



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

Case Reference : **MAN/OOBR/LSC/2014/0106**

Property : **Apartments at Hyndburn Court, Sheader Drive,
Salford M5 5BX**

Applicants : **Deborah Maloney, Stephen Richmond,
Carl Phipps, Brent Starling**

Representative : **Scanlons Consulting Surveyors**

Respondent : **Chancery Gardens (Salford) RTM
Company Limited**

Representative : **Slater Heelis**

Type of Application : **Landlord & Tenant Act 1985 – Section 27A**

Tribunal Members : **Laurence Bennett (Tribunal Judge)
Ian James MRICS**

Date of hearing : **30 March and 8 April 2015**

Date of determination : **6 May 2015**

Date of Decision : **6 May 2015**

DECISION

Application

1. The Applicants apply under Section 27 of the Landlord & Tenant Act 1985 (the Act) for a determination of service charge payable in respect of replacement of windows at the Property.

Attendance

2. Ms Deborah Maloney, the Lead Applicant attended the hearing with Mr Stephen Richmond. She was represented by Mr Russell Butcher, a Barrister instructed under direct access. Her witness was Mr Tony Mancini, a Chartered Building Surveyor with Scanlons Consultant Surveyors LLP.
3. Mr Matthew Hall, a Barrister instructed by Slater Heelis LLP represented the Respondent. Its witnesses were Mr Julian Walsh of Jackson Joinery Manufacturing Limited, Mr Stephen Hunter of Prestige Property Associates Limited t/a Prestige Property Services (Prestige), Mr Steven Thompson of HML Guthrie Property & Estate Management (HMLG) and Mr Ian Willoughby, a Chartered Surveyor.

Inspection

4. The Tribunal visited the Property on the morning of the hearing and inspected the site of the development accompanied by both the Applicants' and Respondent's representatives and some Respondent witnesses. They observed upvc window frames that had been replaced by individual tenants and others replaced by the Respondent. They were able to observe many original wooden frames on the site.
5. The original frames are of soft wood painted and show varying degrees of deterioration including rot to cills, lifting paintwork and defective reveals. There were gradations in condition ranging from satisfactory with little obvious defects and probably not requiring attention to those which did. The Tribunal's observation was restricted to ground level and what could be seen from ground level save in respect of an internal stairway at Hyndman Court.

The Property

6. The Property comprises 90 flats within 4 low-rise blocks constructed during the 1990s. There are 483 windows. It is located in a mixed area approaching Manchester City Centre near to Salford Docks and is close to both a motorway and main railway line. It is on a main road with bus and tram services. There are industrial and commercial buildings close by. It was noted that the development is subject to elevated noise levels from traffic and other main road activity.

The Lease

7. A copy lease relating to an individual flat at the Property was submitted as containing identical covenance to the other flat leases. It includes a covenant regarding the provision of services "to keep the roof foundations windows external parts external walls load bearing walls and external doors of the common parts (save for glass in any windows and the interior walls of the Property) in good and substantial repair." There are further provisions allowing the recovery of expenditure incurred in performing such obligation by way of service charge.

8. The management and service charge responsibilities in relation to the Property are vested in the Respondent Right to Manage Company.

Background

9. Around the end of 2012, the Respondent management company started to consider the state of the windows at the development, many having been replaced by individual tenants.
10. At the time Ms Maloney was a Director of the Management Company although subsequently she resigned. Whilst the Tribunal is not concerned with internal Company matters, it notes from the records provided that she was persistent in her view that only limited work should be carried out to the windows at that time.
11. In due course, following professional advice from Mr Ian Willoughby, a Chartered Surveyor and Prestige Property Services, General Maintenance Contractors, a consultation was initiated in accordance with the provisions of Section 20 Landlord & Tenant Act 1985. The first consultation notice was dated 12 February 2014 and a further consultation notice was served 12 June 2014 with estimates. A further consultation notice was served on 29 July 2014.
12. The lead Applicant responded to the Section 20 consultation. Contractors proposed by her were engaged who replaced timber windowframes with upvc. Payment for this work was taken from a reserve fund transferred to the Respondent RTM Company on its assumption of management responsibilities.

Preliminary issue

13. Mr Hall on behalf of the Respondent submitted that a service charge issue does not arise as the monies were defrayed from existing reserve funds. He referred to Upper Tribunal decision *Solitaire Property Management Company Limited v Dr Stephen Holden* [2012] UKUT86(LC).
14. The Tribunal finds the Respondent's submission inconsistent with its prior conduct. Had service charge considerations not been engaged, it is hard to see why a Section 20 consultation was initiated and repeated.
15. The UT decision quoted does not relate to capital expenditure as incurred in the current circumstances is distinguishable. It appears in *Solitaire* that funds had been used to tide over a shortfall of current expenditure and not for specific capital expenditure. The Tribunal does not find Mr Hall's submissions persuasive and is satisfied that the expenditure on the windowframes falls within that envisaged in Sections 18 and 19 of the Landlord & Tenant Act 1985, that is a payment directly for services, repairs, maintenance, improvements The whole or part of which varies according to the relevant costs. We do not find this changes because monies were paid by Leaseholders in advance on the basis of a budgeted general reserve. It is appropriate that the Tribunal makes a determination under Section 27A of the Landlord & Tenant Act 1985.

Repair or replacement

16. The issue considered below relates to the need to replace and not repair windowframes. Whilst there was some discussion by the expert witnesses whether replacement should have been timber or upvc, the evidence indicates the cost would be similar. The Tribunal was not directly asked to make a determination on the point, however, as it was discussed within the hearing, the Tribunal noting similar cost for either medium does not find this material. The major technical issue for determination is whether replacement rather than repair was appropriate.

The hearing

17. The hearing took place over 2 days.
18. On Mr Butcher's application to accommodate Mr Mancini's prior commitments, his evidence was given at the start of the hearing.

Evidence and submissions

19. There is little dispute about the steps taken by the Respondent following its decision to carry out work to the windowframes. The RTM Company had instructed HMLG to act as its Managing Agents. In turn, HMLG instructed Mr Willoughby whom they had previously engaged to prepare a planned maintenance review. This review covered common parts of the development including roof, entrance doors and windows and other relevant aspects.
20. Mr Willoughby attended the site in February, July and August 2013. At the hearing he detailed his methodology which included sketch drawings categorising individual windowframes; beyond economic life, replacement required immediately, those already replaced and those which required further investigation.
21. HMLG then engaged Prestige, contractors familiar with the site to further assess the windows using a cherry-picker and ladders to provide direct access to all elevations. They confirmed Mr Willoughby's findings. One hundred and eleven windows were found to be beyond economic repair. Mr Stephen Hunter on behalf of Prestige described his investigations. They were on-site for several days.
22. Jacksons, a local manufacturer and installer was engaged as proposed by Ms Maloney in response to the Section 20 consultations. Sixty-five windows have now been replaced at a cost of £29,070.
23. Mr Walsh, a Director of Jacksons was clear in his view that it was appropriate to replace using upvc and to the extent he was aware, that it would be uneconomic to have repaired the windows replaced. He said that his company accepted instructions without querying the specific need for replacement of each individual windowframe. He and Mr Willoughby gave reasons for their view that upvc would be an appropriate replacement including longevity, lack of required maintenance, thermal efficiency, noise insulation and to fit aesthetically with the other windows already replaced by Leaseholders.

24. Mr Mancini was engaged by the Applicant to consider the overall position including compliance with Section 20 procedure, the extent of the Lease obligations and all technical aspects. He produced a report and addendum. Mr Mancini gave details in his oral evidence about his site attendance, the result of his observations and his view regarding the appropriateness of replacement rather than repair. He mentioned differing replacement and repair options.
25. Mr Mancini has contrasted the information provided on behalf of the Respondents' professionals and his own views, in essence, he considers windows have been replaced which were not beyond economic repair. Although he first attended the site after replacement had taken place, he estimates that around 17% of windowframes he inspected were appropriate for replacement rather than repair. This is based on the 67 windows yet to be replaced. He commented that the average individual replacement cost of £365 + VAT is excessive although he did not provide alternative figures. He modified his comments when told the cost of £265 for a single window and £530 for a bay.
26. Mr Mancini's addendum report sets out his opinion that there were deficiencies in the Section 20 process in that the Respondent did not obtain sufficient advice to be able to make an informed decision or provide such to consultees.
27. The witnesses commented on the appropriate specification and requirements for replacement windows, the respective practicality and work involved in alternative methods of repair such as epoxy resin, retreated windowframes and the general planning of replacement in a multi-flatted development.

The Law:

28. Section 18 of the Landlord and Tenant Act 1985 ("the 1985 Act") provides:
 - (1) In the following provisions of this Act "service charge" means" an amount payable by a tenant of a dwelling as part of or in addition to the rent –
 - (a) which is payable directly or indirectly , for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
 - (b) the whole or part of which varies or may vary according to the relevant costs.
 - (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
 - (3) For this purpose-
 - (a) "costs" includes overheads, and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19 provides that

- (1) relevant costs shall be taken into account in determining the amount of a service charge payable for a period –
 - (a) only to the extent that they are reasonably incurred, and
 - (b) where they are incurred on the provision of services or the carrying out of works only if the services or works are of a reasonable standard:

and the amount payable shall be limited accordingly.

Section 27A provides that

- (1) an application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
 - (a) the person by whom it is payable
 - (b) the person to whom it is payable
 - (c) the date at or by which it is payable, and
 - (d) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3)
- (4) No application under subsection (1)...may be made in respect of a matter which -
 - (a) has been agreed by the tenant.....
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

No guidance is given in the 1985 Act as to the meaning of the words "reasonably incurred". Some assistance can be found in the authorities and decisions of the Courts and the Lands Tribunal.

In *Veena v S A Cheong* [2003] 1 EGLR 175 Mr Peter Clarke comprehensively reviewed the authorities at page 182 letters E to L inclusive. He concluded that the word "reasonableness" should be read in its general sense and given a broad common sense meaning [letter K].

Section 20C of the 1985 Act
provides that

- (1) A tenant may make an application for an order that all or any of the costs incurred or to be incurred, by the landlord in connection with proceedings before a court or the First-tier Tribunal (Property Chamber) or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application
- (2) The application shall be made-
 - (a) in the case of court proceedings to the court before which the proceedings are taking place, or, if the application is made after the proceedings are concluded, to the county court
 - (b) in the case of proceedings before a First-tier Tribunal (Property Chamber) to the Tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded to any First-tier Tribunal (Property Chamber)
 - (c)
 - (d)....
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.
- (4)

The Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987) (“the Regulations”).

Consultation – Qualifying Works for which Public Notice is not required

Schedule 4 Part 2

- 1 - (1) The landlord shall give notice in writing of his intention to carry out qualifying works-
- (a) to each tenant; and
 - (b)
- (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

- 2 - (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

3. 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

- 4.— (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 partnership, if any partner in that partnership is, or is to be, a director or 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

5. 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

6.—(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.

Tribunal's conclusions

29. The Lease provisions clearly require that the Respondent maintains windows. We have noted the exception in relation to glazing, however, we accept as a matter of practicality that should it become necessary to replace a window or in certain cases repair, it will be necessary to replace or substitute glazing. To that end, in the circumstances under consideration it is neither possible nor necessary to separate out any extra element of cost in respect of the glass within the windowframes.
30. We determine from the evidence as was not disputed that individual Leaseholders over the years have found it appropriate to replace their windowframes, at their own cost. They have chosen upvc windowframes. Although we do not have definitive statistics, a significant number of windows have been replaced in that way and at the material times the development had a mixture of both original timber and upvc frames. It is clear from our inspection and as was asserted at the hearing by the professional witnesses, the timber frames were not of the highest quality comprising basic softwood frames.
31. There is a measure of agreement that it was necessary for work to be carried out to windowframes and in certain cases, for instance according to Mr Mancini "17%" by way of replacement. His evidence showed his clear preference for repairing windowframes including the use of methods that were criticised as uneconomic by other witnesses. Nevertheless, at the time he inspected the development when windowframes had already been replaced, he reached the conclusion that some 17% required replacement. We were not able to discern the number of frames he felt required attention short of replacement nor the nature and expense of the work this would have entailed. The photographs he annexed in his report were not particularly helpful.

32. In essence Mr Mancini does not consider that the Section 20 consultation was satisfactory because of insufficient independent professional advice and inadequate inspection of the work particularly that there does not appear to have been internal examinations. Standard tender documents were not used and costs could not be relied upon. He commented further that Mr Willoughby's instructions appear to have been based on a replacement scheme and not an open question of what attention the windows required.
33. It is obvious from the statements of the parties that there was a regrettable measure of discord within the Respondent Company. From what we can see Ms Maloney was fighting a lone cause in that she did not believe it appropriate to expend reserves at the time on windowframes. She explained at the hearing that she felt this might deplete resources and leave Management exposed should other urgent work be required. Nevertheless, a company decision was taken to move ahead with the repair and replacement of windows. To the extent that this was necessary it is not possible to criticise that decision.
34. The Management Company acted through the advice of its Managing Agents HMLG; it was not suggested they were inappropriate Managing Agents nor inexperienced or unused to managing developments of this type. The evidence given by Mr Steve Thompson on their behalf gave us the clear impression that he was experienced in management and although he became involved after the initial decision to undertake a programme had been taken, he appeared mindful of the requirements of the development and able to advise and control the process on behalf of the Applicants.
35. We have analysed the steps the Respondent took having formed an intention to attend to the windows. The Management Company's actions were taken on their behalf by professional Management Company, HMLG. In turn, HMLG sought advice from a Chartered Surveyor, Mr Willoughby who they considered had sufficient experience to advise on planned maintenance reviews. The Surveyors recommendations were then tested by Prestige who made a direct physical examination of each of the windows. Ultimately a quotation which had emerged from consultation was accepted and work took place. There is no evidence of a dispute about the quality of the replacement windows although in response to queries issue of a guarantee is awaited.
36. We find each of the steps taken on behalf of the Respondent reasonable. They chose a qualified professional to advise them under the auspices of an experienced Management Company who in turn cross checked by using the services and resources of maintenance contactors familiar with the site. Ultimately, an experienced manufacturer made and installed the windows.

Replacement/renewal

37. The Applicants apart from their view that timing of expenditure was inappropriate in that it exhausted reserves, considers in accordance with the opinion of Mr Mancini that it was not necessary to replace all of the windows so replaced. Mr Mancini's view is that a proportion could have been repaired economically. We accept that timber windowframes can be repaired, the issue is the degree of the deterioration and the consequent cost of doing so. The Tribunal does not have photographic evidence of those windows that had been replaced. For obvious reasons Mr Mancini can only speculate about their condition and bases his comments on the sample of unreplaced windows he inspected. He acknowledged in oral evidence that his opinion was based on his professional experience and knowledge. Mr Willoughby, based on his experience and knowledge made his recommendations. In his case they were accepted in the light of the inspection by Prestige.
38. The Tribunal takes the view that there is no precise scientific benchmark or boundary for deciding between replacement and repair and this necessarily is a judgement that needs to be taken by a person with expert knowledge and familiarity with such matters. That two such people differ is unsurprising. Mr Mancini's comments are made with the benefit of hindsight and a forensic examination of the records of events. We have found it reasonable for the Respondent to proceed in the way it did relying on professional advice; we must now decide whether Mr Willoughby's advice was inappropriate to the extent that unnecessary and unreasonable costs of windowframe replacement were incurred.
39. We have borne in mind that individual Leaseholders had found it necessary to replace their windows at their own expense and that it is likely in our opinion for softwood windowframes to deteriorate over the time period since construction. We have taken into account that a judgement had to be made by the Respondent, steps were taken to confirm professional advice and that a consultation took place. On balance of probabilities we conclude extensive repairs were necessary and that it was cost effective in those cases for windowframe replacement. We are not able to determine frame by frame but find in the circumstances that the costs involved in the replacement were reasonably incurred and that the resulting work was of reasonable standard.
40. We have considered above whether the cost of the work to windows constitutes a recoverable service charge and determine that it does. We also determine that to the extent windows were improved by replacement this was the inevitable result of a cost effective way of dealing with defects and falls within the reasonable cost of work.

Section 20

41. Mr Mancini, with the benefit of hindsight has commented on the Section 20 process. Overall, we do not find it defective, we are satisfied all steps were taken and that ultimately appropriate regard was given to Leaseholders' comments. Ms Maloney's proposed contractor was engaged. We are satisfied Section 20 procedure has been completed. If this had not been apparent, we would nevertheless if requested dispense with compliance on the basis of what was carried out and the lack of identified prejudice to Leaseholders.

Order

42. The cost of replacing windows at the development incurred by the Respondent is payable by Leaseholders as service charge under the provisions of their Lease covenants.