FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/OOBG/LSC/2018/0373**
Property	**:**	**Flat 6, 15 Cheshire Street, London E2 6ED ("flat 6")**
Applicant	**:**	**Kevin John Walters**
Representative	**:**	**In person**
Respondent:	**:**	**Freehold Managers (Nominees) Ltd ("the landlord")**
Representative	**:**	**JB Leitch**
Type of application	**:**	**Liability to pay service charges**
Tribunal members	**:**	**Judge Angus Andrew** **John Barlow JP FRICS** **Lucy West**
Date and venue of hearing	**:**	**4 March 2019** **10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**18 March 2019**

DECISIONS

Note: In this decision figures in [ ] are references to page numbers in the document bundles.

Decisions

1. A service charge of £9,397.13 is payable by Mr Walters in respect of the estimated roofing costs of £451,062 that we find to be reasonable.

2. An administration charge of £90 is payable by Mr Walters.

3. Under the terms of the lease the landlord cannot recover its cost incurred in these proceedings either through the service charge or from Mr Walters as an administration charge.

4. We order the landlord to reimburse Mr Walters with the tribunal fees of £300, such sum to be paid within 28 days.

The applications and the hearing

5. On 9 October 2018 the tribunal received Mr Walters' application under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for a determination of his liability to pay a service charge of £9,487.13 in respect of the estimated cost of re-roofing works. The application form also included three further applications: an application under Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") for a determination of Mr Walter's liability to pay an administration charge of £90: an applications under sections 20C of the 1985 Act to limit the landlord's ability to recover the costs of these proceedings through the service charge and finally an application under paragraph 5A of schedule 11 to the 2002 Act to limit the landlord's ability to recover the costs of these proceedings as an administration charge under the terms of the lease.

6. At the hearing Mr Walters appeared in person. The landlord was represented by Byroni Kleopa, a barrister. In their statement of case the landlord applied for rule 13 costs against Mr Walter's but Ms Kleopa sensibly withdrew the application during the course of the hearing.

7. On behalf of the landlord we heard oral evidence from Jim Watling and Mike Lawson. Mr Watling is an Associate Building Surveyor employed by ATP Architects and Surveyors Ltd. Mr Lawson is the head of Property Management at Montalt Management Ltd ("Montalt") who are the managing agents. Their statements with exhibits are at tabs 10 and 11 of the document bundles.

Background

8. Between 1999 and 2003 Furlong Homes Plc built four similar blocks of flats that are now known as 15 Cheshire Street, 17 Cheshire Street, 19 Cheshire Street and 40 Bacon Street. There are 12 flats in each block so that the development comprises

48 flats. 15 Cheshire Street and 40 Bacon Street each have their own roof whilst a single roof spans 17 Cheshire Street and 19 Cheshire Street. The development was completed over a fairly long period of time apparently because of a land dispute. 15 Cheshire Street, which includes Mr Walters' flat, was the first block to be completed whilst 17 and 19 Cheshire Street were completed some years later. All the flats were sold with the benefit of an NHBC insurance policies. However, because the development was completed over a long period of time the policies expired at different times and for the purpose of the works now under consideration none of the flats in 15 Cheshire Street have the benefit of NHBC policies.

9. The landlord acquired the freehold reversion in October 2005 after all the flats had been sold. Mr Walters is the original lessee of Flat 6. A copy of his lease is at tab 1. The lease is dated 18 June 1999 and is for a term of 999 years from 1 January 1999. Montalt manage the property on behalf of the landlord although it is not clear when they were first appointed. It may have been in 2009 because there is a schedule of more than 50 roof repairs completed to the four blocks between 5 November 2009 and 16 October 2018 [63-64], although the frequency of the roof repairs in 15 Cheshire Street was in dispute.

10. As a result of the large number of roof repairs ALH Roofing Ltd were instructed in early 2015 to inspect the development and provide a report. Their report is contained in two letters dated 12 February 2015 and 13 April 2015 [65-67] and it is brief. Nevertheless, their diagnosis is clear and is summarised in the following phrase *"the degree of the pitch of the roof is too shallow for the type of slate that is in place"*. The earlier letter records that *"On a roof of this type the minimum pitch is 22.5 degrees and water ingress is occurring due to capillary action at certain points"*.

11. Having obtained a report from ALH Roofing Ltd Montalt then made a claim under the NHBC policies. Mr Sneller, a claim's investigator, inspected the roofs of 17 and 19 Cheshire Street on 14 July 2015 and 14 November 2015 and his report is at [290-309]. His inspection records *"pitch confirmed at 19 degrees and a head lap of 100mm"*. As we understand it the head lap is the distance by which each roof tile overlaps the one below it. He considered however that *"these tiles appear to have been laid in accordance with the manufacturers guidelines"*. He concluded by observing that *"the exact cause of ingress cannot be confirmed"* but that *"the worst case scenario would be to strip and refelt and batten the artificial slate roof and remove and rebed, with new DPC, all coping stones to parapet walls"*. On 3 February 2016 NHBC produced an uncosted scope of works template [69-80] that appears to be based on the *"worst case scenario"* outlined in Mr Sneller's report.

12. On 2 June 2016 NHBC agreed to pay 18/48 of cost *"of the entire works required"* [389]. Unfortunately, Mr Walters does not benefit from that agreement because by the time that the defect had been identified the policy, in so far as it related to his flat, had expired.

13. On 25 October 2016 Montalt instructed [535] ATP Architects and Surveyors Ltd to produce a specification for the proposed works and all associated contract documentation *"for the replacement of the existing roof coverings"* at the four blocks. Mr Watling inspected the roofs of three of the blocks on 17 January 2017.

At that time, he could not obtain access to the roof void of 15 Cheshire Street although he undertook an external inspection. That apart, his inspection appears to have been thorough with the use of a scaffold tower to provide access to the roof over 17 and 19 Cheshire Street. Shortly before the hearing on 7 February 2019 Mr Watling was able to gain access to the roof void of 15 Cheshire Street.

14. He measured the pitches of the various rooves. The pitch of the roof to 40 Bacon Street is 17 degrees, to 17 and 19 Cheshire Street 18 degrees and to 15 Cheshire Street 21.4%. Those measurements however relate to the internal rafters. The pitch of the tiles on the lower sections of the rooves are substantially shallower because they are forced upwards over the top of the box gutter that collects rain water. The pitch of the bottom eight rows of tiles on the roof of 15 Cheshire Street reduces from 19.8 degrees to 11.5 degrees.

15. If, as Mr Watling eventually recommended, the box gutter and parapet wall are encapsulated with an Evalon-V membrane, to prevent further leakage, the pitch of the last eight rows of tiles would reduce even further to between 19.1 degrees and 7.5 degrees.

16. Mr Watling's evidence of the effect of these tiles pitches was clear and we did not understand Mr Walters to contradict it. There were no tiles on the market prior to 2013 that could be laid at a pitch of less than 20 degrees. Shallower pitches result in rain seeping under the tiles and leaking into the roof. His solution was two-fold. Firstly, to replace the existing tiles with modern rigid tiles that are effective down to a 15-degree pitch. Secondly to raise all the tiles above the rafters using spacers that would prevent the lower tiles from *"kicking up"* over the encapsulated box gutter, thus preserving the original pitch of the roof.

17. Having identified both the defect in the rooves and an appropriate solution Mr Watling then prepared a detailed specification [81-245]. The specification was put out to tender and three completed tenders were received. The tender report is at [247-251]. The lowest tender from E.J Roberts Roofing Ltd in the sum £359,505 exclusive of VAT was accepted. The total estimated cost including VAT and professional fees was put at £451,062.24.

18. On 1 April 2018 Montalt sent an itemised service charge demand to Mr Walters in the sum of £11,695.54 [522]. That included £9,397.13 being 1/48 of the estimated cost of the proposed roof works. For reasons that will become apparent Mr Walters declined to pay the demand in so far as it related to the roof works. Montalt subsequently issued a first reminder letter followed by a second reminder letter and then levied an administration charge of £90 inclusive of VAT to cover the cost of checking its account for payment and issuing the reminders.

Issues in dispute

19. Mr Walters' case was contained in a long letter at [280-286] that was annotated in manuscript and in a further letter in reply at [527-529].

20. Mr Walters agreed with our assessment that the nub of his case was contained in a paragraph under the heading "conclusions" at [285]. He did not suggest that the

estimated cost of the proposed work was in itself unreasonable. His case was essentially that there was insufficient evidence to support the decision to complete the proposed works in particular to 15 Cheshire Street and that the landlord should first be required to commission a detailed report from *"an independent surveyor with a relevant specialism in roofs and membership of a relevant industrial body"*.

21. In making that case Mr Walters relied on what he considered to be a number of discrepancies in the documents disclosed and relied on by the landlord. For the purpose of this decision the most relevant discrepancies are the conflict between the conclusions of the ALH Roofing report and Mr Sneller's report and the roof repair history of 15 Cheshire Street.

22. As far as the discrepancy between the two reports is concerned it will be recalled that ALH Roofing Ltd concluding that the roof pitches were too shallow for the slates whilst Mr Sneller concluded that the faults must lie elsewhere because the tiles had been laid *"in accordance with the manufacturers guidelines"*.

23. As far as the roof repairs were concerned Mr Walters pointed out that only three or possibly four of the reported leaks could have resulted from problems with the roof at 15 Cheshire Street.

Reasons for our decisions

24. Before turning to the applications before us we comment on two issues that caused us concern. The first relates to the landlord's conduct in these proceedings. The tribunal directions [43-47] required the landlord amongst other things to send to Mr Walters copies of *"all relevant survey reports and other documents to justify the need to replace the roofs"*. In apparent compliance with that direction the landlord produced a disclosure statement [60-61]. That statement exhibited a copy of the NHBC scope of works template [69-80] that was described as the *"NHBC report"*. During the hearing the landlord's representatives continued to refer to this template as *"the NHBC report"*. It is no such thing. The NHBC report is at [288-309]. The landlord clearly had the report in its possession because Ms C Waller of Montalt is named as the claimant. It was only by good fortune that Mr Walters eventually obtained a copy of the report from another leaseholder. The landlord's failure to produce the report and its reliance on the scope of works template as the NHBC report was little short of disingenuous. Had Mr Walters been legally represented the conduct would have justified a rule 13 order.

25. Our second observation relates to the landlord's failure to discuss with the leaseholders the possibility of claiming the costs from the original developers who are, to our knowledge from other cases before this tribunal, a fairly substantial organisation that remains in business. In this context Mr Watling's evidence was unambiguous: the roofs had been negligently constructed and comprised *"a litany of errors"*. It was apparent from answers to our questions that the landlord was alive to the possibility of a claim but had simply not explored it. We fully appreciate that a claim may now face difficult limitation issues and that much may depend upon whether the defects were latent in nature. It is nevertheless surprising that a

possibility of a claim has not at least been discussed with the leaseholders at a much earlier stage. However, for the purpose of these applications the issue is outwith our jurisdiction.

The section 27A application

26. Notwithstanding our comments concerning the landlord's conduct Mr Watling's evidence was compelling. Indeed, Mr Walters appeared to accept this when he conceded that *"something clearly needs to be done"*.

27. Although both the NHBC report and Mr Watling's report indicate that the pitch of the rafters at 15 Cheshire Street was sufficiently steep to accommodate the existing tiles, we accept Mr Watling's unchallenged evidence that the actual pitches of the lower eight rows of tiles would result and had indeed resulted in leaks causing damage to the flats below, albeit that the frequency of the leaks in 15 Cheshire Street was less than that in the other three blocks.

28. Mr Watling's conclusions were to an extent supported by the previous ALH Roofing Ltd and NHBC reports. The former had recommended similar work to that proposed by Mr Watling whilst the NHBC report observed that such work would be required in a *"worst case scenario"* and it is noteworthy that the NHBC had ultimately agreed to pay its share of the total estimated cost. Given the weight of the evidence we do not consider that a further report is either necessary or would serve any useful purpose.

29. Furthermore, Mr Walters' reservations did not apply with equal force to the other three blocks. The pitches of those three rooves were shallower than 20 degrees, which Mr Watling said was the minimum pitch for all tiles on the market before 2013 and the evidence of numerous roof leaks in the other three blocks was incontrovertible.

30. Mr Walters had not appreciated that under the terms of his lease he would still have to contribute to the cost of reroofing the other three blocks. Even allowing for the NHBC contribution he would still have to make a significant contribution. Given Mr Watling's evidence it was more likely than not that the frequency of the roof leaks at 15 Cheshire Street would increase over time. On that ground alone it was both sensible and reasonable to reroof all four blocks now. If the existing roof at Cheshire Street were left in situ and the work had to be completed in isolation at a later date the relative cost would doubtless increase because economies of scale would be lost.

31. Consequently, and for each of the above reasons we are satisfied that the landlord is acting reasonably in proceeding with the proposed works. There being no objection to the estimated cost that results from a competitive tender we conclude that the demanded service charge is payable by Mr Walters.

Application under schedule 11 of the 2002 Act

32. Mr Walters' only reason for disputing the administration charge was that he *"did not consider the proposed work to have been justified sufficiently"*. Although we have some sympathy for Mr Walters position nevertheless, for the reasons set out above, we have concluded that the service charge was payable by Mr Walters. Consequently, it was reasonable for the landlord to pursue the payment of the unpaid service charge. The sum charged is reasonable and indeed Mr Walters does not dispute the amount. Consequently, and for each of these reasons we conclude that the administration charge for £90 is payable by Mr Walters.

Section 20C and paragraph 5A application

33. In answer to our questions Ms Kleopa conceded that there was no provision in the lease that would enable the landlord to recover the cost of these proceedings through the service charge and consequently we need consider the matter no further.

34. Again, in answer to our questions Ms Kleopa said that the only provision in the lease that would enable the landlord to recover the cost of these proceedings as an administration charge was the fairly standard forfeiture provision at clause 3(11) of the lease, which provides: -

> *"From time to time to pay on demand all reasonable costs charges and expenses (including legal costs and surveyor's fees) incurred by the Lessor for the purposes of or incidental to the preparation and service of a Schedule of Dilapidations and Notice to repair or any Notice under the provisions of Sections 146 or 147 of the Law of Property Act 1925 (asmaneded from time to time) notwithstanding that forfeiture be avoided otherwise than by relief granted by the Court".*

35. Where a landlord applies to this tribunal for a determination that a service charge is payable it may well be able to recover the cost of the proceeding under such a clause provided of course that it can satisfy a tribunal that the application was made as a precursor to or in contemplation of forfeiture proceeding. However, as a matter of simple logic that argument cannot be open to a landlord on a tenant's application. Mr Walters did not make his application in contemplation of the landlord forfeiting his lease and the landlord cannot borrow his application and ascribe that motive to it. In short and on the basis of Ms Kleopa's submissions we conclude that the landlord cannot recover the costs incurred in these proceedings as an administration charge.

36. In any event, on the basis of the landlord's conduct referred to in paragraph 24 above we would have concluded that it was both unjust and inequitable for the landlord to recover the cost of these proceedings either through the service charge or as administration charge.

Fees

37. Rules 13(2) of the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013 permits us to make an order requiring the landlord to reimburse Mr Walters with the tribunal's fees of £300 that he has paid. The discretion granted by the rule is wide and is not circumscribed. Given the landlord's conduct referred to in paragraph 24 we are satisfied that it is reasonable to exercise our discretion by making such an order.

Name: Angus Andrew **Date: 18 March 2019**

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).