FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00CN/LDC/2019/0019** **BIR/00CN/LIS/2019/0059**
Property	**:**	**Phase 2, King Edwards Wharf, Sheepcote Street, Birmingham, B16 8AT**
Applicants	**:**	**Kew Phase Two RTM Company Limited**
Representative	**:**	**Trowers and Hamlin Solicitors**
Respondents	**:**	**The lessees listed in the Schedule of lessees of Phase 2 sent to the Tribunal by the Applicants' Representative on 23 May 2019 (1)** **Wallace Estates Limited (2)** **The Governors of the Schools of King Edward VI in Birmingham (3)**
Type of Application	**:**	**Application for a determination of liability to pay and reasonableness of service charges under sections 27A and 19 of the Landlord and Tenant Act 1985 ("the Act") and for dispensation of consultation requirements provided for by section 20 of the Act**
Tribunal Members	**:**	**Judge C Goodall LLB** **Mr I Humphries FRICS**
Date and venue of Hearing	**:**	**Paper determination**
Date of Decision	**:**	**6th February 2020**

DECISION

Background

1. King Edwards Wharf ("the Property") is a residential development in Birmingham. There are two separate buildings which are separated by part of the Birmingham canal network known as Oozells Loop. The building on the east side of the canal is known as King Edwards Wharf Phase 1 ("Phase 1") and is accessed from Sheepcote Street. The building on the west side of the canal is known as King Edwards Wharf Phase 2 ("Phase 2"). Phase 2 has 126 apartments and is accessed from Browning Street. Legally, each Phase is separately managed by a right to manage company with its own board and members. This application concerns Phase 2.

2. This Tribunal has made a number of previous decisions concerning the Property, the most recent of which was a decision dated 26 June 2019 under reference BIR/00CN/LSC/2019/0003 ("the 2019 Decision"). That decision determined that expenditure of up to £202,000 on remedial works to Core 14 of Phase 2 would be payable through the service charge by the lessees of Phase 2.

3. Since this decision, those remedial works have commenced and it has become apparent to the advisers to the Applicant that:

    a. Additional unexpected costs for remedial work to resolve the water ingress issue in Core 14 have arisen in the sum of £33,838.80 including VAT;

    b. It cannot be certain that this cost will fully resolve all water ingress works to Core 14, and prudently the Applicant should set aside a further contingency of £12,000.00;

    c. Additional defects have been discovered in that the metal beams installed to support the now removed Brise Soleil were not correctly fitted to the main structure of the building in Core 14, requiring expenditure to investigate and resolve these defects in the sum of £10,129.80 including VAT;

    d. Core 14 does not have a clear dividing line between it and Core 13, but Core 13 does in fact consist of two distinct parts, one being what is simply an extension of Core 14 and at the same height as that Core, with walls and roof being contiguous ("Core 13A"), and the other part of Core 13 being self-contained and at a different height ("Core 13B"). It does not make practical sense for the works to Core 14 not to continue so that remedial work to Core 13A is carried out at the same time. The anticipated cost of remedial works to Core 13A is £69,214.38, which when VAT is added will total £83,057.26.

4. The applications before the Tribunal are:

a. For an order under section 20ZA of the Act dispensing with the consultation requirement of section 20 of the Act in respect of the works to Core 13A;

b. For an order under section 27A of the Act that proposed expenditure of £116,896.06 would be reasonably incurred. This sum is the addition of the sums identified above in paragraphs 3(a), and 3(d), but does not include 3(b). In Mr Goodchild's witness statement he does in fact ask that the sum referred to at 3(b) should be included in the proposed expenditure sum to be authorised by the Tribunal. That request was repeated to the Tribunal during the inspection referred to below and the Tribunal agreed to treat that request as a variation of the application, so the sum for which the Applicant seeks the Tribunal's sanction is £128,896.06.

5. The Applicant is **not** seeking to bring the likely costs of the works mentioned in paragraph 3(c) above within the scope of this application.

6. The applications were dated 16 December 2019. They were supported by:

a. A witness statement from Mr David Brian Phipps, who is a senior building surveyor employed by Mainstay Residential Limited, the consultants and managers of the remedial works;

b. A witness statement from Mr Kevin Goodchild who is the Chair of the joint board of the two companies who respectively manage Phase 1 and Phase 2. The joint board has no legal status, but is a co-operative forum for discussion of common issues. Mr Goodchild is a director and shareholder of the management company for Phase 1 but he has been involved in the decision process for the works under consideration in these applications;

c. A witness statement from Mr Andrew Smith who is a director of the Applicant.

7. The Tribunal issued directions for the disposal of the applications on 19 December 2019. The two applications were consolidated. The Applicant was to serve a full bundle of the application documents upon the lessees at the Property, who were given until 22 January 2020 to indicate whether they supported or opposed the applications. If any party wished there to be a hearing, they were to so indicate by 17 January 2020. No representations have been received, and no party has requested a hearing.

8. The Tribunal met to determine the applications on 23 January 2020. Prior to that meeting, it inspected the Property.

Rationale for the applications

9. The rationale for the application for dispensation from consultation in respect of the Core 13A works is that because Core 14 works are already ongoing, it would not be sensible, practical or advisable to stop those works for consultation in respect of the Core 13A works to take place. Mr Phipp's evidence is that running the works to the two Cores together will save about 20% of the cost in comparison with doing the Core 13A work separately. Stopping work for consultation would also mean more time before water ingress problems are resolved, causing more loss, damage and inconvenience to lessees.

10. In relation to the proposed expenditure of £128,896.06:

    a. The proposed additional cost of £33,838.80 comes about because more variances in the construction of Phase 1 and Phase 2 have been discovered than were anticipated requiring more work to resolve the water ingress problems. It had been hoped that following the successful completion of remedial works to Core 6 of Phase 1, most of the anticipated problems would have been identified. However, possibly because Phase 2 was built by a different contractor, different problems have been discovered that could not have been anticipated at the time of the preparation of the schedule of works for the main Core 14 remedial works. In his statement, Mr Phipps says that examples of the required work are works to cracked brickwork, poor render, new dpc's, new cavity trays, and missing weep-holes;

    b. The need for an additional contingency of £12,000 is explained by the identification of the possibility of further areas of uncertainty as the works progress which are currently unknown and cannot yet be quantified;

    c. The sum needed for the work to Core 13A is said to be £83, 057.26. This will be for (in very broad terms – see Mr Phipp's statement for detail):

        i. Replacement of the failed inverted waterproof system to the balcony terrace to level 4 with a new waterproof system by Alumasc with 20 year materials and installation warranty with new / reused lead flashings and ensuring all drainage is satisfactory;

        ii. Ensuing rainwater goods are free-flowing;

        iii. Repair of brickwork parapets to courtyard elevation;

        iv. Resolution of water ingress through windows;

        v. Fire stopping;

vi. Redecoration and internal remedial works.

Law

11. Sections 18 to 30 of the Landlord & Tenant Act 1985 contain statutory provisions relating to recovery of service charges in residential leases. Normally, payment of these charges is governed by the terms of the lease – i.e. the contract that has been entered into by the parties. The Act contains additional measures which generally give tenants additional protection in this specific landlord/tenant relationship.

12. Under Section 27A(1) of the Act, an application may be made to the Tribunal for a determination whether a service charge is payable and if it is, the Tribunal may also decide:-

    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

13. Under section 27A(3), an application may also be made for a determination whether, if costs were incurred for … repairs, maintenance or improvement, a service charge would be payable for the costs, and if it would be, the Tribunal may also decide:-

    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

14. Section 19 of the Act provides that:

    "(1) Relevant costs shall be taken into account in determining the amount of the 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 and 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 cost have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise."

15. The law on the requirement to consult, and a landlord's right to request dispensation from that requirement is contained in section 20 and 20ZA of the Act, the relevant provisions of which are:

Section 20 Limitation of service charges: consultation requirements

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

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

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

(4) …

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

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

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

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

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

Section 20ZA Consultation requirements: supplementary

(1) Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works …, the tribunal may make the

determination if satisfied that it is reasonable to dispense with the requirements.

(2) In section 20 and this section—
"qualifying works" means works on a building or any other premises,
...
...
(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—

(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,

(b) to obtain estimates for proposed works or agreements,

(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) Regulations under section 20 or this section—

(a) may make provision generally or only in relation to specific cases, and

(b) may make different provision for different purposes.

(7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

16. Regulations have been made under these sections, which are the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Consultation Regulations"). At regulation 6 of those regulations, the "appropriate amount" for the purposes of section 20(3) of the Act is set at £250. Regulation 7 and the various schedules to the regulations set out the consultation requirements. Part 2 of Schedule 4 applies to qualifying works for which public notice is not required, which would be the position for the types of works in issue in this case. Broadly, this schedule requires that notice of proposed works, describing them, setting out the reasons for them being required, and inviting observations and the names of people from whom the landlord should seek an estimate of cost, should be given to tenants. The landlord is under a duty to have regard to the tenant's

observations. He must endeavour to obtain an estimate from any contractor suggested by the tenants. At least two estimates must be obtained, one of which should be from a person wholly unconnected with the landlord, on which the tenants are entitled to make observations to which the landlord must have regard. When a contract is awarded by the landlord, notice must be given to the tenants with a statement of reasons for awarding that contract. The Tribunal should stress this is only a broad outline, and is no substitute for a detailed consideration of the schedule.

Inspection

17. The Tribunal carried out an inspection on 23 January 2020 accompanied by the Applicant's solicitors, board members of the joint board, Mr Phipps (who is the surveyor overseeing the works for the Applicant), and representatives of the contractor and the management company managing the Property.

18. The Tribunal was unable to inspect the works at close quarters. We were informed that the contract with Insight to carry out the main works to Core 14 had been let in about October 2019 and anticipated completion was 14 February 2020. We were able to see obvious signs of disrepair to render on Phase 2, and the new render work that had been undertaken by Insight to Core 14.

19. During the course of the inspection, we were informed that the pricing of the works to Core 13A had been the subject of competitive tender, with the lowest price being accepted. We were also told that Mr Phipps believed the price for the additional Core 14 works to be reasonable, based upon his knowledge of the tender price for the approved Core 14 works, and his experience in overseeing similar remedial works to Core 6 in Phase 1.

20. The Tribunal was also told that Mr Phipps now no longer works for Mainstay, but he has been engaged personally as the manager of the ongoing remedial works.

Discussion and determination

21. Readers are referred to the 2019 Decision for a more detailed resumé of the history and the terms of the leases for Phase 2. We are satisfied that the additional works to Core 14 and the proposed works to Core 13A are necessary and expedient.

22. Our role is normally to adjudicate when parties are in dispute. For these applications, we note that no lessee has objected.

23. **We agree that the consultation requirements for the Core 13A works should be dispensed with, and so we grant the application under section 20ZA in relation to those works.** The argument that Core 14 and Core 13A are essentially part of the same building with contiguous roof and walls, so that it would be illogical and

involve extra cost if the existing contractor did not continue with the works now, is compelling. No lessee has objected to the works or proposed an alternative contractor. Consultation would be unlikely to bring any real benefit to lessees and would involve them in additional cost. We cannot see that lessees would suffer any prejudice from dispensing with the consultation requirements.

24. So far as approval of the costs of the works as being reasonably incurred is concerned, we were pleased to hear that the Core 13A works had been put out to tender. On that basis, **we approve the proposed works to Core 13A priced at £83, 057.26 (incl. VAT). We are satisfied that it would be reasonable to incur this cost under section 27A(3) of the Act.** As in the 2019 Decision, this does not mean that the cost may not be challenged if the works turn out not to have been carried out to a reasonable standard.

25. In relation to the additional works to Core 14 in the sum of £33,838.80, we accept Mr Phipp's evidence to the effect that these works were not anticipated when the specification was prepared for the main contract for the Core 14 works. Nobody has challenged Mr Phipp's evidence as to the need to carry out the extra work, and so **we approve the application for an order that if expenditure of £33,838.80 (incl. VAT) were incurred on Core 14, it would be treated as reasonably incurred under section 27A(3).**

26. We have more difficulty with the proposed further contingency of £12,000 and we do not allow the application in respect of this sum, for the following reasons:

    a. The Tribunal has no ability to assess whether an unknown cost for the carrying out of unknown future works would be a cost that is reasonably incurred. We accept that most building contracts will contain a contingency which provides for an allowance where the cost to carry out known works cannot be precisely calculated. However in this case, the possible works are unknown and unspecified, and this request is not far off being a request for a blank cheque;

    b. Although we agreed to an amendment to the application form, lessees who chose not to challenge the application on the basis of its original contents should not discover that a decision more to their disadvantage than they anticipated has been made without them being allowed to comment. In our view, it is not in anyone's interests for us to delay this decision and ask for it to be reserved on all lessees;

    c. In reality we think that our decision not to sanction the contingency will not disadvantage the Applicant. Our decision on this point does not mean that it would be unreasonable for the Applicant to incur cost above that already sanctioned by the Tribunal. The Applicant may still incur that cost if it reasonably needs to. It is just that any

objecting lessee would still be able to mount a challenge under section 27A(1) to that expenditure. That challenge would be defeated if the Applicant were to establish that the expenditure of additional sums to the amounts already sanctioned by this Tribunal were reasonably incurred.

Appeal

27. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
First-tier Tribunal (Property Chamber)