FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	BIR/00CT/LIS/2020/0032
HMCTS	:	P:PAPERREMOTE
Property	:	Yew Tree House & The Woodlands 266 Bills Lane Shirley Solihull B90 2PP
Applicants	:	Kenneth Davis and other leaseholders
Representative	:	Kenneth Davis
Respondents	:	Principle Estate Management and Business Flats Ltd
Representative	:	Joe Jobson, Principle Estate Management
Type of Application	:	An Application under Commonhold and Leasehold Reform Act 2002 Schedule 11(5)(a) and Landlord & Tenant Act 1985 Section 20C and Section 27A(3)
Tribunal Members	:	Nicholas Wint FRICS (Chair) Diana Barlow
Date of Decision	**:**	7th April 2021

DECISION

Introduction

1 This is an application made by the Tenants ("the Applicants") dated 24 July 2021 in respect of Yew Tree House and Woodlands at 266 Bills Lane Shirley Solihull West Midlands to the First-tier Tribunal (Property Chamber) (FTT) for an order to determine whether the service charge payable for the year 2019 is payable and reasonable.

2 The Applicants have also applied for an Order under Section 20C of the Landlord & Tenant Act 1985 Act (limitation of service charges: costs of proceedings) and for an Order under Paragraph 5A of Schedule 11 of the Schedule 11 of the Commonhold and Leasehold Reform Act 2002 (limitation of administration charges: costs of proceedings).

3 In accordance with the Applicants request the Tribunal has proceeded by way of a paper determination.

4 The Tribunal's Directions dated 29 September 2020 required the parties to submit their respective statements and any supporting evidence. The Respondent subsequently requested a stay in the proceedings which was rejected by the Applicants.

5 Following a request made by the Respondent to make a supplemental statement commenting on the Applicants statement of Case the Tribunal issued further Directions dated 23 December 2020 advising the parties may submit further comments and evidence.

6 As a consequence of the Public Health Emergency inspections under the Tribunal Rules have been suspended. The Tribunal has not, therefore, carried out an internal inspection of the property and has relied on the evidence adduced by the parties.

Issues

7 The Tribunal has considered the following matters:

Issue 1: Whether roof repairs in the sum of £23,757.60, deducted from the service charge reserve fund in 2019 is payable as Service Charge by the Applicant.

Issue 2: Whether the landlord is entitled to include the disputed sum in the 2019 Service Charge and if so, whether the amount so charged is reasonable.

Issue 3: Whether the landlord has complied with the consultation requirement under section 20 of the 1985 Act.

Issue 4: Whether an order under section 20C of the 1985 Act and /or paragraph 5A of the 2002 Act should be made.

The Lease

8 The Applicant has provided the Tribunal with a copy of a lease dated 14 December 1960 in respect the property described in the First Schedule as land and buildings known as 'The Woodlands' and 'Yew Tree House'.

9 The property is divided into twelve self-contained flats as shown on the lease plan and is described in the Third Schedule as Flat Number 3 Yew Tree House.

10 It is understood and accepted by the Tribunal that this lease is identical to the other Applicants leases.

11 The lease was granted for a term of 99 years from 25 March 1959.

12 The Sixth Schedule of the lease describes the lessor's expenses for maintaining, repairing and insuring the common parts of the land and buildings and in particular:

'*Repairing, rebuilding as necessary and keeping the Reserved Property and every part thereof in good and substantial repair order and condition and renewing and replacing all worn or damaged parts thereof*'.

13 The Reserved Property is described as:

'*First all those parts of the property except the flats … all those structural parts of the flats including the roofs foundations all walls bounding … and external parts of the flats …*'.

14 Schedule Seven refers to the lessee's proportion of these being one-twelfth of the lessor's expenses incurred by the lessor and Clause 3 of the Schedule provides for the lessee to pay the lessor the lessees expenses and Clause 2(b) of Schedule Eight (Covenants by the Lessee with the Lessor) also provides:

'*To pay to the Lessor the Lessees proportion of the Lessor's expenses…*'.

Relevant Law

Meaning of 'service charge' and 'relevant costs'

15 Section 18 of the Act defines what is meant by the term 'service charge' and defines the expression for 'relevant costs' as being an amount payable by a tenant of a dwelling as part of or in addition to the rent-

(a) Which is payable, directly or indirectly for services, repairs, maintenance or insurance or the landlord's costs of management, and
(b) The whole or part of which varies or may vary according to the relevant costs

16 The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord in connection with eh matters for which the service charge is payable.

17 In the matter of the payability of the service charge amount the Tribunal's jurisdiction is derived from sections 19 and 27A of the Landlord and Tenant Act 1985. Section 19 of the Act limits the amount of any relevant costs that may be included in a service charge to costs that are reasonably incurred and section 27A details the liability to pay services charges.

Section 27A Liability to pay service charges: jurisdiction

18 Under Section 27A of the Act, the Tribunal has jurisdiction to decide whether a service charge is or would be payable and if it is or would be, the Tribunal may also decide:

a. The person by whom it is or would be payable
b. The person to whom it is or would be payable
c. The amount, which is or would be payable
d. The date at or by which it is or would be payable; and
e. The manner in which it is or would be payable

Subsection (1) applies whether or not any payment has been made.

An application may also be made to the appropriate tribunal 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 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.

No Applications under subsection (1) or (3) may be made in respect of a matter which:

(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

But the tenant is not to be taken as having agreed or admitted any matter by reason only of having made a payment.

Section 19 Limitation of service charges: reasonableness

19 Section 19(1) of the Act provides that:

"Relevant costs shall be taken into account in determining the amount of the service charge payable for a period –

(1) (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 costs

have been incurred any necessary adjustment shall be made by repayment, reduction of subsequent charges or otherwise.

Section 20 Limitation of service charges: consultation requirements

20 Section 20 of the Act, as amended, and the Regulations provide for the consultation procedures that landlords must normally follow in respect of 'qualifying works' (defined in section 20ZA(2) of the Act as 'work to a building or any other premises') where such 'qualifying works' result in a service charge contribution by an individual lessee in excess of £250.00.

21 Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited … 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) the appropriate tribunal.

Section 20C Limitation of service charges: costs of proceedings

22 A tenant may make an application that all or any of the costs incurred or to be incurred by the landlord in connection with proceedings before the 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.

23 The Tribunal may make such order it considers just and equitable in the circumstances.

Paragraph 5 Schedule 11 of the Commonhold and leasehold Reform Act 2002: limitation of contractual legal costs

24 A tenant may apply for an order reducing or extinguishing a tenant's liability to pay an administration charge in respect of litigation costs.

Applicant's Submission

23 The Applicant's case is set out in the Application and in the statement(s) prepared by their Representative, Mr K Davis.

24 According to Mr Davis the main roof and dormer roofs were replaced at Yew Tree House in 2008 (by Woodhull Roofing) and in 2013 the main roof and dormer roofs were replaced at the Woodlands (by Beacon Building Developments Ltd). In essence Mr Davis claims that both sets of works should have been subject to warranties provided by the contractors at the time and any subsequent repairs should have been covered by a claim made against these warranties. Mr Davis therefore believes the subsequent repairs undertaken by the Respondents to the roofs should not have been carried out by another contractor and the Applicants should not be liable for the resultant costs incurred.

25 In support of this Mr Davis refers to an email dated 12 October 2020 from Mr Geobey of Beacon confirming that a warranty would have been issued at the time to the lessors managing agent but unfortunately as they have changed their IT system and they do not have archive files dating back that far they are unable to provide a copy. In addition, Mr Geobey states that the warranty would have

been subject to various conditions including regular maintenance inspections every 12 months but that they had not been instructed to undertake these. Mr Davis also advises that Mr Chattaway of Woodhull Roofing has similarly advised him that if another contractor has carried out any subsequent work/ repairs to the roof it would render any warranty void.

26 Mr Davis states that having spoken with the original contractors neither had been approached by the Respondent's concerning a possible warranty claim and as subsequent works had now been carried out by a different contractor it has invalidated any warranty that may have been in place.

27 It is therefore the Applicants case that as the order for the original works to the roofs were placed by a professional management company it is reasonable to expect that the repairs would have been subject to a warranty and that the document would have been filed in a safe place and passed on to any subsequent management company to enable a claim to be made if required in the future. The Applicant also claims that the lessors should have checked with the original contractors who carried out the works at the time with a view to making a possible claim under the warranty before engaging another contractor to carry out the more recent repairs. And had a warranty claim been available the Respondent would not have needed to undertake the consultation process and the Applicants would not have had to pay additional service charge costs for further repairs to the roofs.

Respondent's Submission

28 The Respondents case is set out attached to an email dated 13 November 2020.

29 The Respondent states that they are not in possession of any warranty documents relating to the works carried out in 2008 and 2013 and nor were they provided with such when they were appointed following Business Flats Limited acquisition of the property in November 2017. Notwithstanding this the Respondent claims that any warranty in respect of the works in 2008 would have now expired assuming the warranty given at the time was for 10 years.

30 Beacon Building Developments Ltd carried out the works to the main roof and dormer roofs on Yew Tree House in 2014. In a letter dated 13 October 2020 to the Respondents Mr D Geobey confirms his firm carried out the works and these would have been subject to a warranty which would have been sent to the previous managing agent CP Bigwood for their records. However, Mr Geobey also states that the warranty would have been subject to various conditions such as the need to carry out regular inspections and any subsequent repairs would need to be carried out by the installing contractor. Mr Geobey also states that at no time was his firm asked to carry out any subsequent inspections.

31 The Respondent contacted SDL Property Management who acquired CP Bigwood and, in an email, dated 29 October 2020 Samantha Massey of SDL advised that she has not been able to locate a warranty document and nor was she able to access the old Curry & Partners (CP) database to check. The only details she could confirm was that the roof had been replaced in 2013 and that a patch repair had been undertaken to Flat 6 in 2012.

32 In support of their claim that the roofs needed repairing/ replacement the Respondents have submitted evidence from Aurora Building Care who inspected the dormer roofs at Yew Tree House. In their email dated 26

November 2020 they advised that the roofs were in need of replacement and stated that they had previously replaced at least two roofs in the past for the previous management company and had also quoted for all 14 dormers in the past. Also submitted is a quote dated 30 August 2019 from G I Sykes Ltd which includes a price for removing the existing dormer felt roof and a further quote from CPM Ltd dated 27 May 2019.

33 The Respondent also states that the works that have been carried out are to the dormer roof coverings and not the main roofs.

34 In respect of the consultation process, in June 2019 the Respondent served a section 20 Notice (Notice of Intention) on the residents of both blocks stating that the lessor intended to replace the dormer roof coverings alongside other necessary works and provided the quotes from GI Sykes and CPM Ltd for consideration. Following this the Respondents served a further notice in September 2019 on the Applicants advising of the quotes received and inviting any observations to any of the estimates.

35 The Respondents case is therefore that the works were necessary to avoid further deterioration of the roof and damp penetration and that as there was no warranty in place (and if there had been it had now expired) it was now necessary to appoint a new contractor to carry out the roof repairs as required under the landlord's lease obligations and which were also carried out in accordance with the required consultation requirements.

The Tribunal's Determination

36 The Tribunal has had regard to the evidence adduced by the Applicant and Respondent, the relevant law and its knowledge and experience as an expert Tribunal.

37 The questions for the Tribunal are therefore whether the service charge claimed has been reasonably incurred and whether the services or works are of a reasonable standard. The starting point is the lease, as only if the lease allows a charge to be made can it be reasonable. If it is allowed in the lease, the Tribunal then has to go on to consider the parties cases as to whether any element of the service charge is unreasonably incurred or not of a reasonable standard.

38 The Tribunal has also considered whether the Respondents followed the required consultation procedures and the Applicant's request to limit the payment of the landlord's costs and to reduce or extinguish any contractual legal costs the landlord may seek to recover.

Issue 1 & 2: Payability of service charge

39 The Tribunal notes that the Applicants do not dispute the need for the works undertaken by the Respondent. The issue being that these works should, in their view, have been subject to a warranty provided by the contractors who carried out the original roofing works at the time.

40 A letter dated 12 June 2019 from Mr Davis to Principle Estate Management raises the issue of a possible warranty claim against the work of the previous roofing contractors and effectively suggesting that this course of action is investigated first. It is also clear that a significant amount money has been incurred over the past 15 years or so repairing and maintaining the roof and dormers.

41 The correspondence provided by Mr Geobey of Beacon Building Developments Ltd. states that a 10 year warranty would have been given for the work undertaken however neither Mr Geobey or the previous managing agents are able to provide a copy of the document. The warranty given by Woodhull Roofing for the works carried out in 2008 is likely to have now expired notwithstanding the subsequent works carried out by another contractor without their consent and the warranty from Beacon Building rendered invalid because regular annual maintenance inspections were not undertaken at the time.

42 The Respondents advise that they have not been provided with any warranty documents relating to the earlier roof works and Mr Geobey states in an email dated 13 November 2020 that he has looked through his archive files and unfortunately has not been able to locate the warranty. An earlier letter from Mr Geobey to Principle Estate Management dated 13 October 2020 states that there would have been a warranty and it would have been issued to CP Bigwood at the time. SDL who acquired CP Bigwood have also checked their records and those of Curry & Partners and advised they too have been unable to locate a warranty document. The Tribunal would have expected the standard of record keeping to have been far greater than evidenced and finds the fact that the Respondents are unable to trace the warranty documents troubling especially given the apparent link/ connection between each management company responsible for the buildings over the past 15 years or so.

43 The Tribunal does not have jurisdiction to determine a claim of loss arising from an alleged act of negligence on the part of the Respondent/ Respondents managing agent. The Tribunal only has very limited powers to consider an allegation of breach of covenant as a cross claim (or set-off) against payment of service charges where the claim has a direct connection to the service charge.

44 The allegation made by the Applicants against the Respondents is, in the view of the Tribunal, relevant to the determination of the reasonableness of the sum charged for the roof repairs. However, the evidence adduced by both parties in this respect is insufficient to enable the Tribunal to fully consider whether the Applicant has a just and fair claim against the Respondent in this respect.

45 The Tribunal therefore finds that the lease provides that the cost of repairing and maintaining the roof falls within the Applicants repairing obligations and that each Applicant is responsible for the cost, as a relevant cost, which is to be paid through the service charge.

Issue 3: Consultation requirements

46 The provisions in section 20 of the Act essentially provide for three stages in the consultation procedure.

Stage 1:	Pre-tender stage (Notice of Intention)
Stage 2:	Tender stage (Notification of Proposals including estimates)
Stage 3:	Notification that the contract has been placed and the reasons behind the same.

47 The Tribunal is satisfied from the evidence provided that the Respondent's properly followed the required statutory consultation procedures before placing the contract of works.

Issue 4: Limitation of costs

48 The Tribunal has considered the Applicants request to limit the Respondents administration costs arising from this application.

49 The test to be applied, at the discretion of the Tribunal, is whether it is just and equitable having regard to the circumstances. The Tribunal finds that it is just and equitable to limit the costs in this case, because in failing to safely retain important documents affecting the leaseholders' liability for service charges, the Respondent has not only prevented the current managing agents from considering a warranty claim, it has also put beyond reach of the leaseholders, the very evidence needed to establish whether an equitable set-off claim is justified.

50 The Tribunal therefore finds that the Respondents costs in respect of the application made under 20C and paragraph 5A are not relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant.

51 The Tribunal therefore finds that the Applicants liability to pay an administration charge in respect of the litigation costs in relation to these proceedings are extinguished and having regard to the reasons set out above also make an order that any legal costs incurred in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charges payable by the Applicants.

Appeal

If any party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such appeal must be received within 28 days after these written reasons have been sent to the parties (Rule 52 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

If the party wishing to appeal does not comply with the 28-day time limit, the party 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.

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

Nicholas Wint FRICS

Date: 7th April 2021