



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

- Case Reference** : CHI/21UD/LSC/2020/0024
- Property** : Marina Heights  
63 West Hill Road  
St Leonards-on-Sea  
East Sussex  
TN38 0NF
- Applicant** : Mr Gary Pickard (Tribunal Appointed  
Manager)
- Representative** : Ms Barnes, ODT Solicitors
- Respondents** : Ms Rita Akorita  
Mr Philip Burkin  
Mr Richard Cooper and Mrs Jean Cooper  
Mr Kevin Hayes  
Marina Heights (St Leonards) Ltd
- Representatives** : Ms Seal (Counsel) for Ms Akorita  
Ms Akorita for Mr Burkin and Marina Heights  
(St Leonards) Limited  
Mrs Cooper for Mr and Mr Cooper
- Type of Application** : Determination of service charges – Section  
27A Landlord and Tenant Act 1985
- Tribunal  
Member(s)** : Judge J. Dobson  
Mr W H Gater FRICS MCI Arb  
Mr N Robinson FRICS
- Date of Decision** : 26th October 2020

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DECISION

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## **SUMMARY OF DECISION**

### **1. The Tribunal determines the following:**

- 1) The proposed works to replace the roof do not fall within the repairing and maintenance provisions of the Lease, the Lease only allowing such works to be undertaken when “necessary” Replacement of the roof is not found to be necessary at this time, on the evidence available.**
- 2) The other items of work within the specification of works are items to which the lessees must contribute by way of service charges pursuant to the provisions of the Lease.**
- 3) The cost of patch repair to and maintenance of the roof is also an item to which the lessees must contribute by way of service charges pursuant to the provisions of the Lease.**
- 4) The costs that may be recovered by the Applicant as service charges for the items within the specification of works is ££45,368.40 excluding any roof replacement works.**
- 5) A consultation process shall be followed in respect of revised works to the roof, namely patch and other repairs and maintenance, in an appropriate manner.**
- 6) The Tribunal has not made any determination as to costs. The parties may make written representations as to the principle of payment of costs by 20th November 2020.**

## **BACKGROUND**

2. On 21 August 2017 the Tribunal appointed the Applicant as manager of Marina Heights (“the Building”) for a term of three years. There have been contested applications in respect of the Building and in relation to that appointment. The appointment continues pending a hearing listed in mid-October to consider whether it should be extended for a further period. It is understood that is opposed by certain of the Respondents. Whilst that is not directly relevant to the question to be determined in this instance, that background plainly affected aspects of the parties’ approach to this application and, earlier, the matters which led to it.
3. A consultation process was undertaken by the Applicant in respect of the major works proposed, and tenders received. A schedule of works was prepared in April 2018. The overall cost of the works, including contract management costs of £10,377, is stated to be £79,557.00, inclusive of VAT (the accepted tender being in the sum of £69,180 inclusive of VAT).
4. The Applicant applied, pursuant to s27A of the Landlord and Tenant Act 1985, for a determination that the costs of the proposed major works to the

Building are payable as service charges from the Respondent lessees for the period 1st July 2018 until 30th June 2021. The dispute relates to sums claimed on account in respect of those major works and hence the question is whether the disputed estimated service charge is for an amount which is no greater than is reasonable.

5. Directions were given on 23rd April 2020, moving the application towards a final hearing. It should be noted that, as a result of an oversight, the original Directions omitted to include the freeholder, Marina Heights (St Leonards) Ltd, as a Respondent. Those Directions included the identification of 3 key issues for the Tribunal to address, drawn from the application form:
  - i) Are the items of work in dispute items to which the Respondent lessees must contribute pursuant to their leases?
  - ii) Are the costs of the intended works reasonable?
  - iii) Can the Applicant recover the costs of the proceedings?
6. Both the Applicant and a Respondent, Ms Akorita, instructed surveyors and there were, following a joint report dated 28th May 2020, only limited, though not insignificant, areas of dispute set out. There were also several areas of agreement between the surveyors with regard to items of work, including repairs to pointing (if not complete agreement about timing), some works to balconies, handrails, gutters, fascias, drainage goods, redecoration, the rear door lintel and various sundry repairs, plus the vehicle underpass albeit that had been in dispute. The differences between the surveyors were most notably in respect of replacement or patch repair of the flat roof to the building but to a lesser extent, as to whether all pointing work should be undertaken together, about the structural soundness of certain balconies and about the timing of other works.
7. Hence the dispute as to the cost which should be incurred by the Applicant and be recoverable as service charges during the years in question. The Tribunal makes it clear that to the extent that the works in themselves are agreed, there is no basis for the Tribunal to make any determination about those, although the disputed cost of them and the timing of them and so of the demands for funds on account of them does fall for determination, so too disputed works.
8. There are related issues as to legal and other costs which have not been fully addressed or determined and which were agreed to be most appropriately considered following the issue of this Decision. Consequently, save for appropriate short Directions, the issue of costs is not dealt with in this Decision.

## **THE HEARING AND THEREAFTER**

9. The final hearing to determine the dispute was listed on 14th July 2020, with oral expert evidence permitted in relation to the areas of works in dispute. Representation was as listed on the front sheet.

10. For various reasons, the hearing, listed for one day, took until approaching 6.30pm for the oral evidence to be concluded. This was therefore a hearing, not least one conducted as video proceedings. The time for the Applicant's representative to cross examine was constrained to a degree, although to his credit all apparently relevant matters were put.
11. Oral closing submissions were not possible given the hour. The Panel received written closing submissions subsequently, from Mr Barnes for the Applicant and Ms Seal, Ms Akorita and Mrs Cooper for the Respondents opposing the application, termed the "active Respondents" below. The Tribunal then re-convened to consider those and its decision. Regrettably both that re-convene and this Decision have been delayed due to holidays and the substantial amount of material- approximately 500 pages of hearing bundle added to by Skeleton Arguments, 46 pages of written submissions and 18 case authorities cited. The Tribunal appreciates that, not least given the extant application to extend the Management Order, the parties will have been anxious for the Decision to be issued and so time has been given over to it as swiftly as other commitments allowed.

### **THE PROPERTY, THE LEASES AND THE MANAGEMENT ORDER**

12. Marina Heights is a block of flats built in or about the late 1980s ("the Building") with a predominantly mansard type flat roof. The block comprises seven flats arranged across 4 floors, of which two are solely-owned by Ms Akorita, three are owned jointly by Ms Akorita and Mr Burkin and one each is owned by Mr and Mrs Cooper and Mr Hayes. The majority of the flats are not occupied by the leasehold owners but rather are tenanted. Ms Akorita is the sole director and Mr Burkin and she between them are the majority shareholders in the freeholder, holding 5/6ths of the shares.
13. The relevant parts of the sample lease provided dated 5th July 1989 ("the Lease"), are as set out below. The Tribunal understands the leases of the other flats are in the same or substantively the same terms. Those relevant provisions are as follows:

"4. AND THE LESSEE HEREBY COVENANTS with the Lessor:-

(21) To reimburse to the Lessor as sum (hereinafter referred to as "the Service Charge" equal to one seventh..... of the costs expenses outgoings and matters mentioned in the First Schedule hereto the Service Charge to be due and payable on demand and the amount of the Service Charge to be ascertained and certified by the Lessor's Surveyor acting as an expert and not as an arbitrator once a year up to Thirtieth day of June in each year (or if the ascertainment shall not take place on the Thirtieth of June then the said sum shall be ascertained as soon as thereafter may be possible as if such sum had been ascertained up to the Thirtieth day of June aforesaid) commencing on the Thirtieth of June next but not more frequently than once in every yearly period computed from the First day of July to the Thirtieth day of June next following PROVIDED THEREFOR and IT IS

HEREBY AGREED that the Lessee shall (if required by the Lessor) with every half- yearly payment of rent pay to the Lessor such sum on account of the Service Charge payable by the Lessee under this clause and the Lessor's Surveyor shall certify the first of such payments being payable on the signing hereof as being a reasonable interim sum to be paid on account of the Service Charge and that the Service Charge payable by the Lessee hereunder (or such balance as shall remain after giving credit for any half-yearly payment as foresaid) shall be so repaid to him on the Twenty Fifth day of December next.....

6. AND THE LESSOR HEREBY COVENANTS with the Lessee:-  
(4) To keep the roof external walls foundations and mains structure of the Buildings in a good and thorough condition of repair and in good weatherproof condition and also to keep the Retained Parts in good repair

THE FIRST SCHEDULE before referred to  
(Costs expenses outgoings and matters in respect of which the Lessee is to make a contribution)

3. The cost of keeping in repair maintaining cleaning decorating and renewing when necessary the Retained Parts and the roof external walls foundations and main structure of the Buildings and all conduits pipes wires ducts carrying or conveying gas water electricity television ventilation and sewage and surface water (both inside and out) or any similar service

7. Such sum or sums from time to time as the Lessor's Surveyor shall consider desirable to be retained by the Lessor by way of a reserve funds as reasonable provision for prospective costs expenses outgoings and other matters mentioned or referred to in this Schedule”

14. There is a clause which covers the work to gutters and drainage and one which covers painting every five years but as that work is agreed, it is not recited, although the painting requirement was touched on in oral evidence.
15. The relevant Management Order was made on 21st August 2017. The terms of that Order include the following:

**“Interpretation**

In this Order:

b) “Functions” means functions in connection with the management of the Premises and this Order including any obligations and powers of the Respondents under the Leases

2. For the duration of his appointment the Manager shall have the power to raise demands of the Lessees on account of the service charge for the current year in addition to any estimated

contribution to any reserve funds and any annual balancing charges. Demands are not required to be raised in accordance with the Lease. Until 30 June 2018, demands may be raised quarterly on account for such sums as the Manager thinks fit; from 30 June 2018 an annual budget shall be prepared by the Manager., The budget and accounting information required under Clause 4.2(1) of the Lease does not require certification by a surveyor unless the Manger thinks fit. Demands may continue to be raised quarterly or half- yearly as the Manger thinks fit.

4. For the duration of his appointment the Manager shall carry out the management obligations of the [landlord] in accordance with the provisions of the leases and in particular and without prejudice to the generality of the foregoing

- i. The [landlord's] obligation to provide services;
- ii. The [landlord's] repair and maintenance obligations.

7. The Manager shall manage the Premises in in accordance with:

- ii. All statutory requirements, including those set out in the Landlord & Tenant Act 1985

### **Schedule Functions and Services**

15. In addition to undertaking and arranging day- to day maintenance and repairs to arrange for the supervision of major works which are required to be carried out to the Premises (such as extensive interior or exterior redecoration or repairs required to be carried out under the terms of the Leases or other major works where it is necessary to prepare a specification of works, obtain competitive tenders, serve relevant notices on the lessees and [landlord] and supervise the works in question).

### **Fees for additional services**

3. Instructing surveyors solicitors architects or other appropriate persons in the preparation of specifications or schedules of work, obtaining tenders and contract administration for works, fees at the rate of 5% plus VAT and disbursements on any works over £1750 but excluding the fees of any architect, surveyor or other appropriate person instructed in the preparation of specification and schedule of works , such fees to include where required the preparation and service of any notices pursuant to section 20 of the LTA(as amended).

16. For the avoidance of doubt, neither the Lease nor the Management Order give the landlord and/or the Applicant the power to recover service charges for the cost of improvements.

## LAW

17. The relevant statutory provisions are appended to this Decision.
18. There are innumerable case authorities in respect of service charge disputes. Copies were produced of most of the case authorities referenced by the parties, principally Ms Seal, and a number of those to which reference was made by Ms Seal relate to the question of replacement as against repair. Two relate to costs. The remainder principally related to the question of reasonableness of a given approach and or cost.
19. It is not proposed to recite the full list. However, examples of relevant authorities for the purpose of this Decision and the key points are set out below:

*Holding and Management Limited V Property Holdings and Investment Trust PLC [1990] 1 All E.R.938*

*The test to adopt in deciding whether or not particular works can be regarded as repair depend on the context in which repair appears in the lease, the defect and the remedial works propose and various circumstances listed, the weight to which will vary from case to case.*

*Forcelux v Sweetman [2001] 2 EGLR 173*

There are two elements to the answer to the question of whether the cost of any given service charge item is reasonably incurred, namely

- i. Was the decision-making process were reasonable; and
- ii. Is the sum to be charged reasonable in light of the evidence?

The second element was stated to be particularly important.

*Lord Mayor and Citizens of Westminster v Fleury and Others [2010] UKUT 136 (LT)*

The first element principally involves a consideration of whether the proposed method is a reasonable one in all the circumstances, even if other reasonable decisions could have been made. However, that is not a complete answer to the question and other evidence should be considered.

*The London Borough of Hounslow v Waaler [2017] EWCA Civ 45*

The process is relevant but to be tested against the outcome. The fact that the costs of the work will be borne by the lessees is part of the context to whether the costs have been or will be reasonably incurred and interests of the lessees must be conscientiously considered and given the weight due, although they are not determinative- the lessees have no veto and are not entitled to insist on the cheapest possible means of fulfilling the landlord's objective.

Waller importantly distinguishes between costs of repairs and costs of improvements (the case concerning improvements) and the circumstances of the lessees being of greater import in the latter than the former.

*Garside v Taylor* [2011] UKUT 367 (LC)

The nature and location of the property and the amount demanded in previous years, in particular any significant increase and the financial impact on the tenants are relevant to the question of whether costs have been reasonably incurred. So too is the degree of disrepair and the urgency or otherwise of work being undertaken.

20. Different decisions have quite properly been reached as to the appropriateness of repair on the one hand and of replacement on the other in different cases. The correct answer to the question is fact sensitive. The question can only be answered by considering all of the evidence relevant in light of the provisions in the Lease.
21. It can briefly be noted that in the absence of a particularly complex legal point, which there was not, the production of so many case authorities are unnecessary and not especially helpful.
22. That said, none of the parties referred to *Plough Investments v Manchester City Council* [1989] 1 EGLR 244. That authority is of relevance and has been referred to in other authorities cited. The most notable points in the context of this case are that the lessees are not entitled to require the landlord to adopt a minimum standard of repair, the choice being the landlords' provided it is reasonable, but on the other hand, the lessor could only recover for what were truly repairs. That assumes of course no provision in respect of improvements, although it has been said there is no bright line.

#### **THE PARTIES' WRITTEN CASES**

23. The written cases of the parties were set out extensively in the Statements of Case, in witness evidence and in Skeleton Arguments, which on behalf of the Applicant and Ms Akorita could scarcely be described as skeletal. Given the extensive closing submissions, summarised below, it is unnecessary to set out the Skeleton Arguments at any length. Indeed, as all of the documents relied on are contained in the Bundle and total a substantial number of pages, it is not practical to do more than touch on them in this Decision. Where relevant, they are referred to in respect of the findings made and in the application of the law and contractual provisions.
24. The Applicant's position in respect of the matters in dispute was essentially:
  - i) The Applicant's position was neutral in respect of the nature of the roof works required, highlighted for emphasis in the Skeleton Argument served on the Applicant's behalf;



- ii) The Applicant's surveyor advised in favour of replacement of the roof and it is prudent and reasonable to replace the roof in light of the expert surveying evidence received by the Applicant;
- iii) The Applicant did not wish to incur cost not recoverable from the lessees, not least given his position as Tribunal- appointed manager and lacking any proprietary interest;
- iv) The Applicant followed a reasonable process, including the consultation process followed and tendering.
- v) The indemnity letter, as termed, was a reasonable step to take.
- vi) Progress was delayed by an application in 2018 by Ms Akorita to replace the Applicant as manager.
- vii) No definite agreement to defer works was reached in 2019.
- viii) As per Mr Pocock's expert evidence in respect of the major works.
- ix) £42,750 had been demanded in respect of major works across the service charge years 1st July 2018 to 30th June 2020.

25. The essence of the written evidence of Mr Pocock MRICS of Infinity Surveying Ltd, the Applicant's expert, spread across a number of documents sent to the Applicant or produced for this application, but culminating in a written report dated 13th May 2020 and the joint report, was as indicated above in the summary of the Applicant's case where that refers to works and further that:

- a) the roof covering was near the end of its life with the bulges to the felt layer indicating that there may be water penetration;
- b) some of the felt is dried out, blistered and cracking;
- c) patch repairs were possible but with some concern how good that would be in the long term and concern the chippings may present difficulties;
- d) Mr Pocock considered in June 2018 that it was likely that the roof would leak within 1 to 2 years, subsequently amended to within 1 to 5 years, and that patch repairs would be vulnerable to water ingress;
- e) The roof is not in immediate need of replacement but the replacement of the flat roof was the most cost-effective approach, at an initially budgeted cost of £34,000 plus VAT plus fees (approximately half of the budget for the major works as whole);
- f) ongoing repairs would otherwise cost approximately £2500 plus VAT per year or more if significant difficulties arose and concern as to safety in undertaking the works, particularly if the roof deck were strammit;
- g) a core test would enable the construction of the roof to be established and check whether moisture was present in the insulation or elsewhere;
- h) water leaking would support his proposed approach;
- i) scaffolding being erected, itself nearly a quarter of the budgeted cost for the major works (£15,000 plus VAT plus fees), should be utilised;
- j) the pointing to 3 elevations is required and is all urgent;
- k) so too the balcony works, with the lead needing replacing rather than repair certain work not in the original specification of works being required, namely 5 balcony balustrades being insufficient supported and close to failure; and
- l) there was little merit in phasing work where scaffolding would be erected to 3 elevations and could be used for the other works, so it is not appropriate to phase the works.

26. A tender process was undertaken by Mr Pocock at the request of the Applicant in respect of the roof replacement and other works, pursuant to a Schedule of Works as described dated April 2018 and resulting in a Tender Report dated October 2018 and the lowest quote being received from GT Roofing of the £69,180.00 inclusive of VAT of which £35,710.00 plus VAT (and fees) related to works other than the roof replacement, although that figure assumes scaffolding cost to be the same irrespective of the undertaking of, or extent of, roof works. Reference is made in late 2019 to a revised tender reply being sought from GT Roofing excluding roof replacement works and Ms Akorita mentions one in her statement of 5th June 2020, with a slightly lower figure of £34,370.00, excluding VAT and fees. There was no revised quote contained in the Bundle but one was provided attached to an email sent in prior to the hearing and admitted in evidence. That gave an overall for the works other than roof replacement as £34,370.00 plus VAT (and fees).

27. The essence of the written evidence of Mr Nyss MRICS MFPWS of Clarion Surveyors, Ms Akorita's expert, was reflected in the position adopted by the active Respondents and was set out in a few documents, including a report and the joint report from May 2020. In essence, Mr Nyss said that:

- a) the roof is in a serviceable condition, although bulges were accepted;
- b) there is a need to clear significant moss growth and to undertake some maintenance work and patch repairs;
- c) the roof does not need to be replaced and with maintenance should last several years, potentially more than 10 years;
- d) some previous repairs to the roof could be seen;
- e) the roof deck is probably made of chipboard;
- f) patch repairs and maintenance can be undertaken safely;
- g) the balconies are in generally good and structurally sound condition although in need to some rust treatment and the asphalt does need work although not urgently, not leading to damp;
- h) one balcony lead is split but can be repaired and would be more cost-effective, although replacement is not illogical, further the work can wait;
- i) there is pointing required broadly as indicated by Mr Pocock but not all urgent;
- j) the work could be overtaken over a period of time, although costs of access to the areas in need of work should not be repeated.

28. The Respondents, save for Mr Hayes who took no part in the proceedings, essentially advanced the following points beyond the expert opinion of Mr Nyss:

- i) Patch roof repairs would cost in the region of £1800 plus VAT);
- ii) The contractor chosen by the Applicant was not the appropriate contractor to undertake the works and instead a much lower quote from a contractor proposed by Ms Akorita should be accepted;
- iii) The works should be phased, affordability being Mr and Mrs Cooper's particular argument in addition to being argued by the other active Respondents;

- iv) The Applicant had agreed deferral of the roof replacement at the meeting held on 15th August 2020;
  - v) the need or otherwise for some repairs to the balconies were not accepted; and
  - vi) The Applicant had not followed a reasonable process.
29. Other disputes about works which had previously been raised, in particular by Ms Akorita, were not continued with after the opinion of Mr Nyss was obtained.
30. Ms Akorita sought to advance a wider attack on elements of service charge claimed than formed part of the Applicant's application. However, that was dealt with as a preliminary matter prior to evidence being given and was not allowed, so no more need be said.

### **EVIDENCE GIVEN AT THE HEARING**

31. The Tribunal heard oral evidence from the experts for both the Applicant and Ms Akorita namely Mr Pocock and Mr Nyss. In addition, oral evidence was given by the Applicant and by Ms Akorita. There were no questions asked of Mrs Cooper. All of those gave written statements.
32. The Applicant, giving evidence first was questioned until the, reduced, lunch break. He gave brief evidence in chief and indicated that he understood his duty to maintain the Building but also the lessees' concerns as to cost. That was re-iterated in response to cross-examination, although he observed that the cost would be greater if repairs were undertaken but the roof later failed. He accepted that the Respondents had agreed in 2019 to defer works but stated that then the indemnity to him against a claim had not been signed.
33. In response to cross examination by Ms Seal, the Applicant accepted concerns of the Respondents as to cost and phasing and explained why he would not consider the quotes given to Ms Akorita were appropriate to accept, including the implication that they had not undertaken high cost work. The Applicant was taken by Ms Seal through a number of figures where the costing by GT Roofing (the contractor whose tender was the lowest of those who did tender and with whom the Applicant intended to contract) was higher than that of Ms Akorita's proposed contractors and through previous years' service charge figures, which was all clear from the documentation and where the Applicant was asked to confirm matters already apparent. The Tribunal anticipated the line of questioning would lead somewhere else, although it did not.
34. It was accepted by the Applicant that a further meeting about potential deferment of the roof works did not take place. It was, inevitably, accepted that stripping out roof replacement works would reduce the cost considerably. He stated that the advice given to him was that the works could not be phased because the condition of the pointing to three elevations was so poor and that scaffolding cost would be several £000s. Although he accepted that duplication of scaffolding costs if the roof was not now replaced was not certain, he doubted that external work would take place

involving scaffolding after the pointing was attended to within 5 years, where rook leaks within that time were considered likely. The Applicant expressed concern as to whether repairs could safely be undertaken without scaffolding and noted the ongoing cost of repairs. The Applicant expressed concern that the roof could fail if not replaced and he may be mired in litigation with Respondents, bearing in mind history. He repeated a number of times during cross examination and re-examination that his approach reflected surveyor advice.

35. The Applicant was asked about the taking of a core sample. He stated his understanding that Mr Pocock would have found one helpful but he understood it would not alter the advice. The Applicant was also asked whether his fee of 5% of the cost of the works produced a conflict, to which he replied that it only did if he let it affect his approach. He accepted that there had been repairs works prior to his appointment.
36. In re-examination, the Applicant stated that he had approached a contractor suggested by Ms Akorita, who had declined to tender. He stated that the indemnity letter was an attempt to find an acceptable basis on which to not replace the roof and that nothing had been decided prior to that, rather he had an open mind. In terms of phasing, the Applicant stated that the walls needed the pointing and balconies were dangerous. The Applicant also stated that he had other appointments as manager, was aware of his obligations and had sought to explain his approach to the Respondents.
37. Further questions were put by Ms Akorita, in response to which the Applicant agreed only certain areas of the roof required attention and accepted that he had not organised any routine repair of the roof or use of fungicide, expressing concern about the lack of fall protection. It was put to the Applicant that there had been full scaffolding in 2018 and work could have been undertaken then.
38. Additional questions were put by Mrs Cooper as to why balcony repairs had not been carried out, the answer given to which was that it required scaffolding and was part of the intended work. Finally, a couple of questions were put by Mr Robinson FRICS, in response to which the Applicant stated that there was not much money in the reserve account and that not a lot had been paid in response to demands made.
39. Mr Pocock gave the next evidence and was first cross-examined by Ms Seal, starting with the bulges to the roof. Mr Pocock said that there are 4 bulges and dealt with the location of them. He said were normally indicative of a problem, usually caused by water, and although three such could be caused by scaffolding, one was set back from the edge. Mr Pocock also accepted that there could have been water trapped when the roof was installed but doubted that. He did accept the bulges were mostly to capping pieces and water would be likely to cause bulge to the roof not the capping. The drip edges were described as not well bonded. Mr Pocock accepted the roof felt is not worn through.

40. Mr Pocock did not entirely accept the areas of repair to be small, considering there to be 4 bulges, 3 or 4 drip edges and cracking of previous hot bitumen repairs. He considered the previous repairs indicated that there had been leaks but accepted there were none visible when he inspected the interior of the top floor flats in March 2019. He also accepted that if the roof is soft that is normally a good indication of defects and the defective areas were not soft. Mr Pocock accepted that he had changed his view as to how long the roof would last, describing it as not an easy situation but stating the roof had been in place for a long time for a roof such as this and maintained it to be “risky” not to replace the roof “quite soon”. He also expressed the opinion that given the loose chippings to the roof, it would be difficult to get a bonded seal on patch repairs. It was put to Mr Pocock and agreed by him that replacement is not urgent now but given the scaffolding to be erected it would, he considered, be sensible to undertake the work now.
41. Ms Seal also questioned Mr Pocock as to safe access for repairs. Mr Pocock was troubled as to the capability of the roof to deal with the equipment necessary to stop a man falling. Questions then moved on to the core test, Mr Pocock noting he had suggested that in order to provide better information, observing that test or not the roof would get no younger but that if the plywood roof deck had been found solid, he would have less concern even if insulation were wet and there would be less risk. It was accepted by Mr Pocock that work could be phased but he would argue against that and that the pointing to all 3 elevations requiring such work and the balcony would need to be undertaken in the first phase of any phased work. He considered the fact that the work could be further split and that it would spread the financial burden did not render that appropriate.
42. Mr Pocock stated that leaning on the balcony balustrades caused them to move and gave his opinion that they needed to be removed and bolted up, stating that the current bolts are “on the way out”. He was finally cross-examined about the level of his fees and responded that 10% was the industry standard.
43. Mr Pocock was then cross-examined by Ms Akorita, initially about meeting minutes, replying that he did not make any decisions but provided a revised specification when asked to. He clarified that any replacement roof would have to meet current Building Regulations. Essentially further questions and answers covered the same evidence as given previously about safe access, the age of the roof and risks.
44. There were no questions from Mr Cooper but a number from the Tribunal. Mr Pocock stated that when a roof starts to leak, it normally has bulges and that bitumen dries out in the sun creating crazed cracking. He did not consider the capping to be original. Mr Pocock could not say about the roof layers. He considered that there would be roof leaks in 1 to 5 years’ time. He considered it difficult to eradicate moss, which holds water, including because the roof was brittle.
45. Mr Nyss then gave evidence and was first questioned by Mr Barnes about the nature of his report, saying that it was as requested by Ms Akorita,

although it was established that there was a subsequent report. Mr Nyss expressed the opinion that there was no fundamental wear and tear to the roof save for missing chippings and no significant change year to year. He considered that whilst the roof is old and would need replacement at some point, there was no need at this moment. It was put to him that one key issue was the lack of a core sample but he did not consider one should be undertaken for the sake of it and the core sample may affect the approach to a fall arrest system but not the position with repair/ replacement, it being possible to argue for only repair even if the core revealed a leak, although he couldn't see water penetration anywhere. Mr Nyss said there were many types of fall arrest system and for the contractor to decide how to work safely. The repair work to the roof could, he said, be completed in a day.

46. Mr Nyss considered the bulging to be physical damage and the lifting areas to still be bonded underneath. His view was that the roof was felt on chipboard (not stramite as suggested), from the solidity based in walking on it several times- he had been on the roof once per year and several times in the course of the proceedings- and that it was designed to take weight and highly likely to have been designed to be able to be walked on.
47. Mr Nyss accepted 100 square metres of pointing to be "pretty bad" and that it needed to be undertaken "immediately" to the east and west elevations, although the south elevation was not as bad. He said that he took a different approach to the balcony works to that of Mr Pocock but the approach of Mr Pocock was not unreasonable. He concurred that lengths had split. Mr Nyss said that the feet to the balcony rail had never been fixed down. There had, he said, been a problem with the balcony to Flat 7 in 2013 and it was too springy, support being needed to stop that. The overall works could, Mr Nyss stated, be staged and there was not much immediate but work should be grouped together as best possible to avoid duplicating costs. He had not previously expressed a view on staging.
48. Mr Nyss agreed that the tender had been approached in a normal and fair way, that he would have done the same and that he would not necessarily recommend the cheapest contractor, being quite selective about contractors, tending to do with a contractor he had previously dealt with or where there was evidence of work done and indicating the importance of the work being done properly and on time.
49. In response to questions from the Tribunal, there being none from the other advocates, Mr Nyss expanded on his opinion that the blistering was impact damage from scaffold tubes. Mr Nyss accepted that where other works were being undertaken an approach of renewing the roof and saving money was a reasonable course of action. In response to a question about what approach should be taken if patch repairs were carried out and there was water penetration, Mr Nyss expressed the opinion that it would be reasonable to do either of replace the roof and repair and maintain it. He said that the roof should be looked at year on year with fungicidal treatment and re-spreading of the chippings, which he did not accept created risk of damage to the roof covering.

50. Finally, evidence was given by Ms Akorita, who said twice that it was her case that she did not have to pay for the major works as the work had not been undertaken and she asserted that she had paid monthly other than for the major works. She did not accept that the Applicant was entitled to take expert advice. Questions were asked about access to the top floor flat owned by Ms Akorita but nothing of substance resulted. Questions were then asked as to Ms Akorita's means, in response to which Ms Akorita did not accept having been evasive as to the properties owned by her. She said that it was not that she could not afford the cost of works but that she considered the price was excessive and she said her share would cause financial hardship.
51. Ms Akorita accepted in evidence the undertaking of all of the major works in the schedule but not the cost of those. Several questions were asked about other quotes provided by Ms Akorita and her approach to those. She said that the timing of those reflected the deferral of works which she perceived being agreed in August 2019. She wanted a local builder with lower overheads to complete the works. Ms Akorita stated that the lack of funds paid towards the works was a situation of the Applicant's making because of going back on his word in late 2019. It was put that the Applicant could not know of her preference at the time of the consultation, given the quotes were much later. Ms Akorita also said that there was insufficient time for the works to be dealt with before the end of the management order because the Applicant had dithered.
52. Ms Akorita asserted that the Applicant had failed to respond to her queries and referred to the deferment agreed. She expressed the opinion a number of times that the Applicant had gone back on the agreement. She stated that if the management of the Building reverted to her, she would simply maintain and would phase works. She said that there was no evidence of the roof leaking and she accepted getting the rest of the building repaired. In response to questions, Ms Akorita said that the reason that she had not agreed to the indemnity was a lack of reply to a letter by her and photos which she said showed a hand lifting part of the roof, which reasons she did not accept as trivial.
53. The evidence concluded with brief re-examination of Ms Akorita and questions from Mrs Cooper. In respect of the latter, further reference was made to the August meeting. In respect of the former, Ms Akorita now said that she could not afford her contribution to the major works, being unable to re-mortgage and that rent received in part paid the mortgage and in part paid private school fees.

## **CLOSING SUBMISSIONS**

54. The "Applicant's Written Submissions" are 15 pages in length and deal with matters taking each of the key issues previously identified in turn. They make the uncontroversial point that the Building requires repair but also that none of the Respondents assert that the works proposed go beyond the repairing covenant (which does not appear to be correct). Implicitly, the Applicant's representative contends that the works in dispute do all fall within the repairing covenant.

55. The Submissions make the point that Ms Akorita in oral evidence accepted all of the items of work, apparently therefore including the replacement of the roof. The Applicant's representative asserts that is the end of the case of the Respondents as to what he describes as the "need" to replace the roof. However, they then move on to argue that the process followed by the Applicant was reasonable as was the amount charged. In doing so, it is stated that a decision to replace the roof was one of a range of reasonable decisions which could be taken.
56. It is accepted on behalf of the Applicant that neither surveyor could see evidence of water ingress and the Closing refers to a core sample being required to determine the presence or absence of water ingress. Criticisms are made of Ms Akorita for refusing to agree to a core sample, where that would have assisted Mr Pocock in advising the Applicant. It is submitted that neither surveyor could predict the remaining time for which the roof would be effective. Nevertheless, the Submissions accept that neither surveyor regarded the roof as "critically endangered".
57. The Applicant observes that the unchallenged evidence of Mr Pocock was that ongoing repairs would cost £2500 plus VAT per annum. Comments are made as to safety and the need for a suitable fall arrest system. The Submissions continue by arguing that the works to the Building should not be phased, relying on the evidence of Mr Pocock that phasing would lead to such increased costs, and the apparent acceptance by Mr Nyss in those terms.
58. In relation to the cost of roof replacement, the further particular points made are that Ms Akorita could pay for her share of the service charges for that cost, albeit her witness statement had said that she would face financial difficulties, and that the Applicant had followed a tender process, deciding on a suitable- and the cheapest- contractor based on that, such that more recent, since the tender process, lower quotes were not from contractors it was reasonable to instruct. Finally, submissions were made about the "indemnity letter" written by Mr Barnes on behalf of the Applicant in relation to which it was suggested that the reasons given for the failure of Ms Akorita to accept the proposal were poor.
59. The Closing Submissions of Ms Seal for Ms Akorita were 18 pages long. Those firstly made various criticisms of the consultation process, arguing against a reasonable process having been followed, with particular reference to the sequence of events and the indemnity letter and the asserted inappropriateness of that. Ms Seal argued that the Applicant had failed to adequately consider the phasing of works, including in respect of pointing works and had been unreasonable in refusing to consider the further contractors instructed by Ms Akorita. It is argued that the costing of the chosen contractor is unreasonable as compared to the contractors who gave quotes to Ms Akorita rather more recently.
60. The Applicant is then criticised for not taking a neutral approach to the roof works and for preferring replacement, by way of following Mr Pocock's



advice. The submissions move onto Mr Pocock views, described as firm, that the roof be replaced. The Applicant is criticised for not properly weighing the upsides and downsides of different approaches. It is argued that his lack of neutrality affected the consultation process.

61. In relation to the roof, Ms Seal highlights the lack of evidence of the roof leaking and its general satisfactory condition, together with the acceptance by both surveyors that immediate replacement is not needed. She asserts that, in part relying upon his greater familiarity with the roof over several years, the evidence of Mr Nysss should be preferred over that of Mr Pocock including that the cause of the bulges is more likely to be scaffolding pressure and not water penetration, noting the position of the bulges to the perimeter of the roof and Mr Pocock's acceptance that scaffolding may have been the cause of two. It is asserted that the theoretical lifespan of the roof is not relevant, that deterioration is minimal and that patch repairs would be economic together with other maintenance. Further, that the evidence of both surveyors is that repairs could be undertaken safely.
62. Ms Seal revisits certain of the authorities advanced in her Skeleton Argument as to patch repairs against replacement, although it is unnecessary to say more about those in this Decision, save to note that she finds support for Ms Akorita's case in examples of cases where roofs were replaced being ones where the condition was worse and that there were patch repairs in cases she asserts to be similar. Brief argument is then advanced in relation to other works, stating the view of Mr Nyss that the pointing work, accepted as urgent, should be undertaken first and asserting that other works should be dealt with over a period of years, including work to the balcony rail, which is denied to be urgent, as being firmly attached and the subject of previous work.
63. The final 2 matters covered are the financial impact of the work and the costs of the specific contractor. In relation to the former, Ms Seal highlights the increase in service charges as compared to previous years, which is not she says a consequence of previous failure to maintain, and refers to the resources of the Respondents. It is suggested that Ms Akorita could afford £14,000 but not 5/7th of the £79,557 overall costs of the proposed works (although 3 of those 5 would be shared with Mr Burkin and not payable by Ms Akorita alone). The lack of challenge to Mrs Cooper and Mr Burkin's evidence as to limits to resources is noted.
64. Ms Akorita's closing submissions on behalf of the freeholder and Mr Burkin added a further 12 pages. She starts by mentioning the terms of the management order and the leases, asserting the works to go beyond those because of the wording "renewing when necessary". She refers to certain of the specific wording later in the Submissions, as has been set out above. The Submissions repeat the assertion that it is agreed [by the surveyors] that the roof is not leaking or in need of immediate replacement. Reliance is also placed on *Hyde Housing Association v Williams*, an example of a case where the roof covering was found not to have reached the end of its economic life and patch repairs were found sufficient to address the areas of leaking. The Tribunal also understands Ms Akorita to assert replacement of

the roof to be an improvement not provided for in the Lease, rather than falling within repair or similar.

65. The submissions note the matters accepted and not accepted by those represented by Ms Akorita, in respect of which there is a dispute about the works to the roof and some of the exterior decoration works but not about any other works, albeit some of the costs are said to be too high. Whilst the cost of work to the balcony is said to be too high, there is no dispute noted about the need for the work in itself. However, Ms Akorita later relies on the evidence of Mr Nyss as to the balcony not being in a dangerous condition in such a way as to imply that Mr Burkin and the company do not accept the work is needed- the position is not clear.
66. Ms Akorita contends that the works required can be phased without that causing any breach by the Applicant and should be, setting out 2 phases of work proposed by her, neither of which include replacement of the roof, and which proposes scaffolding to different elevations and different parts of the roof works, as well as other works, in different phases. A separate point is made as to staged payments to the proposed contractor. The asserted agreement to defer the roof works, prior to the indemnity letter, is said to be relevant and used as a basis for asserting lack of neutrality on the part of the Applicant. The final comments about the roof made are that the Applicant has not, it is said, regularly maintained it, including not attending to the moss.
67. The submissions raise a specific issue as to the fees to which the Applicant is entitled. The Tribunal comments about it below. Ms Akorita suggests that she has lost confidence in the Applicant.
68. Mrs Cooper limited herself to a page plus 2 pages of appendices. The latter consisted of correspondence between the Applicant and her. She says that Mr Pocock would have recommended the replacement of the roof irrespective of the outcome of the core sample and contends that the Applicant always intended to replace the roof. She expresses concern about unsafe balconies and she complains of a lack of urgency in addressing those. Mrs Cooper finally criticises the consultation process, in particular the indemnity letter, asserting an agreement to defer work had been reached.

## **FINDINGS**

69. The Tribunal makes findings of fact following consideration of the oral and written evidence received from the expert and other witnesses. The Tribunal finds the following facts relevant to its decision and in doing so does not seek to recite every last matter where not directly relevant to the decision made:
  - a) The roof is not currently known to be leaking and there is no identified evidence of water penetration to any of the flats in the Building.
  - b) A core test or other investigation of the roof layers would have assisted considerably in making the answer to the question of the rook leaking or not clearer, at least in the area of the core test.

- c) The weight of available evidence is against there being any, or any more than a marginal, leak into the roof layers.
- d) There are issues with the condition of the roof, including what has been described as “bubbling” and “bulging”, which would be consistent with water ingress into the roof construction.
- e) It is unlikely that such was caused by pressure from scaffolding.
- f) The areas of the roof affected by “bubbling” or “bulging” do require work.
- g) If the roof is not replaced, ongoing repair work will be required and is likely to average out at in the region of £2500 plus VAT per annum, within which cost any allowance would have to be made for an appropriate fall arrest system.
- h) The roof can, on the evidence provided, be safely repaired, albeit that there may well be weather conditions which render repair unsafe for the duration of that. How best to achieve safe repair and what impact that may have on cost, is a matter for specialist roofing contractors.
- i) No maintenance of the roof has been undertaken on behalf of the Applicant during the period of his appointment, although there is no evidence of obvious detriment caused, save for the accumulation of some moss in itself, given the lack of evidence of water penetration and the modest change year to year identified by Mr Nyss, whose evidence on that matter is accepted.
- j) The Applicant did not intend to replace the roof irrespective of the available evidence from the outset of his appointment.
- k) No final and binding agreement to defer replacement of the roof was reached in 2019, although the matter was discussed and the Applicant would have agreed to patch repairs only if his fears as to the risk of problems arising and consequent litigation had been allayed.
- l) Patch repairs could, as Mr Pocock opined, be vulnerable to water penetration but there is insufficient evidence as to the likelihood or otherwise of that and the impact and further to later steps which may be taken in the event of apparent water penetration, to make any finding about such vulnerability or the significance of it.
- m) The Tribunal finds that at some stage during the next several years, replacement in full is very likely to be required. Whilst at any time from now until then, it is not beyond the realms of possibility that a catastrophic failure of what is an old roof could occur, there is no evidence that is more than a possibility for the foreseeable future, which risk may be reduced by appropriate repairs and maintenance.
- n) The pointing to 3 elevations is in a very poor condition and long overdue. There is a real risk of water penetration and/or other damage unless that is addressed swiftly.
- o) The pointing work will require scaffolding to the 3 relevant elevations. It may be that can be utilised for the patch roof repairs, assisting safe repair and that should be considered.
- p) The balconies need to be made safe such that there can be confidence in that safety: the lead should be replaced not repaired.
- q) A proper and reasonable tender process was followed by the Applicant.
- r) It was entirely reasonable for the Applicant to intend to proceed with GT Roofing, in light of the tender process followed. It will be entirely

appropriate to proceed with that contractor for such work as should be undertaken, save the roof works as explained below.

- s) It was reasonable for the Applicant to reject quotes which were provided well after the consultation process had completed, not least because Ms Akorita had been given ample time to obtain quotes during the currency of the process had she chosen to do so.
- t) The requisite repair works will not be undertaken, and indeed cannot be undertaken, until such time as the Applicant is in funds.
- u) Ms Akorita has or is able to obtain the resources to pay her share of the major works if she wishes to.
- v) The Tribunal does not make any finding about Mr and Mrs Cooper, lacking sufficient information to do so, although notes that their flat in Marina Heights is not their home and rather is tenanted, from which the Tribunal finds they derive an income.

70. Applying its expertise to those factual findings, the Tribunal finds much to be said for the replacement of the roof at this time. The advice given by Mr Pocock in favour of replacing it was not unreasonable, as indeed Mr Nyss accepted in oral evidence. A decision that the roof should be replaced would not, of itself and leaving aside the additional considerations as to whether the cost should be recoverable, be an unreasonable one.

71. However, the Tribunal finds that patch repairs would be sufficient to deal with the current issues with the roof and there is no evidence on which it can properly be concluded that greater issues will arise at any given time in the future, still less in the particularly near future. There is insufficient evidence for any conclusion to be reached that repairs to the roof would not be safe. It is more likely on the evidence available that the roof deck is made of chipboard than strammit but the evidence one way or another is scant.

72. Whilst the roof is old and whilst it has exceeded its predicted lifespan, whether because of the quality of the original fitting or because of the subsequent efforts to maintain the roof, or most likely a combination of the two, on the available evidence the roof has not failed and once the specific issues identified above the roof are dealt with, the weight of evidence is that the roof would be in satisfactory condition for the time being.

## **APPLICATION OF THE LEASE AND THE LAW AND DISCUSSION**

73. There is something of a sparsity of submissions from the parties as to the relevant provisions of the Lease and the effect of those. Only Ms Akorita has made specific reference to an impact of the Lease terms. The others have adopted the position that the major works fall within the scope of the Lease and have centred arguments on reasonableness and as otherwise described above.

74. However, it is fundamental to the task of the Tribunal to establish the relevant terms and their effect. The parties were aware that the application was listed for final hearing and that the Tribunal would thereafter reach a determination. The parties were able to make such submissions, or not do,

as they saw fit. The Tribunal approaches the aspect with the benefit of such submissions as were made and applying its expertise.

75. The Applicant is entitled to demand service charges on account pursuant to clause 4(21) of the Lease in such sum as may be reasonable. Reasonable is to be considered in light of the budget for the relevant period, including the reasonable anticipated costs of work required to be undertaken to the Building which fall with the repairing obligations of the lessor, and are to be attended to, in this instance, by the Applicant as appointed manager. In the normal course, that reasonable sum would be the lessee's share of the entirety of the anticipated costs of those works. The Applicant is entitled to collect in the required funds prior to the works commencing and liability for payment arising, irrespective of any staging of payments for the work to be undertaken during the service charge year once commenced.
76. There is, the Tribunal considers, scope for a degree of confusion as to the provisions of the Lease and their effects. The wording contained in clause 6 (4) and in paragraph 3 of the First Schedule differ. The former refers to the landlord's obligation being "To keep the roof external walls foundations and mains structure of the Buildings in a good and thorough condition of repair and in good weatherproof condition and also to keep the Retained Parts in good repair" whilst the latter refers to contribution by the lessee to "The cost of keeping in repair maintaining cleaning decorating and renewing when necessary". Nevertheless, it is paragraph 3 of the First Schedule which sets out that to which the lessees must contribute.
77. Indeed, paragraph 3 of the First Schedule in itself is less clear than may be ideal. As so often the case with the drafting of leases, there is no punctuation in the entire 5-line clause. Consequently, it is less clear than it might be as to whether the clause intends to refer to "maintaining, cleaning, decorating and renewing" all "when necessary", or whether it intends to refer to "maintaining, cleaning, decorating" and to "renewing when necessary". It is also not entirely clear how "keeping in repair" fits with the wording which follows and whether that is also "when necessary" or not.
78. However, "keeping in repair" most sensibly reads as a requirement in itself. Similarly, if "maintaining cleaning decorating" as well as renewing where all "when necessary", indeed "keeping in repair" potentially the same, that could easily have been made clear by expressing the clause as "The cost of when necessary keeping in repair maintain cleaning decorating and renewing" or "The cost of keeping in repair and when necessary maintaining cleaning decorating and renewing".
79. The Tribunal considers that by its position and by the nature of the different requirements, "when necessary" relates specifically to "renewing". It is the "renewing" of the elements provided for "when necessary" which is to be contributed to. However, the renewing is not required to be contributed to otherwise than when it is "necessary". The cost of the other works listed must also be contributed to.

80. Consequently, the Tribunal determines that the bargain entered into by the freeholder, whose role the Applicant has taken on in such matters, and the lessees was that the Building would be maintained, repaired and so on. Further, when such maintenance and repairs were insufficient to address the condition of the Building or the given part of it, and it was therefore “necessary” to do so, the given part of the Building would be renewed.
81. Such given parts plainly include the roof. Whilst the parties have referred during this application to, or predominantly to, the replacement of the roof rather than the renewal of the roof, the Tribunal finds those words to mean one and the same in this context.
82. The Tribunal therefore finds that the effect of the Lease is that the lessees must make a contribution to the renewal of the roof when that is necessary, but not otherwise. If work less than the renewal of the roof is necessary, the lessees’ obligation is to contribute to that lesser work but not to contribute to renewal. The Lease could have allowed for recovery of the costs of improvements but does not do so.
83. The Management Order does not extend the obligations of the lessees to contribute to costs through the service charges and so adds nothing to the provisions of the Lease for the purpose of this application.
84. The answer to the question of whether the replacement of the roof, the principal item of work in dispute, is an item to which the Respondent lessees must contribute pursuant to their leases by way of service charges is consequently a relatively simple one.
85. The Applicant’s case is not advanced on the premise that the replacement of the roof is necessary, rather on the advice given by the Applicant’s surveyor, it is a reasonable approach to take, for the reasons advanced on behalf of the Applicant. The Respondents’ apparent assertions that the replacement of the roof is not even reasonable, albeit Mr Nyss accepts that it is, necessarily includes at least an implicit assertion that replacement is not necessary.
86. It is clear that on the findings made by the Tribunal, the Applicant is unable to demonstrate that renewal of the roof can properly be described as necessary at this time or in advance of a clearly identifiable significant issue in the relatively near future. Therefore, the replacement of the roof is not an item to which the Respondents must contribute at this time.
87. For the avoidance of doubt, whilst Ms Akorita apparently accepted in evidence the need for the replacement of the roof, subject to an issue as to the cost of the work being undertaken by the contractor chosen by the Applicant, the Tribunal does not find that such acceptance binds all of the Respondents and prevents them maintaining their arguments that replacement is not required. Hence, the issue remained a live, and fundamental one, and was not removed from the need for consideration. Neither does any acceptance by Ms Akorita alter the terms of the Lease.

88. Repair includes producing an improvement, and can include complete replacement, where the problem cannot otherwise be addressed. There is extensive authority about such considerations. However, that does not arise in this instant. Here, repair to the roof means just that and such repair must address the bulging and bubbling and any appropriate clearing of the moss and/or redistribution or addition of chippings as appropriate, together with any related works to the roof.
89. It consequently follows from the above that the question of whether or not the replacement of the roof is one of a number of reasonable approaches that could be taken in the absence of the specific wording of the Lease does not arise. There is no need to go beyond the provisions of the Lease and specifically determine a point which does not apply.
90. The cost of appropriate repair and maintenance to the roof is therefore payable, both now and on an ongoing basis as may be appropriate until such time as patch repairs and similar are no longer likely to be effective and there is no practical alternative to renewing the roof.
91. The defects to pointing mean that it is in considerable need of repair and no issue arises as to whether that work falls or does not fall within the maintenance and repairing obligations, nor indeed as to whether it is required. The only apparent issue was with whether that should be in the same job or could be split. The Tribunal considers that it is entirely reasonable that the Applicant decide it be undertaken in the same job with scaffolding erected to all 3 elevations to facilitate that and as soon as practicable, which the Tribunal notes is not anticipated to cost as much as scaffolding would have if also required for roof replacement but is likely on the evidence to cost the majority of that sum. There is nothing in the Lease, Management Order or the general law of direct impact on the approach to be taken.
92. In addition, the work proposed by the Applicant to be undertaken to the balconies is reasonable and so service charges for it are reasonable. The Tribunal is not confident that repair would suffice to the lead and concludes that replacement of the lead is necessary.
93. The work should be undertaken as soon as service charge funds allow and in conjunction with the pointing works, and patch repairs to the roof if appropriate (and the other agreed works to balconies), being the most economic approach and utilising the scaffolding in place.
94. Adding those costs and related scaffolding costs together and adding on the other agreed items within the specification of works, the cost of the works to be carried out at this stage will, including an approximation of roof patch repair costs, be approaching half of the figure for works which the Tribunal application related to.
95. The phasing of the major works is not considered by the Tribunal to be appropriate. The finding as to the nature of the roof works for which service charges are payable in accordance with the terms of the Lease and hence the

significantly lower costs for the roof work- and hence the costs payable overall- are of some relevance, although not the only consideration. The fact that the lessees have known for a considerable time now that work is required and that relevant demands were first made 2 years ago means there has been significant time for the Respondents to ensure that the demands for service charges found to be payable could be met. The active Respondents equally do not reside in the Building and the flats are investments and sources of income, shares of cost reflecting the number of such sources, Ms Akorita and/ or Mr Burkin also owning other properties.

96. In addition, the majority of the cost is for the pointing work and necessary scaffolding (most of which remains necessary- where the £1340 difference in the GT quotes for works excluding the roof may or may not be the difference in scaffolding cost), where the scaffolding is likely to be utilised for other work, which should sensibly be undertaken at the same time. The balance of the works is of modest cost and does not merit a phased approach, the fact that anything delayed and requiring access arrangements would have a much greater cost than other necessary arising from the cost of access, health and safety considerations more generally and scope for additional damage to the property all supporting that work not being delayed.
97. Equally, neither Mr Pocock or, more significantly, Mr Nyss, in oral or written evidence, pushed for phasing of works and both recognised the potential for increased costs. In those circumstances, delay to necessary works, with that potential for additional cost and also for damage arising in the interim is not appropriate.
98. That is subject always to the demands for payment of service charges to meet the costs being met by the Respondents. Plainly, the work will not be undertaken in the absence of funds. The lessees should sensibly ensure that the demands are met and funds are available, not only because of their obligation to do so but in their own interests.
99. It is correct for the Respondents to state that the service charge demands required to raise the funds for works required exceed those of previous years. However, that reflects the cost of that work, the appropriateness as found for that not to be delayed and the lack of a reserve fund to meet the cost of such works have previously accumulated. The argument does not assist the Respondents in this instance.
100. Without dealing with the point at length in the circumstances, the process followed by the Applicant was reasonable overall. The Tribunal does not embark on a forensic analysis. *Forcelux* itself did not do so. Reasonableness allows for a range of actions and should be taken in the round. A proper tender process was undertaken; it was entirely reasonable for the Applicant to seek expert prior to that and generally and the Applicant went further than necessary in holding meetings and communicating with the Respondents. Whilst the Tribunal has found that the roof replacement is not necessary and so the cost of that is not recoverable, that does not make the overall approach of the Applicant unreasonable.



101. The wisdom of the indemnity letter is uncertain and possibly increased, rather than reduced, concerns. That said, the Tribunal has some sympathy for the position in which the Applicant found himself, with strident opposition to work which his surveyor advised and a likely difficulty with obtaining funds. Whilst it is doubtful that there could have been a claim against the Applicant, there is, in light of the history, a logic to the Applicant, as a manager, wishing to have some comfort that if he adopted the approach urged by most of the Respondents, no personal liability might arise. Much as the parties spent a good deal of time and effort on the letter, the Tribunal considers it unnecessary to say more.
102. More generally, the whole process of the Applicant seeking to obtain funds for works and the reaction to that appears to have been heavily affected by the management order and matters which led to and/ or related to that. The Applicant was understandably concerned arising from that. Relations with certain of the Respondents had been poor. The background to this application has echoes of the previous disputes dealt with by this Tribunal and elsewhere but the Tribunal is not re-visiting those cases, rather dealing with the application before it now.
103. The Tribunal is, and records it, very grateful to both Mr Pocock and Mr Nyss for their helpful evidence in relation to the roof works and other works and for their sensible concessions and constructive approach to the hearing. The Tribunal gave a little more weight to the greater experience of the roof held by Mr Nyss, although in the event although the Tribunal finds that in the final analysis the surveyors' opinions did not differ greatly and it did not prefer the evidence of Mr Nyss on all matters, as the findings made reflect.
104. For the avoidance of doubt, the Tribunal rejects the serious assertion made by Ms Akorita in her Closing Submissions that there was any influence on the Applicants approach to replacement or repair of the roof or to the appropriate contractor to instruct and the cost of that contractor undertaking the work arising from the Applicant's entitlement to any fee calculated as a percentage of the cost of the work. Such assertions should be made only with clear evidence of the basis for them, which is entirely lacking. Ms Seal questioned the Applicant about the matter but, very sensibly, with rather more circumspection and making no actual assertion.
105. The choice of contractor for the works was a matter for the Applicant, who is entitled to instruct the contractor successful following the tender and in respect of the pointing works, the balcony works and the works previously agreed about which no determination from the Tribunal was required.
106. The choice of contractor for roof repairs will also be a matter for the Applicant, subject to any required consultation process being followed in relation to such works if the cost of patch repair works and consequent service charges which would be demanded from each lessee require it.
107. The Applicant was and is entitled to demand as service charges the cost of the major works save for the cost of replacement of the roof. The lessees

ought to have paid the service charges demanded save for the roof replacement works found not “necessary” and it is unsatisfactory at best for none of the sums demanded based on costs of the major works to have been paid if, as the Tribunal understands, that is the case. As noted elsewhere in this Decision, delay to the pointing and balcony works will only be likely to serve to increase detrimental effects and to add to costs in due course.

108. The Tribunal observes that the Respondents may or may not in due course come to wish that the roof had been replaced. Whilst the Tribunal has found that the replacement of the roof is not necessary at this time, a sensible approach amongst options available though it may be and not only because of utilising expensive scaffolding, the Tribunal cannot know at what stage the replacement may become necessary. Whilst, that may not be for some years, the Respondents may find that the service charges for which they become liable are somewhat greater than they would have been had the roof replacement been agreed, specific provisions of the Lease aside, at this time. If the necessary scaffolding will cost anything like the cost within the specification of works then the costs will unquestionably be significantly higher and greatly outweigh the reduction in scaffolding costs in the short term. The Respondents may also find that the money spent on ongoing repairs in the meantime no longer appears in due course and with hindsight to have been well- spent. However, that is not a matter for the Tribunal where the provisions of the Lease are as set out above.

109. The Tribunal comments, albeit not part of the determination sought and made, that the Lease, paragraph 7 of the Second Schedule, allows for the provisions of a reserve. Whilst the roof replacement has been found not to be necessary as provided for in the Lease and so service charges to contribute to the cost are not payable now, the roof will need to be replaced in the coming years. Collecting reserve contributions would be prudent, particularly given the assertions made within this case unless the funds build up over a period of time, funding of the roof replace might otherwise be difficult for some lessees. Such build-up of funds over time has indeed been sought by the Respondents who have been active in this application, who presumably will therefore facilitate that.

110. Finally, it must be emphasised that this Decision relates to the specific question before the Tribunal. It is not a comment on wider management and the determination in respect of the terms of the Lease and impact on the extent of the roof works is neither a criticism or any other comment. Neither has the Tribunal taken any account of the term of appointment of the manager or renewal of that or made any attempt to pre-judge the appropriate approach to that. The Tribunal has simply considered the sum reasonable to demand pursuant to the provisions of the Lease and on the evidence available to it.

## **DECISION**

111. The Tribunal does not determine any matters about which the surveyors were in agreement.

112. The Tribunal holds that the Lease only permits the replacement (renewal) of the roof where that is “necessary”. Although there are sound practical arguments for the roof being replaced during the same works as other aspects of the Building being attended to, that is not the same as necessity. The proposed works to replace the roof do not fall within the repairing and maintenance provisions of the Lease. Replacement of the roof is not found to be necessary at this time, on the evidence available.
113. The other items of work within the specification of works are items to which the lessees must contribute by way of service charges pursuant to the Lease. The cost of patch repair to and maintenance of the roof is also an item to which the lessees must contribute.
114. The estimated service charge that the Applicant is entitled to recover includes, firstly, the anticipated reasonable cost of appropriate patch repairs to the roof following any appropriate consultation process and estimates.

Secondly, it is the cost of the major works contained in the schedule excluding to the roof, and including the balcony works and the pointing, at the cost in the GT Roofing’s revised tender and so up to £41,244.00 including VAT plus 10% professional fees, total £45,368.40) in respect of that (and the Applicant is entitled to then charge fees as provided for).

## **COSTS**

115. As agreed with the parties at the outset of the hearing, the Tribunal has not made any determination as to costs pending this Decision being issued and considering appropriate representations.
116. The parties may make written representations as to the principle of payment of costs, i.e. by whom if anyone costs should be recovered, by 23rd November 2020.
117. Upon the Tribunal making a decision in respect of payment of costs in principle, Directions will be given for any party awarded costs to serve a schedule of costs and attach evidence of disbursements and for responses in respect of the amount of any costs determined to be payable to a party.

## 118. APPENDIX OF RELEVANT LEGISLATION

### **Landlord and Tenant Act 1985 (as amended)**

#### Section 18

(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.

#### Section 19

(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 provisions of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.

(2) 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.

#### Section 27A

(1) An application may be made to the 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 amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate 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.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
  - (a) has been agreed or admitted by the tenant,
  - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  - (c) has been the subject of determination by a court, or
  - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.