CHI-21UC-LSC-2007-0070

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTIONS 27A AND 20C OF THE LANDLORD AND TENANT ACT 1985

FLAT 5, CARLISLE GRANGE, 22A GRANGE ROAD, EASTBOURNE, EAST SUSSEX BN21 4HF

Applicant:	MR J MAHONEY (FLAT 5)
Respondent:	CARLISLE GRANGE RESIDENTS LTD (Landlord)
Date of hearing:	13 November 2007
Date of inspection:	13 November 2007
Appearances:	The applicant (in person) Ms Carol Pearce of Stredder Pearce agents and Mr Michael Courtnage MRICS MaPS (for the Respondent)

Members of the Leasehold Valuation Tribunal:

Mr M Loveday BA(Hons) MCIArb
Mr RA Wilkey FRICS FICPD

BACKGROUND

1. This is an application in respect of service charges relating to a block of flats at Carlisle Grange, 22a Grange Road in Eastbourne. The applicant was until August 2007 the lessee of Flat 5. The respondent is the freehold owner. The property is managed by Messrs Stredder Pearce, a firm of property managers and surveyors in Eastbourne. The issue relates to roof works.

2. On 29 July 2007, the applicant applied to the Tribunal for a determination under section 27A of Landlord and Tenant Act 1985 in respect of liability to pay the anticipated cost of the works. Directions were given on 4 September. The works have since been completed, although at the date of the hearing no final bill had been rendered by the contractors.

3. The application raises issues of whether (1) the cost of the works (estimated at £28,879.04) was reasonably incurred and (2) the cost of loft insulation works (£7,315) is recoverable under the terms of the leases of the flats. There is also an application under section 20C of the Act that the respondent's costs in connection with the application to the Tribunal should not be added to the service charge.

INSPECTION

4. The inspection took place on the morning of the hearing. The property comprises a red brick former school building in central Eastbourne which has been converted into 9 flats. The main part, which is on 3 storeys including mansard, appears to have been built in about 1880 although there are later additions. The external decorative condition is good. There is a multi-pitch tiled roof with steep pitches, lead details and decorative terracotta ridge tiles. The Tribunal was able to inspect the exterior of the three rear (west facing) pitches from the large flat roof. These pitches have been very recently recovered in red concrete replacement tiles and the rainwater goods, valley gutters, lead flashings, ridge tiles, vents and various skylights have been renewed. It was evident that the tiles to the east facing front pitches (which are not accessible from the flat roof) have not been renewed. These appeared to be in sound condition, although showing signs of weathering. Since some roof pitches ran

north south, the result is that these pitches were half covered in old and half covered in new tiles. Internally, there is a single roof void accessible by ladders and gangways laid across the ceiling joists. The underside of the recently tiled areas of roof has been lined with new underlay. The floor to the roof void has been insulated with fibreglass type material. This is laid in 3 layers throughout to a thickness of about 1 foot laid between and over the ceiling joists. There are signs that battens have been renewed to the rear pitch, but the rafters appear original. There are also signs of tanks and redundant pipe work having been removed recently, flues having been capped and the internal area generally opened up by the removal of internal partitions.

THE LEASE TERMS

5. A copy of the lease for Flat 5 was provided to the Tribunal. The Lease is made between Regal Way Properties Ltd and Mrs Joan Ryan and is dated 3 May 1978. By clause 4(5) the lessee is required to pay a service charge. By paragraph 1(1) of the Sixth Schedule to the Lease, that charge is to include the lessor's costs "*in carrying out its obligations under clause 5(4) of this Lease.*" By clause 5(4) the landlord is required:

> "*(a) to maintain and keep in good and substantial repair and condition:-*
> *(i) The main structure of the building on the Landlord's Property including the principal internal timbers and the exterior walls and the foundations and the roof thereof with its main water tanks main drains gutters art rain water pipes ...* "
> *(b) As and when the Landlord shall deem necessary to paint the whole of the outside wood iron and other work of the Buildings on the Landlord Property heretofore or usually painted ...* "

THE ROOF WORKS

6. The principal issue relates to the recovering of the west facing pitches of the roof. Save in one respect, the applicant accepts that the relevant costs are recoverable under the terms of the lease and that the respondent has complied with the consultation requirements of section 20 of the 1985 Act. The sole issue is whether the costs were reasonably incurred under section 19 of the Act.

7. Applicant's case. The applicant accepted that ££28,879.04 was a reasonable cost for replacing the entirety of the rear roof pitches. His contention was that this

work was unnecessary, and that patch repairs would have sufficed. He relied on his statement of case (undated) and expanded on these arguments in his oral submissions at the hearing. He contended that under clause 5(4) of the lease, the respondent was required to establish the state of repair of the roof "beyond doubt". In this case, the landlord had failed to employ an independent surveyor to assess whether it was necessary to recover the roof entirely. There were three pieces of evidence that no surveyor was employed. Stredder Pearce admitted in a letter (20 November 2006) that "*there has been no formal written surveyors report issued appertaining to the condition of the roof slopes*". He had requested sight of any report on several occasions, and the agents had not provided one. Furthermore, any surveyor would require access to flat 5, and no such inspection of flat 5 had taken place.

8. The applicant contended that the respondent had therefore unnecessary incurred the substantial cost of recovering the roof when patch repairs would have been sufficient. He relied on a written report of Mr. Roger Morehen BSc MRICS of Messrs. Kingston Morehen Chartered Surveyors (3 May 2007). Mr. Morehen did not attend the hearing. His report stated:

> "*At the present time I do not believe the rear roof slope requires stripping off and renewing. It does require a thorough overhaul which will probably need to be repeated every year. It is obviously important that the tiled roof coverings are maintained to a good standard in order to prevent penetrating dampness occurring internally but, subject to a regular overhaul – and depending upon weather conditions experienced in the future – I believe that the "life" of the tiled roof could be extended for a further 3-5 years*"

Having read the report, the applicant then obtained an estimate from Angel Roofing & Building Services (12 May 2007). This quoted a cost of £240 to replace any defective tiles using ones to match existing and to refit tiles where they have slipped out of place. The applicant alleged that the respondent had admitted the roof pitches could have been repaired rather than renewed. He referred to a letter from the Chairman of the respondent to the leaseholders (1 May 2007) which stated that a consultant surveyor had inspected in 2003 and that he had taken the view then that patch repairs could be carried out but that the roof would require major work within 3-4 years. In a letter (30 May 2007)

the agents also suggested that the front roof pitches still had a further life of 10 years left in them. If that was the case, the same applied to these roof pitches.

Respondent's case. The respondent relied on the expert evidence of Mr Michael Courtnage MRICS MaPS, a Chartered Building Surveyor employed by the agents Stredder Pearce. He relied on a Condition Report (8 August 2007) and a Project Status Report (11 October 2007). The latter dealt with the position on completion of the works and was prepared by a colleague Mark Jackson but Mr Courtnage adopted Mr Jackson's conclusions. The rear roof had been inspected by a number of surveyors over recent years. An initial notice under Schedule 4 Part 2 to the Service Charges (Consultation)(England) Regulations 2003 had been served on leaseholders in November 2006. A specification was prepared and four tenders were received. All the consultation procedures were complied with. Eastbourne BC's planning department agreed in a letter (26 January 2007) that the rear roof pitch "clearly" needed replacing. Instructions were issued to the successful contractor, MW Pyle Roofing on 8 June 2007 and work started on 20 August. Practical completion was deemed to have taken place on 17 September. Mr Courtnage dealt in some detail with the need to recover the roof pitches. The tiles were a mixture of original clay and replacement concrete tiles. There was evidence of general degradation of the clay tiles as a result of which many had become weak and brittle (a sample tile was produced at the hearing). The battens were undersized by current standards and many were damaged and split. The concrete tiles were over 60 years old, they were becoming pitted and many were cracked or damaged. The problems were widely spread over the various pitches and altogether some 300 tiles were missing, had slipped or were damaged. There was a risk of slipping tiles causing injuries below. In addition, the roof fixings were showing signs of damage and nail sickness. Lack of underfelt was leaving the property open to damp problems and had led to a number of problems with the fire alarm system. The valley gutters were at the end of their useful life, there had been redundant roof projections such as vents and the roof lights were potentially dangerous. A number of photographs were produced showing the condition of the roof before the works. Mr Courtnage concluded that the roof coverings required replacement. The RICS suggested that clay roof tiles had a life span of was 60-100 years (with a mean life span of

68 years) and that concrete tiles had a life span of 43-100 years (with a mean life span of 46 years). What was seen on site was consistent with roof coverings which had exceeded their natural life span. If the roof was not recovered, patch repairs would be required year after year and the works would necessary become increasingly expensive. There was also a danger that such repairs would lead to a major roof failure. Conditions were getting wetter and windier. Patch repairs could also cause further damage to other areas of the roof. Such works would be a waste of the maintenance fund. When cross-examined, Mr Courtnage stated that each replacement tile cost about £1. He did not consider that £240 would be sufficient to even carry out patch repairs in even one year since his report identified far more damaged tiles and there would be substantial labour and scaffolding costs as well.

10. Ms. Pearce relied on a detailed statement of case and chronology (13 October 2007) which she elaborated on at the hearing. She stated that the relevant costs were to be largely met from a sinking fund. The works were part of a 10 year maintenance programme. It was incorrect that no surveyors had inspected. In June 2003, scaffolding was erected for works to the rear elevation. Ms. Pearce produced a letter from Mr. John Parsons (10 September 2007) who in 2003 had been a consultant from the project managers Focus Consulting Chartered Surveyors. He had inspected the rear roof from the scaffolding on 16 June 2003 with various contractor and directors of the respondent. His advice was then that there was severe tile batten failure and he had then noted over 200 damaged and decaying tiles. His advice had been to carry out immediate patch repairs and then undertake major roof works by 2006/07 at the latest. Mr. Gavin Lewis from the agents inspected again in September 2003 and patch repairs were carried out. Surveyors had orally reported to the 2004 and 2005 AGM. On 4 August 2006, Mr. Potts, another surveyor from Stredder Pearce, conducted an extensive inspection. It was correct that as of November 2006, no formal report had been prepared, but the surveyors were at that stage unanimous that major works were required. In December 2006, an iron ladder was installed to help with inspection and works. Two inspections took place with planning officers and surveyors in January 2007 (one of which was attended by the applicant), and a specification of works was produced by another surveyor from Stredder Pearce (Mr. Mark

Jackson) on 19 February 2007. Ms. Pearce did not accept that there had been any admission that patch repairs would suffice. Replacement of the roof tiles came within the definition of "repair" in clause 5(4) and in any event, the AGMs had been told each year that the rear roofs were to be replaced in 2007. Mr. Morehen's report did not conflict with the respondent's evidence. Mr. Morehen merely considered that the life of the roof "could" be prolonged by patch repairs for another 5 years. However, this was subject to a thorough overhaul each year for 5 years. This would not be good management practice. Angel Roofing's estimate was not a "thorough overhaul" and could be ignored. As to the issue of the front pitches, these weathered at a different rate to the rear pitches which faced the prevailing winds close to the seafront in Eastbourne.

11. Decision. Under section 19(1) of the Act, relevant costs shall be taken into account in determining the amount of a service charge payable "*only to the extent that they are reasonably incurred*". There is a two stage test involving a consideration of whether the action taken by the landlord was reasonable, and whether the costs incurred in taking the action were reasonable: ***Veena SA v Cheong*** [2003] 1 EGLR 175. The Tribunal rejects the contention that this requires a landlord only to carry out works if it establishes "beyond doubt" that works are required; the words of section 19 plainly state that the landlord may recover costs which are "*reasonably*" incurred. Furthermore, there is nothing in clause 5(5) of the lease which imposes such a restriction on the landlord. The respondent is required to keep the property in "*good and substantial repair and condition*" and need not (indeed must not) wait until it is clear "beyond doubt" that such works are required. Furthermore, the words of clause 5(4) can be contrasted with those of clause 5(5) of the lease which state that the landlord must redecorate when it considers it "*necessary*" to do so.

12. Here, the landlord contends it took expert advice from a number of surveyors, a fact disputed by the applicant. On this issue of fact, the Tribunal accepts the evidence of the respondent that several inspections were carried out by surveyors employed by Stredder Pearce and also by Mr. Parsons. These inspections are documented and can be the only real explanation for the reports

about the works by Stredder Pearce to the respondent's AGMs. The Tribunal also accepts the explanation that the reason for the words used in the letter of 20 November 2006 was that no formal written report had been prepared at that stage.

13. It is therefore clear that at all stages the respondent acted on the advice of Stredder Pearce, a firm of surveyors, that the roof coverings should be replaced rather than subject to patch repairs. Furthermore, both Mr. Parsons and the local authority concurred that this was the best way forward. It is difficult to see how the landlord can be faulted for acting on this advice. The Tribunal also accepts the evidence of Mr. Courtnage that replacement of the roof coverings was preferable to patch repairs. His evidence about the deterioration in the roof tiles and battens, the life span of such tiles and the difficulties with patch repairs are convincing. By contrast, the written evidence from Mr. Morehen was brief and he was not available to be examined on his report at the hearing. The latter's report is not entirely inconsistent with that of Mr. Courtnage – a thorough overhaul each year for 3-5 years may mean very significant costs indeed, and Mr. Morehen does not price the different options. Finally, the Tribunal does not attach any weight to the point that the front roof pitches have not deteriorated to the point that the respondent intends to recover them. The effect of the prevailing winds would generally be to cause more damage to western facing roof pitches and would mean that existing tiles on eastern facing pitches would have a longer life span. In short, it was reasonable for the landlord to incur the relevant cost of recovering the rear roof pitches rather than carrying out patch repairs.

INSULATION WORKS

14. The estimated cost for laying 300mm of new insulation was £5,660 plus VAT at 17.5% and this cost formed part of the roof contract. Although the Tribunal was not referred to the specific regulations, it was common ground that building regulations required the respondent was required to upgrade insulation to meet current standards of at least 250mm thickness if it intended to replace over 25% of the roof coverings.

15. Applicant's case. The applicant accepted the cost was recoverable under clause 5(4)(j) of the lease. He stated that the loft insulation was adequate before the works were carried out. He submitted that the costs was not reasonably incurred because:

(a) The respondent ought properly to have omitted the insulation work from the works contract, so that individual leaseholders could apply for grant aid. Grant aid was available for individual leaseholders from the government backed-HEAT Project but this was not available if the insulation was installed by the respondent as part of the major works. The applicant produced an estimate from HEAT (21 May 2007) which suggested that insulating the ceiling above Flat 5 would only cost £241.26 including VAT. There was another estimate from a contractor Quake Energy Services suggesting a cost of £284.32. The total cost for insulating the roof void would be about double these figures.

(b) The respondent could also have paid a lower rate of VAT on the cost of the insulation. The rate payable on energy conservation products was 5% but because the insulation formed part of the building contract, it had been paid at 17.5%. Had the insulation work been carried out separately, the loft insulation work would not have incurred VAT at the full rate.

(c) The costs were excessive. The applicant had obtained a quotation from CavityTech (24 July 2007) for non-grant aided works for £1,026 inclusive of VAT at 5%. This estimate was much lower than the figure cited by the respondent because CavityTech considered it possible to overlay the existing insulation with a 170mm layer of new material.

16. The respondent's case. Ms. Pearce submitted that the insulation costs were clearly recoverable under clause 5(4)(j) of the lease. She produced photographs showing the loft void before the works. The roof void had been absolutely filthy and covered in dust from the crumbling tiles. During the works, the insulation material would have got even dirtier. Simply overlaying the old dirty material would have made the new insulation dirty as well. The decision had therefore been taken to provide fresh insulation. In any event, significant works were

carried out in the loft space to remove partitions tanks and pipes. The old insulation had to be taken up in places to do this and it did not cover all the areas cleared. Since the insulation had to be to modern standards after the roof works, any phased insulation would have had to be carried out before the roof renewal. This would have delayed everything.

17. Decision. The Tribunal accepts that it was not reasonably practicable to carry out the loft insulation works in phases before the roof works – which is the only way that an application for non-VAT grant-aided work could have been carried out. This would have delayed the works considerably. Moreover, even had this been practicable, much of the insulation would then have had to be replaced once the tanks and partitions were removed from the loft void. The Tribunal also accepts that it was not practicable to overlay dirty old insulation with a fresh layer since this would not have covered the whole roof void and the new material would have been contaminated. The estimates given by the applicant proceed on the wrong basis of piecemeal replacement or of overlaying old insulation. The landlord acted on the advice of a surveyor that this was the way to carry out the work. The cost was therefore reasonably incurred.

SECTION 20C

18. The respondent indicated that it would seek to add the agent's costs of the proceedings before the Tribunal to the service charges. At this stage, the question of whether those costs are recoverable under the terms of the lease does not arise. The applicant has made an application under s.20C of the 1985 Act and the Tribunal has regard to the guidance given by the Lands Tribunal in ***Tenants of Langford Court v Doren*** (2001) LRX/37/2000 in this respect.

19. The applicant contended that the respondent acted unreasonably in starting the works while the Tribunal was pending. Ms. Pearce submitted that it was always plain that the roof works were needed. Not one expert had suggested otherwise (even Mr Morehen said that replacement would be needed in 3-5 years). The applicant had delayed in making his complaint until June 2007, by which time the works were almost under way. 7 out of 9 shareholders backed the respondent. The applicant had sold his flat on 14 August and even the purchaser

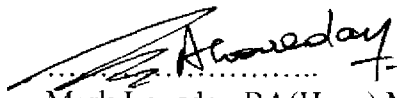
of Flat 5 backed the respondent. The works had been carried out to avoid construction taking place during the winter months and because the tender quotes were about to expire.

20. Section 20C(3) provides that an order may be made where it is "*just and equitable*" to do so. The Tribunal considers it would not be just and equitable to make an order for the following reasons. The applicant has failed in his application. He did not suggest it was unreasonable for the agent to be retained to conduct the matter. The Tribunal finds that the respondent acted reasonably and fairly in resisting the application. The respondent is a leaseholder-owned freehold company and that there is no suggestion it has acted oppressively. Finally, the respondent has acted reasonably in completing the roofing works before the Tribunal hearing. Although by doing this, the respondent risked not being able to recover the cost of the works from leaseholders (in the event that this Tribunal had found for the applicant) there were good reasons for completing the work before the winter set in and the tenders already obtained expired.

CONCLUSIONS

21. The application under section 27A of the Landlord and Tenant Act fails. The relevant costs of roofing works and of loft insulation were reasonably incurred under section 19 of the Act.

22. No order is made under section 20C of the Act.



Mark Loveday BA(Hons) MCI Arb
Chairman
Dated: 5 December 2007