10343

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**CHI/42UB/LSC/2014/0026**
Property	:	**Berkley Court, Oatlands Drive, Weybridge, Surrey, KT13 9HY**
Applicants	:	**Dinn Kotsias Properties** **Mr E Vinci** **Mr S & Mr C Harry**
Respondents	:	**Midopen Ltd** **Mr J McIntyre** **Mr G & Mrs G Barnard** **Mr J Santos** **Mrs M Clark** **Mr J & A Campion** **Mr I Garlick** **Ms C Wilson** **Ms S-L Jerman** **Ms M Ireland** **Mr T Goodhead** **Mr P Rowe**
Type of application	:	**Applications for permission to appeal**
Tribunal members	:	**Mrs H C Bowers MRICS** **Mr M Loveday** **Miss J Dalal**
Date and venue of hearing	:	**27th June 2014-09-26 Kingston County Court, St. James Road, Kingston upon Thames, Surrey, KT1 2AD**
Date of decision	:	**7th October 2014**

DECISION

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Introduction

1. Two applications for permission to appeal have been received from respondents in this matter. The first application is from Mr I Garlick (21 Berkeley Court) which was received on 11th September 2014. The second is made on behalf of Midopen Ltd, the "lead" Respondent in the claim. That application is dated 15th September 2014.

Decision of the tribunal

2. The tribunal has considered the two requests for permission to appeal and determines that:

    a. it will not review its decision; and

    b. permission to appeal is refused.

3. In accordance with section 11 of the Tribunals, Courts and Enforcement Act 2007 and rule 21 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, the two applicants may make further applications for permission to appeal to the Upper Tribunal (Lands Chamber). Such application must be made in writing and received by the Upper Tribunal (Lands Chamber) no later than 14 days after the date on which the First-tier Tribunal sent notice of this refusal to the party applying for permission to appeal.

Reason for the Decision

4. The reasons appear in the appendix attached.

Name: Helen Bowers **Date:** 7th October 2014

APPENDIX TO THE DECISION
REFUSING PERMISSION TO APPEAL

1. The application from Mr Garlick purportedly seeks permission to appeal paragraphs [20], [22] and [23] of the tribunal's decision. In fact, these paragraphs are not findings of the tribunal, they are simply summaries of part of the Applicants' case. The relevant parts of the tribunal's decision that deal with these points are at paragraphs [52] and [54]. The tribunal therefore treats the application from Mr Garlick as seeking permission to appeal paragraphs [52] and [54] of its decision.

2. The application from Midopen does not refer to specific paragraphs of the decision which it seeks to challenge. However, the tribunal also treats the application as seeking permission to appeal paragraphs paras [52] and [54].

Rails, ladders, hatches and steps

3. Both applications seek permission to appeal the tribunal's findings in para [52] in respect of roof works-guard rail (£12,504), ladders (£5,448), roof access hatches (£6,651), folding steps (£5,448). They argue that the tribunal erred in finding that these relevant costs were not recoverable because the works are needed to ensure compliance with CDM regulations, and that it would be best practice for the work to be undertaken. In Midopen's application, specific reference is made to the case of The Lord Mayor and Citizens of the City of Westminster v Fleury [2010] UKUT 136, a case not cited to the tribunal at the hearing. In that case, the question was whether the cost of re-covering a roof was "reasonably incurred" within the meaning of s.19 of the Landlord and Tenant Act 1985. The proposition advanced in ground 2(iii) of Midopen's grounds of appeal is apparently derived from paragraph 10 of the Upper Tribunal's decision in Fleury. That paragraph appears in the context of whether the relevant costs of recovering the roof were "reasonably incurred" under section 19 of the Landlord and Tenant Act 1985.

4. In paragraph [52] of its decision, the tribunal accepted that the provision of rails, ladders, hatches and steps was desirable, but it was noted that the scope of works proposed went beyond the permitted recovery under the service charge regime set out in the leases. The tribunal's decision was concerned with the question of contractual recoverability rather than section 19 Landlord and Tenant Act 1985. Fleury is therefore not relevant to the decision of the tribunal.

5. The tribunal's findings at paragraph [52] were derived from a conventional distinction between "repairs" from "improvements".

Midopen's application for permission to appeal also referred to Postel Properties v Boots the Chemist [1996] 2 EGLR 60. The issue whether works comprise repairs or improvements is always a matter of fact and degree. The tribunal specifically referred to Postel in its decision [49], and paragraph [52] of the decision explains why the argument derived from Postel was rejected. The tribunal found that a distinction should be made between (1) works which are an upgrade within a constructional element of any repair and (2) the proposed works in this case which were not concerned with replacing an element of the roof which was defective. The tribunal found that the improvements proposed by the landlord (no matter how desirable) did not remedy any defect contemplated by the covenant. The Tribunal has considered the paragraph 4.2 of the Upper Tribunal Practice Direction 2010 and concludes there is no reasonable prospect of the applicant(s) demonstrating that the tribunal wrongly interpreted or applied the relevant law.

Aerials

6. The applications seek permission to appeal the tribunal's findings in para [54] in respect of communal aerials (£40,204). Mr Garlick argues that existing individual TV aerials and cables will have to be removed as part of the works. Both applications also referred to new evidence having come to light that there had originally been a communal aerial system, although this had long been out of use and it was no longer intact.

7. The tribunal does not consider that the former argument takes things any further. Replacing individual TV aerials with a single communal system is not a replacement of like for like. As the tribunal found at paragraph [52] of its decision, a complex and costly new communal aerial system is an improvement. As to the latter argument, the 'fresh' evidence could have been presented to the tribunal at the hearing, but it was not (and no explanation is given for the omission). Indeed, submissions were made by the Respondents that the landlord proposed to "adopt" a communal system [38] rather than simply repair an existing one. In paragraph [54] the tribunal found that the aerial works were desirable but accepted the Applicant's submission that the works were improvements. The tribunal has considered paragraph 4.2 of the Upper Tribunal Practice Direction 2010, and again concludes there is no reasonable prospect of the applicant(s) demonstrating that the tribunal wrongly interpreted or applied the relevant law in this respect. Moreover, it cannot be said the tribunal failed to take account of relevant considerations or evidence – the new arguments (and evidence) about the existing aerial system were not advanced at the hearing.

Review

8. Finally, the tribunal has considered the power to review under Rule 55(1) of the Tribunal Procedure (First-tier Tribunal) (Property

Chamber) Rules 2013 and the guidance given by the Upper Tribunal in Scriven v Calthorp Estate [2013] UKUT 0469 (LC). Since it is satisfied that none of the grounds of appeal are likely to be successful, the tribunal ought not to undertake a review of a decision it has made.