

12082



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

Case Reference : **CAM/00MG/LDC/2016/0024**

Property : 9, 17, 23 & 25 Fife House, Cornwall Grove, Bletchley,
Milton Keynes MK3 7HY

Applicant : Milton Keynes Council

Representative : Derek Beaumont

Respondents : Philip Hull (9) [no appearance]
Gentian Huxhijani & Owen Rose (17) [no app]
Michael Anthony Green (23) [in person]
Mr G Jacob (25) [no app]

Type of Application : for dispensation with all or any of the consultation
requirements provided for by section 20 of the
Landlord and Tenant Act 1985
[LTA 1985, s.20ZA]

Tribunal Members : G K Sinclair & D S Brown FRICS

**Date and venue of
Hearing** : Tuesday 6th December 2016 at
Milton Keynes Magistrates Court

Date of Decision : 12th December 2016

DECISION

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Summary

1. By application dated 9 November 2016 (but not received by the tribunal until 17th November) Milton Keynes Council as freehold owner of a block of twelve flats known as 5–27 Fife House, Cornwall Grove, Bletchley sought urgent dispensation from the usual consultation requirements set out in section 20 of the Landlord and Tenant Act 1985. The reason given in section 10 of the application form was:

We need to undertake emergency asbestos soffit removal at 5–27 Fife House due to the deterioration of the product. The asbestos soffits have started to fragment and pose a significant risk to both residents and the public.
2. Directions were issued on 18th November 2016 that curtailed the normal notice time and requiring the applicant to file a statement of case by 25th November. If any of the respondents wished to file and serve a statement in reply they were to do so by the 30th November. In fact the applicant’s statement of case was not filed (by e-mail) until 1st December 2016 and nothing was consequently received from the respondents.
3. For the reasons set out below the tribunal determines that:
 - a. The asbestos soffits, particularly at the front of the building over the main entrance, pose a significant risk to both residents and the public not only by the danger of them falling from height but also from breaking up on the ground and causing the release of asbestos fibre which could get walked into the building, thus contaminating it
 - b. The urgent removal of the soffits is therefore justified
 - c. The cost of erecting and retaining scaffold is such a high proportion of the estimated cost that it was sensible for the applicant to carry out such other work to the timber barge boards, fascias and rainwater goods as seemed to it appropriate at the same time
 - d. Lessees have suffered no, or no sufficient, prejudice by the lack of the normal level of consultation appropriate in a case where a long-term maintenance agreement has already been entered into by the landlord with a single main contractor
 - e. It is reasonable to dispense with the usual consultation procedures.

Material statutory provisions and case law

4. The Landlord and Tenant Act 1985, section 20ZA(1) provides that :

Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.
5. The statutory consultation requirements are set out in regulations, those current being the Service Charges (Consultation Requirements) (England) Regulations

2003¹.

6. When determining whether it is satisfied that it is reasonable to dispense with the requirements the Supreme Court stated in *Daejan Investments Ltd v Benson & others*² that the emphasis should be on any prejudice suffered by the tenants, and that the following points should be borne in mind :
- a. The purpose of the requirements is to ensure that tenants are protected from paying for inappropriate works, or paying more than would be appropriate. In considering dispensation requests, the tribunal should focus on whether the tenants were prejudiced in either respect by the failure of the landlord to comply with the requirements
 - b. As regards compliance with the requirements, it is neither convenient nor sensible to distinguish between a serious failing, and a minor oversight, save in relation to the prejudice it causes. Such a distinction could lead to uncertainty, and to inappropriate and unpredictable outcomes
 - c. The tribunal has power to grant dispensation on appropriate terms, and can impose conditions on the grant of dispensation, including a condition as to costs that the landlord pays the tenants' reasonable costs incurred in connection with the dispensation application
 - d. Where a landlord has failed to comply with the requirements, there may often be a dispute as to whether the tenants would relevantly suffer if an unconditional dispensation was granted
 - e. While the legal burden is on the landlord throughout, the factual burden of identifying some relevant prejudice is on the tenants. They have an obligation to identify what they would have said, given that their complaint is that they have been deprived of the opportunity to say it
 - f. Once the tenants have shown a credible case for prejudice, the tribunal should look to the landlord to rebut it and should be sympathetic to the tenants' case
 - g. Insofar as the tenants will suffer relevant prejudice, the tribunal should, in the absence of some good reason to the contrary, effectively require the landlord to reduce the amount claimed to compensate the tenants fully for that prejudice. This is a fair outcome, as the tenants will be in the same position as if the requirements have been satisfied.

Inspection and hearing

7. The tribunal inspected the subject premises at 10:00 on the morning of the hearing. Also present were Mr Beaumont from Milton Keynes Council, Mr Jason Brace from the maintenance contractors, Mears, and Mr Stuart Sarson, a member of Mears' asbestos team. The weather at the time was misty but what served to obscure the building from view was the full height scaffolding surrounding it. Due to the perceived asbestos risk the contractors would not permit the tribunal to inspect the relevant parts of the building from the scaffolding. All the tribunal was therefore able to see on the day was the general layout and structure of the building, although it did have the benefit of having close up colour photos of the soffits in the hearing bundle.
8. Fife House is a four-storey block containing 12 flats which occupies a corner site in a residential part of Bletchley. The building comprises two parts linked by

¹ SI 2003/1987, as amended by SI 2004/2939 and (as respects public notices) SI 2006/5

² [2013] UKSC 14; [2013] 2 All ER 375

corridors on the upper floors. The front part of the block contains eight flats, with two on each side of the main entrance and central staircase. To the rear is a tower with four flats, one on each floor. On the upper floors these are connected to the main structure by a corridor from the central stairway. The block is of Reema construction, comprising large prefabricated reinforced concrete panels. This was a type of construction common up until about the 1960s, when Fife House was built during the early development of Milton Keynes. Each part of the building has a pitched tiled roof with wooden fascias and barge boards.

9. When the tribunal reconvened at Milton Keynes Magistrates Court Mr Green, lessee of flat number 23, was in attendance. He was the only lessee to do so.
10. In opening the case of the council Mr Beaumont stated that Milton Keynes owns the freehold of Fife house. It has twelve flats, five being held on long leaseholds. Previous inspection had identified that the soffits contained asbestos. By early 2016 the council had entered into a long-term agreement with Mears whereby the latter would carry out general maintenance on all the council's housing stock. In about October 2016 a member of the public noticed that the soffit boards were coming loose. A normal operative attended but suspected that asbestos was in the soffits.
11. From past survey sheets, and an example from 2011 was in the bundle, the council was aware that the cement soffits contained Chrysotile asbestos. This would ordinarily be of low risk, but Mr Brace stated that on further inspection 10–15% of the soffit boards were found to be loose, especially on the end sections where one board adjoins another. Once loose the boards had begun to move, deteriorated and some of the cement had fallen away. They cannot be secured by cherry picker and one cannot fix them the same way under current law. The risk is of the soffit boards falling, hitting someone or splitting and releasing fibres when they hit the ground.
12. Asked by the tribunal what was a risk of harmful contamination in open-air if a soffit board were to hit the ground Mr Brace stated that experts say that any fibre is harmful if inhaled. In response to a suggestion that the risk to the public must be extremely low in open-air ground level he replied that there would be loose asbestos lying at ground level; the HSE would take a dim view if we would leave that lying around, and Mr Beaumont stressed that it was his duty to protect not only the public but the council from that sort of litigation.
13. Mr Sarson was called and stated that he had inspected the material parts of the building on 28th October with Jason Brace. He could see on the soffits there had been slippage and movement. There was a small amount of slippage on some, but in other areas there been a higher degree of slippage, bowing on some, in some areas of fragmentation. The outer surface of the board was breaking up – delaminating. One could see that the soffit line was just slightly recessed behind the fascia, and some boards are beginning to drop away. He said that where the board is breaking up the bonded matrix starts to break down and exposed fibres mixed in with the cement start to become visible. On inspection, by the main doors, it was quite visible when the scaffold is up that it had started to happen on the ends of the boards there. Some boards had fallen, i.e. dropped a few inches from the level of the soffit, near to the main entrance. On some other

sides there was a slight slip as well and overall a good 20–30% had slipped.

14. Mr Green asked how many soffit boards there were around the whole property and suggested that if 100% needs doing then fair enough but he was being build share of £33,000 for only about six boards. He suggested that not all of it was an immediate risk. In response Mr Sarson stated that you can't just do some repairs next to the asbestos. You have to do the whole run because you cannot have someone working next to asbestos on the property. One would also be leaving an element of risk there.
15. Asked by the tribunal if some of this was pre-emptive work, to stop other boards coming loose, what was the level of risk? Mr Sarson said the risk was of initial breakage, then a risk of contamination, because if one walked through the debris of fallen soffits asbestos dust could be carried into the building on shoes into the building and the contamination can be carried in as well.
16. Asked by the tribunal about other works Mr Brace stated that most of the cost is putting the scaffold up so that it was considered good practice and cheaper in the long run that they address any other issues found on the roof. For example some rafter ends will have to be replaced or repaired due to rot. Other than the soffits none of the rest is urgent, but to take the soffits off one needs to remove the fascias. Once the eaves are exposed one should remove the rainwater goods as well. This is all one scheme of works.
17. Asked by the tribunal whether it would not be possible to put up the scaffold, remove the asbestos and then consult for 30 days on the other works such as fascias and rainwater goods Mr Brace said that it was really all part of the same work and delay would not change much. Further, the way the soffit is moulded into the fascia, you cannot remove the soffit without taking it off. If left exposed for a long time a high wind could lift edge tiles. The condition of the timber barge boards and fascias was that some were partly rotten and all were original to the construction, dating from the 1960s.
18. Mr Beaumont, in response to a query from the tribunal about a breakdown of the total estimated cost of the work of £33 000, suggested – without wishing to commit himself – that the scaffold would cost about £19,000, the asbestos work would be quite expensive, but that the replacement of fascias, barge boards and rainwater goods such as gutters and downpipes with PVCu would cost perhaps no more than 10–15% of the total.
19. Although concerned about the total cost and his share of it, especially as he had purchased his flat only recently, the tribunal explained to Mr Green that due to the judgment of the Supreme Court in *Daejan* what it had to focus on was the extent to which he and the other lessees would suffer prejudice due to the lack of the normal consultation process. In this case the contractor Mears was party to a long-term agreement with the council and therefore these major works would not be put out to open tender to third parties. While it was to be expected that a prime contractor such as Mears could handle general maintenance more unusual work would be outsourced to a number of specialist subcontractors on a list, all of whom would have been market tested at some stage.

Discussion and findings

20. Having considered the oral and documentary evidence and the representations by Mr Green the tribunal considers that the gradual but steady failure of the nails holding the soffits in place, and the flexing, fragmentation and delamination of the boards – particularly over the main entrance – all produce a risk not only of boards falling and hitting a pedestrian but also breaking up at ground level and asbestos fibres being walked into the building, causing contamination.
21. Although in certain circumstances it might be reasonable to carry out the urgent work and maintain the scaffolding in place whilst a short consultation on the non-urgent work takes place, on the evidence given by Mr Brace the removal of the cement soffits also requires removal of the fascias and leaving the edges of the roof exposed for some time in winter runs the risk of a high wind getting under and lifting or causing damage to some tiles.
22. As a long-term agreement is in place the scope for lessees to propose alternative contractors is nil. The soffits need to be replaced and it seems unlikely that the other work would not be undertaken at the same time, given that the cost of the scaffolding is almost 60% of the estimated total. It is extremely doubtful that any rival programme for removing the asbestos and replacing the fascias, etc. would differ markedly in nature or price. The tribunal is not therefore satisfied that the lessees would suffer any prejudice by it granting the freeholder dispensation from the consultation requirements set out in section 20 and the regulations.
23. The council's application is therefore granted.

Dated 12th December 2016

Graham Sinclair
Tribunal Judge

ANNEXE - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result sought by the party making the application.
3. The application for permission to appeal must arrive at the Regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.
4. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit. The tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite it being outwith the time limit.