



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

**Case Reference** : CHI/00HP/LSC/2013/0122

**Property** : Dolphin Court, 15 The Avenue, Poole,  
Dorset, BH13 6HB

**Applicant** : Dolphin Court (Branksome  
Park) Ltd

**Representative** : Mr M Preece, Horsey Lightly  
Fynn

**Respondent** : The 22 leaseholders

**Representative** : -

**Type of Application** : Service charges : section 27A of the  
Landlord and Tenant Act 1985 (“the  
1985 Act”)

**Tribunal Members** : Judge P R Boardman (Chairman),  
Judge W M S Tildesley OBE, and Mr K  
M Lyons FRICS

**Date and venue of  
Hearing** : 5 February 2014  
Court 8, Bournemouth County Court,  
Deansleigh Road, Bournemouth,  
Dorset, BH7 7DS

**Date of Decision** : 7 February 2014

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**DECISION**

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## Introduction

1. This is an application for a determination of payability of service charges in relation to works which the Applicant wishes to carry out
2. The papers before the Tribunal are :
  - a. the Applicant's application dated 31 October 2013
  - b. a list of the Respondents' names and addresses
  - c. the Applicant's amended statement of case
  - d. the amended bundle of papers numbered 1 to 84 submitted by the Applicant.
3. References in this decision to page numbers are to page numbers in the Applicant's amended bundle
4. The grounds of the application, as set out in the Applicant's statement of case, were that :
  - a. the Applicant was the freehold owner of the property
  - b. the shareholders of the Applicant were the Respondents, who were the 22 leaseholders
  - c. the leases of each flat, as varied, were believed to be in materially the same terms as the lease of Flat 8 copied at pages 1 to 6, and the lease extension of Apartment (formerly Flat) 21 copied at pages 7 to 18
  - d. the Applicant proposed to carry out the following works at the Property, as detailed in the reports from Samways Surveying Limited, Chartered Building Surveyors dated 24 September 2012 (copied at pages 19 to 25) and 5 December 2012 (copied at pages 26 to 30) :
    - repairing the concrete window surrounds
    - installing lead cavity trays over any window which did not already have one
    - repairing mortar joints round the perimeter of the window surrounds
    - repointing brickwork where necessary
    - repainting each window surround with high-performance paint
    - other associated works
  - e. it was essential to carry out the works in the interests of the health and safety of the Respondents and visitors, not only because there had been instances of concrete and its reinforcement breaking away and falling, but also to ensure the integrity of the structure generally
  - f. the Applicant was liable to carry out the works by virtue of paragraph 3 of the fifth schedule to the original leases, which provided that the Applicant should keep the external and

structural parts of the Property in good and substantial repair and condition

- g. each Respondent was liable for a one-22<sup>nd</sup> share of the costs under clause 4 of the original leases, as varied by the lease extensions by the addition of a new clause 4.2, which provided for the Applicant to raise a levy on the Respondents, payable on demand, in respect of works of an emergency nature or where the settlement of expenditure had not been previously anticipated and which could not be funded from reserves
- h. notices dated 19 February 2013 under section 20 of the 1985 Act (copied at pages 31 to 33) were served on the Respondents, and no written representations had been received during the consultation period
- i. the Applicant obtained a Defects Inspection and Analysis report dated 27 March 2013 from Bennington Green Limited (copied at pages 34 to 57), which confirmed that the works, and their methodology, were appropriate
- j. notices and statements of estimates dated 9 October 2013 in relation to the works (copied at pages 58 to 62) were served on the Respondents, and no written representations had been received during the consultation period
- k. at a meeting of the Applicant on 12 November 2013 (of which minutes, as circulated to all parties by the Applicant's managing agents, were copied at pages 63 to 65) Samways Surveying Limited requested further information from the 2 lowest tendering contractors
- l. by letter dated 20 December 2013 addressed to the Applicant's managing agents (copied at pages 66 to 77, and sent to the Respondents by the Applicant's managing agents on 17 January 2014), Samways Surveying Limited reported the further information received from the 2 contractors
- m. revised notices and statements of estimates dated 17 January 2014 in relation to the works (copied at pages 78 to 84) were served on the Respondents, and no written representations had so far been received
- n. the Applicant was conscious that the cost of the works was significant, and therefore sought tenders to carry out the works in four phases, despite the fact that phasing would incur additional costs compared with carrying out the works as a single project, to make the Respondents' contributions to the works more manageable
- o. the Applicant originally proposed to instruct Construction Design and Maintenance (Dorset) Limited to carry out the works as the contractor which submitted the lowest tender, but, as a result of the additional information received, now proposed to instruct Southern Concrete Services Limited
- p. the Applicant sought a determination from the Tribunal that :
  - the works were reasonably required
  - the cost of the works, incorporating any additional costs and expenses which might be incurred in phasing the works, would be reasonably incurred in accordance with section

19(1)(a) of the 1985 Act

- the Applicant could recover the cost of the works through a service charge levy
5. Mr and Mrs B E Savage of 4 Dolphin Court sent to the Tribunal written notice dated 21 January 2014 that they accepted that the works needed to be undertaken and that they believed that the Applicant should be granted the determination sought as the works were reasonably required and that the cost of the works, as detailed, would be reasonably incurred and would be payable through the service charge
  6. By directions dated 22 January 2014 the Tribunal noted that the Respondents had not sent their statements of case by 15 January 2014 (as directed by the Tribunal's earlier directions dated 5 November 2013), and that Mr and Mrs Savage had informed the Tribunal that they agreed with the application, and the Tribunal directed each of the other Respondents to return to the Tribunal by 30 January 2014 an attached reply slip indicating whether they agreed or disagreed with the application
  7. The following Respondents used the Tribunal's reply slip to indicate that they agreed with the application and would not be attending the hearing :
    - a. P A Mutton, executor of the late Mrs P Mutton, 1 Dolphin Court
    - b. Mr L Farra, 2 Dolphin Court
    - c. Mrs P Rolfe, 5 Dolphin Court
    - d. Mr J Constable, 6 Dolphin Court
    - e. Mr C W Osborn, 10 Dolphin Court
    - f. Mr A P Thomas, 11 Dolphin Court
    - g. Mrs R J Gittins, 13 Dolphin Court
    - h. Mrs S Randall, 15 Dolphin Court
    - i. Mrs S Randall, 17 Dolphin Court
    - j. Mr and Mrs P Kelly, 20 Dolphin Court
    - k. Mr and Mrs J M Lewin, 22 Dolphin Court
  8. Mr J Henderson of 3 Dolphin Court used the Tribunal's reply slip to indicate that he would not be attending the hearing, but to also to state that he agreed with the application only on the basis of a single-phased project in order to resolve the problem quickly and keep the costs to a minimum. Since the directors had taken it upon themselves to remove concrete from the outside of his flat, the flat suffered from dampness and mould inside, and looked unsightly from the outside. This was now on all three faces of his flat, so he proposed that that elevation of the block be done first. He attached 6 photographs and an e-mail dated 20 November 2013 from Matthew Strong of Rebbecks
  9. Miss T J Cooke of 14 Dolphin Court used the Tribunal's reply slip to indicate that she agreed with the application and would not be attending the hearing, but added that she would like the question asked why more had not been done when this was first highlighted in a surveyor's report back in 2008 commissioned by Rebbeck Brothers.

She could supply copies if required. At least works and costs could have been budgeted for 6 years ago

10. Mr and Mrs H Guddee of 18 Dolphin Court used the Tribunal's reply slip to indicate that they agreed with the application and would [sic] be attending the hearing
11. Mr I M Wall, 19 Dolphin Court, responded in the same terms as Mr and Mrs Savage of Flat 4 :
12. Accordingly, the Respondents listed in the application who have not indicated to the Tribunal a response to the application are :
  - a. Mr M P Chapman, 7 Dolphin Court
  - b. Mr A H Thomson, 8 Dolphin Court
  - c. Mrs I M Messer, 9 Dolphin Court
  - d. Mr and Mrs S G Turvey, 12 Dolphin Court
  - e. Mr S Constandinos, 16 Dolphin Court
  - f. Mr B J R Chappell and Miss S L Chappell, 21 Dolphin Court

### **Inspection**

13. The Tribunal inspected the Property on the morning of the hearing on 5 February 2014. Also present were Mr Preece, Mr S Turvey, Director, Mr M Strong, Rebbeck Brothers, Mr R Samways, Samways Surveying Ltd, Mr S Constandinos (Flat 16), and Mrs R J Gittins (for the inspection of Flat 13 only)
14. The Property was a 1960s brick-faced block, comprising 22 flats on 8 floors. The Tribunal adopts the description of the window surrounds contained in the report from Samways Surveying Limited dated 24 September 2012 (copied at page 20), namely "each of the windows has a pre-cast concrete surround which is formed in separate sections comprising lintel section (ie top section), mullion section (vertical sides) and cill section". There are helpful drawings at pages 51 (block plan, elevations, and window types) and 52 (vertical and horizontal window sections), and photographs at pages 22 to 24, 28 to 30, and 44 to 49
15. Many of the window surrounds had missing pieces of concrete. The tops of some lintels had a covering of felt. Others had lead trays
16. The Tribunal inspected the interior of Flats 13 and 16. Mr Turvey showed the Tribunal the soffit in a bedroom in Flat 13 which he said had now been repaired, but which had previously had a crack so large that he could put his hand in

### **The hearing**

17. Present were Mr Preece, Mr Turvey, Mr Strong, Mr Samways, and Mr Bagshawe and Mr Clifford (as observers)

18. The Tribunal indicated that Mr A J Mellery-Pratt FRICS was a member of the Residential Property Tribunal Service, and that it had come to the Tribunal's notice on reading the papers in this case that Mr Mellery-Pratt's firm, Rebbeck Brothers, were managing agents to the Property, and that Mr Mellery-Pratt himself was company secretary to the Applicant company. However, none of the Tribunal panel had spoken to Mr Mellery-Pratt about this case, and would not do so, so that there was no actual conflict of interest in the Tribunal panel determining this case. However, the Tribunal was keen to ensure that there was no perception of conflict either, and had accordingly notified the parties in writing of the potential issue in advance of the hearing. The Tribunal had received no response from any of the Respondents
19. The parties present indicated that they had no issue with the Tribunal continuing to deal with the case, and the Tribunal accordingly decided to do so

### **The Applicant's case**

20. Mr Preece took the Tribunal through the Applicant's statement of case. Mr Samways's methodology had been endorsed by Bennington Green, who, in doing so, had also considered other possible solutions (at paragraph 5.6 of their report at page 40)
21. The Applicant had been transparent throughout, and, in addition to sending formal consultation notices, had discussed the proposed works with leaseholders at a meeting on 12 November 2013, which both Mrs M Henderson (on behalf of her son) and Miss Cooke had attended
22. In relation to Mr Henderson's comments in the Tribunal's reply slip, the difference in cost between carrying out the works in a single phase and in three phases (as now proposed, not four phases as originally proposed) was just under £4000, or £181 a flat, as set out in the notice to each Respondent dated 17 January 2014 (at pages 82 to 84) showing the costs, based on the estimates by Southern Concrete Services Limited, as follows (including VAT in each case) :

	3 phases	single phase
total project cost	£271741	£267751
cost per flat	£12351	£12170

23. In relation to phasing, Mr Strong had sent feedback forms to all the Respondents. 12 had responded. Mr Henderson had not done so. Of the 12, 6 had preferred carrying out the work in a single phase, and 6 had preferred 3 phases. Mr Henderson's comments in the Tribunal's reply slip now meant that 7 of the 22 Respondents preferred a single phase, 6 preferred 3 phases, and 9 had not expressed a preference
24. Mr Strong said that in addition to Mr Henderson's reasons for preferring a single phase, Mr and Mrs Savage had commented that parking would be difficult throughout the works, and a single phase

- would keep disruption to a minimum, and Mr and Mrs Kelly had commented that the 3-phase payments would be required over a short period in any event, and so did not offer any realistic benefit
25. Carrying out the works in a single phase would take about 12 weeks. Meetings would be held with the Respondents with a view to starting the works as soon as possible. Levy invoices for £12170 a flat would be sent out in, say, mid-March 2014 , for payment on 1 April 2014
  26. Carrying out the works in three phases would take about 24 weeks, ie about 8 weeks for each phase, starting in, say, spring 2014, autumn 2014, and spring 2015, respectively. Invoices would be sent out with payment dates of 1 April 2014, 1 July 2014, and 1 April 2015. The figure in each case would not be exactly one third of £12351, because adjustments would be necessary to take account of the phased costs for individual items of work
  27. Mr Preece said that the beneficial financial impact on the Respondents of carrying out the works in three phases, rather than one, although admittedly proportionately small, could be taken into account when deciding whether to adopt a 3-phase approach instead of a single phase approach, following the guidance in the Upper Tribunal decision in **Frognal Court** [2011] UKUT 367 (LC)
  28. Mr Samways said that the Applicant would bear in mind Mr Henderson's request to deal with his elevation first when deciding on the order in which works should be carried out
  29. In relation to Mr Henderson's comment about dampness, Mr Samways's previous inspections had revealed problems of condensation in Flat 3, and, although Mr Samways had not inspected Flat 3 recently, and although the current window surround problems could in principle cause water ingress problems if not addressed, the removal of loose concrete was unlikely in itself to have cause water ingress problems, in that if the concrete had been loose it would have been unlikely to have prevented water ingress before it had been removed
  30. In relation to Miss Cooke's comments in the Tribunal's reply slip, Mr Strong said that Rebbecks had commissioned various surveys in 2008 in relation to water ingress issues, rather than in relation to the current concrete window surround issues. Mr Turvey said that the latter had first become apparent only about 18 months ago when Mrs Gittins had asked him to look at the crack in the soffit in Flat 13 referred to during the Tribunal's inspection
  31. In answer to questions from the Tribunal about the methodology of the proposed works, and whether it would be more appropriate to carry out trial works on one or two flats (such as appeared to be contemplated in the final paragraph of Mr Samways's letter dated 20 December 2013 at page 68) before making a final decision on the methodology for the

remainder, Mr Samways said that he had already inspected each window surround visually and had carried out hammer tests in each case. The proposal was :

- a. to open up each defective concrete surround to a point 100 mm after the last apparent point of corroded reinforcement, and then along from that last point of corrosion until 100 mm beyond the last point of corrosion at each end
- b. to treat the reinforcement with alkaline-rich primer
- c. to prime the concrete surfaces with a slurry coat
- d. to repair the concrete with R3 mortar
- e. to apply 2 coats of an acrylic paint system with fillers added to fill any fine imperfections in the concrete and to form a tough and durable film over the concrete window surrounds of each flat, not just those which had had to be repaired
- f. to rake out the mortar around the perimeter of every window surround, prime the surfaces, and apply a good quality sealant
- g. to replace with lead trays any lintels which were still topped with felt, and to check that any existing lintel lead trays were effective; the estimated prices (at page 82) included a contingency sum of £16000 plus VAT for expenditure in that respect

32. Some concrete window surrounds might need replacement, rather than the proposed repairs, and the estimated prices also included a provisional sum of £16000 plus VAT for expenditure in that respect

33. Mr Strong said that if the work was carried out in three phases, the first phase would be effectively a phase during which lessons could be learnt which would assist with the two subsequent phases

34. In relation to other possible ways of solving the current problems, some leaseholders had suggested installing a plastic cladding to the window surrounds. However, that would only encapsulate the problem, and in any event there would be fixing issues, as noted in Mr Samways's letter dated 5 December 2013 (at page 27) and in Bennington Green's report (at page 40). Replacement of all the concrete window surrounds with new concrete would be an ideal solution if money was no object, but the cost would be prohibitive (Bennington Green's report at page 40)

35. In relation to the suggestion from the Tribunal that the concrete window surrounds could be removed altogether, and larger UPVC windows could be installed instead, Mr Samways said that in each case some (although admittedly not all) of the structural load on the boot lintels was transmitted to the existing concrete mullions, so that the structure would have to be otherwise supported, and, again, the cost would be prohibitive, as noted in Bennington Green's report (at page 40)

36. In answer to questions from the Tribunal about the comment (at page 76) that "prolonged period of decay to the concrete, potentially increasing the amount/quantity of repairs and therefore costs" was one



of the disadvantages in carrying out the works in three phases, and about the Tribunal's suggestion that it would be preferable to carry out trial works on a ground floor flat before making a final decision on methodology for the whole block, Mr Samways said that although a trial on the ground floor would give an insight into whether the quantities allowed in the estimates (at page 82) were sufficient, it would still not be possible to be 100% accurate on the quantities for the rest of the block. It was possible that particular window surrounds might have deteriorated to such an extent that so much had to be cut out that repair, rather than replacement, was not viable, but that would not affect the overall methodology of repairing rather than replacing, and the provisional sum of £16000 plus VAT in that respect was hoped to be sufficient. Southern Concrete's view was that replacement should be the exception, and that repair should be the norm. Mr Samways agreed

37. In answer to questions from the Tribunal about whether the vertical section drawing (at page 52) accurately showed the inner angle of the boot lintels as virtually a right-angle, or whether, as the Tribunal suggested was more normal, there should be slope in the inner angle to deflect water ingress away rather than to allow it to build up behind the outer brickwork, Mr Samways said that he had not actually inspected that detail on site
38. In answer to questions from the Tribunal about guarantees, Mr Samways said that Southern Concrete had told him verbally that they would offer a 10 to 15-year insurance-backed guarantee at a premium of 5% of the contract price

### **The Tribunal's decision**

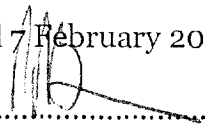
39. The Tribunal has taken account of all the evidence, submissions and comments before it in the round, including :
- a. the comments by Miss Cooke
  - b. the comments by Mr Henderson
  - c. the evidence by Mr Strong that 6 other Respondents had also preferred the works to be carried out in a single phase, and the reasons given in that respect by Mr and Mrs Savage and Mr and Mrs Kelly
  - d. the advantages (listed at page 75) of carrying out the works in a single phase, and the disadvantages (listed at page 76) of doing so in three phases
  - e. the fact that Mr Samways has not yet inspected the precise shape of the boot lintels
  - f. the fact, as Mr Samways acknowledges, that trial works on a ground floor flat would give an insight into whether the quantities allowed in the estimates (at page 82) were sufficient
40. However, as indicated in a summary given at the hearing, the Tribunal finds that :
- a. the Tribunal is satisfied, on a balance of probabilities, that the

- methodology and costings of the proposed works are reasonable
- b. the proposed works should be carried out in three phases, because :
- carrying out the work in three phases will enable the Applicant to review the methodology and costings at the very latest at the end of the first phase in the light of the lessons which will by then have been learned, and taking into account the comments by the Tribunal during the hearing, and the Tribunal expects that the Applicant will then revert to the Respondents and, if necessary, make a fresh application to the Tribunal
  - the extra costs involved in carrying out the works in three phases rather than one are proportionately minimal, namely only £181 a flat compared with a total estimated cost of £12179 for a single phase
  - the phasing of the works will nevertheless have a beneficial financial impact on the Respondents, in that the phasing of the works will also mean a phasing of the payments by way of service charge
- c. accordingly, the extra costs involved in carrying out the works in three phases rather than one will, in all the circumstances, have been reasonably incurred

## Appeals

41. A person wishing to appeal against this decision 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
42. 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
43. 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 admit the application for permission to appeal
44. 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 which the person is seeking

Dated 7 February 2014

  
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Judge P R Boardman  
(Chairman)