SOUTHERN RENT ASSESSMENT PANEL &
LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/24UH/LSC/2010/0117

Between:

Mr S Hollamby and Mr J McLaren (Applicants)

and

Pilot View Management Ltd (Respondent)

Premises: Flat 7 Pilot View 242 Southwood Road, Hayling Island PO11 9RB ("the Premises").

Date of Application: 2 August 2010

Date of Determination: 7 October 2010

Tribunal: Mr D Agnew BA LLB LLM Chairman
Mr P D Turner-Powell FRICS

DETERMINATION AND REASONS

DETERMINATION:

1. The Tribunal determines that the balconies at Pilot View are part of the structure of the building and are the responsibility of the landlord to maintain and repair under the terms of the leases of the flats at Pilot View. The landlord is entitled to include the cost of maintaining and repairing the balconies in the service charge account to which under the leases all lessees of Pilot View must contribute equally. The Tribunal is unable to make any determination as to the reasonableness of the various figures quoted by the Applicants as estimates for the cost of the proposed works to the balconies on the information before the Tribunal.

2. The Tribunal determines that the cost of maintenance and repair to the garages is the responsibility of the landlord who may recoup that cost from the lessees of all the flats in Pilot View equally. The Tribunal also determines that the cost of £604 per garage door is a reasonable cost.

3. The Tribunal determines that it will make no order under Section 20C of the Landlord and Tenant Act 1985.

REASONS:

The Application

4. On 2 August 2010 the Applicant Mr Hollamby made an application to the Tribunal under Section 27A of the Landlord and Tenant Act 1985 ("the Act"). He sought a determination of the Tribunal on two main points namely whether he as the lessee of Flat 7 Pilot View was liable to pay a service charge contribution towards the cost of maintaining and repairing first the balconies and secondly the garages of Pilot View. This requires the Tribunal to construe Mr Hollamby's lease. The ancillary matters he asks the Tribunal to determine were whether, if he is liable to contribute through the service charge to the cost of maintaining the balconies, the total cost estimate of between £1948 and £2848 for replacing lead flashing and other costs likely to be incurred in 2011/12 onwards are reasonable. With regard to the garages he asks the Tribunal to determine whether the total cost of replacing three garage doors in the sum of £1824 is a reasonable cost to add to the service charge if, indeed, the Tribunal determines that this was a legitimate service charge item. He also asked the Tribunal to make an order under Section 20C of the Act precluding the landlord from adding the costs of the Tribunal application to any future service charge demand.

5. Mr Hollamby indicated that he would be content for the matter to be dealt with by way of a paper determination and the usual directions were given indicating that it was the Tribunal's intention to deal with the matter in that way unless it received any objection. No objections were received.

6. Mr J. McLaren, the lessee of Flat 6, at Pilot View asked to be joined to Mr Penfold's application as a party. The Tribunal considered his application and, as he was a lessee likely to be affected by the Tribunal's decision it decided to add him as an Applicant to the proceedings although, as will be referred to later, it transpired that Mr McLaren's position was different and in opposition to that of Mr Hollamby.

The Premises

7. Pilot View is a block of eight flats built in or about 1983. It is situated on the shoreline immediately adjacent to a shingle beach on Hayling Island. It is very exposed to the wind, weather salt and sand blowing off the sea directly onto the building. It is constructed of brick under a tiled roof. The windows are upvc double glazed and there is plastic guttering. The building is two storeys high and on the south face of the building there are three balconies serving the first floor flats which run the length of the building. Mr Hollamby's flat is on the ground floor and so does not have the benefit of a balcony.

8. Within the grounds of Pilot View at the end of an unmade private access road from the highway there is a block of four garages each with their own metal up and over door.

9. It was evident from the Tribunal's inspection that some work had recently been carried out to the balconies. It was also evident that all four of the garage doors had recently been replaced and these were in good condition at the date of the inspection. No garage is demised to Mr Hollamby but one garage is demised to Mr McLaren.

The Leases

10. The Tribunal was supplied with copies of the leases of Flats number 6, 7 and 8 and a copy of a deed of variation in respect of Flat 8 dated 8 May 1987. The demise of Flat 5 is of the flat only; the demise of Flat 6 is of the flat and one garage; the demise of Flat 8 is of the flat and a store and the deed of variation demises, in addition, a garage.

11. In the case of each of the three types of leases referred to in paragraph 10 above there is a recital which states that "the lessor is registered at HM Land Registry as proprietor with absolute freehold title to the freehold property comprised in the title above referred to and intends to construct flats thereon (all of which said premises are hereinafter referred to as "the Building")". It is clear from the plan annexed to the lease of Flat 8 that the demise includes the balcony area outside the south facing bedroom.

12. By clause 1 of the leases the lessees covenant to contribute and pay "yearly for all expenses set out in the fourth schedule hereto during the said term by way of an additional rent an amount to be calculated in the manner set out in the fifth schedule hereto (and therein referred to as "the Maintenance Charge") and falling due for payment at the time and in the manner therein specified." Further by clause 2(6) of the leases the lessees covenant to "contribute and pay the Maintenance Charge at the times and in the manner as specified in the fifth schedule hereto."

13. By clause 2(8) of the leases the lessees covenant "to permit the lessor and its surveyors and agents with or without workmen and others authorised by the lessor at all reasonable times in the daytime and by prior appointment except in the case of emergency to enter into and upon the demised premises or any part or parts thereof for the purpose of repairing any part of the building of which the demised premises forms part and for making repairing maintaining rebuilding cleansing lighting and keeping in order and good condition all parts of the foundations walls roofs floors and other parts of the said building and for renewing maintaining repairing and testing drainage gas and water pipes gutters inspection chambers vents electric wires and cables and for similar purposes ...".

14. By clause 4 of the leases the lessor covenants with the lessees as follows:-
"(3) that (subject to contribution and payment as hereinbefore provided) the lessor will:-
(i) keep and maintain in good and tenantable repair and make up clean redecorate and renew: (a) the main structure and in particular the foundations and external walls roofs vents stacks gutters and rainwater pipes and the outer parts of the window frames of the building ..."

15. The fourth schedule to the leases sets out the expenses and matters in respect of which the lessee is to contribute as follows:- "1 The expense of maintaining repairing making up cleansing decorating and renewing:- (a) the structure of the building and in particular the foundations external and other walls roofs vents stacks gutters and rainwater and other pipes and the outer parts of the window frames ... (e) the general maintenance repair improvement of the Building and grounds. 3. The cost of decorating and maintaining the exterior of the property."

16. In paragraph 1(e) of the fifth schedule to the leases "The Maintenance Charge" means the amount payable to the lessor by the lessee and certified by the accountant calculated as that proportion of the aggregate of the said expenses and outgoings incurred by the lessor in the year to which the certificate relates in the repair maintenance renewal insurance or servicing whereof of the building of which the demised premises forms part and the curtilage thereof attributable to the demised premises being the total of the agreed maintenance expenditure divided by the number of completed residential units forming part of the Building at 242 Southwood Road aforesaid".

<u>The Applicant, Mr Hollamby's case.</u>

17. With regard to the maintenance and repair of the balconies Mr Hollamby's case in summary was as follows:-
(a) He did not have the benefit of a balcony and there was nothing in his lease requiring him to contribute to the cost of maintenance and repair of the balconies through the service charge.
(b) Balconies are included within the demise of the three flats, 5, 6 and 8 and they have exclusive use of those balconies.
(c) There is nothing in his lease which specifically refers to balconies and in the absence of such a specific provision he cannot be required to contribute towards the cost of their repair and maintenance.
The lessees are responsible for the repair and maintenance of the interior of their premises. Is everything within the demise to be regarded as the interior of the premises, including the balconies?
(d) Mr Hollamby stated that the cost of the repairs in the year 2010/11 were estimated to be £244 per flat or £356 per flat if patio doors have to be removed to replace lead flashing. There were likely to be ongoing costs with regard to the balconies for future years and

various figures were quoted as being the possible cost for future years depending upon the work that is carried out. However, Mr Hollamby did not produce copies of any Section 20 notices that had been served or copies of estimates upon which the Tribunal could form a view as to the reasonableness thereof.

18. With regard to the garages Mr Hollamby's case in summary was as follows:-
(a) He does not have the benefit of a garage.
(b) There is no reference specifically to a garage in his lease and so he cannot be required to contribute to the cost of repair and maintenance of the garages.
(c) Those lessees who have garages demised to them have exclusive use of them and should be responsible for their maintenance and repair. One lessee, Mr McLaren, has paid for his garage door to be repaired.
(d) If the individual lessees are responsible for the repair and maintenance of the interior of the premises they must be responsible for part of the cost of the replacement doors representing the internal surface thereof
(e) For the 2010/11 service charge year a demand of £228 has been made towards the cost of replacement of three garage doors in the garage block.

Mr McLaren's case

19. Mr McLaren's submission by fax from South Africa on 4 October 2010 was in the form of tightly packed hand writing containing many insertions making the submission extremely difficult to read and understand. However, Mr McLaren's position with regard to the garage doors was that this was a responsibility of the landlord to carry out and charge an equal proportion of the expenditure to each lessee's service charge. This was therefore contrary to Mr Hollamby's case. Mr McLaren had, however, arranged for his garage door to be replaced by contacting the contractor who had fitted the three new doors to the other garages and had paid for this work himself. He was therefore seeking reimbursement from the Landlord.

20. The rest of Mr McLaren's submissions, in so far as they could be understood by the Tribunal, appeared to concern matters outside the scope of Mr Hollamby's application. Indeed, some of the matters he raised concerned service charge years not within the scope of Mr Hollamby's application and other matters appear to be more to do with company law rather than matters for which the Tribunal has jurisdiction. The Tribunal could not discern from Mr McLaren's submissions any points that he wishes to make with regard to the repairs to the balconies.

The Respondent's case

21. The Respondent contended that on a true construction of the lease both the repair and maintenance of the balconies and the garages were matters for which the landlord was initially responsible under the leases of the flats at Pilot View and for which the landlord was entitled to seek reimbursement by an equal contribution from each of the eight lessees. With regard to the balconies they were an integral part of the structure of the building. These are supported from the main external wall of the flats and at each end by brick pillars along the southern projection. Further, the balcony of Flat 5 forms in part the roof and ceiling of the lounge of Flat 2 below.

22. With regard to the garages these form part of "the Building" referred to in the leases to which each of the eight lessees are liable to contribute to the cost of repair and maintenance equally. All four garage doors were damaged during the great storm of October 1987. The Respondent says that when they came to replace the garage doors Mr McLaren was resident in South Africa and they were unable to gain access to his garage. Mr McLaren subsequently arranged for the same contractor to replace his garage door with a matching door to the other three and he paid the contractor for that work. The Respondents maintain that they have now reimbursed Mr McLaren. They understand that he has now sold his flat.

23. With regard to the amount quoted by the Applicant, Mr Hollamby, for the cost of the balcony repairs, the Respondent had difficulty in following the figures quoted. A Section 20 notice has been served in respect of future balcony repairs and that the amount given in stage 2 of the Section 20 consultation procedure for this item was £11500.

24. The Respondent submits that an order under Section 20C of the Act should not be made. The Respondent is a lessee owned management company and has no source of income other than through the service charge and makes no profit. It would be inequitable for the Tribunal to make an order under that Section.

The Law

25 By Section 27A of the 1985 Act it is provided that:-
(1) An application may be made to a Leasehold Valuation 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 a Leasehold Valuation Tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvement, 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 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.

The Determination

26. The Tribunal agreed that the leases were not as clear as they might be with regard to the repair and service charge provisions. However these provisions are all based on the repair and maintenance of "the Building". Recital (1) of the leases explains that the Building as referred to in the lease means all the premises constructed on the lessor's freehold property comprised in the freeholder's registered title. It is true that this recital refers to the "flats" constructed thereon and does not refer to the garages specifically but the Tribunal construes the words "all of which said premises" as including the garages. It is clear from Mr McLaren's lease that the garages were constructed at the same time as the flats and that where the lease states the intention to construct " flats" it was intended to include the garages being built at that time. The plan annexed to the leases also shows garages. Accordingly, the Tribunal determines that the garages are part of "the Building" for which the landlord is responsible to repair and maintain under clause 4(3) of the lease and for which the lessees must contribute equally by virtue of clause 1, clause 2(6) and paragraph 1 of the fourth schedule to the lease.

27. The Tribunal does not consider that there is any merit in the argument that the lessees are individually responsible for the interior surface of the garage doors and therefore the other lessees should not be required to contribute to the whole of the cost of the replacement of the garage doors. The garage doors are part of the structure for which the landlord is responsible. It cannot replace the door without replacing the interior surface of the door and the Tribunal therefore finds that the whole of the cost of replacing the garage doors is recoverable through the service charge.

28. Whether or not Mr McLaren has been reimbursed for the costs of having his own garage door replaced is not a matter within the jurisdiction of the Tribunal to consider. That is a matter for Mr McLaren to pursue through the County Court if it is still in dispute.

29. With regard to the balconies, the Tribunal has no hesitation in finding that these were part of the structure of the building. The obligation to repair and maintain and to contribute thereto are therefore found in clauses I, 2(6), 4(3)(i) (a) and paragraph 1(a) of the fourth schedule to the lease. The fact that the balconies are included within the demise of the individual flats and that those lessees have exclusive use of those balconies does not mean to say that someone else cannot be made

responsible in the first instance for repairing and maintaining the same and for others to contribute towards that cost. The leases so provide. Further, clause 2(8) of the leases give the lessor and its surveyors and agents and workmen power to enter the demised premises for the purpose of repairing those parts of the building that may be within the demises of the individual leases. It is not necessary for the leases to state specifically that the lessees are obliged to contribute towards the cost of balconies if, as the Tribunal finds, those balconies are part of the structure of the building. Further the Tribunal finds that the balconies are not part of the "interior" of the demised premises. They are part and parcel of the external structure of the building and indeed form the roof and ceiling of the flat below.

30. With regard to the reasonableness of the cost of the repairs. The Tribunal finds that a cost of £604 per garage door is a reasonable cost. The Tribunal was, however, supplied with insufficient documentation to form any view as to the reasonableness of the cost of the recent work carried out to the lead flashing on the balconies or the cost likely to be incurred in the future with regard to such repair. The Tribunal was not supplied with a copy of the Section 20 notice. The Applicant and any other lessee is entitled to make observations under the Section 20 procedure and is entitled to make a Section 27A application for the Tribunal to determine the reasonableness of a charge that is going to be made to the service charge once a specific cost is known and the details of the work to be carried out are supplied to the Tribunal; alternatively lessees can seek a Section 27A determination once the works have been completed and the cost included in a service charge demand in the future if lessees consider that such a cost has been unreasonably incurred or is of an unreasonable amount.

31. With regard to the Section 20C application Mr Hollamby has failed in his arguments that neither the cost of the balcony repairs nor garage door replacement should be included in the service charges to which he contributes. The Respondent has not instructed Solicitors to respond to the application and has not been involved in any lengthy or complex submissions to the Tribunal. Any costs that the Respondent may have incurred in dealing with this application are therefore likely to be fairly small in any event. As the Respondent has succeeded in its arguments the Tribunal considers that it would not be just and equitable for any order to be made under Section 20C of the Act.

Dated this 8th day of November 2010

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D. Agnew BA LLB LLM
Chairman