FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BG/LSC/2019/0158**
Property	:	**Flats 7 & 14 McKinnonwood House, Turin Street, London E2 6BX**
Applicant	:	**(1) Dr Kenneth Smith (Flat 7)** **(2) Ms Eliza Begum (Flat 14)**
Representative	:	**In person**
Respondent	:	**The Mayor and Burgesses of the London Borough of Tower Hamlets**
Representative	:	**Mr. Hardman, counsel**
Types of Application	:	**Liability to pay service charges**
Tribunal Members	:	**Judge Tagliavini** **Mr. N Martindale FRICS** **Mr. C Piarroux**
Date and venue of Hearing	:	**19 August 2019** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**18 October 2019**

DECISION

Decisions of the tribunal

I. The fire safety works are works of repair or maintenance for which, the applicants are liable to contribute in accordance with the terms of their lease.

II. The partition works to the roof space are reasonable only to the extent of the installation of three of solid fire partition walls at a cost of £3,788.24 in McKinnonwood House. The cost of the partitioning works are excessive and are limited to 75% of the final sum claimed for the five partitioning walls.

III. The installation of permanent doors in the roof space is unreasonable and the cost of these works in the sum of £3,592.19 attributed to McKinnonwood House has been unreasonably incurred and is excessive. Therefore, it is not payable by the applicants.

IV. The cost of the installation of fixed electrical lighting and switches in the roof space in the sum of £3,404.70 attributed to McKinnonwood House has been unreasonably incurred and is excessive. Therefore, it is not payable by the applicants.

V. The cost of the additional works to McKinnonwood House arising from the 3 November 2017 meeting held with Promat amounting to £37,240.35 made up of: 26,766.37/boxing; £3,742.19/supalux lining to sloping soffit; £741.00/fire seal pipe through wall and £5,990.79/ boxing newly clad purloin, are unreasonable and are not payable by the applicants.

VI. The surveyor's fees are excessive and limited to 25% of the £3,402 claimed for McKinnonwood House

VII. The administration charges are excessive and limited to 25% of the £398.75 per flat claimed.

The application

1. This is an application seeking the tribunal's determination as to the applicants' liability to pay service charges under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act) in respect of major fire safety works carried out in 2018/19. The applicants also seek a limitation to any costs pursuant to section 20C of the 1995 Act and Schedule 11(5)(a) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act").

The premises

2. Flats 7 and 14 comprise two flats in McKinnonwood House ("the Building") situated in a four storey purpose built block of flats and which form part of a development of a total of 27 blocks known as the Avebury Estate "the Estate." The subject Building has a total of 16 flats split into two blocks, each with their own entrance. Ms Begum and Dr Smith are the long leaseholders of their subject flats under 125 year leases dated 6th May 1991 and 10th November 1997 respectively. The leases are in substantially the same terms and therefore reference to a lease or leases in this decision includes both flat 7 and flat 14.

Background

3. Since 2008 the respondent freeholder has employed the Arms-Length Management Organisation (ALMO) Tower Hamlets Homes to manage its leasehold stock and the properties held by secure tenants. On 24 June 2017 a fire broke out at Dickinson House, a nearby block on the Estate and identical to the subject Building. This fire originated in a top floor flat and spread to the roof space affecting all of the top floor flats in Dickinson House and required the whole of this building to be vacated while works of repair were carried out.

4. Following the fire an inspection of the subject Building was carried out by the London Planning and Emergency Authority and the respondent was served with a Schedule of Fire Safety Audit Observations dated 29 June 2017 requiring works to remedy the deficiencies identified to be rectified by 28 December 2017. The respondent made reference to a report prepared by Savills shortly before the fire in the neighbouring block but the nature and extent of this report was unclear as it was not provided to the tribunal.

5. The substantive actions to be taken were identified in the Audit as:

   (i) ensuring cabling within the common areas is fully fireproof and has 30 minutes of fire resistance and holes within a storage cupboard and a front door to be filled and both made 30 minutes fire resistant;

   (ii) the provision of suitable fire resisting separation by ensuring the roofing structure is sufficiently fire resistant to prevent rapid spread of fire; and

   (iii) a review of the fire risk assessment.

6. In or about September 2017, in response to this Audit the respondent prepared a Scheme Brief concerning the Avebury Estate Fire Breaks and formed the view that it was expedient to carry out fire safety works to all blocks across the Estate, as its inspection had revealed a number of deficiencies despite an earlier report in or about June 2017 by Savills

finding that fire safety precautions in the Building were satisfactory. Fire safety works were subsequently carried out between October to December 2017 with practical completion being in March 2018. The original budget for these works had been £500,000 but was revised to £630,000.

7. Subsequently, the respondent applied for and was granted by the First-tier tribunal in its decision dated 14th November 2018, *(LON/00BG/LDC/2018/0143)*, retrospective dispensation under section 20ZA of the 1985 Act from the statutorily required consultation procedures imposed by that Act for the proposed major fire safety works. These works to the Estate were awarded to Chigwell Construction and resulted in an indicative estimated amount of £2,562.60 to be paid by each of the applicants. Subsequently, during the course of these works, in November 2017 further works were recommended by Promat, the suppliers of the fire-proof partitions installed in the loft area of the Building. Consequently, the costs of the works increased by approximately 45% to a total scheme estimate of £1,914,55, with revised demands being sent to each of the applicants for £4,386.21.

8. The fire safety works ('the Works") which were carried across all of the blocks on the Estate and in the subject Building, included the installation of fire break partitions within the roof spaces, the installation of permanent access doors and fixed lighting together with the replacement of porthole glazed windows with louvre vents. Following completion of these major Works, Dr Smith received a demand for payment in the sum of £4,548.86and Ms Begum a demand for payment in the sum of £4,386.21 said to be their contributions towards the total cost of the fire safety works at a cost of £62,617.86 works for the subject Building.

The issues

9. The tribunal identified the issues to be determined as follows:

   (i) Whether the fire safety works ("the Works") are repairs or improvements and fall outside the terms of the lease?

   (ii) Whether the Works were unreasonable in extent?

   (iii) Whether the Works are reasonable in cost?

The hearing

10. At the hearing of this application the applicants appeared in person with Dr Smith appearing as the spokesperson for both applicants. The respondent was represented by Mr. Hardman of counsel. Each party provided an indexed bundle of documents to the tribunal containing the documents upon which they relied. Oral evidence was given by Dr Smith for the applicants and Mr. Hermanstein for the respondent.

The Applicant's evidence

11. The applicants asserted that the fire safety Works were works of improvement rather than repair or maintenance as there had been no fire safety partitions in situ in the roof space previously and therefore there had been nothing to "repair" or "maintain" in accordance with the terms of the leases. Dr Smith was unable to take the tribunal to any authorities to support his case, preferring the tribunal to use its expertise in determining this issue.

12. Notwithstanding, the applicants' argument that all the Works comprised works of improvement for which they had no liability to pay, the applicants had prepared a Scott Schedule detailing the Works they otherwise took issue with. These items of work were as follows:

    (i) Internal/External surveyors fees in the sum of £3,402.66 for the subject Building ***(not agreed).***

    (ii) Dormer windows in the sum of £2,471.68 ***(agreed by respondent that this sum should be omitted).***

    (iii) Allowance for a plumber in every tank room at a cost of £339.97 ***(accepted by applicants).***

    (iv) Preparation clearance to working area and reinstatement of insulation at a cost of £365.63 ***(accepted by applicants).***

    (v) Screen off entrance in loft area/construct temporary wall/and secure fire check door in Ply and Superlux at a cost of £310.63 ***(agreed by respondent to be omitted from final account).***

    (vi) Supalux lining to sloping soffit (in lieu of wall and door) at a cost of £3,742.19 for subject Building ***(not agreed).***

    (vii) Extra cover for boxing at the head of wall between rafters at a cost to the subject Building of £26,766.37 ***(not agreed).***

    (viii) Extra cover for boxing – newly clad purlin at a cost for the subject building of £5,990.79 ***(not agreed).***

    (ix) One solid firewall at a cost for the subject Building of £3,788.24 ***(not agreed).***

    (x) One solid wall with tank wall in-situ at a price to the subject building of £6,954.36 ***(not agreed).***

    (xi) Nine 1hr fire doors and frames at a cost to the subject Building of £3,592.19 ***(agreed by respondent only to the extent***

that this should be reduced to 8 doors, otherwise not agreed).

(xii) To fire seal pipe through wall at a cost to the subject Building of £741.00 ***(cost of works agreed as reasonable but works unreasonable).***

(xiii) Supply and fit 1 light and switch per partitioned area at a cost to subject Building of £3,404.70 ***(not agreed).***

(xiv) Safe platform working area at a cost to the subject Building of £768.72 ***(accepted by applicants).***

(xv) Major works administration fee at a cost of £398.75 per flat ***(not agreed).***

13. Dr Smith submitted that in any event, the fire safety Works could have been carried out at a considerably lesser cost had a horizontal barrier been constructed between the top floor flats and the roof space. Further, Dr Smith queried the installation of dormer windows in the roof and asserted these had not been included in the works although charged for by the respondent. Dr Smith also asserted that the installation of fixed electrical lighting in the partitioned spaces was unnecessary as other less permanent but equally appropriate provision for a source of light could have been found. Lastly, Dr Smith also challenged the amount of surveyor's fees and administration fees charged by the respondent as excessive.

14. Dr Smith also submitted to the tribunal that the applicants did not consider that the fire safety Works had been necessary at all as there had been no recent change in the fire safety regulations and the roof space had not been built with partitions. Therefore, if the roof space was now considered to be unsafe, it was the responsibility of the respondent to remedy this at their own cost.

The respondent's case

15. The respondent asserted that the fire safety Works required by the Fire Authority's Schedule of Fire Safety Audit Observations dated 29 June 2017 did not prescribe the exact works required, only that their nature and effect was sufficient to resolve the identified risks.

16. Mr. Hardman submitted that the Works identified by the respondent fell under the terms of lease either, as (i) works of repair or maintenance as provided for by clause 5(5)(a) or (ii) alternatively were required by the insurance covenant under clause 5(5)(c) in order to ensure that the building satisfied the insurance requirements against loss or damage by fire or (iii) these works caught by the 'sweeping up' clause 5(5)(o) requiring the respondent to ensure the proper management and safety of the building. Mr. Hardman submitted that

on any of these three scenarios the Works were not improvements but were necessary works of repair or maintenance or required for insurance purposes and for the proper maintenance and safety of the subject Building. As such, the applicants were liable to make their respective contributions towards the cost of these Works. Mr. Hardman also referred the tribunal to a number of cases to support his arguments including the first tier tribunal decision of *FirstPort Property Services Limited v The Various Long Leaseholders of Citiscape* LON/00AH/LSC/2017/0435.

17. Mr. Hardman submitted that the scope of the Works was both necessary and reasonable as demonstrated by the inspection of the Fire Authority and Audit Notice. Further, Mr. Hardman submitted that the respondent had acted reasonably by accepting and acting on the expert advice of the supplier of the fireproof panels Promat, after a meeting was held with their representative on 3 November 2017, at which further works were identified as being required, to take into account the need to safe-guard the purloins and rafter timbers not previously accounted for in the initial Scheme Brief. A further change to the original specification of works involved the provision of permanent louvred ventilation to the top floor of the Building as the other windows on the staircase were found to be openable.

18. It was accepted by the respondent that the cost of the Works had increased significantly since their initial estimated cost. It was also accepted that this increase had arisen as a result of a detailed inspection of the roof space by the supplier of the fire resistant panels, Promat who subsequently had recommended the additional works and which were a cost that had not been originally provided for by the respondent or notified previously to the applicants. Mr. Hardman submitted that as no alternative Schedule of Works or costings had been provided by the applicants, the tribunal should accept Chigwell Construction's Schedule of Rates as reasonable. This Schedule of Rates had been adopted by the respondent which when compared with other contractors, provided the lowest costs. A certificate of completion dated 22 January 2019 was provided to the tribunal.

19. The only oral evidence for the respondent given to the tribunal was provided by Mr. Brian Hermanstein, a surveyor employed by Tower Hamlets Homes who spoke to his unsigned witness report dated 9th July 2019 (signed in the presence of the tribunal). Mr. Hermanstein told the tribunal that after a survey of the building was carried out, a Scheme Brief was drawn up, which included the installation of 60 minute fire break partitions within the roof space of the Building to compartmentalise the area in order to restrict the spread of any fire; the installation of adequate lighting to the partitioned areas and the installation of doors to each compartmentalised area to provide access for routine maintenance to the services in the roof space which included overflow/water pipes and possibly some electrical wiring.

20. Mr. Hermanstein told the tribunal that after an on-site meeting was held in November 2017 between the respondent's representatives and Promat, the suppliers of the fire resistant walls, it was agreed that alterations to the Scheme Brief were required. These included increasing the diameter of the rafters in order to improve the fire resistance; a lengthening of fixing screws; an extension of the boarding to the ridge tree and purlins and the addition of Promaseal Intumescent sealant in identified gaps. These additional works were subsequently approved by the Respondent, thereby increasing the original cost of some elements of the fire safety works by around 45%.

21. Mr. Hardman submitted that in the absence of any expert reports or other evidence from the applicants to support their case, the tribunal should accept the evidence of the respondent as being the best available evidence.

The tribunal's decisions and reasons

22. Despite the absence of alternative reports or costings from the applicants acting in person, the tribunal finds that the oral and documentary evidence to support the respondent's case was significantly lacking in detail or clarity, not only in respect of the documentary evidence provided but also in the absence of significant and relevant witnesses who had been central to the decision making process behind these works and their costs. The tribunal finds that the process adopted by the respondent of ascertaining the nature and extent of the works required as well as their specifying and tendering process to be unsatisfactory and unsound, which had resulted in excessive, unnecessary and overly expensive costs. The tribunal found the lack of any independent expert report to explain and justify these Works to the tribunal to be a significant omission and contributed to the uncertain decision making of the respondent as to precisely what works were required in order to comply with the Fire Safety Notice.

<u>The liability issue</u>

23. The tribunal preferred the respondent's submissions to those of the applicants when considering whether these were works of repair/maintenance or improvements. The tribunal accepts the respondent's argument that these works fall within clause 5(5)(a) of the lease as works of repair or maintenance. This relevant part of which states that the respondent lessor covenants:

> *"To maintain and keep in good and substantial repair and condition:*
>
> *(i) The main structure of the Building including the principal internal timbers and the exterior wall and the foundations and the roof thereof with its main water tanks main drains gutters and rain water pipes (other than those*

included in the demise or in the demise of any other flat in the Building

(vi) all other parts of the Building not included in the foregoing sub-paragraphs (i) to (v) not included in this demise not included in the demise of any other flat or part of the Building and not let or intended for letting (sic)"

The extent and cost of the works issues

24. Despite the respondent having relied on the earlier fire that had occurred in an identical nearby block as the justification for these works, the tribunal was not provided with any evidence as to the cause of that fire, how it had spread or the recommendations made for the prevention and containment of any future fires. Further, the tribunal was not provided with a detailed independent fire safety assessment report of the subject property detailing the nature and extent of the works most suitable for the subject Building in order to comply with the Fire Authority Audit. Instead, the respondent chose to rely upon non expert employees and the views expressed at site meetings by the suppliers of the materials used to form the basis for these Works rather than seeking the views of independent and objective experts in this area.

25. The tribunal finds that fire safety works to address the issues raised in the Schedule of Fire Safety Audit Observations were necessary and their costs reasonably occurred. However, the tribunal was not assisted by the absence of independent evidence from a fire safety expert in ascertaining the scope of the works required. In considering the nature and extent of the partitioning works in the loft area of the Building and the diagrams produced by the respondent on page 329A of the respondent's hearing bundle, the tribunal finds that only three of the five solid partitioning walls installed are likely to assist in preventing the spread of fire from flat to flat with the remaining two walls are unlikely to be of much, if any effect. Therefore, the tribunal finds that 75% of the cost of the installation of the partitioning walls to be reasonable and payable by the applicants.

26. The tribunal finds that the additional works identified at the meeting held between Promat and the respondent's representatives on 3rd November 2017 are excessive and unreasonable both in scope and cost and unjustified by any independent expert evidence, despite the substantial increase in cost of the Works that resulted from these additional works. Therefore, the tribunal finds the costs of these additional works are not payable by the applicants.

27. The tribunal finds that the installation of permanent doors and a fixed electricity supply and switches to the partitioned spaces to have been unnecessary and unreasonable. The tribunal finds that the limited access required to these areas could reasonably have been met by the

use of removable openings in the partitions and portable lamps, in order to carry out any necessary works to pipes supplying services to the subject building, as and when they were required. Consequently, the tribunal finds the costs of these works to be excessive and unreasonable.

The surveyor's fees issue

28. Although Mr Hardman submitted that the surveyor's fees in the sum of £3,402 per block (£91,844.82 for 27 blocks) was merited in light of the fact at least 2 surveyors as a CAD surveyor and a clerk of works had all been employed in delivering this major works project, he accepted that the evidence in support of the claim for the administration fees of £398.75 per flat (172,260 approx. for 27 blocks) was "less than cogent." The tribunal finds the administration charges to be unexplained and unsupported by the evidence provided. The tribunal also finds the sums sought to be excessive and unreasonable and therefore allows only an administration fee of 25% of the sum sought per applicant's flat.

The administration charges issue

29. The tribunal considers that these charges are unsupported by the evidence relied upon by the respondent and are excessive. As the tribunal accepts that some fire safety Works have been reasonably required and carried out, it accepts that some administration charges which will have incurred. Therefore, having regard to the tribunal's findings above the tribunal allows 25% of the administration charges sought from each applicant.

Section 20c

30. The respondent conceded that it would not seek to add the costs of this application to the service charges. Therefore, in so far as is necessary, the tribunal makes an order under section 20C of the 1985 determining that the costs of and associated to this application are not to be added to the service charges.

Signed: Judge Tagliavini **Dated: 18 October 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 he parties about any right of appeal they might 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 , such application must include a request for an extension of time and the reasons 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 these time limits.

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).