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H M COURTS & TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL

In the matter of an application under Section 27(3) of the Landlord & Tenant Act 1985 (Service Charges)

Case No: CHI/43UB/LSC/2012/0009

Property: **25-27 The Parade, Claygate, Surrey KT10 0PD**

Between:

Profitample Ltd
(the Applicant/Landlord)

and

Mr and Mrs J Norton (25a 1st Floor Flat)
Mr G Sharp and Mrs D Rich-Sharp (27a 1st Floor Flat)
Ms S Marlin (27b 2nd Floor Flat)
(the Respondents/Lessees)

Members of the Tribunal:	Mr MA Loveday BA(Hons) MCIArb	Lawyer/Chairman
	Mr PD Turner-Powell FRICS	Valuer Member

Date of the Decision: 19 April 2012

BACKGROUND

1. This application relates to proposed works to part of a terrace of shops with flats above at 25-27 The Parade, Claygate, Surrey KT10 0PD. The proposed works were set out in some detail in a Specification of Works dated March 2011 which was prepared for the Landlord by Mr Charles Skeet-Smith BSc MRICS. By an application dated 9 January 2012, the landlord Profitample Ltd, sought a determination under Landlord and Tenant Act 1985 ("LTA 1985") s.27A(3) as to whether the respondent lessees would be liable to pay a service charge if these works were undertaken. All parties are agreed that the works should be carried out and the sole issue is whether the lessees should have to contribute to the cost.

2. The matter was listed for hearing on 23 March 2012 and the Tribunal inspected the property before the hearing. At the hearing itself, the applicant was represented by Mr Skeet-Smith although Mr Karim (a director of the applicant company) also briefly addressed the Tribunal. The respondents appeared by two of the lessees, Mr Norton (25a, 1st floor flat) and Mr Sharp (27a 1st Floor Flat) and Mrs Norton was also in attendance.

INSPECTION

3. The Tribunal inspected the property at approximately 10.00am on the day of the hearing. The property comprises a double-fronted, mid-terraced building being a shop at ground level with storage areas to the rear with three flats on two floors above. Construction is in brickwork elevations, part rendered under a pitched and tiled roof with a felt flat roof to the rear single storey section. The front elevation was inspected from street level and Mr Skeet-Smith pointed out the condition of the small section of flat roof over the fascia which (it was accepted) had caused damp penetration into the shop in the past. Above this were bay windows with hidden flat roofs. At low level below the shop window was a vertical masonry wall (known as a "stall riser"), where tile facings were falling off and which required repair and decoration.

4. Inside the shop, Mr Karim brought to the tribunal's attention historic evidence of damp penetration inside the front shop window. The Tribunal was also shown evidence of damp penetration to the ceiling of the stock rooms at the rear (under the flat roofs). It was evident that these leaks were still active in wet periods.

5. At the rear, access to the lower flat roof and upper floor flats was reached by a rear shared access way serving this and adjoining properties giving access to a short metal ladder to the flat roof. The Tribunal's attention was brought to the poor condition of the flat roof covering which had been taped over and patch repaired in the past. This extended to the upstands to the party boundary walls. The walls themselves were subject to repair. There were three air conditioning units and one satellite dish resting on supports on the flat roof. To either side of the flat roof were dwarf brickwork party walls with tubular steel restraints set above them. Mr Skeet-Smith brought to the tribunal's attention the poor condition of the brickwork and rusting to the steelwork. In addition, the chimney stack over the entrance doors to the flat was in poor condition. There was also a small section of flat roof and upstand under the access stair. At ground

floor level there was a timber door leading to the stock room in the shop, which was covered with an internal metal security gate.

THE STATUTORY PROVISIONS

6. The jurisdiction of the Tribunal is under LTA 1985 s.27A(3):

> "(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, 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 would be payable,
> (b) the person to whom it would be payable,
> (c) the amount which would be payable,
> (d) the date at or by which it would be payable, and
> (e) the manner in which it would be payable.

7. LTA 1985 s.20 provides:

> **20 Limitation of service charges: consultation requirements**
>
> (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
> (a) complied with in relation to the works or agreement, or
> (b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.
> (2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.
> (3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
> ...
> (6) Where an appropriate amount is set by virtue of [s.20(5)(b)], the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.

8. The appropriate amount under s.20(5)(b) is presently set at £250 per flat.

9. The consultation requirements for major works appear in Part 2 of Schedule 4 to the Service Charges (Consultation Requirements)(England) Regulations 2003 ("the Consultation Regulations"). The first requirement is for the landlord to serve a Notice of Intention to carry out works. Paragraph 1(2) of part 2 states that

> "(2) The Notice shall—

(a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;
(b) state the landlord's reasons for considering it necessary to carry out the proposed works;
(c) state that the reason why the landlord is not inviting recipients of the notice to nominate persons from whom he should try to obtain an estimate for carrying out the works is that public notice of the works is to be given;
(d) invite the making, in writing, of observations in relation to the proposed works; and
(e) specify—
(i) the address to which such observations may be sent;
(ii) that they must be delivered within the relevant period; and
(iii) the date on which the relevant period ends."

THE LEASES

10. The Tribunal was provided with a copy of the leases of the three flats. The lease of flat 25A is dated 20 May 1991 and it contains provisions which also appear in the leases of the other flats. The relevant provisions are as follows:

    a. By clause 1(i) and paragraph 4 of the Particulars the "Demised Premises" are defined as "25A, The Parade, Claygate". The First Schedule further defines "the Premises" as comprising "(a) all walls enclosing the Premises (but in the case of any external walls of the Building only the interior face of such wall ..." and "(c) the windows of the Demised Premises including their internal and external frames and the glass (but excluding the paintwork and decoration of the external surfaces of such windows and window frames)."
    b. Clause 4 deals sets out lessee's covenants. These include an obligation "(i) to repair maintain uphold and keep the Premises so as to afford all necessary support shelter protection and access to the parts of the Building other than the Premises."
    c. Clause 5 deals with landlord's covenants. These include the following obligations at clauses 5(d)(i) to (iii):
    "(d) As often as may be necessary to maintain repair cleanse repaint redecorate and renew:-
    (i) The main structure of the Building including (but not by way of limitation) the foundation roofs and exterior and loadbearing walls
    (ii) The drains pipes conduits and all devices for conveying rainwater from the Building
    (iii) The passages staircases landings entrances and all other the parts of the Building (including the ceiling) enjoyed or used by the Tenant in common with all or any of the other Tenants or occupiers of the Building."
    d. Clause 7 deals with the service charge obligations. The relevant costs of the landlord under LTA 1985 s.18(2) are described in the lease as the "Annual Maintenance Cost". This is defined by clause 7(1)(b) as "the total of all sums actually spent by the Landlord in any Year in connection with the

management and maintenance of the Building..." Without prejudice to this general definition the clause lists various specific items of relevant costs as included in the "Annual Maintenance Cost". These include at clause 7(1)(b)(i) "the costs of and incidental to the performance and observance of Clauses 5(d) and (e) hereof."

11. The machinery of the service charge appears in clauses 5(3) to 5(5) of the lease. In essence, the lessee must pay an interim charge on account of its contribution to the Annual Maintenance Costs in each service charge year, and there is then a provision for end of year accounting and a balancing payment at the end of the service charge year.

12. The shop on the ground floor of the premises is subject to a lease dated 15 September 1995 for a term of 125 years from the date of the lease. The shop lease is apparently vested in Mr Karim. The following are the material provisions of the lease:
    a. By paragraph D of the Particulars the "Demised Premises" were described as "The ground floor shop premises known as 25/27 The Parade Claygate Surrey forming part of the Building and shown for the purposes of identification only edged red on the plan annexed hereto".
    b. By clause 1.7 the "Demised Premises" were further defined as including "(a) the internal faces (only) of all walls and columns which enclose the same" and "(d) window frames and window furniture and all glass in the windows and all doors door frames and door furniture."
    c. By clause 4.4(a) the lessee was required "to put and keep in good and substantial repair and condition the whole of the Demised Premises and every part thereof **AND** as often as may be necessary to renew any of the Landlord's fixtures and fittings in the Demised Premises or substitute new ones of equivalent quality and value to the reasonable satisfaction of the Landlord (damage by the Insured Risks excepted unless payment of the insurance monies shall be withheld in whole or in part by reason of any act neglect or default of the tenant or any undertenant or any other person under its or their control).

THE APPLICANT'S CASE

13. The main evidence and submissions for the Applicant were given by Mr Skeet-Smith. He referred to a statement dated 23 February 2012 and gave oral evidence at the hearing about the nature of the works. The proposed works were set out in some detail in the Specification of Works.

14. Mr Skeet-Smith explained that his firm had been appointed by the landlord to consider works to the roofs of the building and he had looked at previous proposals for repairs. The flat access roof at the rear of the property was covered with a proprietary felt product known as "Nuralite", and it was in excess of 20 years old. The main problem was that the lap joints were opening and allowing water to penetrate through the surface treatment, and localised repairs over the years had proved ineffective. Although the former manufacturer no longer traded, Mr Skeet-Smith had carried our research

about the best course of action. The manufacturer's recommended contractor LHC Roofing Ltd advised that the landlord should overlay the surface treatment with a new membrane rather than recover it, a process known as "re-birthing". The process raised issues about fall levels, and as a result Mr Skeet-Smith carried out a full levels survey which showed fall lines and levels across the roof. A copy of the levels survey was produced to the Tribunal. LHC were prepared to do the work, offering a 20 year guarantee for a 3 layer felt overlay covering with tiles for the paths to the entrances of the flats. This solution offered a considerable saving compared to earlier proposals to remove and replace the existing covering. As for the felt roofs over the two front bay windows and the roof above the shop front, these were to be overlaid in a similar way. The electrical enclosure to the rear of the access flat room near the mews was to be re-decked and re-felted. The small section of flat roof and upstand under the access stair would also be replaced, but this would require removal of the top few treads of the stairs to facilitate inspection and maintenance. Works were also proposed to the brickwork and facades. The facades would be re-pointed and rendering repaired. Joinery (including window frames) and rainwater goods would be replaced or repaired.

15. Mr Skeet-Smith submitted that the relevant costs of the works were recoverable from the lessees under clauses 5(d), 7(1)(b) and 7(5) of the lease. The landlord was required to maintain the "main structure" and the "roof" under clause 5(d) and the lessees was required to contribute to the costs under clauses 7(1)(b) and 7(5). As for the window frames, Mr Skeet-Smith accepted that the Tenant was generally required to repair these under clause 4(i) of the lease. However, under the proviso to paragraph (c) of the First Schedule, the external paintwork was not part of the "Premises" as defined in clause 1(i). It followed that the landlord had to paint the window frames and could recover the costs of doing so. The landlord was also responsible for maintenance of the brick piers which formed part of the "main structure" in clause 5(d)(i).

16. Mr Skeet-Smith did not accept that the costs had been exacerbated by any delay on the part of the landlord. In fact, the "re-birthing" solution was more affordable than earlier proposals to replace the roof.

17. Mr Skeet-Smith also addressed the issue of the statutory consultation. He produced Notices of Intention dated 5 April 2011 which included copies of the Specification of Works. No comments were received from the lessees in reply to the Notice of Intention. He also produced 'paragraph (b) statements' dated 31 October 2011 which included a tender report and copies of four tenders submitted by contractors. The landlord proposed to appoint the contractor that submitted the lowest tender, namely LHC Roofing Ltd which had submitted a tender of £35,468 for the works. On 22 November 2011, Mr and Mrs Norton sent the landlord a detailed Scott Schedule which contained their observations in respect of the works. The landlord had taken those observations into account, and Mr Skeet-Smith referred to a long letter from the landlord dated 9 January 2012 which dealt with each of the points raised by the lessees. Mr Skeet-Smith admitted that the Notices of Intention included a technical defect, in that it stated that representations should be received "within 30 days of this notice" rather than

specifying a particular date by which those representations should be received. However, he relied upon ***Mannai Investments v Eagle Star Life Assurance*** [1997] AC 749 to 'cure' any defect in the notices.

18. In their closing submissions, Mr Skeet-Smith and Mr Karim addressed a number of specific matters raised by the respondents (below). Mr Karim submitted that there had been proper consultation about the major works. The lessees had met with him on 24 October 2010 to discuss the works, and there were minutes of this meeting in the bundle before the Tribunal. The works had been discussed in some detailed comments had been made about the proposed works. He had also attempted to set up a Reserve Fund to pay for the works, but some of the lessees had questioned whether this was necessary. The residents had not taken on board the Notice of Intention and the contents of the Specification of Works when these were served in April 2011, and they were simply reluctant to pay money up front. Mr Skeet-Smith dealt with the items at paragraphs 2.4.2-2.4.5, 2.5.4 and 2.9.5 of the Specification of Works. He accepted that under the lease of the shop it was often tricky to allocate responsibility for works between the lessee and the landlord. However, each of the items referred to remained the responsibility of the landlord because they fell outside the "Demised Premises" as defined by the lease. The air conditioning units had to be lifted or removed temporarily to enable the new roof covering to be run underneath them. There was no improvement, save that small changes would be made to the falls to prevent ponding of rainwater on the surface of the flat roof.

THE RESPONDENTS' CASE

19. Mr Norton accepted that all "seemed to be in order" in relation to the landlord's ability to recover the costs under the terms of the leases. He stressed that in effect the parties were all on the same side in wanting the works to be carried out. However, his main objection was that the costs were apparently to be recovered by way of an interim charge "in one lump sum" rather than being spread over a period of time.

20. Mr Sharp also accepted that the works set out in the Specification of Works were needed. In essence, he raised three general points:
    a. There was historic neglect that may have exacerbated the costs. At this stage Mr Sharp was "putting down a marker" about any increased costs that resulted.
    b. The works could undoubtedly be broken down into two phases, namely works to the rear elevation and works to the front elevation. The landlord and the tenant would feel that the rear parts were more urgent (because of the leaks). However, phasing should be considered to make the project more affordable to the lessees. Mr Norton had come up with alternative estimates for the rear elevation works which produced significantly lower costs.
    c. The costs in the tenders had increased from the landlord's initial estimate of £12,000 (given informally at a meeting with leaseholders on 24 October 2010).

21. Mr Sharp then referred to a number of items in the Specification of Works:
    a. A "key point" was that the Specification of Works included (at paragraphs 2.4.2-2.4.5) repairs to the stall riser. Mr Sharp referred to clause 4.4(a) of the lease of the shop, which placed an obligation on the lessee of the shop to repair "the whole of the Demised Premises" and the Landlord's fixtures and fittings. The residential lessees should not therefore be required to contribute to the cost of repairs for which the lessee of the shop (who happened to be the Applicant) was responsible for.
    b. The Specification of Works included (at paragraphs 2.5.4 and 2.5.5) provision for (i) lifting boards to raise the air conditioning units on the rear roof or (ii) disconnecting the units, storage and re-connection after the new roof covering was in place. The air conditioning units (and the satellite dish also located on the rear roof) were for the sole benefit of the shop, not the flats. The residential lessees should not have to contribute to the cost of working on the air conditioning units or the satellite dish.
    c. The Specification included at paragraph 2.9.5 overhauling the metal gate to the stock room for the shop. Again, the residential lessees should not have to contribute to the cost of security for the shop.
    d. Mr Sharp objected to a minor item at paragraph 2.9.7 of the Specification of Works, namely mastic to the window and door frames. Repairs to the windows were the responsibility of the residential lessees, not the landlord.
    e. The estimated cost of preparing and painting areas of render (referred to at paragraph 2.9.8) were very expensive.

22. Finally, Mr Sharp did not accept that the landlord had properly consulted. There had been only one meeting about the proposed works, and there had not been any real dialogue with the landlord.

THE TRIBUNAL'S DECISION

23. The jurisdiction of the Tribunal under LTA 1985 s.27A(3) is to decide whether, if the applicant incurred costs for the works set out in the Specification of Works, a service charge would be payable for those costs. At this stage the Tribunal may therefore determine whether the relevant costs of the items set out in the Schedule of Works are recoverable under the terms of the leases. The Tribunal may also decide whether any limitation would be imposed on the service charge by any failure to comply with the consultation requirements set out in Part 2 to Schedule 4 to the 2003 Consultation Regulations. This is because the consultation required by LTA s.20 has now purportedly been concluded. However, at this stage no demand for service charges (whether interim charges or balancing charges) has been made and the works have not begun. The Tribunal is therefore unable to determine whether the costs which will be incurred for the works is reasonable and/or whether the works will be of a reasonable standard under LTA 1985 s.19. It follows that the Tribunal cannot as yet decide the amount which would be payable under LTA 1985 s.27A(3)(c).

24. It follows that a number of objections raised by the respondents are premature. In particular, the argument by Mr Norton that the costs of the works should be spread over more than one service charge year, the arguments about 'historic neglect', the argument that the costs exceeded an informal estimate of £12,000, the contention by Mr Sharp that the estimated cost of preparing and painting areas of render were excessive and the suggestion that Mr Norton had alternative estimates for the rear elevation works cannot realistically be dealt with at this stage. They are arguments which may be relevant once demands for service charges have been raised and/or the works are completed. As Mr Sharp quite fairly said at one point, the respondents have now 'put down a marker' in relation to these arguments.

25. Are the relevant costs of the works recoverable under the leases? The Tribunal accepts Mr Skeet-Smith's general analysis of the relevant service charge provisions which are set out above. It is clear that most of the proposed works in the Specification of Works fall within the landlord's repairing obligations and that they are recoverable as part of the Annual Maintenance Costs. Mr Norton accepted that the costs were recoverable under the terms of the leases. Mr Sharp objected to four specific items in the Specification of Works, which will be dealt with in turn.

26. Firstly, there are the works to the stall riser, namely the wall beneath the windows to the shop front. The Tribunal is in no doubt that the lease of the shop excludes the stall riser from the premises demised to the lessee. Clause 1.7 of the shop lease is quite clear that the demise includes only the "internal faces (only) of all walls and columns which enclose the same". The stall riser is not part of the window or window frame. The commercial lessee's obligation to repair in clause 4.4(a) of the lease does not therefore extend to the stall riser. The wall cannot be described as one of the "Landlord's fixtures and fittings in the Demised Premises" in clause 4.4(a). It follows that the landlord cannot require the lessee of the shop to repair the stall riser. It remains part of the structure of the Building which the landlord must repair under clause 5(d)(i) of the residential leases. It follows that by virtue of clause 7 of the lease, the applicant may recover the cost of the stall riser repairs in paragraphs 2.4.2-2.4.5 to the Specification of Works.

27. Secondly, there is the provision for lifting or temporarily moving the air conditioning units on the rear roof. It is true that these units only benefit the lessee of the shop, who is apparently a director of the applicant company. However, Mr Skeet-Smith's evidence is persuasive. The recovering of the roof will generally involve a number of temporary works to be undertaken, such as tarpaulins and coverings, security, temporary decking, scaffolding and so on. Generally speaking, a work of repair will include any reasonable ancillary works. In this case, the Tribunal considers that lifting or removing the air conditioning units (and the satellite dishes) is a reasonable ancillary work which is necessary to enable the roof to be recovered. The Tribunal therefore determines that the costs in paragraphs 2.5.4 and 2.5.5 of the Specification of Works are recoverable from the lessees under clause 7 of the lease.

28. The third objection is to repairs to the metal gate in paragraph 2.9.5 of the Specification of Works. There is little doubt that the wooden door to the stock room itself is demised to the lessee of the shop: see clause 1.7(d) of the shop lease. The Tribunal considers that if the door and door frame to the stock room are demised to the lessee of the shop, an internal security gate which lies within the door and door frame must also form part of the demise to the commercial lessee. The landlord of the shop has no obligation to repair the gate. Under the residential leases the gate does not form part of the structure of the building and it is not something the landlord is obliged to repair under clause 5. The Tribunal therefore determines that these costs are not recoverable from the lessees under clause 7 of the lease.

29. Finally, there is the mastic to the windows. This is a very minor item of cost. Suffice it to say that the Tribunal accepts Mr Skeet-Smith's argument on this. Repairs to the windows were the responsibility of the residential lessees, not the landlord. The lease requires the landlord to decorate and paint the exterior of the window frames, and the use of mastic filler is ancillary to this decoration. The Tribunal determines that the costs in paragraph 2.9.7 of the Specification of Works are recoverable from the lessees under clause 7 of the lease.

30. Are the relevant costs of the works limited by LTA 1985 s.20? The Tribunal has not set out the detailed provisions of Part 2 of Schedule 4 to the Consultation Regulations. Mr Skeet-Smith took the Tribunal through the consultation process, and the Tribunal is satisfied that the regulations were in general complied with. Only two issues arose.

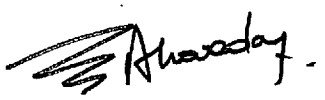
31. Firstly, Mr Sharp complained that the landlord had not properly consulted the lessees. The obligation on the landlord in paragraphs 3 and 5 of Part 2 of Schedule 4 to the Consultation Regulations is to "have regard" to any written observations made by the lessees in response to the Notice of Intention or the Paragraph (b) notice. In this case the only observations were made in respect of the latter. The Tribunal is satisfied that the applicant had proper regard to the letter of 22 November 2011 and the Scott Schedule. The applicant gave a detailed reply on 9 January 2012. It is not required by the regulations to accept observations made by a lessee, but the lengthy reply is evidence that it did seriously have regard to those observations.

32. The only other issue is the Notice of Intention dated 5 April 2011 which stated that responses should be received "within 30 days of this notice". The requirement of the consultation regulations is that the notice shall "specify ... (iii) the date on which the relevant period ends." The "relevant period" is a period of 30 days beginning with the date of the notice: see regulation 2(1). The notice (as Mr Skeet-Smith accepted) did not strictly give a particular date, it specified a period ending on a particular date. The Tribunal is satisfied that this nevertheless complies with the requirements of paragraph 1(2) of Part 2 to Schedule 4. If the Tribunal is wrong about this, it would find that (a) the notice satisfies the reasonable recipient test in ***Mannai Investments*** (supra) and (b) that it would in any event have dispensed with the consultation requirements under LTA 1985 s.20ZA because the lessees were caused no real prejudice by any technical defect

in dates given in the notice. It follows that the defect in the notice does not give rise to any limitation on recoverable costs under LTA 1985 s.20.

CONCLUSIONS

33. For the reasons given above, the Tribunal determines under LTA 1985 s.27A(3) that all the relevant costs of the works set out in the Specification of Works dated March 2011 are recoverable from the lessees, apart from the metal security gate at paragraph 2.9.5. The remaining costs are recoverable under the terms of the leases. There is no limitation on the recovery of service charges under LTA 1985 s.20.



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MA Loveday BA(Hons) MCIArb
Chairman
19 April 2012