FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case References	**:**	**BIR/41UF/LIS/2019/0031**
Properties	**:**	**88, 90A, 92A, 96 & 96A Aldersley Road, Wolverhampton WV6 9LZ**
Applicants	**:**	**Heather Kaur (88)** **Katarin Perediuha (90A)** **Sean McGeary (92A)** **Elizabeth Onafowokan (96)** **Karen Phillips (96A)**
Applicants' Representative	**:**	**None**
Respondent	**:**	**Wolverhampton City Council**
Respondent's Representative	**:**	**Wolverhampton Homes**
Applications	**:**	**(1) Application for a determination of liability to pay and reasonableness of service charges pursuant to ss 19 & 27A Landlord and Tenant Act 1985 (the Act)** **(2) Application for an order limiting the Respondent's costs in the proceedings under s20C of the Act and under paragraph 5 Schedule 11 Commonhold and Leasehold Reform Act 2002 (CLRA 2002) reducing or extinguishing the tenant's liability to pay an administration charge in respect of litigation costs**
Date of Inspection And Hearing	**:**	**25 November 2019**
Tribunal	**:**	**Tribunal Judge P. J. Ellis** **Tribunal Member Mr C. Gell BSc FRICS**
Date of Decision	**:**	**2 January 2020**

DECISION

The Tribunal decides:

> ***(1)For the purposes of s27ALandlord and Tenant Act 1985***
> ***(a) it was reasonable that the existing roof be replaced with a pitched one notwithstanding that the existing roof was not well-maintained causing a replacement to be necessary***
> ***(b)The existing drainage system required repair although there was evidence that the existing drain had not been maintained correctly***
> ***(2)The consultation procedure under section 20 Landlord and Tenant Act 1985 was carried out correctly***
> ***(3)The costs of replacing the roof and the drainage system are not yet known. It is not possible for the Tribunal to determine whether they are reasonable.***
> ***(4)The costs of the proceedings are not relevant costs for the purposes of calculating any service charge.***

Introduction

1. This is an application for determination of the Applicants liability to pay and the reasonableness of service charges payable in the current service charge year 2019.There are also applications relating to costs under s20C Landlord and Tenant Act 1985 and paragraph 5A Schedule 11 Commonhold and Leasehold Reform Act 2002.

2. The works that are the subject of the service charge application have been substantially completed but so far the Respondent has not fully quantified the cost of those charges. Consequently this is not a matter for the determination of the actual sum payable but it is an application for a decision whether or not it is reasonable for the Respondent to include the costs of work in the service charge account.

3. The relevant work relates to the replacement of a flat roof at the property with a pitched roof and separately certain drainage works and costs of other work associated with the installation of a pitched roof and the drainage works.

4. The five named Applicants are all long leaseholders and residents of flats in the property at which the relevant works were undertaken.

5. The reason the Applicants have brought this matter to the Tribunal is that they contend neglect on the part of the Respondent caused or exacerbated the deterioration of the roof and drains and the repair work was required sooner than it should have occurred. Further and in any event they dispute the need to replace the flat roof with a pitched roof.

6. The Respondent is a housing management company owned by Wolverhampton City Council. At the hearing the Respondent was represented by Mr. Tony Watkin, of Counsel instructed by the legal department of the Wolverhampton City Council.

7. The Applicants were unrepresented. Although the application was issued by Miss Karen Phillips the matter was conducted by Katarin Perediuha. The Applicants all consented to Miss Perediuha presenting the case on their behalf. All of the Applicants were present at both the inspection and the hearing safe for Mr. McGeary. The Tribunal were told that he was unable to attend although he wished to be part of the proceedings and for Miss Perediuha the represent him.

8. The application was issued on 5 August 2019. The Tribunal gave directions for disposal of the application and identified four questions for determination. Those questions were:
   a.) Is it reasonable that the existing roof be replaced with a pitched one? Was the existing roof well-maintained and is a replacement necessary?
   b.) Was the existing drainage system maintained correctly?
   c.) Are the charge is reasonable?

d.) Was the consultation procedure under section 20 of the act carried out correctly?

9. The relevant cost the subject of the dispute is as follows:

a.	Scaffolding	£40,597.00
b.	Reroofing Works	£57,863.00
c.	Repair and renewal of drainage system	£16,800.00
d.	Structural, emergency lighting & drainage works	£36,500.00
e.	Replacement TV and satellite dish and lightning conductor and extension of soil pipes	£12,500.00
	Total for the Works	£164,260.00
	Individual Charge	£20,532.00

10. All costs set out above are estimates. Final figures not yet quantified.

Inspection

11. The Tribunal conducted a site inspection in the presence of the Applicants other than Mr McGeary and representatives of the Respondent. The subject property is one of two four storey apartment blocks. According to a desk top survey prepared for the Respondent in 2014 the blocks are of presumed concrete framed structure and external brickwork façade and now with tiled pitch roof. It was not necessary to inspect any of the individual apartments.

12. The development was constructed in or during the 1970s. The two blocks are set at right angles to one another. Access to the development is by a road off Aldersley Road with parking for a small number of vehicles. The estate road leads to the rear southwest corner of the site where there is further parking and two parallel rows of brick-built garages.

13. There is a single storey brick-built structure between the apartment blocks comprising storage rooms. Each apartment has a storage room and garage.

14. The gardens of the development are provided with lawns. At the time of inspection the common garden areas were muddy from the effects of the works.

Leases

15. There are two versions of the leases owned by tenants of the development. Applicants McGeary, Kaur-Budesha and Onafowokan hold version 2 leases. Applicants Perediuha and Phillips hold version 3 leases.
16. Version 2 leases were made during 1990 for a period of 125 years. Version 3 leases were made in January 1993 in the case of Mrs Phillips and November 2003 in the case of Miss Perediuha.

Version 2 Lease

17. By clause 1.15 of lease version 2:

The Service Charge shall mean:

(a) The sums specified in the landlords offer notice being the estimated average annual amount of expenditure on services attributable to the property during the reference and

(b) Such further the sums as may be incurred by the council in providing the services after the expiry of the reference calculated in accordance with clause 6.00 hereof.

And by clause 1.18

The Repair Service Charge shall mean the sums payable by way of charges in respect of the cost of repair as detailed in the Landlords Offer Notice and in pursuance of the performance by the Council of their obligations for repair as set out in Clause 2 of Schedule IV hereof such further charges to be calculated in accordance with Clause 7.00 hereof

And by clause 1.19

The "Improvement Charges" shall mean the charges for improvements detailed in the Landlords Offer notice and the charges calculated in accordance with Clause 7.00 hereof.

18. Clause 6 of this lease provides the mechanism for determining what sum is payable and when. There was no dispute regarding the meaning and effect of this clause. The Tribunal was not shown the Landlord's Offer Notice as there was no dispute by any of the Applicants that service charges are payable and so far as the Tribunal is aware there have been no disputes relating to service charges until this claim. Further the meaning of the Reference Period was not relevant to the dispute, it having expired some years ago.

19. By clause 7.03 the lessee covenanted
"*during the remainder of the term the tenant shall pay to the Council such further Relevant Charges that the Director of Finance may from time to time certify as being payable in respect of anticipated costs for repairs and/ or improvement works to be undertaken to the Property by the Council on each and every occasion that the Council serve upon the Tenants a Landlord's Supplementary Notice giving details thereof.*

20. By clause 6 of Schedule IV which sets out the Council's obligations for which it is entitled to impose service charges,
"6.01. In the management of the Estate on the performance of the obligations of the council here under to employ or retain the services of any employee agent for consultant contractor engineer and professional adviser that the council may reasonably require so as to enable them to carry out or maintain the services and for the general conduct management and security of the Building.

Version 3 Lease

21. The version 3 lease is in different terms and at clause 1.14
"*the "Services" shall mean those works of repair maintenance and improvement which the council shall from time to time carry out or procure to be carried out to the Property the Building the Estate and any other*

property over which the tenant has a right pursuant to the provisions of schedule 1 hereof,

Including the provision of "*management and administration"* (Clause 1.14 (c)).

And by clause 1.15

"*The "Service Charge" shall mean a reasonable part of all the costs directly or indirectly incurred or to be incurred by the council in providing the Services*

AND Service Charge will comprise all of the above mentioned costs 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.

22. By Clause 2.00 of Schedule III the tenant covenanted to pay the Service Charge on demand (and in advance of all or any part of the component costs of the Service Charge being incurred if the Council so requires).
23. Both versions included substantially the same terms relating to the payment by the leaseholders of costs and charges incurred in service of notices relating to wants of repair in the following terms

"*To pay all costs charges and expenses including solicitors costs and surveyors fees incurred by the council for the purposes of and incidental to the service of all notices and schedules relating to wants of repair to the Property and whether so during or after the expiration or sooner determination of the Term(but relating in all cases to such wants of repair accrued not later than such expiration or soon determination)."*

The Statutory Framework

24. Sections 18 -30 of the Act provide a statutory framework for the regulation of the relationship between a landlord and tenant of residential property in connection with service charges.
25. Section 19 provides **.**

(1)Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—

(a)only to the extent that they are reasonably incurred, and

(b)where they are incurred on the provision of services or the carrying out of works, only if the services 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.

26. S20(C) (1)provides

(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 leasehold valuation Tribunal or the First-tier 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.*

27. S27A provides*(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.

28. Paragraph 5A Schedule 11 CLRA 2002 provides

(1) A tenant of a dwelling in England may apply to the relevant court or Tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or Tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph—

(a)"litigation costs" means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and

(b)"the relevant court or Tribunal" means the court or Tribunal mentioned in the table in relation to those proceedings.

The Parties Submissions

29. Miss Perediuha on behalf of the Applicants conceded that the Applicants as lessees were liable to pay service charges but that the reason for this application was that the Respondents by their admitted neglect of maintenance of the roof and drainage system had exacerbated the inevitable wear and tear so that the works the subject of the application were required earlier than would otherwise have been necessary. Furthermore, it was contended that the failure to attend to the drains in due time resulted in costs which were unnecessary. Timely attention to the drains would have avoided the problem.

30. The Applicants criticism of the scaffolding costs related to the erection of 360-degree scaffold. Miss Perediuha informed the Tribunal that previously when the flat roof received attention the scaffold was limited to one side of the building but with 360-degree safety scaffold at roof level. Her recollection was the cost of scaffolding on that occasion was in the region of £1500 per unit. Her submission was that the fair cost of scaffolding should have been that sum with an upward adjustment for inflation.

31. Her submission regarding the roof was that it was unnecessary to install a pitched roof which was more expensive than a flat roof. Further, that observations made by the lessees at a meeting in December 2018 and subsequently in correspondence to that effect supported by the proposition that modern materials mean the life span of a flat roof is in the region of 30 years.

32. If the submission relating to the pitch roof was correct then it followed that the costs associated with lightening conductors, extension to soil pipes, replacement satellite and tv aerials would have been much less.

33. In so far as the consultation was concerned Miss Perediuha maintained that the period allowed was not in accordance with the limits governing consultations of this sort. The Applicants received a letter of 4 December 2018 notifying them that works relating to the replacement of a flat roof with a pitch roof and repairs to the current drainage system would be undertaken and observation must be received within the consultation period of 30 days ending 8 January 2019. The letter included a description of the works and probable costs resulting in a contribution per leaseholder of £19,853.97.

34. Miss Perediuha also said the leaseholders were invited to attend a meeting by the Respondent at which they were notified of the intention to construct a new roof. Representations at the meeting and subsequently were met with a refusal to consider alternatives. The lessees were told the work would go ahead after 30 days consultation period. They felt that the Respondent was uncooperative during the consultation period by not supplying documents. Moreover, proposed purchasers of flats in the block were misled by the Respondents because they were told the probable cost of roof repairs would be in the region of £11,000.

35. In reply to questions from Mr Watkin on behalf of the Respondent, Miss Perediuha was shown a letter from the Respondent dated 25 March 2013 in

which the Respondent notified the lessees that it was their intention to enter a 15 year partnership agreement "*to carry out a comprehensive range of construction related housing projects including refurbishment, modernisation and alteration schemes as well as ….major repairs programmes of work etc*" .

36. The letter was headed Schedule 2 Consultation. Miss Perediuha admitted to not having seen the notice and conceded that had she seen it, she would have paid it little attention as it was a matter of information only.

37. The contract value according to the notice was in the region of £100m. Two contractors were identified as suitable for appointment following a tender process.

38. Miss Perediuha was referred to the letter from the Respondent of 4 December 2018 and its heading "Schedule 3 Notice of work". Further the Applicants agreed each of them had made written representations which included requests that the garages and the store rooms block were retained.

39. In reply Mr Watkin informed the Applicants and the Tribunal that the Respondent anticipates the costs are likely to be lower than stated in the estimates . Some of anticipated costs were not incurred whilst other costs are lower than provided for.

40. He drew a distinction between the two leases. He asserted the version 2 leaseholders are not required to pay costs associated with the construction of the pitch roof as the Respondent regards the work as an improvement which is not recoverable under the terms of the lease. Also the excess costs of drainage are regarded as improvements and irrecoverable.

41. Mr Watkin then dealt with the issues identified by the Tribunal and raised by the Applicants.

42. In relation to scaffolding he called Mr Richard Reybold the Respondent's Design Specification Co-ordinator. He described that from his experience of projects involving replacing flat roofs with flats roofs or with pitched roofs 360 degree full height scaffolding is a necessary safety measure unless there is a parapet wall.

43. He also asserted that pitch roofs have a longer life and even if the roof was replaced with a flat roof there would have been a small pitch caused by raising the level in the centre of the roof and sloping to the edges in order to aid water run-off.

44. Mr Reybold agreed that he relied on the desk top report of 2014 prepared by Ridge Property and Construction Consultants which recommended clearance of blockages to downpipes to relieve standing water on the flat roofs and to strip and recover the roof within the next 4-8 years as justification for constructing the pitch roof rather than replacing the flat roof. He further asserted the Respondent had undertaken a programme of replacing flat roofs with pitch roofs as they have a longer lifespan and require less maintenance. In this case from his reading of the report the work was not urgent and would be dealt with when funding was available.

45. In answer to the Tribunal he admitted there was no cyclical maintenance programme in place and he did not know why, in light of the report maintenance had not been stepped up.

46. He also stated that flat roof manufacturers will not give warranties in excess of 20 years and not the 40 years the Respondent would expect.

47. Mr Watkin's asserted that the Respondent's decisions were reasonable and should be assessed by reference to the desirability and endurance of the

pitched roof. Full height 360 degree scaffolding is required for the construction of a pitched roof to these buildings. He relied upon the decision of Lord Justice Lewison in *LB Hounslow and Waaler [2017]EWCA Civ 45* who identified non controversial propositions in the context of contractual liability including that at common law there is no bright line division between what is repair and what is an improvement. Also that where a defect in a building needs to be rectified the scheme of works carried out to rectify it may be partly repair and partly improvement.

48. In this case he contended that the Respondent had satisfied the requirement of reasonableness in deciding to construct a pitched roof. The cost of the work is proportionate having regard to the length of the unexpired portion of the lease. The Respondent has offered financial assistance with interest free loans to cover the costs. The Respondent had given consideration of lessees observations resulting in the decision to change the scope of the work to leave standing the garages and the store rooms.

49. As far as consultation requirements Mr Watkin relied upon the original consultation in 2013 relating to the long term qualifying agreement as the schedule 2 consultation in accordance with the Service Charge (Consultation Requirements)(England) Regulations 2003. He asserted the notice of 4 December 2018 was the schedule 3 consultation. Having regard to the value of the long term qualifying agreement it was reasonable to proceed with the appointed contractors in connection with the subject works.

50. In answer to the Applicant's contention that historic neglect had caused or contributed to the need to carry out the work prematurely he relied on the decision of the Upper Tribunal in *Daejan Properties Ltd v Griffin and Mathew [2014] 0206 (LC)*

"The only route by which an allegation of historic neglect may provide a defence to a claim for service charges is if it can be shown that, but for a failure by the landlord to make good a defect at the time required by its

covenant, part of the cost eventually incurred in remedying that defect, or the whole of the cost of remedying consequential defects, would have been avoided. In those circumstances the tenant to whom the repairing obligation was owed has a claim in damages for breach of covenant, and that claim may be set off against the same tenant's liability to contribute through the service charge to the cost of the remedial work."

51. The Applicants had adduced no evidence of the costs accrued as a result of the alleged historic neglect.

52. He then asserted that the terms of the leases set out above entitled the Respondent to its legal costs of these proceedings.

The Decision

53. The first issue identified by the Tribunal for decision was whether it was reasonable that the existing roof be replaced with a pitched one? Coupled with whether the existing roof was well-maintained and is a replacement necessary?

54. In making her submissions Miss Perediuha referred to damp conditions in her apartment which is on the top floor of the block and below an area of the roof subject to water ponding. The Applicants contentions were not that the work was unnecessary but that neglect by the Respondent had contributed to the short life of the roof and that replacing it with a pitch roof was more expensive.

55. The Tribunal is satisfied the flat roof required major works to overcome the acknowledged manifest faults and replacement was necessary. The Respondent in these proceedings is prepared to accept that a pitch roof is an improvement rather than repair. There is an allegation that the roof had not been properly maintained. The Respondent agreed that any attention to the roof was in response to lessees' complaints. There was no cyclical maintenance programme and after the Ridge Report of 2014 there was no change in the attention given to the roof. However, the Applicants have not presented any

evidence of the costs in consequence of the want of attention. The Tribunal is unable to determine whether the Respondent's conduct amounted to a breach of contract and if so the value of the compensation (if any) payable. Accordingly the Tribunal finds the cost of repairs to the roof form part of the service charge for the year 2019. The costs to be included in the service charge are limited to the costs of a replacement flat roof in the case of Version 2 lessees but include the cost of the pitch roof for Version 3 lessees.

56. The second issue was whether the existing drainage system maintained correctly. Certain drainage costs are directly associated with the construction of the pitch roof namely the installation of external rainwater goods and the extension to the soil pipes. There is no dispute the drains needed attention. There is a report from MetroRod of Stafford commissioned by the Respondent which sets out a number of recommendations for repair and jetting to clear blockages. The Respondent decided that the age and condition of the drains justified replacement. The Respondent contends that the drains were properly maintained although conceded there is no record of maintenance. Repairs or clearance of blockages were carried out when fault occurred and were reported. The Applicants did not adduce any other evidence to contradict the report of MetroRod nor did they quantify the sum which might have been saved if the drain work had been carried out earlier as they contend. The Tribunal is satisfied that as major works was underway in relation to the roof it was reasonable to undertake drainage work at the same time.

57. Are the charges reasonable? The Respondent has not yet formulated the actual charges incurred in relation to all the works. However, the Tribunal is satisfied it was reasonable to erect 360 degree scaffolding and to conduct drainage work at the same time as the roof work. The Tribunal was told at inspection that certain charges which had been provided for have not in fact accrued. This Tribunal is unable to determine whether the charges were reasonable until properly formulated.

58. Was the consultation procedure under section 20 of the Act carried out correctly? The Tribunal is satisfied that the Applicants had not properly

understood the meaning and effect of the notice of 2013 so that the consultation period in respect of the subject works was reduced in accordance with schedule 3 of the Consultation Requirement Regulations 2003.

59. Nevertheless the Respondent considered the Applicants observations and modified the schedule of works in accordance with their views. The Tribunal is satisfied the consultation procedure was correctly carried out.

60. Whether or not the final charges are reasonable was not a matter upon which the Tribunal was asked to make a ruling because the final costs are yet to be calculated. However, by consent Version 2 lessees will not pay the additional costs incurred in replacing the flat roof with a pitch roof. In the case of the Version 3 lessees the position is clearer. The lease is explicit that the lessee is responsible for improvement costs as part of the service charge. Therefore the Tribunal does not need to decide whether the pitch roof is an improvement as the lease covers both repair and improvement.

61. The Applicant also challenged the cost of drainage. However the work was modified after consultation and moreover the charges were reduced as some costs were considered as improvements by the Respondent. The Tribunal determines that the costs of drainage other than the works of improvements to the system are susceptible of inclusion in the service charge accounts.

S20C and Paragraph 5A Schedule 11 costs

62. The terms of both versions of the lease contain a clause entitling the landlord to recover legal fees in respect of preparation of s146 Law of Property Act 1925 and a further clause specifically referring to the costs of solicitors and surveyors incurred in connection with notices in connection with any want of repair. The further clause is in terms similar to the clause the subject of consideration by the Court of Appeal in *69 Marina, St Leonards-On-Sea, Freeholders of v Oram & Anor [2011] EWCA Civ 1258*. In that case the Chancellor decided that obtaining a determination from the Tribunal as to the payability of service charges was a condition precedent to serving a section 146 Notice. Therefore Landlord's legal costs before the Tribunal were

incidental to the service of a section 146 Notice and recoverable under the Lease.

63. In this case there is no suggestion of forfeiture. The parties are seeking a determination of what sums are payable as service charges. At the outset of the hearing Miss Perediuha reassured the Respondent that the Applicants acknowledged their obligation to pay service charges. Moreover, the legal costs claimed are in connection with the conduct of this hearing and not in connection with notices relating to any wants of repair.

64. In any event the Applicants rely on paragraph 5A of Schedule 11 2002 Act to seek an order reducing or extinguishing their liability to pay a particular administration charge in respect of litigation costs.

65. Although Mr Watkin addressed the Tribunal on the meaning of the leases in relation to costs he made no submission regarding the actual sum claimed for costs. Therefore the Tribunal can only deal with the principle of whether or not costs of the proceedings are payable by these Applicants.

66. The Tribunal has decided it may be reasonable to include the cost of repair work involved in replacing the roof and the drainage system subject to any further review of the actual costs. However it was reasonable for the Applicants to seek a determination of whether those works were repair or improvement.

67. The decision relating to the distinction between repair and improvement was largely dealt with by the Respondent conceding that it limited the costs of work to those of replacing the roof like for like with a flat roof in the case of Version 2 leases.

68. At present the claims for charges for the work itself and the Respondent's costs have not crystallised. The parties were seeking a determination of points of principle. Determination of the reasonableness of the actual charges is not possible until all claims are made.

69. The Tribunal is also satisfied that as matters stand at present the costs of these proceedings are not relevant costs for the purpose of calculating any service charge under s20C Landlord and Tenant Act 1985.

70. Also the Tribunal agrees the Applicants may be liable to the Respondent under the terms of the lease for the litigation costs but as there has been no claim for costs at present the Tribunal makes no order under Para 5A Schedule 11 0f the 2002 Act.

Appeal

71. If either of the parties is dissatisfied with this decision they may apply to this Tribunal for permission to appeal on a matter of law to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to them rule 52 of The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013).

Tribunal Judge PJ Ellis

Chair