



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

**Case reference** : **LON/00AY/LDC/2019/0207 &  
LON/00AY/LSC/2019/0455**

**HMCTS code  
(paper, video,  
audio)** : **V: VIDEO**

**Property** : **Rosewood House and Pippins Court  
Vauxhall Grove, Vauxhall, London SW8  
1TB**

**Applicant** : **Metropolitan Housing Trust Ltd**

**Representative** : **Mr Evans of Counsel instructed by Mr  
Hassan Dervish Solicitor with the  
Applicant**

**Respondents** : **Various Leaseholders of the Property**

**Representative** : **Ms Esther Findlay**

**Type of application** : **1. To dispense with the requirement  
to consult lessees about major  
works  
2. For the determination of the  
liability to pay service charges  
under S.27A Landlord and Tenant  
Act 1985**

**Tribunal members** : **Judge Carr  
Mr S. Mason**

**Venue** : **10 Alfred Place, London WC1E 7LR**

**Date of decision** : **25<sup>th</sup> August 2020**

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**DECISION**

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## **Covid-19 pandemic: description of hearing** [

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was [insert the code and description, e.g. V: REMOTE A face-to-face hearing was not held because [insert e.g. it was not practicable and no-one requested the same, or it was not practicable and all issues could be determined in a remote hearing/on paper]. The documents that I was referred to are in a bundle of [x] pages, the contents of which I have noted. The order made is described at the end of these reasons. [The parties said this about the process: add as applicable].

## **Decisions of the tribunal**

- (1) The tribunal determines to exercise its discretion to dispense with the consultation requirements contained in Schedule 4(2) to the Service Charges (Consultation Requirements) (England) Regulations 2003.
- (2) The tribunal determines that the sum of £66,422.09 plus VAT is payable by the Respondents in respect of the **estimated** service charges for the year 2020 in respect of the major works.
- (3) The tribunal makes the determinations as set out under the various headings in this Decision
- (4) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

## **The application**

1. The Applicant seeks two determinations
  - (i) It has applied pursuant to s.20ZA of the Landlord and Tenant Act 1985, for dispensation from the consultation requirements contained in Schedule 4(2) to the Service Charges (Consultation Requirements) (England) Regulations 2003.
  - (ii) It has applied pursuant to s.27A of the Landlord and Tenant Act 1985 (“the 1985 Act”) as to the amount of estimated service charges payable by the Respondent in respect of major works carried out in 2020.

## **The hearing**

2. The Applicant was represented by Mr Evans of Counsel at the hearing, Mr Evans was accompanied by Mr Dervish, Solicitor with the Applicant,

by Mr Fakoya, Head of Planned Delivery with the Applicant and Mr Uddin of the Applicant's consultations team. The Respondents were represented by Ms Esther Findlay.

3. Mr Evans on behalf of the Applicant objected to the inclusion of the additional documents comprising further submissions by the Respondents and a witness statement from Ms Findlay which had only been served at 1.00am on the morning of the hearing.
4. He argued that the documents contained more than argument; they also included new evidence and attempted to position Ms Findlay as an expert. He asked that the tribunal exclude those documents from its proceedings. He argued that the directions made it abundantly clear what it was that the Respondents had to do, and the timescale by which they should do those things.
5. Ms Findlay explained that the Respondents were not aware that they were able to put in a skeleton argument until they received the Applicant's skeleton, that they did not know what was appropriate to put into a skeleton, but they had used the opportunity to respond to the criticisms of their case made in Mr Evans' skeleton.
6. The tribunal briefly adjourned. It determined to allow the documents to be part of the proceedings. It noted that the directions were paper directions, that the differences between arguments and evidence is often difficult for litigants in person to understand, and that the witness statement signed by Ms Findlay which stated her qualifications were simply an effort to put right a previous omission. Again, in the experience of the tribunal it can be confusing for litigants in person to understand that when they are both representing and giving evidence a signed witness statement is required. It is also understandable that a litigant in person does not understand the function of a skeleton argument.
7. It therefore determined that it was in the interests of justice that the Respondents could present the documents. It also determined that its decision to allow the documents would not prejudice the Applicant, in that the tribunal would not make findings against the Applicant on the basis of new evidence that had only been put before the tribunal that morning.

### **The background**

8. The property which is the subject of this application comprises 2 blocks of flats built in 1995. All the occupiers are long leaseholders, the majority hold shared ownership leases. There are 30 flats in Rosewood House and 12 flats in Pippins Court

9. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.
10. The Respondents hold long leases of flats within the property which require the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge.
11. The Respondents did not raise issues relating to the specific provisions of the lease and therefore it is not referred to in the substance of this decision.

### **The issues**

12. At the start of the hearing the parties identified the relevant issues for determination as follows:
  - (i) Whether the tribunal should exercise its discretion to dispense with the statutory consultation requirements
  - (ii) The reasonableness of estimated service charges for 2020 relating to major works.
  - (iii) Whether the tribunal should make an order under section 20C of the Landlord and Tenant Act 1985.
13. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

### **The application for dispensation**

14. The Applicant sets out the facts as follows:
  - (i) The Applicant became aware, whilst its contractor, Novus, was on site, that the upper parts of the parapet walls to the property were in poor structural condition. A visual inspection carried out on or around 21<sup>st</sup> May 2019 revealed that the tile creasing, and the above brick-on-edge detail had begun to slowly slip down the apex of the roof.
  - (ii) This was an evident health and safety issue because the property overlooks pedestrian footpaths and gardens.

- (iii) A brick was already missing to the right-hand side gable end of Rosewood House. This emphasises the risk of injury persists as long as the disrepair is not remedied.
  - (iv) The Applicant commissioned its independent contract administrator Faithorn Farrell Timms (FFT) to prepare a formal report. Following the visual inspection on 21<sup>st</sup> May it reported in writing on 4<sup>th</sup> July 2019. On 9<sup>th</sup> July 2019 the Applicant's leasehold team gave approval for works to the parapet walls to proceed.
  - (v) The Applicant started the consultation process. A notice of intention was served on the Respondents on 9<sup>th</sup> August 2019. The notice was accompanied by the FFT report and a letter explaining the situation and the reasons for the works. The leaseholders were given until 15<sup>th</sup> August 2019 to respond.
  - (vi) Various observations were received, and responses were given by the Applicant.
  - (vii) In the week commencing 18<sup>th</sup> September 2019 the existing scaffolding for the window replacement works was extended so that the works to the parapet walls might commence. The works to the parapet walls started in the week commencing 30<sup>th</sup> September 2019 utilising the existing contractor, and the scaffolding.
- 15. In summary the Applicant argues that it was necessary to carry out the works very urgently. This enabled the Applicant not only to rapidly address the health and safety issues but also to take advantage of the existing scaffolding.
- 16. The Applicant argues in addition that the Respondents have not demonstrated that they suffered prejudice from the breach of the consultation requirements. There is no evidence that they would have obtained a cost reduction or other advantage had the full consultation process been followed.
- 17. The Respondents argue
  - (i) That the additional cost could have been prevented had adequate inspections been carried out prior to the commencement of the window works. They point to photographs to argue that there was a brick

missing from 2018 demonstrating that there was longstanding evidence of problems.

- (ii) The failure to consult meant that there was no opportunity to market test the quotation from Novus
- (iii) They do not accept that £25,000 was saved by using the pre-existing scaffolding
- (iv) They do not understand why certain costs are as high as they appear to be, in particular the preliminary costs
- (v) The works took longer than they should have done
- (vi) There was poor project management

18. In summary the Respondents accept that the works needed doing, but that failings on the part of the Applicant had prevented the proper consultation processes resulting in limited input from the leaseholders and work that was more expensive than it needed to have been.

19. The Applicant responds by relying on the evidence from Mr Theakstone that the necessity for works to the parapet walls could not be identified without the erection of scaffolding or the use of a cherry picker. Mr Theakstone, who was not at the tribunal as he is no longer employed by the Applicant, says in his statement that the structural defects were very unusual and not consistent with the age of the property and genuinely only visible when viewed off the top lift of a scaffold looking directly at the parapet walls with virtually horizontal sight lines.

### **The Law**

20. The Tribunal is being asked to exercise its discretion under s.20ZA of the Act. The wording of s.20ZA is significant. Subs (1) provides

‘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 or qualifying long term agreements, the tribunal may make the determination **if satisfied that it is reasonable to dispense with the requirements**’ (emphasis added).

### **The tribunal’s decision**

21. The tribunal determines to grant the application.

### **Reasons for the tribunal's decision**

22. The starting point for the tribunal is that the Applicant was faced with the need for urgent work to prevent the property being a health and safety risk. There was a contractor on site, there was scaffolding already erected, and time and money would be saved if works were commenced very quickly.
23. In such circumstances it is appropriate for the tribunal to use its discretion to dispense with the statutory consultation requirements.
24. The tribunal does have some concerns about the evidence before it. In particular, it notes that FFT first inspected in May 2019 following the Applicant becoming aware of the issue, presumably in April 2019 when the scaffolding was erected. However, the foreshortened consultation process did not begin until August 9<sup>th</sup> and the works did not commence until September 2019.
25. This appears to the tribunal to be a somewhat slower response to the problem than one would have expected considering the works posed a risk to health and safety.
26. The tribunal notes that there is very little effort to explain how the problem came about in the FFT report. Its conclusion that the brick on edge detail continues to slowly slip down the apex of the roof is not substantiated. The Applicant could for instance have kept a watch to see whether there was further movement or not. The report did not consider whether there were any alternatives to carrying out immediate works.
27. The tribunal also notes that the Applicant was unable to present any witnesses who had real knowledge of what had transpired. The Respondents were not able to ask questions of Mr Theakstone, for instance. The two witnesses, Mr Fakoya and Mr Uddin did their best and the tribunal is grateful for their efforts, but they were able to shed little light on the decision making process.
28. The tribunal finds it difficult to follow the argument that as much as £25,000 has been saved by utilising and extending the existing scaffolding.
29. The tribunal notes the objections of the Respondents. Quite rightly they feel very frustrated that they lost the opportunity for the work to be market tested.

30. They argue that the Applicant should have known about the problem earlier and they should have had the benefit of a tendering process. For them it would have been appropriate to have combined the window works with the roofing works.
31. Whilst the tribunal is sympathetic to the Respondents it is not enough to say that the Applicant should have known earlier about the need for the work. There is no evidence to suggest that it knew about the need for the work until April/May 2019 and not fully until it received the FFT report in July 2019. The benefit of hindsight would suggest that all the works could have been subject to the full consultation process. But the Applicant did not have the benefit of hindsight.
32. Neither the concerns of the tribunal nor the objections of the Respondents are sufficient to persuade the tribunal that it should not exercise its discretion in these circumstances.

### **Service charge item & amount claimed**

33. The estimated cost of the works total £66,422.09 plus VAT is broken down as follows:
  - (i) £28374.61 works.
  - (ii) £34221.69 scaffolding (£11,885.45 Pippin & £22,336.24 Rosewood).
  - (iii) £3825.79 overhaul of roof tiles.

### **The Applicant's arguments**

34. The Applicant argues the estimated costs were reasonably incurred. They were required because it was necessary to address an urgent health and safety risk.
35. The Applicant argues that the estimated costs are reasonable,
36. It argues
  - (i) By utilising existing scaffolding, contractors and project managers, the estimated saving to the Leaseholders in respect of the scaffold alone is £25,000;
  - (ii) The Applicant will not pass on the scaffold costs incurred between (a) 15th July 2019 and 17th

September 2019 and (b) 23rd September 2019 to 29th September 2019: see statement of Mr Theakstone on p.4 thereof;

(iii) The s.20 Notice indicates that the sinking fund (standing at £174,368.50) will be utilised to offset the cost of the works. The Prelims are 16% and the OH&P are 10% because that is the sum specified in the contract between the Applicant and Novus;

37. It also argues that reasonableness does not require using the cheapest available contractor.

### **The Respondents' arguments**

38. Prior to the day of the hearing the Respondents had not made specific objections to the estimated costs and had not proposed alternative costings. Their objections were generalised, claiming that the costs were not reasonable.

39. In the documents submitted on the day of the hearing, there was some effort to demonstrate that the estimated costs were not reasonable by drawing on the Schedule of Rates from the National Housing Federation. They suggest a particular meterage and include a cost for new bricks. They argue that the scaffolding costs and the preliminary costs are excessive. However, the Applicant was not in a position to respond to those comments which involve technical details and require knowledge of the negotiation process.

40. The Respondents also stated that the quality of the work and the project management was poor. This is not relevant to a decision about the reasonableness of estimated costs.

### **The tribunal's decision**

41. The tribunal determines that the amount payable in respect of estimated charges for major works is £66,422.09 ex VAT .

### **Reasons for the tribunal's decision**

42. There was no evidence available to the tribunal to determine that the estimated costs were not reasonable. The arguments made by the Respondent were either not relevant to the estimated costs (the quality of the works and the project management) or were produced too late for

the Applicant to meaningfully respond and for the tribunal to reach a fair decision.

43. The tribunal notes that there will be a further opportunity for the Respondents to challenge actual costs once demands for those costs are made.

#### **Application under s.20C and refund of fees**

44. The Respondents applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the tribunal determines not to make an order under section 20C of the 1985 Act with the proceedings before the tribunal through the service charge.
45. The Respondents should be aware that any demand for costs should be reasonable.

**Name:** Judge Carr

**Date:** 25<sup>th</sup> August 2020

#### **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).