



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case Reference : **LON/00BK/LSC/2019/0012**

Property : **1-39 Storey Court, St John's Wood Road,
London NW88QX**

Applicant : **Orbit Group Limited (“the Landlord”)**

Representative : **Freemont Property Managers**

Respondents : **Leaseholders of Storey Court (“the
tenants”)**

Type of Application : **Determination of liability to pay and
reasonableness of service charges in the
year commencing 1st October 2018 and
ending on 30th September 2019
pursuant to Landlord and Tenant Act
1985,s27A.**

Tribunal Members : **Jim Shepherd
Stephen Mason BSc FRICS FCI Arb**

Date of Decision : **18 April 2019**

DECISION

1. The cost of prospective works of replacing the existing windows in the Tower at Storey Court with new uPVC windows, along with repairs to the brickwork and pointing in the sum of £102,394 plus VAT together with surveyor's costs of £1,350 plus VAT plus 4.75% of the contract sum plus VAT would be payable as a service charge by

the leaseholders of Storey Court and such costs would be reasonably incurred in accordance with S.19(1)(a) Landlord and Tenant Act 1985.

2. The application made pursuant to Landlord and Tenant Act 1985, s.20C is dismissed.

The application

3. The Applicants were represented by David Edwards of Freemont Property Management Company Limited ("Freemont"). He called evidence from his colleague, Kevin Barr. Mrs Davidson of 4 Storey Court gave evidence herself and called evidence from her husband, Douglas Davidson and Beverley Davis of 2 Storey Court. Both sides submitted written evidence. It was clear that Mrs Davidson was not representing the Residents Association. At Storey Court there was divided opinion on the merits of the proposed works. Neither the Davidsons nor Beverly Davis live in the Tower section of Storey Court.

4. The application made by Orbit Group Limited ("The landlord") is for a determination of liability to pay and reasonableness of service charges for the cost of the replacement of the existing windows in the tower of Storey Court with uPVC windows along with brickwork repair and pointing to the tower ("The works"). The estimated cost of the works is £102,394 plus VAT together with surveyor's costs of £1350 plus VAT and 4.75% of the contract sum plus VAT (Total cost £130327). The application is made pursuant to Landlord and Tenant Act 1985, s. 27A (3) which states:

3) An application may also be made to [the appropriate tribunal] 2 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.

5. The original application (Tab 2/10) referred to the insertion of cavity trays. These are no longer part of the application.

6. Storey Court consists of 31 retirement flats on St John's Road. The building has two broad sections: "The Tower" which consists of a seven storey block with a small basement car park and two four storey blocks to the rear of the Tower. The immediate application concerns works to the Tower alone. Thirty of the flats were sold subject to a 120 year lease commencing 1st January 1987 with one retained for a caretaker and which is currently, we are advised vacant. The leases are based on similar terms (Tab 6 A1 onwards).

7. Para 4 of the Seventh Schedule of the lease states:

The lessor shall keep the Reserved Property (Including the foundation exterior walls load bearing walls and timber of every flat) and all fixtures and fittings

furnishings and appliances therein and additions thereto in a good and tenantable state of repair decoration and conditions including the renewal and replacement of all damaged parts and the decoration as necessary for the external surfaces of the Premises and other flats..

8. Para 9(a) of the Seventh Schedule states:

The Lessor shall so far as it considers practicable equalise the amounts from year to year of its costs and expenses incurred in carrying out its obligations under this Schedule by charging against such costs and expenses in each year and carrying to a reserve fund or funds such sums as it considers reasonable by way of provision for depreciation or for future expenses liabilities or payments whether certain or contingent and whether obligatory or discretionary.

9. Para 19 of the Sixth Schedule states:

The Lessee shall contribute and shall keep the Lessor indemnified from and against one thirtieth (1/30) of the costs and expenses incurred by the Lessor in carrying out its obligations under and giving effect to the provisions of the Seventh Schedule hereto....

10. It is intended that the cost of the works would be borne by the reserve fund to which there has been an increased contribution from £25000 per annum last year to £40000 per annum this year. This increase has been instigated by Freemont Property Managers ("Freemont") who were appointed by the Landlord with effect from 1st July

2017. Prior to this the annual contribution to the reserve fund had remained unchanged since 2013.

11. Kevin Barr a Director of Freemont gave evidence to the Tribunal that when his firm were appointed they were made aware that a survey had been carried out by Anthony Patrick Associates (APA) in March 2016 with a view to preparing a ten year planned maintenance programme. In fact although the survey had been completed no action had been taken with regard to the planned maintenance programme.

12. The APA report is at Tab 6A (25) of the bundle and the Planned Maintenance Programme is at Tab 6 (A/60). Amongst other things the report states at paras 1.5-1.6 :

The timber windows in the building are in need of extensive repair and redecoration works in the shorter term to try and maintain and preserve the units. The windows serving the higher levels of the front elevation of the main building are suffering from exposure to the elements and are showing signs of accelerated deterioration. Although the windows, subject to the recommended extensive repair and redecoration being successfully undertaken, will last for the foreseeable future, consideration should be given for their eventual replacement within the next 10-15 years. Although this initial cost outlay would be considerable, this would provide significantly reduced heat loss to the individual flats and building in general, and by reducing the number of components requiring maintenance, would also result in reduced repair and redecoration costs for the building.

13. The APA report goes on to highlight particular problems with the windows in two flats in the Tower, namely flats 30 and 31 (where there had been water ingress) and in the common areas on the top floor of the Tower. A letter from Mrs Caruthers of Flat 31 (Tab 6B) confirmed the problems that she had suffered as a result of the deterioration of the windows in her property. Also at Tab 4 (25) is a short letter from the owner of flat 30 which states:

I have lived in Flat 30 for 8 years in that time one of my windows has leaked water and ruined the plasterwork.

14. One of the owners of Flat 29 which is also in the Tower informed the Tribunal that her windows were in a poor condition. A letter from both owners of Flat 29 at Tab 4(22) states:

The windows in Storey Court do not meet today's standards of safety, energy efficiency or simple functionality. Many sash-style windows require excessive force to open and /or will not stay open unless propped up. Some of the front windows (to the road) are unsafe to open or cannot be opened at all. The louvered windows do not close properly, with a gap between each louvre of about 1 cm, so that the common areas are extremely cold in the winter.

15. Accordingly the Tribunal had evidence that at least 3 out of the 5 flats in the Tower had windows which were in relatively serious disrepair and probably needed replacement.

16. Once appointed Freemont asked APA to undertake a further review of the condition of Storey Court and provide outline budget costings for possible window replacement works. The update report of October 2017 is at Tab 6A (56 onwards). APA found continued deterioration of the paintwork to the private and communal windows and doors. It was stated that the building needed external repair and redecoration works within the next 12 months to prevent further issues arising with the windows and doors. Estimates were provided for different types of window repair with uPVC replacement the cheapest at £58,869.60.

17. Following meetings between Freemont and Storey Court residents a s.20 notice was issued on 12th March 2018 (6A (77)). The works proposed included the replacement of windows in the Tower and other internal works. Observations were received by Freemont and there was a further meeting of leaseholders on 26th April 2018. Following the meeting the first s.20 notice was withdrawn and a second notice served on 14th May 2018 (6A (123)). In this notice the works were exclusively external and again included the replacement of the windows in the Tower with uPVC windows.

18. In response to the second s.20 notice Mr and Mrs Davidson wrote a detailed letter challenging in particular the proposal to replace the timber windows in the Tower with uPVC windows (Tab 6A/127). In response Mr Barr instructed Talis Chartered Surveyors to carry out a feasibility study to determine if the proposal for uPVC replacement was cost effective. The Talis report at 6A/133 confirmed that over a 15 year period replacement with uPVC windows in the Tower was the cheapest option compared with repair of the existing windows or replacement with timber windows.

19. Thereafter quotes were obtained from three contractors. These were analysed by Talis who recommended that Quoin Contract Limited be instructed (6A (141)). A notice of estimates was prepared and sent to residents on 24th October 2018 (6A (180(a) -180(d)). Mr and Mrs Davidson and Ms Davis opposed the works but of the remaining residents that replied the majority were in favour. Kevin Barr produced an outline capital expenditure plan for Storey Court (6A (219)) which he described in his statement as a "rolling ten year plan".

20. Thereafter the landlord made the present application before starting the works.

The Tribunal's decision

21. The cost of prospective works of replacing the existing windows in the Tower at Storey Court with new UPVC windows, along with repairs to the brickwork and pointing in the sum of £10,2394 plus VAT together with surveyor's costs of £1,350 plus VAT plus 4.75% of the contract sum plus VAT would be payable as a service charge by the leaseholders of Storey Court and such costs would be reasonably incurred in accordance with S.19(1)(a) Landlord and Tenant Act 1985.

22. The application made pursuant to Landlord and Tenant Act 1985, s.20C is dismissed.

Reasons for the Tribunal's decision

Is the cost of the works payable under the lease?

23. Para 4 of the Seventh Schedule of the lease states:

The lessor shall keep the Reserved Property (Including the foundation exterior walls load bearing walls and timber of every flat) and all fixtures and fittings furnishings and appliances therein and additions thereto in a good and tenantable state of repair decoration and conditions including the renewal and replacement of all damaged parts and the decoration as necessary for the external surfaces of the Premises and other flats..

24. The lease therefore allows for the replacement of damaged parts including the windows. The Tribunal rejects Mrs Davidson's suggestion that such replacement can only take place once all repair routes have been exhausted. In her first statement at paragraph 18 (Tab 7/8) she states "it is a covenant to renew worn or damaged parts beyond repair". The covenant is wider than this. Replacement is an available solution where parts of the building are in disrepair.

25. More fundamentally Mrs Davidson sought to argue that the replacement of the windows with uPVC windows in the Tower was an improvement which was not permitted under the lease (para 19 at Tab 7/9) because there are parts being replaced when they are not damaged. This allegation must be put in context. First on the available evidence before the Tribunal three of the five flats in the Tower had windows which were undoubtedly in disrepair to the extent that they probably required replacement. Secondly there was no expert evidence put forward by Mrs Davidson as to the condition of the windows in the Tower. She sought to rely on the APA report but that report merely confirmed that the condition of the windows in two of the flats in

the Tower and the common parts was poor and the other windows appeared to be "generally tired with minor decay and failure of the finishes" (Para 4.4.1.3).

26. On the assumption that Mrs Davidson is correct and that some of the windows in the Tower are not in disrepair is it open to the Landlord to replace all of the windows in the Tower with uPVC ones?

27. In *Wates v Rowland* [1952] 2 QB 12 Evershed LJ referred to the distinction between repairs and improvements as follows:

" In the course of the argument examples were given showing that what was undoubtedly repair might yet involve some degree of improvement, in the sense of the modern substitute being better than which had gone before. At the other end of the scale, it was also clear that work done to satisfy modern standards, although it might involve restoration and might be said to be restoration...yet clearly would be an improvement. Between the two extremes, it seems to me to be largely a matter of degree, which in the ordinary case, the county court judge could decide as a matter of fact, applying a commonsense man-of-the world view".

28. In *Sutton v Drake* LRX/69/2004 Lands Tribunal the lease provided that the tenant was liable to pay for repairs effected by the local authority landlord. The local authority carried out works to the exterior render of the property such that the existing Crittal - type windows (which were otherwise in good repair) would be damaged. The decision was made to provide new double glazed units. The Lands Tribunal held that these were repairs not improvements.

29. In *Wandsworth v Griffin* [2000] 2 E.G.L.R the local authority had replaced flat roofs with pitched roofs and the windows with uPVC double glazed units. The evidence showed that the works involved would provide the best value if life - cycle costing was used as an analytical tool to evaluate an asset over its operating life. The Lands Tribunal stated the following:

"It does not seem to me that a repair ceased to be a repair if it also effects an improvement. In my judgment, the works carried out by the landlords did constitute a repair, if they were indeed cheaper than the alternatives, taking into account both initial and future costs".

30. In *Waalder v Hounslow LBC* [2017] 1 W.L.R. 2817 (where there was an improving lease) the landlord sought to recover the cost of replacing wooden windows with metal framed units along with other works at a cost of £55,195.95 per leaseholder. The Court of Appeal amongst other things decided that if the landlord exercises discretion to carry out works which go beyond a strict obligation to do so he must "take particular account of the interests of the lessees, their views on the proposals and the financial impact of proceeding before claiming the cost".

31. Applying these authorities and considering the specific circumstances of the present case the Tribunal considers that the proposed cost of window replacement is payable under the lease. It is plain that a number of the windows in the Tower are in disrepair. It is possible that some of the windows in the Tower are not in disrepair. Nonetheless the landlord, through Talis carried out a feasibility study which confirmed that over a 15 year period replacement with uPVC windows in the Tower was the

cheapest option compared with repair of the existing windows or replacement with timber windows. Faced with this evidence the common sense approach (per *Wates* above) is to replace the windows in the Tower with uPVC ones. Overall the works would constitute repair rather than improvement.

32. Further applying *Waalder*, the Tribunal considers that the landlord has carried out extensive consultation with the lessees and considered at some length their viewpoints. The financial outlay for each leaseholder in the present case as distinct from *Waalder* would be softened by the use of the Reserve Fund.

Would the costs of the works be reasonably incurred?

33. The Landlord and Tenant Act 1985,s19(1) states the following:

(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...

34. In *Waalder v Hounslow* [2017] EWCA Civ 45 the Court of Appeal said that in the context of this statutory provision "reasonableness" had to be determined by reference to an objective standard. The landlord's decision making process is a relevant factor but this must then be tested against the outcome of that decision (i.e. a 2 stage test - see also *Forcelux v Sweetman* [2001] 2 E.G.L.R 173). The fact that the costs of the work is to be borne by the lessees is part of the context for deciding whether they have been reasonably incurred. Where a landlord has chosen a course of action which leads

to a reasonable outcome, the costs of pursuing that course of action will have been reasonably incurred even if there was a cheaper outcome, which would also have been reasonable.

35. The test to be applied in cases concerning reasonableness is whether the charge that was to be made was reasonable, not whether there are other possible ways of charging that might have been thought more reasonable : *Havering LBC v MacDonald* [2012] UKUT 154 (LC). It is not for the Tribunal to impose its own decision if the course chosen by the landlord leads to a reasonable outcome (*Service Charges and Management* 4th edition, Tanfield Chambers para14-05).

36. In the present case it is clear that the landlord's decision making process was sound. There was extensive consultation with residents and as a result of that consultation an original s.20 notice was withdrawn and a feasibility study carried out by Talis. In addition it is worth noting that the Landlord has made the present application before the works were done which indicates some care in preparation for the works.

37. Further as indicated already in relation to the question of payability the Tribunal accepts that the Talis feasibility study supports the replacement of the windows in the Tower with uPVC windows over repair of the existing windows. Whilst the Davidsons have raised a number of issues in relation to the reliability of the Talis data the Tribunal considers that these do not deflect from the overall outcome and there was no contrary report for the landlord to consider. The Tribunal accepts the Applicant's case that the scaffolding costs are partly excluded for comparative purposes because the scaffolding is going to be used principally for masonry repairs. The Tribunal also accepts the Talis analysis of redecorating cycles.

38. The Davidsons have suggested that the APA report runs contrary to the Talis feasibility study and supports repair of the wooden windows in the Tower. This is incorrect. APA did not provide an opinion on whether the windows should be repaired or replaced neither did they consider the cost of alternative outcomes as Talis did. The APA report was self evidently merely an overview of the condition of Storey Court.

39. Mr Davidson has provided an alternative capital expenditure plan for Storey Court. The Tribunal has considered his spreadsheets and submissions but finds that they do not affect the outcome of the decision we are required to make, namely whether it is reasonable for the landlord to recover the cost of replacing the windows in the Tower with uPVC windows. Amongst other things the Tribunal is concerned that Mr Davidson has assumed that the landlord's capital expenditure plan is "set in stone". It plainly is not. As stated by Mr Barr it is a "rolling 10 year plan". If as suggested by the Davidsons the windows in the remaining part of Storey Court are not in disrepair they may not require repair and or replacement in the near future which could lead to savings in future expenditure. At present however it is clear that the windows in the Tower must be addressed and the landlord's method of addressing this is reasonable.

40. The Davidsons also criticised the landlord for not acting quickly enough to address the condition of the windows following the APA report. During the hearing this argument was expanded into a suggestion that there was a set - off based on this delay. The Tribunal rejects this contention. Any delay was related to the evaluation and consultation process which the landlord properly carried out. In any event the Davidsons have not pointed to specific losses that they have incurred as a result of the delay.

41. Neither does the Tribunal accept the Davidsons' criticism that it is not reasonable to deplete the reserve fund in order to carry out the works. Indeed a reserve fund is specifically designed for this purpose. Further the amounts collected towards the reserve fund to date have been relatively low and to an extent leaseholders have benefitted from this. It may be that future payments towards the reserve fund have to be higher as they were this year in order to rebuild the fund enabling further works to be carried out.

42. The Tribunal rejects the contention by Mrs Davidson that the Talis contract (Tab 6A page 67) is a Qualifying Long Term Agreement which ought to have been separately consulted upon. The agreement is not for a term of more than 12 months or more. In any event the future Talis works were included in the second s.20 notice.

43. Accordingly the Tribunal finds that the cost of prospective works of replacing the existing windows in the Tower at Storey Court with new uPVC windows, along with repairs to the brickwork and pointing in the sum of £102,394 plus VAT together with surveyor's costs of £1,350 plus VAT plus 4.75% of the contract sum plus VAT would be payable as a service charge by the leaseholders of Storey Court and such costs would be reasonably incurred in accordance with S.19(1)(a) Landlord and Tenant Act 1985.

44. During the hearing Mrs Davidson indicated that she wanted the Tribunal to consider exercising its discretion pursuant to Landlord and Tenant Act 1985, s.20C whereby costs incurred in bringing the Application are not to be regarded as relevant costs in determining the amount of service charge payable. The landlord indicated that they would only be seeking to recover the fixed costs of the application, their hearing costs and the cost of printing the bundles. These costs totalled around £1200.

45. The Tribunal considers that the landlord acted fairly in bringing the application before carrying out the works. The proposal for replacing the windows had divided opinion amongst residents although it's fair to say that the majority who responded were in favour. The Davidsons produced lengthy witness statements which the landlord had to consider and respond to. In all the circumstances it is not considered just and equitable to accede to the application under s 20C and it is therefore dismissed.

Name: Jim Shepherd

Date: 18th April 2019