

SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case No. CHI/OOHN/LSC/2007/0014

REASONS

Application : Section 27A of the Landlord and Tenant Act 1985 as amended (“the 1985 Act”)

Applicant/Landlord : Keystone Property Company Limited

Respondent/Leaseholders : Mr L P R Wainwright and Mrs C M Wainwright (Ground Floor Flat) and Mr D Hinton (First Floor Flat)

Building : 69 Brassey Road Winton Bournemouth BH9 1PW

Flats : The 2 residential Flats in the Building

Date of Application : 20 February 2007

Date of Directions : 27 February 2007

Date of Hearing : 30 May 2007

Venue : Function Room 1, Lighthouse Arts Centre, Kingland Road, Poole, BH15 1UG

Attendances on behalf of the Applicant/Landlord : Mrs Anne M Bebb and Mrs Jenny Smart of Napier Management Services Limited (“Napier”)

Attendances on behalf of the Respondent/Leaseholders : Mr and Mrs Wainwright, Mr Hinton, and, until 12.30 pm, Mr P Curtis

Members of the Leasehold Valuation Tribunal : Mr P R Boardman JP MA LLB (Chairman), Mr K Lyons FRICS, and Mr T Dickinson BSc FRICS

Date of Tribunal’s Reasons : 6 June 2007

Introduction

1. This Application by the Applicant/Landlord is under section 27A of the 1985 Act, namely for the Tribunal to determine whether if costs were incurred for repairing the roof of the Building a service charge would be payable for the costs
2. On the 27 February 2007 the Tribunal gave directions
3. The hearing of the application took place on the 30 May 2007

Documents

4. The documents before the Tribunal are the application and supporting documents numbered 1 to 42 in the Tribunal's bundle, the statement dated the 9 March 2007 by Mrs Bebb, and the Applicant/Landlord's bundle of documents numbered 1 to 43

Inspection

5. The Tribunal inspected the Building on the morning of the hearing on the 30 May 2007. Mrs Bebb and Mrs Smart had telephoned to say that they were unable to attend the inspection
6. The Building was a detached house, which had been converted into two self-contained flats, and appeared to have been built in the early 1900's. It was of mostly brick construction, with a slate roof with tiled hips and ridges. A rear single storey extension had an interlocking tiled roof
7. About 20 slates on the right (west) pitch were missing or displaced. Some of the slates on the lowest course on the rear (south hip) were dislodged, with one tingle. Part of the soffit was dislodged under a corner to the rear south eastern side. There was a tingle and a missing slate at the front (north). The valleys had been bitumen-treated
8. Mr and Mrs Wainwright showed the Tribunal some peeling paper on the wall of their front room on the left of the front bay of their Ground Floor Flat. Mr Hinton showed the Tribunal a damp stain to the wall head of the back wall and two stains on the ceiling of the kitchen at the rear of his First Floor Flat, together with a further damp stain to the landing ceiling.

Preliminary and procedural matters

9. Mr Curtis said that he owned the garages next to the Building on the right

The Leases

10. The parties agreed at the hearing that the leases of both Flats were in materially the same terms as the lease of the First Floor Flat dated the 1 September 1978 at pages 8 to 18 of the Tribunal's bundle

11. For the purposes of these proceedings the material parts of the lease of the First Floor Flat are as follows :

Third Schedule paragraph 2

The Lessee shall upon demand contribute and pay one equal half part of the costs and expenses of the matters mentioned in the Fourth Schedule hereto

Fourth Schedule paragraph 3

The Lessors shall maintain repair and renew the main structure and in particular the ... roof... of the [Building]

Letter from Mike Rapp Contracts 24 November 2004 (pages 42 and 43 of the Applicant/Landlord's bundle)

12. The letter, which was addressed to Remus Management, included references to a survey in 2001, when their roofer recalled fixing slates prior to 2001 and remembered well the poor condition of the roof and the fact that it had needed a new roof because of the existing roof covering being "nail shy" with either corroded nails or rotten battens, and probably a lack of felt. The surveyor for the purchaser of the Ground Floor Flat had apparently condemned the existing roof

Collins & Associates "Ten-Year Property Plan Planned Maintenance programme" May 2006 ((pages 35 and 41 of the Applicant/Landlord's bundle)

13. The document comprised a report and accompanying "preventative maintenance notes". It included a description of the roof coverings as needing "extensive repairs/replacement", and recommended a full report by a roof specialist. The budget figure for roof repairs was £6,000

Notices under section 20 of the 1985 Act

14. In a letter from Napier dated the 14 June 2006 addressed to "all leaseholders" at the Building (pages 23 and 24 of the Applicant/Landlord's bundle), Napier, as "authorised agent of the [Applicant/Landlord]", stated that it was the intention of the Applicant/Landlord to carry out roof works, enclosed a copy specification from John I Hill dated the 8 June 2006 (pages 26 to 34), invited written observations within a 30-day consultation period ending on the 14 July 2006, and invited proposals for contractors within 30 days
15. In a letter and accompanying statement of estimates from Napier each dated the 26 July 2006 and addressed to "all leaseholders" at the Building (pages 9 to 12 of the Applicant/Landlord's bundle), Napier, as "authorised agent of the [Applicant/Landlord]", notified the Respondent/Leaseholders of four estimates (pages 13 to 21), and invited written observations

within a 30-day consultation period ending on the 25 August 2006

16. In a letter dated the 29 August 2006 and an undated notice from Napier and addressed to “all leaseholders” at the Building (pages 4 to 8 of the Applicant/Landlord’s bundle), Napier, as “authorised agent of the [Applicant/Landlord]”, notified the Respondent/Leaseholders that AKT Roofing Limited had been appointed to carry out the works, and that the cost of the works would be :

Total contract cost	£15,157.50 including VAT
Contract supervision/health and safety 10% contract sum	£1,515.75 including VAT
Managing agents’ administration (if applicable)	<u>£100.00</u>
Total	£16,773.25

Letter from Bournemouth Borough Council 24 January 2007 (page 2 of the Applicant/Landlord’s bundle)

17. The Council stated that roof repairs needed to be carried out to prevent any potential danger, and that in the interests of public safety it might be necessary for the Council to arrange for emergency action

Statement by Mrs Bebb 9 March 2007

18. Mrs Bebb stated that the Applicant/Landlord appointed Napier to take over the management of the Building in March 2006.
19. In accordance with their standard procedures they instructed a surveyor to provide a 10-year maintenance programme
20. Some money towards the cost of the roof repairs was collected by the previous managing agents, but unfortunately costs had risen in the meantime and a supplementary levy had been raised to cover the shortfall

Letter from Mr and Mrs Wainwright 11 May 2007 (page 21 of the Tribunal’s bundle)

21. Mr and Mrs Wainwright stated that they had moved into the Ground Floor Flat in July 2005
22. They had never disputed that the roof needed urgent repair or replacement. Even the 10-year property plan in May 2006 had budgeted £6,000 for roof repairs

23. They had paid £6,053.76 planned maintenance to the previous managing agents, Remus Management Limited, as shown on their completion statement in July 2005 (page 22). When they received the invoice dated the 29 August 2006 (page 32) only £1,323.22 was in the planned maintenance account. They did not know what the difference of £4,730.54 had been spent on in the intervening one year and one month, because no-one from either managing agent had done one single repair
24. They had not previously seen the report from Mike Rapp Contracts

Oral evidence

25. Mr and Mrs Wainwright and Mr Hinton stated that they agreed that the roof needed repairs, but not that it needed replacement

Replacement/repairs

26. Mrs Bebb said that when Napier had taken over the management they had been advised by the Applicant/Landlord that money had been collected from the Respondent/Leaseholders by the previous agents, Remus, with a view to replacing the roof. The letter from Mike Rapp in 2004 had made it clear that replacement was necessary. Napier had commissioned the 10-year report from Collins dated May 2006, which had stated that the roof had needed extensive repairs/replacement, and had recommended obtaining a report from a roofing expert. Napier had appointed John I Hill who had advised that replacement was preferable to repair, and had drawn the specification. The Applicant/Landlord's view was that continual repair would be ineffective from a safety, as well as an economic, point of view. In January 2007 the Council's letter had stated that it might be necessary to take emergency action
27. In answer to questions from the Tribunal, Mrs Bebb said that she thought that the Applicant/Landlord had indeed fulfilled its obligation to maintain the roof since acquiring the freehold. The letter from Mike Rapp showed that some repairs had been carried out. Napier had instructed Mr Hill to inspect the roof timbers inside, but there was nothing on file to show whether or not he had done so. The Landlord had decided that the roof needed replacement. Mrs Bebb's view was that a roof with insecure nails meant a perpetual danger to residents and the public, and that it was more economical to replace than to carry out continual piecemeal repairs. Insurance companies and mortgagees required confirmation that the roof was sound. Mrs Bebb had not seen the roof herself, but believed it to be the original roof from when the Building was built
28. Mrs Wainwright said that they had moved in in July 2005. She had not known about the Mike Rapp report at that time. Mrs Wainwright was not a surveyor and did not know whether the roof

needed repair or replacement

29. Mr Hinton said that he did not agree that the roof needed replacement. He had moved in in October 1986. There had been only one roof repair since then, and no-one had inspected the inside of the roof. The last time Mr Hinton had been up into the roof had been in about January/February 2007. He was not a builder, and could not comment on the suggestion in the letter from Mike Rapp that there were corroded nails or rotten battens. However, there was some evidence that recovering of the roof had been carried out a very long time ago, perhaps 50 years ago
30. Mrs Wainwright said that the Council's involvement had been at her instigation. She had contacted the Council because she had been concerned about the danger to children of falling slates, and had rung Napier about the possibility of an insurance claim. There had been a bad storm. She had not been concerned about the condition of the roof until then
31. Mr Curtis said that he had noticed a few slates had fallen off the western side of the roof onto his land. Although they had broken on impact, they seemed to be otherwise in reasonable condition
32. In answer to a question from Mrs Bebb, Mr Hinton agreed that the roof was at least 21 years old and had not been replaced in that time
33. In answer to a question from Mrs Bebb, Mr Curtis said that he thought that the slates had fallen off because of the high winds earlier in the year, not because of old age
34. In answer to questions from the Tribunal, Mr Curtis said that the slates had started slipping only in the last few months. The fallen slates had looked to be in good condition. He had owned his land for several years. He had not noticed slates coming off the Building in the past, but had only noticed them doing so earlier this year. About 5 had fallen off onto his land. He had not seen anyone carrying out any work to the outside of the Building
35. In answer to questions from the Tribunal, Mr Hinton said that when he had gone into the roof earlier this year he had seen daylight above his kitchen and above the top of the stairs, corresponding to the damp patches on the ceilings. He could not remember whether there was any roof felt
36. In answer to further questions from the Tribunal, Mrs Bebb said that she had not made an insurance claim because the Applicant/Landlord had thought that the problem was wear and tear and would not be an acceptable claim. Napier had not been aware that the slates had slipped because of high winds. All their records showed that the roof was in poor condition. If a lessee

requested an insurance claim to be made, she would make it, but she had not been aware of any such request

37. Mrs Wainwright said that she had been concerned about the slates coming off because of the recent bad weather and wondered whether it could be repaired under the Building's insurance. She had phoned Napier
38. Mrs Bebb initially said that she had not been the one to take Mrs Wainwright's call, but then remembered that she had. She recalled Mrs Wainwright mentioning slates falling off and the need to take urgent action because of danger to children, but did not recall any mention of high winds or an insurance claim
39. In answer to a question from the Tribunal, Mrs Wainwright and Mr Hinton said that they had not responded to the notices sent by Napier under section 20 of the 1985 Act, except, in Mrs Wainwright's case, to ask whether she could pay by instalments

Specification

40. Mrs Bebb said that Napier had employed John I Hill to prepare the specification. Napier relied on it. He had allowed a sum of £3,000 for contingencies. He had obtained quotes. They were all for similar figures. Mr Hill was not present to give evidence

Cost

41. Mrs Bebb said that the quotes ranged from £9,900 to £11,170 plus contingencies plus VAT. They were in the expected range. The prices seemed fair
42. Mr and Mrs Wainwright and Mr Hinton all agreed that the prices were reasonable for the works specified, but disagreed that those works were necessary

Recovery

43. Mrs Bebb said that the lease allowed recovery of sums in advance, before the work was carried out, under paragraph 2 of the third schedule to the lease
44. In answer to questions from the Tribunal, Mrs Bebb said that "on demand" impliedly, although not expressly, allowed demands on account of future expenditure. She agreed that ambiguous wording in a document had to be construed against the person relying on it. However, the words

“costs and expenses” were not stated in the lease to be limited to past costs and expenses. In addition, “expenses” were not limited to money already expended. “Costs” were different from “expenses”, so that, in relation to the figures in the letter dated the 29 August 2006 (page 4 of the Applicant/Landlord’s bundle), the contract figure of £15,157.50 (£9,900 plus contingency £3,000 plus VAT) was a cost, but the 10% contract supervision figure of £1,515.75 and the agents’ administration figure of £100 were expenses, and impliedly, although not expressly, recoverable under the lease. Mrs Bebb did not agree that recoverable costs and expenses under paragraph 2 of the third schedule were defined by and limited to those “matters” set out in the fourth schedule, because the costs and expenses of matters ancillary to the matters set out in the fourth schedule could be impliedly recovered as well. She did agree that there was no express ability to recover surveyor’s costs, and that there was no statutory CDM requirement in this case in view of the size of the proposed contract

Accounting

45. Mrs Bebb said she understood Mrs Wainwright’s concern about the whereabouts of the £6,053.76 paid to Remus Management by Mr and Mrs Wainwright on completion of their purchase in July 2005 (page 22 of the Tribunal’s bundle), in the light of the nil brought-forward balance on the Napier statement dated the 29 August 2006 (page 32). However, Remus had now provided Napier with funds and a reconciliation of the balances held, and Mrs Bebb had sent Mrs Wainwright an e-mail explaining that the net balance owing to Napier was in fact now the reduced figure of £5,500. Mrs Bebb would now write to Mr and Mrs Wainwright with a detailed account of what had happened to the £6,053.76

The Tribunal’s findings

46. Having considered all the evidence in the round, the Tribunal finds, on a balance of probabilities, that if the proposed costs were incurred for repairing the roof of the Building a service charge would not be payable for the costs
47. The Tribunal’s reasons are as follows

Replacement/repairs

48. The Tribunal has taken account of the following factors relied on by the Applicant/Landlord as establishing the necessity of replacing the roof, rather than carrying out repairs :
- a. the factors mentioned in the letter from Mike Rapp Contracts dated the 24 November 2004
 - b. the fact that Napier had been advised by the Applicant/Landlord that money had been collected from the Respondent/Leaseholders by the previous agents, Remus, with a view

to replacing the roof

- c. Mr Hinton's evidence that the roof was at least 21 years old
- d. the advice in the Collins & Associates "Ten-Year Property Plan Planned Maintenance programme" dated May 2006 that "extensive repairs/replacement" were necessary
- e. the advice from John I Hill that replacement was preferable to repair
- f. the Applicant/Landlord's view that continual repair would be ineffective from a safety, as well as an economic, point of view
- g. the reference in the letter from Bournemouth Borough Council dated the 24 January 2007 to emergency action being needed
- h. the evidence of Mrs Wainwright and Mr Hinton that they did not raise any objection to the proposed works on receiving the notices under section 20 of the 1985 Act
- i. Mrs Wainwright's comment in her letter of the 11 May 2007 that she had never disputed that the roof needed urgent repair or replacement

49. However, the Tribunal has also taken account of :

- a. Mr Curtis's evidence that there had been no external evidence of slippage of slates until the finding of the fallen slates from the west pitch following the recent storms, that the fallen slates appeared to have been in good condition, and the fact that he thought that the slates had fallen off because of the high winds earlier in the year, not because of old age; the Tribunal accepts that evidence, as being straightforward and persuasive
- b. Mrs Wainwright's evidence that the Council's involvement had been at her instigation, and that she had not been concerned about the condition of the roof until the recent storms; again, the Tribunal accepts that evidence as straightforward and persuasive
- c. Mr Hinton's evidence that the only damage to the first floor flat had been the 3 damp patches on the ceilings, and that when he had gone into the roof earlier this year he had seen daylight above his kitchen and above the top of the stairs, whose locations had corresponded to the damp patches on the ceilings, whose locations had themselves corresponded with the slipped or missing slates on the west pitch; again, the Tribunal accepts that evidence as straightforward and persuasive
- d. Mr Hinton's evidence that there had been only one roof repair since he had moved in in 1986, and that no-one had inspected the inside of the roof; again, the Tribunal accepts that evidence as straightforward and persuasive
- e. Mrs Bebb's evidence that Napier had instructed Mr Hill to inspect the roof timbers inside, but there was nothing on file to show whether or not he had done so
- f. Mrs Bebb's evidence that she had not seen the roof herself
- g. the fact that reference in Mr Rapp's letter to the roofer's recollection that the Building needed a new roof apparently was a recollection from "prior to 2001", whereas the direct evidence before the Tribunal, namely from Mr Curtis, Mrs Wainwright, and Mr Hinton, is that there had been no recent problems with slippage of slates prior to the recent storms

- h. the fact that Mr Collins's report referred to "extensive repairs/replacement", rather than simply to "replacement"
- i. the fact that Mr Collins's report recommended a report by a roof specialist, but that there is no subsequent report as such before the Tribunal, only a specification of works from Mr Hill
- j. the fact that the letter from the Council referred to "roof repairs" and "emergency action", but did not refer to replacement, as such
- k. the fact that there is no direct evidence before the Tribunal for the purposes of these proceedings, either by way of written statement, or by way of oral evidence, from Mr Rapp, from the roofer referred to in Mr Rapp's letter, from the surveyor for the purchaser of the Ground Floor Flat referred to in Mr Rapp's letter and who had apparently condemned the existing roof, from Mr Collins, from a roof specialist as recommended by Mr Collins, or from Mr Hill, to corroborate the Applicant/Landlord's view that replacement was necessary, or the Applicant/Landlord's view that continual repair would be ineffective from a safety, as well as an economic, point of view
- l. the fact, as the Tribunal finds, that the Tribunal's inspection of the Building did not reveal :
 - any obvious structural problem, such as deflection, in the roof pitches.
 - such a significant proportion of slipped slates compared with the total number of slates on the whole roof, as might have indicated a need to replace, rather than repair, the roof
 - such significant problems with the valleys as could not have been remedied by further bitumen-treatment, rather than replacement
 - any damage to the Ground Floor Flat which was likely to have been attributable to problems with the roof, rather than, for example, to problems with rising damp
 - any damage to the First Floor Flat which was likely to be attributable to long term problems with the roof requiring its replacement, rather than short-term problems requiring repairs, which the Tribunal finds to be consistent with the evidence of Mrs Wainwright, Mr Hinton, and Mr Curtis, namely that some slates had slipped a few months earlier

50. Having considered in the round all the evidence actually before the Tribunal, the Tribunal is not persuaded, on a balance of probabilities, that the roof now requires replacement, rather than repairs

Specification and cost

51. In the light of the Tribunal's finding that if the proposed costs were incurred for repairing the roof of the Building a service charge would not be payable for the costs, it is not necessary for the Tribunal to make a finding about the specification and cost. However, the Tribunal notes that there has been no dispute by the Respondent/Leaseholders in either respect

Recovery

52. Again, in the light of the Tribunal's finding that if the proposed costs were incurred for repairing the roof of the Building a service charge would not be payable for the costs, it is not necessary for the Tribunal to make a finding about recovery of the sums claimed
53. However, in the light of the submissions before the Tribunal in that respect, the Tribunal sets out its findings in that respect, in case they are helpful to the parties
54. The Tribunal has taken full account of all Mrs Bebb's submissions. However, the Tribunal finds that :
- a. there is no express power in the lease for the Applicant/Landlord to require the Respondent/Leaseholders to pay service charges in advance of costs and expenses being incurred by the Applicant/Landlord in respect of work carried out or to be carried out by the Applicant/Landlord in accordance with the fourth schedule paragraph 3
 - b. neither is there an implied power in the lease for the Applicant/Landlord to do so because :
 - the words "costs and expenses" in paragraph 2 of the third schedule signify, without more, by their ordinary meaning, money already expended in the past, rather than money to be expended in the future
 - in any event, even if, contrary to the Tribunal's finding, the words "costs and expenses" are ambiguous, and are capable in principle of signifying money to be expended in the future, they should be construed against the party, namely the Applicant/Landlord, who is seeking to rely on them, and any such ambiguity should be resolved in favour of the Respondent/Leaseholders
 - the words "on demand" in paragraph 2 of the third schedule are themselves neutral so far as timing of the demand is concerned, namely whether the demand should be made after the incurring of the costs and expenses, or whether it could be made beforehand, and do not themselves imply any power for the Applicant/Landlord to do so
 - c. there is no express power in the lease for the Applicant/Landlord to require the Respondent/Leaseholders to pay service charges in respect of surveyor's fees, "contract supervision/health and safety", or "managing agents' administration"
 - d. neither is there an implied power for the Applicant/Landlord to do so because :
 - the matters in respect of which the Respondent/Leaseholders are liable to pay a service charge are the matters set out in the fourth schedule paragraph 3
 - those matters are not expressed to include surveyor's fees, "contract supervision/health and safety", or "managing agents' administration"
 - in any event, even if, contrary to the Tribunal's finding, the wording of the fourth

schedule paragraph 3 is ambiguous, and is capable in principle of including surveyor's fees, "contract supervision/health and safety", or "managing agents' administration", the wording should be construed against the party, namely the Applicant/Landlord, who is seeking to rely on it, and any such ambiguity should be resolved in favour of the Respondent/Leaseholders

- the words "costs and expenses of the matters mentioned in the Fourth Schedule" in the third schedule paragraph 2 signify, without more, by their ordinary meaning, simply money expended on the matters mentioned in the fourth schedule, and are themselves neutral so far as the nature of those matters are concerned, and do not themselves add anything to, or add any categories of matters to, the matters set out in the fourth schedule

Accounting

55. The Tribunal notes Mrs Bebb's assurance that Mrs Bebb would now write to Mr and Mrs Wainwright with a detailed account of what had happened to the £6,053.76 paid by Mr and Mrs Wainwright in July 2005

Dated the 6 June 2007



.....
P R Boardman
(Chairman)

A Member of the Tribunal
appointed by the Lord Chancellor