



LONDON RENT ASSESSMENT PANEL

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION
UNDER SECTION 20ZA OF THE LANDLORD AND TENANT ACT 1985**

Case Reference: **LON/00BK/LDC/2012/0101**

Premises: **74 Lupus Street SW1V 3EL**

Applicant: **Mansfield Estates LLC**

Respondent: **The Long Leaseholders of 74 Lupus Street**

Leasehold Valuation
Tribunal: **Mr M Martynski (Solicitor)
Mr N Maloney FRICS FIRPM MEW**

Applicant's
representative: **Ms T Fellas (Solicitor)**

Respondent's
representative: **Mr M Buckpit (Counsel)**

Dates of hearing: **3 & 26 October & 11 December 2012**

Decision summary

1. The application for dispensation from the consultation requirements imposed by section 20 Landlord and Tenant Act 1985 is refused.
2. An order is made pursuant to section 20C Landlord and Tenant Act 1985 that none of the costs incurred by the Applicant in connection with these proceedings are to be added to the Service Charge payable by any Respondent.

The Building, the Respondents and the application

3. 74 Lupus Street ('the Building') is a five-storey end of terrace Victorian property with floors from basement to 3rd floor level. The basement and ground floors are for commercial use. The upper three floors contain one

residential flat on each floor. The Building has facades facing both Lupus Street and Winchester Street.

4. The three Respondents to this application are the long leasehold owners of the three residential flats. Under the terms of their leases, they are liable to pay a contribution toward the costs of the repair and maintenance of the structure of the Building and are entitled to be consulted regarding any works to the Building that would result in them paying a contribution of £250 or more to those works under the terms of their leases.
5. The freeholder Applicant's application is for dispensation from the consultation requirements imposed by section 20 Landlord and Tenant Act 1985 and the regulations made under that section in respect of works described in the application as follows:-

Emergency repairs entailing:- hoarding of building, installation of a steel frame requiring removal of the shop-front and basement light wells, underpinning of building and scaffolding to repair high level walls including the installation of a tie system and repair of stucco and cornices, replacement of light wells and shop-front. As instructed by structural engineers and Westminster City Council. Contract period August-December 2012.

6. The Application described the consultation that had been carried out as being:-

Landlord has discussed the works with the tenants, provided drawings and reports and explained the issues involved. The landlord is responsible for paying service charge element related to 2 floors of the building established as 40% of the overall cost and therefore has an interest in keeping the eventual costs as low as possible – this has been discussed with the tenants of the other 3 floors.

7. The explanation given in the application form for the dispensation request was set out as follows:-

The application is made based on advice from the freeholders solicitors. These are emergency repairs to stabilise the building instructed by Structural Engineers and Westminster City Council. The landlord has a duty to carry out those repairs immediately. Delay in carrying out of works resulting from the consultation process will put the building itself and the public at risk and may result in the building being uninsurable.

8. By the time that this application was made on 30 August 2012, the major works, which are the subject of this application, were well underway.

General background

9. The commercial units at the Building had been vacant for some time prior to the Applicant purchasing the Building in June 2011. The Building was purchased from the liquidator of the former shop on the ground floor. The purchase price of just £500,000 reflected the fact that the Building had been for sale for some time due mainly, we presume, to its poor condition.

10. The Applicant's application was made on 30 August 2012. Directions were given on 6 September 2012 when the application was set down to be dealt with on the papers alone without a hearing. After being served with the application, the Respondents filed a Statement of Case in reply and requested a hearing. The hearing was set for 3 October with a time estimate of half a day. In the event, the hearing took up three whole days.
11. In this decision, there are references to various works which, for the sake of clarity, can be identified as follows;
 - (a) works carried out in the second half of 2011 which are structural in nature but they are not major works nor are they the subject of this application
 - (b) works carried out to staircase at ground and first floor level from February to April 2012 – these are not the works which are the subject of this application
 - (c) works that are major structural works and which are the subject of this application which are started in July 2012 and which (so far as the Tribunal is aware) are still continuing – these works are works to secure the Building at basement and ground floor levels by the installation of a steel frame and the repair of the upper walls and associated works
 - (d) works or proposed works to the upper walls of the Building that are part of the major structural works described at (c) above but which are separately referred to later in this decision because from in or about November 2012 (or possibly earlier) they have caused major disputes between the parties regarding access and regarding the way in which those works should be carried out
12. The major structural works which are the subject of this application were started in or about late July 2012 were well underway by the time this application was made in August 2012 and were continuing at the time of the hearing before the Tribunal.

Chronology

13. In order to properly understand the evidence and to analyse the merits of the application, it is necessary to set out a brief chronology of the matter as follows:-
 - 14.06.11 Applicant purchases property
 - June 2011 Peter Bryan, a Structural Engineer, is instructed by the Applicant to carry out a survey of the Building
 - 06.09.11 Mr Ingham sends an email to leaseholders regarding the fact that there are structural problems at the Building

- 01.12.11 Applicant grants lease of ground floor to Mcleod Centre for £425,000 with option to purchase the basement
- Dec 2011 Mr Cooper of Cooper Associates, Structural Engineers, instructed by Applicant to devise a scheme to address the structural condition of the Building
- Dec2011/
Jan 2012 The scheme and drawings devised by Cooper Associates for the structural repairs to the Building are largely completed
- 17.02.12 Respondents told about intention to get structural report from Mr Bryan
- Feb-Apr 12 Works are carried out to the staircase at ground and first floor level by the Applicant as agreed with the Respondents
- 12.04.12 Initial Notice to Westminster Council for Building Control Approval for structural alterations to ground floor and basement
- 28.06.12 Report from Mr Bryan, Structural Engineer
- 11.07.12 First contact with Respondents regarding the intention to start major works
- 16.07.12 Report from Cooper Associates
- 17.07.12 Planning permission granted to the McLeod Centre in respect of both the ground and basement floors
- July 2012 Report from Goddard Consulting, Health and Safety consultants concludes that there are risks of falling materials from and the structural collapse of the Building
- 23.07.12 Structural works start (materials delivered)

The evidence

Mr Ingham – consultant to the Applicant

14. Mr James Ingham gave evidence for the Applicant both by way of witness statement and orally at the hearings. Mr Ingham is a consultant acting on behalf of the Applicant in its dealing with the Building.
15. In his evidence, Mr Ingham told the Tribunal that he was instructed by the Applicant to look at the Building prior to purchase to assess its suitability. He was further retained to oversee the development of the Building. Mr Ingham said that the ground floor and basement had been empty for 18 months prior to the Applicant's purchase.

16. Mr Ingham gave various descriptions of the Building in his evidence to the Tribunal. He said that the Building was 150-200 years old and that it was poor example of a building of its kind and that it was 'falling down' and that it was in a 'terrible state'.
17. Shortly after the purchase, Mr Ingham said that he had contacted Peter Bryan, a Structural Engineer well known to him, to look at the Building. He did this as he was concerned that, given the poor condition of the Building, claims of various kinds could be made against the Applicant. Although Mr Bryan photographed the Building and made notes as to its condition, he did not actually produce a written report until June 2012. However, Mr Ingham was able to talk to Mr Bryan on a number of occasions regarding the condition of the Building prior to Mr Bryan producing his report.
18. Mr Ingham at this early stage had noted what he considered to be a 'substantial' bowing of the upper front facade of the Building onto Lupus Street. He had further noticed that the infills to the light wells at basement level had deteriorated badly and he arranged for some propping of these areas. He further noticed lots of cracks to the exterior of the Building.
19. The general position regarding the Building at this early stage after purchase was, so far as Mr Ingham viewed it, that the Building would require substantial structural work but that there was no immediate urgency for such work to be carried out. No action was taken at this, or any later stage, to start measuring movement in the Building over time - such as the placing of tell tales.
20. Mr Ingham arranged for some works to be carried out between June and September 2011 which included dealing with fire proofing and insulation between the commercial and residential parts of the Building, carrying out some propping in the basement, stripping out the surface finishes of the basement and unblocking drains.
21. On the recommendation of Mr Bryan, in August and September 2011, trial pits were dug in order to allow inspection of the foundations.
22. The Tribunal was shown an email dated 6 September 2011 from Mr Ingham to Ms Carnegie-Brown, who is one of the Respondents. In that email he says;

My first instruction has been to ensure the safety of the building...we have commissioned a preliminary structural engineers appraisal.....indicates that some of the structural works should be carried out as emergency repairs....
The next step is to commission a detailed structural and building condition survey which will be done this week.
23. By email dated 25 October 2011 sent to Mr Ingham by the managing agents, they query whether the insurers have been put on notice regarding the condition of the building. Nothing seems to have been done

about this until July 2012 when an email dated 24 July 2012 is sent to the insurers regarding the major structural works which have just started.

24. On the 30 November 2011, the Applicant sold the ground floor of the Building to the McLeod Centre for learning with an understanding that they could later purchase the basement floor.
25. Also in November (or possibly earlier), another Structural Engineer, Mr Cooper, was instructed by the Applicant to prepare a scheme to secure the structure of the Building. Mr Cooper goes on to design a steel structure to be constructed at basement and ground floor levels in the Building.
26. Mr Ingham then discussed improvements to the staircase at ground and first floor level with the Respondents and works were carried out to that staircase between February and April 2012 with the construction of a landing at first floor level. These works are unconnected with the major structural works which are the subject of these proceedings.
27. In an email dated 17 February 2012 to Ms Carnegie-Brown, Mr Ingham says;

As you will all be aware when Mansfield Estates purchased the property they commissioned a schedule of condition. This highlighted a number of structural issues with the building and the engineer who carried out the survey suggested that Mansfield open up further areas for investigations.

Mansfield has subsequently commissioned a full structural survey on the status of the building. Once Mansfield Estates has received a copy of the written report I intend to circulate it amongst everyone.

28. Mr Ingham then sends an email to Mr Bryan dated 29 February 2012. In that email he asks for two reports. First, a schedule of condition of the upper parts of the Building. Second, a structural survey of the Building highlighting the issues with it but *'drawing no conclusions and making no recommendations at all'*.
29. According to Mr Ingham's witness statement, 'design development' for the major structural works was extensively complete by mid-May 2012 and he was instructed by the Applicant to prepare section 20 consultation documentation in respect of the proposed structural works.
30. During inspections of the Building around 8 June 2012, Mr Ingham noticed that render was falling from the Building. He 'felt' that the cracks around the first floor window level were getting wider. Mr Ingham said that prior to this time, he had not seen anything he considered to be a significant deterioration in the Building. He further said that the movement that had occurred since 2011 could be seen from the various photographs taken of the Building and from visual inspections. It is around this time that Mr Ingham forms the view that the major structural

works planned for the Building (and as designed by Mr Cooper) are now urgent.

31. Mr Ingham then contacted Mr Bryan and chased him to produce his report. That report was finally produced on 29 June 2012.
32. On receipt of Mr Bryan's report, Mr Ingham contacted Westminster Council to arrange to put up hoardings around the building.
33. On being questioned by the Tribunal, Mr Ingham agreed that he would have been in a position to go ahead with the first stage of a section 20 consultation process after getting Mr Bryan's report but at that stage, or around that time, his instructions were to try and agree a deal with the Respondents.
34. A simple plumb bob survey was then carried out at the request of a contractor in order to try and establish the extent of the lean of the Lupus Street side of the Building.
35. The Applicant then instructed Mr Goddard, a health and safety consultant, to comment on Mr Bryan's report.
36. Mr Ingham said that he was concerned that there was insufficient time to go through the statutory consultation process with the leaseholders and he therefore opened discussions with them individually to try and secure their agreement to carrying out of the major structural works designed by the Structural Engineer Mr Cooper. In an email to Ms Carnegie-Brown dated 11 July 2012 regarding these proposed works, Mr Ingham states;

The freeholder has requested that I open a dialog with the leaseholders of the residential parts of the building rather than go to the official channel via the managing agents

37. In a further email dated 14 July 2012 to Ms Carnegie-Brown Mr Ingham says;

To get the work done as reasonably as possible with the minimum addition of professional fees – this is a lawyers and Engineers dream. They would all dearly love for something like this to get out of hand – to be brutally honest don't want to waste 2 years of my life coordinating a bureaucratic nightmare/disagreement which could be avoided if we all communicate and address all of the concerns at the outset.

38. In an email dated 22 July, Ms McMicking, the agent for flat 2 at the Building sends an email to Mr Ingham saying;

.....You only approached me for the first time 5 days ago, and seem to be trying to circumvent the normal professional approach which would be for the appointed managing agent acting for ALL the parties to manage this process.

She asks for various pieces of information and then says;

As you know, this sort of process is governed by strict regulations and ultimately by the Land Tribunal, and I need to be sure that the proper process is being followed and my interests being protected.

39. By email dated 24 July 2012 Mr Ingham sends to the Respondents the structural scheme prepared by Mr Cooper, the Goddard Consulting report and other information regarding the structural works. In that email Mr Ingham goes on to say;

.....I am available to answer any questions you might have – if I am not in the country I am still available on my mobile and will return any messages or voicemails as soon as possible.....

40. Mr Ingham met with leaseholders on 26 July 2012 and showed them structural drawings and a brief scope of the works. Prior to this meeting Mr Ingham had sent (on 14 July) a copy of Mr Bryan's report to the Respondents. Mr Ingham proposed to the leaseholders that they pay a capped sum of £50,000 plus VAT towards the costs of the proposed structural works. Mr Ingham's initial costing for the works was at this stage £278,000.
41. Mr Ingham said that he agreed to the leaseholders' request that they be allowed to instruct their own expert and he suggested to them that Mr Bryan could be retained on their behalf as a checking and monitoring engineer. Ultimately, no agreement on this could be reached.
42. The Applicant decided to press ahead with the works designed by Mr Cooper. Quotes were obtained from two steel installers (one of these was verbal only).
43. Mr Ingham said that on 21 July 2012 the Applicant gave the go ahead for the major works to start and that contractors arrived on site and started delivering the necessary props on 23 July 2012. Substantial propping of the Building was needed prior to the installation of the steel frame.
44. In his conclusions to his witness statement, Mr Ingham said;

A scheme of works was devised, which took about 6 months to finalise, to address the obvious neglect in the building and to carry out other works

Mr Bryan – Structural Engineer for the Applicant

45. Mr Bryan did not give evidence as expert (with associated duties to the parties and the Tribunal), only as a witness.
46. In Mr Bryan's report which was eventually produced in June 2012 (following his inspections in July 2011 and February and May 2012), recorded the condition of the Building. Mr Bryan's conclusions include the following;

Some internal strengthening works have already been installed at ground floor level in an attempt to relieve some of the main loading at the centre of the building. These works are of a fairly substantial nature and appear to be effective.

47. In oral evidence to the Tribunal Mr Bryan said that he had noticed the visibly bowing wall at the Lupus Street facade of the Building and said that he recalled that an eye needed to be kept on the situation. When pressed, he said that he would have considered monitoring on monthly basis.

Mr Cooper – Structural Engineer for the Applicant

48. Mr Cooper did not give evidence as expert (with associated duties to the parties and the Tribunal), only as a witness.

49. In his witness statement, Mr Cooper commented as follows:-

My view from the start was that works to the structure of the Building needed to be 'got on with' i.e. that, whilst they should be carried out within a matter of months rather than weeks, the works could not wait years.

[paragraph 6]

From September / October 2011¹ to January 2012, I noticed a general deterioration but nothing major. The Building was noticeably getting worse by about March or April 2012.

[Paragraph 7]

50. Mr Cooper confirmed that he was instructed to develop a solution to make the Building safe in the long-term. He came up with the solution of putting in a steel frame at basement and ground floor levels. He conceded in his oral evidence to the Tribunal that this would not have been the only solution to the structural problems posed by the Building.
51. As to the order of works, that is addressing the instability and falling masonry in the upper floors and addressing the structural stability in the basement and ground floors, Mr Cooper conceded that either could have been tackled before the other. He chose to deal with the basement and ground floors first and said that if that work was done carefully, it needn't further disturb the upper floors.
52. Mr Cooper said in oral evidence that in December 2011, he did not consider that there was any particular urgency and that there was a scheme in place that he was working to finalise.
53. Commenting on his written report of 16 July 2012 and his reference in that report to the plumb survey that had recently been carried out, Mr Cooper said that he would have liked to have seen such a survey carried out sooner.

¹ The Tribunal was not able to establish exactly when Mr Cooper was instructed, this statement appears to conflict with other evidence which suggests he was instructed in or about November 2011

54. In answer to the Tribunal's question as to what was happening between January and May 2012 regarding the scheme devised by him in December 2011, Mr Cooper replied, "fine tuning".
55. As to the urgency of works by July 2012, Mr Cooper, in cross examination, was clear that although he could not give a definite time frame in which action needed to be taken, the Building was 'unpredictable' and he would have wanted some form of works to take place.
56. Mr Cooper accepted in his evidence to the Tribunal that his steel structure proposal had the effect of opening up the basement to make it a bigger and more open area.

The Goddard Report

57. This is a health and safety report from Goddard Consulting which lacks the essential ingredient of a date but from its contents it appears to have been written in July 2012². That report simply quotes from the Structural Engineer's report and refers to the fact that debris has fallen from the Building. Based on two quotes from an Engineer's report the Goddard report says;

....there is a significant risk of structural collapse in the event that remedial measures are not taken

No timescales are given in this report. The report recommends and specifies the type and extent of hoarding around the Building to be erected for the protection of the public.

Mr Drummond – Respondents' Structural Engineer

58. Mr Drummond produced a report and gave evidence as an expert witness.
59. Mr Drummond first inspected the Building on 20 August 2012. He found that construction works were well underway with internal steelwork inserted at ground floor level. He visited the Building again on 24 September 2012 and formed the view that more than 50% of the major structural work had been completed.
60. Mr Drummond did not agree with the approach taken to the carrying out of works or the alleged urgency of those works. In support of his view on the question of urgency, he made the following points;

² There is in fact a second report from Goddard, again without a date, which appears to have been produced in August 2012, it does not add anything of any significance to the issues in this case

- (a) Mr Bryan's report of June 2012 did not state that the building was in danger of collapse or that immediate temporary support works should be carried out
 - (b) The Goddard report of July 2012 gave no timescale for repairs to be carried out to the Building and it recommended that a Structural Engineer "be instructed"
 - (c) The Cooper report of July 2012 did not recommend any immediate measures to be taken to make safe the public or the building, did not give any time scale for the works and did not address the adequacy of the Building's foundations
61. He considered the reporting on the Building revealed the most urgent matter to be the loose plasterwork at the upper levels and the danger of that falling (which had been partially addressed by the hoarding). He considered the least urgent aspect of the work was the one that had been carried out first, that is the main structural work of the installation of the steel structure.
62. Mr Drummond further commented that there had been no monitoring over time to assess the actual overall movement of the Building and that no action had been taken to carry out a proper verticality survey as recommended by Mr Cooper.
63. As to the overall sequence of works, Mr Drummond was of the view that the walls at upper levels should have been stabilised before work was done to stabilise the Building at lower levels. He considered that the structural works at ground and basement levels may have further destabilised the walls at the upper levels.
64. As to the scheme of structural works arrived at, Mr Drummond did not think that any consideration had been given to repair the structure like for like as opposed to complete stripping out and replacement with steel beams.
65. In his oral evidence to the Tribunal, Mr Drummond said that he had not been unduly concerned by the cracks that he observed both inside and outside the Building. There were, he said, many different reasons for cracks in a building. In his opinion, there were no cracks visible to him that would indicate movement of the Building as a whole. He stated that he would have wanted the Building to have been monitored over time to check for overall movement. As to the bulge in the wall at the Lupus Street elevation, Mr Drummond accepted that that may well have got worse, but he considered that this was most likely localised movement and not an indication of any overall movement of the Building.
66. On the question of the state of the Building when he saw it in August and September 2012, Mr Drummond stated that in his view, it would have been perfectly possible to deal with the issue of falling masonry and to then put on hold all further work (bar possibly some work to further secure the Lupus Street wall and continued monitoring) whilst a

consultation process (which could take months) was embarked upon with the Respondents. Mr Drummond considered there was no risk of structural collapse.

67. Mr Drummond commented that there had been, to his knowledge, no detailed costings of the works. He was concerned that in the absence of a full tender, contractors could take advantage.

The Tribunal's findings

68. Section 20ZA(1) Landlord and Tenant Act 1985 provides as follows:

Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

69. The only question therefore for the Tribunal is whether or not it is reasonable to dispense with the consultation requirements in respect of the qualifying work. In this application, the Tribunal takes the qualifying work to be that set out in the Applicant's application. Given that none of the consultation requirements were complied with prior to or following the start of the works at the Building, the application must be to dispense with all of the statutory consultation requirements set out in the *Service Charges (Consultation Requirements) (England) Regulations 2003* ('the Regulations'). To answer the question of reasonableness, the Tribunal considered various issues as follows.

What was the situation in 2011?

70. That there were serious problems with the Building was apparent to the Applicant even before it purchased the Building. The ground and basement of the Building had been vacant and the Building had been for sale for some time. The Building was purchased for a relatively low sum. The reason for this was almost certainly due to the condition of the Building.
71. Even if this were not the case, it is clear from Mr Ingham's evidence that the poor condition of the Building was known about immediately after purchase. The Applicant therefore at that time knew, or ought to have known, the following facts;
- (a) The Building required major structural work
 - (b) The leaseholders of the three flats on the upper floors of the Building would be liable to pay a contribution to the costs of those works under the terms of their leases
 - (c) The overall costs of the required works and consequently the sums payable by the leaseholders under their leases would be considerable
 - (d) The leaseholders had a right to be consulted regarding the works

72. By the end of 2011, the Applicant had the benefit of the input of two separate Structural Engineers, Mr Bryan and Mr Cooper. Mr Bryan was able to tell the Applicant what was wrong with the Building, Mr Cooper went on to tell the Applicant how things could be put right.
73. The timing and circumstances of the instruction of Mr Cooper of Cooper Associates remain unclear. Mr Ingham's witness statement does not give any detail and little else regarding the instruction was made clear in his oral evidence to the Tribunal. We know from Mr Cooper's evidence that he had been instructed and had visited the Building by November 2011. The first time that Mr Cooper is mentioned in Mr Ingham's witness statement is at paragraph 31 (this and the surrounding paragraphs deal with events in July 2012, at least nine months after Mr Cooper's original instruction); there is no mention however as to when Mr Cooper was instructed. In paragraph 22 of his statement, Mr Ingham states;

By mid-May [2012] design development was extensively complete and Mansfield instructed me to prepare documentation for section 20 notices.

74. We also know from the evidence given by Mr Cooper and from his drawings that by December 2011, he had designed the steel system to stabilise the basement and ground floors. Everything of importance to the leaseholders flowed from that design, that is; the system of steels proposed meant that that the basement areas could be opened out and stripped back, thus creating a larger and more open space; the Building would be propped and the steel system would be put in prior to work being carried out to the structure of the upper floors.
75. It would appear therefore that by the end of 2011, not only did the Applicant have expert views as to what was wrong with the Building; they had a detailed scheme of what to do to the structure to deal with the Building's problems. The evidence as to what then happened in the summer of 2012 (see below) suggests that by December 2011, the Applicant had made up its mind as to the works that it was going to carry out at the Building.
76. The Tribunal considers that by December 2011, the Applicant was in a position to comply with the first stage of the consultation requirements set out in Schedule 4, Part 2, paragraph 8 of the Regulations, by serving the relevant notice. The relevant part of the regulations provide;
- (2) The notice shall—
 - (a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;
 - (b) state the landlord's reasons for considering it necessary to carry out the proposed works;
 - (c) invite the making, in writing, of observations in relation to the proposed works; and
 - (d) specify—
 - (i) the address to which such observations may be sent;
 - (ii) that they must be delivered within the relevant period; and
 - (iii) the date on which the relevant period ends.

(3) The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works.

January to May 2012

77. What then was happening in the period January to May 2012? Mr Cooper produced further drawings for the Building in January 2012 (and then later in June and August 2012) this presumably was the “fine tuning” that he had mentioned.
78. The correspondence seen by the Tribunal does not show that anything of consequence was happening in this period. The parties’ attention seems to have been mainly directed at the works that were being carried out to the staircase between February and April 2012. There was a good deal of discussion regarding those works between the parties.
79. The references in this period to the structural issues are; Mr Ingham’s email dated 17 February 2012 to Ms Carnegie-Brown in which he says that the Applicant has commissioned a full structural survey and that he intended to circulate it amongst everyone and Mr Ingham’s email to Mr Bryan dated 29 February 2012 asking for a schedule of condition of the upper parts of the Building and a structural survey of the Building highlighting the issue with it but *‘drawing no conclusions and making no recommendations at all’*.
80. The evidence appears to show that the Applicant knew what was wrong with the Building and had decided what to do about it (as per Mr Cooper’s scheme) and that it wanted to justify its actions by using the report of Mr Bryan – that report itself not containing any recommendations (possibly so as not to conflict with Mr Cooper’s scheme).
81. Even if this were not the case, this is the impression that the Respondents would have been, and in the event have been, left with given that they have not been consulted regarding the structural works in accordance with the law.

June to July 2012 – the consultation carried out by the Applicant

82. We then come to the crucial two months leading up to the structural works starting at the Building. Mr Ingham was at pains to point out how he did consult and how he was as open as possible during this time.
83. The Tribunal accepts that Mr Ingham was anxious to have a detailed dialogue with the Respondents at this time and to ‘consult’. However these discussions have to be seen in the light of the other evidence referred to earlier in this decision. It appears from the evidence that by 8 June 2012, Mr Ingham is driven by three considerations. First, he is convinced that the Building presents an immediate danger which needs to be addressed by major works; second, that he needs to get the

Respondents to agree to the major structural works decided upon by the Applicant and as designed by Mr Cooper; third, he needs to avoid, what he sees as potentially being a major bureaucratic nightmare, that being the statutory consultation process.

84. It is with these factors in mind that Mr Ingham is 'consulting'. In reality, there is no real consultation as envisaged by the Regulations. Mr Ingham is happy to provide reports and drawings and to make himself as available as possible for discussion, but only with a view to getting the Respondents to agree to the major structural works already decided upon by the Applicant and to agree a contribution to the cost of those works.

The urgency of the work

85. The Applicant's case necessarily relies on two important propositions. First, by June 2012, there was an urgent need to start the major structural works; second, the possibility that the major structural works would become urgent was not foreseeable. The Tribunal is not convinced that either of these propositions is correct.
86. The only witness put forward as an expert witness was Mr Drummond on behalf of the Respondents. Mr Drummond's report contained the declaration that he was aware of his duties and responsibilities as an expert. The Tribunal found Mr Drummond's evidence to be clear and, on the essential issues (dealt with below), not seriously contested.
87. On the question of urgency, Mr Drummond made two main points;
- (a) There was no measuring over time to gauge the extent and type of movement in the Building
 - (b) There was no compelling evidence that there was any need to undertake major structural works urgently in the summer of 2012

Accordingly there could be no justification for not at least having some (even modified) form of statutory consultation with the Respondents.

88. There is nothing in the evidence from Mr Bryan and Mr Cooper (both experts but giving evidence as witnesses rather than as experts with duties to others in the proceedings and the Tribunal) that contradicted Mr Drummond's opinions as set out above. Mr Cooper could not say that there had been any measurement of movement over time. Mr Bryan relied upon his visual inspections. At no point did either Mr Bryan or Mr Cooper confirm that the works that were started in July were so urgent that there was no real option but to start them at that time. Both were of the view that there were worrying signs of movement at the Building and that something had to be done, that however is a long way from any direct endorsement of the Applicant's actions in starting the major work as it did in July 2012 without any meaningful consultation beforehand.

89. The Tribunal accepts Mr Drummond's evidence that the most pressing problem in the summer of 2012 appeared to be the falling masonry and that relatively straightforward measures could be taken to deal with that issue.
90. The Goddard report, with respect to the author of that report, does not say anything meaningful so far as the state of the Building is concerned. The author of that report is not qualified to comment on the structural condition of the Building other than to record that it is a danger by virtue of the fact that debris has fallen from it. The comment in that report that 'there is a significant risk of structural collapse in the event that remedial measures are not taken' is meaningless given that; the author is not qualified as stated above; no detail is given of the type of structural collapse (falling masonry or something more serious?); no timescales are given in the report in respect of this collapse. Further, the comment does not in any event necessarily mean that major structural works have to be undertaken to avoid the danger of collapse.
91. The same type of comment can be made about the dangerous structure notice issued by Westminster Council. The Council is concerned that the hoardings are put up to protect the public. The notice issued by the Council seeks to make sure that the public are made safe, it does not set out what type of works are carried out to the Building. The Council may well have been satisfied with the hoarding and temporary works to stop the fall of masonry.
92. The Tribunal is not satisfied that it was necessary to urgently start major works in June/July 2012 or that there was not sufficient time to have at least some form of *meaningful* consultation with the Respondents.
93. Further, the Tribunal is not satisfied that some sort of emergency in connection with the deterioration of the Building was not foreseeable. As has been stated before and as has been stated by the Applicant's witnesses, things needed to be got on with sooner rather than later. It appears that, albeit possibly inadvertently, the Applicant waited for an urgent situation to arise before consulting with the Respondents whereas it could and should have been aware of the risks and started that consultation much earlier.

Prejudice to the Respondents

94. There can be no doubt that the Respondents have been significantly prejudiced by the lack of consultation for the following reasons.
95. It is clear to the Tribunal from the evidence given by Mr Drummond and Mr Cooper that there is more than one way to address the Building's structural problems. There is the solution proposed by Mr Cooper which has been now irrevocably adopted. There is at least one other solution which is the repair and support of the existing structure at basement and ground floor level. The Respondents will now not get the chance to

properly evaluate the scheme adopted by the Applicant or to consider or propose alternatives. Given that the issue is the structural support of their flats, that issue is one of fundamental importance to the Respondents.

96. Further, the Respondents have been left with the impression (which may or may not be correct – it is not for the Tribunal to decide the point – nor is it relevant to the Tribunal's decision) that Mr Cooper's scheme was designed and pushed forward because it was the one that opens out the basement area and so gives the Applicant the greatest commercial benefit.
97. The Respondents have not been able to have any input into the contractors that have been chosen to carry out the works.
98. No formal and proper tendering process has been undertaken and the Respondents were not given details of the contractors and their quotes in any reasonable time frame. That leaves the Respondents wondering if the contractors chosen to undertake the work were the best for the job and/or the most competitive.
99. The Respondents have been left not having any clear idea of the total cost of the works or of what their contributions to those costs may be under the terms of their lease.
100. It is clear from the evidence of the engineers that there were different views, not only on the way the structure of the Building could be secured but also on the order of works so far as ground and basement and the upper floors were concerned. Mr Drummond was of the view that the propping of the Building and the installation of the steels could have further damaged the structure to the upper floor and that it may have been best to deal with the upper floors first. Regardless of what may have been the correct order in which to tackle the different parts of the Building, the Respondents have clearly been denied the opportunity of considering that issue and making their views known.
101. During the hearing evidence was given as to the disputes that have recently arisen between the parties concerning the repairs to the walls of the upper part, the way in which those repairs are to be carried out and the timing of those repairs. It is clear that those disputes have been very serious and that they have been costly for both parties. It is quite possible that those disputes could have been avoided had the Respondents been properly consulted and told at the outset the works that were proposed and had they been allowed to consider and respond to that information.
102. So far as the Tribunal is aware, an insurance claim (which we believe has been rejected) was not made until shortly before the major structural works started despite the fact that the Applicant was on notice of an insurance issue after it had purchased the property. Had the Respondents been put on notice of the issues by way of a stage one consultation notice,

the issue of insurance may have been raised earlier and may have had a different outcome.

Prejudice to the Applicant

103. The Applicant will be anxious for the Tribunal to note that, even though it may not have consulted, it has taken the necessary action, which in its view was urgent and justified, to secure the structure of the Building in a cost effective manner. The Applicant has pointed out that it is liable to pay a significant proportion of the costs of the works and that it is very much in its own interests to choose the best and most cost effective way to carry out those works. The financial consequences of the Tribunal refusing to dispense with the consultation requirements will be a cost to the Applicant of at least £150,000 and possibly much more³. Conversely, the Applicant would argue with some justification, that the Respondents will have the benefit of having the Building repaired whilst not having to pay the costs of that repair, a saving of at least £50,000 per leaseholder. The Tribunal is however aware that the Respondents' legal costs of this application and of the disputes over the way in which works are being carried out to the upper floors have been substantial and those are costs which would have been avoided if the statutory consultation regulations had been complied with.

Is it reasonable in all the circumstances to dispense with the consultation requirements?

104. There is no doubt that the Applicant could have, but did not - for whatever reason - start a statutory consultation process by around December 2011 or January 2012 in sufficient time for that process to either have been completed or to have given the Respondents a reasonable amount of time and information to take part in the process in time to start the works in the summer 2012.

105. Whatever consultation there was in the summer of 2012, it was wholly inadequate and could in no way, in the circumstances of this case, compensate for the lack of statutory consultation.

106. The Tribunal is not convinced in any event that by the summer of 2012, the works were so urgent that there could be no meaningful consultation before those works started. Further, an emergency regarding the deterioration of the Building could have been anticipated and accordingly the timetable for consultation could have been started, with that in mind, sooner rather than later.

107. The lack of consultation has caused the Respondents clear and substantial prejudice.

³ Although of course this is not a material consideration in the consideration of the Tribunal's power to grant dispensation – *Daejan Investments Ltd V Benson (C/A) [2011] EWCA Civ 38*

108. Whilst the refusal of this application will result in the Applicant having to bear very significant costs, that results from the Applicant's own failings.
109. In all the circumstances, it would not be reasonable to dispense with the statutory consultation requirements in this application and the application is accordingly refused.

Costs

110. Counsel for the Respondents asked for an order preventing the Applicant from placing the costs incurred in this action on any Service Charge payable by the Respondents.
111. Given the Tribunal's findings, it would be wholly unjust if the Applicant's (no doubt very considerable) costs had to be partially paid by each leaseholder.
112. Accordingly an order is made that none of the costs incurred, or to be incurred, by the Applicant in connection with this application are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by any Respondent.

Chairman:



Mark Martynski

Date: 14 January 2013