LRX/150/2007

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – service charges – landlord's covenants to maintain exterior of window frames of flat and to maintain exterior of block in which flat contained – whether landlord's obligation to maintain windows in exterior of block other than those of flat – held yes so that cost of replacing windows could be included in service charge – appeal dismissed

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

BETWEEN **MS G C CAHALANE** **Appellant**

and

LONDON BOROUGH OF WANDSWORTH **Respondent**

Re: Flat 25, Fordyce House,
Colson Way,
London SW16 1SF

Before: The President

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 20 October 2008

Justin Bates instructed by Anthony Gold for the appellant
Jon Holbrook instructed by Ashford, solicitors of Exeter, for the respondent

The following cases are referred to in this decision:

Gilje v Charlegrove Securities Ltd [2001] EWCA Civ 1777.
Tam Wing Cheun v Bank of Credit and Commerce Hong Kong Ltd [1996] 2 BCLG 69.
Sheffield City Council v Oliver (Lands Tribunal ref LRX/146/2007, 18 August 2008, unreported)
Irvine v Morgan [1991] 1 EGLR 261

The following further cases were referred to in argument:

Prestcold (Central) Ltd v Minister of Labour [1969] 1 WLR 89
R (Khatun) v London Borough of Newham [2005] QB 37
SA Maritime et Commercial of Geneva v Anglo-Iranian Oil Co Ltd [1954] 1 WLR 492
Marlborough Park Services Ltd v Rowe [2006] HLR 30

DECISION

1. This an appeal against a decision of a leasehold valuation tribunal dated 24 July 2007 under section 27A of the Landlord and Tenant Act 1985. At the time of the LVT hearing the appellant was the leasehold owner of Flat 25, Fordyce House, Colson Way, London SW16 1SF under a lease for 125 years granted to her by the respondent, the London Borough of Wandsworth, in December 1997. The lease was not granted under the Right to Buy provisions of the Housing Act 1985. The respondent is the freehold owner. In October 2004 the respondent began a major works programme to the Colson Way Estate, which consists of six blocks of flats, of which Fordyce House is one. As part of the works programme the timber windows of a number of flats were replaced with PVC units, but the appellant objected to having her windows replaced and the respondent did not replace them. She later had new windows installed at her own expense.

2. The respondent levied service charges amounting to £7,251 in respect of the works, and the appellant has paid this amount. A substantial part of the charges represents the appellant's contributions towards the costs incurred in replacing the windows of other flats in the block. She contends that under the terms of her lease she is not obliged to pay for works to the windows of other flats. The LVT rejected this argument, and she now appeals under permission to appeal granted by Judge Gilbart QC.

3. The issue is purely one of construction of the lease. The starting point is the Fourth Schedule, which is entitled "Council's Obligations in respect of the Block". "Block" is defined as "the block or block of flats together with the entrance ways and common parts shown edged in blue on plan No.1." Paragraphs 2 and 3 of the schedule are material for present purposes:

> "2. Subject to the terms of paragraph 7 of the Third Schedule hereto at all times during the term well and substantially to repair cleanse uphold support and maintain the exterior of the Block and the communal television aerials door entry systems fences walls and the entrance ways paths lifts staircases main walls party walls roof foundations and all structural parts thereof respectively including but without prejudice to the generality of the foregoing all those parts used in common with lessees of other flats in the Block and all drains watercourses sewers pipes water pipes gas pipes electric wiring gutters down pipes and other conduction media belonging thereto respectively with all necessary reparations and amendments whatsoever and to light the passages landings lifts balconies staircases and other communal parts of the Block –
>
> 3. To repair and maintain the exterior of the window frames window sashes and balcony or patio doors and of the frames thereof (if any) of the Flat and as often as may be necessary to replace the whole or part of the window frames window sashes window furniture and balcony or patio doors and frames and furniture thereof (if any) –"

4. Paragraph 4 requires the council as often as may reasonably be required to paint all the outside parts of the block which are usually or ought to be painted and to decorate the interior common parts; and paragraph 5 requires the council to do such things as they may decide are necessary to ensure the efficient maintenance administration or security of the block.

5. "Flat" is defined as follows:

> "The Flat shown edged in red on Plan No.2 and located on the sixth floor of the Block as specified in the Particulars including for the purpose of obligation as well as grant:-
>
> (i) the interior part of the window frames and of the balcony or patio doors (if any) and the glass in the windows and in the balcony or patio doors (if any) of the Flat (subject to the Council's duty to maintain the same as provided in paragraph 3 of the Fourth Schedule hereto) ..."

6. Clause 3(b) contains the lessee's covenant to pay a service charge. Part of the service charge consists of:

> "the Fourth Schedule percentage of the costs expenses and outgoings of the Council from the date of the Notice of Estimates given by the Council in complying with its obligations under paragraphs 2, 3, 4 and 5 of the Fourth Schedule hereto."

The "Fourth Schedule percentage" is stated to be 3.617%.

7. For the appellant Mr Justin Bates submits that on a proper construction of the lease the council's obligations in respect of the repair and maintenance of windows is confined to the repair and maintenance of the exterior of the window frames of the flat as provided for by paragraph 3 of the Fourth Schedule and that they have no obligation under paragraph 2 to maintain and repair the exterior of other windows in the block; and accordingly the council are not entitled to include in the service charge the cost of replacing such other windows.

8. Mr Bates essentially advances two arguments. Firstly he says that the Fourth Schedule in clear terms does not provide for the council to repair and maintain the exterior of windows in the block other than those of the appellant's flat. He accepts that, if there were no paragraph 3, the obligation in paragraph 2 to repair etc "the exterior of the block" would probably extend to all the windows including those of the flat. But, he says, since paragraph 3 is not introduced by a phrase to the effect that its provisions are without prejudice to those of paragraph 2, the two sets of provisions must be construed so that they do not overlap. The obligation to repair and maintain windows is expressly covered in paragraph 3, so that paragraph 2 cannot be construed as extending to windows also. There could be no point in providing in a separate paragraph for the repair and maintenance of the windows of the flat if this was already provided for by paragraph 2.

9. Alternatively, Mr Bates says, if it is not clear that paragraph 2 extends to the repair and maintenance of windows, established principles of construction require that it should not be construed as so extending. The first principle is that for a landlord to recover money from a

tenant under a service charge there must be clear terms in the contractual provisions entitling him to do so. He refers to *Gilje v Charlegrove Securities Ltd* [2001] EWCA Civ 1777. Associated with this principle is the contra proferentem rule of general application, that words will be construed against the person who put them forward for inclusion in the agreement. On this Mr Bates refers to *Tam Wing Cheun v Bank of Credit and Commerce Hong Kong Ltd* [1996] 2 BCLG 69. In addition regulation 6 of the Unfair Terms in Consumer Contracts Regulations 1994 provided (and regulation 7 of the 1999 Regulations continues to provide) that "if there is doubt about the meaning of a written term the interpretation most favourable to the consumer shall prevail." (The lessee is a consumer for this purpose.) On this basis, any doubt about whether paragraph 2 extends to the repair and maintenance of the exterior of other windows in the block must be resolved in favour of the appellant.

10. For the council Mr Jon Holbrook advances two contentions. The first is that the provisions of the Fourth Schedule should be construed in the context of the lease as a whole and that, so construed, they embrace the windows of the block as part of the exterior or structure of the block. Secondly he says that, if the appellant is right, there would be absurd consequences; and this shows that the contentions advanced on her behalf are wrong.

11. Mr Holbrook refers to the lessee's covenant at clause 3(i) to "keep the flat in good and tenantable repair". He points out that the flat is defined "for the purpose of obligation as well as grant" to include "the interior part of the window frames ... (subject to the Council's duty to maintain the same as provided in paragraph 3 of the Fourth Schedule)". Paragraph 3 itself, he says, is in two parts. The first is the requirement to repair and maintain the exterior of the windows. The second is the requirement "as often as may be necessary to replace the whole or part of window frames ...." The second obligation is required to enable the different responsibilities of the lessee in respect of the interior of the window frames and the council's responsibility in respect of the exterior to be brushed aside when the frames require replacement. Thus paragraph 3 has an essential function in relation to the flat that is not achieved by the obligation in paragraph 2 in relation to the exterior of the block. There is therefore, he says, no ambiguity, and in paragraph 2 the exterior or alternatively the structure includes the exterior of the windows in the block.

12. The absurd consequences which Mr Holbrook says would arise if the lessee's contentions were to succeed are two. Firstly the lessee would have no right to require the council to maintain the exterior of the windows in the block, and this would be highly undesirable. Secondly, he points out that, while the tenant would have no obligation to pay anything towards the cost of replacing the windows of other flats in the block, if the windows of her flat required replacement she would only have to pay 3.617% of the cost, and that, says Mr Holbrook, would be absurd.

13. I accept Mr Holbrook's submissions. There is, in my judgment, no doubt that the words in paragraph 2 providing for the repair and maintenance of "the exterior of the Block" and "all structural parts thereof" are apt to cover repair and maintenance of the exterior windows: see *Sheffield City Council v Oliver* (Lands Tribunal ref LRX/146/2007, 18 August 2008, unreported) applying *Irvine v Morgan* [1991] 1 EGLR 261. I can see no justification for

treating paragraphs 2 and 3 as providing for mutually exclusive obligations. Paragraph 2 is concerned with repair and maintenance of the block, and paragraph 3 with repair and maintenance of exterior windows in the flat. The explanation for the specific provisions of paragraph 3 is the one given by Mr Holbrook, and there is no reason to cut down the ambit of paragraph 2 because of what paragraph 3 provides. There is in my judgment no ambiguity.

14. Even if there were doubt as to the scope of paragraph 2 I am by no means sure that case law and the Unfair Contracts Regulations would require the doubt to be resolved in favour of the lessee in the present case. Paragraph 2 imposes obligations on the landlord, and in other circumstances the lessee might be disposed to contend that the obligations extended to the repair and maintenance of the windows of other flats in the block. The value of her flat and her enjoyment of it could be adversely affected if lack of repair of these adversely affected the appearance of the block. It is only the service charge consequences in a situation where the council have replaced some windows in the block but not hers that causes her to argue for a limited meaning to be given to the obligations of the council under paragraph 2. It does not seem to me that to construe the provision contra proferentem would require that the obligation should be construed narrowly or that such narrow interpretation would necessarily be the one "most favourable to" the lessee.

15. Finally, there could be no possible reason for requiring the lessee to pay only 3.617% of the cost of replacing the frame of her windows whilst not requiring her to pay anything towards the replacement of window frames in other flats in the block. The percentage is one that relates her flat to the block as a whole and it is designed to ensure that fair mutual contributions to the costs of repair and maintenance are made. The implication of applying the percentage to the costs of repairing and maintaining the exterior of the windows of the lessee's flat is that she would be liable for the same percentage contribution to the costs of repairing and maintaining the exterior windows of other flats in the block; and this supports the conclusion that paragraph 2 extends to those windows.

16. The appellant's contentions accordingly fail, and the appeal must be dismissed.

Dated 21 October 2008

George Bartlett QC, President