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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/00AN/LIS/2012/0099**
Property	:	**1-44 Samels Court, London, W6**
Applicant	:	**SAMELS COURT (W6) LIMITED**
Representative	:	**MR DUCKWORTH (Counsel)**
Respondent	:	**LESSEES OF 1-44 SAMELS COURT**
Representative	:	**No attendance**
Type of Application	:	**Section 27A and 20ZA**
Tribunal Members	:	**Judge D Dovar** **Mr Wilkey FRICS**
Date and venue of Hearing	:	**7th October 2013** **Wandsworth County Court**
Date of Decision	:	**8th October 2013**

DECISION

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1. These related applications, both dated 8th October 2012, under sections 27A and 20ZA of the Landlord and Tenant Act 1985 are in respect of intended major works to all the windows at 1-44 Samels Court, London, W6 ('the Property'). The section 27A application was amended on 10th December 2012. The Applicant seeks a determination as to whether the costs incurred in either repairing the windows or replacing them with uPVC would be payable by the leaseholders by way of service charge.

2. In the course of these proceedings, the Respondents were invited to indicate whether they consented to or opposed the application. Of the 44 leaseholders, all bar 6 consented to the application. Of those 6, 4 later withdrew their objections, one did not respond at all and the other did not wish to use lawyers or call witnesses but set out their objection in writing (in a letter dated 28th August 2013). No one attended either the site visit or the hearing in order to object to the applications.

The Property and inspection

3. The Tribunal inspected the premises before the hearing in the company of the following on behalf of the Applicants: Neil Maloney (Managing Agent), Lesley Hurd (Director and Lessee of Flat 34), Graham Knox (Director and Lessee of Flats 27 and 28) and Nathaniel Duckworth of Counsel.

4. Samels Court comprises 44 self-contained flats in two four storey and one three storey detached blocks. Each building is constructed with a concrete frame, brick cavity external walls and a flat asphalt roof. Windows in the various flats are generally single glazed timber

casements with painted mosaic horizontal bands above window openings. A few windows have been renewed in the past and secondary glazing is apparent in some flats. In addition, many of the ground floor flats have bars across the window openings to improve security. The freehold was purchased by the Applicant Company from the Local Authority in 1995. The development occupies a level plot immediately to the south of the Great West Road and includes on-site parking.

5. The Tribunal examined the outside of the blocks from ground level and noted that most of the windows and timber cladding beneath were in poor order including several areas of decay. Some of the windows were becoming detached from their hinges and there was an apparent risk that they could fall. The attention of the Tribunal was drawn to Flat 34 which is on the ground floor in the south east corner. Windows in this flat have been partly replaced and partly repaired. This was in connection with an agreed "trial".

6. Mr Knox allowed internal access for the Tribunal to inspect the living room in Flat 27 which is on the second floor. Even though this window has recently been refurbished, decay is apparent beneath the paint. This may be partly due to condensation and partly to defects to and around the windows. There is no insulation beneath the windows but a radiator has been located beneath the main window in the living room of this flat. The Tribunal was also shown the additional depth within the usable floor space of the flat which would be taken up by replacement with uPVC. It amounted to a loss of around half an inch.

The Leases

7. The Tribunal was provided with a copy of the lease for Flat 1, which it takes as a representative lease.

8. That lease provides as follows:

    a. Clause 1, which sets out the extent of the demise, demises to the tenant '*the internal and external walls of the flat.*' No express reference it made to the windows;

    b. By clause 3 (1) (c), the tenant covenants to maintain uphold and keep the demised premises in good and tenantable repair and condition. That is '*other than the parts comprised and referred to in paragraphs (4) and (6) of clause 5*'.

    c. Clause 5 (4) contains the landlord's repairing covenant in which the landlord covenants to '*maintain and keep in good and substantial repair and condition (i) the main structure of the Building ...*'

9. The Tribunal was also informed that each lease had originally been a term of 99 years (from around 1969), but that all, save for 3 leases, had since been extended to a term of 999 years.

Evidence

10. The Tribunal were provided with written statements from Mr Knox and from the Applicant's expert, Mr Horner FRICS. The Tribunal were also provided with: two reports from Congreve Horner (dated 14th February

2011 and 28th February 2012); one report from Cardoe Martin dated 16th August 2012; and a cost in use analysis from Mr Horner dated 23rd April 2013.

11. Mr Knox and Mr Horner were tendered for questioning.

12. Mr Knox clarified why the replacement with uPVC option had been pursued rather than a timber replacement. He said that questionnaires had been sent out to the leaseholders and of the responses received, the most popular options were for repair or replacement with uPVC.

13. He was asked about the Cardoe Martin report dated 16th August 2012, which was not supportive of replacement with uPVC. He said he had concerns over that report in that it was based on an inspection of only one flat, no. 41, which had been recently refurbished. He considered the Congreve Horner report of February 2011 to be more authoritative given that it had followed a much more thorough inspection. Even though that report seemed to favour timber replacement over uPVC replacement, he thought the hardwood option would be too expensive. The Applicant had built up a certain amount in their sinking fund since 2002 and didn't want to ask the leaseholders for a larger contribution than necessary.

14. Mr Horner clarified his cost in use analysis in which he had compared the relative cost of the various options over 40 years. Firstly, in his February 2011 report, the cost in use analysis showed that over 40 years, timber replacement would be marginally cheaper. However, he said that this needed to be put in the context that: it was only at year 40 that the timber option became cheaper when the uPVC would have had to have

been replaced; timber had a much greater capital cost in year one (around £100,000 more than uPVC); and it was based on his belief that if properly maintained, timber could last forever. His later cost in use analysis put repair at double the cost of replacement with uPVC over 40 years. This was due to the fact that not only would there be significant cost (and disruption) to carry out repairs now, but that in 20 years time, due to the condition of the timber, it would all need to be replaced.

Statute

15. Section 27A of the Landlord and Tenant Act 1985 confers jurisdiction on the Tribunal to determine whether a service charge is payable and if so, (amongst other matters) the amount which is payable and the date at or by which it is payable. The determination can be made whether or not any payment has been made and also in respect of anticipated expenditure.

16. Section 19 places a statutory limit on service charges by only allowing their recovery to the extent that they are reasonably incurred and where the service or work is to a reasonable standard. Under section 19 (2) where sums are due before the costs are incurred, 'no greater amount than is reasonable is so payable'.

Section 20ZA Application

17. Notice of intention was served on 22nd November 2010. Notice of estimates was served on 25th June 2012 (with amended versions being served on 28th June 2012 and 3rd July 2012). The lowest tender being

£151,362 plus £87,228.52. Although the initial notice set out replacement as an option, the specification and tenders related only to repair. Further the application for dispensation was in relation to 'works of repair and redecoration' only. Accordingly the consultation procedure has only been carried out in relation to the works of repair and not replacement.

18. None of the Respondents raised any queries with regard to the statutory consultation procedure that had been carried out. In light of this, at the outset of the hearing, the Applicant applied to withdraw its s20ZA application.

19. If the Applicant were to pursue the repair option and contract with Collins Contractors Ltd in accordance with the notice of estimate dated 3rd July 2012, then the Tribunal considers that there has been compliance with the consultation requirements. Given the absence of any objection to the consultation procedure, the application for dispensation is unnecessary and so consent is given to the withdrawal.

Section 27A Application

The Application

20. The amended s27A application dated 12th December 2012 seeks a determination that the costs of either repairing the windows or replacing them with uPVC would be recoverable as a service charge item.

21. This gave rise to three issues before the Tribunal:

a. Whether works to the windows fell within the landlord's repairing covenant;

b. Whether either of the proposed works fell within the repairing covenant; and

c. Whether either the proposed works satisfied the criteria set down in section 19 of the Landlord and Tenant Act 1985.

Windows within repairing covenant

22. The Tribunal were satisfied that the windows were structural and therefore, although they appeared to form part of the demise to the tenant, they fell within the landlord's repairing covenant at clause 5(4). The categorisation of the windows as structural was supported by the report of Cardoe Martin dated 16th August 2012 at paragraphs 8.3.2 and 8.3.8.

Proposed works within repairing covenant

23. It was clear to the Tribunal from the inspection that the windows were in need of repair. It follows that the first option suggested by the Applicant, that of repair to the timber, was within their repairing covenant.

24. The second, replacement with uPVC, was less obviously within the wording of the covenant given that it entailed a wholesale replacement of the windows with an unlike match which could be considered an improvement. This was the Applicant's preferred option. In support of their case that it was within the repairing covenant, the Applicant submitted:

a. Following *Plough Investments v. Manchester City Council* [1989] 1 EGLR 244, the general principle was that where there were a range of remedies, it was for the landlord to choose which method to adopt;

b. It was possible for repair works to include complete replacement. Whether replacement can be described as repair is something which will turn on the fact and degree in each case. There were a variety of matters that went into the melting pot to determine whether it was reasonable to describe an improvement as a repair; such as: age and character of the building, length of lease, the nature and extent of works, and costs. On that last matter, costs, the Tribunal was not limited to looking at the immediate cost, but in accordance with *Wandsworth LBC v. Griffin* [2000] 2 EGLR 106, LT, regard should also be had to the capital and future costs associated with the scheme;

c. Where a replacement was proposed, it did not need to be an exact replica, but recourse could be had to more modern designs and materials.

d. Repair was not limited to simply repairing existing defects, but could also include work designed to prevent future damage.

25. The Tribunal were referred to three authorities. The first, *Mullaney v. Maybourne Grange (Croydon) Management Co Ltd* [1986] 1 EGLR 70, the Applicant accepted was a case against them in that it determined that

replacement of wooden frame windows in modern block with double glazed ones was not a repair. To counter that, reliance was placed on *Minja Properties v. Cussins Property Group Plc* [1998] 2 EGLR 52, in which a complete replacement of steel frame windows with aluminium double glazed windows was found to fall within the repairing obligations. In that case Harman J had posed the question as whether or not the proposed works were 'so radically or extravagantly different so as to provide something entirely new'. In deciding which of the two authorities to prefer, the Applicant drew assistance from the view of the authors of Dowding and Reynolds on Dilapidations (5th ed) who supported following *Minja*.

26. The final authority relied upon was *Wandsworth v Griffin* in which the replacement of a single glazed metal window in council block with uPVC double glazed was found to be within the repairing covenant.

27. The Applicant acknowledged that the authorities were not binding but were a useful guide for the Tribunal and that each case would turn on its own facts. The Applicant then pointed to the following specific factors in this case in order to support its claim that the replacement with uPVC would fall within the repairing covenant:

    a. The Initial capital cost of replacement was higher than repair, but the cost in use analysis showed that the replacement costs were better value for money. When capital and future costs are considered, they show over 40 years that the replacement option is almost 50% of the timber repair option;

b. The uPVC option is a longer term solution and ensures no further replacement is needed for 40 years. The repair option only forestalls replacement for not more than 20 years. This will entail not only further cost, but also increased disruption with major repairs taking place now and replacement works needed in 20 years time;

c. All the leases were initially 99 years, but now all bar 3 been varied to 999 years. It was therefore reasonable to expect leaseholders with such an interest to invest in a long term solution to the problem;

d. The test repairs to flat 34 had shown that the repair option was not without its own problems;

e. There was little difference in the disruption caused by both options. Replacement would be more disruptive but for a shorter period.

28. In response to questions about the loss of usable floor space that would be caused by the replacement with uPVC, the Applicant submitted that this was a section 19 issue, rather than an issue for whether the works fell within the repairing obligation.

29. The Tribunal were satisfied that the replacement option proposed was, in this case, within the repairing obligation. In particular, the Tribunal did not consider that the replacement option was so different from the current windows. Although they were going to be completely replaced,

there were still going to be windows in the same position. The difference arose out of reliance on modern materials and design to improve the performance of the buildings and avoid unnecessary dilapidation caused by the current construction. Further, the Tribunal considered that the length of the leases and cost savings in the long term supported this conclusion. The Tribunal noted that there was some conflicting authority on this point, but was satisfied that its conclusion was in accordance with *Minja* and *Griffin*.

Section 19

30. The Tribunal is satisfied that the repair works would be justified under section 19. There appears to have been no opposition by anyone to that approach. Again the issue of replacement is one that requires a little more consideration.

31. The Tribunal was reminded of the remarks in *Plough*, that the landlord does not have choose the cheapest option available to remedy the disrepair, but must do what is reasonable in the circumstances. It was also referred to the Lands Tribunal case of *Fernandez v. Shanterton Scond Management Co Ltd* (LRX-153-2006) in which it was said that in determining whether a landlord had acted reasonably, it was relevant whether they were acting in accordance with professional advice.

32. The Tribunal was concerned that the Cardoe Martin Report of 16th August 2012 was dismissive of replacement with uPVC. The Applicant distanced themselves from this report. It was said that this report should be treated with caution as: it was commissioned by a previous

board of directors who had a more prescriptive agenda; was based on the inspection of one flat only and was at odds with the Congreve Horner Reports.

33. The Applicant maintained that the replacement works were reasonable as: they represented value for money in the long term; the vast majority of leases were for 999 years; and the vast majority of tenants had consented to the application. It was also stated that this case was similar to *Griffin* where the cost in use analysis was an important factor in determining whether the section 19 test had been satisfied.

34. With regard to the loss of usable space, the Applicant contended that this was not a material issue. This was a minor difference which would not affect the use and enjoyment of the flats and any loss was more than compensated for by the benefits to be achieved by the proposed replacement.

35. The Tribunal was satisfied that in the circumstances the proposed replacement with uPVC was reasonable for the purposes of section 19. Whilst this is, at least at the outset, a more expensive option than repair, the Tribunal considers that in the long term it will be of greater benefit to the leaseholders and represent a cost saving. The Tribunal bears in mind that the Landlord need not go for the cheapest option, but must do what is reasonable in the circumstances. Further, given that even the shortest leases have terms in excess of 40 years, all the leaseholders will benefit from a replacement.

Conclusion

36. The Tribunal determines that both options, repair and replacement, fall within the Landlord's repairing obligations and that it would be entitled to recover the costs of either of those options through the service charge.

37. Further in respect of the repair option, the sum set out in the notice of estimate dated 3rd July 2012 would be recoverable on the basis that the works were carried out by Collins Contractors Limited in accordance with their tender.

38. In respect of the replacement option, no consultation has been carried out and so the Tribunal is not able to determine a specific sum that would be payable.

Judge D Dovar

Chairman

8th October 2013

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.