HM Courts & Tribunals Service

LEASEHOLD VALUATION TRIBUNAL
Case no. CAM/22UN/LBC/2012/0005

Property	:	**2, 3, 4, 6, 7, 8, 10, 12, 14, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 34 and 35 Quayside Court, The Quay, Harwich CO12 3HH**
Applicant	:	**Countrywise Property Management Ltd.**
Respondents	:	**John Farmer (2, 3, 4, 6, 8, 10, 12, 22, 26 & 28) Mr. and Mrs. Mervin Lambert (7) Miss. S. Atkinson (14) Mrs. A. Hatton (18) Ms. M. Gibbins (20) Sean O'Farrell (21) Mr. S. Powell (23) The Rev. Canon G. Greenslade (24) Mr. J. Ford (25) Mr. K. Jennings (27) Mr. D. Woodcock (34 & 35)**
Date of Application	:	**3rd May 2012**
Type of Application	:	**For a determination that the Respondents are in breach of a covenant or condition in leases between the Applicant and Respondents (Section 168(4) Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"))**
Tribunal	:	**Bruce Edgington (lawyer chair) Roland Thomas MRICS David W Cox**
Date and venue for hearing	:	**24th July 2012 at The Guildhall, Harwich Town Council, Church Street, Harwich CO12 3DS**

DECISION

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1. There is insufficient evidence to satisfy the Tribunal that the Respondents are in breach of covenants to decorate and repair

window frames in their various leases ("the leases") of various dates wherein the properties were let to the Respondents set out above for terms of 199 years from 25th March 1988.

Reasons

Introduction

2. The Applicant, through its spokesperson Mrs. Hayley Carter, states that it purchased the freehold of the building known as Quayside Court, The Quay, Harwich, in October 1997. It is described as being a Grade II listed building of special historic importance and was formerly the Great Eastern Hotel and the Town Hall. Judging by the dates of the long leases, it would seem that it was converted into flats in 1988 or thereabouts.

3. In simple terms, the Applicant asserts that the named lessees are in breach of the terms of their leases in that they have not maintained their window frames. The original application included Mrs. E. Hefferman in number 33 but both the Applicant and Mrs. Hefferman have asked for her name to be removed as a Respondent as she has repaired and decorated her 4 windows.

4. On the papers, the facts do not seem to be in dispute. Neither the Applicant landlord nor the management company named in the leases has undertaken decorations or repairs to the windows in recent years – probably since 1997. The Applicant says that the fault lies with the Respondents and the Respondents say that the fault lies with the Applicant and the management company. Both rely on the terms of the leases. The end result of this is that some lessees have taken it upon themselves to effect repairs and replacements of windows and the Respondents have not. That may be an over simplification but is the basic situation.

5. Since 1st March 2012, a lessees' right to manage ("RTM") company has taken over responsibility for management.

The Law

6. The parties seek a declaration from this Tribunal as to their respective liabilities for repairs and decoration of the window frames. If that is what the parties want, then they should have applied to the court for the appropriate declaratory relief. Alternatively, if they consider that the leases need variation, then an application should have been made to this Tribunal under Part IV of the **Landlord and Tenant Act 1987** ("the 1987 Act") for variations to the leases. After all, the cost of work to the windows will have to be met by the lessees at the end of the day.

7. The only jurisdiction for this Tribunal is under Section 168 of the 2002 Act which introduced a requirement that before a landlord of a long lease could start the forfeiture process and serve a notice under Section 146 of the **Law of Property Act 1925** he must first make "*...an*

application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred". In this case, the Applicant stated to the Tribunal at the hearing that it did not seek forfeiture.

The Leases

8. The leases are lengthy documents and should have been clear from the outset. However they are not as straightforward as they should have been because each side has been advised differently as to who is responsible for the maintenance of the windows and frames. Copies of the letter and e-mail from the 2 solicitors have been included in the hearing bundle.

9. The Tribunal has seen only one lease but it is assumed that the relevant terms are the same throughout all the leases. The first thing to consider is whether the windows form part of each demise. They do. Part III of the First Schedule sets out what is included in each demise and this includes "*the internal plastered wall coverings and plaster work of all the walls bounding the demised premises and the doors and door frames and windows and window frames fitted in such walls and panes of glass therein..*".

10. The next stage in considering the terms of the lease is to see what is said about who maintains the windows and window frames. Clause 2(4) states that it is the lessees' responsibility to "*wash paint varnish and enamel all the inside woodwork and ironwork* (once every 5 years)*....and otherwise keep the demised premises in good and substantial repair throughout the term*". As we know, the demised premises include the windows and frames.

11. The Fourth Schedule (described as being the regulations for the property) says "*except as provided for in Clause 2(4) of this lease not at any time to paint treat or decorate any part of the exterior of the demised premises*". Of course, it could be said that Clause 2(4) makes provision that it is the lessees' responsibility to maintain the window frames i.e. to decorate them which would exclude the effect of the Fourth Schedule.

12. In Clause 3(1)(a) each lessee covenants with both the landlord and the management company to "*keep the demised premises (other than the parts thereof to be maintained by the Management Company pursuant to the covenants in that behalf hereinafter contained) and all....windows and window frames glass doors and door frames...in good substantial and tenantable repair...and as occasion requires thoroughly to clean all windows serving the demised premises at least once in every month...*". The Fourth Schedule makes it clear that it is both the inside and outside of the windows which are to be kept clean.

13. Finally, the obligations of the management company need to be considered. They are contained in the Fifth Schedule. They include insuring the building and maintaining, upkeeping, repairing and

decorating "*the external walls and structures and in particular the roof foundations basement area chimney stacks gutters and rainwater pipes of the Lessor's property (including the Building) together with all internal structural walls and partitions party walls floors and ceilings not included within the definition of the demised premises as herein contained*". This does not include the window frames because they are part of the demised premises, not the lessor's property.

14. There is an additional provision in the Fifth Schedule in paragraph 5, for the management company to decorate the external parts of the lessor's property. In the context of how this lease, and every other long lease, is drawn, a reference to lessor's property usually means property not demised to a long lessee. However, if that interpretation were adopted in this case, there would be an obvious gap i.e. neither the lessees nor the management company would have an obligation to decorate the window frames. It will be recalled that the lessees are prevented from decorating the exterior surfaces.

The inspection

15. The inspection was attending by several of the lessees. At the Tribunal chair's suggestion, it was agreed that rather than proceed with an inspection of each flat in question, the hearing should be held first to enable the issues to be identified. If, as seemed reasonably clear from the papers, the Respondents agreed that they had not decorated the external surfaces of their window frames and that they were in need of decoration and repair, then an inspection of each flat was rather a waste of everyone's time.

16. It was a warm sunny day. Quayside Court is an imposing building which, as its address suggests, is on the quay in Harwich overlooking the water at the front. There was some evidence of deterioration in the stonework at the front which is more exposed to the elements. Many of the window frames, particularly at the rear of the building are in very poor condition with evidence of decay and deterioration. Substantial repair/replacement will be required. Otherwise, the building and grounds appeared to be in reasonable condition. Having said that, it should be said, of course, that the Tribunal did not go into the building and only had a cursory look at the exterior.

The hearing

17. The hearing was attended by the Applicant, through Ms. Carter, together with the lessees from flats 7, 20, 21, 24, 25, 27 and 33. Mr. Farmer was also there and his flats are as set out above. In the main, the hearing was reasonably amicable although the Tribunal did detect an undertone of mistrust between Ms. Carter and some of the lessees.

18. The first thing the Tribunal tried to ascertain was what had happened to the Management Company named in the lease. It seems that this company still exists. However, a copy of the Memorandum and Articles of Association were produced and they showed that the landlord holds an 'A' share and the lessees hold 34 'B' shares. In fact

there are only 33 lessees. The problem with this company is that the holder of the 'A' share has 3 votes for every 'B' share held i.e. a total of 99 votes in respect of every decision as opposed to the 33 votes from the lessees.

19. This means that although there are some structural decisions which require a 75% majority, all practical decisions are taken by shareholdings which have a built in method for the landlord to outvote everyone else. It is, of course, the directors who make the day to day decisions of any private limited company. However, with the landlord able to dictate who is or who is not a director, the outcome is obvious. This should have been known to the lessees when they bought their flats but one cannot but have some sympathy for the lessees who would appear to have a somewhat impotent degree of 'involvement' in the running of the management company.

20. It does seem clear that at one stage the management company did assume responsibility for the decoration and replacement of windows from time to time. Ms. Carter accepted that some time ago 3 lessees other than herself had had their window frames replaced by the management company with the cost forming part of the service charge. She said that there was then insufficient money to continue with any replacements or decoration works.

21. However, it is clear from the evidence and in particular her letter of the 6th December 2005 and her comments in the minuted meetings on the 28th June 2007 and 13th March 2008 at pages 95, 96 and 98 respectively in the hearing bundle, that she believed that it was the management company's responsibility to decorate the exterior and repair the window frames until relatively recently.

22. Mrs. Hefferman, although not now a Respondent, did address the Tribunal very eloquently by referring to the actions and words of the landlord, and Ms. Carter in particular, which established course of events and behaviour which showed that it and she did accept that the decoration of the windows was the responsibility of the management company.

23. The Tribunal was told that the RTM company has put in hand plans to undertake a refurbishment of the rear elevation of the building to include repairing and decorating the window frames. As the cost is less than the statutory £250 per flat, no consultation is required.

Conclusions

24. When discussing the terms of the lease above it would appear that there may be a gap. Doing the best it can in the context that this is an expert Tribunal and not a court with powers to make declaratory judgments, it is this Tribunal's view that the only way to give commercial efficacy to these leases is to interpret the various obligations in Clause 2(4), the Fourth Schedule and the Fifth Schedule,

paragraph 5, to mean that it is the management company's responsibility to decorate the exterior surfaces of the window frames.

25. This would also be the realistic and sensible way to look at this situation because the higher window frames would need scaffolding and this would really be impracticable on an individual basis. The lease does permit the management company and now the RTM company to build up a reserve to deal with this sort of major expenditure. The Tribunal was told that £8,000 in uncommitted service charge funds has been passed over to the RTM company by Ms. Carter's company and she is chasing her Accountant to conclude the final balance. There should be some more money to hand over. The Tribunal was also told that this money has been put into a separate fund to start a reserve for future expenditure. This is a wise move.

26. However, the above interpretation does not affect the provision in the lease that it is the lessees who own the window frames and if repairs and replacements are needed, it is the lessees' responsibility to do this. The Respondents point the finger at the management company for failing to decorate as a cause of the need to replace. That may be right but if the lessees thought it was the management company's job to do this, action should have been taken to enforce the terms of the lease to ensure that the decoration was kept up. The response to that may well have been "well, there is insufficient money available to do the work".

27. In view of the uncertainty about the terms of the lease and the fact that the lessees all accept that decoration and repair is the ultimate financial responsibility of the lessees, the Tribunal cannot see how it could be determined that the Respondent lessees are actually in breach of the terms of their leases, certainly not intentionally. It is of particular relevance that Ms. Carter said that it was certainly not the Applicant's intention to attempt to forfeit any lease.

The Future

28. It was clear from the discussions at the hearing that the lessee Respondents just want the windows to be repaired and decorated. Now that the RTM has taken over maintenance, that company has put in hand the decoration and repair of one elevation. The only possible danger is that when the service charge demands are sent out for the cost of that work, someone may object by saying that the windows should have been repaired and paid for by the individual lessees.

29. If that happens, then an application may have to be made to this Tribunal for a decision about whether that service charge is payable by all the lessees or just the ones whose windows are being repaired and decorated. Alternatively an application may be made to the court for a declaration as to whose responsibility it is for these costs. Whichever application is made, this decision and the interpretation placed on the

terms of the lease will no doubt be considered by the Tribunal/Judge involved.

30. Now that the RTM has taken over the day to day management of the building, one perceived problem has been removed namely the structure of the management company in the lease. However, there is still the problem over the interpretation in the lease. An application to this Tribunal under Part IV of the 1987 Act to vary the lease would need a 75% majority of lessees with not more than 10% objecting. There are a number of variations which could be made but the most crucial would be to the Fifth Schedule to make sure that the decoration of the external surfaces of the window frames was the responsibility of the management company. There could then be no doubt that this duty would be in the hands of the RTM company.

31. It may be better to place ownership of the window frames into the hands of the lessor with just internal decoration being the liability of the lessee. This would put both decoration and replacement on a uniform basis. This would have the added advantage that there could be fewer approaches to the listed building authority. This would certainly be the normal arrangement with a listed building.

32. As to decoration work, it really is impractical to do this every 5 years for the whole building at one 'go'. It may be better to choose 5 roughly equal elevations or areas and change the leases so that the flats in those areas could be dealt with in 5 successive years in order to spread the cost. Alternatively, as this would involve scaffolding being there every year, the lessees may prefer, say, one third in area every 2 years.

33. The one issue which hovered like a dark cloud over the hearing was about who should pay for repairs to window frames allegedly caused by the lack of decoration. The problem with this, as is mentioned above, is that instead of just sitting back and expecting the management company to do the work at the time, efforts could have been made to enforce the lease earlier. The lessees seem to have begrudgingly accepted assurances from Ms. Carter in 2007 and 2008 that the work would be done as soon as funds were available. Thus, they could be said to have almost acquiesced in the lack of action.

34. The Tribunal's view, for what it is worth, is that an assessment will have to be made of each window in each phase of the decoration and repair work. The decoration will be part of the service charge and the cost of repair/replacement will have to be paid by the individual lessees.

35. Thus, as a suggestion only, the Tribunal recommends:-

- A meeting of the management company to see if there can be an agreed plan of action
- A variation of the leases to make sure that the window frames are decorated and, in future, repaired by the management

company and, in default, by the landlord with the cost being part of the service charge

- An additional variation to allow for the decoration and repairs to be split into 5 'tranches' with one 'tranche' being undertaken each year or the alternative suggested above.
- That the RTM company proceed with its phased work to the exterior of the building with decoration being part of the service charge and repair being the responsibility of the individual lessees. This should get the whole building up to a reasonable standard and the suggested variation to make future repairs part of the service charge could then be put into effect.

36. This plan will require goodwill on all sides. Speed is of the essence because people are bound to want to buy and sell flats which will not be easy whilst this dispute continues.

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Bruce Edgington
Chair
25th July 2012