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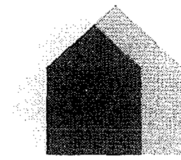


Residential
Property
TRIBUNAL SERVICE

LON/OOAW/LSC/2010/0393

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER THE LANDLORD AND TENANT ACT 1985 (as amended) SECTION 27A

PROPERTY:	SERLBY COURT SOMERSET SQUARE LONDON W14 8EF
APPLICANT:	JOVE PROPERTIES (1) LTD and JOVE PROPERTIES (2) LTD
Represented by:	Messrs Blenheims Estate and Asset Management
RESPONDENTS:	THE LONG LEASEHOLDERS OF FLATS 1-33 SERLBY COURT AFORESAID
Represented by:	The Respondents were not represented

Appearances:
For the Applicant: Mrs Leanne Barker of Blenheims Estate and Asset Management

The Respondents were not represented and none of them attended

Dates of Hearing: 18th October 2010

TRIBUNAL
Mrs T I Rabin JP
Ms S Coughlin MCIEH
Mr D Wills ACIB

Date of Tribunal's decision: 7th November 2010

SERLBY COURT SOMERSET SQUARE LONDON W14 8EF

FACTS

1. The Tribunal was dealing with an application by the Applicants who are the landlords of the Serlby Court, Somerset Square London W14 8EF ("the Building") for a determination as to whether the cost of replacement of all the windows in the Building was a charge that could properly be included in the service charges payable in respect of the Building. The Respondents are the long leaseholders of the flats in the Building. A copy of the lease of Flat 26, which is typical of the leases of all the flats, is in the file. The application has been made under Section 27A of the Landlord and Tenant Act 1985 as amended ("the Act").

2. The only issue before the Tribunal was whether the terms of the leases allowed the Applicant to replace all the windows in the Building and charge the cost of this to the service charges. The Tribunal did not consider the condition of the windows and makes no findings in respect thereof.

THE LAW

3. The relevant legal principles that the Tribunal has taken into account in arriving at its decision are set out in Schedule 1 below.

THE HEARING

4. The hearing took place on 18th October 2010. Mrs Barker represented the Applicant but there were no written or oral representations from the Respondents and none of them attended the hearing. In view of the nature of the application, the Tribunal did not consider that an inspection of the Building was necessary.

5. The Applicant produced a bundle which included, amongst other items, a statement of case by the Applicant and a report by Harris Associates and the Tribunal considered the contents of the Bundle before coming to its decision

EVIDENCE

6. Ms Barker gave evidence and said that there were 34 flats in the Building, 33 of which were sold on long leases and the resident porter occupied the last one. The Building had been constructed in the early 1970s and the windows were aluminium units with single glazing and date from the construction of the Building. There is a Residents' Association, recognised by the Applicants and once a month a meeting is held where the representatives of the Residents' Association meet a representative from the managing agents, Blenheims Estate and Asset Management. The

current managing agents took over the management of the Building in October 2009.

7. The Respondents have raised complaints about the condition, performance and operation of the windows. The complaints were that the windows allowed water in, were difficult to open and close and rattled, there was poor thermal insulation, condensation and draughts and it was hard to find replacement parts for them. There were also complaints about a lack of noise insulation. It had been noted by the Applicant that the windows were showing advanced signs of severe deterioration and this resulted in poor performance.

8. The previous managing agents commissioned a survey of the Building and as a result, a preliminary notice under Section 20 of the Act was served on 20th August 2008 followed by a letter advising all the Respondents that there would be an inspection undertaken. This was prior to the current managing agents being appointed and Mrs Barker told the Tribunal that she did not have any details of the budget or of any estimates obtained.

9. Mrs Barker stated that the leases did not provide for a proper reserve fund to be built up but only allowed for an increase in the service charge contribution to be based on the expenditure for the previous year. There is a small amount in reserve but this cannot be added to under the provisions of the leases. Because the reserve fund was small and the Applicant's ability to increase the reserve was limited by the restrictions imposed in the leases, it would take some time to increase the level of reserve. However, the Applicant would collect as much in funds as was permitted under the terms of the leases and hoped to be able to undertake the window replacement in 2013/2014.

10. Mrs Barker said that after the Respondents had been advised that the Applicant intended to replace the windows and served with a preliminary notice under Section 20, no written responses to the Section 20 Notice had been received. The initial notice under Section 20, dated August 2008, included a brief description of the proposed works and the reasons why the works were required. It referred to budget costs of between £285,000 and £425,000. When the current managing agents took over, from October 2009, they advised the Respondents by letter that there would be further consideration to the window project, which would be made available in due course. No comments were received from any of the Respondents and the Residents' Association have discussed the replacement of the windows at their regular meetings and are supportive of the proposal.

11. The Applicant commissioned a report from Harris Associates who inspected the Building and number of flats in July 2010. The conclusions can be summarised as follows:

- The windows are 35 years old and the average typical life of aluminium windows is 45 years with an average minimum life of 30 years and an average maximum life of 60 years.
- The existing windows are suffering from various defects.
- Whilst repairing and retaining the existing windows would cost less in the short term, the ongoing maintenance of the existing windows would be higher. The life cycle for repairing and maintaining the existing windows over a 25 year period, allowing for replacement in year 10 would be 25% more than replacing the windows now.
- The existing windows suffer from defects and shortcomings, such as draughts, thermal deficiencies and difficulty in cleaning, all of which could be addressed if new windows were provided.
- Replacement of some of the windows will result in these being required to match the existing windows in size and design. This will limit the choice of replacement. Piecemeal replacement will limit the choice of alternative windows systems, which could be explored, and a single replacement will ensure consistency.
- Although the windows are not beyond repair, a view must be taken on the economies of retaining and maintaining the existing units over the mid to long term
- The decision whether to replace must take account of the requirement for improving performance related issues

12. The managing agents sent a letter to all the Respondents setting out the issues they may wish to comment upon in relation to the proposed work with space for comments to be made. The Residents' Association agreed that the windows should be replaced and suggested that the condition of the exterior of the Building should be examined whilst the scaffolding was in place to ascertain if any repairs were necessary and these could be undertaken whilst the scaffolding was in place to educe the costs and limit the disturbance.

13. Objections were received from the long leaseholders of 11 of the flats in the Building. No copies of the objections were included but a copy of a letter in response from the managing agent was included in the bundle and can be summarised as follows:
    - The question of noise ,design and security did not affect the objectors but these were not the key reasons for the proposed work
    - The replacement of the windows was totally necessary. The budget has been prepared but the comparative costs of replacement and repair cannot be assessed until specifications have been prepared and tendered. However, a recent review has shown that the proposal to replace the windows is more economical than repairing then in the long term
    - Assurance will be given that there will be scaffold alarms and 24 hour porterage during the works to ensure security

- Advice has been obtained from an experienced residential property valuer to the effect that the replacement of the windows will not add to the cost of extending a lease nor increase the value of the freehold and, if the windows are in poor repair, the value will need to be increased.
- The works are not "extravagantly cosmetic". The roof has been inspected and is in good condition

DECISION

14. The Tribunal took careful note of the contents of the report from Harris Associates. It also noted that there were eleven long leaseholders who did not wish the project to proceed. It appears that the objections relate in part to the necessity of expenditure on new windows when there was an option of repairing, whether there would be adequate security in place and whether the replacement of the windows would affect the value of the flats or the freehold in a case where a long leaseholder wished to extend their lease. The managing agents addressed these points and there is a letter of support from the Residents' Association of which many of the long leaseholders are members, although not all. A number of letters of support have been received by the Tribunal following a "round robin" sent by the managing agents seeking confirmation of their approval.

15. The report from Harris Associates concludes that the most economical option in the long run would be for the windows to be renewed and has set out in full the reasons for coming to this decision. The Tribunal noted that the cost of repairing the defective windows in a manner that maintains the appearance of the exterior of the Building was feasible but that, even with repairs, the windows would need to be replaced within ten years. Mrs Barker said in evidence that there were a limited number of firms who could undertake the repair of windows of the nature of those in the Building as they were old fashioned and replacement parts were hard to locate.

16. The Respondents have complained about the defects in the windows and the lack of insulation from both noise and cold. Mrs Barker said that a number of windows were in extremely poor condition and the individual long leaseholders have been repairing defective catches and window seals themselves.

17. The Tribunal has not inspected the windows. It is common ground between the parties that the windows are currently unsatisfactory as demonstrated by the comments that have been made to the managing agents. The windows are old and, after 35 years, are coming to the end of their useful life. The Applicant is intending to complete the Section 20 procedure with a view to replacing all the windows. The Tribunal takes the view in principle that the most cost effective way in the long term would be to replace the windows throughout the whole Building with

double glazed units. The unchallenged evidence before the Tribunal is that repair of the windows would cause difficulties in locating contractors with the ability to undertake work to windows of this age.

18. The Applicant is proposing to replace the windows and, taking a long-term view, the Tribunal is satisfied there would be cost savings in replacing all the windows under one contract. The windows need repair and this is the Applicant's responsibility under the terms of the leases. The replacement windows would be beneficial to the Respondents in providing modern, double glazed units which would give them greater protection from both cold and noise. There would be a saving in future maintenance expenses and a modern design would facilitate cleaning

19. The Tribunal must also determine whether the cost of the replacement of the windows is permitted under the terms of the leases. The Tribunal has considered the effect of the following clauses in the leases:

Recitals

(2) The Lessor has.......erected ...a block of flats with parking spaces thereunder and twelve lock up garages to be used therewith which said block of flats with the parking places and garages (hereinafter called "the Building").......

Clause 1 - demise

........including one half in depth of the structural areas between the floors of the Flat and the ceilings of the Flat or other premises below and one half of the structural area between the ceiling of the Flat and the floors of the flat above and the interior (including the plaster) of the external walls between such levels........

Tenant's repairing obligations

2(7) From time to time and at all times during the term well and substantially to repair cleanse maintain amend and keep the interior of the Flat (which without prejudice to the generality of the foregoing shall include the plaster on the walls and ceilings the floors the entrance door window glass wires pipes tanks and all sanitary water apparatus and radiators therein but shall not include any pipes or wires which are situate in but do not serve the Premises)..........................

Landlord's repairing obligations

4(4) To keep the structure of the Building and the sewers pipes and wires serving the same in good repair and condition and to carry out .... Provided always that liability of the Lessor hereunder shall not extend to any repairs or to the carrying out of any works for which the Tenant shall be liable under the covenants hereinbefore contained or which shall be the liability of the other tenants of the Building or any of them

4(5) Once in the year 1978 and once on every succeeding fourth year throughout the Term to paint in good and workmanlike manner all outside wood stucco cement iron and other parts usually or which ought to be painted of the Building.......

Service charge provisions relevant to the application

3 (3). ....in connection with the management and maintenance of the Building .....and the provision of services to the same or any part thereof which without limiting the generality of the foregoing shall extend to and include the following:

(i) The costs of and incidental to the to the observance and performance of the covenants on the part of the Lessor hereinafter contained in sub-clauses...... of Clause 4 hereof

(xi) The cost of carrying out of all other work or providing services of any kind whatsoever which the Lessor may from time to time consider necessary or desirable for the purpose of maintaining or improving the Building or the fixtures and fittings thereon and the services thereon in the interests of the tenants thereof

20. The leases have not been happily drafted in relation to specifying the extent of demise to the individual long leaseholders nor is there a clear definition of the common parts towards which they contribute to the repair and maintenance. This is not unusual in a lease of this age. However the demise to the individual long leaseholders clearly excludes the windows, as the definition is limited to the internal parts of the flats. Clause 2(7) does include an obligation for the tenant to repair the window glass but, since the window glass is not demised to them, the Tribunal interprets this as an obligation to repair any damage and is clearly not a demise.

21. The Tribunal considered whether the replacement of the windows was a repair or improvement. The leases allow for the landlord to undertake improvement in Clause 3 (3)(xi) but, in any event the Tribunal has had regard to the findings in **Sutton LBC v Drake LRX/69/2004** where the landlord decided to replace windows and the Upper Tribunal (Lands) found that the replacement was a repair and not an improvement. In practical terms the fact that, currently new windows cannot be installed unless they are double glazed, then replacement must be with double glazed units. The case of **Wandsworth BC v Griffin [2000} 1 EGLR,** it was determined that the replacement of the windows with double glazed units was best value if life cycle costings were used to evaluate the cost over the operating life of the windows. The Tribunal finds that the replacement of the windows would be a repair but, that the repair would enhance the Building.

22. In the absence of a clear definition of the common parts, the Tribunal finds that the Applicant retains all of the Building with the exception of the parts that are specifically referred to in the demise of the individual flats and recited in the leases. It follows that the Applicant retains the structure of the Building and, in the absence of any specific exclusion, this must include the windows as part of the structure. The Tribunal is aware of the case of **Sheffield City Council and Hazel St Clair Oliver LRX 146/2007** where the Lands Tribunal found that windows were part of the

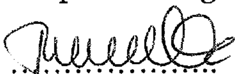
structure of the Building. Although this case related to properties covered by Part IV of the Housing Act 1985, in this case the Tribunal found that the windows were not demised to the tenants and formed a part of the structure of the property and the landlord was entitled to demand a contribution towards the cost of repairing the structure in accordance with the terms of the lease. In this case where the leases are silent and the windows are clearly not demised to the individual long leaseholders, the Tribunal is satisfied that the cost of replacing the windows is an item that should properly be included in the service charge. Even if the Tribunal were wrong and the replacement of the windows was to be found to be an improvement, the cost would in any event be recoverable under the terms of Clause 3(3)(xi) of the Leases.

CONCLUSION

23. The Tribunal is satisfied that the replacement of the windows can be properly included in the service charge account. However, the Tribunal makes no finding on the reasonableness of the costs to be incurred as the Section 20 procedure has not been finalised and no specifications or estimates have been served. The Respondents will have the opportunity to make comments on the specifications and estimates during the Section 20 procedure and after it has been completed.

SECTION 20C OF THE ACT

24. There was no application before the Tribunal for an order under Section 20C of the Act to the effect that the costs of these proceedings are not proper costs to be included in the service charges. The Tribunal does not find that there is any provision in the leases for the costs of these proceedings to be included in the service charges.



Mrs T Rabin JP
Chairman
Dated: 7th November 2010.

Schedule

The Relevant Law

Law of Property Act 1925

Section 62(1) of the Act provides that a conveyance of land shall be deemed to include and shall by virtue of the Act operate to convey with the land all buildings, erections, fixtures, hedges, fences, water-courses and other matters and advantages whatsoever appertaining or reputed to appertain to the land at the time of conveyance, demised, occupied or enjoyed with the land or any part thereof.

Landlord and Tenant Act 1985

Section 18(1) of the Act provides that, for the purposes of relevant parts of the Act 'service charges' means an amount payable by a tenant of a dwelling as part of or in addition to the rent -

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

Section 19(1) of the Act provides that relevant costs shall be taken into account in determining the amount of a service charge payable for a period -

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provision of services or the carrying out of works, only if the services are of a reasonable standard;

and the amount payable shall be limited accordingly.

Section 20C(1) of the Act provides that a tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a leasehold valuation tribunal 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 or any other person or persons specified in the application.

Section 20 B of the Act provides:

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the

tenant the (subject to subsection (2)) the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred

(2) Subsection (1) shall not apply if within the period of 18 months beginning with the day when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and the he would subsequently be required under the terms of his lease to contribute to them by payment of the service charge

Section 27A of the Act provides that 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.

Leasehold Valuation Tribunals (Fees) (England) Regulations 2003

Regulation 9(1) provides that subject to paragraph (2) a Tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or any part of any fees paid by him in respect of the proceedings.

Construction of Leases

1. The general legal principles.

   Lord Diplock said in *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191, 201E, that

   '...if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'

2. The definitive modern approach came from Lord Hoffman in *Investors' Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 WLR 896, 912H - 913F when he set out the modern rules of interpretation.

   'The principles may be summarised as follows:

(1) *Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*

(2) *The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and subject to the exception to be mentioned next, includes absolutely anything which could have affected the way in which the language of the document would have been understood by a reasonable man.*

(3) *The law excludes from the admissible background the previous negotiations of the parties and their subjective intent. They are inadmissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*

(4) *The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: See Mannai Investments Co. Ltd v. Eagle Star Life Assurance Co. Ltd. [1997] A C 749.*

(5) *The rule that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. ON the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had...'*

3. Lord Hoffman added a slight qualification to these principles when in *Jumbo King Ltd v. Faithful Properties* Unreported 2 December 1999, Hong Kong Court of Final Appeal, he said,

'The overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to

mean. Therefore, if in spite of linguistic problems the meaning is clear, it is that meaning which must prevail.'

4. Emphasis was made on the correct approach and the importance of the background in *Holdings and Barnes plc v. Hill House Hammond Ltd (No.1)* [2001] EWCA Civ 1334 when Clarke LJ said, about the above authorities,

   'Those cases are to my mind of particular assistance here because they show that the question is what a reasonable person would understand the parties to mean by the words of the contract to be construed. It is important to note that the reasonable person must be taken to have knowledge of the surrounding circumstances or factual matrix. As appears below, that knowledge is of particular importance on the facts of the instant case.'

5. Lord Bingham in *BCCI (SA) v. Ali* [2002] 1 AC 251; [2001] 2 WLR 735 said,

   'In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties subjective states of mind but makes an objective judgment based on the materials already identified. The general principles summarised by Lord Hoffman in Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896, 912-913 apply in a case such as this.'

6. Regard may be had to the general background as part of the factual matrix in order to help construe words in a document - see *Partridge & others v Lawrence & others* [2003] EWCA Civ 1121

7. Sometimes as part of the process of construction of a document it is necessary to imply a term or terms into it. In order for a term to be implied the following conditions must be fulfilled:

   1. the term must be reasonable;
   2. the term must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
   3. the term must be so obvious that it goes without saying;
   4. the term must be capable of clear expression;
   5. the term must not contradict any express term of the contract.

A clear statement of the criteria was set out in *B.P. Refinery (Westernport) Pty Ltd v Shire of Hastings* [1978] 52 ALJR 20.

8. In the context of the construction of service charges provisions in a residential lease, we believe that it is trite law that a lease has to be construed in the same way as any other instrument or commercial contract. Words used must be given the ordinary natural meaning in the context. It is also trite law that a tenant is only obliged to pay what the lease provides for him to pay. See *Riverplate Properties Ltd v Paul* [1975] Ch 133.

9. In *Sella House Ltd v Mears* [1989] 12 EG 67 the service charge provisions in the lease provided for the recovery of expenditure incurred by the lessor in carrying out its obligations. Those obligations included:

> '*(i)* *to employ at the lessor's discretion a firm of managing agents to manage the building and discharge all proper fees salaries charges and expenses payable to such agents or such other persons who might be managing the building including the cost of computing and collecting the rents and service charges in respect of the building, and*
>
> *(ii)* *to employ all such surveyors builders architects engineers tradesmen accountants or other professional persons as might be necessary or desirable for the proper maintenance safety and administration of the building.*

The Court of Appeal held that legal expenses incurred in recovering rent and service charges from defaulting tenants were not recoverable.

In the context of discussion on the terms of the lease relating to legal expenses, Taylor LJ made the following comment:

> *'For my part, I should require to see a clause in clear and unambiguous terms before being persuaded that that result was intended by the parties.'*

10. The approach to construction of a service charge provision in a residential lease was reviewed in *Gilje v Charlesgrove Securities Ltd* [2001] EWCA 1777, where ambiguous provisions were looked at in respect of a notional rent on the caretaker's accommodation. Laws LJ said:

> *'On ordinary principles there must be clear terms in the contractual provisions said to entitle him to do so. The lease, moreover, was drafted or proffered by the landlord. It falls to be construed contra proferentum.'*