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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BE/LSC/2015/0208**
Property	:	**14 Cam Court, Bibury Close, London SE15 6AG**
Applicants	:	**(1) Tess Huong Le** **(2) Daniel Hill**
Representative	:	**Tess Huong Le (First Applicant)**
Respondent	:	**London Borough of Southwark**
Representative	:	**Mr Ahmed**
Type of application	:	**For the determination of the reasonableness of and the liability to pay service charges**
Tribunal members	:	**Judge T Cowen** **Mr A Lewicki FRICS MBEng**
Venue of hearing	:	**10 Alfred Place, London WC1E 7LR**
Date of hearing	:	**10 November 2015**

DECISION

Decision of the tribunal

(1) The Tribunal determines that all the elements attributable to the replacement of the flat roof surface of the building (including scaffolding, other preliminaries and related professional fees), which are contained in the estimated service charges which are the subject of the section 20 major works notices, are NOT PAYABLE by way of service charges.

(2) We have not calculated the precise amounts involved because the application was based only on estimates and because there had been a dispute about apportionment which was resolved by agreement prior to the hearing. This decision concerns the points of principle which were argued before us. In the event that any dispute arises as to the calculation of actual service charges in the light of this decision, the parties are at liberty to make a further application, but they will of course be bound by the points of principle decided in this application.

(3) The Tribunal makes no order as to costs under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules").

(4) The Tribunal orders, pursuant to section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act") that the costs incurred by the Respondent in these proceedings are not to be treated as relevant costs for determining any service charges

(5) The reasons for the orders made above are set out in the remainder of this decision.

The application

1. The Property is a three bedroom second floor flat located in a purpose built six-storey block of split-level flats known as 1-36 Cam Court ("the Building"). Cam Court is part of an estate known as Gloucester Grove. There are 33 flats in the Building.

2. The Applicants are the leaseholders of the Property under a lease dated 29 October 2007 for 125 years and commencing on that date ("the Lease"). The Applicants are the original lessees who purchased the Lease under the right to buy scheme. They do not presently occupy the Property.

3. The Respondent ("the Council") is the Applicants' landlord under the Lease. The Lease provides for the payment of service charges by the Applicants to the Council.

4. The Applicants commenced the application to the Tribunal in May 2015 seeking a determination of the payability of service charges for major works for the service charge years 1 April 2015 to 31 March 2016.

5. The disputed elements of the major works in question involve:

   a. Complete replacement of the flat asphalt **roof** of the Buiding

   b. Brick and concrete repairs to the **walls**

   c. Replacement of **balcony** floor coverings

   d. **Preliminaries** and **risk** items.

6. The amount in dispute is the sum of £12,126.79 being part of the amount charged in respect of the major works element for the relevant year. The Applicants do not dispute (1) one item on the major works element relating to the repair and enhancement of the landlord's electricity supply and (2) the non-major works element of the service charges for that year.

7. The Applicants also made an application under section 20C of the 1985 Act for an order that the costs incurred by the Council in these proceedings are not to be treated as relevant costs for determining any service charges. The Council has indicated in its Statement of Case that it has no intention of passing on its costs of these proceedings before this Tribunal by way of service charges under the Lease.

8. The works in question commenced on 16 January 2015 and were projected to be completed by January 2016. The Tribunal was therefore unable to inspect the alleged items of disrepair in their original state. For the same reason, there was no final account of costs at the date of the Tribunal hearing. Our decision relates only to the estimates provided as part of the section 20 notice procedure.

The Service Charge Covenants and Other Relevant Covenants

9. The relevant covenants in the Lease can be summarised as follows:

   a. At clause 2(3)(a) a lessee's covenant to pay the service charges set out in the Third Schedule.

   b. At paragraph 2(1) of the Third Schedule, the Council is required to provide a reasonable estimate for the amount payable in the coming service charge year.

c. At paragraph 2(2) of the Third Schedule, a lessee's covenant to pay the estimate in advance in equal quarterly payments

d. At paragraph 7(1) of the Third Schedule, a lessee's covenant to contribute towards the Council's costs of carrying out works required by clause 4(2)-(4) of the Lease

e. Clause 4(2)-(4) of the Lease requires the Council to keep in repair (amongst other things) "the structure and exterior of the Property and the Building and to make good any defect affecting that structure" to provide the Services as defined in the Lease and clause 4(6) requires it to insure the Building

f. At paragraph 7(6) of the Third Schedule, a lessee's covenant to contribute towards the Council's costs of maintenance and management.

10. The service charge year is defined in the Third Schedule to run from 1 April to 31 March each year. Service charge estimates are followed by a balancing charge or credit once the accounts are finalised after the end of the service charge year.

11. The service charge is defined in the Third Schedule as a "fair proportion" (determined by the Council using "any reasonable method") of the costs and expenses incurred by the Council in complying with its obligations to repair, insure and provide services, as outlined above, together with the cost of maintenance and management of the Estate and employment of managing agents.

12. The Council is also entitled, under the Third Schedule to the Lease, to charge the Applicants for installation of double glazed windows, by way of improvement, and an entry-phone system, in the absolute discretion of the Council. It is common ground between the parties that the Council is not entitled to charge the Applicants under the terms of the Lease for any other improvements.

Jurisdiction

13. This decision concerns a determination pursuant to s.27A of the 1985 Act as to the amount of service charges payable by the Applicant. That section together with other relevant statutory provisions are set out in full in the appendix to this decision.

14. Those provisions give this Tribunal the jurisdiction to consider (amongst other things):

a. whether any particular item is recoverable as a service charge at all

b. how much is payable by way of service charge in respect of any particular item;

c. and, in deciding that question, to consider whether any given cost is reasonably incurred under section 19 of the Act.

The Issues

15. The following areas of dispute were identified in the Applicant's statement of case:

a. The roof replacement work is not a repair but an improvement. Under the terms of the Lease, the Applicants are not liable to pay for the cost of improvement.

b. If the roof replacement works and other disputed items are recoverable as a service charge under the term so the Lease, their cost is not reasonably incurred within the meaning of section 19 of the 1985 Act.

c. The proposed proportion of the cost of works payable by the Applicants – 1/13 – is not a reasonable method of apportionment, because there are 36 flats. A more reasonable proportion would be 1/36.

16. The last of these – the apportionment issue – was no longer in dispute between the parties because, before the hearing, they agreed that the proportion should be 7/236. That issue therefore no longer require any decision for us.

17. Of the remaining issues, by far the most significant in terms of cost and argument is the question whether the replacement of the roof is a recoverable item and if so how much is payable.

18. The other remaining items, balcony floor coverings and brick/concrete repairs to walls, are expressed by the Council to be in the section 20 notice and estimated service charges only to the extent that further inspection reveals the work to be necessary. In our judgment, it is not unreasonable for the Council to include those items on that basis in estimates and so we make no deductions with respect to those.

19. That reasoning does not apply to the roof replacement works as the Council have made a definite decision to replace the roof and had, at the date of the hearing, commenced doing so.

20. The remainder of this decision will therefore focus on the issue of the roof.

The Roof Issue

21. In essence, the Applicants say that the replacement of the roof was unnecessary because it was not in disrepair. If the Applicants are right, then the replacement of the roof was not a repair,and its cost cannot be recovered by way of service charges. The Applicants say that the Council is entitled to replace the roof if it wishes, it is after all the Council's roof. But, they say, the Council cannot charge the Applicants under the service charge provisions of the Lease if the replacement of the roof is simply an improvement to the Building. The Applicants say that they are only liable to pay for the replacement cost as a service charge if the roof was in disrepair such that the disrepair required its replacement. It is common ground between the parties that the service charge provisions of the Lease do not allow the Council to collect service charges for improvements, only for legitimate and reasonable repairs.

22. The Council argues before us that the roof was in disrepair and that its replacement was a reasonable means of remedying that repair. The Council correctly reminded us of the test in *Forcelux v Sweetman* [2001] 2 EGLR 173, namely that the question for us is not whether the method they chose is the very best or the very cheapest. Nor is it a question whether we would have chosen the same method if we were in the Council's shoes. The question for us is whether the Council's decision to carry out the works was a reasonable decision, whether it "falls within the band of reasonable decisions".

23. The matter therefore boils down to the following questions:

    a. Was the roof in disrepair?

    b. If so, what was the nature of the disrepair?

    c. Was replacement of the roof one of the reasonable responses to any such disrepair?

    d. Was the estimated cost a reasonable amount?

24. In order to adjudicate on these issues, the first step is to set out the process by which the decision to replace the roof was made.

The Section 20 Notices

25. The Council served notices of major works under section 20 of the 1985 Act in late 2014 and early 2015. There is no challenge to the procedural validity of those notices.

26. They gave the Applicants notice of the Council's intention to carry out "Warm, Dry , Safe Works" comprising flat roof repairs and valley gutter works, concrete and brickwork repairs, landlord electric repairs, repairs to balconies and walkways, pigeon prevention and scaffolding.

27. The notices dated 10 December 2014 included a section in which the Council stated that it believes that the roof works are necessary because:

> "Following inspection of all roofs. The roof surface is showing signs of blistering, splitting and crazing of the asphalt, which is indicative of excessive thermal stress and a breakdown of the vapour control layer. These areas will continue to deteriorate and should be considered as a failure of the membranes. The solar reflective paint has broken down in most areas due to weathering and is no longer effective in protecting the asphalt from UV degradation. If these defects persist then the membrane will continue to fail and allow water to penetrate into the properties below causing substantial damage."

28. It is worth adding that this paragraph appeared under a heading which included the Building together with three other blocks (Andoversford Court, Downend Court and Wilsbridge Court). It is therefore fair to say that the description of the condition of the roof is not specific to this Building, Cam Court.

29. The reason given for the work on the balconies and walkways is that there are signs of blistering and cracking to the asphalt finish, which is approaching the end of its lifespan and that "repairs where required will be undertaken".

30. The notices were signed by Sharon Fotheringham of the Council's Capital Works Team. She also provided a witness statement and attended to give evidence before us.

31. A schedule attached to the section 20 notice shows that the total rechargeable cost of the works was projected to be about £423,000 including prelims and scaffolding. Of that total sum, about £16,000 relates to landlords' electricity supply costs which are not in dispute.

Description of the Roof

32. Before the works commenced, the Building had a flat asphalt-covered roof set over the block with a low level parapet wall to the perimeter. There was no perimeter guard rail. The asphalt was finished with

chippings and various vent hoods and mushroom vents penetrated through the roof.

The Decision to Replace the Roof

33. The Council went through a number of stages before reaching the decision to replace the roof:

The Feasibility Study

34. The Council instructed Keepmoat to carry out a feasibility study. Keepmoat engaged Blakeney Leigh Ltd to carry it out on their behalf. John Ottley of Blakeney Leigh gave evidence that the initial inspections were carried out in July 2014. In the trial bundle, we had a copy of version 5 of its report dated October 2014.

35. It is worth noting that the overview section of that report sets out the brief which was given by the Council, which asked for "repair or replacement recommendations ... required to meet the Warmer Dryer & Safer standard of the client and to include any FRA items and essential repairs". It is notable that the brief for the feasibility study was based on a standard which was different from, and potentially wider than, the Council's obligations under the Lease.

36. The Council's "Warm Dry and Safe" programme is defined on materials sent out to tenants and supplied in our bundle as follows:

> "Major Works programmes are based on 'Warm, Dry and Safe' (WDS) principles and this is similar to the Government's Decent Homes Standard, a standard that the Government requires all our homes to meet.
>
> The WDS principles are:
>
> - Warm - modern, functioning heating, well-insulated roofs, windows in good condition or double glazed with secure locks, sliding window vents and restrictor hinges where needed, draught excluders on front doors, cavity wall insulation
> - Dry - roofs, windows and building fabric in good condition, free from water penetration and damp
> - Safe - modern electrics including rewiring where necessary, secure front doors (fire rated where necessary)
>
> What works can I expect as part of the Warm, Dry and Safe programmes?
>
> The exact works you will receive will depend on detailed surveys that are carried out prior to works starting. Works are carried out only where they are required to meet the WDS standard, and can involve some of the following:

- Window replacement or window repairs
- Roof replacement or major roof repairs
- Works to renew or replace bathroom components (tenants only)
- Internal rewiring (tenants only) and work to mains electrical supplies
- Replacement of external doors across
- Structural work including to walls and balconies."

37. It is notable that the WDS standard includes matters such as well-insulated roofs and rewiring: modernising works which go beyond the standard of repair required under the landlord's covenants in the Lease. It could be said that WDS is a programme for improving the Council's stock, rather than simply repairing it, in the sense of remedying defects.

38. We further noted that one of the Calfordseaden witnesses, Daniel Pescod, described the WDS project as a "Contract, whereby, internal and external **improvement** works are being carried out" (our emphasis) in paragraph 4 of his witness statement.

39. Another feature of the WDS programme is that it contains spend targets. For example, we were referred to minutes of a Council cabinet meeting on 22 July 2014 in paragraph 9 of which the "spend targets" of £80m for 2013/14 and £90m for 2014/15 were recorded. Mr Surtees, the Council's project manager strangely denied that these were spend targets. The fact that there are spend targets does not necessarily mean that unnecessary work is being done or that the roof was not in disrepair. It does, however, form part of the background from which it might be inferred that the WDS programme partly involved improvement works, rather than repair works. By definition, since repair is necessarily a responsive process, it makes no sense to have "spend targets" for works of repair, but it does make sense to have "spend targets" for a planned scheme of improvements.

40. The executive summary for that report states the inspection team had "identified a number of potential works". In the section of the report dealing with the roof of the Building, it was noted that "the surface of the roof is in poor condition with cracking and crazing to the asphalt covering as well as to the detailing around the roof vents. Blistering of the asphalt covering was noted to localised areas." It was further noted that flashing, which had been replaced in the previous 5 years, had failed "resulting in limited waterproofing around the perimeter". Moss growth was also noted. The section of the report concluded: "It is recommended that the roof covering is removed and renewed". Following from that, various ancillary jobs were recommended such as renewal of the insulation and the installation of a guard rail.

41. The Keepmoat report was based on inspection and photographs were included with the report. John Ottley produced the photographs he took in July 2014.

The Calfordseaden Review

42. Calfordseaden conducted a review of the feasibility study. It went beyond even the "Warm, Dry, Safe" scope by recommending works which "appear justified". Their only comment on the roof of the Building says:

> "It has been recommended for the flat roof to be renewed. The roof has been repaired extensively and so would benefit from renewal. This has been confirmed by site inspection."

43. Derek Huseyin and Edward Coster of Calfordseaden gave evidence that their role was to assess whether the Feasibility Study gave an "accurate representation of the condition of the building and the works required to be carried out to meet the brief". They inspected the site on 19 August 2014 and Mr Huseyin produced photographs from that inspection. Mr Coster said that his role was only at the early stage of the review and that in August 2014 he handed over to Mr Huseyin, who was the one who produced the report.

44. Mr Huseyin gave evidence that "the brief provided by the London Borough of Southwark stated that any flat roof requiring substantial repair within the subsequent five years should be specified to be replaced" and Mr Coster said that the Feasibility Study had identified that the roof would need to be substantially repaired within 5 years. They said that they found splits at the upstands and around roof vents and blistering and pitting over the main roof area. The flashings needed replacement and there was ponding in some areas, which suggested distortion of the asphalt surface. They thought that the original asphalt covering was beyond its reasonable life expectancy, based on various industry materials which Mr Huseyin produced and Mr Coster was of the opinion that the asphalt was "potentially at the end of its predicted service life and more likely to suffer from widespread failure within the next 5 years" based on a sample survey which had been conducted on the roof of a neighbouring building, Willsbridge Court. Mr Coster gave evidence that in his view it was "reasonable to draw conclusions" about the Cam Court roof from the survey of the Willsbridge Court roof.

45. In cross examination, Mr Coster conceded that the roof was only "potentially" at the end of its life and that he had reached this conclusion based on BCIS statistics (see further below) rather than on the condition of the roof itself. Mr Coster also referred to various other pieces of technical literature during his oral evidence. They drew

attention to various measures required to avoid solar gain, (such as solar reflective paint and the fixing of stone chippings). But all of those measures had been employed on the roof at the Property and those which required repairing were dealt with by Mr Tarling in his report. In the light of the reasons for replacement given in the Calfordseaden report, Mr Coster said that he had not seen the repair log for the Cam Court roof.

46. Mr Coster gave evidence that there had been about four recent reports of water leaks by tenants, but he did not inspect any of the flats and was not able to say what the cause of the leaks was. He conceded that there was potential for water ingress through the missing lids to the ducts rather than because of the state of repair of the roof surface itself.

47. Mr Huseyin, in cross examination, conceded that he had not seen the repair log at the time of completing the Calfordseaden review of the feasibility study. He said that he had been told at the time by the Council that there had been repairs. He said that some previous repairs were obvious on inspection, such as the relatively new flashings.

48. He did later see the repair logs and he was taken through them in cross examination. He conceded that they did not appear to be an especially reliable or clear record of work done.

49. Mr Huseyin said that he saw cracks in the asphalt which were more than 3 mm deep, but he could not identify where they were and he did not take any of his own photographs at the time of his inspection.

50. Both Mr Coster and Mr Huseyin were tested in cross examination about why Calfordseaden had given previous repairs as the reason for recommending the replacement of the roof. Neither of them were able to offer a satisfactory explanation. It was put to them that exactly the same paragraph regarding previous extensive repairs appeared in their report in relation to the roof of Andoversford Court, which made it look as if parts of the report were simply cut and pasted, rather than the result of careful consideration of each building.

The Section 20 consultation

51. When the Applicants received the section 20 notices, they sent a request for further information to the Council. Sharon Fotheringham of the Council replied on 30 January 2015. When asked to justify why the entire roof replacement was proposed in circumstances where repair issues were only in localised areas, she described the decision to replace the roof as follows:

> "The decision to renew the roof is based on the premise that if the roof is likely to require repairs within the next five years, it should be renewed. It is more cost-effective in the long

term for the roof to be renewed complete with a guarantee compared to it being repaired on an ad-hoc basis when it fails."

52. Sharon Fotheringham also said that the Ubiflex flashings showed signs of having been vandalised.

53. The Council's case, as expressed in their Statement of Case, was that the decision to replace the roof was a reasonable decision in order to ensure greater value for money, because the roof would require further repairs throughout the remainder of its life and replacement now would save money in the future.

54. Once the decision was taken by the Council to replace the roof, a certain amount of other work followed from that. For example, the replacement roof was said, by the Council, to have required scaffolding. Once the decision was taken to erect scaffolding, various other works were planned which were convenient to do while scaffolding was up, such as concrete and brickwork repairs. The Council said so in a letter to the Applicants dated 30 January 215. It is implicit that those works would not have been done but for the scaffolding to replace the roof.

The Applicants' expert evidence

55. Mr Arnold Tarling FRICS is a Building Surveyor. He was instructed by the Applicants to prepare a report on the condition of the roof. He inspected on 17 February 2015, before any works were done to the roof, and his report was sent to the Respondents the following day.

56. In his opinion, contained in his report:

a) The main roof was in "extremely good condition for its age"

b) The roof has a life in excess of 20 more years and does not need replacing

c) The roof showed some of the features noted by the Council's witnesses (blisters, stress cracks to the junction with upstands, areas of missing chippings), but that these were all "repairable at very little costs". Blistering was very small and did not need repairing, new chippings can be bonded to the roof where needed and Aquaflex can be used to fill in cracks at the upstands.

d) There was no evidence of ponding

e) Cowls to the breather vents and extractor fans had been removed (probably by workmen) and some left on the roof. These should be replaced to avoid rainwater ingress to the vents. This was not a failure of the roof itself, but it would explain any water ingress suffered by flats below.

f) Poorly installed flashings need repairing.

g) Brickwork was open at a movement joint and cleaning out and filling before fixing a flashing.

57. Mr Tarling said in oral evidence that cracking and crazing of the surface of asphalt was not a defect unless it goes to a depth of more than 3 mm and even then it can be repaired, unless the roof was cracked all over to that extent. He did not see, on inspection, any cracks which were that deep.

58. He contested Mr Ottley's view that "ballast" had been displaced. He said that there was never any ballast on the roof and never should be. There were stone chippings, some of which had been displaced and could be replaced. They were not an essential part of the functioning of the roof – they were there to deal with the heat transfer issues which could arise. Loose stone chippings did not cause a problem as they were designed to wash away without causing any blockage. The need to replace stone chippings was not therefore a defect in the roof – certainly not one which required replacement of the roof.

59. He said that there was surface movement in the area covered by solar relflective paint and this had created cracking in the paint itself. There was no cracking of the material under the paint. The solar reflective paint needed repainting every 5 years as part of the regular maintenance of the roof, in any event. That also was not an item of disrepair, certainly not one which required replacement of the roof.

60. Mr Tarling took particular issue with the suggestion that the flashings were failing. He said that the flashings were unnecessary in the first place and never should have been fitted. It was not necessary to replace them and the roof was not in disrepair in that respect.

61. He did agree that the expansion joint on the parapet wall needed some attention, but not that there was any loose brickwork. In any event, this did not relate to the asphalt surface of the roof.

62. Mr Tarling said that the Council's plan to install a perimeter handrail was for the purposes of complying with the Working at Heights Directive and was therefore, in his opinion, an improvement.

63. Mr Tarling's view overall was that the roof was about 40 years old. It was put to him in cross examination that the BCIS life expectancy figures for asphalt flat roofs showed that the mean life expectancy for such a roof was only 36 years. The Tribunal had some difficulty interpreting these figures which showed a range of life expectancies from minimum median expectancy of 20 years to a mode maximum of 60 years. No-one was able satisfactorily to explain which was the relevant figure. That was, in any event, academic because Mr Tarling explained how the BCIS statistics are produced. He told us that they

are compiled from people reporting when they replace a roof. BCIS do not carry out any physical tests, so there is no way of knowing whether the roofs in question were actually at the end of their lives. Mr Tarling said that people tend to replace roofs long before they need to. This is especially the case with asphalt roofing which is a very durable material which is easily repairable. It can be ground off, heated up and new asphalt can be bonded onto an existing surface. He said that the nature of asphalt repairs is such that the repaired part is likely to last longer than the original asphalt. Mr Tarling was not seriously challenged on this analysis and we accept his evidence.

64. Mr Tarling had considered the repairs history of the roof. In order for replacement of the roof to be a reasonable option, he would expect there to be frequent water leaks becoming more frequent. He would want to know where the leaks were coming from and whether repairs were being effective. There was no evidence that any of this had been considered in this case, despite the fact that the Council had engaged at least two independent teams to investigate and prepare recommendations.

65. Mr Tarling that there were signs of aging on the roof, such as movement of upstands, but that this was no more than one would expect and that it did not indicate the need for replacement. According to Mr Tarling, the work done in the 1970s or 1980s to install the roof surface was very good. It was the recent repairs which were either unnecessary or demonstrated poor workmanship, but not so as to endanger the integrity of the roof as a whole.

66. Taking all that into account, Mr Tarling's view was that, with small patch repairs, this roof would last for another 20 years. He expressed the view that it was simply not reasonable to repair the roof in 2015.

67. Mr Tarling accepted that heat gain from insulation can put a strain of the lifespan of an asphalt roof, but protective measures can be put in place to deal with the problem, such as by providing a good coating of solar reflective paint and laying stone chippings.

68. Mr Tarling had not prepared a detailed costing of the items which he recommended as small immediate repairs before the hearing. When asked to estimate those costs at the hearing, he gave a figure of about £6,000. He also explained that many of these works could be done without the need for scaffolding, by using Aquaflex.

69. On 18 February 2015, the Applicants sent to the Respondents the expert report of Mr Tarling. Sharon Fotheringham responded for the Council by email on 9 March 2015. She outlined the various patch repairs which were required to be done immediately (such as repairs to upstands and breather vents and isolated repairs to the asphalt surface) and estimated their cost to be in the region of £17,000. She also said

that scaffolding costing about £54,000 would still be necessary even to do the patch repairs.

Mr Ottley's Response to Mr Tarling's Evidence

70. John Ottley of Blakeney Leigh gave his opinion in evidence in response to Mr Tarling's report. Mr Ottley had inspected the roof in July 2014 and was involved in the preparation of the Feasibility Study report which followed and upon which the Council made its decision. Mr Ottley's opinion evidence is not therefore impartial because his input was an important part of the decision which the Council is defending. In a sense, therefore, he was defending his own part in that decision. He is not as well placed to comment on the reasonableness of that decision as would be the case with an independent expert, like Mr Tarling.

71. Mr Ottley gave evidence that the accepted life span of an asphalt roof is 50 years, subject to having appropriate maintenance. He said that the heat gain resulting from insulation would reduce that lifespan to about 35-40 years, which was the age of the roof of the Building.

72. On inspection he saw "signs of defects" and decided that "substantial ad-hoc repairs" were required and that "repeated repairs are likely to be required over the forthcoming years on an annual basis", the cost of which would become "excessive and unreasonable".

73. He said that some of the cracking in paint which he saw was "worrying because it is a sign of a potential hairline fracture below, which you cannot see and which you would only discover when water penetrates".

74. Mr Ottley said that he had not personally looked at the repair logs for the roof. He said that it was his practice not to look at them before inspecting, because the logs "may not be accurate" and this may cloud his judgment. They are therefore "not the driving factor". he also said that he would not expect previous repairs to be easily visible on inspection.

75. He produced a "life cycle costing analysis" in which he purported to show that the renewal of the roof would cost about £253,000 while the repairs needed now would cost £126,000 odd and would extend the life of the roof only by about 7 years after which the full cost of renewal would need to be incurred. He therefore concluded that the renewal of the roof now was a reasonable option.

76. Mr Ottley denied that the repairs advocated by Mr Tarling would extend the life of the roof by a further 20 years. He characterised them as only "holding repairs". He said that asphalt becomes more brittle over time. He estimated that the roof would need replacing within 7 years, in any event, even if the temporary repairs were carried out. It

would not be cost effective, he said, to pay for those repairs now and thereafter for any further patch repairs following by a complete replacement.

77. Mr Ottley and Mr Tarling disagreed about the likely cost of repairs which are currently needed and the methods by which they could be achieved. We do not intend to go into detail about those matters here, because the question before us is not to assess the likely cost of repairs which are not being proposed to be done by the Council. We do, however, take that dispute into account as part of the mix of factors to be considered.

78. The defects highlighted by Mr Ottley were shown in photographs and included:

a. displaced ballast – he said that about 10% of the stone chippings were missing
b. crazing and cracking of asphalt
c. shrinkage around outlets
d. cracking and splitting to upstands
e. failing of flashings
f. slumping of asphalt
g. missing duct lids
h. open brick mortar joint requiring repointing

79. Mr Ottley went so far as to conclude that, in his opinion, the roof "had started to fail".

BRE Good Repair Guide 16

80. A number of witnesses referred (or were referred) to the BRE Good Repair Guide 16 for Flat Roofs. All appeared to agree that it represented good practice. Part one contains a section headed "Repair, refurbish or replace?" which provides a detailed checklist of factors to consider as well as commenting that the table of factors "also recognises that this decision is influenced by the age of the roof". It is interesting that the table deals with bitumen felt roofs as well as mastic asphalt. The bitumen felt roof section of the table includes separate columns for different stages of the life of the roof. There is no such division for the mastic asphalt roof section of the table. In our view, that tends to support Mr Tarling's view that the age of a mastic asphalt roof is not as relevant as other factors.

81. The column relating specifically to mastic asphalt roofs specified which defects warranted which type of remedial treatment. The only factors

which the Guide regarded as warranting **replacement** of the surface were:

a. "Many leaks during or after rainfall. Roof continues to leak for some time after rainfall". By contrast, single leaks could be repaired and the repairs could be expected to "last a long time" with regular inspection thereafter.

b. "Roof is not leaking but there are a lot of blisters, some of which are large", but only if the cause of the blisters has not been identified.

c. "Flowing, rippling, ruckling or crazing of surface" which is "severe".

82. As a result of our findings of fact (in particular our preference for the evidence of Mr Tarling), there is no evidence that any of those features appeared in the roof at Cam Court before the commencement of the works.

83. Part two of the BRE Guide starts with the following sentence: "many sound roofs are renewed when a repair would be sufficient – and there are many excellent techniques and products available to make minor repairs". This supports the oral evidence of Mr Tarling recorded in paragraph 63 of this decision, above. The detailed sections of Part Two of the Guide flesh out the recommendations of the table in Part One and in every case recommend repair rather than replacement for the defects which were noted by the Council on the Cam Court roof (eg small blisters, crazing which is not too deep, cracks and splits).

84. It is notable that neither Mr Tarling nor any of the technical literature to which we were referred reflected Mr Ottley's concern for concealed fractures hidden under cracked paint or other surface defects. The consensus of expert opinion and technical literature appeared to be, in our judgment, that mastic asphalt was a very durable and long-lasting material and that it is only very obvious and severe defects which indicate that the surface needs replacing.

85. In our judgment, it is not reasonable to recommend replacement of an asphalt roof based on fears that hidden problems may be concealed under minor superficial defects, which prevailing industry advice regards as capable of simple and durable repairs.

Conclusion on expert evidence

86. For the reasons stated above, we regard Mr Tarling as a better qualified and more independent expert witness than Mr Ottley. In any event, we found Mr Tarling to be a more convincing witness during the hearing. We noted that a great deal of Mr Ottley's evidence was based on speculation, rather than observation and expertise. For example, Mr

Ottley agreed with Mr Tarling about the number of blisters and their approximate size. He also agreed with Mr Tarling that blisters can be left alone if they are not causing a leak, but Mr Ottley went on to speculate that "there may be [other] blisters concealed under thick layers of [stone] chipping".

87. Mr Tarling, on the other hand, displayed clear expertise and experience beyond that of any witness called by the Respondent. He was challenged in detail on his evidence and various pieces of technical literature were put to him. He carefully explained his reasoning and his expert opinion when responding to all hostile questioning. We prefer his expert opinion in all respects.

Discussion

88. Applying the evidence and our findings to the issues to be decided leads us to consider the following questions:

a. Was the roof of Cam Court in disrepair so as to fall within the Council's obligation under the repair covenant of the lease?

b. If so, did the proposed replacement of the roof come within the category of works which would be carried out by the Council to comply with that obligation?

c. If so, would the sums estimated for the works proposed under the section 20 notices be "reasonably incurred" within the meaning of section 19 of the Landlord and Tenant Act 1985?

89. The first two of those questions can broadly be characterised as the issue which is often referred to in the short-hand of "repair vs. improvement" in the sense that ordinarily (as in this lease) the landlord is entitled to service charges for "repairs" but not for "improvements". From looking at the authorities, it is clear that the use of the word "improvement" in this context is not strictly accurate, which is why we have phrased the questions in (a) and (b) above as we have. Essentially, however, it is the same issue.

90. We were referred in closing submissions to passages from chapter 13 of Woodfall's Law of Landlord and Tenant. The authors of that textbook set out to define what "repair" is, so as to be able to distinguish it from those things which are not repair. At para 13.029, they say as follows:

> "The concept of repair is the converse of disrepair. Accordingly before liability can arise under a covenant to repair, the subject-matter of the covenant must be out of repair (*Post Office v Aquarius Properties* [1987] 1 All E.R. 1055, CA) …
>
> …a covenant to repair does not require the covenantor to carry out work which is merely convenient (e.g. the

> removal of asbestos) where the work is not necessary to remedy damage (*Secretary of State for the Environment v Euston Centre Investments* (No.2) [1994] E.G.C.S. 167); nor does it require the covenantor to replace plant which is capable of being kept in working order by measures falling short of replacement. (*Land Securities v Westminster City Council (No.2)* [1995] 1 E.G.L.R. 245)
>
> Similarly, if an item of plant is continuing to perform its function, a repairing covenant does not require preventative works to be carried out in order to prevent the anticipated consequences of a failure of the plant. (*Mason v Totalfinaelf UK* [2003] 3 E.G.L.R. 91)"

Specifically in connection with roofs, the authors of Woodfall say this at para 13.037.9:

> "Replacement will generally be required only where patch repairs are not reasonably or sensibly possible. (*Ultraworth v General Accident Fire & Life Assurance Corp* [2002] 2 E.G.L.R. 115; *Carmel Southend v Strachan & Henshaw* [2007] 3 E.G.L.R. 15 and *Riverside Property Investments v Blackhawk Automotive* [2005] 1 E.G.L.R. 114.)"

91. We have considered the evidence in the light of these principles. The starting point seems to us to be what the Council itself says about the reasons for its decision to replace the roof. The Council went through an extensive decision-making procedure before resolving to replace the roof. It was stressed upon us how much care had been taken to get this decision right both as to the scope as well as the costs of the works and as to the independent status of the various agencies consulted. We do however, have considerable doubts about the underlying basis on which that decision was made. If a decision-making process is launched on the wrong criteria, then it does not matter how extensive or independent the consultation process might be – the answer will be arrived at in the wrong manner. It seems to us that the most notable aspects of the Council's process of decision making are as follows:

a. The brief for the feasibility study asked Keepmoat to make "repair or replacement recommendations...required to meet the Warmer Dryer & Safer standard of the client and to include any FRA items and essential repairs". No reference was made to the repair covenant in the leases of the leaseholders. The WDS standard (as considered above) includes elements which go beyond repair. It is also notable that "replacement recommendations" were sought as one of the primary requests to Keepmoat. In other words, Keepmoat were not instructed to consider what repairs needed to be done for the Council to comply with its obligations under the leases. They were asked to

consider a variety of different matters, most of which went beyond the scope of simple repair.

b. The spend targets for the WDS programme indicated that there was money available in the budget (wherever it might have come from) to carry out improvements and that there was an aim to spend a certain amount of it in the relevant year.

c. Neither of the preceding points automatically mean that any works are necessarily improvements rather than repairs, but it provides a framework which colours the issue. In other words, this is a situation (unlike with most private landlords, by contrast) where the Council was carrying out a programme which included improvements as well as repairs on a large scale. That means that, in any given case, there is a significant possibility that the works being done are improvements or involve elements of works which are not repair under the terms of the lease.

d. The next feature of the Council's decision making process is the reasons given for the decision to replace the roof. The Keepmoat report mentioned a number of visible defects (one of which was the alleged failure of a previous repair, namely the new flashings). The Calfordseaden review on the other hand concluded that the roof would "benefit from renewal" because of its history of repairs. No particulars of this were given in the report and none of the witnesses from Calfordseaden were able to given any specifics In fact most of them said that they had not even seen the repair logs and accepted that the repair logs were unlikely to be sufficiently accurate. It remains a mystery why this was given as the primary reason for such an important decision by the agency tasked with auditing the recommendations of the Keepmoat report, which had given different reasons for the same decision. The mystery may perhaps be solved by the fact that the text of the reasons for roof replacement at Cam Court in the Calfordseaden report are virtually word-for-word identical to the reasons given in the same report for replacement of a different roof at a different building, as noted above. It looks to us like a cut-and-paste of the text. Whether this was intentional or an error we do not know, and none of the Calfordseaden witnesses were able to explain it. In addition to that, the Calfordseaden witnesses gave evidence that there was an additional reason for replacement of the roof at Cam Court, namely its life expectancy.

e. The issue of life expectancy also casts some doubt on the decision-making process. Mr Huseyin gave evidence, as set out above, that the Council's brief was that any flat roof requiring substantial repairs within 5 years should be replaced now. Apart

from the fact that there was no evidence of any specific substantial repair which would be required in that period, that is not a proper test for whether the roof is now in disrepair. See the reference to the *Mason v Totalfinaelf UK* case above. In addition, the assessment of the Cam Court roof as being at the end of its life expectancy period was based on a sample survey which had been conducted on a neighbouring roof.

92. In our judgment, the result of all these observations is that we are unable to place any reliance on the Calfordseaden report on the Cam Court roof as offering any reasonable rationale for the decision to replace the roof, nor can we place any reliance on the opinion evidence of the witnesses from Calfordseaden.

93. That leaves us with the conflicting evidence of Mr Ottley (who was responsible for the relevant parts of the original Keepmoat feasibility study) and Mr Tarling as to the visible defects on the roof and their respective opinions about the life expectancy of the roof and any necessary repairs.

94. Even Mr Tarling agreed that there were some defects on the roof which required repair, which means that the answer to the question whether there is any disrepair within the meaning of the lease is: yes. But they differed substantially on the question as to what was reasonably necessary to be done to repair those defects.

95. For the reasons we have set out above, we prefer the evidence of Mr Tarling. In our judgment, it follows from his evidence that replacing the roof in order to address the issue of a few minor repairable defects in the roof surface and in the joints of the parapet wall is simply not "repair" at all. The replacement of the roof is not at all necessary to address those defects, so the replacement of the roof is simply not the Council complying with its obligation to repair under the lease. Obviously the minor defects identified by Mr Tarling will be remedied by the replacement of the roof, because the defects will physically no longer be there. But that does not make it an act of repair, so called. The replacement of the roof constitutes works which are something other than repair (improvement or renewal perhaps) in the sense that they are not works which are necessary to remedy the defects in the existing roof surface and structure. See the *Euston Centre* and *Land Securities* cases cited by Woodfall above.

96. So our primary conclusion (taking all of the above into account) is that the replacement of the roof is not repair and is therefore not being done by the Council in compliance with its repair obligations and is therefore not an item which can be charged to the Applicants by way of service charges at all.

97. If, contrary to our primary finding, the replacement of the roof can be regarded as repair within the meaning of the lease, then we must go on to consider whether the cost of replacement would be "reasonably incurred" for the purposes of section 19 of the Landlord and Tenant Act 1985.

98. We were referred to the decision of the Lands Tribunal in *Forcelux v Sweetman* [2001] 2 EGLR 173 on this point at paragraphs 39-40:

> "The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred.
>
> But to answer that question, there are, in my judgment, two distinctly separate matters I have to consider. First, the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Second, whether the amount charged was reasonable in the light of that evidence."

99. In our judgment, for all the reasons given above, the decision to replace the roof was not appropriate at all. We were helpfully and correctly reminded by Mr Ahmed, for the Council, that the question for us is not whether we would have made a different decision, but rather whether the Council's decision was outside the realm of possible reasonable responses to the disrepair on the roof. For the reasons, we have set out above, we have reached the conclusion that this decision was completely outside the range of reasonable options. We are assisted in that decision by the obvious fact that the Council, when making this decision, was not in fact making a decision about their repairing covenant under the lease at all, but rather a policy decision based on different criteria, such as the WDS scheme's objectives.

Conclusion and Costs

100. We have therefore decided that, if the replacement of the roof is a repair within the meaning of the lease, then its cost was not reasonably incurred within the meaning of section 19 of the Landlord and Tenant Act 1985. We were satisfied with Mr Tarling's explanation that all necessary works could be done without having to erect scaffolding at the building. It is also worthy of note that the replacement roof works, undertaken by the Council prior to the hearing but after the Tribunal application, were undertaken without scaffold.

101. We have therefore decided that the cost of scaffolding and other preliminaries relating to the roof replacement works are also not payable by way of service charges.

102. We have also decided that, in the circumstances, we should make an order under section 20C of the Landlord and Tenant Act 1985 that the costs incurred by the Respondent in these proceedings are not to be treated as relevant costs for determining any service charges

Dated this 4th day of April 2016

JUDGE TIMOTHY COWEN

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;
   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,
   (d) the date at or by which it is payable, and
   (e) the manner in which it is payable.

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

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are

taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—

(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—

(a) specified in his lease, nor

(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject matter of an application under sub-paragraph (1).