

12074



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

Case Reference : **CHI/00HN/LSC/2016/0054**

Property : **Tower Court, 14 West Cliff Road,
Bournemouth, BH2 5HA**

Applicant : **Tower Court Properties
Limited**

Representative : **Foxes Property Management Limited
("Foxes")**

Respondent : **The Leaseholders**

Representative : **-**

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

Tribunal Member : **Judge P R Boardman**

**Date and venue of
Hearing** : **Decided on the papers**

Date of Decision : **24 October 2016**

DECISION

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Introduction

1. This application, dated 24 May 2016, is in the following terms :
 - a. "The landlord would like the Tribunal to decide whether or not they can seal the airspace between the external brick wall and the window amongst the major works which are planned to start and finish in Summer 2016, and recover the cost thereof by way of service charge"
 - b. ".....a surveyor's report.....states that water is damaging the lower parts of the building as a result of penetration through this airspace"
 - c. "total value of dispute £21963.60"
2. The application states that the property is a purpose-built block of fifty-one flats, and that the leaseholders formed the Applicant company and purchased the freehold in 1993
3. The Tribunal has decided the application on the papers before it, without an oral hearing, pursuant to rule 31 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules"), and the Tribunal's directions dated 9 June 2016, no party having requested a hearing in the meantime
4. The Tribunal has decided that it is not necessary for the Tribunal to inspect the property in view of the nature of this application and the documents provided to the Tribunal

Documents

5. The documents before the Tribunal are as follows :
 - a. the application form
 - b. an e-mail from Martyn Hudson, Rawlins Davy Solicitors, dated 14 April 2016
 - c. a statement by Mr Derek Hergest in opposition to the application
 - d. the lease of Flat 1 dated 12 August 1994
 - e. a document entitled "Landlord's comments"
 - f. a report dated 15 September 2015 by Greenward Associates
 - g. a tender report dated March 2016 by Greenward Associates
 - h. a notice dated 26 January 2016 under section 20 of the 1985 Act of intention to carry out works
 - i. a notice of statement of estimates dated 24 March 2016 under section 20 of the 1985 Act

- j. a notice to accompany the statement of estimates dated 24 March 2016 under section 20 of the 1985 Act

Report dated 15 September 2015 by Greenward Associates

6. The report stated that the property was a residential block of flats of cavity masonry wall construction under a flat roof. Each flat had a projecting balcony, many of which had been incorporated into the living space. Some flat owners had reported water ingress issues, most of which had been traced to failed, or failing, silicone weather sealant. The concrete lintels in many locations lacked sufficient lead cover flashing to prevent water ingress above the lintel. The enclosed balconies all had signs of water ingress. The silicone weather sealant was failing in many locations. The lead flashing round the window frame cills was lifting in many locations, and there were areas where the concrete had become friable, and was allowing water to ingress
7. The report annexed helpful photographs
8. The report made recommendations to :
 - a. rake out the current silicone sealant joint to all window frames, and apply new external grade sealant to ensure that the weather sealing is leak free
 - b. investigate the flat roof over Flat 21, and carry out remedial works as necessary
 - c. repair and redecorate the friable areas of concrete which are starting to spall
 - d. repair, seal and redecorate the spalling concrete round the balcony window frames
 - e. redress the lead flashings round the balcony windows and seal the leading edges of the lead work with "Lead Mate" sealant
 - f. extend the lead cover flashings to the concrete lintels to cover the leading face of the window lintels, and seal the leading edges of the flashing with "Lead Mate" sealant
 - g. rake out the high level friable areas of cement based pointing, and apply new cement based pointing
 - h. include the remedial works in the imminent periodic redecoration via cradles or rope access to limit the cost of access

E-mail from Martyn Hudson, Rawlins Davy Solicitors, dated 14 April 2016

9. Mr Hudson stated that :
 - a. under the leases the windows and window frames belonged to the tenants
 - b. the sealant, being an integral part of the combination of those two, was also an obligation of the tenants
 - c. whilst it was entirely sensible for the landlord to co-ordinate and

arrange for the repair and replacement of the sealant collectively and as one contract to ensure that cheapest rates applied, it was not technically within the landlord's jurisdiction

- d. however, whilst some would need doing, possibly some would not, and those owners might refuse to contribute, or to allow access

Statement by Mr Hergest

10. Mr Hergest stated that :

- a. he was the owner of Flat 41, and a director of the applicant company
- b. the property was built in 1962/3
- c. it was a 12-storey block of 50 two-bedroom flats, to which Mr Hergest's statement related, and a penthouse, to which it did not
- d. each flat had, Mr Hergest believed, four identically-sized windows, and a balcony
- e. forty-six balconies had been enclosed
- f. double-glazed windows were fixed to three dwarf balcony walls, the exterior walls, and the concrete slab of the balcony above
- g. the fixing of the frames in Mr Hergest's flat was by way of screws and sealant, and they were not "tied" in
- h. the dwarf walls were not cavity walls, so that heavy rain saturated the walls, and high winds drove in the rain, which could allow the water to saturate the floor of the balcony, which was the ceiling of the one below
- i. the second and third schedules to the lease stated that the balcony was the responsibility of the lessee
- j. his contractors would give Mr Hergest only a one-year guarantee on his balcony windows, but had given a ten-year guarantee on the other windows
- k. the surveyor's report had concluded that :
 - window lintels were either cracked or breaking down (landlord's responsibility)
 - sealant round window frames were broken, breaking down or missing sections (lessees' responsibility)
 - lead flashing on balcony windows were lifting due to high winds or unsuitable fitting (lessees' responsibility)
- l. the surveyor had been unaware of responsibilities, and had only reported his findings
- m. he had suggested removing the sealant from all 200 windows and the 46 balconies, installing Fosroc Nitroseal MS60 Sealant, or equivalent, and measures to fix the balcony lead flashing
- n. the cost of sealant was £21963.60 (£18303 plus VAT) plus an overseeing fee of 7% plus VAT, bringing the total to £23501.05
- o. the surveyor had indicated that the sealant breakdown was only on 12 balconies, and that 10 windows out of 100 needed replacing, so Mr Hergest questioned why there was a need to replace all

- p. the flat owners who had maintained their flats in accordance with their leases should not have to pay for those owners who had neglected to do so
- q. those lessees wishing to have the lead flashing and sealant replacement carried out in their flats should be able to make their own arrangements with the managing agent and other agencies at their own cost at the same time as the undertaking of works
- r. if the Tribunal were to grant the Applicant's application :
 - there might still be water ingress through the dwarf walls even if the suggested work were carried out to the balconies,
 - the Applicant company would be responsible even after the guarantee period if the replacement sealant broke down on any of the windows causing damage to interior decorations
 - the Applicant company would have no control over the standard of work carried out on windows by contractors in the future
 - the Applicant company would probably be responsible for all such works in the future

Landlord's comments

11. The comments were that :

- a. the application was for a determination whether the landlord could include the sealant of the airspace between the windows and the external brickwork as part of the works
- b. the airspace was not mentioned in the leases
- c. the third schedule to the leases described "The Premises" as including "the outer walls and the windows the window frames and the glass therein"
- d. the landlord's preference was to include the sealant of the airspace in the works, so that the building would be fully sealed, in accordance with the surveyor's recommendations
- e. the surveyor had advised that the damage to the lower floor flats had been caused by water ingress into the cavity, of which a leading cause was the water ingress through the airspace between the windows and the external brickwork
- f. the landlord had received telephone communication from the owners of Flats 18, 19, 39 and 44 supporting the landlord's application, as it could be costly for residents due to the access required for the works
- g. the owner of Flat 41 was opposing the application
- h. the landlord had received no communication from the other flat owners

The Lease of Flat 1

12. The only lease copied for the Tribunal is the lease of Flat 1. For the purposes of this decision the Tribunal has assumed that all the leases are in materially the same terms

13. The material provisions of the lease of Flat 1 are as follows :

Recitals

(2) In this Deed unless the context otherwise requires :-

(e) The expression "The Reserved Property" means that part of the Property not included in the Flats being the Property more particularly described in the Second Schedule hereto

(f) The expression "The Premises" means the property hereby demised as described in the Third Schedule hereto including for the purposes of obligation as well as grant the ceilings floors joists beams cisterns tanks sewers drains pipes wires ducts and conduits specified in the said Schedule

Second Schedule

The Reserved Property

.....secondly so much of the Building including the main structural parts thereof the roofs foundations and the outer walls and external parts thereof including the balcony rails (but not the windows the window frames or the glass therefore or the entrance doors of the Flats or the frames thereof nor the interior faces of such outer walls as bound the Flats).....cisterns tanks sewers drains pipes radiators wires ducts and conduits aerials and sanitary and water apparatus and other things not comprised in the demise of any one Flat or used solely for the purpose of one Flat

Third Schedule

The Premises

All that flat known as Flat 1 "Tower Court".....situate on the ground floor of the building including the balcony and so much of the internal faces or parts of the outer walls and the windows the window frames and the glass therein as lie between such heights where such outer walls and windows enclose any room of the Flat but excluding the balcony rails and one half in height of the floor slabs between the ceiling of the Flat and the Flat immediately above it and one half in height of the floor slabs between the floor of the Flat and the Flat immediately below it but excluding all cisterns tanks sewers drains pipes radiators wires ducts and conduits aerials and sanitary and water apparatus as lie between such heights

Sixth Schedule

Part I Covenants by the lessee with the lessor

3. *The Lessee shall.....keep the Premises.....in a good and tenantable*

state of repair

20. *The Lessor shall pay and keep the Lessor indemnified against one fifty-first part of the costs charges and expenses incurred by the Lessor in carrying out its obligations under the Seventh Schedule hereof.....*

***Seventh Schedule
Covenants by the lessor***

5. *The Lessor shall keep the Reserved Property.....in a good and tenatable state of repair decoration and condition including the renewal and replacement of all worn and damaged parts.....*

The Tribunal's findings

14. The Tribunal makes the following findings
- a. the application before the Tribunal relates only to sealing the airspace between the external brick walls and the windows, and the Tribunal has therefore not considered other matters referred to in the surveyor's report, such as the flat roof over Flat 21, the friable areas of concrete, or the lead flashings
 - b. the lease does not expressly allocate between the landlord and the tenant the responsibility for sealing the airspace between the external brick walls and the windows
 - c. the external walls are part of the Reserved Property under recital (2)(e) of the lease and the second schedule to the lease, and therefore fall within the landlord's obligations under paragraph 5 of the seventh schedule to the lease
 - d. however, the windows and window frames are part of the Demised Premises under recital (2)(f) of the lease and the third schedule to the lease, and therefore fall within the tenant's obligations under paragraph 3 of the sixth schedule to the lease
 - e. the sealant round the windows and window frames also fall within the tenant's obligations under paragraph 3 of the sixth schedule to the lease, in that :
 - the application of the sealant is part of the process of installing the windows and window frames
 - its purpose is to prevent water ingress through what would otherwise be a gap between the window frame and the surrounding wall
 - there would be no such gap at that location in the external walls but for the installation of the windows and the window frames
 - it follows that the responsibility for maintaining, and, if necessary, the replacement of, the sealant, falls on the tenant, not the landlord

- f. the Tribunal appreciates the reasons for the Applicant's wish to carry out the sealant work at the same time as the other forthcoming works, but finds that the lease does not give the landlord the right to carry out the sealant work or to include the cost in the service charge

15. Appeals

- 16. A person wishing to appeal against this decision must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case
- 17. 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
- 18. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to admit the application for permission to appeal
- 19. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result which the person is seeking

Dated 24 October 2016

.....
Judge P R Boardman