

11549



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

**Case Reference** : CHI/00HN/LSC/2016/0061

**Property** : Meadow Court, 1011 Wimborne Road,  
Bournemouth, Dorset, BH9 2BU

**Applicant** : Tyrell Investments Inc

**Representative** : Napier Management Services  
("Napier")

**Respondent** : The Leaseholders of Flats 1 to 16

**Representative** : Ms J Brunyee for Flats 2, 9, 10 and 11

**Type of Application** : Service Charges : Section 27A of the  
Landlord and Tenant Act 1985 ("the  
1985 Act")

**Tribunal Members** : Judge P R Boardman (Chairman),  
Mrs J Coupe FRICS, and Mr P Turner-  
Powell FRICS

**Date and venue of  
Hearing :** 17 November 2016  
The Best Western Connaught Hotel,  
30 West Hill Road, Bournemouth,  
BH2 5PH

**Date of Decision** : 21 November 2016

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**DECISION**

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## Introduction

1. This application, dated 14 June 2016, is for the Tribunal to decide whether works for remedial damp and rainwater goods repairs costing £40765.33 are the responsibility of the landlord under the leases, and whether the cost is a reasonable service charge expense under the terms of the leases
2. The application described the property as a mid to early 20<sup>th</sup> century purpose-built block of flats comprising 16 units of accommodation over four storeys
3. The documents before the Tribunal are in two bundles, each with a pagination starting at page 1, rather than being paginated consecutively to each other. As indicated to the parties at the hearing the Tribunal has attributed the letter “A” to the first bundle, headed simply “Bundle for case reference.....”, and “B” to the second bundle, headed “Supplemental (Respondents) Bundle for case reference.....”. References in this decision to page numbers, such as A38, B10, and so on, are to page numbers in the respective bundles
4. In addition, there is before the Tribunal, attached to a letter from Napier dated 8 September 2016, a statement on behalf of the Respondents entitled “Why we deem the cost of the roof to be unreasonable for Meadow Court”

## Documents

5. The documents before the Tribunal include :
  - a. the application form (pages B1 to 11)
  - b. the Applicant’s statement of case dated 8 August 2016 (Page A1)
  - c. the lease of Flat 6 dated 19 January 1995 (Pages A2 to 20)
  - d. a report by Greenward Associates dated November 2015 (pages A21 to 52)
  - e. a letter dated 22 January 2016 from Napier to Mr N James (pages A53 to 55), with a “notice 1” under section 20 of the 1985 Act
  - f. a “Schedule of Building Works” by Greenward Associates dated January 2016 (Pages A56 to 83)
  - g. a letter dated 14 April 2016 from Napier to Mr N James, with a “notice 2” under section 20 of the 1985 Act, including a “summarised tender sheet” as follows :
    - Greendale Construction Limited : £30476.11 plus VAT
    - InSync Property Group : £47774.00 plus VAT

Prestige Building Contractors : £54700.00 plus VAT  
 Spetisbury Construction Limited : £48022.85 plus VAT  
 and stating that they proposed to instruct Greendale Construction Limited at a total cost of £40765.33 :

|                                   |                |
|-----------------------------------|----------------|
| Cost of works :                   | 30476.11       |
| Surveyor/Contract administrator : | 1995.00        |
| Napier "(s20 fee)" :              | <u>1500.00</u> |
| Total :                           | 33971.11       |
| VAT :                             | <u>6794.22</u> |
| Grand total :                     | 40765.33       |

- h. a "Tender Report" by Greenward Associates dated April 2016 (pages A90 to 112)
- i. a signed form supporting the landlord's application for a determination on its intention to carry out works of remedial damp and rainwater goods repairs at a cost of £40765.33 from the leaseholder of Flat 15 (page A117)
- j. signed forms opposing the landlord's application from the leaseholders of Flats 2, 9, 10 and 11, and stating that Mrs Brunyee was their appointed representative (pages A119 to 122)
- k. a statement on behalf of the Respondents (pages B21 to 22), including assertions that :
  - the landlord was liable for the costs
  - the amount was unreasonable
  - the issues at the property had included damp, jobs not finished, tradesmen never doing a job, and broken buzzers
  - it was unfair that one flat had got all the damp work paid for and everyone else had to suffer and pay for it themselves
  - the cost would be covered under insurance, but not for flat 9 who incurred damage
  - driveway repairs had not been done
  - reserve fund – Napier had said that there was no power to have one under the lease
  - works carried out in the past had caused more expense for the future
  - there had been delay in getting work done
- l. the documents referred to by the Respondents (pages B23 to 155)
- m. the statement on behalf of the Respondents entitled "Why we deem the cost of the roof to be unreasonable for Meadow Court", including assertions that:
  - the cost of the roof was now unreasonable because of Napier's failure to deal with it seriously
  - there was no evidence that Napier had tried to claim against the people who originally carried out the work
  - it was unreasonable to pay when no insurance claim had been made and no explanation why they could not claim on insurance
  - the cost was unreasonable when the work had left the block in a

sub-standard condition compared with its original state

- many residents had complained about the block and its issues relating to damp, but work done had been minimal and just to tide them over for “this massive bill”

### **The lease of Flat 5**

6. The only lease copied for the Tribunal is the lease of Flat 6. For the purposes of this decision the Tribunal has assumed that all the leases are in materially the same terms
7. The material provisions of the lease of Flat 6 are as follows :

#### ***Clause 2***

##### ***Covenants by the lessee***

*(i) To keep the Demised premises (other than the parts thereof comprised and referred to in paragraph (d) [sic] of clause 3 hereof).....in good and tenantable repair and condition.....*

*(j) To contribute and pay 7.5% of the costs.....mentioned in the fourth schedule hereto.....*

#### ***Clause 3***

##### ***Covenants by the lessor***

*(d) That the Lessor will require every person to whom it shall grant a lease of the other flat [sic] in the building to covenant to observe the same restrictions as set forth in the first schedule hereto and the same covenants as contained in clause 2 hereof*

*(f) .....the Lessor will maintain repair decorate and renew :*

*(i) the main structure and in particular the foundations roof chimney stacks gutters and rainwater pipes of the building (excluding the windows and window frames)*

### **Inspection**

8. The Tribunal inspected the property on the morning of 17 November 2016, before the hearing
9. Also present were Mrs G Drysdale and Mr D Quinton of Napier, Mr T Green of Greenward Associates, and Mr A Pike of Flat 7. There was no answer from the doors of Flats 2, 10 or 11. Mrs S Chababe of Flat 9 allowed the Tribunal access to inspect her flat. The Tribunal was satisfied that the Tribunal had given the Respondents notice of the time and date of the inspection, and decided to proceed with the inspection in the absence

of the other Respondents

10. The property was a 1930s, corner-situated, four-storey, brick-built block under a flat roof, with balconies and UPVC-framed windows with sealed double-glazed units. There was a private parking area and small garden at the rear, accessed from Wimborne Road at the front, which was west-facing, and Meadow Court Close on the left-hand, north-facing, side
11. Mrs S Chababe, of Flat 9, showed the Tribunal her flat, which was on the ground floor of the property on the north facing elevation, and pointed out evidence of damp on the walls in her kitchen, lounge and bedroom
12. Mr Pike, of Flat 7, showed the Tribunal his flat, which was on the fourth storey of the property on the south facing elevation
13. Mr Green pointed out the new roof kerbing, gutters and drainpipes on the eastern elevation of the property
14. The parties showed the Tribunal the exterior wall of the property on the north-facing side adjoining Meadow Court Close. There were bathroom and kitchen windows on each floor, including those of Flat 9. The base of the exterior wall sloped downwards from Wimborne Road to the garden and car park at the rear of the property. It was covered in leaves at the time of the Tribunal's inspection

### **The hearing**

15. Attending the hearing were Mrs G Drysdale, Mr D Quinton, Mr T Green, Mr A Pike, and Mr R Drake of Flat 14. At the Tribunal's earlier inspection of the property, Mrs Chababe had indicated that she was not well, and would probably not be attending the hearing. None of the other Respondents attended. The Tribunal was satisfied that the Tribunal had given the Respondents notice of the time and date of the hearing, and decided in all the circumstances to proceed with the hearing in their absence
16. Mr Green said that he was the managing director of Greenward Associates.
17. His report dated November 2015 had followed complaints by leaseholders to the Applicant about water ingress, mostly through the north elevation by Meadow Court Close, but also to Flats 4 and 6. He had summarised his recommendations for remedying the problems in his schedule of building works at page A76, namely :
  - a. 1.0.0 general items
  - b. 2.0.0 scaffolding access
  - c. 3.0.0 gutters and downpipes
  - d. 4.0.0 roof edge kerbs

- e. 5.0.0 masonry cavities
- f. 6.0.0 brickwork repairs
- g. 7.0.0 window cavity trays
- h. 8.0.0 French drain works (left-hand elevation)
- i. 9.0.0 contingency
- j. 10.0.0 completion

18. In order to take advantage of the summer weather, and after completion of the second-stage consultation procedure under section 20 of the 1985 Act, items 3.0.0 and 4.0.0 of the works had been completed in August 2016, as seen on inspection by the Tribunal that morning. The remaining items had yet to be started
19. Mr Green said that item 7.0.0 was necessary because the window cavity trays were either missing or degraded. Item 8.0.0 was necessary because there had been a build-up of the ground at the base of the north-facing wall of the property, so that the top of the damp proof course was now below ground level
20. In relation to the cost of the works, summarised at page A87, Mr Pike commented that he thought Napier's "s20 fee" of £1500 plus VAT was steep. Mrs Drysdale said that there had been much correspondence about the damp problems and the proposed works, including meetings with the leaseholders and Mr Green and Ben Hume, who had then been part of Mrs Drysdale's team at Napier
21. Mr Pike and Mr Drake said that they accepted that all the works set out in Mr Green's schedule of works were reasonable, and that the cost of £30476.11 plus VAT, being the lowest of four tenders, was reasonable
22. However, Mr Drake said that landlord should have checked the condition of the window cavity trays and the ground build-up, and that the landlord's failure to do so had caused unnecessary work and expense now
23. In relation to the window cavity trays, Mr Green speculated that the problems with the window cavity trays had resulted from the time when the original metal-frame windows had been taken out and replaced with UPVC. He suggested that the fact that they were of different types and from different manufacturers indicated that they had not all been done at the same time
24. Mr Pike said that he thought that all the windows had already been replaced when he moved in about twenty-one years ago, but he was not sure when the windows in the north elevation had been replaced, as they were at the other end of the building from his flat
25. Mrs Drysdale said that she did not know when the Applicant had acquired the freehold of the property. Napier had managed the property for at least

seven years, and the Applicant had been the freeholder throughout

26. Mr Drake said that the Applicant should have carried out a survey before acquiring the freehold, which would have revealed the problems with the window cavity trays. The Applicant would then either have negotiated a reduction in the purchase price, or would have required the previous freeholder to carry out the works before the Applicant acquired the freehold, in which case the works would have been done then, and there would be no need for them to be done now. Either way, the Applicant should not be trying to claim the cost of the works from the current leaseholders
27. The Tribunal put it to Mr Drake that this was speculation, and that in any event it was just as likely that if the Applicant had asked the previous freeholder for a reduction in price the previous freeholder would instead have carried out the works and then required the leaseholders at that time to pay for the cost through the service charge. Mr Drake responded that his suggested scenario was the more likely
28. Mr Drake said that in any event, if, as appeared likely, it had been the leaseholders, rather than the landlord, who had replaced the windows and caused damage to the window cavity trays in doing so, the leaseholders should have asked permission from the landlord when doing so, and the landlord should have inspected as part of the process of considering the applications for permission, and should have insisted on any damage to the cavity trays being put right at the time. It was negligence by the landlord not to have done so, and the Applicant should not now be trying to claim the cost from the current leaseholders
29. However, the Tribunal referred to the terms of the lease, and indicated its initial view that :
  - a. the combination of clauses 2(i) and 3(f) rendered the leaseholder, not the landlord, liable for the maintenance of the windows and window frames
  - b. although clause 2(i) referred to clause 3(d), that was clearly a drafting error, and the reference had clearly been intended to be to clause 3(f)
  - c. if, as the Tribunal was minded to find, the leaseholders were indeed liable for the maintenance of the windows, they would not be subject to a requirement to obtain the landlord's permission to do so, unless, unexpectedly, there was a specific provision in the lease to that effect
30. Neither Mr Drake nor Mr Pike was able to draw the Tribunal's attention to any such provision
31. In relation to the ground build-up at the base of the north-facing wall, Mr Drake said that the landlord should have carried out an inspection and discovered the problem. Mr Pike said that along the base of the property

there was rubble from previous building works, although, in answer to questions from the Tribunal, Mr Pike said that he was referring to rubble along the base of the front wall, and accepted that the Tribunal's attention had not been drawn to any such rubble along the base of the north-facing wall during the Tribunal's inspection that morning

32. Mr Green said that he had not seen any evidence of rubble along the base of the north-facing wall. The build-up of ground level appeared instead to have been caused by soil washing down the slope
33. Mrs Drysdale said that Napier visually inspected the property on behalf of the landlord once a quarter, but the person carrying out the inspections was not necessarily a qualified surveyor
34. The Tribunal asked whether either Mr Drake or Mr Pike wished to comment on any of the matters referred to in the statement on behalf of the Respondents (pages B21 to 22), or the statement on behalf of the Respondents entitled "Why we deem the cost of the roof to be unreasonable for Meadow Court". Both Mr Drake and Mr Pike said that :
  - a. they accepted the Tribunal's indication that the questions of the roof, a reserve fund, and an insurance claim were not relevant, as such, to the issue before the Tribunal in this application, namely whether the proposed damp remedial works were reasonable and whether the proposed cost was reasonable
  - b. to the extent that some of the matters referred to were assertions about the problems caused by the current state of the window cavity trays and the build-up of the ground level at the base of the north-facing wall, Mr Drake and Mr Pike had already made their submissions in those respects to the Tribunal
  - c. they were unaware of the other matters referred to, and had no complaints about Napier

### **The Tribunal's findings**

35. The Tribunal makes the following findings
  - a. the proposed works are those detailed in the schedule of works prepared by Greenward Associates
  - b. those works fall within the landlord's obligations under clause 3(f) of the lease
  - c. the leaseholders are obliged under clause 2(j) of the lease to pay a contribution to the reasonable costs incurred by the landlord in doing so
  - d. the proposed costs of £40765.33 are reasonable, in that :
    - the quotation of £30476.11 plus VAT from the chosen contractor, Greendale Construction Limited, was the lowest quotation following a tendering process, and is, in any event, a reasonable figure for the works proposed



- the proposed figure of £1995 plus VAT for “Surveyor/Contract Administrator” is a reasonable figure in that respect
  - the proposed figure of £1500 plus VAT for “Napier (s 20 fee)” is, in all the circumstances outlined by Mrs Drysdale at the hearing, a reasonable additional figure in that respect
- e. the consultation procedure undertaken on behalf of the landlord under section 20 of the 1985 conforms with that section and with the regulations made pursuant to that section
- f. none of the leaseholders has notified the Tribunal of any dispute about the nature of the works, the reasonableness of the works or the cost of the works, or about the consultation procedure undertaken on behalf of the landlord under section 20 of the 1985 Act; indeed, and on the contrary, Mr Drake, Mr Pike, and the leaseholder of Flat 15, have all indicated their support for the proposals
- g. the Tribunal is not persuaded that the landlord is responsible for the current state of the window cavity trays or for the ground build-up at the base of the north-facing wall; on the contrary, the Tribunal finds that :
- the lessee is responsible for maintenance of the windows and window frames under clause 2(i) of the lease, the reference in that clause to clause 3(d) being, as the Tribunal finds, clearly a reference instead to clause 3(f)
  - it is more likely than not, in all the circumstances, that :
    - the windows were replaced many, and probably over twenty, years ago
    - the replacement was carried out by the respective lessees
    - any current defects in, or lack of, the window cavity trays result from those replacement works
    - the lessees did not seek approval from the landlord before or after carrying out the work
    - the current state of the window cavity trays has accordingly not been caused by any act or omission by the landlord
  - it is more likely than not that the ground build-up along the base of the north-facing wall has been mostly, or wholly, caused by soil washing down the slope, and not by any act or omission by the landlord
  - any responsibility on the landlord to carry out an inspection of the window cavity trays and the ground build-up along the base of the north-facing wall, and to remedy the current damp problems, has, in all the circumstances, been discharged by the Applicant’s instructing Greenward Associates to inspect the property, and to prepare the November 2015 report and the January 2016 schedule of works
  - the other matters referred to in the statement on behalf of the Respondents (pages B21 to 22), and the statement on behalf of the Respondents entitled “Why we deem the cost of the roof to be unreasonable for Meadow Court”, are not matters which

are relevant to the proposed damp remedial works which are the subject of this application by the Applicant

- h. having considered all the circumstances, the Tribunal finds that the proposed works are the responsibility of the landlord under the lease, and that it is reasonable for the proposed costs to be included in the service charges to be paid by the leaseholders

### 36. Appeals

- 37. 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
- 38. 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
- 39. 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
- 40. 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 21 November 2016

.....  
Judge P R Boardman