



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

Case Reference : CHI/29UN/LSC/2021/0081

Property : 14 Balmoral Road, Margate, Kent CT9 5PQ

Applicant : Mr Graham Kinnear

Respondent : Thanet District Council

Representative : Sam Madge-Wyld, Counsel

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

Tribunal : Judge David Clarke
Peter Turner-Powell FRICS
Jayam Dalal

Date of Hearing : 4 May 2022

Venue of hearing : Virtual

Date of Decision : 31st May 2022

DETERMINATION and STATEMENT OF REASONS

Determination

The Tribunal determines:

- 1. That the Notice of Intention to carry out Qualifying Works given by the Respondent to the Applicant on 9 June 2021 was inadequate and invalid.**
- 2. That it should grant to the Respondent dispensation from the consultation requirements in respect of the works undertaken to the roof of 14-24 Balmoral Road and does not consider that any conditions should be imposed in respect of that dispensation.**
- 3. That it is satisfied that it was reasonable for the Respondent to undertake the repairs and renewal of the coverings to the flat roof above 14-24 Balmoral Road.**
- 4. That the costs were reasonably incurred within section 19(1)(a) of the 1985 Act and that the Applicant is liable to contribute the sum of £7,119.02 towards the full cost of replacing the roof to 14-24 Balmoral Road.**

The Tribunal defers its decision on the s20C application. The Respondent has a period of 21 days from receipt of this determination to make any submissions it wishes to make. If the Respondent makes any such submissions, the Applicant has 21 days to reply to those submissions. If no such submissions are received, the Tribunal will make its decision on the s20C application for the evidence already before it.

No order is made on the application under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

Statement of Reasons

The Application

1. This application (“the Application”) was made on 5 September 2021 under and by virtue of the Landlord and Tenant Act 1985 (“the Act”) section 27A and asks for a determination of liability to pay and reasonableness of service charges relating to flat roof repairs. The Applicant is Mr Graham Kinnear who is the leaseholder of 14 Balmoral Road in Margate, Kent (“the Property”). The Property is one of 6 flats or apartments in a block known as 14-24 Balmoral Road (“Block 14-24”). The Applicant believes that the Property is the only flat in Block 14-24 that has been sold off on a long lease. The Respondent is Thanet District Council.
2. Block 14-24 is the middle block of three self-contained blocks that are structurally attached (numbered 2-12, 14-24, and 26-36). Each block shares a flat roof, but each of the three flat roofs is distinct from the other two. The three roofs are not continuous and there a step in height between each block.
3. The Application relates to repairs undertaken by a firm called Premier Roofing and Construction (“Premier”) in the late summer and early autumn of 2021 and completed in October 2021. Premier had been appointed in 2019 after the Respondent had invited tenders for companies across the European Union for a works contract for the maintenance and renewal of all flat roofs within the Respondent Council’s housing stock. Premier, which was the sole bidder, was awarded the contract. The relevant consultation requirements in relation to the award of that contract were carried out.
4. The flat roofs of all three blocks were inspected in April 2021 by Premier and by a second party – MM Building Consultants (“MMBC”). In the light of their reports, on 9 June 2021, and in accordance with the requirements of Schedule 3 of the Service Charges (Consultation Requirements) (England) Regulations 2003 (“the Regulations”), the Applicant was served with a notice of intention (“the Notice”) to carry out major works. The Notice invited the Applicant to make observations in relation to the proposed works. The contents of the Notice are discussed in more detail in paragraph 18 below.
5. The Applicant responded by nominating the name of a contractor to do the works, but after the appointment of Premier under a works contract, he was not entitled to do that (but the mistake is understandable). He also asked for proof that the roof had reached the end of its lifespan and the Respondent sent the specification and schedule of the proposed works and the reports and photographs to him on 29 June 2021.
6. The Applicant then obtained, on 27 August 2021, a quotation for roofing works to Block 14-24, no doubt based on the specifications supplied by the Respondent, from a firm called County Construction Ltd. That firm quoted a sum of £42,540 including VAT for the work. This would have appeared to be much better value to the Applicant than the estimated figure of £133,176.07 contained in the Notice.

7. Following the Application being made on 5 September 2021, Directions were issued by Judge Morrison on 20 October 2021. These Directions included an offer of online mediation. The Applicant requested mediation and a date was scheduled for 8 December 2021. However, on 7 December, Estelle Culligan wrote to the Tribunal on behalf of the Respondent and withdrew from the mediation hearing at the last moment, despite stating that the Respondent was keen to resolve the issue without resort to a formal hearing. The Respondent withdrew because (she said) the Council was confident that the Notice was served correctly, and the Council could not exercise a discretion to reduce a service charge.

8. Consequently, on 5 January 2022, Judge Whitney issued Further Directions after an online case management hearing. It was at that hearing that the Applicant raised the issue of whether the total costs of about £130,000 were for a larger block than Block 14-24. It was not possible to resolve that issue at the online hearing.

9. Though the roofing works were completed in October 2021, they have not yet been charged to the Applicant. The Tribunal was told that the proportionate cost will be part of the service charge due in August or September 2022.

The Lease

10. The lease (“the Lease”) of the Property is dated 11 July 1994 and was granted by the Respondent Council to a predecessor in title of the Applicant. It grants a term of 125 years from the date of the Lease at a ground rent of £10 per annum.

11. There are just two salient points to make about the terms of the Lease. Firstly, though there are three linked blocks of flats, the ‘Site’ is defined in the Lease as the freehold land and building known as 14-24 Balmoral Road alone. Thus, the linked blocks on either side have no relevance for the Property.

12. Secondly, the Applicant is required to contribute to the service charge and there is no dispute that repairs to the roof are included in the costs that fall under that charge. It is significant, however, to set out how the contribution of the Applicant in respect of the Property is to be calculated. This is to be:

“a sum calculated on the basis of the proportion which the rateable value of the demised premises shall bear to the aggregate of all the rateable units . . . of the Site . . . of the aggregate cost to the Lessor of complying with the lessor’s covenants in this Lease”.

13. The amount of the Applicant’s service charge must therefore be related only to costs incurred in repairs to Block 14-24 and not to the other two linked blocks or any wider property. It is the cost of the repairs to the roof of Block 14-24 alone that are relevant for the calculation of the service charge due from the Applicant.

The Issues

14. The issues identified are based on the bundle of documents supplied and the oral evidence given at the hearing. The counsel for the Respondent, Mr Madge-Wyld, supplied

the Tribunal with a skeleton argument. In response to a pre-hearing query from the Tribunal, the Respondent also supplied details of the relevant Building Regulations relating to roofing work. The Tribunal is grateful for the information supplied.

15. There were three issues before the Tribunal although the third had effectively been resolved by the time of the hearing:

- (1) Whether the Respondent had met the consultation requirements in accordance with section 20 of the Act.
- (2) Whether it was reasonable to undertake the repair and replacement that was envisaged, and has now been completed, or whether, in respect of Block 14-24, there was a need for works at all or whether some lesser remedial work would have sufficed.
- (3) Whether the cost of the works was reasonable.

16. The Applicant did not raise any concerns about the standard or quality of the works which have now been completed.

Submissions of the Parties

1. By the Applicant

17. The Applicant's submissions were not contained in a single formally drawn up statement of case but can be adequately discerned from the Application and his 'statement in response to the Respondent's statement of case'. He also made his submissions with clarity at the hearing.

18. The Applicant contended that the consultation undertaken was invalid. The Respondent relies on its letter to the Applicant of 9 June 2021. The Applicant does not dispute that there was an adequate description of the works in that letter and accepts that the reasons for doing the work were given. However, his case is that the notice is invalidated because the costs set out are not those that relate to Block 14-24. The letter is headed:

'Notice of intention to carry out Qualifying Works - Roof Replacement - 14-24 Balmoral Road'.

The letter contained a statement of total estimated expenditure in connection with the proposed works of £133,176.07 with an estimated cost to the Applicant of £22,196.01.

19. The submission made is that notice was incorrect and therefore invalid. The estimated sum set out was for all three flat roofs on the three linked blocks. It should have contained the estimated sum for Block 14-24 alone which would have been one third of this sum. The amounts were only corrected by the Respondent Council on 27 January 2022, a letter that contained no apology for the error but said that the Respondent could now 'provide clarity'. Taking the actual costs of the works to all three blocks of £128,142.35 the January letter said that the cost allocation to Block 14-24 was £42,714.35 and the Applicant's contribution would be £7,119.02.

20. On that basis, the Applicant submitted that the sums contained in the letter of 9 June 2021 were patently wrong and that the figure is so erroneous that it must render the notice invalid.

21. The Applicant's second main contention was that the reports on which the decision to proceed with the works was based were inadequate to justify the works that had been done. His arguments can be divided between the general and the specific. He contended that the reports (he said he struggled to so describe them) were not professional, consisted primarily of photographs and included the finding that there was no water ingress noted and core samples taken from the flat roof were 'mainly dry'. In short, the reports were insufficient to show his flat roof had reached the end of its life expectancy. More specifically, he contended that the reports did not differentiate between the state of the roofs of the three blocks so that there was insufficient evidence that the roof to Block 14-24 needed the extensive work that had been carried out. He did not know of any complaints about leaks to his roof prior to the work.

22. He also raised a question that it seemed the firm known as MMBC had been liquidated before the date of their report. He did accept that if works were required, then the work should be completed in accordance with current building standards. He was not able to bring any direct evidence as to the state of the roof in June 2021 but to be fair to him this was hardly possible given that the work commenced and was completed so soon after the Notice was sent to him.

23. Finally, the Applicant said that, after the revision of the amount he was due to pay, he now accepted that it was broadly representative of the costs incurred in relation to Block 14-24. In answer to a question from the Tribunal, he said that the revised figure was reasonable – though he did strongly feel that he had been misled.

2. By the Respondent

24. The Respondent submitted a statement of case and, just before the hearing, a skeleton argument, both drafted by Mr Madge-Wyld.

25. On the issue of consultation, the submission was that the requirements had been followed in full by the letter of 9 June 2021. But it did not address the key point – namely whether it was a valid notice given the error identified, namely that the cost related to three blocks not just Block 14-24. More surprisingly, the skeleton argument did not deal with the point either even though it recognised that the Notice must set out the cost of the works.

26. At the hearing, faced with the issue, Mr Madge-Wyld submitted that the Notice was valid, notwithstanding the error. The Regulations did not require the amount of the Applicant's contribution to be stated and the Notice was not invalidated. But if it was, he made an oral application for dispensation under section 20(1)(b) of the Act. He referred to the Supreme Court decision in *Daejan Investments v Benson* [2013] UKSC 14 in support.

27. On the issue of whether the work was justified, the submission was that the inspection by two contractors (Premier and MMBC) justified the work undertaken. Premier identified that the existing roof covering was in a poor condition, the felt membranes had deteriorated and were in urgent need of replacement, and the perimeter and edge detail was in a poor condition. Their report indicated evidence of repairs that suggested past water ingress and some of the repairs were showing signs of non-performance, while invasive testing showed some areas of the roof were wet or damp. The brickwork and flashing to the chimney was in a poor condition. MMBC concluded that the condition of the roof suggested that its life had come to an end, parts of the roof may no longer be water-tight, the chimneys needed re-flashing and the doors on the roof to the water tanks needed replacing.

28. This submission was supported by statements of evidence in the bundle of documents. At the hearing, oral evidence was given by those witnesses, namely Claire Price and Katie Horwood, employees of the Respondent. Ms Pryce, a manager in the Respondent's Planned Maintenance, Landlord Compliance and Responsive Repairs team, indicated that the MMBC issue was about a change of company name and the company was operating at the time of its report. She conceded that the identified leaks were on a side block and there was no record of leaks in the roof of Block 14-24 but stressed that the Respondent treated the three roofs as one whole. She denied Premier had a conflict of interest. She stated that the two reports had been discussed by her with a Mr Joshua Arthur, the Respondent's surveyor, who concluded that they provided the basis for the work that was to be done. She did not however have a minute of the meeting with Mr Arthur, nor could she confirm his qualifications. She maintained that it was not viable to replace the roof in sections.

29. Ms Horwood, a Home Ownership Officer in the Respondent's Tenant and Leaseholder Service team, accepted that the sum set out in the Notice was the amount for the total cost of repairs to all three blocks, not the amount for Block 14-24. But she considered that the Notice was not defective as it made the Applicant aware that the works were to be carried out.

30. Mr Madge-Wyld referred the Tribunal to the decision of *Waalder v Hounslow LBC* [2017] EWCA Civ 45 and submitted that that decision made it clear that for the Respondent to establish that it was reasonable to replace the flat roof coverings and undertake repairs, there was a two-stage test – which he contended was satisfied. Objectively, the Respondent had been reasonable in the decision it had taken. There could be more than one reasonable course of action. It was for the Respondent as landlord to come to a decision and there was a margin of appreciation.

31. He also referred to *Southall Court (Residents) Ltd v Tiwari* [2011] UKUT 218 which also involved a flat roof replacement. A tribunal had concluded that the roofing tiles had another 12-18 months of life and concluded that it was unreasonable for the landlord to re-cover the roof. The Upper Tribunal concluded that was wrong. There is a discretion to be allowed to a landlord as to the programme of work to be adopted.

32. In the light of these authorities, Mr Madge-Wyld submitted that it was self-evident that the decision of the Respondent was within the reasonable range of decisions (even if ‘staggering on’ might also be reasonable). The reports could not be fairly described as ‘just photos’ as they were combined with descriptions. There was sufficient evidence to decide to repair the three roofs together in the late summer of 2021 and taking action at an appropriate time to prevent future disrepair was sensible.

33. On the final issue on the costs of the work, Mr Madge-Wyld noted that this had been effectively conceded by the Applicant. He noted just how close the quotation from County Construction was to the final cost allocated to Block 14-24.

Decision

(1) Validity of the consultation

34. The Applicant’s claim that the Notice of Intention to carry out Qualifying Works given by the Respondent to the Applicant on 9 June 2021 was invalid is upheld. The Regulations require the notice to contain a statement of the total amount of expenditure estimated as likely to be incurred in connection with the proposed works. The Notice is clearly headed ‘14-24 Balmoral Road’ and states that the expenditure is estimated to be £133,176.07 with an estimated cost to the Applicant of £22,196.01. It is now accepted by the Respondent that this notice contained a clear error. The costs quoted related to the three blocks 2-36 Balmoral Road and were three times as high as the costs which were appropriate to the Block 14-24 alone. The Notice did not therefore contain the proper estimate of the works likely to be incurred in respect of Block 14-24. The only meaning that could reasonably be given to a recipient of this notice is that he would be expected to pay £22,196 being his share of the total set out. The error, which was not corrected by the Respondent until a letter of 27 January 2022, invalidates the Notice.

35. The invalidity of the Notice would mean that the Respondent has omitted to fulfil the consultation requirements of the 1985 Act and would be limited to recovery of the very modest amount permitted by statute - unless the Tribunal is minded to dispense with those consultation requirements. Though Mr Madge-Wyld maintained that the notice was valid, he did also make an oral application under sections 20 and 20ZA of the 1985 Act for dispensation. He relied on the case of *Daejan Investments v Benson* [2013] UKSC 14. In that case, the Supreme Court decided that dispensation should not be refused unless the leaseholders have suffered any relevant prejudice from the failure to comply with the consultation requirements. Though the Applicant has been put to unnecessary trouble arising from the error in the letter of 9 June 2021, that is not relevant prejudice within the Act, as explained in the *Daejan* case. The Applicant has not had to pay for inappropriate repair works and will not be paying more than is appropriate for the works that have been done.

36. The Tribunal therefore grants to the Respondent dispensation from the consultation requirements in respect of the works undertaken to the roof of 14-24 Balmoral Road and does not consider that any conditions should be imposed in respect of that dispensation.

(2) Reasonableness of works undertaken

37. The evidence provided by the Respondent is not ideal. Primarily, the reports on which the decision to proceed was based consist mainly of photographs with a note below each one; and significantly, there is no separation of the condition of the three separate roofs to 2-12, 14-24 and 25-36. It is therefore not clear to the Applicant what the condition of the roof to 14-26 was in detail at the time of the reports. Moreover, though the Respondent gave oral evidence that the Council's surveyor had considered the reports and concluded that the work recommended was necessary, there was no written evidence by way of a summary report or minute of the meeting to that effect. It would have been good practice to provide such written evidence.

38. The Applicant did not, and perhaps could not, provide direct evidence that the roof of 14-24 was in sufficiently good condition to be left for work to be done at a future time. However, the evidence that the Tribunal did have revealed that these flat roofs were nearing the end of their useful life. The reports and photographs clearly showed that some work was immediately necessary; and while the problems identified might have been confined to the other two roofs, they might have equally extended to that of 14-24. Applying its expertise, the Tribunal considered that it was sensible and reasonable for the works to be done. Moreover, a decision not to do the works to the roof of 14-24 while doing works to the roofs either side, would (as the Respondent rightly submitted) have involved considerable extra expense overall in due course.

39. The Tribunal is also satisfied from the material provided before the hearing that, to the extent that the works undertaken involved improvements, then those improvements were required under Building Regulations.

40. For these reasons, the Tribunal is satisfied that it was reasonable for the Respondent to undertake the repairs and renewal of the coverings to the flat roof above 14-24 Balmoral Road.

(3) The costs incurred

41. Understandably, in the Application and in his statement of case, the Applicant challenged the costs of the works. This was understandable because, for a period of eight months, he believed he was to be charged over £22,000 out of a total in excess of £130,000 while he had commissioned a survey in August 2021 for the same works to the roof of 14-24 Balmoral Road and received a quotation in the sum of £42,540 including VAT. It was only on 29 January 2022 that the Council rectified the error. That letter stated that the works had been completed to all three block roofs for £128,142.35 which meant that the sum allocated to 14-24 Balmoral Road was £42,714.35 (and just £7,119.02 to the Applicant's flat).

42. At the hearing therefore, the Applicant did not provide any new evidence to suggest the sum now expected of him was unreasonable in amount. Indeed, he conceded that that the revised figure was reasonable. The Tribunal therefore determines that the costs were reasonably incurred within section 19(1)(a) of the 1985 Act and that the Applicant is liable to contribute the sum of £7,119.02 towards the full cost of replacing the roof to 14-24 Balmoral Road. To get to this result, the total cost of the roof works was divided between

the three blocks, and then within each block subdivided by the individual rateable value of each flat relative to the total for each block.

Concluding Comment

43. Though the Tribunal's overall determination is to validate the works undertaken by the Respondent, in this case one can hardly criticise the Applicant for bringing this case. The Application was made on 5 September 2021. Until the end of January 2022, the Applicant was under the impression that he was being expected to contribute over £22,000 when he had evidence of a quotation that would result in him contributing about £7,000. During this time, Directions had been issued on 20 October 2021 and mediation agreed. Yet the Council withdrew from mediation on the basis the Council 'could not exercise discretion to justify any reduction'. It was the Applicant who identified in the case management hearing, as recorded in Further Directions made on 5 January 2022, that 'the total cost of the works may have been for a larger block than simply that of which his flat forms part'.

44. If the Council had not made the initial error, or corrected it much sooner, this case may never need to have been brought. Moreover, mediation is not only about a financial or other compromise but has a wider purpose. If the Council had proceeded with the mediation in December, it is likely that the error would have been identified earlier and it is therefore certainly possible that a full hearing would not have been required.

Applications under section 20C and Paragraph 5A; and costs

45. No submission was made by either party in respect of the applications for an Order under section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

46. Mr Madge-Wyld preferred not to make his submissions in respect of the application under section 20C of the Act until this determination was known. The Tribunal therefore defers its decision on the s20C application. The Respondent has a period of 21 days from receipt of this determination to make any submissions it wishes to make. If the Respondent makes any such submissions, the Applicant has 21 days to reply to those submissions. If no such submissions are received, the Tribunal will make its decision on the s20C application for the evidence already before it.

47. No order is made under section 5A as there is no administration charge relating to litigation costs identified by the Applicant and relevant to this determination.

48. Neither party made any application in respect of costs under section 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Right of Appeal

49. 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 (RPSouthern@justice.gov.uk). 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.

50. 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.

51. 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.

16 May 2022