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Residential Property
TRIBUNAL SERVICE

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL for the
LONDON RENT ASSESSMENT PANEL
LANDLORD AND TENANT ACT 1985

LON/00AW/LSC/2009/0816

Premises:	86-88 Lexham Gardens London W8 5JB
Applicants:	Ms SG Fox (Flat 2 or "A") Ms T Ernest (Flat 3 or "B") Prof M and Mrs C Troup (Flat 4) Mr P and Mrs A Sebag (Flat 5) Mr A Oskolkov and Ms T Tolkacheva (Flat 6) Mr RM Berry (Flat 7) Mr ND McMillan (Flat 9)
Represented by:	Mr J May, John May Law solicitors
Respondent:	Norrick Investments Ltd
Represented by:	Ms G Bedworth of counsel Strain Keville solicitors
Tribunal:	Mr NK Nicol Mrs E Flint DMS FRICS
Date of Hearing:	25/03/10
Date of Decision:	25/03/10

REASONS FOR DETERMINATION

1. The Applicants are the lessees of seven of the nine flats at 86-88 Lexham Gardens, London W8 5JB. The Respondent has been the freeholder since 1979. The two non-participating lessees are Mr B Delaney of Flat 1, who it is conceded is the owner of the freeholder company, and Mr Cornwell of Flat 8.

2. Works are being carried out to the ceiling of Flat 8 and the beams between Flat 8 and Flat 9 above at an estimated cost of £30,765.84. The parties' respective experts are in full agreement that the works are necessary and appropriate because an unknown contractor had, at some time in the past, removed part of a structural beam, destroying the load-bearing capacity of the floor above. However, the Applicants' assert that no service charges are payable arising from the cost of these works for a number of reasons. The Tribunal has decided to reject the Applicants' submissions for the reasons set out below.

3. Before turning to the substantive issues, it should be pointed out that the hearing of this matter was originally scheduled to determine preliminary issues. As presented by the parties, the issues to be determined were not preliminary issues and the parties submitted that the Tribunal should hear the whole case. Therefore, subject to one issue considered further below, this is the Tribunal's final determination.

Repair

4. The Applicants' primary submission was that the defect which the works are to remedy does not fall within the repairing covenants of each lease, the details of which Mr May helpfully summarised in tabular form in his Skeleton Argument. They alleged that the defect was a defect already present when each of the lessees' purchased their interest, so that it was an inherent defect, not a matter of disrepair, and/or that it was caused by a third party with the permission of the Respondent or in default of proper supervision from the Respondent.

5. There was extensive argument in the papers before the Tribunal and in oral submissions as to when the defective work was carried out. The main suspects were 1966/67 when the property was first converted into flats or 1992 when

works were carried out, with a licence from the Respondent, to the top floor flat. The Respondent argued that the first date was the more likely while the Applicants conceded that it was not possible to know from the available evidence. However, the Tribunal does not need to rule on this issue because the Applicants' submissions fail entirely for other reasons.

6. Firstly, the defect in question is clearly disrepair and, therefore, within the repairing covenants in the subject leases. As Lawton LJ put it succinctly in *Quick v Taff Ely BC* [1986] 1 QB 809 at 821G, "that which requires repair is in a condition worse than it was at some earlier time." The beam in question used to be whole but has since been damaged. Disrepair does not change its nature by who caused it or whether it was caused negligently. It is a simple matter of fact and degree. It is also irrelevant that the defect arose prior to any of the lessees' acquiring their current interest. As Mr May conceded, a covenant to keep in repair extends to an obligation to put the relevant property into repair.

7. Secondly, the Applicants have not even begun to establish any factual or evidential basis for pinning liability for the defect on the Respondent. As Mr May conceded, they do not know who caused the defect or when. Nor did he put forward any legal principle or proposition on the basis of which the Respondent would be liable for the acts of a third party. At the Tribunal's prompting, Mr May asserted an obligation on the Respondent, as the trustee of the service charge account, to seek recovery of any sums due in damages for negligence by a third party but, due to the same lack of evidence, did not begin to establish the existence of any cause of action.

8. To be fair to Mr May and the Applicants, the works have been necessitated by a third party and they would appear to regard it as grossly unfair that they should have to bear the burden of the cost of remedying that third party's actions. They think the defect was caused at a time when the Respondent was the freeholder and assert that the Respondent thereby had the power to prevent it and, in default of exercising that power, should bear the loss. However, this argument rests on a number of fallacies, the main and crucial one being the aforementioned lack of evidence. An inference of the type made by the Applicants may seem compelling but is not enough to found a cause of action.

Works within Flat 8

9. The works include works to the ceiling of Flat 8. Mr May pointed out that these works were to areas demised to the lessee of Flat 8 and not apparently within the Respondent's repairing covenant. He asserted that the cost of such works should be removed from the relevant costs for any service charge. However, as Ms Bedworth pointed out on behalf of the Respondent, the works to the ceiling of Flat 8 are consequent on the other works – the one cannot be done without the other. In such circumstances, the Respondent is liable under the repairing covenant to include the works to the ceiling of Flat 8 and may put the costs through the service charge in the same way as in respect of the rest of the works.

Service charge proportions

10. Each of the leases specifies the proportion of the relevant costs which each lessee is to pay as their service charge. However, the proportions in all nine leases add up to 106%. The Respondent has dealt with this by conferring a unique benefit on Mr Delaney, charging him only 2% instead of the 8% specified in his lease, so that the total service charges demanded add up to only 100%. Not surprisingly, the Applicants baulk at the obvious unfairness of this. If the Respondent were to collect the full 106%, there would be a surplus on the service charge account, the due proportion of which each lessee would be able to recover. Instead, Mr Delaney gets a unique, unearned benefit, presumably because the Respondent is his company.

11. Mr May asserted that the Respondent's actions in relation to Mr Delaney's unique concession had a number of consequences:-

    (a) He argued that all the service charge demands were defective because Mr Delaney's specified the wrong percentage. The Tribunal rejects this argument. The demands to each of the Applicants were entirely proper and in accordance with their leases. They cannot be rendered defective by a defect in someone else's demand.

    (b) Mr May further argued that the consultation carried out under s.20 of the Landlord and Tenant Act 1985 was consequently defective. The Tribunal is

unable to understand how the wrong percentage being applied to Mr Delaney can result in a defect to the consultation process.

(c) Mr May argued that the service charge demands were unreasonable and relied on s.19 of the Landlord and Tenant Act 1985. However, s.19 refers to the reasonableness of the relevant costs, which the Applicants are not challenging.

12. The fact is that the service charge demands to each of the Applicants fully complied with their leases. The unfairness derives from the potential over-recovery of service charges due to the incorrect percentages being listed in the leases. The Tribunal accepts that the Respondent's unique concession to Mr Delaney is unfair and possibly unlawful but there does not appear to be a remedy available which is within the Tribunal's jurisdiction, other than a possible variation of the lease under s.35 of the Landlord and Tenant Act 1987 to vary the percentages for which there has yet to be any application. It is the Tribunal's hope that the parties find a fair resolution to this issue, not least in order to avoid possible further litigation.

Costs

13. The Applicants sought an order under s.20C of the Landlord and Tenant Act 1985 requiring the Respondent not to include the costs of these proceedings in any future service charges. The Tribunal could not identify any provisions in the leases which would allow the Respondent to recover such sums but that is a dispute for another day since the Respondent had no notice that the Applicants would make this argument to the Tribunal. If there is such a power in the leases, the Tribunal should bear in mind that it is an entitlement which should only be curtailed if it is just and equitable in all the circumstances. In this case, the Applicants have failed to establish any of their points and so there is no basis in justice or equity to make such an order.

Conclusion

14. The Tribunal is satisfied that the costs of the works have been reasonably incurred and any service charges based on them are payable. The Tribunal is not

able to specify the sums in question because the parties had not exchanged all relevant documents and could not agree on whether the sums had been accurately calculated. Since this is merely a matter of arithmetic, the Tribunal hopes that the parties can resolve this one matter between them without any further visit to the Tribunal. However, the parties may apply for leave for a further hearing on this issue at any time before 25th May 2010, in the absence of which the Tribunal will close its file.

Chairman N.K.Neil.....

Date 25th March 2010