LRX/130/2006

LANDS TRIBUNAL ACT 1949

Landlord and tenant- service charges

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN **ASHLEY GARDENS FREEHOLDS LTD** **Appellants**

and

MR M COLE **Respondent**

Re: Ashley Gardens
Thirleby Road
London SW1P 1HN

Before: His Honour Judge Reid QC

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL on 5 November 2007

© CROWN COPYRIGHT 2007

DECISION

1. This is an appeal against a decision of a Leasehold Valuation Tribunal on an application under sections 27A and 20C of the Landlord and Tenant Act 1985 as amended. By the application Mr Cole, the lessee of Flat 142a, Ashley Gardens, Thirleby Road, London SW1, applied for a determination as to whether the landlord, Ashley Gardens Freeholds Limited ("Ashley Gardens"), was entitled to charge the costs in connection with preparatory works to the windows of Blocks 1-5 and 8-11 Ashley Gardens prior to external decoration of the windows, to the service charge accounts in the years ending December 2003, 2005 and 2006. The preparatory works consisted of the application of a proprietary pre-paint repair system to the windows. It was common ground that under the terms of Mr Cole's lease Ashley gardens was obliged to paint the whole of the outside of the Blocks (including the wooden windows) wherever necessary.

2. Ashley Gardens argued before the LVT that the works done on the windows before repainting in accordance with its obligations under the various long leases of flats comprised in the blocks comprised merely work preparatory to the proper painting of the Blocks and that it was entitled to charge to the service charge account both the cost of the preparatory works and of the painting. Mr Cole accepted that Ashley Gardens could charge for ordinary preparatory works but argued that these preparatory works amounted to works of repair. He submitted that since the individual lessees had covenanted to keep their flats (including the respective wooden window frames) in repair, the cost of the preparatory work to those windows which were windows to individual flats as opposed to windows opening onto common parts, was not properly chargeable to the service charge account.

3. As a secondary argument Ashley Gardens argued that even if the works were works of repair it was entitled to charge those charges to the service charge account by virtue of clause 5(18) of Mr Cole's lease. That clause provides as follows:-

> "Subject to and conditional upon payment being made by the Lessee of the service charge at the times and in the manner hereinbefore provided the Lessors (but not to bind themselves after they shall have parted with the reversion of the demise premises or to incur further liability thereafter) hereby covenant with the Lessee to perform the following obligations namely:-
>
> .... (18) Without prejudice to the foregoing do or cause to be done all such works installation acts matters and things as in the absolute discretion of the Lessors be necessary or advisable for the proper maintenance safety and administration of the Buildings".

Mr Cole argued that Ashley gardens was not entitled to rely on this clause.

4. The LVT held that the preparatory works amounted to repairs rather than mere preparation and against that decision there is no appeal. But the LVT went on to hold that

Clause 5(18) did not enable the landlords to do the works found to be works of repair and to charge them to the service charge account.

5. The LVT's decision in relation to this point was very short:

> "17. They then considered Mr Letman's argument that if this were their conclusion the lease contained a provision at Clause 5(18) which enabled the landlords to do such work, at his absolute discretion, 'for the proper maintenance safety and administration of the Buildings'.
>
> 18. The Tribunal did not accept that such works of repair as were being questioned came within this provision which was in the nature of a re-entry clause."

6. The case for Ashley Gardens before the Lands Tribunal is that Clause 5(18) is wide enough to embrace the pre-paint repair system works to the windows. It argued that the discretion under Clause 5(18) was unqualified and enabled it, amongst other things to do those works which are "necessary or advisable for the proper maintenance of the Buildings". No suggestion having been made that the system was in anyway inappropriate, there could be no doubt that the pre-paint system work as specified was necessary or otherwise advisable for the proper maintenance of the Buildings. The works ensured that the required painting was properly carried out. Indeed the surveyor's advice was that the use of the pre-paint system was essential to meet Ashley Gardens' obligation to repaint. It was further argued that there was nothing in Clause 5(18) to prevent the Clause being used to repair parts of the Buildings within individual demise premises, such as the window frames (the windows of each flat forming part of the demise of the flat). The definition of "Buildings" was not limited in any way but included the entirety of the blocks of flats. The previous sub-clauses (1) – (17) comprehensively covered the both the demised parts of the buildings and the retained premises and were not limited in any way and therefore sub-clause (18) must also extend to the demised premises.

7. There was no unfairness, it was submitted, to any of the lessee in this. The provisions of Clause 6 gave protection to the lessee. Clause 6 begins "The Lessors will act fairly and reasonably in carrying out its [sic] obligations under Clause 5 hereof and will at all times endeavour to manage and maintain the Buildings economically and efficiently....". Furthermore it was pointed out that were the works disproportionate or unnecessary protection could be had by means of application to the LVT under the Act of 1985.

8. Ashley Gardens also submitted that it could not be said that Clause 5(18) was in any way a condition of re-entry or anything like it and noted that the LVT gave no reasons for this part of their decision.

9. In response Mr Cole submitted that the likes of Clause 5(18) had no place in modern leases. Absolute discretion flew in the face of the landlord and tenant legislation over the past 40 odd years and was wholly unreasonable. Absolute discretion clearly needed to be

absolutely restrained. He submitted that Ashley Gardens ought not to be seeking to charge the repairs to individual windows in individual flats to the service charge fund. The proper course would be to force each of the tenants whose windows were in need of repair to do those repairs at their own expense and then charge the service charge fund only in respect of windows to the common parts and the actual repainting and redecoration works. He pointed out that the benefit of the repair works being charged to the service charge fund accrued unfairly to those flats on the upper floors and with outward facing windows which were much more likely to be damaged by the elements than to those flats on the lower floors and all with windows facing into light wells where the likelihood of damage by the elements was far less. He complained that the activities of the landlord had been inconsistent (eg it had charged an individual tenant for repairs to a window in replacing sashes) but in other cases had not sought to charge the necessary pre-painting repair work to the individual tenants. His submission was that even though it would require Ashley Gardens to scrutinise each of the windows involved (over 2000 windows in all) before starting on the works, this was necessary so that the landlord could fairly determine what part of any repair work was properly chargeable to the service charge account and what part should be charged to each individual tenant.

10. In my judgment the submissions on behalf of Ashley Gardens are correct. Clause 5(18) does permit the landlord to do works including repair works. The discretion is, as the lease says, absolute, but there are adequate safeguards for the tenants against misuse of power by the landlord. They are to be found not only in the Landlord and Tenant Act 1985 but also in Clause 6 of the lease. It is impossible, in my judgment, to categorise the works of repair which fell to be done as being "in the nature of a re-entry clause" as the LVT apparently thought. There was no dispute that in carrying out its obligation to repaint the windows Ashley Gardens was required to carry out the necessary preparatory work. Whilst the works using this particular proprietary window care pre-paint repair system included works of repair rather than purely preparation and painting, in my judgment the landlord was entitled to do that work using that system as being work "necessary or advisable for the proper maintenance safety and administration of the Buildings" by virtue of Clause 5(18). It is therefore entitled to charge sums properly incurred in using that system to the service charge account. It follows that in my judgment the decision of the LVT in this respect was wrong and the appeal will therefore be allowed.

Dated 7th November 2007

His Honour Judge Reid QC