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

Case Reference : **BIR/47UC/LSC/2016/0003**

Property : **Flats 1-3, Tedstone, 3 Orchard Road,
Malvern WR14 3DA**

Applicants : **Ms S Harper (Flat 1)
Ms D Palmer**

First Respondent : **Ms G Poole (Flat 2)**

Second Respondents : **Mr M George and Ms L Strauss (Flat 3)**

Type of Application : **s27A Landlord and Tenant Act 1985**

Tribunal Members : **Judge D Jackson
Ms S Tyrer**

Date and venue of : **28th June 2016**

Hearing : **Worcester Magistrates Court**

Date of Decision : **21 July 2016**

Decision

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Background

1. The Property is a large late Victorian three storey house which was converted in the late 1970's into three self-contained flats. The Property is divided horizontally with Flat 1 occupying the ground floor and Flat 3 occupying the top floor.
2. The Applicants are the freeholders and also the leaseholders of Flat 1.
3. The Second Respondents, who are the leaseholders of top floor Flat 3 have taken no part in these proceedings.
4. On 24th February 2016 the Applicants made Application to the Tribunal for a determination of liability to pay and reasonableness of service charges under s27A of the Landlord and Tenant Act 1985 ("the Act"). The application relates solely to future works to be carried out to the roof and rainwater goods. At the hearing it was confirmed that a determination was being sought solely in relation to the pitched, tiled roof and not in relation to the flat roofs at the rear of the Property.
5. Regrettably there has been a long history of bitter animosity between the Applicant and occupier of Flat 1, Ms Harper and the First Respondent and occupier of Flat 2, Ms Poole. Ill feeling between the parties is apparent from the contents of their written Statements and was evident at the inspection. At the hearing both parties (and supporters who attended with them) attempted to use the proceedings as a vehicle to vent their old grievances. It was therefore necessary at the hearing to refuse to allow the parties to advance arguments in relation to personal grievances which were not directly relevant to payability and reasonableness of the proposed roofing works.
6. Directions were given by the Tribunal on 26th February 2016, 18th April 2016 and 5th May 2016.
7. The Tribunal has considered written submissions of the Applicants dated 23rd March 2016 and 1st June 2016. The Respondent has produced written submissions dated 1st May 2016 and further submissions received by the Tribunal on 2nd June 2016.

8. The hearing took place on 28th June 2016. Both Ms Harper and Ms Poole gave evidence. The Tribunal also heard from Juliet Weston MRICS, Chartered Surveyor instructed by the Applicants.

The Lease

9. Flat 1 is held under a Lease dated 21st May 1984 and made between Patricia Joyce Simmons (1) and Clifford Sabey and Ulla Britt Sabey (2). Flat 2 is held under a Lease dated 18th July 1979 and made between PJ Simmons (1) and Mr and Mrs RD Coleman (2). Flat 3 is held under a Lease dated 2nd October 1979 and made between Patricia Joyce Simmons (1) and James Henry Spybey and Sheila Spyby (2).
10. For the purposes of this application all the Leases contain the same relevant clauses.
11. The first recital records:

“The Lessor is the owner in fee simple of the property known as Tedstone Number 3 Orchard Road Great Malvern in the County of Hereford and Worcester (hereinafter called “the Property”) which property is converted into three flats.”

12. Clause 2(e) of the Lease of Flat 2 contains a Lessees covenant:

“to pay one third of the cost of the maintenance and repair of the roof of the Property as and when requested by the Lessor.”

13. Clause 3(f) contains a Lessor covenant:

“Subject to the contributions and payments by the Lessees as herein provided to maintain and keep in good repair the roof of the said Property.”

14. At the hearing Ms Poole accepted that she was liable under her Lease for 1/3rd of the cost of repair and maintenance of the roof. She also agreed that the freeholder could request payments in advance subject to reasonableness. Her case is that the freeholder, rather than demand monies in full, should set up a maintenance fund over 5 years with monthly contributions in the order of £400 per flat.

15. We find that as a matter of construction that each leaseholder is liable for 1/3rd of the costs of maintenance and repair of the roof of the Property. We further find that the freeholder can demand payment in advance subject to the reasonableness requirements of s19 of the Act.

The Law

16. Where a freeholder seeks payment on account the provisions of s19(2) of the Act apply:

“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.”

17. S27A (2) of the Act provides:

“An application may also be made to the Tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to:-

- a) The person by whom it would be payable,
- b) The person to whom it would be payable,
- c) The amount which would be payable,
- d) The date at or by which it would be payable, and
- e) The manner in which it would be payable”.

18. The Tribunal has had regard to the decision of the Upper Tribunal in **The Lord Mayor and Citizens of the City of Westminster v Fleury** [2010] UKUT 136 (LT) on the question of whether to patch or replace a defective roof:

“The question is whether the decision to recover the roofs was a reasonable one in all the circumstances, even if other reasonable decisions could also be taken. The fact there is evidence a reasonable surveyor might recommend the roof be recovered is no doubt an important factor in answering that question, but it cannot be determinative. Further, the weight to be attached to such evidence may depend upon where in the range of reasonableness the recommendation lies.”

Inspection

19. The Tribunal inspected the Property on the morning of the hearing.
20. We were able to get a good view of the roof from the road at the front of the Property and from the raised rear garden.
21. The Property has a multi-pitched roof. The roof covering is of clay tiles dating from construction. There was no evidence of re-roofing since the Property was built over 100 years ago. The ridge tiles are also clay with decorative finials.
22. Significant sections of the roof require renewal. There was evidence of tiles slipping particularly to the rear elevation. Slippage was particularly evident at the end of the run to the rear elevation and around the valley channelling by the turret roof. A wave or ripple effect was apparent on the ridge which is suggestive of batons starting to move.
23. The roof has a steep rake which is typical of a late Victorian property. There have been some limited modifications at the time of conversion. There were some replacement tiles to the rear pitch elevation. Replacement appeared to have been on a piecemeal basis around this area and around the skylight adjacent to the turret.
24. There was loose mortar around the eaves and mortar pinking at the end of each ridge.
25. Rainwater goods were blocked at the rear and near the side bay. The verges and hoppers were blocked. The rainwater goods need renewing at the same time as the

roofing work is carried out. There were also insufficient rainwater goods for the roof area.

26. Ms Poole kindly allowed us access to her middle floor Flat 2. There was evidence of water ingress from the flat roof in her sitting room. In her bedroom there was further damage to the ceiling originating from a gulley/valley in the main roof. Ms Poole told us that there was an inspection hatch in Flat 3. However as the Second Respondents have played no part in the proceedings the Tribunal did not seek access to the top floor Flat 3. Ms Poole also showed us an area of damp in her front bedroom which she told us was due to water ingress from the guttering rather than the roof itself.

Deliberation

27. The Applicant relies on the RICS Condition Report prepared by Ms Weston in 2014.

Ms Weston also attended the hearing and gave evidence.

28. The First Respondent has obtained a letter dated 26th April 2016 from DJ Yapp Roofing Contractor (E-12 to Ms Poole's letter of 1st May 2016).

29. We prefer the written and oral evidence of Ms Weston to the evidence of Mr Yapp. Ms Poole quite rightly drew to our attention that Ms Harper is a client of Ms Weston. Accordingly we cannot give her report the weight we would attach to that of an independent expert. However we found Ms Weston to be an honest and objective witness and her report to be a thorough one. To the extent that there have been changes since her report was prepared in 2014 we find that the state of the roof has continued to deteriorate.

30. Mr Yapp is of the opinion that "generally the roof is in quite good shape" and "the roof is not in a too bad condition". Having inspected the roof ourselves we do not agree with Mr Yapp. As set out at paragraphs 22-25 above significant sections of the roof require renewing.

31. Mr Yapp indicates that the roof “probably has 5 or more years’ life left in it but could be even longer”. Ms Poole submits that as there are no leaks at present the appropriate course is to build up a maintenance fund of £400 per flat per month which would build up sufficient funds to pay for a complete renewal of the roof in 5 years’ time.
32. Ms Poole, in her oral submissions, argues that maintenance and in particular gutter clearance is the paramount issue. The roof is not presently leaking. The problems she has experienced in her flat are due to the flat roof which is not part of the proposed works and to blocked gutters/valleys. She argues that renewal is not immediately required and that in the interim a maintenance fund could be accumulated.
33. We have to consider whether the decision to replace the roof now is a reasonable one in all the circumstances. All parties agree that the roof has, even on the most optimistic view, very little life left in it. The leaks pointed out by Ms Poole relate to overflowing gutters and gulleys or to the flat roof. None of those leaks relate to the roof itself. However having inspected the roof and noted the significant repairs required now we find that it would be unreasonable to delay even for a few years. There are slipping tiles and waves/rippling which indicate that the batons are failing. The roof will continue to deteriorate. There is a real risk of damage or injury being caused by a falling tile. It is only a matter of time before the roof fails and lets in water. To delay will only increase costs later and risks damage to other parts of the Property by water ingress. We find that the decision of the Applicant’s to replace the roof now is a reasonable one in all the circumstances.
34. We have considered whether the roof could be patched or whether there could be a phased replacement over a number of years. We do not consider patching appropriate as this is not a case of replacing a limited number of tiles. There are significant sections of roof that require renewal. A significant element of the costs of roofing at the Property is scaffolding. To put up scaffolding to carry out a patching exercise

would incur scaffolding costs that would be incurred again within a few years once further renewal is required.

35. A phased renewal would also lead to significantly increased costs, particularly in terms of scaffolding. Scaffolding is particularly expensive because of the complications of the configuration of the Property. We also received submission that there may be sarking at the Property to which the roof tiles have been torched with bitumen. If that is the case then replacing distinct sections would be difficult. We would estimate that a phased replacement could lead to total costs being increased by 25%.
36. Ms Poole, although arguing for a delay in carrying out the works, accepted that roofing costs would increase over the 5 year period proposed by her. She also told the Tribunal that having spoken to Mr Yapp that a phased replacement was not the best way to proceed and that he suggested "save money and do it all in one hit."
37. However the findings of the Tribunal are that the whole of the roof requires renewal now. It is not reasonable to require the freeholder to carry out a phased renewal leading to increased costs and continued deterioration of those parts of the roof which are not replaced in the first phase. The decision to replace the whole of the roof at once is a reasonable one.

Consultation

38. Ms Weston has acted for the Applicants in relation to s20 consultation. Bundle D sent to the Tribunal under cover of Applicants letter of 1st June 2016 contains the entirety of the consultation material.
39. No issue has been raised by the Respondents in relation to the consultation requirements. We therefore find that s20 has been complied with.
40. The Applicants have obtained three estimates based on a revised schedule of works prepared by Ms Weston (annex 17 to Bundle D).

41. Notice of Intention dated 26th October 2016 (annex 26 to Bundle D) sets out the three estimates received:
- a) AES Roofing contractors Ltd £71,700 plus vat
 - b) APS (GB) Ltd £58,380 plus vat
 - c) GF Hill Ltd £60,125 plus vat
42. The Applicant confirmed to the Tribunal that she wished to proceed with APS who had provided the lowest estimate. The APS estimate is at annex 23 to Bundle D. We asked Ms Weston why there was no itemised breakdown by APS. Ms Weston told the Tribunal that the estimate was based on the schedule of works and that there would be a pre contract meeting to “go through the pricing.”
43. Ms Poole confirmed that she had engaged with the consultation process and that she had put forward GF Hill as her preferred contractor. The Tribunal asked Ms Poole for her observations on the reasonableness of the APS estimate. Ms Poole told the Tribunal that she did not dispute the reasonableness of that quotation; her case was that no immediate replacement was required and that in the meantime a sinking fund could be built up.
44. We find for the purposes of s19 (2) that the sum of £58,380 plus vat is reasonable.
45. We asked about a contingency. Ms Weston asks for 5%. That figure is lower than the Tribunal anticipated and we also find that it is reasonable.
46. Accordingly the total reasonable cost of the roofing work inclusive of vat and 5% contingency is £73558.80.

Payability

47. For the purposes of s27A (2) (a)-(c) we find that 1/3rd of £73558.80 is payable by Ms Poole as leaseholder of Flat 2 to the Applicants.

48. We also have to consider the date and manner of payment. We were told by Ms

Weston that the lead in time between accepting the quotation and commencing work is about 6 months. We find that bearing in mind the significant sums involved the freeholder would need to be in funds at the time of accepting the quotation. This is consistent with clauses 2(e) and 3(f) of the Lease which allows the Lessor to require payment "as and when requested" and only requires the Lessor to maintain and keep in good repair the roof "subject to the contributions and payments by the Lessees".

49. There is no obligation on the Lessor under the terms of the Lease to build up a maintenance/sinking fund nor to request regular payments in advance. We find that the Applicants are entitled to require payment of the whole sum in advance

Decision

50. The sum of £24519.60 being 1/3rd of the proposed costs of renewal of the pitched roof at the Property in accordance with the estimate date 17th September 2015 from APS(GB) Ltd is reasonable under s19(2) of the Act.

51. We determine under s27A(2) of the Act that the sum of £24519.60 is payable by the First Respondent as leaseholder of Flat 2 and also by the Second Respondents as leaseholders of Flat 3 to the Applicants as freeholders of the Property.

52. The date of payment, in full, shall be due 6 months prior to commencement of the roofing works by APS (GB) Ltd.

53. The Applicants shall send with their demand for payment a letter from APS (GB) Ltd confirming the start date of the roofing works.

D Jackson

Judge of the First-tier Tribunal

21 July 2016

Either party may appeal this decision to the Upper Tribunal (Lands Chamber). In order to do so an application for permission to appeal must be received by the First-tier Tribunal not later than 28 days after the date on which this Decision is sent to the party seeking permission. Any application for permission must be in writing and set out the grounds on which permission is sought.