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

Case Reference : CAM/33UG/LSC/2017/0095

Property : 36 Fugill Road, Norwich NR7 9QY

Applicant : Dennis Jeans (in person)

Respondent : Norwich City Council

Representative : Victoria Jempson (counsel) instructed by npLaw

Type of Application : For determination of reasonableness and payability of service charges

Tribunal Members : G K Sinclair, G F Smith MRICS FAAV REV & C Gowman BSc MCIEH MCMI

Date and venue of Hearing : Wednesday 17th January 2017, at Holiday Inn Norwich North, Cromer Road, Norwich

Date of decision : 8th February 2018

DECISION

- Determination paras 1–3
- Background paras 4–8
- Relevant lease provisions..... paras 9–12
- Material statutory provisions paras 13–15
- Inspection and hearing..... paras 16–34
- Discussion and findings paras 35–40

1. Although some of the points made by the applicant in his statement of case seem to be repeated the issues raised by him appear to be as follows:

- a. The respondent landlord “did not take proper and correct procurement procedures when deciding to renew the staircase at the premises”
- b. That in contravention of the regulations concerning major works it did not obtain more than one quotation, thus failing “to mitigate the costs to the applicant nor the taxpayer”
- c. That the works were not necessary, as the staircase had been upgraded approximately eight years previously and was still under guarantee from the previous works instigated by the respondent
- d. That it failed to mitigate the costs by investigating the insurance position for faulty workmanship or use of a product which was not fit for purpose when the block was originally constructed
- e. That it did not make a claim against the contractors on the guarantee for the previous repairs to the staircases eight years previously.

2. On the above issues the tribunal determines respectively as follows:

- a. The allegation that the respondent did not undertake proper and correct procurement procedures does not add anything to the complaint that it failed to comply with the statutory consultation procedure
- b. The respondent landlord carried out a proper section 20 consultation exercise by inviting tenders from a number of contractors, the result of which was the receipt of only one response from Thomas Sinden, a company that had satisfactorily completed an earlier phase of the Omnia refurbishment work
- c. The evidence contained in the various structural surveys obtained by the landlord demonstrates that high salt levels within the reinforced concrete slabs were causing corrosion and that the work was therefore necessary
- d. That this block and others employing the same Omnia slab construction method were erected by contractors R G Carter Ltd in the 1960s using techniques which were then common. Even if a cause of action in breach of contract or negligence existed then any such claim would be defeated by a defence of limitation
- e. That the works carried out in about 2003 by City Works were essentially minor repairs that would not have attracted a guarantee or warranty for the entire replacement of the concrete stairs and walkways.

3. The tribunal therefore determines that the works were reasonably necessary and were carried out to a reasonable standard. The cost of the works, in the absence of any competitive quote, had been tested by council procurement officers and found to be satisfactory. The increase in price is explicable by changes sought by the landlord in the light of its experience of similar works carried out at another block and fluctuations in the price of steel by the time this work took place. The

cost is determined by the tribunal as reasonable and the proportion sought by the Council from the applicant is, subject to any arrangement he may have come to with his assignee, payable by him.

Background

4. As was the case with local housing authorities in major towns and cities across the country, the 1960s was a decade when the needs for slum clearance and the replacement of pre-fab housing constructed in the immediate post-war period required Norwich City Council to adopt modern system-build techniques in order quickly to build the large numbers of flats and houses required to re-house many of its citizens. One of the new methods employed, in the block in question and elsewhere, was the Omnia concrete slab construction method whereby preformed slabs and other parts such as staircases were manufactured in factory conditions and delivered to site for installation.
5. Omnia construction produces very slender slabs. The concrete reinforcement is of steel. Concrete is alkaline and steel can sit in that. However, in order to speed up the curing of the concrete the manufacturer added salt. Once chlorides are present the mix becomes acidic and damage to the steel slowly follows.
6. Due to the gradual spalling of concrete and partial exposure of reinforcing rods within it from concrete walkways and staircases in Omnia blocks across the city the City Council arranged in 2008 for GB Geotechnics Ltd (GBG) to conduct a survey and prepare a technical report into the condition of and need for remedial action concerning such buildings within the Council's housing stock. A later, final report was prepared by GBG in 2013. Sometime prior to this, in about 2003, some minor repair work had been undertaken by City Works, the Council's former direct labour organisation which at the time retained the contract to carry out all repair and maintenance work for the local authority.
7. As a result of the 2008 GBG report Norwich City Council, through its surveyors NPS, produced a specification of works for the repair of all its Omnia blocks and, following the statutory consultation procedure required in the case of those flats now held under Right to Buy leaseholds, invited various contractors to tender for the work. This was done in phases across the city, with the specification for this block influenced by the experience of the remedial work undertaken at some of the other blocks and the final GBG report produced in 2013.
8. It is the repair and steel reinforcement work to the concrete walkways together with the replacement of the concrete staircases at Fugill Road that has become the subject of this service charge dispute between Mr Jeans, the former lessee of 36 Fugill Road, and Norwich City Council.

Relevant lease provisions

9. The lease for 36 Fugill Road is dated 29th of February 1988. It is of a standard Right to Buy format adopted by Norwich City Council. The term granted is 125 years from the commencement date, the building comprises the entire block of buildings at Fugill Road, Norwich and the property is identified as being flat 36 on the second floor. By clause 4 (3) the lessee covenants with the Council to pay such sums of service charge is payable in accordance with the provisions of Schedule C. By clause 6 (1) the Council covenants with the lessee to keep in repair

(including decorative repair) the structure and exterior of the property and the building and, by (2), to keep in repair any other property over or in respect of which the lessee has rights as specified in Schedule A. Such rights include the right to pass on repulsion foot only over the lobbies stairways and landings to use lifts (if any) in the building.

10. Schedule C deals with the service charge. By paragraph 1 the Council's expenditure is defined as being:
 - the reasonable expenditure of the Council (including interest paid on any money borrowed for that purpose): –
 - (a) in complying with its obligations set out in clause 6 (1) (2) and (9) and excepting expenditure incurred in carrying out repairs as amount to the making good of structural defects except structural defects already notified the lessee or of which the Council does not become aware earlier than 10 years from the date of this lease...
11. The service charge payable by the lessee is:
 - such percentage as shall from time to time be a fair share as determined by the Council's housing manager or such other officer of the Council as shall be appropriate of the Council's expenditure attributable to the property proportionate to the number and/or nature and/or size of the properties from time to time comprised in the building and/or claiming to exercise or entitled to use the rights specified in Schedule A...
12. By paragraph 2 of the Schedule the Council is required to keep a detailed account of its expenditure and to procure that a service charge statement is prepared for every such year or period and furnish the lessee with a copy as soon as reasonably practicable at the end of every such year or period.

Material statutory provisions

13. The tribunal's powers to determine whether an amount by way of service charge is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.
14. Insofar as major works are concerned, ie those in respect of which any tenant is liable to make a contribution towards the service charge in excess of £250, then section 20 provides that the relevant contributions of tenants are limited to that amount unless the consultation requirements have either been complied with in relation to the works or dispensed with by (or on appeal from) the tribunal. As the likely cost of the works was well below the threshold requiring public notice under the relevant EU public contracts directive the consultation requirements, in the instant case, are those appearing in Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003.¹
15. While the applicant may argue that a claim in negligence may arise involving

¹ SI 2003/1987

latent defects (but not involving personal injury), section 14 of the Limitation Act 1980 provides for an overriding time limit of fifteen years from the date (or, if more than one, from the last of the dates) on which there occurred any act or omission which is alleged to constitute negligence; and to which the damage in respect of which damages are claimed is alleged to be attributable (in whole or in part).

Inspection and hearing

16. The tribunal inspected the block at Fugill Road, Norwich at 10:00 on the morning of the hearing. The inspection was directed principally at the staircase and sets of concrete landings by which the applicants second floor flat is approached. As the work had already been undertaken all the tribunal could see was the end result, not the condition of concrete – and in particular the staircase – prior to the work taking place. However, in the hearing bundle tribunal had advantage of seeing a number of colour photographs illustrating the pre-contract position, at pages 40 to 48.
17. The concrete staircase had been cantilevered, the tribunal being shown on site by Mr Watts where it had been inserted into and supported by the external layer of bricks to the main wall of the staircase. This had now been replaced by a steel structure supported by vertical steel beams. This steelwork was also connected to a steel frame which also supported the underside of the first and second storey concrete walkways, with transverse beams connecting to a continuous beam running under the outer edge of each walkway and railings.
18. Each concrete walkway remained intact, save that from underneath various patches in the concrete could be seen where testing of the interior of the concrete had taken place. The upper or wearing side of each walkway was surfaced with a new protective but relatively non-slip membrane.
19. At the applicant's request the tribunal also took a look at the other staircase. This, he said, was made more exposed to the weather and therefore had been in poor condition compared with the staircase to his flat. He remained of the view that his staircase had been perfectly fine.
20. The hearing began at 11:05. As the Council was legally represented and sought to justify the expenditure which it hoped to recover from Mr Jeans it was invited to open with its case first. The tribunal had before it a hearing bundle comprising 253 pages. This included the parties' respective statements of case, a copy of the lease, the service charge demands served by Norwich City Council, the parties' respective documents and witness statements filed on behalf of the Council.
21. The council adduced evidence in the form of witness statements by the following witnesses:
 - a. Richard Buckenham – a contracts officer employed by the Council
 - b. Mark Greenall – LGSS insurance manager, employed by Cambridgeshire County Council within its LGSS shared services organisation
 - c. Neil Watts – the major works manager who oversees the capital housing structural repairs programme for NPS Norwich Ltd on behalf of Norwich City Council
 - d. Robert Edward Daines – a leasehold officer within the home ownership

team of the respondent Council.
Of these all but Mr Greenall attended to give oral evidence.

22. Mr Jeans did not file and serve any witness statement, nor rely upon any expert evidence notwithstanding the fact that the correspondence revealed that he had from time to time sought advice from a consulting engineer.
23. Mr Watts, whose statement starts on page 166, stated that this scheme was part of a rolling programme of repairs for that type of Omnia property across the city. It was a result of recommendations made in the 2008 report by GBG, and the delay in starting work was due to it being one of a rolling programme and because not many contractors were willing to get involved. Challenged by Mr Jeans, he said that the problem is not cosmetic and not only was strengthening required but there was a problem from a high level of salts within the concrete structure. That involved breaking out specific areas of concrete, waterproofing areas, etc. He said that the presence of chloride was often not visible. Detecting it involves drilling and examination of the salt content. Asked whether delay to the works would cause further deterioration he said that sometimes you can see the results of chloride and sometimes you can't.
24. Mr Jeans asked about the work done in 2003. Would that first repair have had a guarantee? Mr Watts had not been involved at the time, but understood that some waterproofing had taken place. Referred by Mr Jeans to a letter from Norwich City Council dated 7th August 2003 to the then lessee of 36 Fugill Road, and to a passage at the top of page 193, Mr Watts considered that this was a responsive repair that was being discussed, not a 20 years repair.
25. Asked whether there was a guarantee on the disputed works, Mr Watts said that there would be a 10 years warranty on the concrete repairs, 20 years warranty on the waterproof membrane, but none on the steel. He said warranties for steel do not exist. The steel was galvanised to a British Standard. Any warranty would be by the manufacturer of the material concerned.
26. Mr Buckenham gave evidence about the procurement process. He said that he was instructed by NPS Norwich to go to tender for the project in July 2013. He followed the procurement process, which is that a tender pack is produced and goes on to a government portal/website. It is usually put out for five weeks for a return. The council had also asked the previous tenderers for Omnia works to enquire if interested. The council received only the one response from Thomas Sinden. Council policy is that as long as the one tender is best value then it will accept it. He would approach NPS and enquire of prices for previous similar contracts. NPS did the evaluation on the Council's behalf. There was some query concerning an increase in price. Prices had gone up, because of materials cost, since previous contracts one previous job would be done by Thomas Sinden, another by a different company. That other company was not interested in tendering this time.
27. Asked about the price of the contract it was put to him that it had gone up from £500,000 to £700,000 and then to over £1 million. How, he was asked, can one man at NPS decide whether this is best value for money? These price rises were disputed. The actual tender figure, as appears from an appraisal of the tender by

David Dilley Consultancy dated 18th October 2013 (page 137, at 139), was in the sum of £788,385.03. Of that total the measured works element was £587,332.78, with the balance made up of preliminaries, contingencies, etc. It was put to Mr Jeans that at the time there were also considerable fluctuations in the price of steel.

28. Mr Daines was responsible for the consultation exercise. The initial letter to lessees was dated 15th January 2013. A further letter, page 188, enclosed specification papers. The Council did not receive a nomination someone to approach for a tender within the required 30 days. In the first letter the Council referred to the cost per leaseholder as being over £5000. Figures put in to help leaseholders budget concerning the likely costs. In a letter dated 28th May 2015 from the manager of the home ownership team there is reference to the need to use more steel than originally thought. This was the result of experience gained in earlier phases of the work.
29. While it was clear from the correspondence that Mr Jeans had been seeking a lot of information about the project it was only during the course of the hearing that he indicated that it had actually been his intention to tender for the work himself, subcontracting out the actual work to others. Due to delays in the provision of more detailed information by the Council he was unable to meet the deadline tendering. However, while the tender documentation would have referred to a number of blocks within this phase he was only interested in Fugill Road.
30. Mr Jeans asked repeatedly at the hearing whether JBS Contractors had ever been contacted to tender, and furthermore suggested that the tender had been hidden from them. It was made clear by the Council that JBS were not on the Council's approved list initially, but that when they were they had made it clear they were not "comfortable" with Omnia type construction.
31. The evidence concerning insurance appearing in the statement of Mr Greenall was not challenged by any evidence from Mr Jeans, and while he volunteered that he had sought one hour's legal advice he failed to recognise and seemed unable to deal with the concept that any potential legal claim against the company that had built the block in the 1960s would be statute barred.
32. Mr Jeans remained of the view that lessees had been prejudiced by the fact that only one tender had been received, causing the consultation exercise to be flawed and thereby exposing them to unnecessary financial risk. Despite the technical evidence advanced Mr Jeans remained of the view that the works were not reasonably required because corrosion had successfully been dealt with in 2004. He said the work to all of the stairs was not required and that to et the landings neither. The cost of replacing them all was neither required nor reasonable. If additional remedial works were required then nothing was needed save for a steel frame supporting the staircase.
33. He considered that insurance should have been in force and that the contractors, including perhaps City Care in 2004, should have been pursued for defective work.
34. In her closing submissions for the Council Ms Jempson argued that there was

absolutely no evidence from the applicant that the work was not required. Whilst problems to the concrete may not have been visible to the naked eye the reports by GBG showed general deterioration and it was therefore necessary for the stairs to be replaced in the round. Mr Jeans had produced no engineer's or surveyor's report to the contrary. The Council was under a duty to carry out works if advice was given to that effect.

35. She said that the insurance position was irrelevant. This is not a factor covered by any insurance policy. This is corrosion related to chloride; not a matter of poor workmanship. On procurement she argued that the consultation exercise was carried out properly, but there was no legitimate issue with the tender procedure and that the increase in price was due to the need for additional steel and the consequence of delay between the original tender exercise and the work starting. The cost of the replacement stairs was therefore properly incurred and the applicant was obliged to pay his service charge under the lease. His application should fail.

Discussion and findings

36. Having considered the evidence before it the tribunal has little hesitation in accepting that the work undertaken was justified by the technical reports from GBG and that the tender exercise was carried out properly. It is not the Council's fault that few companies are seemingly willing to tackle repairs to buildings that were constructed using the Omnia plank method and that only one responded. The one tender was then analysed for value not just by NPS, on behalf of the Council, but by the David Dilley Consultancy, a firm of independent Chartered Quantity Surveyors.
37. The applicant's arguments concerning the need to receive more than one tender, rather than invite three or more, are wrong. The tribunal is satisfied that the statutory consultation process was carried out properly, and that no-one would have reasonably imagined that the applicant was himself seeking information with which to tender for the project. Indeed he was not, as he was only interested in the repairs to his own block; not the others in this phase.
38. Despite what Mr Jeans argued about the lack of need to repair his particular staircase, as it had a relatively more sheltered aspect than the other staircase, the tribunal determines that the Council was in possession of reports showing that the concrete elements to the block suffered from a generic problem, so that it was entirely reasonable that repairs should be carried out throughout. How could the Council justify, to its insurers or to an injured party, its failure to repair the whole block? Further, having benefited in a previous decision from an attempt by the Council to charge only the lessees in one half of the building who were directly concerned with a repair to common parts, it is surprising that Mr Jeans should seek to argue that only the other staircase may have required repair – and that it was nothing to do with him.
39. The tribunal also rejects Mr Jeans' arguments concerning insurance of the works undertaken in the past. Whether or not the original construction was, by the standards of the day, negligent any claim against the company, R G Carter Ltd, was long ago statute-barred. As for the remedial work – very much patch and mend – carried out by City Works in 2004, it is highly unlikely that the work

would have been guaranteed or warranted in any way. It was also designed just to carry out essential maintenance - not the strategic repair of problems yet to be discovered. Further, City Works has long ceased to exist.

40. In conclusion, the tribunal is satisfied that the service charge costs incurred in respect of these major works were actually and reasonably incurred, and that the works were carried out to a reasonable standard. The application is therefore dismissed.

Dated 8th February 2018

Graham Sinclair

Graham Sinclair
Tribunal Judge