



FIRST-TIER TRIBUNAL PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference : CHI/43UK/LIS/2021/0041

Property : Vorberry Place, 125 Godstone Road, Whyteleaf,
Surrey CR3 0EH

Applicant : Mahesh Vora

Representative: Richard Granby of Counsel

Respondent: Mr N Vaz & Ms S Marcal (Flat 1)
Mr M Vora (Flat 2)
Ms G M R O'Hara (Flat 3)
Miss E I A Murray (Flat 4)
Mr Z S Sakkaff (Flat 5)
Mr T Atkins (Flat 6)
Mr A Sherlock & Ms M Vidal (Flat 7)
Ms K L Law (Flat 8)
Mr H F Godinho (Flat 9)
Mr J P & Mrs L Evans (Flat 10)

Representative: Angus Gloag of Counsel

Types of Application: Determination of service charges - Section 27A
Landlord and Tenant Act 1985 ("the 1985 Act")

Tribunal Members: Judge P J Barber
Mr B Bourne MRICS
Mr M Jenkinson

Date of Decision: 30 March 2022

DECISION

Decision

(1) In accordance with the provisions of Section 27A of the 1985 Act, the service charges in dispute for the Property for the relevant years are determined as follows:-

(a) 2020

(i) Subject to being properly demanded, £12,324.00 is payable by the Respondent lessees to the Applicant, being the FRC invoice for inspection (£7074.00) and the FRC invoice for the report (£5,250.00).

(ii) Subject to being properly demanded, £12,225.33 is payable by the Respondent lessees to the Applicant, for the buildings insurance premium.

(b) 2021

Subject to being properly demanded, £13,531.15 is payable by the Respondent lessees to the Applicant, for the buildings insurance premium.

(c) 2022

Subject to being properly demanded, £15,445.18 is payable by the Respondent lessees to the Applicant, for the buildings insurance premium.

(2) The Tribunal determines that the budget estimate for in the region of £235,000 as proposed for 2022, is not reasonable or payable.

Reasons

INTRODUCTION & BACKGROUND

1. The application received by the Tribunal was dated 20 August 2021 and was for determination of service charges in 2020, 2021 and 2022; in broad terms, the Applicant stated in the application that in 2020, concerns had arisen about the construction of the building, in regard to the use of polystyrene insulation and a lack of cavity barriers, resulting in external wall intrusive investigation, including the obtaining of a fire engineer's report, and leading to increased buildings insurance premiums. The Applicant stated that in 2021, surveyor's costs were incurred for assessing remedial works, and the buildings insurance premium remained high, whilst remedial work was still pending. For 2022, the Applicant stated that the total cost of remedial works to be incurred would be in the region of £235,000, including surveyor's fees and VAT.
2. Directions were issued on 1 October 2021, providing for the matter to be determined by way of a video hearing on 12 January 2022, given that the remedial work was apparently required urgently. However, the Applicant requested an adjournment due to his then representative contracting Covid 19; the Tribunal consented and the hearing was re-arranged for 25 March 2022.
3. The Applicant provided an electronic bundle of documents to the Tribunal, comprising 199 pages and which included copies of the application, the directions,

emails, a fire report, insurance documents and a copy of a specimen lease being that for Flat 4 dated 18 December 2015 (“the Lease”).

4. In a statement of case dated 22 October 2021, the Applicant broadly submitted that at the time of renewing the buildings insurance via the brokers, St Giles, in November 2019, a question was raised regarding whether there was any insulation behind the rendering to the building which would increase fire risk. The Applicant had said that the developer had indicated that structural insulated panels (“SIPs”) had been installed behind the rendering; certain further information had been provided by the developer, following which the insurer increased the premium to £12,225.00. It was decided to undertake some investigation as to the composition of the façade and a fire engineer was appointed to provide a report. The fire report recommended that the insulation be replaced, although no Government assistance would be available given that the height of the building was less than 7.8 metres. The Applicant indicated that the only course of action would be to replace the insulation and that the insurance premium should then be reduced; notices of intent pursuant to Section 20 of the 1985 Act, were served on leaseholders.
5. In her statement of case dated 8 November 2021, Laura Vidal submitted for the Respondent leaseholders that the application had contained multiple inaccuracies, plus information omitted which, she said, could unjustly influence the decision. Ms Vidal referred to the fire report, saying that the render manufacturer was unknown and also questioned the fire class rating; Ms Vidal submitted that the managing agent, Parkfords, had indicated that the insulation should comply with Euroclass A1 or better, but the Respondents considered that the building needed to comply with Class B-s3, d2(2), or better. Ms Vidal referred to a second EWS1 report on the building, which she said recommended installation of cavity barriers only, instead of full replacement of the cladding material. Ms Vidal said that Parkfords had originally told leaseholders that the second report had made the same recommendations as the first, although she added that Parkfords had later claimed the second report to be invalid. Ms Vidal said that leaseholders had had no written verification that the 10 year building warranty does not cover any of the works. Ms Vidal said in regard to reasonableness of the charges, that assumptions had been made in the first report, that there was a lack of clarity regarding whether the works were to make the building safe, or to improve insurance rates, or to future proof the building. Ms Vidal also raised concerns regarding whether materials used in construction complied with current Building Regulations, and whether, if the materials are still in use elsewhere, they actually require removal, and also whether cavity barriers may be considered as repair or maintenance, referring to a decision in *City of London Corporation v Various leaseholders of Great Artur House (2019) UKUT 341 (LC)*.
6. The bundle also included copies of a report made by Façade Remedial Consultants (“FRC”) following an inspection on 3 August 2020, and also a Report dated 24 September 2020 made by Tri Fire Consultant Fire Engineers, together with copies of invoices for the reports and details of the insurance premiums demanded in the relevant period.
7. Vorberry Place appears to be a purpose-built block of 10 flats constructed in or about 2015/16. Due to Covid 19 restrictions, no inspection was carried out of the Property.

THE LAW

8. Section 19 Landlord and Tenant Act 1985 provides that:-

- (1) *Relevant costs shall be taken into account in determining the amount of a service charge payable for a period-*
 - (a) *Only to the extent that they are reasonably incurred, and*
 - (b) *Where they are incurred on the provision of services or the carrying out of works, only if the services 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 Landlord and Tenant Act 1985 provides that:-

- (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, the date at or by which it is payable, and*
 - (d) *The manner in which it is payable.*
- (2) *Subsection (1) applies whether or not any payment has been made.*
- (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)-(7)....

REPRESENTATIONS

9. The CVP video hearing on 25 March 2022 was attended by Richard Granby, Angus Gloag, Benson O'Hara (for part of the hearing only), Laura Vidal and Gemma Walsh of the managing agent, Parkfords.
10. The Tribunal office had on the day before the hearing, received an application for adjournment from Mr Atkins, the lessee of Flat 6, on the ground that he had not received the bundle. Mr Atkins had been advised that he should attend the hearing so that his application for adjournment could be considered as a preliminary issue. In the event Mr Atkins emailed the Tribunal to advise that he was working and unable to attend. Judge Barber asked Mr Granby to confirm that the papers had been served on all 10 leaseholders; Mr Granby so confirmed. The Tribunal accepted this evidence. Accordingly, the Tribunal decided in the interests of fairness for all the parties, given the delay from the original hearing date in January 2022, that the hearing should proceed.
11. Mr Granby confirmed to the Tribunal at the outset, the correctness of the amounts claimed and which are the subject of the application; he also confirmed that all leases are in broadly similar form. Mr Granby referred to a skeleton argument which he said had been emailed to the Tribunal office late yesterday, together with copies of a number of decided case reports. Mr Gloag, appearing for 5 of the leaseholders, said he had seen the skeleton argument which was accepted, although he added that in his view this application had been made prematurely, without sufficient investigation. Mr Gloag added that he had sent copies of a series of emails to the Tribunal, to which no objection appeared to be raised by Mr Granby. The hearing was adjourned for a short period to enable the Tribunal panel members to read the skeleton argument and the additional emails.
12. On resumption of the hearing, Judge Barber asked if there was any prospect of any settlement or of any matters being conceded; however, it appeared that an impasse had been reached as between the parties. Accordingly, Judge Barber invited Mr Granby to present his case for the Applicant.
13. Mr Granby said that the Applicant seeks a determination in principle, that the works proposed are reasonable, although he accepted it may be tricky to identify what amount would be the reasonable cost of those works. Mr Granby added that the driver to the application is the cost of insurance; he referred to the Lease and the definitions in it for "*Insurance Rent*", "*Service Charge*", "*Service Costs*" and "*Services*", and also the provisions of Schedules 4, 6 and 7. Mr Granby referred to the Respondents' statement of case at Page 134 of the bundle, and the decision in *City of London Corporation v Various Leaseholders of Great Artur House [2019] UKUT 341 (LC)*, adding that the issue of repair or replacement was not relevant, given the broad definitions in the Lease which included renewal and replacement. Similarly, Mr Granby said that the broad heading within *Service Costs* as defined under Part 2 Schedule 7 of the Lease, being costs, fees and disbursements reasonably and properly incurred of:

"any other person [reasonably and properly] retained by the Landlord to act for the Landlord in connection with the Estate or the provision of Services."

was sufficiently generic to include costs incurred for obtaining the fire safety and other reports. Mr Granby said that the payability of insurance premium costs was not in issue, no prima facie challenge having been raised by the Respondents; he referred to his skeleton argument, adding that the Applicant had used a broker to arrange the insurance.

14. Mr Granby referred to the FRC fire safety report and the conclusion that the cavity barriers be replaced with non-flammable material, adding that the Tri Fire report at Page 113 again recommended replacement of the SIPs panels and cavity barriers, by non-combustible material. Mr Granby referred to the “*rough estimate*” of costs for the work in the MDB Surveyors report, being £170,000 plus 10% for contract supervision, plus VAT. Mr Granby added that if the Tribunal considered such costs to be unclear, then it could at least decide in principle that the work be determined as approved. Mr Granby said that even if the Respondents obtained a different technical view from an alternative expert, the landlord may still rely on his own expert, provided he is acting reasonably. Mr Granby repeated that the Applicant’s driver in this matter is to reduce the insurance costs for the future, adding that the Tribunal may decide it is reasonable in principle to do the works, without also considering reasonability of costs, referring to the decision in *City of Westminster v Fleury* [2010] UKUT 136 (LC).
15. Mr Gloag said that Vorberry Place had been built in 2015/16 and added that the Applicant is the father-in-law of the developer, Clive Nunes and that within 8 years after the date of original construction, the Applicant was seeking large sums to carry out remedial works. Mr Gloag referred to the emails at Page 28 of the bundle, and nervousness on the part of the landlord regarding fire risks, post the *Grenfell Tower* disaster. Mr Gloag referred to Page 91 of the bundle where he said the FRC Report at paragraph 8.1 had concluded merely that “*We do not think Vorberry Place’s façade construction is likely to pass a BS8414 test...*” and that the Tri Fire report concluded in paragraph B2 at Page 113 of the bundle, that “*adequate standard of safety is not achieved and I have identified to the client organisation the remedial and interim measures required...*”. Mr Gloag also submitted that the construction drawings did not reflect the “as built” structure, adding that the building is not as designed and he questioned the links between the Applicant landlord and the developer. Mr Gloag referred to an extract from an email from LWF, the fire engineering & risk management consultants sent to Clive Nunes and dated 10 June 2021, at Page 144 of the bundle “*We do not consider it necessary to completely replace the insulation material*”..... and suggested it provided scope for the possibility that not all insulation material may need to be replaced. Mr Gloag suggested that there had been a falling out as between the landlord and the developer, resulting in the remedial costs ending up with the leaseholders, referring also to an email at Page 209 from Gemma Welsh of Parkfords, alluding to a need for 5 yearly reviews in the long term. Mr Gloag said that at 7.8 metres high, the building is well below the 18 metre threshold which he said would trigger compliance with Government guidelines. Mr Gloag added that at Page 210 of the bundle, there was some reference to an acceptance by the landlord that a further inspection report would be required to clarify the works needed. Mr Gloag further suggested that mediation might have been tried, rather than these proceedings. Mr Gloag questioned the availability of evidence to demonstrate that the insurance premiums would fall back as suggested, even if the large costs are incurred in carrying out the works, adding that there remains a significant question mark against the developer, regarding why this

construction method was selected. Mr Gloag further suggested that there remained some contradiction in the existing reports, for which a further new report was clearly needed in order to resolve the position.

16. Mr Granby added by way of clarification that the loss adjusters had said that the cost of the remedial work would not be borne by the new build warranty provider. Mr Granby said that any relationship between the Applicant and the developer is wholly irrelevant, referring to *Continental Property Ventures Inc v White [2006] 1 EGLR 85*, and that even if there was a claim made against the developer, the Applicant was able to seek monies from the leaseholders in accordance with the contractual arrangements under the Lease, and the possibility of there being other means of recovery would only be relevant if there was an overwhelming likelihood of success, which he said was not the case here. Mr Granby said that mediation is not a condition precedent to proceedings, and that if the Respondents disputed the reports, they should have submitted clear evidence to support such view, rather than raising verbal “*what if*” questions during the hearing. Mr Granby added that the Respondents had simply not submitted any alternative solutions to resolve the cladding issues, and that the Applicant was entitled to select the option recommended to him, provided he acted reasonably in so doing.
17. In regard to the ancillary issues of costs under Section 20C of the 1985 Act and Paragraph 5A, the Tribunal decided that these should be dealt with separately by application of the parties, in the light of the decision to be made on the substantive application.

18. CONSIDERATION

19. The Tribunal, have taken into account all the case papers in the bundle.
20. The Tribunal notes the provisions of the Lease in Schedule 7, regarding the costs and fees of any other person properly retained by the landlord, and determines that, as the potential cladding issue was brought to light by previous insurers, it was reasonable, for the Applicant landlord to commission the reports from FRC and that in consequence, the costs of £12,234.00 arising and claimed for the service charge year 2020, are payable by the leaseholders to the landlord via the service charge.
21. Similarly, the Tribunal accepts the evidence given, that the insurance premium was increased due to issues raised at renewal concerning construction methodology, that the landlord acted reasonably and properly by using a broker to obtain alternative insurance, and that in consequence, the premium rose by approximately £10,000 per annum. The Respondents provided no evidence by way of comparison, as to any other alternatives quotes which may or may not have been available; the Applicant had provided copies of the three insurance invoices. Accordingly, the Tribunal determines that the buildings insurance premiums claimed, being £12,225.33 for 2020, £13,531.15 for 2021, and £15,445.18 for 2022, are reasonable and payable by the leaseholders to the landlord, via the service charge.
22. In regard to the cost of the proposed cladding works, the Tribunal notes that only a “*rough estimate*” was provided in the MDB report; the Tribunal notes the suggestion by Mr Granby that it may simply decide in principle that the works are reasonably necessary, without the benefit of, or need for any fully costed and detailed figures. The Tribunal has concerns that this approach would involve something akin to a “blank cheque” approval being given. The Tribunal also notes and took into account the reference made by Mr Granby to the decision in *Westminster v Fleury*, but

considers that the facts were not entirely the same as in the present case, given that in *Westminster v Fleury*, the appeal to UKUT had been unopposed and also the works had already been carried out. The Tribunal further notes that Mr Granby had clearly stated the Applicant's only driver for carrying out the proposed works, to be to reduce future insurance premiums. Mr Gloag pointed out that there is no certainty as to the amounts by which future premiums may be expected to fall; however, even if a £10,000 annual premium reduction were to apply, then the cost of the works, only roughly estimated at £235,000, would result in it taking in the region of 20+ years for such works costs to be re-couped. Moreover, it is unclear how even the figure of £235,000 is achieved, given that the "rough estimate" of £170,000 for works, £17,000 for supervision and VAT thereon, would appear to amount to only £224,400. For the avoidance of doubt, the Tribunal makes no order in respect of MDB surveyor's as referred to in the original application, in the absence of clear and verified details being provided as to such costs.

23. The Tribunal also considers that on the evidence provided, there are a number of further inconsistencies, including the suggestion that there may have been deviation from the drawings upon construction, and/or that Building Regulations may or may not have been breached, both being issues not clearly explained or pursued by either party. The Tribunal notes the apparent acceptance by the Applicant that some further report is needed, and also the lack of clarity regarding whether or not all the insulation material may actually need replacing. In such circumstances, the Tribunal considers that there must be some legitimate doubt or question raised not only as regards the reasonable accuracy or reliability of the estimated costs, but also as to the precise nature and extent of the works which actually do, or do not need to be carried out.
24. The Tribunal notes the rather unclear references made during the hearing to the existence of a relationship as between the Applicant and the original developer, and whilst it notes Mr Granby's comments to the effect that other means for recovering the cost of the works are not relevant unless there is overwhelming likelihood of recovery, the situation here is that scant, if any material evidence has been provided, as to the likelihood of such alternative recovery. The Tribunal considers that the application has been made somewhat prematurely, given that the precise nature and extent of the works was not entirely clarified as at the date of the application. Moreover, no evidence of such clarification was provided even by the date of the hearing, and it would appear in consequence that no attempt has been made, or indeed has been possible, to obtain a fully and properly costed schedule for the intended works, whatever they may eventually transpire to be. In addition, the Tribunal notes that Mr Granby said the main driver for this application was the reduction of future insurance costs; however, no clear evidence was provided as to the extent or likely rapidity as to the achievement of any such reductions or savings. Accordingly, given the uncertainty not only as to the costs, but also as to the actual extent of the works needed, and due to the other concerns and issues as identified above, the Tribunal is not in a position to, and does not determine that the budget service charge estimate of £235,000.00 as claimed in the application, is reasonable and payable. Similarly, given at least some unresolved doubts as to the properly required extent of works, the Tribunal is not in a position to determine reasonability of the works alone.
25. The Tribunal nevertheless accepts that in the light of the *Grenfell Tower* disaster, possibly defective cladding is a most serious health and safety concern, and must

point out very clearly to the parties that it is not saying that the works, or any of them, should or should not be carried out; the decision as to whether or not, or when to carry out the works is a matter for the Applicant landlord. Similarly, the lessees should not interpret this decision as meaning that no liability may ever arise for all or any of the costs envisaged, and prudent leaseholders may wish to make their own contingency provisions or to set aside savings of their own, on a reserve basis against future costs potentially yet arising.

Appeals

1. 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, by email to rpsouthern@justice.gov.uk

2. 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.

3. 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.

4. 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 the party making the application is seeking.