the evidence are given below under the appropriate heading.

Background

12. The property consists of two three bedroom flats, Flat 22 (the first floor flat) and Flat 22A (the second floor flat). The property is approximately 70 years old. It is built over a ground floor commercial unit.

13. The flats were demised by long leases both dated 30th August 1990 and made between Stephen Harley Rabin as Lessor and Kristina Ruth Rabin as Lessee. The lease of Flat 22 was assigned to the first Respondent and the lease of Flat 22A was assigned to the second Respondents in March 2005.

14. The Applicant carried out external work to the property during 2005 following a consultation process. The consultation began on 17th March 2005. Works commenced on 10th October 2005 and were completed in November 2005. The work included the renewal of window sills, some renewal of glazing to the windows, work to guttering, pipework, brickwork and work to the doors of the flats and external painting. No work was done to the interior of the property.

15. The Applicant is seeking, in connection with these works, the sum of £5,817.07 from the first Respondent and the sum of £6,429.40 from the second Respondent. The sums differ because of the different floor sizes of the flats.

The Service Charge provisions of the Leases

16. The provisions of the leases (which are identical) that are relevant to this application are set out in Clause 3(9) (a) and Clause 4(2) (a) of each of the leases. Clause 3(9) (a) entitles the landlord to recover its costs and expenses in respect of its repairing and maintenance obligations. Clause 4(2)(a) sets out those obligations and because the scope of subparagraph (i) of this clause is disputed it is set out in full below.

17. Clause 4(2)(a)(i) provides that the Landlord will ' maintain and keep in good and substantial repair and condition:
    i. The main structure of the Building including the principal internal timbers and the exterior walls and the foundations and the roof and chimneys thereof with its main water tanks main drains gutters and rainwater pipes (other than those included in this demise or exclusively serving the Demised Premises)'.

18. The demised premises are defined in Schedule 1 to each of the leases. Particularly relevant to the application is paragraph (a) which specifies that the demise of the flat includes
    (a) The internal plastered coverings and plaster work of the walls bounding the Flat and the doors and door frames and window frames fitted in such walls and the glass fitted in such window frames

19. Explicitly excluded from the demise by paragraph (ii) of Schedule 1 are 'any of the main timbers and joists of the Building or any of the walls or partitions therein (whether internal or external) except such of the plastered surfaces thereof and the doors and door frames fitted therein as are expressly included in this demise'.

The Applicant's submission in relation to the scope of the Service Charge provisions

20. The applicant argues that the decorating and repairing obligations fall together and that the Landlord is responsible for the external fabric of the property and the tenants are responsible for the internal repair and decoration. It argues that the terms of the lease should be understood as including only the internal parts of the walls bounding the flats within the demise and specifically arguing that the demise includes only the internal elements of the window frames.

21. The Applicant supports its argument by submitting that such a construction accords with common sense and custom and practice. In paragraph 21 of its skeleton argument it submits that 'it would be strange if, as the Respondents suggest, the landlord was responsible for repairing the external walls but not the window frames. Each lessee would be responsible for scaffolding the whole of the building to repair its own window frames externally. Such a construction cannot have been what the parties to the leases intended' and in the course of the hearing Counsel for the Applicant argued that such a construction would be so unusual it would require very clear words.

The Respondents' submission

22. Counsel for the Respondents emphasised that the description of the demised premises in paragraph (a) of Schedule 1 specifically includes all of the glass and the window frames and that the repairing obligation in clause 4(2) (a) makes no mention of doors and windows but simply refers to the main structure of the building.

23. She agreed with Counsel for the Applicant that the decorating and repairing obligations fell together within the lease. However in her submission the decoration and repair of the windows and doors were the responsibility of the tenants. She argued that this was not an unusual provision as it allows the Landlord to avoid responsibility for the repair and maintenance of windows.

24. Ms Cope also drew the attention of the Tribunal to the omission of the word internal from the demise of the door frames and window frames in the demise. In her submission, if it had been the intention to demise only the internal window and door frames then it would have been very easy for the draftsman to have included the word and limited the demise.

The Tribunal's decision

25. The Tribunal agreed with the Applicant that one would normally expect to see the responsibility for the repair and decoration of the doors and windows to fall upon the landlord. This is because of the expense and inconvenience of scaffolding.

26. However the Tribunal has to decide the distribution of the repairing obligations on the basis of the wording of the leases. In the opinion of the

Tribunal the demise includes the doors, the door frames, the window frames and the glass to the windows. The demise is not limited to the internal parts of the doors and the windows. Therefore the Tribunal determines that the service charge provision set out in Clause 3(9) (a) does not entitle the Applicant to recover the costs of the work carried out to the doors and windows of the property.

27. In addition the Tribunal considered whether the legal costs charged by the Applicant were covered by the service charge provision set out in Clause 3(9). As the clause makes no specific reference to legal costs the Tribunal determines that the Applicant is not entitled to charge its legal costs to the Respondents' service charge account.

28. The Tribunal considers that the parties to the original lease apparently being related probably explains the unusual provision. It appears that little attention was paid to the drafting of the clauses distributing maintenance responsibilities. The Tribunal suggests that the Applicant may wish to consider an application to the tribunal to vary the terms of the lease.

The Dispensation Application

29. The relevant consultation requirements are set out in Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003.

The Applicant's submission

30. The Applicant's argument is set out in paragraphs 13 and 14 of its skeleton argument presented to the tribunal by Mr Cowan. It argues that the letters and notices that it sent to the Respondents dated 17th March 2005, 26th May 2005 and 23rd September 2005 complied with the spirit of the consultation requirements. It submits that the Respondents were given the opportunity to comment on the scope of the works and the estimates themselves. They were given the opportunity to nominate a contractor. Regard was had to the observations that they made. They were told why the contract had been awarded in the manner that it had. It further argues that the most that can be said of the applicant's conduct was that, by serving its estimates at the outset, it conflated the consultation procedure set out in Paragraphs 8 - 10 with the procedure under paragraph 11 (5) (b).

31. The nub of the dispensation application is set out in paragraph 9 of the skeleton argument. 'In short, the Applicant's case is that it is reasonable for the LVT to dispense with any shortcomings in the Applicant's attempts to consult with the respondents because:
    (a) a genuine attempt was made to comply with the requirements including a postponement of the work to allow for the observations to be made;
    (b) The Respondents' objections to the course followed are technical and demonstrate no actual prejudice to the Respondents; and
    (c) The Respondents observations at the time made no difference to the process.

The Respondents' submission

32. Ms Cope, for the Respondents, argues that the consultation requirements are not mere technicalities, but fundamental to the protections provided by Parliament to lessees where the lessor intends to carry out works the costs of which it intends to reclaim by service charge. She points out that the consultation requirements are a two stage process and that the Applicant has failed to carry out the first stage of the process.

33. The details of the first stage are set out in paragraph 8 to 10 of the regulations. These paragraphs in summary require that the landlord gives notice in writing of his intention to carry out qualifying works to each tenant that describes the works proposed to be carried out and invites the tenant to make observations on the proposals.

34. Ms Cope submits that the first stage is crucial to the protections offered. Failure to follow this stage means that plans are already crystallised before the tenants have had an opportunity to intervene. She illustrates her argument by suggesting that a considerable proportion of the works listed in the Schedule of work provided to the tenants as part of the consultation process were in fact either exploratory works or decorative works and that the only specific instance of repair was for the refixing of the four slipped tiles to the front elevation. She urged the Tribunal to compare and contrast the works proposed by the Applicant and the works in fact carried out and note the huge difference between the two.

Determination

35. The Tribunal is entitled to dispense with all or any of the consultation requirements if it is satisfied that it is reasonable to dispense with the requirements. In this case the Tribunal's determination was to decline to exercise its discretion because it did not consider that it was reasonable to do so. It agrees with Ms Cope that the regulations are an important part of the protections which are available to tenants, and considers that decisions to dispense with the requirements should not be taken lightly. Whilst it accepts the Applicant's argument that the Respondent did not demonstrate that it had suffered prejudice by its conflation of the procedure, the Tribunal does not consider that this is sufficient in this particular case to justify dispensation. The Applicant was represented by solicitors who referred to the correct regulations at the time of their first letter to the Respondents in connection with the proposed works. Furthermore the exploratory nature of the works meant that the failure to adhere to the first part of the consultation process made it impossible for the Respondents or the Tribunal to be clear that the Respondents have suffered no prejudice. The Tribunal considers that one important purpose that the consultation requirements serve is to ensure that lessees know the extent of their liability in relation to proposed works. In this instance this did not happen. The lessees did not know the extent of their liability.

The reasonableness of the service charges

36. In the light of the Tribunal's decision in relation to the scope of the service charge provision and the application to dispense with the consultation requirements there is no necessity for it to determine the reasonableness of the service charges. However the Tribunal considered that it may be helpful to the parties if it did so.

37. Mr Brian Turner gave evidence for the Applicant in connection with the reasonableness of the service charges. It was apparent to the Tribunal that he had taken great care to ensure that the costs of carrying out the works was reasonable and proportionate and that the works identified were reasonable to carry out to maintain the property.

38. However the Tribunal considered that the sum of £3,650.00 plus VAT charged by the Applicant's solicitors in connection with the maintenance works was not reasonable. In its opinion a reasonable charge would have been £500 plus VAT for each flat.

The Respondents' application under section 20C of the 1985 Act.

39. The Applicant also made an application under section 20C of the 1985 Act for an order that the costs incurred by the Respondent arising from the proceedings should not be included in any future service charges account. As the Tribunal has already determined that the service charge provision does not entitle the Applicant to legal costs, the Tribunal is not required to make a determination upon this application.

Chairman ..... Helen Carr .....

Date ..... 9 / 10 / 2006