FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/23UF/LIS/2018/0050
Property	:	Highview Lodge, Wesley Court, Acre Street, Stroud, Gloucestershire GL5 1DW
Applicant	:	Highview 2004 RTM Company Limited
Representative	:	Mainstay Residential Limited
Respondent	:	Green Square Group
Representative	:	
Type of Application	:	Service charges and administration charges
Tribunal Member(s)	:	Judge Tildesley OBE
Date and Venue of Hearing	:	Determination on the Papers
Date of Decision	:	25 January 2019

DECISION

Decisions of the Tribunal

I. The Tribunal determines that the

a) The replacement of the external wooden frames and glazed unit and French doors to the flats with a modern equivalent of uPVC frames and glazed units falls within the definition of management services in paragraph 1 of the Fifth schedule to the lease.

b) The costs of the proposed works fall within the definition of management services expenditure, and, therefore, can be recovered as a service charge from the leaseholders.

II. The Tribunal's determination is limited to one of law, namely, the proper construction of the terms of the lease. The Tribunal has made no determination on whether the proposed works are necessary and on the reasonableness of the anticipated costs of the works

The Application

1. The Applicant seeks a determination under Section 27A of the Landlord and Tenant Act 1985 as to whether service charges are payable for the replacement of the external windows to the 29 leasehold properties with uPVC frames and glass.

2. The Applicant applied to the Tribunal because of an objection from one leaseholder, Green Square Group of 25 Highview Lodge, to the proposed major works to the property which included the replacement of external windows to the flats with uPVC frames and glass. The leaseholder has subsequently withdrawn its objection. The Applicant, however, has requested the Tribunal to make a determination on this matter because of conflicting legal advice.

3. On 16 November 2018 the Tribunal issued directions to deal with the Application on the papers. The Applicant supplied a statement of case dated 30 November 2018. The Tribunal indicated that it would publish its decision by no later than 31 January 2019.

4. The Application included a copy of the lease for Flat 2 made between Weltonvale Limited of the one part and Ms S L Bragg of the other part dated 23 September 1994. The lease is for a term of 125 years from 1 July 1994 with a ground rent of £40 per annum for the first 33 years, £80 for the next 33 years, £160 for the next 33 years and £320 for the remainder of the term. The Tribunal understands that the leases for the other flats in the property are identical to the lease for Flat 2 in all major respects.

5. The property is a two and three storey apartment block spread over five blocks located on Acre Street, Stroud. There are 29 apartments and the flats are accessed via communal front doors with an individual block or an open walkway. There are parking areas for the apartments within the grounds of the property.

6. Mainstay Residential Limited ("Mainstay") has been the managing agent for the property since 2005. The Applicant decided in early 2017 that the property required extensive work to bring the property back to an acceptable standard. The Applicant instructed Mainstay to prepare a specification for the works and to commence statutory consultation with leaseholders in accordance with section 20 of the 1985 Act.

7. The specification for the proposed works included replacement of rainwater goods and fascia boards, the replacement of wooden window frames and glass in the communal areas and in the exterior of the flats with uPVC glazed units, the installation of uPVC communal doors in place of the existing wooden ones, redecoration of Juliet balconies and the replacement of garage doors.

8. Mainstay has received tenders from three contractors for the specified works ranging from £158,695 plus VAT to £221,764.52 plus VAT. Surveyors' fees including project management of 9 per cent plus VAT of the total contract value and Maintstay's fee of 2.5 per cent of the total contract value would be an additional cost.

Consideration

9. The Application seeks a determination on whether it can recover the costs of replacing the external windows and French doors to the flats with uPVC glazed units from the leaseholders through the service charge.

10. The Tribunal proceeds on the basis that the current windows with wooden frames are in a very poor state and that redecoration is not an option because of the rotten condition of the wooden frames.

11. The question for the Tribunal to determine is one of construction of the lease.

12. Lord Neuberger in *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619 at paragraph 15 sets out the approach that courts and tribunals should follow when interpreting a lease:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd*

> [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

13. The Tribunal is determining a question of law when deciding the correct construction of the lease which is confirmed by *Woodfall* at para 7.163.1:

> "The construction of a lease is a matter of law and there is no evidential burden on either party: thus, it was held to be incorrect for a leasehold valuation tribunal to determine that the relevant leases were uncertain and therefore that the landlord and a management company had failed to discharge the onus of showing that the service charges claimed were recoverable under the terms of the leases." [Footnoted to Redrow Regeneration (Barking) Ltd v Edwards [2012] UKUT 373 (LC); [2013] L & TR 8.]".

14. The Tribunal starts its examination of the lease with the tenant's covenant to pay a service charge which is with the landlord and the other tenants and found at sub-clause 6.1:

> "To pay to the Landlord (subject to clause 10.1 and 10.2) an annual service charge ("the service charge") of an amount determined in accordance with the provisions of and at the times and in the manner specified in clause 9 of the lease".

15. Clause 9 deals with the mechanics of the service charge. The relevant parts of Clause 9 for this determination are the definition of "service charge" which means "the due proportion of the total charge", and the definition of "total charge" which means "the total of all management services expenditure during an account period net of any receipts from insurers the tenant or other occupiers of the estate or third parties (otherwise than by way of a service charge) which are properly applicable towards payment of such expenditure".

16. Under sub clause 10.1 the landlord covenants with the tenant to provide and maintain the management services as the same are more fully set out in the Fifth schedule. Sub clause 10.2 is not relevant to the determination.

17. Clause 7 which is headed Service Charge defines management services as "those services appropriate to the management and maintenance of the Estate which the Landlord shall provide as set out in the Fifth schedule", and management services expenditure as

"the aggregate of the costs of the management services together with any value added tax".

18. The Fifth schedule headed management services states that the management services shall mean the following services:

> Para 1: "Maintaining repairing amending renewing cleaning redecorating and in all ways keeping in good condition the estate and in particular the roof foundations floor (including garage spaces) structural columns and walls and the accessways ramps and forecourts of the Estate (including doors door frames windows and window frames forming part of those walls) and all pipes wires cables apparatus drains and gutters and channels not included in any flat or exclusively serving the same and all ventilating and security systems and equipment and all other apparatus equipment fixtures and fittings therein or thereon and removing all rubbish and cultivating all gardens forming part of them and not included in any demise of a flat".
>
> Para 2: Repainting and decorating the exterior of the buildings on the Estate (including the internal and external surfaces of the doors door frames windows and window frames forming part of it and external surfaces of doors doorframes, windows and window frames forming part of each flat) in such manner as shall be determined by the Landlord or failing such determination in the manner in which the same was previously painted or decorated or as near as circumstances permit and in particular painting and decorating such exterior at least once in every three years save that any part that it treated with substances which require reapplication less frequently than once in every three years shall be so treated as and when proper and necessary to do so to maintain the condition and appearance.
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> Para 3.3 inspecting maintaining overhauling repairing redecorating and renewing the entrances (including any external stairways leading from ground level to the entrances) halls staircases passages landings lifts and other internal parts of the Estate the use and enjoyment of which is common to lessees of each flat (including the outer surfaces of doors and door frames in the walls thereof albeit that such doors and door frames shall be included in any demise or letting of a flat) and the apparatus equipment including entry phone security and safety systems fixtures fittings coverings carpets and furniture therein or thereon and whenever requisite or desired but with regard to the decoration at least once in every five years save that part that is treated with

> substances which require re-application less frequently than once in every five years shall be so treated as and when proper and necessary to maintain the condition and appearances.
>
> Para 3.4.2 carrying out such additional works and providing such additional services as may be considered necessary by the Landlord from time to time.

19. Paragraphs 3.4.1. 3.5.1, 3.5.2, 3.6, 3.7, 3.8, 4 and 5 of The Fifth schedule are not relevant to this application.

20. The Fifth schedule carries a proviso which states that

> "Provided however that the Management Services (except as provided in paragraph 5.1.12 of this Schedule) shall not include any work for which the Tenant of a Flat shall be liable".

The Tribunal notes that the copy lease supplied has no paragraph 5.1.12 to the Fifth schedule.

21. Sub-clause 1.4 defines the Estate as "the property comprised in the title above (GR160437) referred to which property is commonly known as High View Lodge and is shown edged red on Plan 2".

22. The Tribunal now turns to those parts of the lease that deals with the definition of the demised premises and the tenant's obligations in respect of them.

23. Under the definitions section sub-clause 1.3 defines the Demised Premises as "02 High View Lodge Nelson Street Stroud edged red on Plan 1 annexed to the Lease more particularly described in the First Schedule".

24. The First Schedule headed the "Demised Premises" states that

> "the Demised Premises comprise All that the flat situated in the position shown edged red on Plan 1 [and the garage shown edged red on Plan 2] and all sewers drains pipes cables or other conduits exclusively serving the same and appurtenant to it forming part of the Estate provided that THE Demised premises shall include only such non-structural surfaces of any terrace or balcony (including the paving thereof forming part of the same) and the interior screeds ducts finishes and surfaces upon or otherwise attached to any structural wall floor roof or ceiling within or enclosing the dwelling but shall nevertheless include all windows window frames doors and door frames forming part of any wall within or enclosing the same and the glazing of every external window and further provided that any internal non-structural wall separating the Demised Premises from any other part of the Estate shall be a party wall severed medially" .

25. The tenant's repairing liability is set out in Clause 5.3. sub clause 5.3.1 states that

> "At all times during the Term well and substantially cleanse repair maintain support and uphold the Demised Premises including (where within the Demised Premises) any storage room entrance passage landing stairway balcony or terrace exclusively serving or forming part of the Demised Premises and all the Landlord's fixtures and all sewers drains pipes water tanks radiators ventilators apparatus wires and cables forming part of or exclusively serving the Demised Premises and to make good all damage occasioned whether to the Demised premises or to its appurtenances or to any other part of the Estate caused by any stopping up bursting leakage escape or overflow of water or any other substance or any escape of electricity in or from the Demised premises or any part of them or from any water tank sewer drain pipe or cable exclusively serving them. PROVIDED THAT the tenant shall not be liable to make good any damaged covered by insurance effected by the Landlord pursuant to the provisions of this lease save where the insurance monies shall be irrecoverable in whole or in part in consequence of any act or default of the tenant".

26. Sub-clause 5.3.2 requires the tenant "clean the inside and outside of the windows in the Demised Premises at least once in every month and to keep the said windows glazed at all times".

27. Under sub-clause 5.3.3 the tenant covenants:

> "One in every seven years of the Term and in the last year of the Term (whether determined by effluxion of time or in any other way) to paint in a proper and workmanlike manner all the inside wood and ironwork usually painted of the Demised premises with two coats of good quality paint and also with every such internal painting to whitewash colourwash distemper grain varnish paper and otherwise decorate in a proper and workmanlike manner all such internal parts of the Demised premises as have been or ought properly to be so treated".

28. The Applicant contended that there was a serious conflict between the wording of the First Schedule defining the extent of demised premises and the definition of management services under paragraph 1 of the Fifth schedule because both referred to windows and window frames. This was the reason why the Applicant had sought a determination from the Tribunal.

29. The Tribunal begins its analysis with the natural and ordinary meaning of the relevant clauses which deal with the landlord's covenant for management services under the Fifth schedule.

30. Under paragraph 1 the landlord is responsible for the repair and maintenance of the Estate which includes the structure of the property that house the individual flats, and in particular the roof,

foundations, floors, structural columns, walls and the doors, door frames, windows and window frames forming part of those walls. Paragraph 1 does not distinguish between windows forming part of walls and those windows exclusively serving individual flats. The remaining part of paragraph 1 limits the landlord's repair and maintenance of pipes, wires, cables and rainwater goods to those that are not included in the any flat or exclusively serving the same.

31. The Tribunal is satisfied that the landlord's repairing covenant under paragraph 1 extends to doors, door frames, windows and window frames of individual flats provided they form part of the structural walls of the property.

32. The Tribunal's construction of paragraph 1 is supported by the wording of the landlord's covenant to decorate the exterior of the property in paragraph 2. Under this paragraph the landlord is responsible for repainting and decorating the exterior of the buildings on the Estate which includes the internal and external surfaces of the doors, door frames, windows and window frames forming part of it and the external surfaces of doors, door frames, windows and window frames forming part of each flat.

33. The Tribunal considers the wording of paragraph 2 instructive in two respects. First paragraph 2 explicitly states that the landlord's obligations under the lease to provide maintenance services includes windows forming part of each flat. Second it places a limitation on the landlord's decorating responsibilities to external surfaces which is consistent with the nature of the service provided. In the Tribunal's view it would not be possible to place such a restriction on the landlord's obligation to repair because if a window frame was in disrepair the whole frame would have to be attended to in order to fulfil the covenant on the part of the landlord.

34. The Fifth Schedule, however, has a proviso that management services should not include any work for which the tenant of a flat shall be liable.

35. The tenant's obligations are set out in clause 5.3. There is no explicit mention of windows and doors in either the tenant's repairing obligation under sub-clause 5.3.1 and in the decorating obligation under sub-clause 5.3.3. Under sub-clause 5.3.2 the tenant is responsible for cleaning the inside and outside of the windows of the flat and keeping the said windows glazed at all times.

36. The complication arises from the definition of demised premises which is the object of the tenant's repairing obligation under sub-clause 5.3.1. Under the First schedule demised premises is confined to non-structural walls as are within or enclose the Flat, all non structural surfaces of any terraces or balcony and the interior screeds and surfaces attached to any structural walls or ceilings. The

dominant theme of the definition is that demised premises comprises the non-structural parts of the flat.

37. The conclusion on non-structural parts is challenged by the wording which appears in the definition of demised premises:

> "but shall nevertheless include all windows window frames doors and door frames forming part of any wall within or enclosing the same and the glazing of every external window".

38. The use of the phrase "but shall nevertheless" at the beginning suggests that what follows is an exception to the dominant theme of non- structural parts. This suggestion is reinforced by the reference "to *any* wall within or enclosing the same" (*the flat),* which by definition includes all walls both structural and non-structural.

39. The inclusion of windows forming part of any wall within the definition of demised premises raises the possibility that the tenant is liable for the repairs of the windows. This brings into play the proviso to the Fifth schedule of excluding any works for which the tenant is liable from the definition of management services.

40. The Applicant puts forward an alternative interpretation. The Applicant argues that the definition of demised premises in the First schedule is primarily concerned with identifying the flat rather than the respective repairing liabilities of the tenant and landlord. The Applicant contends that if the lease is looked at as a whole it would be possible to identify an intention to exclude the external windows of the building from the demise so that the costs of their maintenance, repair and renewal would be recoverable through the service charge.

41. The Tribunal is of the view that the Applicant's submissions have merit but its reasoning is flawed. The Tribunal agrees with the Applicant's approach of examining the relevant clauses in the context of the lease as whole. The Tribunal considers the Applicant's concerns about the windows of the external walls being part of the demised premises misplaced. The Lands Tribunal in *Sheffield City Council v Oliver* [2008] LRX/146/2007 *unreported*[1] decided that the costs of works to the tenants' windows were recoverable as service charges notwithstanding that the windows were reserved as part of the demise of the flat because windows were part of the "structure and exterior" of the building. The Lands Tribunal, however, emphasised that in any one case the intentions of the parties are to be ascertained from the meaning of the particular words used in the specific lease and the surrounding circumstances.

[1] Approved in the Upper Tribunal decision of *Miss C Waaler v The London Borough of Hounslow* [2015] UKUT 0017 (LC).

42. The Tribunal reverts to the relevant clauses of this lease. Under paragraph 1 of the Fifth schedule the landlord is responsible for the repair and maintenance of doors, door frames, windows and window frames forming part of the structural walls. The first schedule includes non-structural walls but not structural walls within the demise. The Tribunal considers that when interpreting the clauses of this lease the focus should be on "walls" rather than on "windows". The Tribunal observes that the object of the landlord's repairing covenant is not "windows" per se but on whether the "windows" form part of the structural walls. The Tribunal also notes the decision of the Queen's Bench Division in *Irvine v Morgan* [1991] 1 EGLR 261 which determined that external windows were part of the structure of a dwelling house even though the windows may not be load bearing.

43. When the relevant repairing clauses are viewed through the prism of walls, the Tribunal is satisfied that the parties to the lease intended the landlord to be responsible for the repair and maintenance of the structural walls of the property which includes windows and doors that form part of those walls, and for the tenant to be responsible for the repair and maintenance of non-structural walls of flat including windows and doors forming part.

44. The Tribunal maintains that its interpretation of the repairing clauses in the lease: the landlord responsible for the structure of the property and the tenant for the non-structural items in the flat adheres to the usual arrangements under residential leases and makes commercial good sense.

45. The Tribunal notes that the landlord's repairing covenant under paragraph 1 of the Fifth schedule refers just to windows and window frames. The definition of demised premises in the First schedule includes the glazing of every external window in addition to windows and window frames.

46. The specific mention of glazing in the First schedule poses the question whether the landlord's repairing covenant extends to the glazing of external windows that form part of the structural walls. The Tribunal is satisfied that the glazing is covered by the landlord's repairing covenant because the tenant's liability is limited to keeping the windows glazed at all times which falls short of a repairing obligation (see sub-clause 5.3.2). The Tribunal's interpretation of the inclusion of glazing in the tenant's covenant is to ensure that the windows are kept glazed and to oblige the tenant to replace broken glass which does not involve a repair of the window and frame.

47. Following on from the Tribunal's construction of the lease the next question for consideration is one of fact: do the external windows and French doors of the flats form part of the structural walls of the property? The Tribunal has viewed photographs of the property on

the internet, and is satisfied that the external windows and French doors to the flats are integral to the walls by ensuring that the flats are wind and water proof.

48. The Tribunal, therefore, finds that the definition of management services includes the repair and maintenance of the external windows and French doors to the flats.

49. The final question for the Tribunal is whether the actual works proposed by the Applicant fall within the landlord's repairing liability under paragraph 1 of the Fifth schedule. The Tribunal proceeds on the basis that the Applicant's assertion that the current windows and windows frames are in a state of disrepair is correct. The Applicant states that the majority of the wooden window frames are rotten and beyond repair, and produced three photographs of a window frames in various states of disrepair. It is not necessary for the Tribunal to make a finding of fact on the state of disrepair because the question for determination is one of law.

50. The Applicant informs the Tribunal that it intends to replace the present external wooden window frames and double glazed units with uPVC frames and glazed units. The Tribunal is satisfied that the proposed uPVC windows are a modern equivalent of the existing windows and that such replacement falls within the wide scope of the landlord's repairing covenant under paragraph 1 of the Fifth schedule of maintaining, repairing, amending and renewing.

Decision

51. The Tribunal decides as follows:

a) The replacement of the external wooden frames and glazed unit and French doors to the flats with a modern equivalent of uPVC frames and glazed units falls within the definition of management services in paragraph 1 of the Fifth schedule to the lease.

b) The costs of the proposed works fall within the definition of management services expenditure, and, therefore, can be recovered as a service charge from the leaseholders.

52. The Tribunal's determination is limited to one of law, namely, the proper construction of the terms of the lease. The Tribunal has made no determination on whether the proposed works are necessary and on the reasonableness of the anticipated costs of the works.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.