



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/00HN/LSC/2015/0024

Property : Admirals Walk, West Cliff Road,
Bournemouth BH2 5HH

Applicant : Admirals Walk 2000 Ltd

Representative : Napier Management Services Limited
Ms A Lacey-Payne
Ms K Head

Respondent : All Lessees (127 lessees)

Representative : Dr Cooper (Flat 121) representing the
lessees of Flat Nos. 29, 37, 50,66,79,91,102
and 104.
Mrs Cooper (Flat 121)
Mr G Clifton, for Ms V Ghotbi (Flat 78)
Mr Dixon (Flat 11)

Type of Application : Liability to pay service charges

Tribunal Member(s) : Mr D Banfield FRICS
Judge Tildesley OBE

Date of Hearing : 25 June 2015

Date of Decision : 22 July 2015

DECISION

Decision

We determine that service charges are payable in advance by way of special levy for major works consisting of the replacement of balcony rails in stainless steel at a cost of £549,000 plus VAT and re-waterproofing of balcony slabs at a cost of £242,954 plus VAT.

Lessees' individual liability will be the Tenant's service charge proportion determined in Third Schedule to the 2002 lease and clause 4 (c) of the 1972 lease.

Application

1. The Applicant (the Landlord) seeks a determination under Section 27A of the Landlord and Tenant Act 1985 (the Act) as to whether service charges are payable in advance for major works which involve replacement of balcony rails in stainless steel (cost of £549,000 plus VAT) and re-waterproofing of balcony slabs (cost of £197,864 plus VAT) (now revised to £242,954 plus VAT).

Background

2. This block has been the subject of a number of determinations by the Tribunal and it is not necessary therefore to describe the property in detail. In summary however it is a 14 storey concrete framed block built in the 1960s and comprising some 121 flats of varying dimensions. It is set in its own grounds with both surface and underground parking areas. Upper floor flats have access to balconies cantilevered off the main frame with a reinforced concrete floor slab into which steel stanchions are set supporting railings around the perimeter.
3. The steel stanchions are topped with a rail terminating at the external wall of the flat to which it is attached and from which it receives support. In the original design glazed sections were located between the stanchions supported on a steel "u" section welded to them and topped by a timber rail holding the glazing in place.
4. Over the years a number of the balconies have been altered by replacing the existing glass and its supporting framework (but not the stanchions) with UPVC framed glass panels fixed to the existing stanchions. Some lessees have also added "privacy screens" to shield them from adjoining balconies.
5. There are two forms of lease at the property; the original from 1972 where service charges are collected in arrears and leases granted in 2002 following the purchase of the freehold by a tenant owned company where service charges are paid in advance. The landlord's repairing obligations whilst lacking clarity are similar in both and will be more fully described below.

6. In a decision by the Tribunal of 16 December 2009 (LON/00HN/LSC/2009/0654) it was determined that it is the landlord's obligation to repair or replace the stanchions where in disrepair with similar albeit of modern design and if in such replacement a screen was broken then its replacement was also the Landlord's responsibility.
7. Following an Appeal the Applicant has now obtained planning consent for the replacement of all the balcony stanchions and screens with stainless steel and glass in a different style to both the original balconies and the later UPVC replacements.
8. There are also said to be signs that the structure of the balconies is deteriorating with sections of concrete coming away exposing the reinforcing steel work beneath. The provision of waterproofing to the upper surface of the balcony will, it is considered reduce the water penetration and reduce the corrosive effect of moisture meeting unprotected steel.
9. Following receipt of the application the Tribunal directed that the leaseholders should be circulated with the application and a form requesting amongst other matters whether the application was supported or not.
10. Of the 121 forms sent out 61 were returned with 51 in support the remaining 10 against.

Inspection

11. Prior to the hearing we carried out an inspection of the interior of a number flats in the company of representatives of both the Applicant and Respondents. We do not propose to describe each in detail but will refer to matters which have assisted us in coming to our decision.
12. We saw the construction of the original balconies where the steel stanchions were set into the concrete floor slab off which the glazed screens and timber rails were supported. We noted that many had varying degrees of corrosion where the steel entered the slab. Corrosion ranged from largely imperceptible to extensive with different levels of corrosion being present on the same balcony. At Flat 25 one of the stanchions had been exposed below the floor slab and whilst corroded, appeared to be reasonably sound. However the concrete forming the surrounding section of floor slab structure appeared to have lost its strength and was easily displaced.
13. In some flats we were able to examine the UPVC replacements. These consisted of UPVC framed glazed sections fitted between and enclosing the major part of the existing stanchions.

14. We were also shown the underside of some balconies where there were signs of rust “spotting”, what were referred to as “stalactites” and in some locations sections of missing concrete exposing the reinforcing bars beneath. At Flat 78 we saw cracks to the tiling of the balcony slab.

Evidence

15. At the hearing later in the day Mrs Aileen Lacey-Payne and Mrs Kim Head both of Napier Management Services Limited represented the applicant landlord. Mr Tom Green of Greenward Associates Chartered Surveyors and Designers gave evidence and Mr Allan Hudson one of the Directors of Admirals Walk 2000 Limited was present.
16. Dr and Mrs Cooper represented the majority of the objecting lessees with Mr Gordon Clifton representing Ms V Ghotbi of Flat 78 and Mr Kevin Dixon speaking on behalf of himself and Mr David Bell (Flat 11)
17. At the commencement of the hearing Mrs Lacey-Payne confirmed that there was no objection to the admission of the written statement of Mr Dixon dated 4 June 2015 despite its late receipt. Dr Cooper confirmed that the respondents’ objections related to the replacement screens and that the need for waterproofing of the balcony slabs was not challenged. It was also confirmed that the respondents did not challenge the S.20 process although they did disagree with the outcome.
18. Mrs Lacey–Payne confirmed that the increase in the cost of waterproofing the slab from that referred to in the application was due to the lowest tenderer having had their accreditation withdrawn by the product manufacturer thus rendering them ineligible to carry out the works and provide the necessary guarantee.
19. In reply to a question from Dr Cooper Mrs Lacey-Payne said that the priorities for expenditure were to make the building dry and safe and once this had been achieved further works could be considered.
20. Mrs Lacey-Payne referred to the Tribunal’s decision in 2009 confirming that the stanchions were within the landlord’s repairing obligations and that although no longer relying on it the stanchions’ deterioration was catalogued by Building Consultancy Bureau Limited (BCB) in their report of 14 February 2011.
21. The BCB report was based on measurements taken of one stanchion on each balcony to determine the level of corrosion. From calculations it was their advice that where any stanchion had corroded from the original 25mmx25mm section to leave less than a 23mmx23mm section they should be deemed unsafe, not fit for

purpose and the residents warned accordingly. The results of their inspection were tabulated showing the results for each flat. On this test some 70% of stanchions were less than 23mmx23mm and failed to meet the standard.

22. In explaining the Applicant's lack of reliance on BCB's report Mr Green said that the survey being based on examining only one stanchion on each balcony it was not prudent to assume that the other stanchions were in the same condition.
23. He referred to the balcony of Flat 13 where BCB's test had indicated little corrosion and therefore not at risk but where the corner stanchion had in February 2014 been "ripped out" by storm damage which also damaged the remaining stanchions resulting in their complete replacement. He disagreed with Dr Cooper's assertion that it was the connections between the stanchions and the screens that had failed and said that all of the stanchions were either pulled out of the slab or were distorted.
24. Following the damage to Flat 13 Mr Green wrote to Mrs Head on 19 May 2014; *"I must advise that all balconies need to be placed out of bounds to all persons as the exact condition of the structural support is unknown"*.
25. He referred to the BS6399 test referred to in the respondents' statements but said that this was a method of calculating loads from the dimensions of the component parts and without being able to determine the current dimensions of the stanchions which would require exposing their bases it was not a suitable test to employ.
26. In his opinion the only reliable test would be to break up the slab around the stanchions to examine their condition but by doing so the waterproof membrane of the slab would be compromised further exacerbating the corrosion of the steel reinforcement contained within.
27. In his witness statement Mr Green referred to the wish of some residents to phase the work with the worst balconies being attended to first. He pointed out however that unless every stanchion to every balcony is exposed and investigated it would be impossible to ascertain which balconies are in the most urgent need for attention and that such an investigation would be intrusive and highly expensive. His view was that the stanchions are all the same age and likely to be in the same condition.
28. He said that he had a "duty of care" to report if he considers balconies unsafe to use.
29. Following disclosure the insurers applied the following condition to renewal in March 2015;

- a. *Public liability limit of indemnity restricted to £1,000,000 in respect of the balconies*
- b. *Subjectivities:*
 - i. *Completion of all balcony remedial works within 12 months of inception*
 - ii. *Declaration*
 - iii. *Survey of premises by insurer within 12 weeks of inception.*

30. Mr Green said that there were signs of the slab “delaminating” and exposing the reinforcement due to water penetrating the slab and causing carbonation of the untreated steel and the washing out of calcium as evidenced by the “stalactites” which caused the loss of strength referred to above and if left untreated could lead to the structural failure of the balconies. It was essential that this deterioration was attended to and whilst not reversing the deterioration already taken place waterproofing should halt the process.
31. Mr Green confirmed that the price for waterproofing the slabs included repairing the slab prior to treatment and that any work to replace the stanchions subsequent to the waterproofing would make it ineffective. It is therefore essential that the two elements of the repair are completed at the same time. This would also avoid the need to access the balconies twice thereby minimising the disruption to leaseholders. More importantly it would also ensure that neither of the warranties is invalidated by completing the works at separate times. In order for waterproofing to be effective it would be necessary to remove any surface coverings to expose the slab beneath.
32. Mrs Cooper said that she accepted that some stanchions needed replacement and that the appropriate material would be stainless steel but with a UPVC overlay. She did not however accept that all needed to be replaced and suggested the phased approach referred to in paragraph 27 above. She referred to the results of the BCB report from which she concluded that the 52 balconies with stanchions of less than 19mm section needed replacement very soon and in some cases immediately.
33. Mrs Cooper further highlighted the problems of corrosion affecting stainless steel in coastal areas depending on the surface finish selected. Although it was suggested that all that was needed was an annual clean she was concerned that the costs of doing so would be excessive.
34. Dr Cooper said that the design of the proposed stainless steel and glass screens was inappropriate to the building and that the residents should have had the opportunity of commenting prior to the commencement of the planning procedure. He said that following the planning inspector’s conditional approval any change from the approved design would result in a further planning application being

made with the attendant delays this would cause. Such difficulties would be avoided if any replacements matched the design of the UPVC balcony screens which now formed the majority.

35. Dr Cooper accepted that some of the balconies required attention but did not consider they all needed to be done at the same time. He said it was unfair to those lessees who had maintained their balconies in good condition and where replacement was as yet unnecessary. He pointed out that some residents had installed privacy screens which would not be capable of re-use unless the existing style was maintained.
36. Dr Cooper said that if the balconies were capable of withstanding the extreme wind pressures to which they were subject they were certainly safe for any force a human was capable of exerting.
37. In his written statement Dr Cooper said that the charges to individual leaseholders based on the size of the flat rather than the size of the balcony was unfair.
38. Dr Cooper considered that the more important matter was the state of the concrete and suggested that non destructive testing should be employed despite its higher cost. He suggested that balconies could be tested in batches
39. Mr Green confirmed that the planning consent obtained was subject to approval of the final design which had yet to be finalised. No further planning applications would be required. He had no comment to make on the private survey obtained by the lessee of Flat 111 in which it was said that the balcony was safe. He denied making any reference to legal action relating to possible degradation of stainless steel components at a nearby hotel.
40. In answer to a question from Mr Dixon Mr Green said that historic lack of maintenance had caused the current problems and that a full investigation of the defects was an expensive undertaking.
41. In answer to a question from the Tribunal Mr Green said that it was not cost effective to phase the works as the waterproofing needs to be done urgently and unless the stanchions are replaced before the waterproofing their subsequent replacement will destroy the effectiveness of the waterproofing.
42. Both Mr Dixon and Dr Cooper have raised the appropriateness of the use of the "special levy" as a means of demanding the cost of the proposed works.
43. Mr Dixon said that the demand was defective in that it was lacking in detail and referred only to "major works" and not that it was being demanded as a special levy. He suggests that the special levy should be used to collect money that has already been expended and that it is

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

....

Decision

50. This application relates to works that are to be undertaken in the future and we therefore rely on the evidence submitted both in the bundle and at the hearing and with the benefit of our inspection of the property's existing condition.
51. During our inspection we noted that corrosion was present in some of the stanchions where they entered the floor slab and that in some areas the reinforcing rods were visible where sections of concrete were missing. We also noted that where screens had been replaced this did not include the stanchions. Where the base of a stanchion had been exposed it was clear that the concrete surrounding it had lost its strength and could be easily removed.
52. Where screens have been replaced it is accepted that the stanchions have not been renewed. As it is the stanchions that provide the structural stability whether or not screens have been renewed has no bearing on whether the stanchions require replacement.
53. We have seen the report made by BCB in 2011 and note that their conclusion is based on the measurement of only one stanchion per balcony. We accept the Applicant's view that in the light of the damage to the balcony of Flat 13 where the BCB report had suggested the balcony was sound the report could no longer be relied upon.
54. The Respondents consider that the correct test is that of BS6399. No challenge was made however to Mr Green's assertion that this was a means of calculating load bearing capacity based on measurement of the component parts which could only be ascertained by cutting into the slab. No explanation was provided by the Respondents as to how such a test could be applied and as such we reject this as an option.
55. Dr Cooper has referred to a private survey carried out at Flat 111 which deemed the balcony to be safe. A copy of the survey was not however made available to us and no reliance can therefore be placed upon it.
56. Mr Green and Dr Cooper disagree as to what damage was sustained to the balcony at Flat 13. It is regrettable that there is no photographic evidence but we accept the detailed description of the storm damage

given by Mr Green and accept that corrosion at least played a part in its damage.

57. In the light of the BCB report which indicated that some 70% of stanchions were unsafe and the subsequent damage caused to a balcony reported as meeting current requirements we accept that Mr Green was justified in questioning the safety of all the balconies and advising the managing agents that they were deemed unsafe and should be placed out of bounds.
58. Following the receipt of such advice it was beholden on the managing agents to advise the building's insurers with the inevitable result of a restriction on the cover available.
59. As Dr Cooper has opined the more pressing matter is the stability of the balcony slabs and the deterioration caused we are told by the ingress of water into the slab and the subsequent corrosion of the steel reinforcement. We accept that to carry out waterproofing at this stage and then subsequently break into the slab to replace the stanchions will give rise to a waste of costs due to the need to repeat the process and as such should be avoided. We also accept that to carry out the work in two stages is likely to affect the warranties provided.
60. Given the above findings, the lack of expert evidence supporting the respondents' case, the pressing need to carry out the waterproofing, the lack of a satisfactory means of non destructive testing of the stanchions and the need to precede the works with the replacement of the stanchions we find that the proposed replacement is necessary.
61. Turning now to the form of such replacement we have considered the tender report indicating that the stainless steel and glass option was the least expensive. We have considered the assertions that certain surface finishes are prone to staining. We have also heard that the final design has not been settled and that the quotations received allow for minor adjustment.
62. We accept that whatever style of screen eventually selected will have no bearing on the need to replace the stanchions and that on the evidence before us the decision to accept the least expensive option cannot be criticised. As such we consider the replacement of the balconies with the proposed stainless steel and glass to be an acceptable option and as such is permitted. We note that the landlord will have further engagement with the lessees to determine the final design.
63. We now come to consider the terms of the leases and whether the cost of such work is recoverable by way of service charge. The Tribunal's decision of 16 December 2009 sets out a clear analysis of both forms of lease and whilst not binding on this Tribunal their findings have not been challenged by the parties. Paragraph 15 of that decision

determines that any replacement may be of modern specification and provided that the stanchion it replaces is in disrepair.

64. Clearly it has not been demonstrated that each and every stanchion now proposed to be replaced is in disrepair but, we do not consider this to be the prime reason for the works proposed. It is acknowledged that the balcony slabs require attention and may therefore be deemed to be in disrepair and in need of attention; the replacement of stanchions being a necessary precursor to such works. We determine therefore that the works proposed fall within the landlord's obligations in both forms of lease and are therefore recoverable by way of service charge.
65. We then turn to the use of the special levy in respect of the 2002 leases. Mrs Lacey-Payne refers to it as bad management but necessary. Whilst we accept that planned expenditure should be included within the service charge as *estimated service costs* and payable quarterly we also accept that this causes cash flow problems in that it is only at the end of the following year that the sum for estimated costs will be received.
66. Mr Dixon suggests that it is implicit that the levy only relates to expenditure already incurred and we accept that the requirement to pay any demands within twenty-one days may suggest such an interpretation. The Third Schedule definition of *special levy* is simply a cost *not included in the estimated service costs* and the actual wording is not conditional. As such we are reluctant to read into the lease words that do not appear and therefore determine that to demand the costs to be incurred by way of special levy is within the terms of the lease and as such is permitted.
67. Mr Dixon raised objection to the form in which the £15,000 special levy had been demanded. He pointed out that the invoice dated 16 June 2014 simply referred to "major works" and as such was confusing. Subsequent to the hearing we were provided with a copy of a covering letter also dated 16 June 2014 which described the circumstances leading to the need for the levy, the invoice for which was enclosed. We are therefore satisfied that the demand was correctly made.
68. We note however that the covering letter refers to the cost of the work to the balconies being "dependent upon size". We consider that this may be confusing and for the avoidance of any doubt we confirm that the liability of individual lessees is determined by the service charge proportion set out in the Third Schedule to the 2002 lease and Clause 4(c) of the 1972 lease.

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. 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.

2. 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.

3. 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