



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

Case Reference	: LON/OOAG/LSC/2021/0438
Property	: The Bourne Estate
Applicant	: Leaseholders of the Bourne Estate
Representative	: Mr Hai
Respondent	: London Borough of Camden
Representative	: Jonathon Upton
Type of Application	: Determination as to reasonableness and payability of service charges.
Tribunal Members	: Judge Shepherd Andrew Lerwicki FRICS
Date of Determination	: 19 th August 2022

1. This case concerns the Bourne estate in the Holborn district of Central London. The estate was built between 1905 and 1909 and is regarded as one of London's best examples of tenement housing. The majority of the housing blocks within the estate have been Grade 2 listed. The estate was designed by the London County Council architects department. The estate is the third of three key estates built by London County Council.

2. The application is brought by some of the leaseholders on the Bourne estate (“The Applicants”). The Respondents are the freeholders of the estate the London borough of Camden (“The Respondents”). A determination is sought as to the reasonableness and payability of service charges for the period 2019 to 2021. In fact the dispute broadly concerned major works on the estate concerning the replacement of windows (“The works”).

3. Mr Hai is the lead leaseholder and represented the Applicants at the hearing. His statement of case was wide-ranging in terms of the issues covered however once the Scott Schedule was prepared the issues were focused on the following matters:
 - a) Alleged defective consultation for the works.

 - b) Allegation that the works were not reasonable in quality and the cost was not reasonably incurred.

 - c) Alleged losses suffered as a result of negligence and poor workmanship. Pausing here the Tribunal was surprised that this issue had been pursued because at a case management conference Mr Hai had indicated that he no longer intended to pursue it.

4. The Applicants seek a determination pursuant to section 27A of the Landlord and Tenant Act 1985 as to the amount payable as a service charge for the replacement of windows including the cost of scaffolding to flats on the estate. Mr Upton for the Respondents summarised the issues that the Tribunal had to determine:

- a) whether replacement of the windows was within the repairing covenant in the lease?
- b) whether the costs of the window replacement works including scaffolding were reasonably incurred and reasonable in amount?
- c) Whether the Respondent complied with the consultation requirements?
- d) Whether the tribunal had jurisdiction to determine claims for damages for loss of enjoyment and or loss of time due to alleged negligence?
- e) Whether to make an order under section 20C of the Landlord and Tenant Act 1985?

Background

- 5. The Bourne estate consists of 12 blocks of flats which as already indicated are Grade 2 listed except for Gooch House a 13th block. The Applicants are long leaseholders of flats in seven blocks. All the leases contain covenants by the Respondents to maintain, repair, redecorate, renew and amend the blocks including the window frames and windows and the lessees covenant to contribute to the cost through the service charge.
- 6. The works took place in three phases. In phase one and two which are the subject of this application, works were carried out to 8 blocks. Works to the remaining blocks will be carried out under phase three. The windows have been replaced in their entirety with new timber double glazed sash windows and casement windows with fenestrations to match the original design. The

windows installed are made to measure Akoya timber windows which have a life expectancy in excess of 50 years. The windows have also been finished with a microporous paint system and have easy clean hinges and sashes.

7. The works were carried out across three service charge years ending 2019, 2020 and 2021. The Respondent have demanded both estimated and actual charges for these service charge years.

The hearing

8. The hearing took place over two days on 21st -22nd June 2022. On the first day the tribunal inspected the estate and looked at the windows in several flats including Mr Hai's flat. The inspection was internal and external. The estate is impressive. It has a sense of grandeur and history. It was difficult to see the difference between the new windows and the windows replaced in terms of aesthetic. The Tribunal was shown a number of blocks which are to be within phase three of the works. The quality of the windows externally varied although it was clear that some of the windows were in a very poor state.
9. As indicated Mr Hai represented the Applicants and Jonathan Upton of Counsel represented the Respondents. The tribunal is grateful to both for the clarity and cogency of their written and oral arguments. As well as legal argument the parties provided an impressive range of evidence both factual and expert. For the Applicants as well as Mr Hai witness statements were provided by Mr Bo Poraj, Catherine Campbell, Christopher Craig, Pryish Kotecha, Georgina Wood, Ian Brown, Janet Moore, Ben Mansour and Piers Collins. The Respondents' factual evidence was provided by Stephen Hales and John Burton and an expert report was provided by John Flowers. His report was dated the 18th of March 2022. Mr Flowers answered questions from the Applicants on the 26th of May 2022.

10. Mr Hai purchased his properties at 4 Laney Building and 55 Radcliffe Building in 2014 and 2015 respectively. He says that the Respondents served consultation documents in 2018 and he responded asking questions. He said that he considered the windows in Laney to be in a good condition and did not need replacement. He said that there was some flaking of paint on the exterior but the underlying wood was sound. He says he chaired a meeting on the 2nd of July 2019 attended by the Respondents at which he asked questions about costs and the necessity to change the windows. He alleged at the meeting John Burton told everyone that no cost benefit analysis had been undertaken in relation to cost of repair versus replacement. This was denied by Mr Burton in evidence. Prior to the replacement of the windows in Laney Mr Hai had secondary glazing installed inside his property. He was required to agree to the secondary glazing being removed without restoration. He says that the secondary glazing was removed in a way that rendered it useless and he received no compensation for the loss of these assets. He also said that the building regulations required trickle air vents to be installed in new windows. The replacement windows had been installed in his property without them. This was accepted by the Respondents who confirmed that this would be addressed.

11. Mr Hai said that on the 5th of November 2019 the Respondents produced a report detailing the snagging in the windows. During the hearing it became clear that the snagging had not been completed and there have been delays as a result of the pandemic. The Respondents confirmed they would address all snagging.

12. When the tribunal inspected the windows internally although it was a limited inspection the following issues were evident;
 - a) The brass screws were rusting and the brass fittings were tarnished.

 - b) The fasteners hit the wooden astragal bars when opening and closing unless the user repositioned the fastener to a particular position. This was causing

damage to the windows when they were being opened if they were not properly operated.

13. The other leaseholders at the hearing gave similar evidence to Mr Hai alleging variously that the previous windows were in reasonable condition and did not really need replacement and that the works carried out were not to a reasonable standard. Ms Woods accepted that Mr Hai had written her statement. As a tenant she had been happy to have the windows replaced but as a leaseholder she was not happy as she had to incur the cost. This was commendably honest. Several of the residents repeated the complaints about the fittings on the windows.

14. For the Respondent's Stephen Hales gave evidence. He is a Senior Officer consultation and final account. He gave evidence in relation to the s20 consultation process. His colleague Dominic Clarke was the consultation officer at the time and dealt with observations and responses to the leaseholders. Mr Hales was invited to attend the meeting on the 2nd of July 2019 which was set up by the leasehold services team to meet a specific group of leaseholders. Mr Hales gave evidence about the observations dealt with by Dominic Clarke during the consultation. There were 14 observations four of which were made by the Applicants. Mr Clark responded to each observation and provided a table which was shown to the Tribunal. Mr Hales pointed out that the leaseholders of 4 Nigel House, 9 Sheen House and 13 Kirkby House did not oppose window replacement, for example Ms Moore of 13 Kirkby stated in her observation dated the 30th of May 2018 that the windows should have been renewed a long time before her father brought the bought the flat in 1990. Further Mr Wood of 9 Sheen House in his observation said he had been renting the property from the council six years before he purchased it via the RTB scheme and had asked for the windows to be replaced eight years ago previously confirming that they are indeed dilapidated and let out a lot of heat.

15. John Burton also gave evidence to the Tribunal. He was a project manager who had worked at Camden Council for 48 years. From the mid - 1980s until 2004 he was maintenance manager for the Southern part of the borough which included the Bourne estate. From 2004 onwards he been a project manager on major work schemes. The windows and external decoration programme on the Bourne estate was one of his projects and he'd been involved in it from the outset.

16. Mr Burton was very familiar with the Bourne Estate. He regularly met with residents and the tenants' association to discuss the condition and repairs required. He said that for over 20 years he was being pressured to carry out substantial works of repair to the estate and in particular for the old windows to be replaced. The original windows were timber framed and we're over 120 years old. in 2002 a major works external decoration programme was carried out by a contractor called William Very. The contract was badly performed and the costs were not passed onto the leaseholders in respect of the window repairs. Mr Burton said that the windows were not uniformly bad but some windows on certain elevations were in significant disrepair and certain windows had been nailed shut for safety reasons.

17. Mr Burton said that by 2014 - 2015 the Bourne Estate had been added to the capital works programme to address the problem with the windows. He was appointed project management for the scheme and external consultants, Bailey Garner were appointed to advise in relation to the scheme and its procurement. Bailey Garner's report in 2014 made reference to Radcliffe Building and Buckridge Building. That report noted the preference to replace the old single glazed timber windows with double glazed factory finished windows. This was subject to listed building approval. Consultation took place with conservation officers and Bailey Garner appointed Donald Insall Associates to produce a report on the heritage position of the estate which was provided in October 2016 and Bailey Garner then produced a design and access statement for the proposed scheme in December 2016.

18. Mr Burton said that the consensus was that given the overall condition of the windows and the fact that repairs were required window replacement was the right method of repairing the windows and bringing them up to condition. It was concluded that replacement with low maintenance factory pre painted Akoya windows which were guaranteed for 50 years was the best option.

19. Mr Burton says that in addition to the formal s. 20 consultation a number of informal consultations were undertaken. He met with the residents and the tenants association on several occasions to discuss the proposed works. In addition Leaseholder Services arranged a consultation event in the Town Hall in 2018 to which all leaseholders were invited. He said that he could not recall any strong objection except by Mr Hai.

20. Mr Burton was involved in the consultation exercise because Dominic Clark sent him the observations to consider. He said that similar questions were being asked by the lessees and he suggested preparing a table. He said he carefully considered the observations but there was nothing within them that caused him to reconsider the decision to carry out the scheme including the works of window replacement.

21. Mr Burton said that there were 500 flats on the Bourne estate with thousands of individual windows and the windows were in varying conditions of disrepair. Camden had to consider the estate as a whole and the fact that 12 of the 13 blocks were listed. Camden also had to consider its future repairing obligations and the choice of window replacement with the Akoya timber frames meant that the entire estate would have windows in the same condition guaranteed for 50 years. The alternative was to continue with a mix of ad hoc repairs and at some point an eventual window replacement programme. The windows at the Bourne estate were not of one single uniform design. There were specific design

solutions required for some flats. Mr Burton said that the ongoing problems with the fittings on the windows were as a result of the use and not their design. He said that after the new windows were installed the contractor demonstrated the opening mechanisms to the occupants and left a manual.

22. Mr Burton acknowledged that there was some snagging required and Wates have not always dealt with this as quickly as he would have expected. He also acknowledged that there were outstanding issues at Mr Hai's flat at 4 Laney House.

23. In relation to scaffolding he said that the scaffold cost in the budget was set by reference to a square metre charge. Where extra scaffolding costs were claimed by the contractor there was a process to identify and quantify compensation events. Attached to his evidence were some compelling pictures of windows in very poor condition.

24. John Flowers gave expert evidence on behalf of the Respondents. Mr Flowers is a fellow of the Royal Institute of Chartered Surveyors. He said in his report that the windows that have been used as replacements namely the new timber double glazed sash windows and casement windows with fenestrations largely matched the originals subject to the constraints of using double glazing. The dormer windows were also replaced. There were a small number of original narrow metal framed crittall windows which had been retained repaired and re-decorated

25. He says that see report produced by Donald Insall Associates in order to obtain listed building consent included justification of the benefits of replacing the windows rather than repairing and redecorating them and he concurred with this opinion. The replacement was more cost effective than long term repair and decoration. Mr flowers said that the previous windows suffered from defects including timber decay in the frames and casements and sashes. The existing windows offered poor sound insulation stop in addition the original windows were single glazed and not draught stripped and therefore had a poor thermal

performance. Mr Flowers considered that procuring the works in a large contract was more cost effective as there are economies of scale both in terms of purchasing power of a larger contract but also the preliminary costs. A significant part of the overall costs of the project related to access scaffolding to facilitate the window replacement. The works could not have been undertaken without full access scaffolding. Whilst the entire risk of the scaffolding could have been put on the contractor at tender stage it's likely the contractor would have priced this element significantly higher to reflect the risk.

26. In summary, Mr Flowers considered that the replacement of the windows with like for like single glazed windows would not have been possible as their replacement had to be Building Regulation compliant. Now the windows had been replaced it was unlikely that external decorations would be required for at least 10 years which would reduce future service charge costs.

27. In relation to consultation it became clear during the hearing that the relevant consultation requirements were those set out in Schedule 3 to the Service Charges (Consultation Requirements) (England) Regulations 2003/1987. This was because the works were issued under a qualifying long term agreement. Camden maintain qualifying long term agreements with several contractors and decide amongst those contractors who is to carry out certain works. The consultation requirements under schedule 3 are more limited than the consultation requirements required for qualifying works. It was clear that in this case on its face at least that Camden had complied with the requirements in Schedule 3.

28. In closing Mr Upton took the tribunal through the relevant law which was detailed in his skeleton argument. Of most benefit to the tribunal was his explanation of the subject matter of the covenant in this case. The subject matter is the whole of the block because of the issue of "matching" i.e. maintaining uniformity. He relied on a passage from Dowding and Reynolds at paragraph 8 -09 for this proposition. So for present purposes where some of the

windows were in a poor condition and the subject matter of the covenant was the whole of the block then the block was out of repair. He also emphasised the importance of life cycle costing in assessing the benefits of repair or replacement. Further if a repair required compliance with Building Regulations then it was still a repair even if there was an element of improvement. He relied in particular on the case of *Wandsworth LBC v Griffin* [2002]2 EGLR 105. His general proposition was that some of the windows in the blocks were out of repair and required replacement. The works carried out under the William Very tender were poor and the subsequent reports recommended replacement. It was up to the landlord to decide whether to replace the windows and the sole question was whether it a reasonable decision to replace the windows. As an alternative proposition he said that the leases in any event allowed for improvements. He did acknowledge that some of the fittings and ironmongery were in poor condition and these would be remedied but the fact that they were in poor condition did not render the works unreasonable. He maintained that the evidence of Mr Burton particularly confirmed that Camden had considered observations made by the leaseholders in the consultation.

29. Mr Hai said that the leaseholders had been misled in the consultation because they had been told that most of the windows were dilapidated. He also maintained that the only option put forward was replacement. His primary concern in relation to the windows was the failure to consult in his opinion. He was also concerned about the condition of the windows.

Determination

30. Taking each of the issues identified above the Tribunal makes the following determination

Was replacement of the windows within the repairing covenant?

31. It is clear that several authorities support the fact that the replacement of windows in the present circumstances would come within the repairing covenant of the lease – see in particular *Tay v Holding & Management (Solitaire)* [2019] UKUT 373 (LC). The windows were required to meet building regulations as well as listing building consent even if this meant some improvement. The fact that some of the windows in a block were in reasonable condition prior to the work did not negate the fact that others were out of repair and something had to be done about them. Replacement was a reasonable and sound option. The Tribunal was particularly impressed by Mr Burton’s evidence that carried considerable gravitas because of his experience and first - hand knowledge. The Tribunal accepts that residents had repeatedly complained to him about needing new windows. The leaseholders may not have been as keen on replacement as a result of the cost but that does not render the council’s decision to replace unreasonable.

Was the cost of the window replacement works including scaffolding reasonably incurred and reasonable in amount?

32. The Tribunal considers the cost of the window replacement including scaffolding was reasonably incurred. A number of reports had supported replacement rather than repair particularly when one considered life cycle costing. The cost of scaffolding was high but the Tribunal accepts Mr Flowers’ evidence that even if the risk had been imposed on the contractor the cost would have been high. The new windows have ensured that thermal performance has improved. The windows are also better sound insulated. The Tribunal is concerned however that there are some apparent defects in the window fittings. It was reassured by the Respondents’ confirmation that they will deal with snagging items raised. In particular, the rusting and tarnished fittings need to be addressed by the Respondents. In addition, trickle vents need to be provided to the new windows. In relation to the damage caused by the fasteners on a balance of probabilities the Tribunal accepts Mr Burton’s evidence that this is

the result of user error and occupiers need to be given clearer instructions on use.

Did the Respondents comply with the consultation requirements?

33. The Tribunal considers that the Respondents did comply with the consultation requirements in Schedule C. Mr Burton's evidence was honest and clear. He took into account observations as he was required to do. The leaseholders were not misled in correspondence. A general statement about the condition of the windows in consultation was not to be judged with a fine-tooth comb. The message was clear. There were windows out of repair and something had to be done about them.

Does the Tribunal have jurisdiction to determine claims for damages for loss of enjoyment due to alleged negligence?

34. The Tribunal does not have jurisdiction to determine claims for damages for loss of enjoyment due to negligence. There is a limited jurisdiction to consider equitable set off in the context of historic neglect: *Continental Property Ventures v White* [2007] L & TR 4 but that is not what was being proposed by Mr Hai.

Should the Tribunal exercise its discretion under s.20C of the Landlord and Tenant Act 1985?

35. The Tribunal will not make an order under s.20C. The Respondents have conducted themselves properly in dealing with the Applicants' challenge. They should be entitled to recover their costs from the service charge if the lease allows it.

Judge Shepherd

19th August 2022

ANNEX - RIGHTS OF APPEAL Appealing against the tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal at the Regional tribunal office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.
3. 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 not being within the time limit.
4. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers
5. Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.