113740

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/24UJ/LSC/2015/0003
Property	:	Brooklands, Gosport Lane, Lyndhurst, Hants
Applicant	:	Mrs Lacey Payne of Napier Management Services Limited
Respondent	:	The lessees of Brooklands (see Appendix A attached)
Observing	:	Mr W. M. S Tildesley O.B.E.
Type of Application	:	Section 27A Landlord and Tenant Act 1985 (service charges)
Tribunal Members	:	Judge J Brownhill (Chair) Mr P D Turner-Powell FRICS Ms Wong
Date and venue of Hearing	:	27th April 2015 Bournemouth County Court
Date of Decision	:	6th May 2015

DECISION

Introduction

1 Where numbers appear in square brackets [] in the body of this decision, they refer to pages of the bundle before the Tribunal.

2 The Applicant is the Tribunal appointed manager of the property (pursuant to case number CHI/24UJ/LAM/2012/204). The Applicant applies under section 27A of the 1985 Act for a determination of the reasonableness of intended works concerning: (a) the external redecorations and roof repairs to the property and (b) works to the water pipes serving the property. These works are intended to form part of the 2015 service charges.

3 The Respondents were given the opportunity to identify any specific issues, items or amounts in dispute relating to those two sets of works by virtue of the directions dated 20th January 2015 [21]. Responses were received from numerous leaseholders as detailed in the bundle. As explained during the hearing the Tribunal was only concerned with determining issues raised in relation to these works.

Summary

4 The Tribunal found that:

a) The external redecoration, roof and associated works as detailed within the Bennington Green specification of works were reasonable and within the ambit of the lessor's obligations as contained in the leases;

b) The Bennington Green fee of £7,216.was reasonable, and the selection of Bennington Green as surveyor was not required, of itself, to be subject to the section 20 consultation process.

c) The choice between powder coated aluminium or plastic rainwater goods was one for the Applicant in exercising her discretion: the Tribunal found both options to be within the range of reasonable responses open to her.

d) The issue concerning the proposed works to the water pipes was adjourned part heard. This was to enable the Applicant to obtain expert evidence in support of her contention that the proposed works fell within the ambit of the Lessor's covenants under the lease. Directions were issued by the Tribunal in this regard. A copy of these directions is attached as Appendix C.

e) Any application pursuant section 20C of The Landlord and Tenant Act 1985 and/or any application for the reimbursement of fees (pursuant to Rule 13(2) of the Tribunal Procedure (First Tier Tribunal)(Property Chamber) Rules 2013 (hereinafter referred to as 'the 2013 Rules')) was also to be adjourned to the next hearing.

The Inspection

5 The Tribunal had the benefit, on the 27/04/2015, of inspecting the exterior of the buildings, some of parts of the cellar, and the interior of Flat 6 within the building. Present at the inspection were the Applicant and her colleague Ms Bellingham, as well as Mr and Mrs Woolley, representing Ms Porter (the leaseholder of flat 6).

6 The property is a substantial building, converted into 7 flats and set in significant communal grounds. The property includes separate garages (forming a separate brick building), one underground garage and a number of cellars (which are situated in the basement of the main building). The building is constructed of brick under a slate roof. Externally it is clear that the property is in need of significant and urgent redecoration and consequent repair work. The main entrance to the property opens onto a hall from which there is access to flats 1, 2, 3 and 7 on the ground floor. Stairs from the hall lead to flat 6 on the first floor. The Tribunal were shown various areas of damp staining inside flat 6 which it was said resulted from leaks due to the poor condition of the roof and/or chimney. Access to the remaining flats is by a different entrance. There is a further outhouse, also constructed from brick.

The Law

7 The statutory provisions primarily relevant to applications of this nature are contained in sections 18, 19 and 27A of the 1985 Act. These are reproduced in Appendix B attached to this decision.

Preliminary Matters

8 Mr and Mrs Molle lessees of flat 2 in their letter [284] of the 07/04/2015 objected to the inclusion in the bundle of two letters, written after the deadline set by the Tribunal's directions for responses from the lessees, specifically:

a) [25] letter from Mr Mussett the lessee of flat 4 dated 12/03/2015; and

b) [53] letter from Ms Porter of flat 6 dated 28/02/2015.

9 Mr Molle indicated at the hearing that he considered it inappropriate for those two documents to have been included within the bundle or to be relied on by the Tribunal as they had been produced in breach of the Tribunal's directions.

10 The Tribunal heard argument from Mr Molle, and Mr Mussett (Mr Woolley making no comment) on this issue. The Tribunal noted that the directions of 20/01/2015 provided at [21] that lessee's statements should have been sent by 24/02/2015. Both the letters referred to by Mr Molle were dated after this, and so they were in breach of the Tribunal's directions.

11 The Tribunal has power under Rule 6(a) of the 2013 Rules, to "...extend or shorten the time for complying with any rule, practice direction or direction even if the application for an extension of time is not made until after the time limit has expired.". Further pursuant to Rule 6(d) of the 2013 Rules the

Tribunal may permit a party or another person to provide or produce documents information or submissions to the Tribunal or a party.

12 The Tribunal considered that it was appropriate to extend time for compliance with the 20/01/2015 directions, so as to admit into evidence the two letters identified above. The Tribunal considered that although the two letters were late, nonetheless all parties had had sufficient time to consider the contents of those letters and that there was no significant prejudice or injustice caused to any party if the letters were admitted. The letters were therefore admitted into evidence and remained in the bundle.

The Issues

13 There were two main topics between the Tribunal: first the external redecoration and associated works; and secondly works to the water pipes serving the property

The external redecoration and associated works.

14 The Tribunal identified the following specific issues concerning the external redecoration works arising from the various leaseholders' responses:

a) The cost of the surveyor's report/specification of works prepared by Bennington Green [205];

b) The use of aluminium or plastic rainwater goods when carrying out the aforesaid works;

c) Whether the Section 20C consultation process had been complied with; and

d) Whether the works to the 'outbuildings' were properly within the Lessor's obligations given that parts of the outbuildings, garages and cellars had been expressly demised to certain leaseholders.

15 The Tribunal explicitly explained that it would not be determining any issue concerning the precise apportionment of the service charges arising from the wording of the leases. This had not been raised as an issue within the Applicant's application; only one Respondent had referred to this in her response to the Tribunal (Ms Lyle of Flat 5). Ms Lyle had set out the terms of her lease (which differed in this regard from the other leases before us) and the basis on which payments were being made by her. The Applicants did not, from the information before the Tribunal appear to take issue with Ms Lyle's approach to this issue given the terms of her lease. The Tribunal did not have copies of all 7 leases and nor did it have the benefit of any written submissions from the Applicant on this issue.

16 The Tribunal also explained that it would not be considering any arguments or issues arising from allegations about some leaseholders obstructing access to communal areas of the cellar of the building. Enforcement (as between the lessees) of various access covenants and/or rights contained within the lease or even findings of breach against lessees were not matters suitable for determination within a section 27A application.

The Lease

17 The Tribunal identified the following provisions of the lease to be specifically relevant to the issues concerning the external redecoration and associated works:

a) Clause 1 [36] "In this Lease the expression "the Building" means the premises known as "Brooklands" Lyndhurst Hampshire including (except where the context otherwise requires) the curtilage and gardens enjoyed therewith."

b) Clause 3(III) [38] The Lessee's covenants: "That the Lessee will pay in advance on the said First day of January in each year during the terms hereby granted..... of the estimated costs expenses and outgoings incurred by the Lessor in any year or part of a year in respect of the terms of expenditure set out in the Second Schedule hereto and of any other expenditure properly incurred for the purpose of or incidental to the management and supply of services for the Building and the liability accruing in respect of such expenditure (to be certified in accordance with the provisions of the Second Schedule) shall be determined from time to time by the Lessor's Surveyor who decision shall be final."

c) Clause 5 (III) [43] The Lessor's covenants: "And the Lessor HEREBY COVENANTS with the Lessee.... so often (not being more than once in every third year of the term hereby granted) as the Lessor shall decide to clean all stonework and to paint all outside wood iron stucco and other work of the Building usually or previously painted or which ought to be painted with three coats at least of good oil colour in a proper and workmanlike manner and in a tint or colour to be selected by the Lessor

d) Clause 5 (IV) [43] The Lessor's covenants: "And the Lessor HEREBY COVENANTS with the Lessee....to maintain furnish cleanse repair cultivate and when necessary renew in a good and workmanlike manner.....(c) the main structure exterior and roof of the Building and appurtenances thereof (d) the gardens drives pathways passages staircases landings entrances and other parts of the common parts of the Building."; and

e) The Second Schedule of the lease [47] setting out the detailed mechanism of the service charge provisions.

The Bennington Green Report

18 Both Mr Mussett at [27] and Ms Porter at [53] made comments concerning what was, in their view, the excessive cost of the Bennington Green report, namely £7,216.20 [121]. Ms Porter referred to the fact that the previous agents had obtained a survey from chartered surveyors (at a cost she said of some £5,000) pointing out that this had been available to the Applicant but that instead Bennington Green had been instructed at significant cost.

19 Mrs Lacey-Payne explained that she had indeed had sight of a condition report prepared by a surveyor prior to her taking over as manager of the property. It

was a condition report only and did not include any details or specification of the works required to the property. A specification report was required so that the works could be properly consulted upon within the section 20 consultation procedure and relevant quotes obtained. The Tribunal had not seen a copy of this earlier report, but accepted Mrs Lacey- Payne's unchallenged evidence on this point.

20 Mrs Lacey-Payne explained that she had attempted to contact the author of the condition report to see if they would provide a specification of works but that she had found great difficulty in identify surveyors willing to get involved in projects of this sort. Mrs Lacey-Payne went onto explain that the fee of £7,216 was in fact the total cost which Bennington Green were charging for:

a) Drawing up the specification, preparing tender documents;

b) Putting the specification out to tender;

c) Checking quotes and carrying out a tender analysis; and

d) Supervising the works

21 Mrs Lacey-Payne indicated to the Tribunal that after the hearing she would send an email confirmation from Messrs Bennington Green establishing that all of the matters listed above were included in their fee. A copy of a letter from Bennington Green dated 26/11/2015 was received by the Tribunal on 28/04/2015. It confirmed the evidence given by Mrs Lacey Payne as detailed above.

22 Mrs Lacey-Payne continued, stating that the £7,216 Bennington Green fee amounted to a standard charge of 10% of the works price. The Tribunal noted that this was borne out by the figures at [161], and using their own expert knowledge accepted that 10% was indeed an industry standard charge for this sort of work.

23 The Tribunal concluded that the Bennington Green fee of £7,216.20 (covering the cost of work listed in paragraph 20 above) was reasonable in all the circumstances. The Tribunal noted that there was no evidence before it showing that the surveyor who had prepared the previous condition report would have been willing or able to produce the specification report in the timescales required or carry out the listed items of work at any different cost.

24 Mrs Lyle questioned whether these costs (aside from and separate to the actual redecoration and associated works) should themselves have been the subject of a section 20 consultation process, as the cost to each leaseholder would exceed £250.

25 The Tribunal considered the provisions of section 20 of the Landlord and Tenant Act 1985 (hereinafter referred to as 'the 1985 Act'). Section 20(1) provides:

> "Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either

(a) Complied with in relation to the works or agreement, or
(b) Dispensed with in relation to the works or agreement...by.....a Tribunal"

26 Section 20ZA(2) of the 1985 Act provides:
"In section 20 and this section –
'qualifying works' means works on a building or any other premises, ..."

27 The Tribunal found that the agreement between the Applicant and Bennington Green did not fall within the ambit of 'qualifying works' as defined. The items/ matters to be carried out by Bennington Green under the terms of their email and pursuant to their fee were not "works on a building." Therefore it was not necessary for the Applicant to have engaged in the section 20 consultation process prior to the instruction/engagement of Bennington Green.

The works to the outbuilding

28 Mr and Mrs Molle argued at [88] that some of the works envisaged under the Bennington Green specification were to outbuildings on the site – i.e. to the garages etc. (both the separate garage building and the basement area underneath the flats). Mr and Mrs Molle pointed out that some of the garages and cellars had been expressly demised to specific leaseholders and so they argued it was inappropriate for works to be carried out to these privately demised areas and then charged to the service charge. A similar argument was raised by Mrs Lyle at [58].

29 The Tribunal noted, from the documentation contained in the bundle, that some of the garages and cellars had indeed, subsequent to the creation of the leases, been demised or acknowledged as having been demised, to specific leaseholders. For example, at [100] by way of deed of rectification dated 01/12/1995 a garage was noted as being within the demised premises of flat 1 (see plan at [107]). At [108] there was a supplemental lease to flat 3 which included within the demised premises a cellar and garage detailed on a plan at [112].

30 The extent of the proposed works to the garages and cellars were considered by the Tribunal. Mrs Lacey Payne pointed out that the work envisaged to these areas were redecoration of external parts only: i.e. painting and any associated repairs relating to the same: for example repair/replacement of any decayed external wood which was to be painted. The Tribunal considered the schedule of works in this regard, in particular at [241] and [242] including the comment at [242] under the heading 'note': "External decoration works are to be carried out to the entire demise. This is to cover all existing painted surfaces and includes elements such as the outbuildings/boundary walls/ railings etc.)".

31 The Tribunal considered that the works envisaged under the Bennington Green specification to the garages and cellars were external redecoration works only and were within the ambit of the Lessor's covenanted obligations.

32 The Lessor was obliged under clause 5(III) of the leases [43] to paint all outside wood, iron, stucco and other work of the Building usually or previously painted or which ought to be painted. The Building was defined within clause 1 of the lease [36] as meaning the premises known as Brooklands including the curtilage and gardens enjoyed therewith. The Tribunal found that the garages and outbuildings came within the definition of 'the Building' as defined. The Tribunal found that these provisions meant that the Lessor had an obligation to decorate the outside wood and other external surfaces of the garages, outbuildings etc. It was of no consequence that some or even all of the garages may have been demised to individual leaseholders, that did not impact upon the extent of the Lessor's covenant in this regard. Indeed the flats were demised to leaseholders but there remained an obligation on the Lessor to carry out external decoration works etc. to the painted windows etc of the flats.

33 Further and in any event the Lessor additionally had an obligation under clause 5(IV)(c) to maintain and repair the main structure exterior and roof of the Building and appurtenances. The work envisaged to the garages and cellars under the Bennington Green report would, in the Tribunal's view fall within the ambit of such covenant in any event.

34 Further and for the avoidance of doubt, the Tribunal found that work removing rotting and/or rotten/ decayed wood, which formed part of external doors and windows (as was envisaged in the Bennington Green specification of works) was a proper and necessary part of painting such surfaces in a good and workmanlike manner. If rotten wood was merely to be painted over, without being replaced or repaired where possible, the leaseholders would have a legitimate argument that the external redecoration works had not been carried out in a workmanlike manner.

35 The Tribunal therefore concluded that the works specified within the Bennington Green report to the garages, cellars and outbuildings (namely to the external painted surfaces) were within the ambit of the Lessor's covenants.

Aluminium rainwater goods and down pipes

36 Mr Mussett raised an issue concerning the materials intended to be used by the Applicant when carrying out works to the rainwater goods at the property. Mr Mussett argued that at present there was a mismatch of materials used on the site: some rainwater goods were plastic and some of other materials. Mr Mussett hoped that given the value, age and character of the building the Applicant would use powder coated aluminium products in relation to the external rainwater goods as he felt that this was more befitting of a substantial and period property.

37 Mrs Bromley indicated that she could not see the problem with using plastic guttering at the property, specifically given the fact that some of the windows in the property were plastic or PVCu.

38 Mrs Lacey-Payne indicated that the section 20 consultation and the Bennington Green specification included at [241] two options for material in relation to this item: option one being PVCu and the second option involving

powder coated aluminium goods. Mrs Lacey-Payne indicated to the Tribunal that she was undecided as to which way to proceed, but noted that of course there would be a cost implication for residents if the aluminium products were used as these would be at a higher cost than plastic goods.

39 Under clause 5(IV)(a), the Lessor has an obligation to maintain, furnish cleanse repair cultivate and where necessary renew the rainwater goods [42]. As a matter of law a Lessor is entitled to chose which method of repair or materials to use when carrying out its obligations; the test is only whether the Lessor's choice of method /materials/ manner of repair etc is one of a range of reasonable responses. In essence the question is whether the mode of repair is one which is sensible person would have adopted? It is of particular note that the Lessor does not have to choose the cheapest option. The Tribunal concluded that both the options being contemplated by the Applicant amounted to reasonable responses: she was entitled to choose either option. The Tribunal did though specifically consider that the existence of UPVC windows within the building may be a relevant factor for her to consider when exercising her discretion in this regard. It is not the role of the Tribunal to make the Applicant's decision for her in this regard.

The section 20 consultation process

40 Both in the bundle and at the Tribunal hearing, a number of points were made by various leaseholders concerning the section 20 consultation process relating to the external redecoration and associated works. Namely :

a) It was said that an insufficient description of the works was given on the face of the section 20 notice; and
b) That observations made by leaseholders in response to the section 20 notices served had not been acknowledged or answered by the Applicant or her staff.

41 In relation to the external redecoration works, Mrs Lacey-Payne explained that she had sent out copies of the first consultation notice to all leaseholders under cover of letter dated 15/04/2014 [201]. None of the Respondents contested this evidence, and the Tribunal therefore accepted it. The first notice described the works as "External redecorations and associated repairs, roof and window repairs." The notice also stipulated that a description of the works could be viewed, by appointment, at the Fordingbridge Office of Napier Management Services Ltd. The consultation period under the first notice ended on 23/05/2014.

42 Mrs Lacey-Payne gave evidence, and again this was accepted by the Tribunal, that a second section 20 notice was served on all leaseholders under cover of a letter dated 23/10/2014 [155]. A copy of the second notice appears at [157], and referred to the consultation period expiring on 23/10/2014.

43 The Tribunal noted the numerous leaseholders complaints that observations made pursuant to those notices had not been acknowledged or replied to by the Applicant or her staff. It was not alleged that any nominations were made in response to the notices. Ms Lacey-Payne pointed to emails within the bundle at [113][116][117] and [119] to show that there had been some response from the

Applicant's colleague at Napier Management to queries from the lessees. However given that all the responses from Napier were not included in the bundle it was difficult to identify whether specific queries had been addressed or not. This may be something which the Applicant wishes to adduce evidence in respect of at the adjourned hearing, especially should there be any issue concerning costs.

44 In so far as relevant to the consultation process, under the provisions of Part 2 of Schedule 4 to the Service Charges (Consultation Requirements)(England) Regulations 2003 (the 2003 Regulations), the Applicant is required to "..have regard..." to the observations made in response to the notices served (see paragraphs 10 and 12 of the 2003 Regulations). There is no express requirement that such observations are either to be acknowledged or individually answered at that stage of the consultation process, though it would clearly be best practice to do so.

45 Mrs Lacey-Payne indicated to the Tribunal that she had had 'regard' to the observations received in response to both notices: that was why she had brought the matter to the Tribunal for a determination. The Tribunal accepted that the Applicant had had sufficient regard to the observations received in response to the notices, to comply with the consultation requirements. To 'have regard' to the observations does not mean that the Applicant is bound by the observations, but she cannot simply ignore them: the Applicant should consider the observations in good faith and give such weight to them as she sees fit. The Tribunal were satisfied that Mrs Lacey-Payne had done this as evidenced by her decision to bring an application to the Tribunal concerning the works.

46 The Tribunal noted that pursuant to paragraph 13 of the 2003 Regulations the Applicant would be required, at the Third Stage of the consultation process and pursuant to paragraph 13 of the 2003 Regulations

"...where the landlord enters into a contract for the carrying out of qualifying works, he shall, within 21 days of entering into the contact, by notice in writing to each tenant.....

(a) State his reasons for awarding the contract or specify the place ad 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."

47 Mrs Lacey Payne confirmed that the third stage of the consultation process had not yet been engaged upon as she had not yet entered into a contract for the works. It is at the third stage of the consultation process that the Lessor is obliged to set out its responses to the observations received, and not before. Therefore the fact that, on the lessees' case, the Applicant had allegedly not responded to their observations was not a matter which impacted on the validity of the consultation process given the stage which had currently been reached.

48 In relation to the criticism that the notices contained insufficient detail as to the scope of the works, the Tribunal found that the notices explicitly stated that a description of the works could be inspected at Napier Management's offices, and that this was sufficient to comply with the statutory provisions of the section 20 consultation process. The Tribunal also noted that prior to 25/04/2014 Mr and Mrs Molle had in fact been supplied with at least some of the documentation including seemingly the schedule of works [113]. They indicated that it was "inconvenient" for them to visit Napier's offices to inspect the documentation available.

49 The Tribunal were satisfied that, to date, and given that a contract had not yet been entered into in relation to the external redecoration and associated works, that the section 20 consultation procedure had been complied with.

The works to the water pipes

50 The Applicant sought a determination from the Tribunal that works to be carried out to the water pipes serving the property were reasonable and fell within the provisions of the Lessor's covenants under the lease.

51 The Tribunal noted that there were a number of explanations before them as to the cause of the problems with the water supply to some of the flats within the property.

a) At [27] Mr Mussett argued that the problem was largely due to a lack of water volume. In what the Tribunal found to be a most helpful explanation, Mr Mussett he expanded on this at the hearing and gave his view that the problem arose as a result in changes in the demand for water since the 1960's, when the previous pipes (system) was installed. In particular he referred to the installation of combination boilers by lessees, which by their nature he stated demanded a higher volume of water. At one point Mr Mussett stated that the condition of the pipes was unknown and that was not pertinent, adding that the "....lack of volume caused by....only thing which is certain is the change in use of water since the 1960's." And elsewhere "the pipes.... given their age probably as a matter of common sense would be in a state of disrepair."
b) [51] Mr Sanders and Ms Lacy stated their view that the problems with water supply to some flats were caused by the fact that the ".....original header tanks have been disconnected and dismantled and the main feed has been tapped into a several points 'in a line'."
c) [53] Ms Porter stated that the problem related to the fact that the supply pipe was now 150 years old and originally of only 1.5" diameter but that this had been reduced by half as a result of scaling.
d) And finally at [71] it was said that the water board had carried out an inspection of the water supply at some of the flats and found this to be adequate. Though it is to be noted that Mr Mussett had a logical explanation as to why this was the case: namely that the water board carried out their tests in certain flats only, during the day, when there was no great demand for water within the flats: – it is when numerous flats are each using/demanding water, that there is a problem with a sufficient water supply reaching some flats.

52 While there were a series of emails from a Mr Cope of Mabey Francis (an engineer) and two contractors Dixons Mechanical and AP Chant none of these emails nor the unsupported views submitted by the Respondents in 51 above properly explained the precise problem at the property, nor the cause of the problem. The Tribunal were unable, on the basis of the evidence currently before it, to properly ascertain whether the proposed works fell within the ambit of the lessor's covenant pursuant to clause 5(IV)(b) [43]: namely to maintain, furnish cleanse repair cultivate and when necessary renew. The Tribunal were not currently able to establish if the works proposed to the water pipes were properly to be identified as a repair or an improvement.

53 Given that this was clearly an important issue for a number of leaseholders, the Tribunal considered it appropriate to give the Applicant a further opportunity to obtain expert evidence in this regard, as opposed to, at this stage merely refusing the Applicant's application.

54 The Tribunal has therefore adjourned this issue part heard, pursuant to its case management powers under regulation 6 of the 2013 Regulations and gave the detailed directions as appears in Appendix C attached.

Appeal

55 At present the Applicant's application is part heard but the Tribunal have reached a final determination on part of the application as detailed above.

56 A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making a written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

57 The application must arrive at the Tribunal office within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

58 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 allow the application for permission to appeal to proceed.

59 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 the party making the application is seeking.

Judge J Brownhill (Chair)

Dated; 6th May 2015

Appendix A

Respondents

Flat 1: Mrs Lacy.

Flat 2: Mr and Mrs Molle, who both attended at the hearing

Flat 3: Dr Garrard

Flat 4: Mr and Mrs Musset. Mr Mussett attended the hearing.

Flat 5: Mrs Lyle, who attended the hearing

Flat 6: Mrs Porter, who did not attend but was represented at both the hearing and the inspection by Mr Woolley

Flat 7: Mrs Bromley, who attended the hearing.

Appendix B

Landlord and Tenant Act 1985

Section 18 Meaning of "service charge" and "relevant costs".

(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 Limitation of service charges: reasonableness.

(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.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

.....

(5) If a person takes any proceedings in the High Court in pursuance of any of the provisions of this Act relating to service charges and he could have taken those proceedings in the county court, he shall not be entitled to recover any costs.]

Section 27A Liability to pay service charges: jurisdiction

(1) An application may be made to an 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 amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.]

Appendix C

Case Reference	:	CHI/24UJ/LSC/2015/0003
Property	:	Brooklands, Gosport Lane, Lyndhurst, Hants
Applicant	:	Mrs Lacey Payne of Napier Management Services Limited
Respondent	:	The lessees of Brooklands (see Appendix A attached)
Observing	:	Mr W. M. S Tildesley O.B.E.
Type of Application	:	Section 27A Landlord and Tenant Act 1985 (service charges)
Tribunal Members	:	Judge J Brownhill (Chair) Mr P D Turner-Powell FRICS Ms Wong
Date and venue of Hearing	:	27th April 2015 Bournemouth County Court
Date of Directions	:	6th May 2015

DIRECTIONS

IMPORTANT NOTES ON DIRECTIONS

(1) They are formal Orders made to assist the parties and the Tribunal in dealing with the application swiftly and economically.

(2) They **must be complied with**. Failure to comply may result in the Tribunal refusing to hear the defaulting party's case and ordering that party to pay costs.

(3) If a party wants to alter the directions or propose new ones the party must immediately apply in writing to the Tribunal giving full reasons and, if possible, obtain the consent of the other party to the amendment.

(4) The Tribunal will only **accept documents if served by post or hand**. A party wishing to serve documents by email or fax must obtain the permission of the Tribunal which will only be given in exceptional circumstances.

(5) No written communications should be sent to the Tribunal unless a copy is also sent to the other party and this is so marked on each communication.

(6) A party requires the Tribunal's permission before calling expert evidence.

(7) The Tribunal may decline to hear evidence which is not provided in accordance with the directions below.

The Tribunal issues the following directions in relation to this matter:

a) The Applicant has permission:
   i. To reply on an expert's report dealing with the following issues:
      a. An explanation of the precise problems with the supply of water to the property (or some of the flats within the property);
      b. An explanation as to the cause(s) of those problems, if possible attributing relative percentages to each cause;
      c. A detailed description of the proposed works or sets of works including estimates;
      d. An explanation as to proposed distribution of the pipes throughout the building and how it will differ to the current system: in particular details should be provided in relation to proposals that new pipes will need to run through the lower flats. Is it proposed that existing water pipes which may be present in the lower flats be removed, or that they remain and new pipes are added?;
      e. details and costs of resolution of the wayleave issue, including consideration of the implications if a wayleave is not obtained.

As explained at the hearing the Tribunal are not directing the Applicant to use a particular expert in this regard. However it may be that the Applicant considers that a joint expert would be an appropriate way to proceed.

ii. Any further evidence or matters on which she seeks to rely in relation to the works to the water pipes or any issue concerning costs or the reimbursement of fees. The Tribunal repeats its comments at paragraph 43 above.

A copy of any expert report under paragraph (i) above or further evidence or documents under paragraph (ii) above must be filed with the Tribunal Office and served on each of the Respondent leaseholders by 4pm on 08/06/2015.

2 The Respondents shall by 4pm on the 06/07/2015 provide to the Tribunal and to the Applicant any written comments, or submissions concerning:

i. The issue of works to the water pipes (the parties should note that there should be no repetition of points already made and included within the bundle in relation to these works, nor any need to recite the history from 2011 concerning the installation of the new main supply pipe);
ii. Comments on the expert's report; and
iii. Any application or issue concerning costs or reimbursement of fees.

3 The parties shall within 7 days of 27/04/2015 provide to the Regional office of the Property Tribunal details of any dates to avoid covering the period 27/07/2015 to 30/09/2015.

4 The proceedings will be listed for a half day hearing on the first open date after 27/07/2015 to determine the remaining issue.

5 The Applicant shall be responsible for preparing an updated bundle (containing the further documents filed and served in accordance with the above directions and a copy of these directions). The bundle should be prepared so that it is in a file, with an index and page numbers. The Applicant shall by 17 August 2015 send **one** copy of the bundle to each of the Respondents and send **four** copies to the Tribunal.

Judge J Brownhill (Chair)

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/24UJ/LSC/2015/0003
Property	:	Brooklands, Gosport Lane, Lyndhurst, Hants
Applicant	:	Mrs Lacey Payne of Napier Management Services Limited
Respondent	:	The lessees of Brooklands (see Appendix A attached)
Type of Application	:	Section 27A Landlord and Tenant Act 1985 (service charges)
Tribunal Members	:	Judge J Brownhill (Chair) Mr P D Turner-Powell FRICS Ms T Wong
Date and venue of Hearing	:	28th October 2015 Poole Magistrates and Tribunal Centre
Date of Decision	:	4th November 2015

DECISION

---

1 Where numbers appear in square brackets [] in the body of this decision, they refer to pages of the bundle before the Tribunal.

2 This decision relates to a part heard application concerning Brooklands, Gosport Lane, Lyndhurst, Hants (hereinafter referred to as 'the property'). The Tribunal refers to its previous decision of 06/05/2015 following an inspection and hearing at Bournemouth County Court on 27/04/2015. In that decision, the Tribunal made findings and gave its decision on part of the application and adjourned, part heard, another part of the application concerning proposed works to the water supply pipes to and at the property.

Summary

3 The Tribunal:

a. Dismiss the remaining element of the application concerning proposed work to the water supply system to and at the property, as on the basis of the evidence before it, the Tribunal was not satisfied that the proposed works fell within the ambit of the lessor's covenant; and

b. Made an order under section 20C of the Landlord and Tenant Act 1985.

Factual background

4 The property is a substantial building, converted into 7 flats and set in significant communal grounds. It is accessed up a drive from the main road. The property includes separate garages (forming a separate brick building), one underground garage and a number of cellars (which are situated in the basement of the main building). The Tribunal inspected the property prior to the hearing on the 27/04/2015 as referred to in its previous judgment.

5 The Applicant sought a determination from the Tribunal that works to be carried out to the water pipes serving the property were reasonable and fell within the provisions of the Lessor's covenants under the lease. This part of the application arose as a number of the leaseholders at the property (specifically flats 1, 4 and 6) have reported problems with a lack of water supply/ water pressure to their flats at peak times, specifically when other flats were also drawing on the supply. The Applicant wishes to instruct contractors to carry out works to address this longstanding and ongoing issue. The Tribunal heard from one of the Respondent's Mrs Porter, who referred to this having been an issue ever since she moved in 13 years ago.

6 The Tribunal noted at the last hearing that there were a number of competing explanations (detailed in paragraph 51 of that Judgment) from a number of leaseholders as to their views as to the cause of the problems with the water supply to some of the flats within the property: there was no definitive explanation as to the precise problem or its cause. There were also a series of emails from a Mr Cope of Mabey Francis (an engineer) and two contractors Dixons Mechanical and AP Chant. However none of these emails nor the unsupported views submitted by the Respondents properly explained the precise problem at the property, nor the cause of the problem. The Tribunal were unable in April 2015, on the basis of the evidence currently before it, to properly ascertain whether the proposed works fell within the ambit of the

lessor's covenant. The Tribunal were not able to establish if the works proposed to the water pipes were properly to be identified as a repair or an improvement.

7 The Tribunal therefore gave directions, including permitting the Applicant to rely on an expert's report concerning the following:

a. An explanation of the precise problems with the supply of water to the property (or some of the flats within the property);

b. An explanation as to the cause(s) of those problems, if possible attributing relative percentages to each cause;

c. A detailed description of the proposed works or sets of works including estimates;

d. An explanation as to proposed distribution of the pipes throughout the building and how it will differ to the current system: in particular details should be provided in relation to proposals that new pipes will need to run through the lower flats. Is it proposed that existing water pipes which may be present in the lower flats be removed, or that they remain and new pipes are added?;

e. details and costs of resolution of the wayleave issue, including consideration of the implications if a wayleave is not obtained.

8 The directions provided that the Applicants were to file and serve copies of such an expert report and any other supporting documents on which they sought to rely by 08/06/2015. The Respondents were to file any responses or comments or any further documents on which they sought to rely by 06/07/2015. A final hearing was listed for 07/09/2015.

<u>The Evidence and events between the two hearings</u>

9 The Applicant relies on various pieces of evidence from Mr A Cope of Mabey Francis, including:

a. at [4] of the supplemental bundle is an email from Mr Cope of Mabey Francis dated 06/05/2015.

b. a 'brief report' from Mabey Francis, titled issue 2, and dated 04/06/2015 [6];

c. answers from most of the leaseholders to questions posed by the Mabey Francis report [14]-[25];

d. a further report from Mabey Francis dated 06/07/2015 [26].

e. An email quote from Ian Newberry Solicitors [48] concerning the preparation of a wayleave agreement.

10 The Tribunal also had before it an email at [42] dated 30/06/2015 from Mr and Mrs Molle, and 2 letters from Mr Mussett [44] dated 07/06/2015 and 05/07/2015.

The September 2015 adjournment

11 The Applicant had been due to file and serve copies of supplemental bundles by 17/08/2015. Unfortunately this was not done. On the 24/08/2015 an officer of HMCTS contacted the applicants to chase the bundles, and was told that they had not been prepared as the Applicant had been taken ill and was in hospital.

12 On the 28/08/2015 a colleague of the Applicant contacted the Tribunal service by email asking for an adjournment of the hearing on 02/09/2015. She was told that a formal application would be required. None was received.

13 The Tribunal however granted the Applicant an adjournment on 04/09/2015, on the basis that there was little point in attending on the 07/09/2015 without a bundle having been prepared or produced. At this point the Tribunal had not had sight of any further documents. When granting the application the Tribunal asked the Applicant to explain, at the next hearing, why someone else within the Applicant's office had not been able to prepare the bundle, as well as providing evidence of the ill health which had necessitated the adjournment. The hearing was subsequently listed on 28/10/2015.

14 At the hearing on the 28/10/2015 the Applicant produced a letter from her GP dated 27/10/2015 in which it was stated, omitting unnecessary detail, that the Applicant had undergone a procedure in Southampton hospital on the 06/08/2015, but had been readmitted on 17/08/2015 with a post operative infection. She was discharged from hospital on 21/08/2015 and returned to work on 03/09/2015. The Applicant who attended at the hearing told the Tribunal that she had been extremely unwell in the week leading up to her readmission on 17/08/2015. The Tribunal noted that the bundles were to have been filed and served by 17/08/2015.

15 At the hearing on the 28/10/2015 the Tribunal was particularly concerned that the Applicant explain why, even in her absence, others in the office had been seemingly unable to produce the bundle – it appearing that the information/reports etc had already been obtained. Ms Lacey-Payne explained that as she was so unwell in the week leading up to the 17/08/2015 she had not mentioned to any colleagues the outstanding Tribunal directions which needed to be complied. She stated that though others in the office would have dealt with any emergency concerning the properties she managed, there was no procedure in place to notify colleagues of the need to comply with the outstanding Tribunal directions. Ms Lacey Payne assured the Tribunal that lessons had been learned from this and that in future these matters would be listed on an office board so that others were aware of any outstanding directions in the event that the appropriate employee was for any reason unable to fulfil the directions themselves.

16 None of the parties referred to having incurred any financial loss as a result of the adjournment from 07/09/2015, nor the Tribunal had incurred any wasted expenditure, other than the time taken to chase the bundles and deal with the adjournment request. The Tribunal therefore decided not to make an award of costs against the Applicant under Rule 13 of The Tribunal Procedure (First Tier Tribunal)(Property Chamber) Rules 2013.

Late evidence filed by the Applicant.

17 At the hearing on 28/10/2015 Mr Molle reiterated his opposition to the inclusion of the third report of Mabey Francis, filed and served out of time. Mr Molle had first raised the late filing of this third report in an email dated 07/07/2015. He explained that he had been sent this report by email on 06/07/2015 at 16.00. This was some 4 weeks after the relevant deadline for Applicant to file any expert evidence had expired. The 06/07/2015 was in fact the deadline imposed by the directions for the Respondents to file any comments on the Applicant's evidence.

18 On or around 13/07/2015 the Tribunal responded to Mr Molle explaining that issues concerning late submissions and/or non compliance with directions would be dealt with at the final hearing. The Tribunal explained that if Mr Molle wished to make submissions/comments on the third report he should do so, and not merely assume that the report would be excluded. Further the Tribunal added that if any party was now suggesting that the final hearing could not go ahead as scheduled (at that stage for 07/09/2015) as a result of specific prejudice, then they should make an appropriate application for the Tribunal's consideration.

19 The Tribunal received no such application. Nor did the Tribunal receive any application from the Applicant to rely on the late report, even though the Tribunal's directions made it perfectly clear that in the event that a party wished to vary any of the directions an application would be required. The Tribunal noted that the late filing of this evidence by the Applicant occurred prior to her operation and subsequent ill health in August 2015.

20 The Tribunal also noted that the Applicant had subsequently included in the bundle an email from Ian Newberry, a Solicitor, providing a quote for the costs of works associated with any anticipated wayleave [48]. That email was dated 06/08/2015, and again breached the Tribunal's directions as it was late. In fact Mr Molle explained that he had not had sight of this document prior to his receipt of the bundle on or around the 15/09/2015.

21 The Tribunal was concerned about the Applicant's failure to comply with its directions, and the apparent attitude that a party could continue to provide late documents and/or reports as it suited them, without any reference to the Tribunal's directions and without making any formal application. The Tribunal warned the Applicant that this was entirely unacceptable. However the Tribunal went onto consider whether, in all the circumstances the third Mabey Francis report and the email from Ian Newberry Solicitors should nonetheless be admitted into evidence.

22 The Tribunal heard from Mr Molle, who advocated that the evidence should be excluded, as well as from the Applicant Ms Lacey Payne. Mrs Porter (another Respondent present at the hearing) indicated that she had no specific submissions to make on this issue.

23 Ms Lacey Payne argued that the third report was in fact an attempt to include the expert's response to the information supplied by the Respondents in the emails at [14]-[25]. Having considered the contents of this third report however the Tribunal found that this was patently not the case. The changes

and additions to the third version of the Mabey Francis report were not, substantively, related to the information provided by the Respondents. The differences in the third report included details of 'theoretical flow rates' and a seeming change in emphasis in conclusions as to the cause of the problems, as well as the inclusion of a hand drawn plan and photographs.

24 Ms Lacey Payne then argued that the changes to the report were designed to ensure that none of the Respondents were taken by surprise by the evidence which Mr Cope of Mabey Francis would give at the final hearing. While no permission had been given for oral expert evidence, the Applicant had intended to call Mr Cope to give evidence at the adjourned hearing.

25 There was one other, very serious matter, which the Tribunal brought to the attention of the Applicant and which was a very significant cause for concern. As a result of an email sent by the Applicant to the Tribunal on 06/07/2015 it became apparent from the email trail attached that on 30/06/2015 Mr Cope of Mabey Francis had met with Mr Mussett, one of the Respondents, on his own. Mr Mussett had been copied into Mr Cope's email and provided with a copy of the third report as a result. Mr Mussett was asked to provide input in the form of a date for inclusion into the report. It also appears that Mr Mussett had suggested that Mr Cope include photographs and a sketch to his report, which suggestion Mr Cope acted on.

26 It therefore seemed that not only had Mr Mussett, a Respondent to the application, been provided with a copy of the third report in advance of all the other Respondents, but also that he had been able to have a private meeting with Mr Cope and had seemingly influenced the content of this third report. Mr Mussett had apparently made a request to Ms Lacey Payne for this meeting, which she had consented to. This was, as the Tribunal highlighted to Ms Lacey Payne, entirely improper and inappropriate: It amounted to a breach of the rules of natural justice, and meant that one of the Respondents had been provided with an opportunity to meet and influence the expert witness when others had not. While it might be the case that Mr Mussett had not realised that such a meeting was inappropriate, the Applicant certainly should have. The Tribunal had been astounded that the Applicant had not realised that such a meeting with one only of the Respondents would be entirely improper. Had it not been for the email trail, the Tribunal would have been unaware of Mr Mussett's contact with Mr Cope. This contact meant that Mr Cope's third report therefore had to be looked at in a rather different light.

27 Having said that however, the Tribunal decided that it would exercise its powers pursuant to Rule 6(a) of the 2013 Rules to extend time and receive the third Mabey Francis report and the email of Ian Newberry into evidence.

28 Rule 6(a) of the 2013 Rules gives the Tribunal power to "...extend or shorten the time for complying with any rule, practice direction or direction even if the application for an extension of time is not made until after the time limit has expired.". Further pursuant to Rule 6(d) of the 2013 Rules the Tribunal may permit a party or another person to provide or produce documents information or submissions to the Tribunal or a party.

29 The Tribunal considered that it was appropriate to extend time for compliance with its directions so as to admit the late evidence as:

a. The Tribunal were able to compare the previous versions of Mr Cope's report with the third version, and could therefore view the amendments made in light of the inappropriate contact between him and Mr Mussett;

b. While the third report had been filed late and there was no real reason why any of the contents of that report had not been included earlier, the Respondents had now all had a full and proper opportunity to consider the report, in particular given the adjournment from 07/09/2015 to 28/10/2015.

c. No significant prejudice or injustice was caused to any party by reason of the lateness of the documents submitted.

d. Further in relation to the email at [48] from Ian Newberry, this was merely a quote concerning likely costs for the legal work involved in securing a wayleave. While this too had been filed late, the Tribunal did not consider that the Respondents had been particularly prejudiced by the late filing of such evidence. In fact if it had become germane to the Tribunal's decision, the Tribunal would have considered a request from any party for an opportunity to obtain and submit further written quotes from other solicitors to give comparable costs. However, as will be seen, and for the reasons set out below, this approach was not required.

Responses from the Respondents to the application.

30 On the 27/10/2015 the Tribunal received an email from Mr Mussett, in which he apologised for and explained that he would be unable to attend at the adjourned hearing on 28/10/2015. He reiterated that he remained supportive of the Applicant's application and included two letters he had previously sent to the Applicant. He seemed to make criticisms of the Mabey Francis Report "The report did not include much of the detail that I was expecting" (05/07/2015). He referred to the galvanised supply pipe having exceeded its projected lifespan, and in his second letter he referred to flow rates and confirms that he is in favour of the works being completed as proposed.

31 In addition to his submissions at [42][43] Mr Molle, explained during the course of the hearing that he opposed the application and considered the proposed works to the water pipes as amounting to improvement works and therefore falling outside the ambit of the lessor's covenants. He additionally made a number of criticisms of the Mabey Francis report, which are detailed below and at [42][43]. He indicated that he did not accept the evidence of Mr Cope.

32 Mrs Porter explained that she had had problems with the water supply to her flat, at peak times, for the 13 years. She explained that the reference at [22] to a problem with the water to a flat of the company director, was a reference to her flat, as her husband had been the company director at that time. She also

explained that there had not been any leak and far from the water supply problem having been resolved, it had continued.

The lease

33 The Tribunal asked the Applicant to identify which provisions under the lease she was arguing permitted the envisaged works to the water supply pipes at the property. In the original application (see page [33] of the original bundle), the Applicant had referred to a number of the provisions of the lease as being appropriate, including Clause 5 (IV) [43]. This provides that: "And the Lessor HEREBY COVENANTS with the Lessee....to **maintain furnish cleanse repair cultivate and when necessary renew** in a good and workmanlike manner (a) the gutters pipes and other things for conveying rainwater from the Building and all external parts of the Building, (b) the gas and **water pipes** drains and electric wires and other gas water and electric installations in under or upon or serving the Building and enjoyed or used by the lessee in common with the owners of the other flats or maisonettes (c).....". (emphasis added).

34 The Tribunal also drew the parties attention to Clause 3(x) of the lease [40] which provides that the lessee is "....to pay a due proportion of the costs and expenses of all **repairs or renewals** of....pipes watercourses or installations enjoyed or used in common with adjacent or adjoining flat (not being Lessors responsibility under clause 6(iv) hereof). (emphasis added). It is of note that there is no clause 6(iv) within the lease.

The Law

35 It is important to note that the obligation imposed on the Lessor is not expressly described as an obligation to keep the water pipes in 'proper working order'. In O'Connor v Old Etonian HA [2002] EWCA Civ 150: there was such an obligation to keep pipes in 'proper working order' and installations for the supply of a utility in proper working order. The Court of Appeal held that such a covenant required a landlord to ensure that at the beginning of the tenancy the installations are so designed and constructed as to be capable of performing their functions. Further that an installation is in proper working order if it is able to function under those conditions of supply which it is reasonable to anticipate will prevail. And that an unanticipated change in the nature of the supply of a utility may occur for a variety of reasons; if the supplier deliberately imposes a change because of an advance in technology, the landlord is obliged to modify the installations to ensure that they continue to function. But, on the current facts the clause does not include any reference to 'proper working order'.

36 In general terms the legal authorities are clear that an obligation to keep in repair doesn't of itself require or oblige a lessor to remedy defects of design or construction, even if their consequence is that premises are not reasonably habitable.

37 The covenant lists the lessor's obligations as being to "maintain furnish cleanse repair cultivate and when necessary renew". The covenant as drafted follows

what is referred to as 'torrential style' of drafting, that is to say that the clause contains a number of associated concepts and expressions, some or all of which may be thought to mean more or less the same thing. A strict application of the principle that every word used in a contract must, if possible, be given meaning, would result in each of the various expressions and concepts being construed so as to mean something different. Such a strict application of principle however is not always appropriate.

38 Does the inclusion of the verb 'renew' in the relevant covenant in this lease, mean more than repair? Dowding and Reynolds on Dilapidations at paragraph 4-28, in an excerpt read to the parties at the hearing states "It is clear from the above that the wording of the proviso to the covenant played a substantial part in the judge's reasoning. But where there is no separate context indicating that something more than repair is contemplated, then it is thought that 'renew' is likely to be construed as it was in Collins v Finn, i.e. as adding nothing to the obligation to repair.". In the Tribunal's view there was no separate context indicating that anything more than 'repair' was contemplated by the relevant clause. The Tribunal therefore concluded that on the current facts 'renew' here meant no more than 'repair'. While a lessor might to be obliged to renew certain elements in the structure or machinery etc which forms the building, that is as part of the repairing obligation and goes no further than that obligation to repair.

39 The Tribunal also found, considering the case of Westbury Estates v The Royal Bank of Scotland 2006 SLT 1143, that an obligation to repair does not include an obligation to replace items which were neither defective nor malfunctioning simply on the ground that they were at or approaching the end of their economic life. Damage or deterioration is not necessarily to be equated with a failure in function. It is possible for a part of the building not to perform its intended function and yet not be in disrepair.

40 No work is required under a covenant to repair until there is damage or deterioration to the relevant item of plant or equipment which is the subject-matter of the covenant, which has caused it to fall below the standard contemplated by the covenant. The fact that an item of plant is old fashioned, or that it is less efficient when compared with its modern equivalent, or that the market would not regard it as suitable is not enough to bring the covenant into play. As a general principle, it must be possible to identify a respect in which its physical condition has deteriorated to a point where it is below the standard to which the parties required it to be kept. The requirement that there must be disrepair before the covenant comes into operation will ordinarily mean that a failure in function, which is not the result of physical damage or deterioration, will not give rise to any liability under the covenant to carry out work.

41 Further Dowding and Reynolds on Dilapidations also states "In deciding whether the condition of particular plant amounts to a breach of covenant, it is important not to be over reliant on published data as to the likely lifespan of plant of the same description. .....Plant which has exceeded the published projected lifespan for that type of item is often referred to as being at the end of its useful or economic life. ....it is potentially misleading [to rely on this

concept] where the issue is whether the plant is in disrepair, since everything will depend on the physical condition of the item in question. ...the fact that it [the item in question] has already lasted beyond its projected lifespan is not conclusive as to the existence of disrepair, still less that complete replacement is necessary." It is therefore clearly important that the item in question must be carefully inspected. See too Flour Daniel Properties Ltd v Shortlands Investments Ltd [2001] 2 EGLR 103

The expert evidence

42 The following is intended by way of a general summary only of the water pipe supply system at the property: The mains water to the property is supplied through a long underground pipe ('thought' to be galvanised steel), running from a connection with water company's pipes at the bottom of the drive, up the length of the drive and into the basement. In the basement the flats are served by 'rising pipe work'. The system of such is apparently the result of "...several alterations..", and in Mr Cope's view "...forms an irregular unbalanced system which does not give equal priority to each flat."[8]. Some years previously, a 63mm MDPE coil was laid through a neighbouring property, which if connected would provide a larger incoming supply over a shorter distance and would render the supply pipe running up the drive redundant. To date this new supply pipe has not been connected to the property.

43 Being mindful of the matters highlighted at paragraphs 25 to 26 above, the following is intended as a summary of the reports of Mabey Francis before the Tribunal:

a. Mr Cope **believes** that the existing underground supply pipe to the property, running up the drive, is galvanised steel, which, where visible is 32mm in size.

    i. Given his explanation that this is his belief, it would suggest that he hasn't carried out any testing of this;

b. Mr Cope at [8] in his Second report states that "...it is felt..." that the most probable causes of poor performance are....:

    i. Both the existing underground supply pipe and the distribution pipe work are inadequate by pipe size and/or blockage such as scale.

        1. In his third report the emphasis is slightly altered, he concludes that the pipes are inadequate by pipe size, and that this may be exacerbated by partial blockage such as scale [29]. It is seemingly therefore Mr Cope's conclusion that really it is the existing pipe size which is the main issue, but that this might be being further exacerbated by a partial blockage. This is supported by Mr Cope's conclusions at [30] that "We ...believe that the issues experienced are caused by a deficient water supply infrastructure at the property....".

2. This conclusion is not supported by any evidence of testing to see if there was any blockage, partial or otherwise. It is not clear to the Tribunal whether any testing would have been possible, for example by cameras being placed into some at least of the pipes to see whether a partial blockage or scale could be identified.

3. Nor does the report address whether if there was a scale blockage whether there are other options, such as cleansing the pipes to remove any scale build up. This is an issue raised by Mr Molle at [42].

4. Mr Mussett at [18] gives his view that the incoming supply pipe is "of a questionable state of derogation both in terms of corrosion, joint leakage and furring... on occasion Southern Water inspectors have commented on its probable poor condition." It is of note that the expert, makes no reference to corrosion or joint leakage to this pipe, though as observed above, it is not clear that the expert has undertaken any specific tests to examine the pipes current actual state.

5. If it is the case, as seemingly is Mr Cope's view, that it is the inadequate pipe size which is the real problem here, this, does not on the basis of the evidence before us, amount to disrepair.

6. The Tribunal was not satisfied on the balance of probabilities, on the basis of the evidence before it, that there was a blockage of the water pipes, partial or otherwise, caused by scale or indeed anything else.

ii. The nature of the branching to serve each property does not maximise the available performance of the incoming supply.

1. It is clear this potential cause of the problem does not amount to disrepair.

c. Mr Cope refers to 'understanding' that Southern water have confirmed on several occasions the water supply meets the statutory requirements;
   i. Mr Cope does not however appear to have verified this himself or sought documentary confirmation that this is in fact the case.
d. He concludes at [9] that the "..existing arrangement is theoretically incapable of achieving the necessary flow rate to serve seven flats simultaneously. However he gives no details of flow readings he has taken or the basis on which he has reached this conclusion. In any event, this too seems to confirm his view that the real problem is the size and arrangement of the pipes, rather than any blockage.
e. In this Third report Mr Cope refers at [28] for the first time to there being no stopcock on the incoming water service as it enters the basement, and that whilst valves exist on some of the pipe work branches many of these are unserviceable.

i. One wonders why this was not referred to in previous reports by Mr Cope. Did he not see it? Had he in fact tested the valves? Though it is of note that it is referred to in Mr Mussett's email at [19] of 03/06/2015. Is Mr Cope merely relaying what he has been told by Mr Mussett?;
ii. Even if the Tribunal were to accept that the condition of the valves on some of the pipe work branches amounted to disrepair, such disrepair of itself would not reasonably require the extensive works proposed by the Applicant:
    1. The Tribunal presumes that the valves could be replaced in isolation; and
    2. The Tribunal presumes given the phrasing and structure of the report, that the disrepair to the valves does not cause or impact on the problems with levels of water flow experienced by the three flats at peak times.

f. Mr Cope refers to theoretical flow rates [29], comparing the existing pipe work (27litres/min), with his proposed pipe work arrangement (150litres/min) and the calculated simultaneous demand of 7 flats at the property (102litres/min).

    i. It is not clear where or how Mr Cope has obtained (or calculated) his 'theoretical flow rates' from – certainly in relation to the existing arrangement;

    ii. Given the reference to the rates being 'theoretical' it appears that he hasn't undertaken any specific testing. Indeed the Tribunal notes that Mr Mussett states in his letter of 07/07/2015 that the flow rate he says which was measured by Southern Water (under the existing pipe work) was at best 20-22litres/min.

g. Mr Cope refers to the economic life span of 35 years for galvanised steel pipe work, fittings and valves [30], and that "The system must therefore be considered beyond its expected lifespan and due for replacement." This too is newly inserted into the third report.

44 Mr Cope proposes various works at the property which can be grouped as follows:

a. Stage 1:

    i. Investigation into the purpose of all the pipe work rising from the basement;

    ii. Replacement of the existing galvanised distribution pipe work within the basement with a larger 54mm pipe, ensuring each branch is fitted with a new quarter turn isolating ball;

b. Stage 2
    i. Utilise the previously laid 63mm MDPE underground pipe work to serve the new distribution pipe work, rendering the galvanised steel pipe running up the drive redundant;

ii. This will require a way leave from the neighbouring property and a water company connection;
iii. If a wayleave cannot be obtained, [34] "it may prove necessary to replace the incoming pipe work along its existing route." (i.e. down the drive).

c. Stage 3
i. Consider replacement of water risers by installing new water supplies from the basement to each individual flat.

Mr Cope stated in his report that the works could be carried out as one contract (which would result in a competitive tender) but that it might be more prudent to consider a phased approached to the works in order to avoid unnecessary expense, should an early phase result in a successful outcome [31].

45 Mr Cope estimates the total cost of works (excluding those at stage 2 (iii)) as being in the region of £19,000 plus £1,000 contingency, plus professional fees.

46 The Applicant had clearly intended Mr Cope from Mabey Francis to attend the adjourned hearing [17]. The Tribunal were of the view that this would have potentially been very helpful. However, the Applicant arrived at the hearing to explain that she had been told the day before (27/10/2015) that Mr Cope was now unable to attend the hearing. This is despite the Applicant having checked Mr Cope's dates to avoid when arranging the 28/10/2015 hearing date and having notified him back in September of the new hearing date. Mr Cope's absence had a significant impact on the Applicant's ability to present her case. She explained that she was, in effect, wholly reliant on Mr Cope in relation to any technical matters concerning the water pipes and was unable herself to answer the Tribunal's questions. The Tribunal makes no criticism of the Applicant concerning Mr Cope's non attendance, at such short notice, but it had a potentially significant impact on the application.

47 The Applicant invited the Tribunal to either decide the remainder of the application on the basis of the evidence before it, or adjourn the hearing once more so that Mr Cope could attend, or alternative evidence be obtained. The Tribunal took time to consider this further adjournment application, but decided that it would not adjourn the hearing again. This was a part heard application from April 2015; there had already been a second adjournment as a result of the Applicant's ill health in September 2015, and there was no guarantee that Mr Cope would attend at any adjourned hearing, or in fact that his oral evidence would assist the Tribunal any more than his written reports. It was not fair to keep the Respondents hanging on for a decision on the application

Conclusions

The proposed water pipe works

48 The Tribunal were not satisfied, on the basis of the evidence **currently** before it, that the water pipe works proposed by the Applicant were within the ambit of the relevant lessor's covenants under the lease:

a. While the Tribunal notes that claims of disrepair had been identified to a number of valves on some of the pipe work branches, the Tribunal found that:

    i. This was not causative of the water supply problems which three of the flats suffered from during peak times;

b. The main cause of the problem was believed by Mr Cope to be the size of the pipes initially installed and the structure of their layout and branching. This is not therefore disrepair.

c. While Mr Cope referred to there potentially being a scale build up in the pipes, this had not been confirmed by Mr Cope; there had seemingly been no tests or investigative works undertaken to confirm this suggestion. It was ultimately unsupported speculation. The Tribunal were not satisfied, on the basis of the evidence currently before it, that there were scale deposits to the inside of the relevant pipes, and further that the extent of such deposits amounted to disrepair. While scale deposits on the inside of the water supply pipes **might** be seen as disrepair, the Applicant and the expert had failed to refer to or investigate less radical methods of removing such scale deposits: could the pipes be cleansed and the scale removed, what was the cost of those works. Further the mere presence of scale on the inside of the pipes needed to be considered against the principle that no work is required under a covenant to repair until there is damage or deterioration to the relevant item which is the subject-matter of the covenant, which has caused it to fall **below the standard contemplated by the covenant**. The Tribunal were not satisfied that the mere presence of scale on such a pipe would satisfy that test, something more would be required;

d. The fact that the allegedly galvanised supply pipes were old, and beyond their anticipated economic lifespan, did not, per se, mean that they were in a state of disrepair.

49 The Tribunal were not satisfied on the balance of probabilities, and on the basis of the evidence currently before it, that the water supply system at the property was in a state of disrepair. That is not to say that the Tribunal does not accept the direct evidence of the three flats (flats 1, 4 and 6) that there are significant problems with the water flow to those three flats at peak times, but rather that legally such problems could not, on basis the current evidence, be properly characterised as the result of disrepair to the pipes/system.

50 At the very end of the hearing the Applicant referred, in passing, to the fact that dry rot had apparently been found at the property in or around January 2015. In August 2015 the insurers and a surveyor inspected "..under the building and found a leaking pipe". The Tribunal was surprised and frustrated that this information had only been referred to by the Applicant at the end of the hearing, almost in passing. There was no documentary evidence supplied in support of this assertion, (the cause of any leak, nor the identity of the pipes or their condition), before the Tribunal, and this was despite the fact that the hearing had been adjourned from 07/09/2015 to 28/10/2015. Indeed the Applicant was not

putting this information forward as part of her application. For the reasons set out above and at paragraph 47 the Tribunal was not prepared to grant yet a further adjournment so that the Applicant could identify whether this evidence supported an assertion of disrepair to the pipe more generally. It was of note however that the leak had been repaired locally, without the wholesale replacement of the water pipes.

51 As the Tribunal were not satisfied, **on the basis of the evidence before them**, that the water supply pipes to the property were in a state of disrepair, or that the works proposed by the Applicant, fell within the ambit of the repairing covenant, the Tribunal dismiss the application.

52 As a result the Tribunal did not go onto consider in any detail issues concerning potential alternative methods of remedying any disrepair, or whether the costs referred to were reasonable.

53 In relation to costs though the Tribunal noted in passing, the huge discrepancy in the quotes provided: in the original bundle the costs of the works then being referred to were in the sum of £5,993 + vat (the Dixon quote) – page [169] of the original bundle, and £7,179.19 + vat (or £2,166.94) (the AP Chant quote) at page [175] of the original bundle. Yet now, Mabey Francis were referring to works of some £20,000 + professional fees.

Section 20C of The Landlord and Tenant Act 1985 (the 1985 Act).

54 The Tribunal stated in its decision of 02/05/2015 at paragraph 4(e) that "Any application pursuant section 20C of The Landlord and Tenant Act 1985 and/or any application for the reimbursement of fees (pursuant to Rule 13(2) of the Tribunal Procedure (First Tier Tribunal)(Property Chamber) Rules 2013 (hereinafter referred to as 'the 2013 Rules')) was also to be adjourned to the next hearing." – namely 28/10/2015. Further at paragraph 43 of its previous Judgment the Tribunal stated that "...given that all the responses from Napier were not included in the bundle it was difficult to identify whether specific queries had been addressed or not. This may be something which the Applicant wishes to adduce evidence in respect of at the adjourned hearing, especially should there be any issue concerning costs." Nothing further has been received from the Applicant in this regard.

55 The Tribunal also provided in its directions of 06/05/2015 at paragraph 2(iii) that the Respondents were to provide written comments or submissions concerning any application or issue concerning costs or reimbursement of fees.

56 Mr and Mrs Molle refer at [42] to the costs of the proposed works, and that the investigative costs to date should be added to the costs of the proposed works, they also query at [43] having to pay for the costs of the Mabey Francis report through the service charge.

57 As was discussed with the parties at the hearing on 28/10/2015 the Tribunal would consider whether to make an order under section 20C of the 1985 Act, to prevent the Applicant from recovering their costs of the Tribunal proceedings through the service charge. A Tribunal may make an order under section 20C if it considers it to be just and equitable to do so.

58 The Tribunal do consider it just and equitable to make such an order. In doing so the Tribunal noted the following:

a. No further information was received from the Applicant in relation to the matters raised at paragraph 43 of is previous judgment, and the assertion by a number of the Respondent leaseholders that their specific queries arising from section 20 notices had not been addressed or responded to by the Applicant;
b. The Applicant submitted that there were no costs to be claimed as a result of the last Tribunal hearing on 27/04/2015, she explained that she was not going to be charging anything for preparation or attendance at the hearing. The Applicant stated that she only wanted to recover the costs of Mabey Francis report, though she indicated that she would be challenging any invoice raised by him;
c. The Tribunal accepted that the Applicant had commissioned the report as a result of the last hearing. The Tribunal had of course not ordered her to obtain an expert report, but rather given her permission to obtain an expert report dealing with certain issues, as the evidence then before the Tribunal in support of that aspect of the application was inadequate. The application was adjourned part heard to allow the Applicant to remedy this deficiency in the application;
d. There were various criticisms which could be made of the Mabey Francis reports, as detailed above, as well as arising from the fact that Mr Cope having indicated he was going to attend the hearing on 28/10/2015 then backed out at the last moment. The Tribunal however did not consider that the Applicant could be blamed for Mr Cope's failure to attend. The deficiencies in his report however, could have been raised by the Applicant directly with Mabey Francis;
e. The Tribunal pointed out to the Applicant that despite precise issues being raised by the Tribunal at the last hearing, in particular the significance of any 'disrepair' given the wording of the lease, and the matters listed in the directions at paragraph 1(a), the reports of Mabey Francis were lacking and unsatisfactory in a number of respects as detailed above;
f. The Tribunal's concern that one of the Respondent leaseholders had been afforded the opportunity to meet with and discuss matters with the expert, and have input into his report, when none of the other Respondents were afforded that opportunity; and
g. That this aspect of the application had, ultimately on the basis of the evidence before it, been dismissed.

59 The parties should note that the fact that a section 20C order is made does not involve a consideration or determination of whether the provisions of the leases allow the Applicant to seek to recover the costs of the Tribunal proceedings through the service charge provisions, nor the reasonableness of any such costs.

Appeals

60 A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) 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.

61 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.

62 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 allow the application for permission to appeal to proceed.

63 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 the party making the application is seeking.

Appendix A

Respondents

Flat 1: Mrs Lacy.

Flat 2: Mr and Mrs Molle, (Mr Molle attended at the hearing).

Flat 3: Dr Garrard.

Flat 4: Mr and Mrs Mussett.

Flat 5: Mrs Lyle.

Flat 6: Mrs Porter, (who attended the hearing with her friend Mr Woolley).

Flat 7: Mrs Bromley.

Appendix B

Landlord and Tenant Act 1985

Section 18 Meaning of "service charge" and "relevant costs".

(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 Limitation of service charges: reasonableness.

(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.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

.....

(5) If a person takes any proceedings in the High Court in pursuance of any of the provisions of this Act relating to service charges and he could have taken those proceedings in the county court, he shall not be entitled to recover any costs.]

Section 27A Liability to pay service charges: jurisdiction

(1) An application may be made to an 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 amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.]