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HM Courts & Tribunals Service

LEASEHOLD VALUATION TRIBUNAL

Case number : CAM/33UF/LSC/2013/0035

Property	:	**35 Prince of Wales Road, Cromer, Norfolk NR27 9HS**
Application	:	For determination of liability to pay service charges for the year 2013 [LTA 1985, s.27A]
Applicant	:	Michael Ling
Respondent	:	Ms Anna Hunt
Interested party	:	Mr E Pooley

DECISION

handed down 29th May 2013

Tribunal	:	G K Sinclair (chairman), G S Smith MRICS FAAV REV & D Reeve
Hearing date	:	Friday 24th May 2013 at The Links Hotel, West Runton, Norfolk
Representation	*Applicant*	in person
	Respondent	in person
	Interested party	no appearance or representation

1. By this application, challenging certain service charge works, the Applicant appeared to be seeking a determination that the works constituted "improvement" rather than "repair" and therefore the amounts which his landlord would seek from him were not recoverable. Until the inspection and hearing the impression given by the papers was that the works had been carried out. This proved not to be the case. The works have not been started, no budget provided and no sum demanded.

2. In the circumstances this application is premature, but for the reasons which follow the tribunal determines that if the landlord were to consult properly then :
   a. The recarpeting and internal redecoration would be reasonable and recoverable under the lease
   b. The replacement of defective light switches in the common parts would be a reasonable repair at reasonable cost
   c. If required by the local housing authority or fire authority or as a condition of any future insurance policy then the cost of installing smoke alarms and providing fire extinguishers would be reasonable and recoverable under the lease
   d. The replacement of external door locks with those meeting insurance industry minimum standards would constitute reasonable repair (or be recoverable if required by the insurer), whereas a key code lock would not necessarily do so. Anything more exotic, such as an electronic remote door entry system, would be an improvement and its cost would not be recoverable under the lease.

3. Had the Applicant made an application under section 20C concerning the addition of the landlord's costs to this or any future year's service charge, which he expressly did not, then it would have been refused.

4. The landlord sought an order for the recovery of her legal costs incurred in connection with this application. She presented a copy of an invoice from Pope & Co for £1 115 in respect of reviewing the lease, correspondence and drafting her witness statement for the tribunal. The governing principles and financial cap on any award of costs appear in paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002. For the reasons which follow the tribunal declines to make any award.

Material lease provisions

5. The lease in question is dated 25th October 1991 and made between Trevor Spencer Emery as lessor and Patricia Gail Emery as lessee. It concerns the first floor flat (one of three in this converted building) and grants a term of 99 years from 1st September 1987 at a yearly rent of £50 payable in advance on the 1st September in each year without any deduction

> ...and also by way of further or additional rent from time to time a sum or sums of money equal to one third part of the amount which the lessor may expend in carrying out his obligations under clause 5 hereof.

The unexpired term at the date of this decision is therefore just over 73 years.

6. About three years ago Mr Ling acquired the lease of the first floor flat by assignment. On 1st February 2013 Ms Hunt, in exercise of her statutory right of first refusal as an existing leaseholder of the top floor flat, acquired the freehold reversion from Mr Emery. For financial reasons Mr Ling had declined to join in the purchase.

7. By clause 3(1) the lessee covenants to pay the reserved rent on the days and in the manner mentioned and by 3(2) to pay all existing and future rates taxes assessments and outgoings whether parliamentary local or otherwise imposed or charged on the flat or, if imposed on the building without apportionment, to pay one third only.

8. By clause 5(1) the lessor covenants to pay all existing and future rates taxes assessments and outgoings now or hereafter imposed or payable in respect of the building and not payable by the lessees under their leases.

9. By clause 5(3) the lessor covenant to insure and keep insured the building during the term against the perils usually covered by a householders comprehensive policy

> ...and to make all payments necessary for the above purposes within seven days after the same shall have become payable...

10. Clause 5(5) is the repairing covenant and bears quoting in full :

> To repair and keep in tenantable repair (except in so far as the burden is laid hereunder upon the lessee) the structure of the building and all additions thereto including the roof and foundations gutters and rainwater pipes electricity gas and water pipes the main entrance and passages landings staircases and common parts and the walls fences and drains thereof all exterior paint work to be painted

at least once in every three years and the exterior brickwork to be painted as required.

Relevant legislative provisions

11. Section 18 of the Landlord and Tenant Act 1985 defines the expression "service charge", for the tribunal's purposes, as :

> 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...

12. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :

a. only to the extent that they are reasonably incurred, and

b. where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.

13. The tribunal's powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

14. Insofar as major works are concerned, ie those in respect of which the contribution of any tenant liable to pay towards the service charge will exceed £250, then section 20 provides that the relevant contributions of tenants are limited to that amount unless the consultation requirements have been either complied with in relation to the works or dispensed with by (or on appeal from) a leasehold valuation tribunal. The consultation requirements, in the instant case, are those appearing in Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003[1] (as amended).

15. Two further provisions, concerning demands for payment of service charge, are relevant to this case. First, by section 47 of the Landlord and Tenant Act 1987, where any written demand is given to a tenant of premises for rent or other sums payable under the lease (which expression would include a demand for payment of service charge), the demand must contain the name and address of the landlord.

16. Secondly, since 1st October 2007 section 21B of the 1985 Act provides that a demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges. The content of that summary is prescribed by the Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007.[2] The document must contain the prescribed heading and text and must be legible in a typewritten or printed form of at least 10 point.

[1] SI 2003/1987

[2] SI 2007/1257

Inspection and hearing

17. The tribunal inspected the property at 10:00 on the morning of the hearing. It is a mid-terraced house situate on a busy one-way street in the heart of Cromer, accessed directly from a narrow pavement. Most nearby premises have shop units on the ground floor. Although there is a common yard to the rear (easily accessed by the public via West Street) the proposed works affect only the interior, so the inspection was confined to the entrance hall and stairway. Also, the Yale lock to the glazed rear door had been found to be broken that morning, so the tribunal did not wish to make it worse by attempting to open the door.

18. The stairway giving access to Mr Ling's flat on the first floor and Ms Hunt's on the second is quite gloomy and is lit by several ceiling lights controlled by a timer switch on each landing. Some of these are said to be defective, although they appeared to work on the day. The carpet on the stairs, first floor landing and hallway is worn, torn at one point, grey in colour and has seen better days. Under the stairs, by a parked bicycle, a large patch of carpet was observed to be stained by what the tribunal was informed is oil, the source of which is unknown.

19. Above head height on the wall just inside the inner doorway on the ground floor the tribunal noticed that a large area of the paint surface is lifting and peeling. Whether the plaster surface beneath also shows signs of crumbling requires closer inspection under better lighting conditions.

20. Neither the front door nor the rear door to the yard (the latter with a large single-glazed panel) are secured by anything better than an ordinary non-deadlocked Yale rim lock. The lessor's intention, challenged by Mr Ling, was to replace that on the front door to the street with a keypad controlled lock.

21. At the hearing the tribunal had before it a small bundle comprising the application, directions, copy lease, a detailed witness statement by Ms Hunt with exhibits, and some additional documents and correspondence from herself to Mr Ling. His only response, dated 10th March 2013, was to inform her that he had applied for a dispute resolution to the Leasehold Valuation Tribunal.

22. The evidence that emerged at the hearing was that the original lessor, Mr Emery, was a self-employed builder who would arrange the external work on the property himself, never consult about it, and then invoice the lessees for the expense he had incurred (or his charge-out rate) in September. Mr Ling had paid without demur. However, Mr Ling said that Mr Emery had focused on the exterior only, perhaps because he knew that under the lease he could not recover for interior decoration. As for Ms Hunt's plans to smarten the place up, this he felt was designed only to increase the freehold value; it would have no effect on the value of his own flat. The proposed works could not be classed as "repair" but were instead "improvement" and not recoverable from lessees under the lease. Replacement of the stair carpet was not making a "repair" but providing something else new and better, so it was not recoverable. Expensive locks were also an improvement.

23. Also, whereas Mr Emery would incur expenditure and then claim back a share in

September, Ms Hunt would invoice for a one third share immediately after incurring any expenditure (such as insurance). She also wanted to establish a reserve fund for periodic works such as external decoration. (It was pointed out to him by the tribunal that the lease provides for recovery "from time to time" of sums which the lessor "may expend", which could include payment in advance).

24. Ms Hunt, when asked why in paragraph 13 of her statement she said that she intended

> ...to get a further quote for the decorating as it exceeds £1 000

said that this was the legal advice she had received from Pope & Co; that £1 000 was the limit. The tribunal explained that the statutory consultation requirements had changed some time ago and that the relevant threshold was now £250 per flat for "major works". She confirmed that she had not as yet demanded any money for these works.

25. Ms Hunt said that, although in her statement she expressed her opinion about what an insurer might want, no insurer had yet imposed any requirements about smoke alarms and fire extinguishers. As she had simply left the insurance with the company used by her predecessor[3] no insurance agent had yet come round to inspect the condition of the building or the state of its external locks.

26. She said that recarpeting and redecorating needs to be done properly once, then it won't need to be done for a few years. She said that she would go for a darker carpet. So far as the timer switches controlling the lights were concerned she had obtained a report from an electrician, which was in the bundle.

27. At the conclusion of the hearing Mr Ling made clear that the reasonableness of the cost was not in issue. He simply argued that the proposed works were improvement and not repair. The cost was therefore irrecoverable.

Discussion and findings

28. Many leases contain a series of sub-clauses concerning repair, renewal, and internal and external redecoration. One often sees a sub-clause concerning repairs, etc, another to do with the nature and timing of internal redecoration and a third in similar terms to do with external redecoration. This lease contains just the one repair clause, at the end of which is tacked on a provision dealing with how frequently the exterior paintwork should be painted. Redecoration seems therefore to be subsumed within the overall term "repair", although nothing is said about how frequently the interior should be painted.

29. What is a repair, a renewal or an improvement? A repair is usually to a part of an item, or the thing demised. That repair can involve renewal or replacement of part but not the whole of the thing concerned. However :

> If an earthenware pipe breaks, you can only repair it by renewing it. Or, again, if window frames become rotten and decayed, you cannot repair them except by renewing; and many other instances might be given.[4]

According to legal authority it is all a question of fact and degree. In some cases the only

[3] Norwich & Peterborough, now taken over by Towergate

[4] *Lurcott v Wakely* [1893] 2 QB 212 (CA), per Cozens-Hardy MR

realistic way of effecting the relevant repairs is to carry out additional work which will go somewhat further than putting the property back into its former condition and will indeed result in some improvement.[5]

30. The carpet is part of the main entrance, stairs, landing and passages. Unless one has a valuable Persian rug it is almost unheard of to attempt to repair a carpet by replacing particularly worn sections with new. The parts will not match, and the fresh joins will create only further points where the carpet may work loose and create a tripping hazard. Also, the cost of patch repairs will in most cases outweigh that of removing the worn carpet and simply replacing it with new.

31. The tribunal is satisfied that renewal of the stained and worn carpet is a repair of part of the main entrance and passages, landings staircases and common parts. The estimate submitted is reasonable but is above the major works consultation threshold. Provided that proper consultation takes place the cost is recoverable under clause 5(5).

32. Internal redecoration, following removal of the badly flaking paintwork, rubbing down and making good of the underlying surface also qualifies as a repair, as clause 5(5) clearly treats external redecoration as a recoverable cost under the heading "repair". It would be surprising if internal redecoration (even if no regularity of treatment is specified) were not also so treated. Again, Ms Hunt is aware that the estimate is high and so intends to seek another. Provided that proper consultation is undertaken – and both these items can be considered together – then the cost is recoverable.

33. The provision of smoke alarms and fire extinguishers is undoubtedly sensible, but is it an improvement? They are not there now, and have not been before. Should the need for them be imposed either by direction of the local housing authority using its powers under the Housing Act 2004 or by the local fire authority, or be imposed as a condition of obtaining insurance cover, then such cost could arguably be recovered under clause 3(2) and 5(1) as an outgoing imposed on the building by the local authority or under clause 5(3) as a necessary payment incurred to obtain insurance cover. Their presence might also reduce the annual insurance premium, which can only benefit the lessees.

34. Provision of a 5-lever deadlock to both front and rear doors is neither unreasonably expensive nor an improvement. It is an insurance industry standard and has been for many years. The current locks are non-compliant. One is broken. Replacement with a keypad controlled lock is, however, very different in character to what is there now (and whether it is an "improvement" is debatable).

35. The tribunal is satisfied from the evidence before it that replacement of some or all of the existing light switches is a repair, is reasonably necessary, and the cost is reasonable. No consultation is required.

36. As no work has been carried out and no demand made for any advance payment of service charge the tribunal considers that Mr Ling's application was premature. Further, it is dismayed by his complete failure to engage with Ms Hunt and raise with her the

5 *Quick v Taff-Ely Borough Council* [1986] QB 809

results of his enquiries of the Leasehold Advisory Service. She wrote to him about her plans on numerous occasions without any response from him. She only lives one flight up the stairs.

37. She, on the other hand, appears to have been ill-served by her legal advisers on the subject of consultation. The tribunal trusts that the information conveyed at the hearing and in this decision about basic management issues is helpful and will ensure that she follows the correct procedures for recovering service charge contributions.

Costs

38. At the conclusion of the hearing Ms Hunt asked for recovery of her legal costs. These amounted to £1 115. A solicitors' bill was produced. The tribunal had to explain to her that its powers to award costs are strictly limited by paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002. This provides that the tribunal may only make an award of costs if a party

> ...has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

The maximum that may be awarded is capped at £500.

39. Ms Hunt accepted that Mr Ling had not acted vexatiously, abusively or disruptively. That leaves only "frivolously" and "otherwise unreasonably". The amounts and issue at stake are not trivial or frivolous. The decision to apply to the tribunal for a determination of one's legal rights without first engaging with the lessor might in certain circumstances be regarded as unreasonable but not, on balance, in this. Although no formal demand had been made it was Ms Hunt's practice (at least starting with the insurance) to ask for money on a frequent basis and in respect of separate items. The lease appears to allow this (provided the demands comply with the law). He could perhaps anticipate that she might simply proceed with the disputed work and then claim a share from him.

40. The lessor's application for costs is therefore dismissed.

41. Mr Ling has not asked for an order under section 20C of the Landlord and Tenant Act 1985. Had he done so the tribunal would not in the circumstances outlined above have granted it.

Dated 29th May 2013

Graham K Sinclair – Chairman
for the Leasehold Valuation Tribunal