



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference : **MAN/00EM/LSC/2019/0015**

Property : **Flats 1 - 20, Easter Wynd, Berwick
upon Tweed TD15 1DT**

Applicant : **Karbon Homes Limited**

Representative : **Mr D Bird; Team Leader - Karbon
Homes**

Respondents : **The Long Lessees at Easter Wynd
See Annex A**

Representatives : **In person**

Type of application : **Section 27a Landlord & Tenant Act
1985 - Liability to pay Service
Charges**

Tribunal members : **Judge Lancelot Robson
Mr R Harris FRICS**

Date of Determination : **10th October 2019**

Decision Date : **13th November 2019**

DECISION

Decision Summary

The Tribunal decided that:

- (1) The Lease provisions (notably the definition of “The Premises”, item (2) in the Particulars) demised the doors windows and window frames to the Respondents (in respect of their own flats).
- (2) The other Lease provisions do not remove the primary responsibility for repair, maintenance and renewal from the Respondents.
- (3) The Applicant’s submission that the Lease was ambiguous and/or that on a correct interpretation it was implied that the Applicant had the right and responsibility to repair, renew or maintain the window frames and charge the costs thereof to the Respondents through the Service Charge provisions, was rejected.
- (4) In view of the decisions above, and due to the insufficiency of the evidence upon the proposed costs, it would make no finding upon the question of reasonableness of the Applicant’s proposed costs.
- (5) The Respondents’ submissions to the effect that that the Applicant should carry out and/or pay the costs of the proposed works in any event due to the Applicant’s alleged neglect, were also rejected.
- (6) It would not consider making an order reducing the Applicant’s costs of the application payable by the Respondents pursuant to Section 20C of the Landlord and Tenant Act 1985, as no such costs had yet been demanded.
- (7) The Tribunal also made the detailed decisions noted below

Preliminary Matters

1. By an Application made on 22nd February 2019, the Applicant seeks a determination pursuant to Section 27A of the Landlord and Tenant Act 1985 as to whether the long leases of Easter Wynd permit it to carry out repairs to the windows and window frames, and to reimburse itself for the costs thereof through the service charge.
2. The Tribunal gave Directions for determination of this matter on 31st May 2019, to be by way of an inspection and a determination on the papers without a hearing.

3. Due to an administrative error, the Tribunal was asked by the Tribunal office to inspect the property on 5th September 2019, but the parties were informed that the inspection would take place on 19th September 2019, thus none of the parties were present at the inspection. This error was only discovered after the Tribunal had inspected on 5th September 2019, and had begun to consider the matter. The Tribunal then gave further written directions to allow the parties the opportunity to make any further written submissions they might wish, before considering the matter further. It then adjourned. A number of the parties took this opportunity. The Tribunal then reconvened on 10th October 2019 to consider its decision.
4. Extracts from the relevant legislation are attached as Appendix 1 below.

Background

5. The Tribunal's understanding of the factual background is that the subject development was completed in several stages, the last of which was completed in or about 1985. All the leaseholders initially held shared ownership leases. Many have now purchased the remaining shares of their leases, either entirely or partly. The current landlord, and Applicant, is Karbon Homes, a charitable Community Benefit Society regulated by the Homes and Communities Agency. The Tribunal was provided with a copy of two (specimen) flat leases apparently furnished by the Land Registry which were in substantially the same terms, but both were redacted to omit the name of the lessees, and the Flat numbers (hereafter "the Lease"). While several of the Respondents suggested that their leases contained different terms, they did not provide copies to the Tribunal, and did not challenge the accuracy of any specific items in the copies provided by the Applicant. The Tribunal thus considered that no substantive challenge to the lease terms was being made in relation to the copy leases provided, and that it should treat the copies provided by the landlord as definitive.
6. The application was made under Section 27A (3) of the Landlord and Tenant Act 1985 (as amended). The Tribunal was offered a condition survey report dated 7th January 2019 prepared by Storm Tempest Property Consultancy, which concluded that 24% of the windows (38) at Easter Wynd were beyond cost-effective repair. A further 38 windows required significant repairs. The ongoing cost of repairing the existing timber framed windows over 20 years could be reduced by 75% if all were fully replaced with good quality timber replacement windows. Replacing all the windows was estimated to be £125,000 plus VAT and access costs. The cost of the immediate repairs to the existing windows was estimated at £42,000. The predicted cost of cyclical repairs to the existing windows was £70,000, but if new windows were fitted, that cost would be reduced.
7. The Applicant had not yet served Section 20 notices as it was unwilling to incur the costs of preparing for a Section 20 consultation, pending clarification of the Lease terms.

Inspection

8. The Tribunal inspected the property from ground level on the morning of 5th September 2019. The subject property is a development of 20 flats in five separate blocks. It is in a conservation area and is built of traditional materials under pitched roofs, comprising four stories with a lift serving some properties. The timber framed windows varied in their state of repair. They mostly had thin double-glazing units of a less effective type, popular in the 1980s. The scheme is built on a steeply sloping site overlooking the River Tweed, lying between Eastern Lane, West Street and Easter Wynd. The scheme generally looks inward to a central passageway and landscaped courtyard. The windows of properties looking to seaward and at high level, appeared to be weathering rather more than those at lower level and facing inwards. The Tribunal noted that the windows of at least two flats had been replaced with UPVC double glazed frames, some of which had been painted to match the paintwork of the rest of the development. The Tribunal noted that many gutters at high level were choked, although there were few signs of water staining from overflowing gutters.

Applicant's submissions

9. The Applicant in its written submissions stated that:
 - a) While preparing for external redecoration in 2018, substantial rot was noted in several windows in flats in the Easter Wynd development. The project was placed on hold to obtain legal advice on the responsibility for replacement of the window units.
 - b) The Applicant agreed that the definition of "Premises" (item (2) of the Particulars) in the Lease includes "all doors windows and window frames", thus these items belong to the lessees.
 - c) The Applicant's legal advisers advised that the intention of the Lease was that the windows remain in the ownership of each lessee, but the task of repairing the windows rested with the freeholder because the lessee's repairing clause (clause 3(3), dealing with the interior) in the Lease failed to mention the window frames as an item that should be maintained by the lessees. The Applicant submits that it therefore follows that it is responsible for maintaining the windows under its repairing obligation (clause 5(3)), and can recover its costs through the service charge.
 - d) The Lease does not specifically refer to improvements or replacement of items, including window frames. The Applicant's obligation is therefore to "maintain repair redecorate and renew".
 - e) The Applicant, having appointed an independent surveyor, Storm Tempest, and taken advice, believes that it is more cost effective and preferable to carry out a wholesale replacement of the window frames rather than carry out repairs as and when required. The surveyor's report was included in the initial application to the Tribunal and circulated to each Respondent.

f) In its preamble to its statement of case, the Applicant disclosed that it has not yet sought estimates for the proposed window replacement works so it has no firm costs. Nevertheless Storm Tempest have estimated that the costs of a full replacement would be in the region of £125,000 plus VAT, and the cost of access equipment would be £15,000 plus VAT. These costs would be recovered from the lessees over an extended period of 20-30 years on an interest free basis.

Respondents' submissions

10. Eleven of the twenty Respondents sent written submissions (Flats 1, 6, 7, 9, 10, 12, 14, 16, 17, 18, and 20). All those Respondents objected to the Applicant's proposals, although their reasons varied to some degree. However the main submissions can be listed as follows:

- a) The landlord should carry out the work
- b) The proposed costs were too expensive
- c) The landlord should pay for the work, as it had historically neglected the building and failed to repair it in good time
- d) The Tribunal should make a Section 20C order so that the landlord could not recover its costs of this application through the service charge.
- e) Two Respondents submitted that they had replaced their windows recently, and had no wish to have them replaced or to pay the costs of doing so.
- f) One Respondent challenged the Applicant's interpretation of the Lease.

Determination.

11. The Tribunal considered all the evidence and submissions.

12. It particularly noted that the Applicant had offered no case law or other evidence to support its legal submissions on the interpretation of the Lease. While it put forward a complex line of argument as to the interpretation of the Lease, the Tribunal was quite unable to test those arguments. Without the Applicant's legal advisers being present, or at least preparing detailed written submissions on the point, the Applicant's submissions can best be described as vague and insubstantial.

13. The Tribunal noted that Respondents' submissions also had some difficulties. Many asserted that the Landlord should pay for the work due to its long term neglect (i.e. Historic Neglect). However proving Historic Neglect is difficult, not least because the window frames particularly, are nearly 35 years old, and likely to be reaching the end of their useful lives in any event. Parties claiming Historic Neglect would normally be expected to produce a formal Expert's Report which considered the factual evidence available and concluded in terms that the cost of repairing the building had increased significantly due to the landlord's failure to act, as compared to the cost of doing so more quickly.

14. The Tribunal then considered what it was able to determine in this application. The application was made pursuant to Section 27A (3), which is relatively restrictive. The Applicant has not yet prepared a specification of work or obtained tenders. Thus there appeared to be insufficient evidence of the work to be done or the costs to be incurred. The best that can be said for a surveyor's prediction on costs (no matter how experienced the surveyor concerned), is that it is a ball park figure; a starting point. The Tribunal therefore declined to rule on this point. In the light of that decision, the issues of Historic Neglect raised by the Respondents are premature, since the Tribunal will not decide in this application if any figure is reasonable. The Tribunal decided that it should limit its consideration to the ownership and responsibility for repair of the window frames. This would enable the parties to proceed to other matters.

15. The Tribunal decided that there was enough evidence to consider the interpretation of the Lease. Subsections 27A(3)(a) and (b) of the Landlord and Tenant Act 1985 give the Tribunal jurisdiction to decide by whom a service charge should be paid, and to whom it should be paid. Thus it could decide if the Applicant was entitled to do the work, and if it could charge the costs to the service charge.

16. The relevant terms of the Lease are as follows:

““The Premises” Flat number on the floor of the Building shown edged red on the attached plan and including:-

- (1) The fixtures and fittings therein*
- (2) all doors, windows and window frames*
- (3) -(5).....”*

Tenant's Covenants

- Clause 3

“To Repair the Interior

(3) To keep the interior of the Premises and the glass in the windows and doors (if any) of the Premises and the interior faces (including the plaster and other internal covering or lining and any floor boards tiling and screeding) of the walls ceilings and floors of the Premises and all radiators and water and sanitary apparatus and gas and electrical apparatus of the Premises and all pipes drains and wires which are in the Premises and which are used only for the Premises and not for other premises in the Building and the fixtures and appurtenances of and belonging to the Premises clean and in good and substantial repair and condition (damage by fire or other risks insured under Clause 5(2) excepted unless such insurance shall be vitiated by any act or default of the Leaseholder)”

Landlord's Covenants

Clause 5(3)

“To repair and decorate structure and exterior

(3) That (subject to payment of the rent and service charge and to except as to such extent as the Leaseholder or tenant of any other part of the Building shall be liable in respect thereof respectively under the terms of this Lease or of any other lease) the Landlord shall maintain repair redecorate and renew:-

(a) the roof foundations and main structure of the Building and all external parts thereof including all external and load-bearing walls and all parts of the Building which are not the responsibility of the Leaseholder under this Lease or of any other leaseholder under a similar lease of other premises in the Building provided always the Landlord shall redecorate as necessary the outside doors of the Premises

b) the pipes sewers drains wires cisterns and tanks and other gas electrical drainage ventilation and water apparatus and machinery in under and upon the Building (except such as serve exclusively an individual flat in the Building and except such as belong to the Post Office or any public utility supply authority)

c) The Common Parts

...”

Clauses 5(5) and (6) provide:

“As to lettings of other premises

(5) That every lease or tenancy of premises in the Building hereafter granted by the Landlord shall contain covenants to be observed by the tenant thereof similar to those set out in the First Schedule hereto and (save in the case of any premises which may be let at full or fair rents) shall substantially be in the same form as this Lease

To enforce covenants in other leases

(6) If so required by the Leaseholder to enforce the tenants’ covenants similar to those contained in this Lease which are or may be entered into by the tenants of other premises in the Building so far as they affect the Premises provided the Leaseholder indemnifies the Landlord against all costs and expenses of such enforcement”

Second Schedule; paragraph 4 - Easements Rights and Privileges included in the Lease

The right to enter other premises

“4. The right for the Leaseholder with workmen and others at all reasonable times on notice (except in case of emergency) to enter upon other parts of the Building

(i)

(ii) for the purpose of repairing maintaining renewing or rebuilding the Premises or any part of the Building giving subjacent or lateral support shelter or protection to the Premises causing as little disturbance as possible and making good any damage caused”

(NB The Third Schedule grants the Landlord a reciprocal right to Paragraph 4 above).

17. There was no dispute between the parties that the window frames belonged to the Respondents pursuant to the definition of “Premises” in The Particulars to the Lease. There also appeared to be no dispute between the parties that the Applicant was entitled to levy a service charge to reimburse itself for works carried out pursuant to clauses 5 (2) (3) and (4). The Tribunal noted that Clause 5(2) dealt with insurance, and clause 5(4) dealt with lighting and cleaning the common parts which are irrelevant to this application.

18. Contrary to the Applicant’s view, the Tribunal considered that the terms of Clause 3(3) cast the repair of the window frames squarely upon the Leaseholder, firstly because the frames were part of the “Premises”, and secondly because Clause 3(3) included “appurtenances” amongst those items repairable by the tenant. An appurtenance is defined as something belonging to a property, e.g. a right, (such as an easement) or an object (e.g. a window frame).

19. Further, the Landlord’s covenant in Clause 5(3)(a) (partly underlined by the Tribunal above) required the Landlord to repair the roof, structure and exterior of the Building, excluding parts of the Building which are not the responsibility of the Leaseholder. It should also be noted that the Landlord by virtue of this sub clause, is only entitled to charge for items not the responsibility of the leaseholders.

20. The Applicant effectively suggested that there was an ambiguity or lacuna in the Lease, which was curable by the interpretation it put upon the Landlord’s rights and obligations to repair. However the Tribunal was not convinced, on the balance of probabilities, that this view was correct. Applying the principles set out in Holding & Barnes plc v Hill House Hammond [2001] EWCA Civ. 1334, and considering the Lease provisions in their whole context, the Tribunal decided that the Lease, on the plain natural meaning of its words, appeared to have dealt fully and clearly with the repairing provisions. Further, it provided for situations where lessees failed to repair (Clause 5(5) and 5(6)) and provided the necessary cross rights of entry (Second and Third Schedules)

21. The Tribunal considered that there was no need to strain the words of the Lease as the Applicant suggested. It decided that there was a clear and workable procedure for dealing with repairs, and although it might not be the simplest procedure to operate in practice, that was what the parties had agreed. In an application under Section 27A, the Tribunal could not rewrite the Lease.

22. Thus the Tribunal decided that the terms of the Lease made the repair, maintenance and renewal of the window frames primarily the responsibility of the individual Respondents.

23. To assist the parties, the Tribunal notes that the Applicant may need to erect scaffolding for other purposes in the near future. Also, replacing the window frames may not require scaffolding. The parties might consider collaborating over the use of the scaffolding. The Applicant might also consider issuing a standard design specification, and even a costed window replacement package for individual leaseholders. This however, is entirely a matter for discussion between the parties, and does not form a part of the Tribunal's decision.

Section 20C Landlord and Tenant Act 1985

24. The Tribunal notes that only the Applicant's costs are in issue in this part of the application. The Tribunal decided that it would deal with these matters summarily. The Respondents submitted that the Applicant's costs of this application should not be considered relevant costs and added to the general service charge. The Tribunal is therefore asked to exercise its discretion (acting reasonably) when deciding if it should make such an order.

25. The Tribunal decided that it would decline to make an order under Section 20C. No estimate of those costs had been requested or provided. This application was a preliminary application and one of its stated objectives was to reduce costs for the Respondents.

Tribunal Judge: Lancelot Robson

Dated; 13th November 2019

Appendix 1

Landlord & Tenant Act 1985

Section 18

- (1) In the following provisions of this Act "service charge" means an amount payable by a Tenant of a dwelling as part of or in addition to the rent -
 - (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the Landlord's costs of management, and
 - (b) the whole or part of which varies or may vary according to the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the Landlord, or a superior Landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose -
 - (a) "costs" includes overheads, and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
 - (a) only to the extent that they are reasonably incurred, and
 - (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

- (1) An application may be made to a Leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -
 - (a) the person by whom it is payable,
 - (b) the person to whom it is payable,
 - (c) the amount which is payable,
 - (d) the date at or by which it is payable, and
 - (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- (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.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
 - (a) has been agreed or admitted by the Tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the Tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the Tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20C

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
- (2) The application shall be made—

- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;
 - (b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;
 - (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
 - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.
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Annex A

Mr D I Blackburn
Mr & Mrs J & E Walters
Mr J Q Currie
Miss H O Bayley & Mr R S Marshall
Mr D Hepworth
Mr J Smith & Mrs T Catto-Smith
Mr E G Watson
Mrs B Peaston
Mr & Mrs A R Beveridge
Mr M Fleetham
Mr M Lockie
Miss L A Brown
Mr D Stephenson
Mr & Mrs J & S Laidlaw
Estate of the Late Mrs J Burn
Mr K Turnbull
Mr G Newbury
Ms M Brown
Mr J Edmundson
Mr G Liddle