



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

Case Reference : **MAN/00BR/LSC/2019/0061**

Property : **NV Buildings, The Quays,
Salford M50 3BB**

Applicant : **NV Buildings (Salford Quays)
Management Company Limited**

Applicant's Representative : **Weightmans LLP**

Respondents : **Various**

Including

“A” Respondents : **Messrs P Scott and R Cainer and
Mr D & Mrs K Cumberland**

“A” Respondents’ Representative : **Mr P Aslett, Counsel**

“B” Respondents : **Ms M Campbell, Mr I Bradley,
K Cheung and T Wu**

“B” Respondents’ Representative : **Ms M Campbell**

Type of Application : **Landlord and Tenant Act 1985
 (“the 1985 Act”) – Sections 27A(3)
and 20C**

Tribunal Members : **Judge C. Wood
Mr K Kasambara**

Date of Decision : **10 February 2020**

DECISION

Decision

1. The Tribunal determines as follows:
 - 1.1 that, in accordance with the terms of the Apartment Lease, (as that term is defined in paragraph 5.1 of this Decision), the costs included in the Services Budget for 2019-2020, (“the Budget”), relating to the cladding replacement works at the Property, but excluding the costs relating to “provision for parking replacement”, are recoverable from the Respondents as service charge and each of the Respondents is liable to pay his/her Proportion (as that term is defined in the Apartment Lease) of such costs;
 - 1.2 the costs relating to “provision for parking replacement” are not recoverable as service charge under the terms of the Apartment Lease and the Respondents are not liable to pay them;
 - 1.3 that, in accordance with section 19(2) of the 1985 Act, the estimated costs relating to the cladding replacement works as set out in the Budget, but excluding the costs relating to the “provision for parking replacement”, are reasonable;
 - 1.4. the Tribunal considers that it is not just and equitable in all the circumstances to grant the “A” Respondents’ application under section 20C of the 1985 Act, which is denied.

Background

- 2.1 The general background to this matter is the Government’s introduction in July 2017, following the Grenfell Tower tragedy, of a compulsory testing regime for multi-storey and high-rise buildings in excess of 18 metres constructed with similar external cladding.
- 2.2 The chronology of events which has led to the Application is usefully summarised in the letter dated 26 July 2019 from Design Fire Consultants to the Applicant. This also explains the basis for the Applicant’s decision to undertake permanent facade remediation rather than other possible mitigating actions as it was determined that this alone would adequately resist the spread of fire originating either internally or externally.
- 2.3 Investigative work confirmed that the cladding at the Property is not ACM cladding of the type used on Grenfell Tower. As confirmed in the letter dated 6 June 2019 from the Ministry of Housing, Communities and Local Government, “Non-ACM cladding systems or other structural works which are not directly related to the remediation of ACM cladding systems will not be part of the fund”, (being the grant fund announced by the Government on 9 May 2019 as available to assist towards defraying the costs of replacement cladding works).
- 2.4 In the Board Report contained in the Budget, the Applicant outlined how they had determined the costs of the project: “Estimates for the works itself are advised by the Project Manager. Other project costs are based on reasoned estimates, based on an assessment of the risks associated with managing a contract of this type”.
- 2.5 In a letter dated 1 May 2018 from the agent for the current freeholder, it was stated that, with regard to the question of liability for the cost of the remediation works, “...the position is already covered by the leases which include provisions for repairs and maintenance as well as contractual mechanisms to recover the cost of this”.

- 2.6 On or about 30 May 2019, service charge demands were issued for payment of the amounts determined in accordance with the Budget, with the 1st payment required to be made on 1 July 2019.
- 2.7 In July 2019, following the developer's agreement to make a contribution of £2.25m towards the cost of the remediation works, letters were sent to the leaseholders amending their service charge demands and offering refunds where payment had been made.
- 2.8 The terms of that agreement are subject to confidentiality obligations between the Applicant and the developer. The effect of the contribution has been to reduce the estimated costs by c80%.

The Application

- 3.1 The Applicant sought determinations by the Tribunal under section 27A of the 1985 Act as to the reasonableness of, and liability to pay, certain costs as service charge and including determinations as to whether, under the terms of the Respondents' leases of their apartments, the following costs are recoverable as service charge:
 - 3.1.1 the cost of the cladding replacement works;
 - 3.1.2 the cost of obtaining warranties in respect of the new cladding; and,
 - 3.1.3 the cost of providing temporary parking spaces; and
 - 3.1.4 whether the Applicant was entitled to seek payment in advance of these costs.
- 3.2 The Respondents are together all of the leaseholders of the apartment and car parking leases at the Property. The "A" Respondents and the "B" Respondents are those Respondents who had indicated to the Tribunal that they wished to participate actively in the proceedings. Together they comprise the leaseholders of 6 apartments within the Property. There are 246 apartments in total at the Property.
- 3.3 Directions were issued on 9 September 2019 for the conduct of the proceedings, in response to which written submissions were received from the Applicant, the "A" Respondents and the "B" Respondents.
- 3.4 A hearing of the Application was scheduled for 11:30 on Friday 15 November 2019, following an inspection of the Property at 10:00 on the same date.

Inspection

- 4.1 The inspection was attended by Messrs Botfish and Goodall, on behalf of the Applicant, by the "A" Respondents, Ms M Campbell and Mr. P Scott.
- 4.2 The Tribunal were shown where samples of the cladding had been taken from the exterior of the Blocks for investigative purposes. Mr. Botfish outlined the scope of the cladding replacement works by reference to one of the Blocks.
- 4.3 It was also explained to the Tribunal, by reference to the layout and location of the car parks, how the works might result in the unavailability of certain car parking spaces. Ms Campbell drew the Tribunal's attention to the current unavailability of certain car parking spaces; measures that were already in place to maximise the availability of parking within the Development were explained by Mr. Botfish.

The Leases

- 5.1 Specimen apartment and car parking leases had been provided to the Tribunal within the Applicant's statement of case. Not all of the Respondents had entered into a car parking lease. The leases are referred to in this Decision as "the Apartment Lease" and "the Parking Lease".
- 5.2 The relevant clauses in the Apartment Lease for the purposes of this Decision are as follows:
- 5.2.1 The Fourth Schedule: paragraph 3 (Calculation of Service Charge):
- (i) paragraph 3.2: "...an appropriate amount as a reserve for or towards those of the Services as are appropriate to the property and likely to give rise to expenditure after such Service Charge Year being matters which are likely to arise either only once during the then unexpired term or at intervals of more than one year during such unexpired Term..."
- 5.2.2 The Fifth Schedule: paragraph 1 (Decoration and repair of structure and maintenance of grounds); paragraph 5 (Payment of costs incurred in management) and paragraph 15 (Other services and repairs), in particular:
- (i) paragraph 1.2: "To keep the structural walls...within the Block and the Development and the whole of their structure...in good repair and condition...";
 - (ii) paragraph 5.1: "in the running and management of the Block and the Development...";
 - (iii) paragraph 5.2: "...in...taking such action as the Lessor or the Management Company shall reasonably think necessary in respect of any notice or order or proposal for a notice or order served under any statute order regulation...on the Lessor or the Management Company in respect of the Block the Development...or all or any of the properties therein";
 - (iv) paragraph 15: "To carry out all repairs to any other part of the Block and the Development for which the Lessor or the Management Company may be liable and...to carry out such other repairs and such improvement works...as the Lessor or the Management Company shall consider necessary to maintain the Block and the development as good class residential flats or otherwise desirable in the general interest of the Lessee and the lessees of other properties in the Development".
- 5.3 Clause 4.2 in the Parking Lease is in substantially the same terms as clause 5.2 of the Apartment Lease.
- 5.4 The "Service Charge Year" is defined as the period from 1 July – 30 June.

Law

6.1 Section 18 of the 1985 Act provides:

- (1) in the following provisions of this Act “service charge” means “an amount payable by a tenant of a dwelling as part of or in addition to the rent -
 - (a) which is payable directly or indirectly for services, repairs, maintenance, improvements or insurance or the landlord’s costs of management, and
 - (b) the whole or part of which varies or may vary according to the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose –
 - (a) “costs” includes overheads, and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

6.2. Section 19 provides that –

- (1) relevant costs shall be taken into account in determining the amount of a service charge payable for a period –
 - (a) only to the extent that they are reasonably incurred, and
 - (b) where they are incurred on the provision of services or the carrying out of works only if the services or works are of a reasonable standard;

6.3. Section 27A (1) and (2) provides that:

- (1) an application may be made to an appropriate 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 date at or by which it is payable, and
 - (d) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.

6.4 In *Veena SA v Cheong* [2003] 1 EGLR 175, Mr. Peter Clarke comprehensively reviewed the authorities at page 182 letters E to L inclusive. He concluded that the word “reasonableness” should be read in its general sense and given a broad common sense meaning [letter K].

6.5 Section 20C of the 1985 Act provides as follows:

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings

before...the First-tier 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 tenant or any other person or persons specified in the application.

(2) ...

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Hearing

7. Mr. I.Goodall, Mr. P.Brown and Mr. N.Botfish attended the hearing on behalf of the Applicant. The Applicant was represented by Ms S Davies of Weightmans Solicitors. The “A” Respondents attended in person and were represented by Mr.P.Aslett of Counsel. Ms M Campbell attended in person for herself and on behalf of the other “B” Respondents.
8. The Applicant’s oral submissions are summarised as follows:
 - 8.1 the reason for making the Application at this point was primarily to settle the issue regarding liability as progress on the cladding replacement works, and, in particular, engaging a contractor could not be made without the certainty that the necessary funds were available to the Applicant;
 - 8.2 Mr. Botfish’s statement sets out the background and chronology of this matter;
 - 8.3 the Applicant is the management company, deriving all of its income from service charge. The directors and shareholders are all lessees/Respondents;
 - 8.4 reference was made to clause 5 of the Apartment Lease, (Management Company’s covenants), paragraphs 1.1 and 1.2, paragraph 5.2 and paragraph 15 of the Fifth Schedule of the Apartment Lease as establishing the Applicant’s contractual right to recover the costs claimed as service charge;
 - 8.5 the right to obtain a payment in advance is set out in paragraph 3.2 of the Fourth Schedule of the Apartment Lease;
 - 8.6 the rationale for charging the costs of providing alternative car parking as service charge under the Apartment Lease rather than under the Parking Lease is that it is a consequence of the works to the Property;
 - 8.7 the works are not eligible for Government-funded compensation;
 - 8.8 the Applicant has sought and obtained a significant contribution of £2.25m from the original developer (c80% of the total estimated costs) which has significantly reduced the cost for individual lessees. The total estimated amount now being sought as service charge from the Respondents is £404,000 as compared with £2.654m;
 - 8.9 the Applicant has sought to keep the leaseholders apprised of developments and discussions with the developer insofar as possible within the constraints of confidentiality provisions contained within the agreement between it and the developer;
 - 8.10 the Applicant has also kept in contact with GMFRS who have expressed a wish that the works are undertaken as soon as possible;

- 8.11 the Applicant is aware of commercial problems for leaseholders in selling and re-mortgaging their apartments whilst the works have not been undertaken;
- 8.12 the Applicant is aware of its statutory duties and a s20 consultation will be undertaken prior to the commencement of the works. However, the chronology of this Application has been determined by the need to ensure no significant delay between a consultation and the commencement of the works and the need to satisfy any contractor that the Applicant has the financial resources to pay for the works. The Applicant had therefore determined that it was necessary to collect the funds in advance of the s20 consultation;
- 8.13 insurance premiums have always been high but have increased since the Grenfell Tower tragedy and the Applicant has now been advised by their brokers that no other insurer is willing to quote for the business.
9. The oral submissions of Mr. Aslett, Counsel for the “A” Respondents, are summarised as follows:
- 9.1 there is a lack of clarity regarding the scope of the Application and of transparency/detail regarding the developer contribution;
- 9.2 leaseholders had a legitimate expectation when they purchased their flats that they would be fit for purpose. Whilst that now appears to be questionable, it is inequitable/unfair that they should bear the remediation costs: the liability for remediation should rest with the freeholder not the tenants;
- 9.3 a consequence of the works being undertaken will be an increase in the value of the freehold which will then adversely affect any leaseholders who have contributed to the cost of the works if they subsequently seek enfranchisement: in effect, they will be paying twice;
- 9.4 it is not accepted that the construction of the Apartment Lease permits the recovery of the costs of these works under the clauses cited by the Applicant and any interpretative uncertainty should be resolved in favour of the Respondents. Specifically, the costs of the works are not recoverable as service charge expenditure for the following reasons:
- (i) paragraph 1.2 of the Fifth Schedule: the cladding is neither in disrepair nor in poor condition. The Fire Risk Assessment undertaken by the Applicant has identified an increased risk to person and property by reason of the type of cladding currently on the Blocks. The works which are being proposed should therefore be viewed as works intended to minimise that risk. The costs of such works are not of a type envisaged by this clause and so do not constitute service charge expenditure;
 - (ii) the same arguments apply to paragraph 15 which also refers to “repairs” and “improvements”, neither of which are relevant in this context;
 - (iii) further with regard to paragraph 15: the reference to “services” is not appropriate in this context; the reference to “improvements” is limited to those “necessary to maintain the Block...” which implies maintenance to a particular standard which is unclear; the meaning of the terms, “good estate management” and “in the general interest of the Lessee” are likewise unclear, although where the action undertaken results in the enhancement of the value

of the freehold, it arguably cannot be “in the interest of the Lessee...” where there is a subsequent enfranchisement; it was conceded that in the context of health and safety, there may be a suggestion that carrying out the works is “in the interest of the Lessee and the other lessees of other properties in the Development”: however, the letter from GMFRS is now over 2 years’ old which suggests that they have not considered this to be a severe risk; with regard to the practical considerations cited by the Applicant eg difficulties of insuring the Property, no evidence of this has been produced to the Tribunal;

- (iv) paragraph 5.2: despite the assertion in Mr. Botfish’s statement, no notice or order has been issued in the terms set out in this paragraph which would entitle the recovery of costs as service charge under its terms;
- 9.5 carrying out the works at this point is pre-emptive as there is no certainty that, following the publication of the second report into the Grenfell Tower fire focussed on identification of the causes of the fire, the proposed works will put the Blocks into a condition compliant with any future recommendations/safety standards;
- 9.6 the Tribunal should not fetter or influence the s20 consultation whenever it is carried out and so should limit its decision to one of liability;
- 9.7 the lack of “proper” estimates for the costs of the works makes it inappropriate to make a determination as to reasonableness under section 19(2);
- 9.8 it is improper to seek to recover as service charge from all leaseholders compensation for a discrete number of leaseholders whose car parking spaces might be affected by the carrying out of the works. If this is service charge expenditure, then it should be recovered from those Respondents who have entered into a Parking Lease and under its provisions;
- 9.9 the section 20C application should be granted because of the “poor way in which the Application has been brought” ie prior to undertaking a section 20 consultation, which has led to costs having been unnecessarily incurred by the “A” Respondents.
- 10. Questions of Mr. Botfish by Mr. Aslett concerned the following issues:
 - 10.1 the contribution made by the developer;
 - 10.2 the nature and purpose of the VAT advice, the costs of which are included within the costs of the cladding replacement works;
 - 10.3 the making of interim service charge demands, the making of refunds on receipt of the developer contribution and the charging of interest on arrears;
 - 10.4 how “an appropriate amount” (paragraph 3.2, Fourth Schedule) had been determined for the purpose of the interim service charge demands.
- 11. The “B” Respondents’ oral submissions were made by Ms Campbell and related to the principal issue of the difference in treatment of those Respondents who had Parking Leases and whose parking spaces have been unavailable since December 2017 but who have been denied any compensation by the Applicant, and the present proposal to recover the costs of alternative parking for affected leaseholders as service charge from all Respondents.

Reasons

11. **Liability:** the Tribunal was satisfied that, as a matter of contract, the proposed estimated expenditure on the cladding replacement works as set out in the Budget, (but excluding costs relating to the provision for parking replacement, VAT advice and Fire Risk Assessments), constituted service charge expenditure under paragraphs 1.2 and/or 15 of the Fifth Schedule of the Apartment Lease, and that each of the Respondents was accordingly liable to pay his/her Proportion as determined in accordance with the provisions of the Fourth Schedule of the Apartment Lease.
12. In reaching its determination that the costs referred to in paragraph 11 comprised service charge expenditure under paragraph 1.2, the Tribunal rejected the “A” Respondents’ submission that the cladding should be regarded as “in good repair and condition” as there was nothing inherently wrong with it. It was the Tribunal’s view that cladding which was determined to constitute a fire risk and thus presented a risk to the safety of residents, visitors and other 3rd parties could not be regarded as “in good condition”.
13. The Tribunal considered that this was consistent with the views of the Tribunal in the decision (Case reference LON/00AH/LSC/2017/0435) to which the Tribunal was referred by Mr.Aslett: see paragraph 58, where it is stated: “We do not see how the two blocks can be said to be “in good and substantial repair order and condition” whilst the cladding remains a fire risk”. The Tribunal also rejected Mr.Aslett’s submission that there was any substantive interpretative difference in the wording of the leases in these cases, (“in good repair and condition”/”in good and substantial repair order and condition”).
14. Even if the costs could not be considered as service charge expenditure under paragraph 1.2, the Tribunal was also satisfied that, in accordance with paragraph 15 of the Fifth Schedule of the Apartment Lease, the works constituted “improvement works”, specifically, that the removal/reduction of an identified fire risk to occupants, visitors and other 3rd parties was properly to be regarded as an “improvement”.
15. The Tribunal was further satisfied that it was in accordance with the terms of paragraph 15 to seek to defray the costs of carrying out the cladding replacement works as such works were “...necessary to maintain the Block and the Development as good class residential flats or otherwise desirable in the general interest of the Lessee and the lessees of other properties in the Development”. Again, the Tribunal considered that the removal/reduction of an identified fire risk to occupants, visitors and other 3rd parties constituted necessary maintenance and/or “otherwise desirable in the general interest...” of the Respondents.
16. In reaching its determinations, and in establishing the contractual liability of the Respondents under the terms of the Apartment Lease, the Tribunal also rejected the proposition that questions of equity as between the Respondents and the Landlord/developer and of a speculative financial effect on the value of the freehold were of relevance. Further, if they were, then the Tribunal considered that the health and safety considerations would be of greater persuasive importance.
17. The Tribunal was not satisfied that the costs of providing alternative parking for any leaseholder whose car parking space was affected by the carrying out of the works was a cost recoverable as service charge by the Applicant under the Apartment Lease. Although it was not argued by the Applicant, the Tribunal did not consider that such costs were recoverable as service charge under the terms of the Parking Lease either.

18. The Tribunal noted that the Applicant had sought recovery of the costs relating to the VAT advice and the Fire Risk Assessments as service charge under the same paragraphs in the Apartment Lease as the costs of the replacement cladding works. Whilst the Tribunal did not consider that these costs were recoverable under these provisions, as a matter of principle, it was satisfied that (i) such costs would normally be recoverable as management costs; and, (ii) paragraph 5.1 of the Apartment Lease includes "...costs and expenses incurred by the...Management Company...in the running and management of the Block and the Development...". It is suggested that it is in the parties' interests to adopt a pragmatic approach to the recovery of such costs as service charge.
19. **Payment in advance:** the Tribunal was satisfied that the Applicant was entitled under paragraph 3.2 of the Fourth Schedule to seek payment of service charge in one Service Charge Year to establish a reserve fund to meet expenditure to be incurred in a subsequent Service Charge Year. In this respect, the Tribunal was sympathetic to the Applicant's need, as a management company with no financial resources save for its service charge receipts, to be able to demonstrate to contractors that it was in funds, and the need to avoid any significant delay between a s20 consultation and the commencement of the replacement cladding works.
20. **Reasonableness:** the Tribunal was further satisfied that it was appropriate to make a determination of reasonableness under section 19(2) of the 1985 Act, based on the estimated costs as set out in the Budget. It is explicit in section 19(2) that any determination of reasonableness may be subject to subsequent "necessary adjustment" following the incurring of the expenditure which may be by "repayment, reduction, or subsequent charges or otherwise". For the reason set out in paragraph 12 above, the Tribunal was satisfied that, in the circumstances, the sequence of events pursued by the Applicant was appropriate.
21. Further, the Tribunal rejected Mr.Aslett's submission that to make a determination under section 19(2) based on estimated costs would, in any way, "fetter" or "influence" any subsequent s20 consultation. Rather the provisions of section 19(2), as set out in paragraph 20 above, ensure that there is the requisite flexibility to enable the Applicant to deal with any difference between the costs determined to be reasonable in this Decision and the costs as determined in accordance with the s20 consultation.
22. In determining the s20C application, the Tribunal was required to consider what is "just and equitable in all the circumstances". Notwithstanding that in one respect, (the provision for alternative parking), the Tribunal determined that the Applicant was not entitled to recover the cost as service charge, in all other respects the Tribunal had determined that the Respondents were liable to meet the costs set out in the Budget as service charge, and that the Applicant had acted in accordance with the terms of the Apartment Lease in seeking payment in advance based on estimated costs. Further, the Tribunal accepted the Applicant's rationale for the chronology of its approach and the need to obtain the Tribunal's determinations in order to progress the works.

C Wood
Tribunal Judge
10 February 2020