FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HN/LSC/2020/0015
Property	:	Flats 1-14 Snowdon Mount, 4 Snowdon Road, Bournemouth BH4 9HL
Applicants	:	Lydia Turnbull and 11 other lessees (list on page 2)
Representative	:	Lydia Turnbull (for 10 lessees)
Respondent	:	RMB 102 Limited
Representative	:	J B Leitch Solicitors
Type of Application	:	Determination of service charges: section 27A Landlord and Tenant Act 1985
Tribunal Member(s)	:	Judge E Morrison
Dated	:	3 November 2020

DECISION

List of Respondents

Lydia Turnbull
Rebecca Goodson
Hayley Dawson
Peter Stevenson
Sam Johnson
Shauna Clapham
Gemma De Toro Flores
Jennifer Harding
Philip Abraham
Paul Haycroft (all represented by Lydia Turnbull)

James Moore
Pawel and Kasia Dziubinski

The application

1. By an application dated 12 February 2020 the Applicant lessees of ten flats at Snowdon Mount asked the Tribunal to make a determination of their liability to pay, and the reasonableness of, on account service charges demanded in connection with major works, pursuant to section 19 and 27A of the Landlord and Tenant Act 1985 ("the Act"). The Respondent is the lessor of the block.

2. The Applicants also applied for an order under section 20C of the Act to prevent the Respondent seeking to recover its costs of these proceedings through future service charges.

Procedural background

3. Case management hearings were held on 28 April 2020 and 22 June 2020. The Applicants represented by Ms Turnbull provided a statement of case which set out two principal arguments: (a) that the total sum demanded on account was excessive, and (b) that damages for alleged breaches of the Respondent's repairing obligations should be assessed and set off against any sums otherwise payable. The Respondent's statement of case in response contended that the sums demanded were reasonable, and that any set-off claim should be considered only once the works were complete and the actual costs ascertained.

4. The Tribunal decided that Respondent's contention with regard to the set off claim should be decided as a preliminary issue. Submissions were made and the Tribunal issued a written decision dated 20 July 2020 that it would decline to exercise its jurisdiction to consider the set off claim in these proceedings.

5. This left the issue as to the reasonableness of the sums demanded. The Tribunal directed that this would be determined on the papers, without an oral hearing, unless anyone objected. There being no objection, this decision is made on the basis of the documents in the bundle provided, which include statements of case, witness statements (from the Respondent) and supporting documents.

6. The Applicant lessees not represented by Ms Turnbull have not provided any statements of case or other evidence for consideration by the Tribunal.

The relevant legislation

7. The tribunal has power under section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when a service charge is payable.

8. By section 19 of the Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard. When service charges are payable in advance, no more than a reasonable amount is payable, and after the relevant costs have been incurred any necessary adjustment is made.

9. Under section 20C of the Act a tenant may apply for an order that all or any of the costs incurred by a landlord in connection with proceedings before a tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

The lease

10. The parties do not dispute that the major works for which the service charges have been demanded fall within the lessor's repairing obligations, or that the costs are, if reasonable, recoverable from the lessees through the service charge. The relevant provisions in the sample lease can be summarised as follows:

- The lease is granted for a 99 year term from 1 January 2008
- The structure of the building, including the roofs and beams, is not demised and forms part of the Reserved Property
- The lessor covenants to keep the Reserved Property in a good and tenantable state of repair, and can employ managing agents
- The costs to the lessor of complying with its repairing obligations are recoverable through the service charge
- The lessee covenants to pay 1/14th of the costs comprising the service charge (there are 14 flats), including interim payments on account within fourteen days of receiving a written demand setting out how the payment is calculated
- There is no requirement for on account payments to be demanded at any particular time during the service charge year and there is no limit on number.

The relevant chronology

11. Snowdon Mount is a three-storey purpose-built block of 14 flats built in 2008. The second floor penthouse apartments are set back from the main elevation with the formation of a roof terrace over the apartments below. The roof terrace ("the balcony roof") is above the first floor flats.

The main roof is above the second floor penthouse flats. The property has a timber framework with brick cavity walls.

12. The property has suffered from water ingress through the roof terrace since shortly after it was built, and in December 2011 a claim, on behalf of all the flats, was made to Zurich under the Building Guarantee, which was refused. Problems continued and worsened, and a second claim was made in November 2014, which was also refused in August 2016. The lessees have referred the dispute to the Financial Ombudsman but the process has been subject to ongoing delay and there has been no adjudication as yet. The Respondent has also made a claim under the buildings insurance policy, but this too has been rejected.

13. In 2015/16 the Respondent, who had acquired the freehold interest in July 2014, put forward a scheme of repairs prepared by Savills, and consulted under section 20. Some of the lessees disputed whether the works proposed were sufficient to remedy the problems, and appointed their own surveyor. An application was made to the Tribunal in respect of the on account sums demanded, and in March 2017 the Tribunal agreed with the lessees that the sums demanded were not reasonable. Thereafter the Respondent agreed to proceed employing the lessees' surveyor, Greenwards, who proposed a different means of repair.

14. Greenwards then prepared a full specification which went out to tender in the autumn of 2017, and a further section 20 consultation took place. Westmade were appointed as contractors to carry out the works, which included work to the main roof as well as the balcony roof and its perimeter balustrading.

15. On 20 July 2018 the Respondent issued on account demands in the total sum of £159,632.76 (£11,402.34 per lessee) in respect of the proposed major works ("the first demand").

16. It was then discovered that the condition of the balustrade to the balcony roof required complete replacement instead of repair as previously specified. Dispensation from the need to consult was obtained from the Tribunal in April 2019, and a second demand was issued on 2 May 2019 for a total of £40,874.26 (£2919.59 per lessee) to cover the additional cost ("the second demand").

17. In the meantime work had commenced in April 2019. The repairs to the main roof were completed, but the contractors then discovered further serious damage to the structural beams beneath the balcony, which meant that the repairs to the balcony roof could not be carried out under the existing specification. Structural engineers investigated and found extensive decay to the loadbearing elements of the building, and that the roof terrace was in a dangerous condition. Greenwards revised the specification and there was a further section 20 consultation. In the

meantime a "top hat" scaffold was erected over the building to protect it from further water ingress, the Tribunal again being asked for, and granting, dispensation from consultation for this on the grounds of urgency.

18. On 31 January 2020 the Respondent issued a third on account demand for the major works in the total sum of £255,528.98 (£18,252.07 per lessee) ("the third demand"). A credit was later given against the third demand of £47,600.00, reducing the total of the third demand to £207,928.98.

19. Therefore the total demanded over all three demands is £408,436.00.

20. The works were delayed due to Covid 19 and the need, as a result of the additional problems found in 2019, for all occupiers to vacate the building. The contractors were due to recommence work in September 2020.

The Applicants' case

21. The Applicants' originally challenged the reasonableness of the second and third demands. Having received the Tribunal's decision on the set off point, their challenge is confined to the third demand. Their case, in summary, is that the third demand is not in a reasonable amount, i.e. it is too high, because there should be funds left over from those demanded in the first and second demands which could be applied to the works covered by the third demand.

22. This conclusion has been reached by the following analysis. First, there is a calculation of what the main roof repair should have cost, based on the original estimate, of £36,000.00. From this it is suggested that £164,500.00 of the total of the £200,500.00 collected through the first and second demands should have remained in hand. As the Respondent stated that only £74,000.00 remained the Applicants query the validity of the remaining expenditure of approximately £90,000.00. Copies of the invoices supporting all of the expenditure have been disclosed. The principal expenditure is: £76,193.89 to the contractors Westmade, £11,784.48 to GGP, the structural engineers, £8252.84 to Greenwards, the surveyors and project managers, and £34,626.00 for the top hat scaffold. In response the Applicants suggest that the amount paid to Westmade is disproportionate, that monies paid to GGP were not the subject of section 20 consultation, and are therefore unauthorised, and they query whether it was right to use the monies collected to fund the top hat scaffold.

23. The Applicants submit that the total reasonable cost for all the works is £318,117.00 - which would mean that the third demand should be reduced by £90,319.00 to £117,609.98. The figure of £318,117.00 is arrived at by adding £36,000.00 (the Applicants' suggested cost for the

main roof work already completed) to £282,117.00, which was the Respondent's estimated cost for the remaining work. The Applicants say they are being charged twice for the balcony roof and balustrading replacement.

The Respondent's case

24. The Respondent notes there is no challenge to the statutory or contractual validity of the demands, and the only issue is whether the amounts demanded are reasonable as advance estimates for the works. The Tribunal's jurisdiction is limited to considering this issue; the Tribunal should not consider whether the works as carried out to date are of a reasonable standard or whether the costs have been reasonably incurred. All that the Respondent has to show is that the sums demanded are broadly reasonable in light of the works anticipated.

25. The first demand reflects the cost of the originally planned works, including professional fees and VAT, and the second demand reflects the additional cost of replacing rather than repairing the balustrading, again including professional fees and VAT. The Applicants no longer challenge either of these demands.

26. The third demand reflects the expanded scope required as a result of the discovery of additional structural damage in 2019. The money spent by 31 December 2019 covered not only the main roof work, which cost more than the figure of £36,000.00 suggested by the Applicants, but also considerable additional works by Westmade over a period of months, further professional input arising from the discovery of the further decay, and the top hat scaffold. Professional fees fall outside the scope of statutory consultation. The costs covered by the third demand also include £50,000.00 for contingencies, which is reasonable given the history of discovering the need for further work as areas are uncovered, and the desire to avoid further delay resulting from a further need to consult. There has been no duplication of cost in the sense of monies being demanded twice for the same work.

27. The Respondent's case is therefore that the demands are all in no greater amount than is reasonable.

Discussion and determination

28. In making its submissions the Respondent refers to the decision in *Knapper v Francis* [2017] UKUT 3 (LC). In that case the Upper Tribunal had to decide whether, in determining reasonableness of an on account demand, facts that became known after the date of the demand could be taken into account. Some of the costs budgeted for in the on account demand had not been spent. The Upper Tribunal said that the question of what ought to be paid on a particular date depends

on the circumstances in existence at that date, and matters which become known later can be disregarded.

29. The Appellants do not suggest that the first and second demands were unreasonable. Their basis for saying that the amount of the third demand is unreasonable is that not all the monies collected through the first two demands were spent and/or were not spent on what they had originally been collected for. As *Knapper* makes clear these eventualities cannot affect the reasonableness of the first two demands at the time they were made.

30. The question for the Tribunal is therefore whether, based on what was known at the time of the third demand, the amount of that demand is higher than reasonable. The Appellants have put forward an analysis of the figures and expenditure prior to the third demand which they submit shows that, at the date of the third demand, more has been demanded than was reasonably estimated, at that time, to be required to complete the works. If that analysis was correct, their case might have some real merit.

31. However, the Tribunal concludes that the analysis is wrong, for the following reasons:

- It is assumed that only £36,000.00 of the monies already demanded should be allocated to the contractors' work on the roof, in line with the original estimate for the main roof repair. However, in reality, over £76,000.00 had already been paid to the contractors, not just for work to the main roof, but for other works required as a result of the additional problems discovered. The fact that the additional work/cost was not budgeted for in the first two demands, does not mean the expenditure is to be ignored when preparing the third demand. The additional expenditure had to be funded from somewhere, and if not from the monies already collected, the cost would simply have been added to the third demand.

- The calculation is based on the assumption that the cost of the top hat scaffolding should not have been funded by monies collected through the first and second demands. However, the Respondent was entitled to use the monies for this purpose; the monies were not ring-fenced except in the broad sense of being for the major works, of which the top hat scaffolding became a necessary element.

- The calculation also ignores the costs that have been paid out in professional fees, again higher than originally estimated, but incurred nonetheless and therefore reducing the amount left to pay for the remaining works covered by the revised specification.

- The argument that professional fees were unauthorised because they were not the subject of a section 20 consultation is wrong in law because section 20 only applies to "qualifying works", not asociated services: *Paddington Walk Management Ltd v Peabody Trust* [2010] LT&R)(6). In any event there is no requirement to consult before costs are demanded on account: *23 Dollis Avenue v Vejdani* [2016] UKUT 365 (LC).

32. The Respondent has explained how the amount of the third demand was arrived at. It is based on the contractor's estimate after a full section 20 consultation, together with an allowance for professional fees. It takes full account of the monies remaining "in the pot". There is no evidence that the amount demanded in the third demand (as amended after the credit of £47,600.00) is for anything more than the sum required to meet the reasonable estimate of costs to complete the works, which all agree need to be completed as soon as possible.

33. The Tribunal therefore finds that all the on account demands are reasonable and payable.

34. This decision does not mean that the Applicants cannot challenge the way in which the monies have been spent. However, that will have to await completion of the works. The final cost will then be known and if the lessees consider that any of that cost has been unreasonably incurred, or that any of the work has not been done to a reasonable standard, they can apply for a further determination under section 27A. That will also be the point at which a set off claim, if still considered appropriate, can be pursued.

Application for order under section 20C

35. The parties were invited to make submissions on this issue. The Applicants say that the Respondent did not give full disclosure of documents until directed by the Tribunal and did not resolve a formal complaint made by the Applicants in July 2019, leading to a situation where they had no option but to make the application to the Tribunal.

36. The Respondent says that the lease does not provide for the costs associated with the application to be recovered through the service charge and therefore no submissions are made.

37. If the lease does not permit recovery of the Respondent's costs through the service charge a section 20C order has no significance. In any event, the Tribunal, when considering a 20C order, must consider what is just and equitable. The Tribunal has seen no evidence that the Respondent has been obstructive to the Applicants and the outcome is wholly in its favour. The Tribunal therefore makes no order under section 20C.

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.