



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

**Case Reference** : CAM/22UF/LSC/2014/0075

**Property** : 59 Claremont Heights, Colchester CO2 1ZU

**Applicant** : Mr Robert Cook

**Respondent** : Claremont Heights 1-72 RTM Company Ltd

**Application** : Application, pursuant to s27 of the Landlord & Tenant Act 1985, to determine the payability and reasonableness of service charges and administration charges.

**Tribunal Members** : Judge Reeder  
Mrs Evelyn Flint DMS FRICS IRRV (valuer member)  
Mr John E Francis (lay member)

**Date of hearing** : 6 November 2014 (Colchester County Court)

**Date of Decision** : 6 November 2014

**Date Written** : 20 December 2014

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**DECISION**

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## **DECISION**

### **The window replacement/repair issue**

1. The Tribunal determines that the cost of works proposed by the respondent to replace, rather than repair, the windows to the 72 flats in "Block 1" Claremont Heights (ie. flats 1-72) in Spring 2015 would not, on the evidence before it, be reasonably incurred.

### **The s.20 consultation issue**

2. The Tribunal makes no order relating to the applicant's criticism that the statutory consultation process in relation to the works programme proposed to commence in Spring 2015 has, thus far, been a 'hollow' consultation which has ignored the views of the leasehold owners of flats in 'Block 1'.

### **The costs of the Tribunal proceedings**

3. Within 28 days of the date that this Decision is sent to the parties, any party may file with the Tribunal office, and serve on the other party, an application for any of the following orders -

3.1 an order requiring a party to reimburse to the other party the whole or part of the amount of any fee paid by the other party (pursuant to regulation 13(2) of the First-Tier Tribunal (Property Chamber) Rules 2013), and/or

3.2 an order requiring a party to pay the costs of the other party costs on the ground that the paying party has acted unreasonably in bringing, defending or conducting the proceedings before the Tribunal (pursuant to regulation 13(1)(b) of the First-Tier Tribunal (Property Chamber) Rules 2013), and/or

3.3 an order providing that the respondent's costs of and occasioned by the proceedings before this Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the applicant in this or any future service charge accounting year (pursuant to section 20C of the Landlord & Tenant Act 1985).

4. Any party served with such an application shall, within 14 days of receiving that application, file with the Tribunal office and serve on the other party a written response to that application.
5. The Tribunal will determine any such cost application(s) on the papers and without a hearing.

## **REASONS**

### **The application, parties, premises & disputed service charges**

6. This matter comes before the Tribunal pursuant to an application by Mr Robert Cook, leasehold owner 59 Claremont Heights, received by the Tribunal on 1 July 2014.
7. Mr Cook's flat is one of 72 flats located in "Block A" Claremont Heights, which comprises flats 1-72.
8. The respondent is the Claremont Heights 1-72 RTM Company Ltd which was established in 2009 to manage the block.
9. Mr Cook states his application challenges a proportion of the service charges demands for the accounting years (ie. calendar years) 2013 and 2014.
10. He does not challenge the 'usual' annual service charge component (being £775.16 for each of the accounting years).
11. He challenges solely that part of the additional service charge component described as the "Yearly Reserve" (being £991.80 for each of the accounting years) which is intended to be paid into the Reserve Fund to pay for the replacement of the windows in the block as part of a wider works programme which the RTM intends to commence in Spring 2015.
12. It is not the estimated cost which is challenged, but whether the cost of window replacement, as opposed to repair, would be reasonably incurred in Spring 2015.

13. Mr Cook does not dispute any other aspect of the proposed works programme or the related estimated costs.
14. That works programme is intended to cover both this block and the adjacent 'Block B', which comprises the 90 flats numbered 73-162 Claremont Heights. That block is separately managed by the Claremont Heights 73-162 RTM Ltd.
15. Mr Cook further challenges, or more correctly criticises, the statutory consultation process in relation to the major works programme proposed to commence in Spring 2015 on the ground that, in so far as relates to the window replacement/repair issue it is a 'hollow' consultation which is ignoring the views of the leasehold owners of flats in 'Block 1'.
16. He also contends that the process is being conducted in bad faith in that the directors of the respondent RTM are leasehold owners of flats in the adjacent 'Block B' (ie. the 90 flats in Claremont Heights 73-162) and pursue the replacement of the windows in both 'Block A' and 'Block B' as part of one works programme in order to improve the condition of, and increase the value of, their own flats located in 'Block B' and to require the leasehold owners of flats in 'Block A' to pay a contribution toward the cost of window replacement for 'Block B'.

#### **The inspection by the Tribunal**

17. The Tribunal has made an external visual inspection of 'Block A' and 'Block B' and the grounds in which they stand immediately prior to the hearing on 6 November 2014. We have been assisted during that inspection by the applicant and his wife together with Mr Ebbage. We have been assisted during that inspection by a number of the directors of the respondent RTM Company Ltd together with their legal representatives and their managing agents, Messrs Boydens.
18. As might be expected we have paid particular attention to the condition of the windows and doors to the flats. Softwood double glazed windows and doors are installed to the flats. The window and doors to the communal parts are painted timber inset with toughened single glazed units.

19. We have also paid particular attention to the land and grounds immediately surrounding the block. The grounds adjacent to the outer-facing elevations are reasonably level with some access restrictions due to hedging and garden. The grounds adjacent to inner-facing elevations are sloping and/or provide different levels with some access restrictions due to the shape of the blocks.
20. We have not been asked to and have not viewed the internal retained common parts of either 'Block A' or Block B'.

### **The hearing before the Tribunal**

21. The applicant has been accompanied and supported by his wife and by Mr Ebbage who was the leasehold owner of 69 Claremont Heights until December 2013. All have combined to very ably pursue the application. The leasehold owners of flats 158 (Mr Richards), 12 (Peter & Sheila Constable), 34 (John Spiers & Shirley Porter), and 137 (Mr Phein) have accompanied and supported the application and have been present during the hearing.
22. The respondent RTM has been very ably represented by Mr Armstong (counsel) and Mr O'Connell (solicitor). The hearing has been attended by Mrs Friedlander (RTM director), Mr Friedlander (RTM director), Mr Brayley (RTM director), Mr Whitered (RTM director), Mr Moles (surveyor, Daniel Connal Partnership), Mr Barber (Messrs Boydens) and Ms Deraghty (Messrs Boydens).
23. The Tribunal has been provided with a 471 page hearing bundle which has been considered with care. Both parties provided detailed statements of case which have been of assistance. The hearing bundle includes a witness statement from Mr Ebbage on behalf of Mr Cook. Mr Ebbage has given oral evidence to the Tribunal. The bundle includes a 'condition survey and planned maintenance schedule' relating to 1-72 Claremont Heights dated July 2013 prepared by Mr Daniel Moles BSc MRICS, senior building surveyor for the Daniel Connal Partnership. Mr Moles has given oral evidence to the Tribunal.
24. On 3 November 2014 the Tribunal received a witness statement from Mrs Friedlander (RTM Director) accompanied by an 86 page exhibit bundle. On 5 November 2014 the Tribunal received copy correspondence from Mr Cook to the respondent objecting to

the late service of this evidence, together with a letter dated 5 November 2014 raising a number of questions arising from the Friedlander statement. This statement has been filed well outside of the extended deadline for such statements (being 22 September 2014) provided by the President's directions order. Mr Cook states that he has had insufficient time to properly consider and so reply to the same. He takes a pragmatic view and invites the Tribunal to consider this material should we take the view it assists us to reach a proper determination on the issues. We have considered it. Further, Mrs Friedlander has given oral evidence to the Tribunal.

25. On the morning of the hearing Mr Armstrong, counsel for the respondent, has provided to both the Tribunal and Mr Cook a skeleton argument, chronology, and small bundle of legal materials including case law. Mr Cook has self-evidently had insufficient time to properly consider and so reply to the same. He again takes a pragmatic view and invites the Tribunal to consider this material should we take the view it assists us to reach a proper determination on the issues. We have considered it.
26. Both parties were afforded ample time to argue their respective cases with the hearing ending at 5.45pm. For that reason costs issues were not addressed during the hearing.

### **The lease**

27. The Tribunal is provided with a copy lease which the parties confirm is the relevant lease for the premises. The Tribunal has considered this lease carefully. The parties have addressed the Tribunal on the covenants relevant to the dispute. The relevant terms and effect of the lease are not disputed by the parties.
28. The applicant is liable to pay the service charge which is his percentage proportion of the annual maintenance provision as determined in accordance with the Fourth Schedule to the lease (covenant 1.8). This is payable by two instalments due on 1 January and 1 July in each year (covenant 3.2).
29. The annual maintenance provision is calculated in accordance with Part III of the Fourth Schedule and includes an appropriate amount as a reserve for or towards Fifth Schedule purposes (purposes for which the service charge is to be applied) which are likely to give rise to future expenditure (Fourth Schedule Part III paragraph 2(ii)).

30. The Fifth Schedule purposes include keeping the structure of the block in good repair and condition (Fifth Schedule paragraph 1(b)), and carrying out such improvements works as the respondent shall consider necessary to maintain the block as a block of good class residential flats or otherwise desirable in the interest of the lessees (Fifth Schedule paragraph 13).
31. The windows are excluded from the demised premises and are retained as part of the structure (First Schedule paragraph 2(i)).
32. It is clear that the nature and scope of works proposed in the July 2013 Daniel Connal report are permitted as repairs or improvements under the lease.

### **The law**

33. The *Landlord & Tenant Act 1985* as amended by the *Commonhold & Leasehold Reform Act 2002* sets out the Tribunal's jurisdiction to determine liability to pay service charges. *Section 27A(1)* of 1985 Act provides as follows -

*An application may be made to a leasehold valuation 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 is payable.*

34. *Section 18* sets out the meanings of 'service charge' and 'relevant costs'.
35. *Section 19(1)(a)* of the 1985 Act provides that "relevant costs shall be taken into account in determining the amount of a service charge payable for a period only to the extent that they are reasonably incurred".
36. *Section 19(1)(b)* of the 1985 Act provides that "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".

### **Discussion & determinations**

#### **The maintenance & repair or replacement issue**

37. It is agreed that the windows and doors were previously maintained on a 3 year cycle by the previous managing company, Messrs Holding & Management (Solitaire) Limited. The last completed maintenance cycles were in 2003 and 2006. The 2009 maintenance cycle was not completed as a right to manage application was pursued and management passed from Messrs Holding & Management (Solitaire) Limited to the respondent RTM in that year. In due course the RTM appointed Messrs Boydens as managing agents.
38. The respondent RTM proposes to replace the existing windows and doors in block A with modern UPVC units as part of a wider works programme to blocks A and B which it wishes to commence in Spring 2015. In order to fund the window replacement the RTM is demanding an additional service charge component to be held in the reserve fund for this purpose, being £991.80 for each of the accounting years 2013 and 2014.
39. Mr Cook contends that the higher cost of installing replacement UPVC window units rather than repairing the existing timber windows in Spring 2015 would not be reasonably incurred because it is not a reasonable decision to replace the windows at that time. He argues that the windows are not delapidated to a state which makes it reasonable to replace them in Spring 2015. He argues that all that is reasonably required is maintenance and repair and that this will leave the windows in a sound and serviceable condition for a period of 5 years or more. He argues that this will then provide a reasonable period over which the respondent can levy a 'yearly reserve' charge in each service charge year to build up a Reserve Fund to pay for window replacement at that time.
40. The respondent contends that it has a broad discretion as to how to carry out works. The respondent states that its Board feel that window replacement is appropriate and that this view is based on a survey which recommends window replacement which is not contradicted by other expert opinion. To this end it has sought to establish



reserves to fund replacement over several years. Mrs Freeland has told us that the respondent RTM company originally intended to carry out repairs to the window but subsequently decided to instruct replacement as their agents Messrs Boydens "said replacement may be a better idea" and that Messrs Boydens or Messrs Daniel Connal proposed it.

41. In written submissions the respondent contends that "the single most important fact" is that the July 2013 Daniel Connal report concludes that "the windows and doors have surpassed their service life and it would be uneconomical to restore them to a serviceable condition". A statement to this effect is indeed to be found at paragraph 3.4 of that report.
42. In his oral evidence to the Tribunal Mr Moles states that this report and opinion is based on a single visual inspection of the windows from ground level. He has had no documentation, paperwork or information about the windows.
43. In his oral evidence he states clearly that in his opinion the windows and doors have not passed their service life. This corresponds with the Tribunal's own visual inspection today. It corresponds too with the view of the applicant and those who accompany him at the hearing. Mr Moles accepts that if maintenance and repair works are carried out to them in Spring 2015 then this will leave the windows in a sound and serviceable condition for a period of 5 years or more.
44. Having stated in his oral evidence that the windows have not passed their service life, Mr Moles states that the advice to replace rather than repair is based on "a philosophy to include the windows as part of a wider works package now to provide economies of scale". In written submissions the respondent contends that "a key factor" is that scaffolding costs are high such that "it is more economic to carry out replacement rather than repeated repairs". In his oral submissions Mr Armstrong states the rationale for the window replacement decision is purely a cost/benefit analysis and that the cost of scaffolding is a key consideration. All agree that the cost of maintenance and repair to the windows and doors will be in the region of £31,500. All agree that the cost of replacement of windows and doors will be in the region of £150,000. All agree that the other works as proposed will be in the region of £35,000. All agree that the cost of scaffolding for each works cycle will be in the region of £40,000.

45. In relation to the intended overall works and the cost of the same the Tribunal has carefully considered the July 2013 condition survey and maintenance schedule prepared by Mr Moles together with the oral evidence at the hearing.
46. The roof is said to be in fair condition subject to the securing of one loose tile and has a remaining life of 15-20 years and it is proposed that it be inspected every 5 years or when access is provided by scaffolding or similar means. It follows that scaffolding will be needed for this in or about 5 years time.
47. Rainwater goods are in poor condition and it is proposed should be replaced within the next 3-5 years. Such work will require scaffolding in or about 5 years time.
48. Timber fascias and gable weatherboarding are said to be in a poor decorative condition and require redecoration. It is proposed to make good and decorate them and then over-clad them with UPVC. Such work will require scaffolding.
49. Soffits are in good condition but it is considered prudent to make good and decorate and then over-clad them with UPVC if work is to be carried out to the fascias and weatherboarding. Such work will require scaffolding.
50. The steel balconies are in a poor decorative state and require redecoration. This work may require scaffolding. The suggestion that a cherry picker may suffice is questionable given the uneven site and on reflection was not pursued by any party.
51. Other general works items include some re-pointing of low level brickwork, some replacement of low level coping, some work to entrance steps, work to the entrance porches, the redecoration of internal communal parts. These works will not require scaffolding.
52. The issue for determination by the Tribunal is whether the additional cost of replacing rather than repairing the windows will be reasonably incurred, predicated on a 'works date' of Spring 2015 and within the context of the intended wider works programme. It follows that the issue for the Tribunal is whether, within that context, the decision to replace rather than repair the windows is a reasonable decision. The Tribunal jurisdiction calls for us to exercise a review function, rather than to consider the matter de novo and substitute our own decision. The Tribunal will not interfere with a decision

providing it falls within the permissible range of reasonable decisions available to it. Accordingly, the decision will not be found to be unreasonable merely because there are other reasonable alternative, including less expensive, courses of action which might be pursued. Further, the Tribunal accepts that the respondent RTM must be accorded a broad discretion as to how to carry out works.

53. All agree that the cost of maintenance and repair to the windows and doors will be in the region of £31,500. All agree that the cost of replacement of windows and doors will be in the region of £150,000. All agree that the cost of scaffolding will be in the region of £40,000 for the replacement option and £30,000 for the repair & maintenance option. The figures cited in documentation have varied over time and the Tribunal was directed to the most up to date figures provided at page 82 of the documentary bundle to Mrs Friedlander's October 2014 witness statement. This September 2004 spreadsheet prepared by Mr Moles confirms the scaffolding costs as £40,000 and £30,000 respectively and states that the overall cost (including scaffolding) of the window replacement option is approximately £218,050 whilst the overall cost of the repair & redecoration option is approximately £80,000. The respondent RTM confirms that as at 31 December 2013 the service charge account held approximately £160,000 to be applied to the works.

54. In exercising our review function and considering whether the proposal to replace rather than repair the windows is a reasonable decision it is clear to the Tribunal that the respondent misdirected itself in relation to what it calls "the single most important fact", being that the windows and doors have surpassed their service life and it would be uneconomical to restore them to a serviceable condition". It is understandable given that a statement to this effect is indeed to be found at paragraph 3.4 of that report. However, Mr Moles oral evidence to the evidence is clear and unequivocal. The windows and doors have not surpassed their service life.

55. Further, Mr Moles accepts in his oral evidence to the tribunal that if maintenance and repair works are carried out to them in Spring 2015 then this will leave the windows in a sound and serviceable condition for a period of 5 years or more. Insofar as the respondent relied on the July 2013 report in coming to the decision to replace rather than report they were not aware of and so could not take into account this relevant consideration.

56. In exercising our review function and considering whether the proposal to replace rather than repair the windows is a reasonable decision the Tribunal must consider the respondent's analysis of costs/benefit and decision to decision to follow "a philosophy to include the windows as part of a wider works package now to provide economies of scale". It follows that we must consider the respondent's approach to the "key factor" that scaffolding costs are high such that "it is more economic to carry out replacement rather than repeated repairs".
57. On the evidence and information before it the Tribunal considers that the respondent has not adequately considered the £10,000 repair/replacement scaffolding costs differential stated in the September 2004 spread sheet. Indeed there is no indication that it has been factored into the decision-making in any rational sense.
58. The July 2013 'condition survey and planned maintenance schedule' and/or oral evidence before us confirms that a survey of the state of the roof and any required repair will be needed in approximately 5 years, that the rainwater goods are likely to require replacement in approximately 5 years, and that the steel balconies are likely to require a further maintenance/re-decoration in approximately 5 years time. It follows that a substantial scaffolding cost will accrue at that time. On the evidence and information before it the Tribunal considers that the respondent has not adequately considered this factor.
59. The failure to consider these factors undermines the respondent's economic rationale for deciding to carry out the replacement of windows and doors at a cost of £150,000 rather than maintenance & repairs at a cost of £31,500 within the context of an overall cost of £218,000 for the replacement option as against £80,000 for the maintenance & repair option. Such a differential in costs calls for a properly considered and reasonable decision to choose the more expensive option. The Tribunal does not find such a consideration and decision on the evidence and information before it.
60. The respondent RTM confirms that as at 31 December 2013 the service charge account held approximately £160,000 to be applied to the works. The Tribunal considers that the accrued reserve held toward the intended works programme is a relevant consideration when deciding between competing options which have materially different respective costs. There was no adequate consideration of this by the respondent on the evidence and information before the Tribunal.

61. It is apparent on the information and evidence before the Tribunal that the maintenance & repair option may be carried out in Spring 2015 at a cost of £80,000 and will provide a 5 year period during which the £80,000 remaining in the reserve fund can be augmented by appropriate half yearly demands to that fund to finance the window and door replacement option at a cost of approximately £218,000 in or around 2010 at which time scaffolding will be required in any event for the reasons set out earlier in this Decision. There was no adequate consideration of this 'overview' of these known factors by the respondent on the evidence and information before the Tribunal.
62. It follows that the Tribunal determines that the cost of works proposed by the respondent to replace, rather than repair, the windows to the 72 flats in "Block 1" Claremont Heights (ie. flats 1-72) in Spring 2015 would not, on the evidence before it, be reasonably incurred.

### **The consultation issue**

63. The applicant contends that the consultation exercise which has reached tender report stage is 'hollow' in that it is ignoring the views of those lessees who oppose window replacement at this time.
64. He further contends that the replacement decision has been made in bad faith in that the directors of the respondent RTM are leasehold owners of flats in the adjacent 'Block B' (ie. the 90 flats in Claremont Heights 73-162) and pursue the replacement of the windows in both 'Block A' and 'Block B' as part of one major works package in order to improve the condition of, and increase the value of, their own flats located in 'Block B' and to require the leasehold owners of flats in 'Block A' to pay a contribution toward the cost of window replacement for 'Block B'.
65. On the information before it the Tribunal can discern no bad faith on the part of the respondent RTM company or its directors.
66. It is apparent that the statutory consultation procedure is not yet complete. Doubtless this Decision will be considered when discharging the remaining stages of that consultation and making final decisions as to the scope of the Spring 2015 works programme are made.

67. In such circumstances, given the Tribunal's determination that the relevant costs of window replacement, rather than repair, works would not be reasonably incurred in Spring 2015, the Tribunal need not and does not consider the applicant's criticisms of the consultation procedure further.

### **Recovering the costs of the proceedings before the Tribunal**

68. As stated above, the parties have been afforded a full day for the hearing ending at 5.45pm. For that reason costs issues have not been addressed during the hearing. As indicated to the parties at the end of the hearing directions for written costs submissions are set out below.

69. Within 28 days of the date that this Decision is sent to the parties, any party may file with the Tribunal office, and serve on the other party, an application for any of the following orders -

(i) an order requiring a party to reimburse to the other party the whole or part of the amount of any fee paid by the other party (pursuant to regulation 13(2) of the First-Tier Tribunal (Property Chamber) Rules 2013), and/or

(ii) an order requiring a party to pay the costs of the other party costs on the ground that the paying party has acted unreasonably in bringing, defending or conducting the proceedings before the Tribunal (pursuant to regulation 13(1)(b) of the First-Tier Tribunal (Property Chamber) Rules 2013), and/or

(iii) an order providing that the respondent's costs of and occasioned by the proceedings before this Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the applicant in this or any future service charge accounting year (pursuant to section 20C of the Landlord & Tenant Act 1985).

(iv) Any party served with such an application shall, within 14 days of receiving that application, file with the Tribunal office and serve on the other party a written response to that application.

70. The Tribunal will determine any such cost application(s) on the papers and without a hearing.

**Stephen Reeder**  
**Judge of the First Tier Tribunal**