



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

Case Reference : **CHI/00HN/LSC/2020/0023**

Property : **29 Cavendish Road, Bournemouth,
Dorset, BH1 3QZ**

Applicant : **Ms G White**

**Applicant's
Representative** : **Rebbeck Brothers**

Respondent : **(1) Mr Ben Ibberson – Flat 1
(2) Ms M De Silva – Flat 3
(3) Ms D Gargan – Flat 4**

**Respondent's
Representative** : **MJP Law (for First Respondent)**

Type of Application : **Determination of liability to pay and
reasonableness of service charges
under Section 27A of the Landlord
and Tenant Act 1985**

Tribunal Members : **Judge Professor David Clarke
Michael Woodrow, MRICS**

Date : **30 November 2020**

DETERMINATION AND STATEMENT OF REASONS

DETERMINATION

The Tribunal determines that the provisional sum of £5,500 plus VAT, namely £6,600, included within the specification of major works in relation to roofing repair to a garage was inappropriately and unreasonably included within the budget of £93,500 for major works in the service charge year ending 25 December 2020.

The Tribunal determines that in all other respects the budget for those major roofing works, now amounting to £86,900, is reasonable.

STATEMENT OF REASONS

The Application

1. This application (“the Application”) was made on 25 February 2020 by Ms G White (“the Applicant”) in relation to a property known as 29 Cavendish Road Bournemouth, (“the Property”) which is divided into four residential flats. It seeks a determination under Section 27A of the Landlord and Tenant Act 1985 (“the Act”) that the sum of £93,500 included within the service charge levied for the calendar year ending 25 December 2020 is a reasonable charge in respect of the proposed major works of repair and renewal to the roof of the Property.

Background to the Application

2. The Applicant is the Head Lessee of the Property. This Head Lease is dated 5 December 1997 for a period of 99 years from 25 March 1997. The initial rent for the first period of 21 years was £825. The Head Lease requires the Applicant as head lessee to maintain the Property in good and substantial repair and condition. The Head Lease was granted partly in consideration of the surrender of a previous head lease and was granted subject to three leases of flats in the Property each for a period of 99 years less 10 days from 25 March 1951. Presumably, the former head lease was for 99 years from that date in 1951.

3. The identity of the current freeholder was not revealed to the Tribunal. The freeholder has played no part in these proceedings and has no direct interest in the outcome except that the roofing works, when undertaken, will fulfil the repairing obligation owed by the Applicant to the freeholder.

4. There are now four flats in the Property. The Tribunal was supplied with a copy of the underlease of Flat 3 (“the Underlease”). It is dated the same day as the Head Lease, namely 5 December 1997 and is for a term of 99 years less 10 days from 25 March 1997. The recitals again record that the Underlease is granted following the surrender of the former 1951 underlease. The Underlease is now held by Ms M De Silva, (“the Second Respondent”). Her flat is partly on the second floor and partly on the third floor of the Property. She has lived in Flat 3 since her purchase in March 2002. The Underlease includes in the demise part of the garden of the Property.

5. The Underlease requires the underlessee to keep the flat in good and tenable repair and to contribute one third part of the costs, expenses, outgoings and matters mentioned in the Fourth Schedule to the Underlease. The Fourth Schedule includes the 'costs of maintaining, repairing, redecorating and renewing the exterior walls and in particular the roof chimney stacks gutters rainwater pipes and foundations' of the Property.

6. The Tribunal understands that each underlease of the flats in the Property are in a broadly similar form to the Underlease of Flat 3. There are now four flats within the Property as, sometime between 1997 and 2002, Flat 2 was divided into two so that it now consists of Flat 2 and Flat 4. Whether Flat 4 was created by way of a sub-underlease, or by way of a fresh underlease granted by and with the consent of the then head lessee is not known. It is worth recording that the creation of this fourth flat appears to be in breach of the covenants in the Head Lease, but nothing turns on that issue in respect of these proceedings.

7. The Applicant is also the owner of Flat 2. The three Respondents to this Application are the lessees of the other three underleases, namely Mr. Ben Ibberson and Mr. Hugh Ibberson, executors of the estate of Mrs. V. Ibberson (Flat 1), the Second Respondent, Ms M De Silva of Flat 3 and Ms D Gargan (Flat 4). Only the Second Respondent opposes this Application.

The Roof of the Property

8. The Tribunal need not recount in detail the full recent history of surveys of, and repairs to, the roof of the Property, 29 Cavendish Road. In the absence of an inspection, the Tribunal were supplied with detailed photographs taken from a cherry-picker and copies of survey reports and details of repairs to the roof undertaken in the past few years. The reason that a detailed review of this material is unnecessary is the fact that the Second Respondent does not dispute the need for major roofing works at the Property but only the reasonableness of the amount in the service charge budget to enable those works to be done.

9. All the survey reports in the papers indicate the problems with the slate roof and concur that major works are required. For example, the opinion is put forward in the report of Bennington Green in 2016 that the roofing slates are original to the Property and they are nearing the end of their life. The roof is timber pitched, with a flat crown and includes four velux style windows, two brick chimneys and a dormer. There is a recent history of slates becoming damaged, breaking, falling or needing attention. There is unanimity that the fundamental problem is 'nail sickness', and rotting battens are suspected. Various repairs have had to be done, with slipped slates resecured with metal clips (tingles). All the expert reports conclude that the roof has reached the end of its useful life given its many deficiencies and the extensive evidence of historic reactive repair works.

10. The need for major roof works and the problem of nail sickness was identified as long ago as 2008. In 2010, the flat owners could not agree to progress works – there was

a split decision. It was decided to wait to allow the owners to save for the cost of the works, though it was recognized delay would increase costs. A meeting of the Applicant's agents and the three flat owners other than the Applicant in 2013, after further reports and specifications raised the need for a complete reroofing, again did not reach agreement to proceed with the proposed works. Further recommendations were made in 2016. Throughout this period, and in the last four years, various repair works to the roof have been required.

11. The most recent report was provided in February 2018 by the firm of Russell Fareham Associates. Their conclusion was also that the roof required a major overhaul removing the existing slates and with new ones using copper fixings. Their report highlighted the hazard that existed because of the risk of falling slates.

The Applicant's case

12. The case submitted by the Applicant is straightforward. In the light of the history of problems with the roof of the Property and of previous failures to reach agreement on the works, the Applicant, through her agents, began the process (not for the first time) to get the major repair to the roof completed. The required notice of intention to carry out works under section 20 of the Act to comply with the statutory consultation requirements was issued on 14 December 2017 and invited written observations and invited the leaseholders to propose the name of a person from whom an estimate to carry out the proposed works should be obtained. No such proposal or written observations were received.

13. Specifications for the work were drawn up by the firm of Winkle Bottom, Chartered Surveyors, on 5 April 2018. Tender documents were sent to four contractors on 23 April 2018. Tenders were submitted by three contractors on 24 May 2018. The evaluations of the tenders received was undertaken by Winkle Bottom in a report dated 1 June 2018 and a recommendation made to accept the most competitive tender from a firm called AKT Roofing.

14. The Russell Fareham report having been circulated to all the flat owners on 28 February 2018, the Applicant's agents wrote to all of them again on 10 July 2018 enclosing a notice and statement of estimates in relation to the proposed works. There is again no record of any response by the Second Respondent to that consultation. In her witness statement of 3 September 2020, she notes that she regrets that she failed to engage with the consultation process. There is nothing to suggest that she challenges the validity of the consultation process. AKT Roofing then submitted a revised tender dated 24 October 2018.

15. Subsequently, the sum of £93,500 was included in the service charge demands from the four flat owners for the service charge year ending 25 December 2020. That sum is based on the specifications drawn up and the revised tender sum from AKT Roofing. It also included, as advised by the Applicant in her reply to the Second Respondent's statement of case dated 3 September 2020, "a further £6,000 to allow for any increases in prices since the time of the quote". Though this was not raised as an issue by the Second Respondent, the Tribunal has considered whether this additional amount is

reasonable. The Tribunal considers that, given the passage of time since the 2018 revised tender, it was and is reasonable for this sum to be added. Any use of this extra sum will have to be specifically justified as the works progress.

16. The Second Respondent's liability is for one third of the annual service charge demand. The Applicant instituted this Application to establish the reasonableness of the cost of the proposed works.

The Second Respondent's Case

17. The case for the Second Respondent is that the cost of the works is unreasonable. In support of that argument, she has commissioned two reports. The first, permitted by Directions dated 22 July 2020, is an expert report from a Mr. Leigh Belasco of Belasco Associates dated 20 May 2020 ("the Belasco Report"). The second is a fresh tender for the re-roofing work at the Property and dated 7 August 2020 from a firm known as Inventiv Roofing Solutions ("the Inventiv Quotation").

18. From her three separate witness statements, her submissions can be summarised as follows:

- (1) The provisional cost of repairs to the roof of garage number 2 should not have been included as disrepair has not been shown.
- (2) The works in part relate to improvements rather than repairs, and improvements do not fall within the costs recoverable by the Underlease. The item raised in this regard is the plan to install roof insulation.
- (3) The internals of the roof have not been inspected casting doubt on the scope and accuracy of the specifications.
- (4) The service charge is, overall, unreasonable as demonstrated by the conclusions in the Belasco Report. The submission of unreasonableness is further claimed to be unreasonable in the light of the tender and quotation to do the roofing works submitted by Inventiv Roofing Solutions.

Each of these submissions will be considered in turn.

Analysis and Determination

(1) Should the garage roof have been included?

19. The Applicant included in the specification for the works, within the items listed as Provisional sums, an item 'to replace the garage roof' amounting to £5,500 plus VAT. There are two garages at the Property, one for Flat 1 and the other for Flat 2. Though the specification does not make it clear which garage is included, the reply to the Second Respondent's statement of case by Emily Plate indicates that this relates to garage 2, belonging to Flat 2. Winkle Bottom mention that they were asked to include the garage roof repair in the specification at the last minute which explains why a provisional figure is included.

20. It would be unusual, to say the least, if a garage demised to one flat was repairable partly at the expense of a leaseholder who does not have a garage at all. Nevertheless, Ms Plate submits that that is indeed the case, though she does ask the Tribunal to comment on this responsibility. Fortunately, she includes in her written statement extracts from both the Headlease and the Underlease of Flat 2. She is correct that the

Head Lessee (the Applicant) covenants to repair the Property and all buildings on the site. She then refers to the covenant in the Underlease of Flat 2 where the underlessee of Flat 2 covenants to keep the flat and the garage in repair. This is also clear – the garage is to be kept in repair by the underlessee of Flat 2. However, she then believes that the Fourth Schedule of that Underlease means that the garage is included in the ‘part of the premises not required to be repaired by the (under)lessee’. That is wrong. The garage is required to be repaired by the underlessee of Flat 2 and so is not included in the costs to be borne under the service charge. Moreover, the Underlease of Flat 3, where the Tribunal has a full copy, makes no reference at all to the inclusion of repairs to any garage in the service charge.

21. The Tribunal therefore determines that the inclusion within the specification of works of the sum of £5,500 plus VAT (£6,600) to replace the roof of a garage was incorrect and unreasonable. The Applicant must remove that amount from the cost of the roofing works within the service charge so the amount requested from the Second Respondent (one-third) must be reduced by £2,200.

(2) Are any works improvements?

22. The Second Respondent submits that the works in part relate to improvements rather than repairs; and improvements do not fall within the costs recoverable by the Underlease. The only specific item raised in this regard is the plan to install roof insulation. It is correct that the covenant in the Underlease (of Flat 3) is to contribute one third part of the costs, expenses, outgoings and matters mentioned in the Fourth Schedule to the Underlease and the Fourth Schedule includes the ‘costs of maintaining, repairing, redecorating and renewing the exterior walls and in particular the roof chimney stacks gutters rainwater pipes and foundations’ of the Property – but does not require a contribution to improvements.

23. The only possible element of improvement contained within the specification of works is the provisional sum of £15,000 to upgrade roof insulation to flat roofs and the pitched roof slopes, including ventilation. The specification clearly set out that the works were to be in accordance with the current U-value requirements and Building Regulations. The Second Respondent does not indicate any other aspect of the work that she contends would amount to improvements and the Tribunal cannot discern any from the specification of works. Indeed, the expert Belasco Report concludes that, apart from the work to introduce insulation, the works identified are essential maintenance and repairs.

24. Works of repair that involve an element of improvement may be fully justified even if there is no specific obligation to pay for improvements in the covenant in the lease. In any event, the repairing obligation is wider when the repairing covenant extends to renewal (*Credit Suisse v Beegas Nominees Ltd* [1994] 4 All ER 803) – and the covenant in this case does extend to renewal, specifically of the roof. Moreover, it does not go beyond repair to use more modern materials during the repair and the length of the term may be relevant. Here, the deciding factor indicating that the specification does not go beyond the terms of the covenant is that the repair can only be done if the contractors observe the all regulatory requirements and do the work in conformity with the Building

Regulations applicable at the time of the work. Those regulations require the inclusion of insulation in order to try and meet the current U-value targets, as outlined in the Winkle Bottom response of 24 June 2020.

25. The Tribunal therefore determines that the specification of works does not contain any element of improvement to the Property that would take the works beyond the terms of the Underlease.

(3) Should there have been an inspection internally?

26. The Second Respondent relies on the expert Belasco Report to assert that the cost of the proposed works is unreasonable on the ground that the internal condition of the roof has not been inspected and should have been; and without that internal inspection there is doubt on the scope and accuracy of the specification. However, Mr. Belasco did not inspect the Property and relied on the papers submitted to him in preparing his desk top report. The Applicant asserts in her reply that the roof space is largely taken up by living accommodation and a full internal inspection of the underside of the roof would require too much damage to internal finishes and decorations – which is why Winkle Bottom, the surveyors, had to include provisional sums.

27. The Tribunal can ascertain, from the photographic evidence supplied, that the Applicant is correct in this submission. It would not be sensible to inspect internally with the very considerable damage that would cause. It was, and is, reasonable for the specification for repairs to this roof to be drawn up by means of external inspection with provisional sums for potential repairs to roofing timbers. The Tribunal determines that the specification is not unreasonable in any way from the lack of an internal inspection.

(4) Is there any basis for the claim of unreasonableness?

28. The Second Respondent concludes by submitting that, taken overall, the amount for roofing works included within the service charge for the year ending 25 December 2020 has not been reasonably incurred within section 19(1) of the Act. She relies upon the Belasco Report and the Inventiv Quotation. Since there is no submission that there should be no repair works to the roof (and given the history outlined to the Tribunal it would be very hard, if not impossible, to make such a contention) it is necessary for the Second Respondent to demonstrate that in some way the repairs that are said to be necessary, or the details of the specifications, or the overall costs for such work, are unreasonable.

29. The Tribunal concludes that there is no compelling evidence to demonstrate that the works, or the costs, are unreasonable. Firstly, neither the Second Respondent herself, nor the expert witness, has demonstrated that any part of the proposed works is not necessary. The Belasco Report does, as discussed above, express concern about the uncertainty created by the high level of provisional costs in the specification. However, the Tribunal has already concluded that that approach is justified given the sensible decision not to try to inspect the roof internally. Given that the surveys over the years broadly reach the same conclusion as to the works that are required, the repairs proposed are undoubtedly very necessary and reasonable.

30. Apart from a suggestion to remove the contingency from the proposed contract, on the basis that the provisional sums make it unnecessary, the Belasco Report makes no criticism of the specifications for the work as drawn up by Winkle Bottom. The Tribunal does not agree that the contingency (of £4,500) should be deleted. It will only be expended in whole or in part, at the discretion of the supervising contract administrator. Given the overall position, retention of the contingency is sensible and reasonable.

31. It therefore comes down to the question of whether the costs overall are reasonable. The provisional sum relating to the garage roof must be removed, but in all other respects the Tribunal concludes that the costs are reasonable. The accepted tender of AKT Roofing was the most competitive of the three received. The Belasco Report considered that some aspects of their pricing might be less realistic than the two other tenders (and perhaps too low) – it certainly does not suggest in any way that, overall, the price tendered was too high.

32. Finally, the Inventiv Quotation does not provide any basis for concluding the sums contained in the service charge are unreasonable. Their quotation, ignoring the provisional sums, was £62,230 plus VAT compared to AKT Roofing at £69,830 plus VAT. However, there is no evidence that the Inventiv figures are based on the specification provided and the estimate lacks a detailed breakdown to permit the surveyor to do a tender report. The Applicant also contends that, overall, the Inventiv Quotation is in fact a little more expensive than that of AKT Roofing – and if one deducts the work to the garage roof and adds in the ‘extra over cost’ item in the Inventiv Quotation, it does work out as more expensive than that of AKT Roofing. The Second Respondent had the opportunity to suggest a contractor to submit a tender after service of the notice under Section 20 of the Act. The Tribunal does not consider that this estimate by Inventiv of the costs of roofing works, where the contractor would have had access to the tender given by AKT Roofing, contains any or sufficient material on which the Tribunal could conclude the sum in the service charge is unreasonable.

33. The Tribunal therefore determines that, after deduction of the provisional sum relating to the garage roof of £6,600, (being £5,500 plus VAT), that the sum included in the service charge for major works, amounting to £86,900, is reasonable.

Costs

34. The Second Respondent has not made an application under Section 20C of the Act. The Tribunal has considered whether an order under that section might be appropriate were an application to be made and has concluded that it is not.

35. The Applicant asks that the costs of bringing this matter to the Tribunal for a certificate of reasonableness is ordered to be included within the service charge costs as part of the contract for works. That is not an order the Tribunal can make. The Applicant will need to decide, with legal advice if necessary, whether the terms of the underleases permit the costs that they have incurred to be included within a later service charge.

36. In the light of that request in relation to costs, the Tribunal has considered whether it would be appropriate to invite submissions from the parties as to whether it should consider an order for costs against the Second Respondent under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The Tribunal considers that it should not make such an invitation.

Right of Appeal

37. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

38. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

39. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

40. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result that the party who is making the application for permission to appeal is seeking.