Tribunal rules that leaseholders have to pay the costs of replacement cladding (Leaseholders of flats at Cypress Place and Vallea Court, Manchester v Pemberstone Reversions)

15/08/2018

Property Disputes analysis: Pemberstone Reversions acquired the freeholds to two blocks of flats in Manchester that comprised over 300 flats. The blocks were covered in cladding that failed to meet fire safety requirements after Grenfell. Pemberstone added the £3m costs of replacing the cladding to each leaseholder's annual service charge, meaning each flat owner had a bill of £10,000. Included in this sum was a 'waking watch' charge, for 24-hour security in case there was a fire, before the dangerous cladding was replaced. Following crowdfunding, the leaseholders challenged Pemberstone's entitlement to recovery and its amount in the First-tier Tribunal (FTT). Sarah Finch, a partner at Hamlins LLP in London, comments on what lessons can be learned from this case and considers the implications for property lawyers.

Leaseholders of flats at Cypress Place and Vallea Court, Manchester v Pemberstone Reversions (5) Limited, MAN/00BR/LSC/2018/0016

What are the practical implications of this case?

This case will provide some comfort to landlords of high rise blocks who are faced with expensive works to re-clad their blocks and provide interim fire safety measures. Depending upon the terms of the particular leases, these costs are potentially recoverable from their tenants via the service charge.

Although it is not a binding authority, practitioners can advise their landlord clients that as long as the lease allows the landlord to recover the costs of these works via the service charge, the building regulations status of the block should not determine whether or not the costs are recoverable. Practitioners also have some guidance as to which types of lease clauses will allow landlords to recover these types of costs. Although each case will turn on its facts and the interpretation of individual leases, the types of clauses in this case are fairly common in well-drafted leases.

The FTT showed that it was willing to balance logistical difficulties faced by the landlord in implementing some of the interim fire safety measures against the overall expense in determining reasonableness of the service charges. The landlord is not necessarily forced to choose the cheapest course of action in order to show that the costs are reasonable.

What was the background?

In this case, the applicant landlord was the owner of two blocks of flats containing 130 and 245 flats, respectively. The landlord undertook the government-mandated testing brought in after Grenfell and discovered some of the cladding was of the kind used at Grenfell. As a result of this discovery, the landlord undertook the following interim measures by implementing:

- an evacuation rather than 'stay put' policy
- a 'waking watch' by fire safety trained security officers

In the meantime, the landlord began the consultation process for the replacement of the cladding. All of these were among the steps recommended by the government guidelines where a block has

Grenfell cladding. The landlord sought to recover the costs of the interim measures (and in the long term, the replacement cladding) from the tenants of the blocks under the service charge provisions in their leases.

Some of the tenants challenged the recoverability of these charges under section 27A of the Landlord and Tenant Act 1985 (LTA 1985). Their challenges can be summarised as follows:

- the blocks were built in accordance with building regulations, so they are either compliant and no works to replace the cladding were needed or they were not compliant, in which case the tenants should not have to pay to remedy this
- to require the tenants to pay would be morally wrong
- any costs payable should be capped at the difference between the replacement costs and original costs and spread over the remaining terms of the leases
- the waking watch costs were unreasonable, and the landlord should have installed a temporary centralised fire alarm
- the waking watch company was connected to the managing agent

It is important to note that these challenges were both on the basis that the service charges were not recoverable under the terms of the leases and they were not reasonable within the meaning of LTA 1985, s 19. The tenants also applied for an order under LTA 1985, s 20C, limiting the landlord's ability to recover costs via the service charge.

What did the FTT decide?

The FTT found that the costs were recoverable under the terms of the tenants' leases. Of particular significance for landlords were the following findings:

- the costs of the replacement cladding and waking watch were recoverable under the following four lease terms, namely those that:
  - required the landlord to repair and maintain the structure of the blocks
  - allowed the landlord to recover costs for works or services the landlord considers necessary for the sake of good estate management
  - allowed the landlord to recover the cost of works for the general benefit of the apartments in the blocks
  - required the landlord to comply with the terms of its head leases of the block which required the landlord to comply with statutory and fire safety requirements

- whether or not the blocks were compliant with building regulations and the moral position were not matters for the FTT, which was only concerned with the contractual position between the parties and the relevant statutory provisions
- the fact there may have been a cheaper alternative (such as installing a temporary alarm system) did not make the waking watch unreasonable of itself—the FTT placed significance on the expense and logistical difficulties for the landlord in accessing the various apartments
- the fact that the waking watch company was connected to the managing agent could not be shown to have caused any disadvantage to the leaseholders

Given the FTT had made an order in the form requested by the landlord, the landlord refused to grant the LTA 1985, s 20C order, which means that the tenants can be required to pay the landlord's legal costs via the service charge.

Sarah Finch is a partner in the real estate litigation team at Hamlins LLP in London. She specialises in real estate litigation and has a broad practice which focuses on leasehold enfranchisement, rights of first refusal and disputes involving high value residential property.

Interviewed by David Bowden.

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