8400

HM COURTS & TRIBUNALS SERVICE
LEASEHOLD VALUATION TRIBUNAL

S.27A(3) of the Landlord & Tenant Act 1985 (as amended)("the 1985 Act")

Case Number:	**CHI/00ML/LSC/2012/0117**
Property:	**Berriedale House 251-255 Kingsway Hove East Sussex BN3 4HD**
Applicant:	**Berriedale House Limited**
Respondents:	**The 51 Long Lessees**
Date of Inspection / Determination	**16th November 2012**
Tribunal:	**Mr R Wilson LLB (Lawyer Chairman) Mr N Cleverton FRICS (Valuer Member)**
Date of the Tribunal's Decision:	**23rd November 2012**

THE APPLICATION.

1) This was an application made by the Applicant under S.27A(3) of the 1985 Act for a determination whether, if costs were incurred for a programme of work to address water ingress to the south and western elevation of the building, a service charge would be payable for the costs and if so the amount which would be payable. The Tribunal was also requested to determine whether the lessee consultation was sufficient.

2) By consent of the parties the application was determined on the basis of the papers alone and without a hearing.

THE DECISION in SUMMARY

3) The Tribunal determines that if works are carried out to the building to address water ingress substantially in accordance with the specification prepared by Classic Property Management in May 2012 (Issue 3), then a service charge would be payable for those works and an estimated figure of £54,000 is a reasonable sum to collect on account.

4) The tribunal further determines that the consultation exercise carried out by the Applicants is defective.

Law.

5) The Tribunal has power under section 27A of the 1985 Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The Tribunal can decide by whom, to whom, how much and when service charge is payable.

6) Payments on account for service charge fall to be dealt with under S.19(2) of the 1985 Act. This legislation expressly contemplates the payment of service charges on account. Where a service charge is payable before relevant costs are incurred no greater amount than is reasonable is so payable and there is a mechanism in S.19(2) for adjustments to be made by repayment reduction or subsequent charges or otherwise once the relevant costs have been incurred.

7) S.20 of the 1985 Act provides that where there are qualifying works, the relevant contributions of tenants are limited unless the consultation requirements have been either complied with or dispensed with by the determination of a Leasehold Valuation Tribunal.

   The definitions of the various terms used within S.20 e.g. consultation reports, qualifying works etc., are set out in that section.

   In order for the specified consultation requirements to be required, the relevant costs of the qualifying work have to exceed an appropriate amount, which is set by regulation and at the date of the application is £250 per lessee.

   Details of the consultation requirements are contained within a statutory instrument entitled Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987. The requirements include, for example, the need for the landlord to state why they consider the works or the agreement to be necessary and for further statements setting out their response to observations received and their reasons for selection of the successful contractor. Consultation notices must be sent both to

individual tenants and to any Recognised Tenants' Associations (RTAs); both the tenants and the RTA have a right to nominate an alternative contractor depending on the circumstances, and the landlord must try to obtain an estimate from such nominees. The procedures also provide for two separate 30-day periods for tenants to make observations.

THE LEASE

8) The Tribunal was provided with a specimen lease relating to Flat 51 and understands that the leases of the other flats in the building are in similar terms and the service charge liability arises in the same way.

9) The Applicant's covenants for repair and maintenance are contained in the Sixth Schedule of the leases at paragraph 3 (iii) and reads as follows*: At all times during the said term to keep the interior and exterior walls and ceilings and floors of the building together with those included in this or in any other demise and the roof structure and main drains thereof in good and substantial repair and condition.*

10) The Respondents' covenant to contribute towards the service charge is also contained in the Sixth Schedule at paragraph 1(b) which reads as follows: *in succeeding years a sum equal to 3% of the annual maintenance provision for that year computed in accordance with part II of this schedule and subject to the provisions set out in part II of this schedule and the tenant shall pay the maintenance contribution for each calendar year by two equal instalments on the 25th day of December in the preceding year and the 24th day of June in such calendar year.*

INSPECTION

11) The Tribunal inspected the property in the presence of the managing agent. The subject property is an eight storey block of purpose built self-contained flats on the ground and seven upper floors. It is located on Hove seafront on the corner of Kingsway and Berriedale Road. The Tribunal understands that the building was constructed in 1967 comprising a reinforced concrete frame with concrete floors and roof. The edges of the concrete floors can be seen from the outside at each floor level. Between each floor level there are panels of cavity wall masonry work and windows, the outer leaf of masonry work being in fair faced brick.

12) The Tribunal was able to gain access and inspected 4 flats: Flat 33 on the fourth floor, Flats 41 & 47 on the sixth floor and Flat 51 on the seventh floor. Two attempts were made to gain access to Flat 17 as requested by one of the lessees, but no one answered the door.

THE ISSUES TO BE DECIDED

13) From the papers before it the Tribunal identified the issues to be decided as follows:

   a) Are all of the works specified in the schedule ("the Works ") required by the Applicant on the grounds of performance of its repairing and maintenance obligations?

   b) Are the estimated costs of the Works reasonable in amount?

c) Has the Applicant complied with the statutory consultation procedure in relation to the Works?

14) The Applicant had set out its position in its statement of case, which was accompanied by a bundle of evidence running to some 83 pages.

15) The directions of the Tribunal dated the 6th September 2012 provided for any lessee who wished to oppose the application to file a reply. None of the Respondents had filed a reply but the Tribunal's papers include a letter from Mr Hollingsworth, the son of the leaseholder of Flat 17, dated 2nd November 2012. The letter contains a number of criticisms relating to the internal inspection of the flats, the quality of the work specification prepared by the managing agents, and a number of observations covering constitutional and corporate matters arising out of the decision-making process of the Applicant company which is collectively owned by the lessees. The letter also suggests that the tenders received are unusual in so far as the tendering companies are not VAT registered and despite requests from a number of lessees neither contractor has provided tenders on their company note paper.

THE TRIBUNAL'S DELIBERATIONS

Scope of the Works

16) The Tribunal first considered the Applicant's repairing and maintenance obligations contained in the leases and formed the conclusion that the covenants are wide enough to encompass all of the Works. As a general rule the method of execution of work rests with the landlord and the Tribunal recognises that it is possible to remedy disrepair in a variety of ways. It is established law that where a landlord covenants to keep the structure and exterior of a building in repair and the tenant's covenant is to contribute towards the cost of so doing, it is for the landlord to decide how to repair, although his/her decisions must be reasonable.

17) The Tribunal's papers include a report on the dampness in the flats prepared by Mr David Smith a chartered building surveyor and a structural engineer. The report is dated 12th July 2012 and is addressed to the managing agents. The report sets out in admirably clarity Mr Smith's findings on the damp issue which he finds affecting the internal finishes in bedrooms one and two in most flats. The location of the property and its exposure to severe weather from the South /West means it is inevitable that rainwater will penetrate the external leaf of masonry work. Rising damp is apparent in most flats, irrespective of the quality of windows, suggesting that the problem is mainly attributable to damp penetrating directly through the outer face brickwork. In addition at paragraph 5.11 he reports that the cavity trays are defective. The problem of blocked cavities can be addressed by the removal of localized area of bricks in the outer leaf of masonry work just above floor level and physically removing the debris.

18) There is a conclusion that the nature of the installed cavity wall insulation is not appropriate in a building in this location where it is exposed to severe weather and that this is the fundamental cause of the damp problems. A further conclusion is that the most appropriate remedy is to remove the insulation to the southern elevation of the building so that the principle of having a cavity to prevent internal dampness can work effectively by being clear and work in conjunction with cavity trays and weep holes.

19) The final section of Mr Smith's report lists recommendations for the appropriate remedial work, which include removing the existing rigid foam insulation, installation of new cavity trays and, on the western elevation, the removal of all debris within the

cavities. It is also recommended that the entire western elevation should be re-pointed.

20) The lessees have not led any evidence to cast doubt on the conclusions of this report and the Tribunal considers that the findings are clear that the structure is in disrepair which is causing damp to the flats. The report further highlights what needs to be done to address the problems.

21) The Tribunal has reviewed the schedule of work and is satisfied that it broadly covers the conclusions and recommendations of Mr Smith and that the cost of the work can properly be recovered from the lessees by way of service charge.

Cost of the Work

22) The Tribunal is also satisfied that the overall estimated cost is a reasonable estimate. In this regard it notes that the figure of £54,000 is based on a competitive tendering process and is based on the lowest price tender received. The final cost will depend on the full extent of work actually carried out and may well be either more or less than the estimated amount. Nonetheless the Tribunal is satisfied that the estimate has been prepared by reference to a properly costed schedule of work and represents a reasonable estimate of the likely cost.

23) The Tribunal is also satisfied that in this case it is reasonable for a surveyor to be employed to administer the Work and the cost proposed by Mr Smith in this regard of £2,500 is reasonable. Bearing in mind that he is now familiar with the building and the nature of the necessary remedial work it would appear that his services would be of benefit to the Applicant and Respondents alike.

Consultation Procedure

24) The Tribunal has concluded with regret that the Applicant has not carried out the consultation process in the correct way and has not fully complied with the consultation requirements set out in the 1985 Act and Regulations thereunder. The Tribunal has identified an omission in the Stage One letter/notice and misleading wording in the Stage Two letter/notice.

Stage One Notice: The requirements for consultation are set out in Part 2 of Schedule 4 of the Regulations. Under paragraph 8(2) the notice is required to state the landlord's reasons for considering it necessary to carry out the proposed works. The letter to the lessees from Classic Property Management dated the 23rd March 2012, which the Tribunal takes to be the Stage One notice does not include such a statement of reasons. In the judgment of the Tribunal the statement of reasons for the work is a mandatory requirement of the Regulations.

In addition there is a second shortcoming in the notice in that it does not specify the date on which the consultation period ends as required by 8(2)(d)(iii) of the Regulations. Instead the notice contains a 'do-it-yourself' calculation formula which the Tribunal considers is open to misunderstanding/misinterpretation.

Stage Two Notice: Paragraph 11(5) of the Regulations require the landlord to supply a statement (called a paragraph (b) statement) setting out, with reference to at least two estimates, the amount specified as the estimated costs of the works and where the landlord has received observations, a summary of those observations and his response to them. That requirement has been complied with in the letter from Classic

Management dated the 31st May 2012, which included the paragraph (b) statement. However even though it is a notable feature of the Regulations that at no point do they purport to regulate the landlord's choice of contractor directly, paragraphs 10 and 12 do require the landlord to have regard to observations at two stages of the process. On the evidence before the Tribunal, the letter of the 31st May 2012, which was presumably sent to each lessee, stated that it was the intention of the management company to award the contract to RH Building Services. The Tribunal has concluded with regret that the inclusion of these words might well cause a lessee to consider that the Applicant had closed its mind to any new observations both as to the choice of contractor and the scope of the works, see *Daejan Investments v Benson* [2011] EWCA Civ 38 and that therefore participation in the second stage of the consultation process was pointless. In the judgment of the Tribunal the unqualified statement that the Landlord intended to instruct RH Building Services rendered nugatory to a significant degree the opportunity to comment on the two estimates rendering the consultation exercise defective.

Concluding Comments

25) It is regrettable that the Tribunal has identified what some might consider to be insignificant shortcomings with the consultation documentation as it is clear that Works do need to be carried out to the building to stop the water ingress. It is in no one's interest that this work be delayed.

26) The Tribunal reminds the parties that compliant consultation is not a prerequisite for a freeholders ability to make a service charge demand based on estimated expenditure and the Tribunal is satisfied that the service charge surcharge already made by the Applicants is payable and reasonable in amount but **as an estimate only.** It is only when the actual amount is ascertained and demanded that the question of compliant consultation comes into play.

27) The Applicants application has been partially successful in establishing that if costs are incurred to carry out the Works then the reasonable cost of those works will be recoverable from the leaseholders by way of service charge.

28) That said the practical affect of this order is stark. In the absence of either fresh and compliant statutory consultation or an order from the Tribunal dispensing with further consultation the maximum amount recoverable from the lessees, when the work has been completed, will be capped to £250 per leaseholder. In these circumstances it would appear that the Applicant Company has two options available to it. Firstly it can apply to the Tribunal under section 20ZA of the Landlord and Tenant Act 1985 for an order dispensing with further consultation in relation to the proposed works. This application might or might not be successful. If it is successful the Applicants can then proceed with the Work without facing the cap on full recoverability. As an alternative the Applicants can now elect to carry out fresh consultation making sure that the omission and the shortcomings identified by the Tribunal do not feature in the documentation. At the end of that consultation the Works can proceed with the prospect of full recovery.

Signed ____________________
Mr RTA Wilson (Chairman)

Dated 23rd November 2012