



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

Case Reference : CAM/38UE26U/LDC/2014/0010

Properties : 2-26 & 52-76 Mosquito Way, and
126-150 Dragon Road,
Hatfield,
Herts,
AL10 9AZ

Applicant : Danecarr imited

Representative : Trinity Estates
("Managing Agents")

Respondents : The long lessees in the list
attached to the application

Representative : none

Date of Application : 5th March 2014 (received 13th)

Type of Application : Section 20ZA of the Landlord and
Tenant Act 1985, as amended ("the
1985 Act") for permission to dispense
with the consultation requirements in
respect of qualifying works

Tribunal : Judge J. Oxlade
M. Krisko BSc (EST MAN) FRICS

**Date and venue of
Hearing** : 8th April 2014 at the Mercure
Hatfield Oak Hotel, Roehyde Way,
Hertfordshire, AL10 9AF

Attendees:

Applicant:

Respondents:

From the Managing Agents:

Lessees:

Ms. H. Pitt, Estate Manager
Mr. Bellamy, Regional Manager
Mr. Hogg, Building Surveyor
Mr. Lawrence, Senior Building Surveyor

Mr. & Mrs. D Ogle (24)
Dr. Daniels (54)
Mr. C. Clayton (70)
Mr. N. Atkinson (132)
Ms. M. Galea (138)
Mr. N. Fulborough (142)

DECISION

For the following reasons, the Tribunal grants dispensation from the consultation requirements set out in Part 2 to Schedule 4 of the Service Charges (Consultation etc.) (England) Regulations 2003¹ in respect of proposed works to the box guttering, render, and roof repairs of 2-26 & 52-76 Mosquito Way, 126-150 Dragon Road, Hatfield, Herts (“the premises”), subject to the following conditions:

- (A) the Applicant do diligently pursue the claim already made by them against the NHBC, and (where appropriate) giving consideration to extending the breadth of that claim, and
- (B) On receipt of a copy of any report or written determination of the NHBC’s in respect of the claim as made (or as amended) serving a copy of it on the Respondents.

REASONS

Background

1. The Applicant is the freeholder (‘the company’) of an estate consisting of several blocks of flats, which include Mosquito Way and Dragon Road. Trinity Estates (“the Manager”) is appointed under the leases of the flats in the development to undertake responsibility for the supply of services to the estate; the lessees have a corresponding obligation to pay a proportion of the maintenance expenses.

2. In particular clause 1 of the Tenth Schedule provides that conditional on having first received the lessee’s proportion, the manager shall carry out works detailed in the Sixth Schedule, which include at Clause 4:

“Inspecting, rebuilding, re-pointing, cleaning, renewing, redecorating, or otherwise treating as necessary and keeping the internal and external common parts of the Block comprised in the maintained property and every part thereof in good and substantial repair order and condition and renewing and replacing all work or damaged parts”.

¹ Set out in Appendix A

3. In early January 2014 the manager received notice that there was water ingress into flat 24, located on the third floor, following a prolonged period of heavy rain. There was also water ingress in another block, into flats 138 and 148, located on the 3rd and 4th floors. The water ingress into flat 148 was over the Christmas period.

4. Mr. Hogg, a building surveyor employed by the manager, made a site visit on 15th January 2014 and inspected flats 24 and 148. He noted that there was evidence of damp staining to the ceilings of the kitchens and one bedroom in each flat.

5. A contractor was engaged to erect scaffolding, to the south and west side of Dragon Way, which block has similar/identical detailing to Mosquito Way. The contractor noted several points: there was a thin coat of render applied onto marine ply board, which render had cracked, allowing water penetration to the ply board. The failure of the render is noticeable where it meets the flashing, which itself had not been tied to the building. Further, the drip detail which had been relied on to hold the flashing in place, had become loose. Finally, much of the ply was showing signs of prolonged water ingress and decay.

6. Mr. Hogg's conclusion was that the water ingress was likely to be due to:

- poor detailing and design of the upper elevations, with a render of insufficient thickness applied so that it was poorly bonded to an unsuitable backing,
- flashing not having been tied in place.

7. Mr. Hogg suggested that the manager should seek to establish if an NHBC guarantee was in place, and so make a claim on it; whether insurance would cover any of the costs; in the alternative, to obtain quotes.

Consultation Requirements

8. Three quotes were obtained from Formation Management Limited, TMG, and DJ Russell, with a view to establishing whether or not the costs could exceed £250 per flat, to inform the decision to undertake the section 20 consultation requirements.

9. Having obtained these quotes and established that they were likely to result in a relevant contribution to service charges of any one lessee exceeding £250, on 27th February 2014 a notice of intention was issued to lessees. This was re-issued on 6th March 2014 to expand a description of the works as works to "box guttering, render, and possible roof repairs". It was considered necessary to carry out the works because "the render and box guttering has failed in several areas around the upper levels, causing water ingress into the building".

10. In light of the risk of further damage to the exterior and interior of the building, and in the absence of the possibility of remedial works falling short of total repair, on behalf of the company the manager sought a dispensation from the consultation procedure.

Application

11. On 5th March 2014 an application was made to the Tribunal for a dispensation from the remainder of the consultation requirements, and Directions were made on 14th March for the filing of evidence.

12. The manager said that it would obtain three quotes before instructing the works, and would invite the residents to nominate any contractors that they wished; the spirit of consultation would be observed, albeit within a shorter timescale, with a view to preventing further damage and expense.

Hearing and Inspection

Inspection

13. On the morning of the hearing in the presence of Mr. and Mrs. Ogle and the manager's surveyors, the Tribunal inspected flat 24 and found it as described in the report of Mr. Hogg. Although the ceilings in the kitchen and bedroom appeared to be dry, there was staining consistent with water penetration and which exposed the plasterboard joints,.

14. Mr. Ogle managed to secure access to the flat above (flat 26) from which the Tribunal could see the arrangements for discharge of water from the roof, the box guttering detail, and particularly noted the use of leadwork and render.

15. The Tribunal noted that there was a parapet wall, behind which was a gulley approximately 2 ½ feet deep, and the exterior wall of the flat set back. The gulley was lined with lead, and the exterior wall to the flat was rendered to the point of meeting the leadwork. The design of the gulley had the effect of discharging water from the roof into the gulley, with the intention that the hole in the gulley wall would discharge this into a hopper and away down a down pipe. The Tribunal noted that there was considerable debris close to the hole in the gulley, that in many places the layering of lead was not sealed/fused, that the render was poor and cracked in places (including around the windows of flat 26). The Tribunal did not see exposed plywood.

16. The Tribunal considered the exterior of block 52-76, and noted the cracked render to the right hand pillar and what appeared to be a second downpipe on the right hand side of the entrance hall. The Tribunal entered the communal hallway of the block, and were asked to observe the hallway outside flat 70; whilst told that there had been a problem with ingress of water, could see no evidence of that now. Regrettably, the Tribunal arrived too late to see the inside of flat 54.

17. The Tribunal noted that although the block to the left of block 52-76 was of an almost identical style and finish, the arrangements for discharge of rainwater were different; the Tribunal was told that this had been completed by a different builder.

Documents Filed

18. In preparation for the hearing, the Applicant filed the following documents:

- an application dated 5th March 2014,
- a copy of the lease of flat known as plot 188
- a list of lessees,
- a statement dated 24th March 2014
- a sample copy of a letter dated 15th January 2014 sent to lessees setting out the problems as identified by Ryan Hogg Building Surveyor for Trinity
- notices of intention dated 27th February and re-issued on 6th March in amended form
- copy specification of works
- quotes from DJ Russell, TMG, and Formation Management Limited.

19. The only response filed by a lessee was that filed by Mr. and Mrs. Ogle (lessees of flat 24), who in a letter dated 17th March 2014 said that they wished to support the application for dispensation and stressed the urgency of the matter. Their concern was that the flat has become uninhabitable and that over time the condition had deteriorated.

Hearing

20. Lessees of six flats attended, as recorded above. No correspondence had been received by the manager from any other lessee, and they had received no objections for any lessee to the application.

Preliminary Matters

21. At the commencement of the hearing, the Tribunal explained the relevant statutory provisions, namely that section 20 of the 1985 Act, requires that a consultation procedure be followed where works are to be undertaken resulting in any one flat incurring costs of £250 or more. The consultation procedure is set out in Part 2 to Schedule 4 of the Service Charges (Consultation etc.) (England) Regulations 2003. Where the lessor had not complied or did not intend to comply with the procedure, dispensation could be sought pursuant to section 20ZA of the 1985 Act, either before or after the works have taken place, which the Tribunal could grant "if satisfied that it is reasonable to dispense with the requirements". The power is discretionary and can be granted on terms. The grant of dispensation does not amount to a finding that the costs to be incurred are reasonable or payable; if there is a later dispute about this then the Tribunal could determine an application made pursuant to section 27A of the 1985 Act.

22. On behalf of the Applicant, Mr. Bellamy set out the background, as summarised above. He pointed out that the notice of intention expired the day

before the hearing and that a claim had been made against NHBC, who were due to visit the premises on 14th April to assess the claim. If they accepted the claim, then the consultation process (and application to dispense) was academic. In response to the notice of intention, they had received some telephone calls from lessees asking questions concerning the cost of the works, the specific nature of the works, and how extensive they would be. One of the lessees, Mr. Atkinson, had experience in this field, and so he asked technical questions.

23. The intention in making the application was to dispense with the remainder of the consultation procedure, not simply to shorten timescales. However, he would assure the Tribunal that the manager would continue to keep lessees informed, as the manager had done to date.

Substantive Matters

24. Mr. Hogg set out his observations of the problems:

- the render at high level is beginning to flake off, particularly around the box guttering,
- there are gaps between the lead flashing and the building,
- the render is thin and applied to the wrong surface (ply, which expands and contracts).

25. Mr. Hogg's recommendation was for patch repairs to be undertaken to the ply, and to install a mesh to enable bonding of the render with marine ply. He had spoken to four manufacturers who recommended using a carrier board, but they would not guarantee it if installed on ply.

26. The NHBC were due to visit on 14th April to assess the claim.

27. Mr. Lawrence had inspected this aspect of the building for the first time this morning. He had some experience of the progress of claims against NHBC, and anticipated that NHBC would provide a report of their conclusions within two weeks, although this can be shorter. Their hope was that the NHBC would accept the claim and that they would direct the regional developer to do the remedial works – Laing had bought out Taylor Wimpey, who were not dodging their responsibilities.

28. The lessees asked questions and offered their view points. Mr. Atkinson had formed an informal Residents Association.

29. As to the possibility of an insurance claim the manager did not consider that buildings insurance would cover the costs of the exterior works needed, as the problems did not arise from an insurable event – i.e. from accident – but, poor workmanship/use of materials. However, the internal damage from the water ingress may be dealt with by insurance.

30. As to the NHBC claim it appears that the NHBC guarantees would all expire in the latter part of this year; different dates depending on when the buildings were signed off. Mr. Lawrence did not consider that the application of render to ply was good building practice when it was done, as there was no bonding method. If the NHBC did effect repairs, the standard of work would be expected

to last a reasonable period of time. His expectation was that all the render at the upper levels would be taken off. The fungal growth seen around the window of flat 26 was evidence of damp. If the NHBC accepted responsibility, the manager would have no control over the works, but would have a watching brief. Mr. Anderson thought that the NHBC would do some of the works, and have all agree on the acceptability of the standard as a benchmark from which all other repairs would be judged.

31. The Tribunal asked that the manager take the opportunity presented (i) by scaffolding at high level, to assess all other work which might reasonably be needed at high level and (ii) by having NHBC involved, to consider the width of the claim. On the inspection the Tribunal had noted that the lead joints were not all well joined, and that the debris in the gulley could be indicative of inefficient water discharge. Mr. Lawrence, said that he had walked along the gulleys, which did not "give" under his weight and so he was not concerned as to the efficiency of the lead work. He agreed that the downpipes were not the best, but did not consider that they needed to be changed or that any (save perhaps one of them) looked as if they had blocked. Mr. Lawrence pointed out that the specification (page S3/25) did include a provisional sum for inspecting timbers behind ply and report if timbers needed replacement, together with repair of box work structure with suitable marine ply.

32. The lessees present confirmed that they had no objection to the application for dispensation and Mr. and Mrs. Ogle fully supported the application.

33. At the end of the hearing the Tribunal reserved its decision.

Discussion

34. It is entirely appropriate for the manager to reasonably pursue the possibility of making a successful claim against the NHBC, before committing considerable time and costs to a full section 20 consultation process; if the NHBC accept responsibility for effecting all external repairs to the building, then there will be no service charge liability for the lessees to meet.

35. The section 20 consultation process will only be needed if the NHBC decline to accept responsibility for the totality of the works; however, it was entirely appropriate for the manager to have started the consultation process, to put lessees on notice of the possibility of major works and a possible service charge liability, and so to run two approaches in tandem. In light of the NHBC featuring large, it is appropriate for the manager to serve on the lessees a copy of any report published by them on the outcome of the claim.

36. If the NHBC reject the claim then there will be some urgency in progressing this alternative line, in view of the nature of the problem: water ingress can over time cause considerable damage to the fabric of the building; a flat may become/continue to be uninhabitable. The Tribunal is mindful that outside works of this type should ideally be undertaken in reasonable weather conditions, and that the approaching summer gives a window of opportunity.

It is apparent that the living conditions of flat 24 are far from ideal, and this has been the case for some time.

37. The Tribunal is satisfied that subject to the conditions referred to above, dispensation from consultation should now be granted on the basis that the manager will continue to liaise with lessees, to inform them of the progress of the matter, to answer reasonable enquiries expeditiously, to note any relevant lessee observations, to take up contractor nominations made by lessees, and to ensure that the likely service charge liability is notified to the lessees as soon as reasonably practicable.

38. The Tribunal noted that the NHBC guarantees are due to expire towards the end of the year, and noted the managers agreement that a review should properly be undertaken of matters relevant to that guarantee – so as not to miss any possibility of making a claim on wider or other matters, as appropriate.

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Joanne Oxlade
Judge of the First Tier, Property Chamber (Residential Property)

15th April 2014

Appendix A

PART 2 CONSULTATION REQUIREMENTS FOR QUALIFYING WORKS FOR WHICH PUBLIC NOTICE IS NOT REQUIRED

Notice of intention

- 8.— (1) The landlord shall give notice in writing of his intention to carry out qualifying works—
- (a) to each tenant; and
 - (b) where a recognised tenants' association represents some or all of the tenants, to the association.
- (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.

Inspection of description of proposed works

- 9.— (1) Where a notice under paragraph 1 specifies a place and hours for inspection—
- (a) the place and hours so specified must be reasonable; and
 - (b) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.
- (2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

Duty to have regard to observations in relation to proposed works

10. Where, within the relevant period, observations are made, in relation to the proposed works by any tenant or recognised tenants' association, the landlord shall have regard to those observations.

Estimates and response to observations

11.— (1) Where, within the relevant period, a nomination is made by a recognised tenants' association (whether or not a nomination is made by any tenant), the landlord shall try to obtain an estimate from the nominated person.

(2) Where, within the relevant period, a nomination is made by only one of the tenants (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate from the nominated person.

(3) Where, within the relevant period, a single nomination is made by more than one tenant (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate—

(a) from the person who received the most nominations; or

(b) if there is no such person, but two (or more) persons received the same number of nominations, being a number in excess of the nominations received by any other person, from one of those two (or more) persons; or

(c) in any other case, from any nominated person.

(4) Where, within the relevant period, more than one nomination is made by any tenant and more than one nomination is made by a recognised tenants' association, the landlord shall try to obtain an estimate—

(a) from at least one person nominated by a tenant; and

(b) from at least one person nominated by the association, other than a person from whom an estimate is sought as mentioned in paragraph (a).

(5) The landlord shall, in accordance with this sub-paragraph and sub-paragraphs (6) to (9)—

(a) obtain estimates for the carrying out of the proposed works;

(b) supply, free of charge, a statement ("the paragraph (b) statement") setting out—

(i) as regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works; and

(ii) where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, a summary of the observations and his response to them; and

(c) make all of the estimates available for inspection.

(6) At least one of the estimates must be that of a person wholly unconnected with the landlord.

(7) For the purpose of paragraph (6), it shall be assumed that there is a connection between a person and the landlord—

(a) where the landlord is a company, if the person is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(b) where the landlord is a company, and the person is a partner in a manager of the company or is a close relative of any such director or manager;

(c) where both the landlord and the person are companies, if any director or manager of one company is, or is to be, a director or manager of the other company;

(d) where the person is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or

(e) where the person is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager.

(8) Where the landlord has obtained an estimate from a nominated person, that estimate must be one of those to which the paragraph (b) statement relates.

(9) The paragraph (b) statement shall be supplied to, and the estimates made available for inspection by—

(a) each tenant; and

(b) the secretary of the recognised tenants' association (if any).

(10) The landlord shall, by notice in writing to each tenant and the association (if any)—

(a) specify the place and hours at which the estimates may be inspected;

(b) invite the making, in writing, of observations in relation to those estimates;

(c) 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.

(11) Paragraph 2 shall apply to estimates made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.

Duty to have regard to observations in relation to estimates

12. Where, within the relevant period, observations are made in relation to the estimates by a recognised tenants' association or, as the case may be, any tenant, the landlord shall have regard to those observations.

Duty on entering into contract

13.—(1) Subject to sub-paragraph (2), where the landlord enters into a contract for the carrying out of qualifying works, he shall, within 21 days of entering into the contract, by notice in writing to each tenant and the recognised tenants' association (if any)—

(a) state his reasons for awarding the contract or specify the place and hours at which a statement of those reasons may be inspected; and

(b) where he received observations to which (in accordance with paragraph 5) he was required to have regard, summarise the observations and set out his response to them.

(2) The requirements of sub-paragraph (1) do not apply where the person with whom the contract is made is a nominated person or submitted the lowest estimate.

(3) Paragraph 2 shall apply to a statement made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.