

11687



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

Case Reference : CHI/00HN/LSC/2016/0010
CHI/00HN/LSC/205/0088

Property : 68 Southcote Road Bournemouth Dorset
BH1 3SS

Applicant : Tyrell Investments Inc.

Representative : Napier Management Services

Respondents : Mr I Patrick-Valentine, Mr P Patrick-
Valentine, Mr S Prewer, Mr and Mrs R N
Atkinson, Mr G R Mears and Ms V J Guy

Representative : Not represented

Type of Application : Liability to pay service charges

Tribunal Members : Judge N Jutton, Mr P D Turner-Powell
FRICS

Date of Decision : 29th July 2016

DECISION

1 **Introduction**

2 The Applicant, Tyrrel Investments Inc, is the Freeholder of 68 Southcote Road, Bournemouth, Dorset, BH1 3SS (the Property).

3 There are 4 flats at the Property. The flats are held on identical long Leases. Mr I Patrick-Valentine and Mr P Patrick-Valentine are the Lessees of Flat 1. Mr and Mrs R N Atkinson the Lessees of Flat 2. Mr S Prewer the Lessee of Flat 3 and Mr G R Mears and Ms V J Guy the Lessees of Flat 4.

4 On 17 December 2015 the Applicant submitted an application to the Tribunal for a determination as to whether the costs of proposed major works to repair a flat roof at the property could be recovered by the Applicant from the Respondents as part of service charge payments falling due under the terms of the Lease and if so whether the proposed cost of such works would be reasonably incurred. The Applicant proposed to carry out the works at a total cost of £11,040 inclusive of VAT and Managing Agents fees for undertaking a consultation process pursuant to section 20 of the Landlord & Tenant Act 1985.

5 On 4 February 2016 the Applicant submitted a second application to the Tribunal. The Applicant sought a determination from the Tribunal as to whether the costs of proposed major works to install a French Drain and other works to the front side and rear of the Property could be recovered from the Respondents pursuant to the terms of the Lease as part of the service charge payments and if so whether the proposed costs of those works would be reasonably incurred. The costs that the Applicant proposed to incur totalled £9,990 inclusive of VAT, Surveyor's fees and Managing Agents fees for conducting a section 20 consultation process.

6 By Directions made by the Tribunal on 13th February 2016 the two applications were joined to be determined together. Directions were also made for the parties to serve Statements of Case and for the filing of a Hearing Bundle.

7 The Directions further provided that the application would be determined on the papers without a hearing in accordance with Rule 31 of the Tribunal Procedure Rules 2013 unless a party objected within 28 days of receipt of the directions. None of the parties have objected.

8 On 13 May 2016 the Tribunal made a Decision in respect of the works to the roof and made Directions for the further conduct of the case in respect of the proposed works to install the French drain.

9 The Tribunal was subsequently notified that the lease of Flat 4 had been assigned to Graham Robin Mears and Victoria Jane Guy on 29 June 2015, that is prior to the date of the two applications before the Tribunal. Mr Mears and Ms Guy had not been named as parties to the proceedings and the Tribunal was of the view that properly they should be made a party and be allowed the opportunity to respond to the two applications. Upon the basis that there had been a procedural irregularity and that it was in the interests of justice so to do the Tribunal made an Order on 23

June 2016 setting aside its Decision dated 13 May 2016 (save for its Directions of that date) and made Directions allowing for Mr Mears and Ms Guy if they wished to file and serve Statements of Case in response to the two applications.

10 **Documents**

11 The documents before the Tribunal consisted of:

1. A Bundle of some 100 pages which contained the applications to the Tribunal, the Lease of Flat 1, documents in each case in relation to the section 20 consultation process, estimates of the costs of proposed works received from contractors, a report on water ingress at the Property dated 17 November 2015 from Tom Green a Chartered Surveyor of Green Ward Associates in Poole Dorset, the Tribunal's Directions dated 13 February 2016 and the Applicant's Statement of Case dated 31 March 2016.
2. A further letter from the Applicant's Surveyor Mr Tom Green addressed to the Applicant's Representative dated 25 May 2016 providing more details as to the French Drain works compiled and served pursuant to the Directions made by the Tribunal on 13 May 2016.

12 No Statements of Case, representations or documents of any kind have been filed by the Respondents.

13 Having considered the documents filed and having regard to the fact that the Respondents have not elected to file an expert's report of their own or to provide a Statement of Case or indeed to make any representations, and given that neither party has requested a hearing, the Tribunal has proceeded to determine the applications on paper without a hearing.

14 **The Inspection**

15 The Property appears to have been constructed in the early 20th century. The exterior walls are rendered. To the front of the Property is a tarmac car parking area which tarmac abuts the wall of the building. There are tarmac paths to the sides of the Property. In front of the rear wall of the Property are flowerbeds. Surrounding the Property at ground level is a concrete plinth of approximately 18 inches high which is painted black. The proposed works to the roof at the front of the Property appeared at the time of the inspection to have been already carried out.

16 **The Law**

The statutory provisions relevant to applications of this nature are to be found in sections 18, 19, and 27A of the 1985 Act. They provide as follows:

The 1985 Act

18 (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.*

19 (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*

27A (1) *An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to –*

- (a) *the person by whom it is payable,*
- (b) *the person to whom it is payable,*
- (c) *the 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.*

17 **The Lease**

18 A copy of the Lease to Flat 1 at the Property appears at pages 13-24 in the Bundle and again at pages 65-76.

19 By clause 1 of the Lease, the Lessee covenants to pay to the Lessor:

“.....by way of additional or further rent a sum or sums of money equal to one equal fourth part of the amounts which the Lessor shall expend on the matters referred to in the Third Schedule hereto such additional or further rents to be paid within fourteen days of the Lessor notifying the Lessee of such expenditure”.

20 The Third Schedule to the Lease is headed “Costs expenses outgoings and matters in respect of which the Lessee is to contribute a fourth share”.

21 Clause 1 of the Third Schedule is in the following terms:

“The expense of maintaining repairing and renewing (i) any walls or fences bounding the area edged with a colour red on the said plan the walls footings foundations exterior walls and general structure roof chimney stacks gutters and rainwater pipes of the building (ii) the gas and water pipes tanks drains and electric cables and wires in under or upon the building or the gardens and curtilage thereof and enjoyed or used by the Lessee in common with the Lessor or any occupiers of any other part or parts of the building and (iii) any other part or parts of the building or premises whatsoever not included in this demise used in common by the Lessee and the Lessor or any Lessee or owner for the time being of any other part of the building”.

22 **The Issues**

23 Issues which fall to be determined by the Tribunal are as follows:

1. Whether if the costs of works to repair the roof of the property which the Applicant proposed to carry out were incurred would a service charge be payable by the Respondents in respect of those costs. If so would the proposed costs of those works in the total sum of £11,040 inclusive of VAT and Managing Agents fees for undertaking a section 20 consultation process be reasonably incurred (The Roof Works).
2. Whether if the costs of works which the Applicant proposed to carry out for installation of the French Drain and other works at the property were incurred would a service charge be payable by the Respondents in respect of those costs. If so would the proposed costs of those works in the sum of £9,990 inclusive of VAT, Surveyor's fees and Managing Agents fees for undertaking a section 20 consultation process be reasonably incurred (The French Drain Works).

24 **The Roof Works - The Applicant's Case**

25 At the date of the Tribunal's inspection the works to the roof appeared to have been carried out. The Applicant's Case is set out in its Application Form and in its Statement of Case dated 31 March 2016 (page 100).

26 The Applicant refers to clause 1 of the Lease which is set out above and which provides for the Lessee to pay by way of additional further rent one equal fourth part of the amounts which the Lessor expends on the works of maintenance repair and renewal as set out in the Third Schedule.

27 The Applicant also makes reference to clause 3(ii) of the Lease which contains the Lessor's repairing covenant. The wording is in like terms to clause 1 of the Third Schedule. The Applicant then makes reference to clauses 1(i) and (ii) of the Third Schedule which are set out above.

28 The Applicant says that the works to repair the flat roofs at the Property are required to prevent ingress from the elements and to comply with recommendations contained in a Report from a company called

Greendale Construction Limited dated 9 January 2015 (pages 28-33) and in order to comply with a provision in the Buildings Insurance Policy (page 52 of the Bundle) relating to roof maintenance which provides for any flat roof at the Property to be inspected at least every two years and for any defect found on such inspection to be repaired immediately. Such provision being described as a condition precedent to the Insurer's liability under the terms of the Policy.

- 29 The Applicant proposed that the works to the roof of the property be carried out by a company called AKT Roofing in accordance with a quote dated 22 September 2015 (page 42). The total cost of the proposed works including VAT and Manging Agents fees for undertaking the section 20 consultation process are as per a statement at page 39 a total of £11,040.

30 **The Tribunal's Decision**

- 31 The Lease provides at clause 1 that the Lessee will pay to the Lessor one equal fourth part of the amounts which the Lessor will expend on the property as set out in the Third Schedule such payments to be made within 14 days of the Lessor notifying the Lessee of such expenditure (page 16). There is no provision in the Lease for payment to be made by the Lessee in advance of such expenditure. It is understandable in the circumstances that the Applicant may before incurring a major item of expenditure seek a determination from the Tribunal as to whether or not such item of expenditure is firstly recoverable from the Lessees under the terms of the Lease as service charge payments and secondly whether the costs and expenses which the Applicant intends to incur will be reasonable.

- 32 The costs expenses and outgoings which the Applicant can recover from the Lessees by way of service charge payments are set out in the Third Schedule to the Lease. These are the costs of "*maintaining repairing and renewing*" those matters set out in clause 1 of that Schedule. (Clauses 2, 3, 4 and 5 of the Third Schedule contain additional provisions relating to exterior painting cleaning of common areas insurance and the upkeep of a television aerial).

- 33 The Tribunal is satisfied and so determines that the costs of The Roof Works are recoverable by the Applicant from the Respondents as service charge payments being costs of maintenance repair and renewal as set out in the Third Schedule to the Lease.

- 34 Upon the basis of its inspection (the works having been completed) and upon the documents before it, the Tribunal is satisfied that the costs of the works, provided they were carried out to a satisfactory standard and in a good and proper workmanlike manner, are reasonably incurred in the sum of £11,040.

35 **The French Drain Works – The Applicant's Case**

- 36 At the date of the Tribunal's inspection, the works that were proposed to install the French drain have not been carried out. The Applicant's case

is set out in its application form and in its Statement of Case dated 31 March 2016 (page 100).

- 37 The Applicant says that the external ground level of the Property has risen over a number of years. That the exterior hardstanding has been laid directly against the exterior wall of the Property.
- 38 The Applicant proposes installing a French drain to the front, side and rear elevations of the Property in order to prevent surface water coming into contact with the exterior wall. That to be in the form of a trench excavated by at least 300mm deep x 150mm wide. Details of the proposed works are set out in the report of the Applicant's expert Mr Tom Green (pages 81-87 of the Bundle) and further explained in Mr Green's letter of 25 May 2016.
- 39 The works Mr Green says are works of "*preventative maintenance*" rather than improvement. He describes the proposed works as the "*cheaper option*" and is of the opinion that they are the most likely method of curing the damp ingress problems at the Property. As he explains in his letter of 25 May 2016, the French Drain Works will lower the outside ground level and isolate the masonry wall away from the ground water therefore curing the saturation of the masonry wall. The works in Mr Green's opinion are not a material improvement but a necessary repair method to reduce the water ingress affecting the Property.
- 40 The Applicant proposes instructing a company called Insync Property Group to carry out the works. There is an estimate from that company dated 27 November 2015 (page 96) for the sum of £7425.75 plus VAT. The total proposed costs to include the cost of the Surveyor's report from Mr Green and the Applicant's managing agents' fees for undertaking a consultation process pursuant to section 20 of the Landlord & Tenant Act 1985 and VAT, are £9990. There is a summarised statement setting out those figures in the Bundle (page 91).

41 **The Tribunal's Decision**

- 42 As stated at paragraph 31 above, it is understandable that the Applicant has made this application. There is no provision in the lease which would allow the Applicant to recover payments in advance by way of service charge payments to cover the proposed costs of the French drain works. Before incurring what would be a relatively major item of expenditure, the Applicant seeks the comfort of a Decision from the Tribunal as to whether or not the costs of The French Drain Works are recoverable under the terms of the lease as service charge payments and if so, whether the proposed costs of those works would be reasonably incurred.
- 43 As stated above, the costs, expenses and outgoings which the Applicant can recover from the Respondents by way of service charge payments are set out in the 3rd Schedule to the Lease. They are in short the costs, expenses and outgoings incurred by the Applicant in maintaining, repairing and renewing the general structure of the Property including

walls and foundations, drains and other parts of the building or premises used in common by the lessees and the lessor.

- 44 The Tribunal is satisfied that the costs of The French Drain Works which the Applicant proposes to carry out are recoverable by the Applicant from the Respondents as service charge payments being works which amount to a necessary repair to prevent the further ingress of damp into the Property.
- 45 Further, upon the basis of its inspection and of the documents before it, the Tribunal is satisfied that the cost of the proposed works, provided they are carried out to a satisfactory standard and in a good and proper workmanlike manner, would be reasonably incurred and as such recoverable from the Respondents as service charge payments. That the proposed costs of The French Drain Works of £9990 if incurred by the Applicant would be reasonably incurred and would be payable by the Respondents to the Applicant as service charges.

46 **Summary of the Tribunal's Decision**

1. That the costs of The Roof Works, provided they were carried out to a satisfactory standard and in a good and proper workmanlike manner, were reasonably incurred in the sum of £11,040 and are recoverable from the Respondents as service charge payments under the terms of the lease.
2. That if the proposed French Drain Works are carried out to a satisfactory standard and in a good and proper workmanlike manner, they will be reasonably incurred in the sum of £9990 and will be recoverable as service charge payments from the Respondents under the terms of the lease.

Dated this 29th day of July 2016

Judge N Jutton

Appeals

1. 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.
2. 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.

3. 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.
4. 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.