FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00HN/LIS/2020/0045
Property	**:**	12 Carlton Road, Bournemouth, BH1 3TG
Applicants	**:**	Tyrrel Investments Inc
Representative	**:**	Mr Ian Newbery (solicitor)
Respondents	**:**	Mr P Crowsley, Mr A Persaud, Mr M J Fancy
Representative	**:**	Not represented
Type of Application	**:**	Determination of Service Charges – Section 27A Landlord & Tenant Act 1985
Tribunal Members	**:**	Judge N Jutton, Mr D Ashby DipSur FRICS
Date of Hearing	**:**	17 May 2021 by video enabled hearing
Date of Decision	**:**	20 May 2021

DECISION

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1 12 Carlton Road, Bournemouth, BH1 3TG (the Property) is one of a pair of semi-detached buildings (the other being No. 10 Carlton Road) constructed over 100 years ago. There is some debate as to its exact age. A Surveyor's report attached to the Supplemental Witness Statement of the Second Respondent, Mr Persaud, suggests it was constructed in the early 1900s. The Third Respondent, Mr Fancy, suggests in his Supplemental Statement that it was constructed approximately between 1850 and 1880. It is three storeys in height at the front and four storeys at the rear. It has been converted, it would appear sometime in the 1980s, into three residential flats.

2 The First Respondent, Mr Crowsley, is the current lessee of the upper flat which is known as Flat A which he holds under the terms of a lease dated 1 July 1988. The Second Respondent, Mr Persuad, is the lessee of the flat described as the garden floor flat which he holds under the terms of a lease dated 1 October 1982 and the Third Respondent, Mr Fancy, is the lessee of the ground floor flat which he holds under the terms of a lease dated 23 November 1990.

3 The current lessor is the Applicant. The Applicant acquired the freehold interest in the property in 1994.

4 The Applicant makes an application for a determination pursuant to section 27A(3) of the Landlord & Tenant Act 1985 (the 1985 Act) that if costs were incurred in relation to certain proposed works to the Property, as to whether or not those costs, provided they were reasonably incurred, could be recoverable from the Respondents as part of the service charges payable by them under the terms of their respective leases. The proposed works are works to replace the roof to the Property, and works to eradicate damp issues with a chimney at the Property.

5 The Respondents make an Application for an order that any costs incurred by the Applicant in relation to 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 them and for an order reducing or extinguishing any liability, they may have to pay an administration charge in respect of the Applicant's costs of these proceedings.

6 **Documents**

7 The documents before the Tribunal comprised a bundle of documents which included the Application, copies of the leases of the Respondents' flats, Statements of Case produced by the parties together with supporting

documents and Supplemental Statements of Case produced by the parties pursuant to Directions made by the Tribunal on 11 January 2021.

8 **The Issues**

9 At the start of the hearing, the Tribunal agreed with the parties that the issues which it was to determine were as follows:

a. If costs were incurred by the Applicant for carrying out certain repair works to a chimney at the Property, then provided such costs were reasonably incurred, would they be payable by the Respondents as part of the service charge payable by them?

b. If costs were incurred by the Applicant for carrying out works proposed to the roof at the Property, then provided such costs were reasonably incurred, would they be payable by the Respondents as part of the service charge payable by them?

c. That should the Tribunal make an Order that any costs incurred by the Applicant in connection with these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondents pursuant to section 20C of the 1985 Act?

d. That should the Tribunal make an Order reducing or extinguishing the Respondents' liability to pay any charges claimed by the Applicant as administration charges in respect of these proceedings, pursuant to section 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 (the 2002 Act)?

10 **The Law**

11 The relevant statutory provisions are to be found in sections 18, 19, 20C and 27A of the 1985 Act and in Schedule 11 to the 2002 Act. They provide as follows:

The 1985 Act

18 (1) In the following provisions of this Act "service charge" means 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, improvements 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.

(2) *The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.*

(3) *For this purpose –*

(a) *"costs" includes overheads, and*
(b) *costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.*

19 *(1)* *Relevant costs shall be taken into account in determining the amount of a 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 or 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 or subsequent charges or otherwise*

20C *(1)* *A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the First-Tier Tribunal, or in connection with arbitration proceedings, 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.*

(2) *The application shall be made –.....*

(ba) in the case of proceedings before the First-Tier Tribunal, to the Tribunal.

(3) *The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.*

27A *(1)* *An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, 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

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

(3) 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 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.

(4) No application 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.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

The 2002 Act (Schedule 11)

1 (1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—

(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) .....

(3) *In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—*

(a) *specified in his lease, nor*

(b) *calculated in accordance with a formula specified in his lease.*

(4) .....

2 *A variable administration charge is payable only to the extent that the amount of the charge is reasonable.*

3 .....

4 *(1)* *A demand for the payment of an administration charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to administration charges.*

(2) *The appropriate national authority may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.*

(3) *A tenant may withhold payment of an administration charge which has been demanded from him if sub-paragraph (1) is not complied with in relation to the demand.*

(4) *Where a tenant withholds an administration charge under this paragraph, any provisions of the lease relating to non-payment or late payment of administration charges do not have effect in relation to the period for which he so withholds it.*

5 *(1)* *An application may be made to [the appropriate tribunal] for a determination whether an administration charge is payable and, if it is, 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.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on [the appropriate tribunal] in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).

5A (1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph—

(a) *"litigation costs" means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and*

(b) *"the relevant court or tribunal" means the court or tribunal mentioned in the table in relation to those proceedings.*

The table referred to includes proceedings before this Tribunal

12 **The Lease**

13 There were copies of the leases for each flat at pages 17-61 of the bundle. The wording on the leases is effectively identical. The relevant provisions are as follows:

By clause 3 the landlord covenants as follows:

"(1) Subject to the tenant contributing one third of the costs thereof

(a) to well and substantially repair uphold support and maintain the roof roof timbers and foundations of the Building and to repair maintain cleanse clear re-paint and re-point the soil surface water drains gutters downpipes brickwork and external parts of the windows and doors of the Building and .....

PROVIDED ALWAYS and it is hereby agreed that the landlord in carrying out its repairing obligations hereinbefore contained shall not be required to put the roof main structure and foundations of the building in any better condition than they are now in (fair wear and tear excepted) ...

(3) That the Tenant paying the rents hereby reserved and performing and observing the several covenants and conditions herein contained and on his part to be performed and observed shall and may peaceably and quietly hold and enjoy the Demised Premises during the term hereby granted without any interruption or disturbance from or by the Landlord or any person lawfully claiming through under or in trust for him".

By clause 2 of the lease, the lessee covenants as follows:

"2(4)At all times during the said term to contribute one third of the cost of repairing and maintaining the roof over the building known as 12 Carlton Road Boscombe Bournemouth aforesaid of which the Demised Premises form part and one third part of the costs of

repairing maintaining cleansing and clearing the soil and surface water drains of the said building and one third part of the costs of repairing maintaining or renewing the rendering to the external brickwork and repairing and maintaining and painting the guttering and downpipes of the said building and the external parts of the windows and doors thereof and of re-pointing the external brickwork thereof and one third of the cost of the repairing of the outside wood and ironwork of the building which are usually or have heretofore been painted with two coats at least of good quality paint ….

2(6) At all times during the said term to bear and pay one third of the expenses of making repairing maintaining supporting and rebuilding and cleansing all ways passageways pathways sewers drains pipes water courses water pipes cisterns gutters party walls party structures chimney stacks fences easements and appurtenances belonging to or used or capable of being used by the Tenant in common with the Landlord or the tenants or occupiers of the premises near to or adjoining the Demised Premises …".

14 **The Chimney Works**

15 At the start of the hearing the Tribunal asked each of the three Respondents whether they opposed that part of the Application in relation to the proposed works to the chimney stack. Each confirmed that these works were not in issue. Accordingly, the Tribunal determines that if the Applicant carries out the chimney works (as outlined in paragraph 22 of the Applicant's supplemental Statement of Case dated 18 September 2020) provided the costs of doing so are reasonably incurred, such costs may be recovered by the Applicant from the Respondents as part of the service charge payable by the Respondents.

16 **The Proposed Works to the Roof**

17 **The Applicant's Case**

18 It is, the Applicant says, its responsibility pursuant to the terms of the lease to repair and to maintain the roof of the Property. That it was discovered a year or so ago that the roof was failing. A report was produced by Mr Darren Piper (who appeared before the Tribunal) of Graham Garner & Partners Limited, Consulting Civil and Structural Engineers, dated 27 July 2020, a copy of which was at pages 147-149 of the hearing bundle.

19 Mr Piper reported as follows:

"Following partial removal of the external roof finishes it was noted that the rafters have either partially or completely pulled away from the ridge board and the roof surface has significantly distorted.

The roof currently consists of 50mm wide x 90mm deep rafters at 400mm centres spanning approximately 4.5m from the external cavity wall up to a central ridge board, with reference to Trada tables the rafters are significantly over-spanned.

Furthermore the external supporting wall extends above floor level and as such the rafter feet are not tied to the floor joists placing complete reliance on horizontal and vertical support of the rafters at ridge level.

In light of the above it is our opinion that the roof structure originally incorporated purlins and struts to support the roof and these have been removed and the internal timber stud walls added to sub divide the roof space into four bedrooms.

Consequently in its current configuration we are unable to structurally justify the roof".

20 There are photographs which illustrate, the Applicant says, the defects with the roof annexed to its supplemental Statement. In particular, the Tribunal was referred to the photographs at pages 10 and 11 to the Applicant's Supplemental Statement. The photograph at page 10 shows a nail which previously, the Applicant says, supported a rafter which is no longer attached. The photograph at page 11 shows the Applicant says the roof distortion with the rafters having dropped and the roof bowing downwards. They illustrate, the Applicant says, a substantial degree of disrepair that needs to be remedied.

21 Mr Piper says in his report that he is of the opinion that the roof structure originally incorporated purlins and struts to support the roof which were then removed, he suggests, to make room for timber stud walls that sub-divided the roof space into bedrooms at the time that the building was converted into flats. Work which the Applicant says must have been carried out prior to the leases being entered into. At the same time as that work was carried out, Mr Piper suggests that the original slate roof tiles were replaced with concrete tiles. That as a result of a heavier roof and inadequate structural support, over the years that structural weakness has caused the roof to sag and for the rafters ultimately to become disconnected from the top ridge. There is as such an inherent structural defect in the design of the roof (as it was at the date of the leases) which has caused the subsequent major disrepair. The works which the Applicant proposes to carry out are set out in a Specification of Schedule of Work which is annexed to the Applicant's

supplementary Statement of Case and is dated February 2021. The proposed works, the Applicant says, are to strengthen the roof so that it is structurally sound so that the same issues of disrepair will not reoccur in the future. Further, modern Building Regulations, the Applicant says, require the replacement roof to meet current standards in relation to thermal performance and to include a dormer to be placed above the stairway to allow sufficient access from the floor below. The estimated costs of the works are in the region of £195,000. There is an estimate annexed to the Applicant's supplementary Statement of Case.

22 The roof is, the Applicant says, in a state of disrepair. That the obligation to put it back into a state of repair falls within the landlord's covenant at clause 3(1)(a) of the lease and the liability to pay for the costs of those repairs as part of service charges fall within the Respondent's covenant at paragraph 2(4) of the leases.

23 There is, the Applicant says, no doctrine that an inherent defect would prevent works to rectify that defect from falling within a covenant to repair or maintain. That the Applicant is obliged to put the roof back into the state of repair that it was at the time the leases were entered into. Further, that the roof would not be adequately supported, if the rafters were simply replaced on a like for like basis, it would fail again. That it would be structurally unsound. The starting point is to determine whether that which is to be repaired is in a physical condition worse than it was at an earlier time. In this case, at the date of the leases. That, the Applicant says, is clearly the case here. The proposed works, the Applicant says, are not works of improvement but works of repair. The Applicant makes reference to the well-known authority of **Waaler v Hounslow LBC** (2017) EWCA Civ 45. That where the deterioration is by reason of an inherent defect in the design or construction of the building, works to eradicate that defect may be a repair. That using better materials or carrying out additional work that may be required by Building Regulations or in order to conform with good practice, does not preclude works from being works of repair and that where a defect in the building needs to be rectified, a scheme of works carried out to rectify it may be partly repair and partly improvement.

24 In the circumstances, the Applicant says that the proposed works as set out in the Specification on a proper construction of the covenant to repair contained in the leases, constitute works of repair within the meaning of the leases and are recoverable from the Respondents as part of the service charge payable by them.

25 It matters not, the Applicant says, that the previous freeholder may or may not have been at fault when converting the Property into flats by removing purlins and struts that previously supported the roof. Further, it is not known

with certainty what historically the structure of the roof may have been. That pre-dates the dates of the current leases. That whether or not the previous freeholder, prior to the granting of the current leases, carried out works of alteration to the roof, does not alter the parties' obligations now arising under the terms of the leases.

26 The Applicant says it takes on board the understandable views and representations made by the Respondents. However, the Applicant has to exercise a degree of discretion in determining what repairs need to be carried out and how to carry out those repairs and it is entitled to do so provided it does so reasonably. The Applicant says that it takes into account the interests of the lessees, in particular it has regard to the length of the leases. These are lengthy leases of 999 years. The position might be different the Applicant contends if there were only a few years left on the leases, but that is not the case here. That it is in the Respondent's best interests for the roof to be repaired properly and for the work to be carried out now. The work will, as Mr Newbery put it, *"cost what it costs"*. That no other proposals for works of repair to the roof have been put forward by the Respondents. Indeed, the Applicant believes there is no alternative to the proposed works of repair. This is not a case, the Applicant says, where the proposed works would give back to the lessees something different to that which was in place at the start of the leases. The proposed works, Mr Newbery submitted, must be looked at through the prism of the decision in *Waaler*. That the proposed works were not an improvement but a repair. A repair, the Applicant says, that can only be remedied in one way. That it was regrettable, Mr Newbery said, how expensive the proposed works were estimated to be but nonetheless they were works that had to be done. It was unfortunate that there was no provision in the lease to allow for a reserve fund. Since the start of the leases, these were works which would always at some stage have manifested themselves. That it would have made no difference had the Applicant become aware of the defects with the roof at an earlier date save for possibly the effect of inflation on the cost of the works. The nature and extent of the works required would have been no different.

27 The Tribunal asked the Applicant's Structural Engineer, Mr Piper, why the valley beams shown in the Specification of Works were designed in steel rather than timber. This would appear to make the detailing complex and possibly more costly. Mr Piper said that it would not be possible to use timber because timber would not meet the bending, deflection and sheer requirements. When questioned further about the detail of the valley beams to the main beam under the ridge (section B-B on the plans to the Specification of Works) and where the drawing notes, *"The connection to ridge beam to be developed with fabricator",* Mr Piper stated that the 3D modelling for this detail had not been completed. Mr Quintin of the Applicant's Managing Agents confirmed that a contractor submitting tenders

would be expected to supply such details as part of the tender process. The tenders were due to be returned by 23 May. Mr Carr, the Applicant's Surveyor, explained that contractors putting forward tenders were expected to make an allowance for the fabrication design as regards the connection of the steel beam to the ridge beam, and he did not anticipate that that would incur any additional unexpected cost.

28 In answer to questions from the Tribunal, Mr Carr confirmed that the reason why the proposed design of the new roof included a dormer above the staircase, was to allow for adequate head room for the stairwell in order to comply with modern Building Regulations.

29 Mr Newbery addressed Mr Crowsley's written submission that the historic removal of the purlins from the roof constituted an ongoing breach on the Applicant's part of the covenant for quiet enjoyment contained in the lease. That was, Mr Newbery said, an understandable misunderstanding of the covenant for quiet enjoyment. That a covenant for quiet enjoyment was a covenant that the lessor would not interfere with the lessee's lawful occupation of a property. It did not mean that the lessor was obliged to take positive steps to ensure that there was no breach of covenant. What a lessor could not do, as Mr Newbery put it, was take action to put a lessee 'on the street' or to 'knock a building down'. It is well-established, the Applicant says, that a covenant for quiet enjoyment does not oblige a landlord to build, repair or improve a building. Both the Applicant (and Mr Crowsley in his Statement of Case) make reference to the case of **Southwark LBC v Mills** (1999) 3 WLR 939 HL and to the Judgment of Lord Hoffmann, an extract of which is set out at paragraph 38 of Mr Crowsley's Supplemental Statement of Case. In particular, Mr Newbery submitted that the covenant for quiet enjoyment was broken where the lessees' lawful possession of the Property is substantially interfered with by the acts of the lessor. That is not, the Applicant says, the case here. Mr Newbery said that the suggestion that the Applicant was in breach of the covenant for quiet enjoyment was understandable but fundamentally misconceived. It did not, as he put it, *"stand up"*.

30 Mr Newbery addressed Mr Persaud's written submission that the fact that the roof was in need of repair constituted a breach of the provisions of the Sale of Goods Act 1979. The Act, Mr Newbery says, related to goods. That section 61 of the Act defined 'goods' as personal chattels. That as such, the Sale of Goods Act was of no assistance to the Respondents.

31 As to Mr Persaud's contention that a duty of care was owed by the Applicant towards the Respondents, Mr Newbery made the point that none of the parties were parties to the original leases. The doctrine of caveat emptor

(buyer beware) applied. There was no duty of care as contended for by the Respondents between the present parties.

32 As regards Mr Fancy's submissions, Mr Newbery made the point that it would not have been possible historically to put together a reserve fund to meet the anticipated cost of the proposed works because there was no provision in the lease allowing for a reserve fund. That the Applicant's Surveyor, Mr Carr, was not a Director of the Managing Agent company. Nor had the Structural Engineer, Mr Piper, been employed by the Surveyor. The Structural Engineer was, as Mr Newbery put it, at arm's length from the Applicants, the Managing Agents and Mr Carr.

33 In answer to questions from the Tribunal, Mr Quintin confirmed that the proposed works had been subject to and were the subject of an ongoing consultation process pursuant to section 20 of the 1985 Act. That tenders were being obtained from contractors whose names had been put forward by the Respondents as part of that consultation process.

34 In summary, Mr Newbery said that the proposed works were works of repair which the Applicants were obliged to and entitled to undertake under the terms of the lease. They were the only reasonable repairs that could be carried out. That any element of improvement associated with such works was no more than incidental.

35 **The Respondents' Case**

36 **Mr Crowsley**

37 Mr Crowsley very fairly in his written submission said that the proposed works to the roof were a reasonable resolution to the faults with the roof. That they were works he contends that should have been addressed by the freeholder at the time that the Property was converted into flats. He questions whether or not the roof is in a worse condition than it was at the start of the leases. He says that as the perceived fault with the roof pre-dated the leases, the works to rectify should be considered as works of improvement, not repair. That the freeholder of the Property at the time that it was converted into flats was at fault for removing the purlins, albeit that would have been no doubt contrary to common building practice and to Building Regulations. That had the freeholder used good practice and complied with Building Regulations when converting the Property, there would have been no subsequent problem with the roof.

38 The Tribunal should, Mr Crowsley said, take into account the length of the leases of the flats. It should take into account the Respondents' view of the proposed works and the financial impact those works may have on them. As

he puts it at paragraph 21 of his supplemental statement of case, *"If the tenants are liable for the cost of these roof works, we are effectively buying something twice and paying for something that should have been done before the leases of the flats sold and paid for by the freeholder"*. None of the cases cited by the Applicant, Mr Crowsley said, address a scenario where a landlord or agent of the landlord has deliberately removed structural elements from the property.

39 Mr Crowsley suggests at paragraph 25 of his supplemental statement of case that the roof had started to fail as soon as the structural elements had been removed. That *"…the roof slowly started to sag, and the rafters moved away from the ridge. The roof was in the same state then as it is now, it is just that the gaps in the timber joints have got bigger over time"*.

40 That as the roof at the time that the leases were granted had the same structural defects as it has now, then the proposed works Mr Crowsley contends would have the effect of giving back something different to that which existed at the time of the grant of the leases.

41 In short, Mr Crowsley said that all of the proposed works are works of improvement.

42 Further, Mr Crowsley submits that the Applicant is in breach of the covenant for quiet enjoyment. That by removing the purlins, the previous freeholder had removed his right to make use of his flat. That for a lessor to remove parts of a structure so as to make a roof dangerously unstable constituted a breach of the covenant for quiet enjoyment.

43 **Mr Persaud's Case**

44 Mr Persaud accepts that there is no dispute that the roof is sub-standard and was not compliant with Building Regulations at the time that the property was converted into three flats. He wonders whether it was therefore legal to sell the flats in what may have been an unsafe state. He ponders whether or not there has been a breach of the provision of the Sale of Goods Act 1979.

45 Mr Persaud further wonders whether a duty of care may exist between the Applicant and the Respondents particularly as regards the personal safety of the Respondents by reason of the sale of flats to the Respondents in a property which in the event had an unstable/faulty roof.

46 Mr Persaud suggests that the Applicant and/or its Managing Agents were at fault for not carrying out periodic inspections of the roof. It would have been good practice, he says, for them to do so at least every 7 years. That had inspections been carried out and defects with the roof spotted, the substantial

costs that may now be occasioned would have been avoided or reduced. He makes reference to a report from a Surveyor, Mr Malloy, dated 11 December 2013 which is exhibited to his supplementary Statement of Case in which the Surveyor reports that *"an examination of the roof did not reveal any obvious distortion or lateral movement"*.

47 Mr Persuad complains as he puts it of a *"…rather cavalier attitude to maintaining the building and keeping costs down…"* on the part of the Applicant and its representatives. In all the circumstances, he suggests that the cost of the proposed works should be borne by the Applicant, not the Respondents.

48 **Mr Fancy's Case**

49 Mr Fancy submits that there has been an historic failure on the Applicant's or its Managing Agents' part to inspect the Property and in particular the roof. He suggests that had the Applicant properly inspected the roof when it acquired the Property in 1994, the defects with the roof would have been identified and could have been dealt with immediately. That, he said, would have resulted in cheaper, less 'obstructive' remedial works. He suggests that thereafter a failure on the Applicant's part to maintain and repair the roof has exacerbated the cost of the works that are now required. He says that roof inspections, particularly with older buildings, should be carried out regularly and that has not happened here. He says at paragraph 14 of his supplemental statement of case:

"It is quite clear that had the roof sag been spotted at an earlier stage or the conversion identified as being faulty, the expense to make good the damage would have been significantly reduced. It is also likely that alternative methods of repair would have been available … there would have been time to put together a reserve fund and/or carry out cheaper works. The fact that the roof has stayed standing for all these years also suggests that a total replacement would not have been necessary if the defect had been identified sooner".

50 Mr Fancy makes the point that when he purchased his flat in August 2017, he did not do so *"blindly"*. He refers to the principle of caveat emptor. He instructed a reputable Surveyor to produce an RICS Home Buyer's Report. Unfortunately, the Surveyor was unable to access the roof structure for the purpose of preparing his report. However, the Surveyor said that from ground level he was of the view that no repair to the roof was currently needed. That accordingly, Mr Fancy purchased the flat under the impression that the fabric of the building was in a good state of repair and was well maintained by the Managing Agents on behalf of the Applicant. Given that

the estimated costs of the proposed works were in the region of £195,000, when compared to the cost of a new building, that must surely mean Mr Fancy submits that the works constitute a *"substantial improvement"*.

51 The inclusion of a dormer window in the proposed works constitutes, Mr Fancy suggests, an improvement rather than a repair.

52 **The Tribunal's Decision**

53 The Tribunal has considered very carefully both the written and oral submissions made to it. Just because there may not be a reference to certain submissions in this Decision does not mean that the Tribunal has not considered those submissions.

54 The first question which the Tribunal asks itself is, is there a want of repair? Has there been a deterioration of the roof from its previous state? A deterioration from its condition/state at the time the leases were granted?

55 It is suggested by Mr Crowsley that because both as at the date of the leases and now there were no purlins and the rafters were not properly secured to the ridge, that there cannot have been a deterioration of the roof from a previous state.

56 The Tribunal does not agree. The evidence, in particular by reference to the report of Mr Piper (at pages 147-149 of the bundle) and the photographs annexed to the Applicant's supplementary Statement of Case, is that the condition of the roof is worsening and has been deteriorating over a period of time. That roof rafters have pulled away from the ridge board. That the roof is distorting. That there has been a deterioration of the roof from its previous state. The Tribunal is satisfied that if works of repair are not carried out with a degree of urgency, the condition of the roof will deteriorate further.

57 The second question which the Tribunal asks itself is whether or not the proposed works being works to remedy at least in part an inherent defect, constitute works of repair? The Tribunal is satisfied from the evidence that the failure of the roof and the need for urgent repairs arises on the balance of probabilities by reason of the removal of purlins by the previous freeholder and the application of concrete tiles to the roof in place of slate.

58 It is well-established that there is no doctrine that the want of repair to a property due to an inherent defect cannot fall within the ambit of a covenant to repair (**Ravenseft Properties Limited v Davstone (Holdings) Limited** (1979) 1 ALL ER 929).

59 The Tribunal is satisfied that there is an inherent defect with the construction/ design of the roof at the Property. That such defect was in place at the time the leases were granted. It is almost certainly a defect occasioned by the actions of a previous freeholder when converting the Property into flats. The Tribunal must have regard to the condition of the Property at the date of the leases as far as it is able. It is, as was put by Forbes J in Ravenseft:

"...it is always a question of degree whether that which the tenant has been asked to do can properly be described as repair, or whether on the contrary it would involve giving back to the landlord a wholly different thing from that which he demised".

In the view of the Tribunal, a defect in the form of the omission of purlins or struts is not sufficient to change the character of the Property so as to take the works of repair required to rectify those omissions outside of the covenant on the Applicant's part to repair or the Respondents' covenant to pay for such repairs by way of service charges.

60 The third question which the Tribunal asks itself is whether or not the proposed works constitute repairs or works of improvement. In particular, having regard to all of the relevant circumstances, can the proposed works be fairly regarded as repair in the context of the leases?

61 As it was put by Sachs LJ in **Brew Brothers Limited v Snax (Ross) Limited** (1970) 1 QB 612, 640:

"It seems to me that the correct approach is to look at the particular building, to look at the state which it is in at the date of the lease, to look at the precise terms of the lease, and then to come to a conclusion as to whether, on a fair interpretation of those terms in relation to that state, the requisite work can fairly be termed repair. However large the covenant, it must not be looked at in vacuo.

Quite clearly, this approach involves in every instance a question of degree ...".

62 This was expanded upon by Nicholls LJ in **Holding and Management Limited v Property Holding and Investment Trust Plc & Others** (1990) 1 ALL ER 938 CA in which His Lordship stated:

"Thus the exercise involves considering the context in which the word 'repair' appears in a particular lease and also the defect and remedial works proposed. Accordingly, the circumstances to be taken into account in a particular case under one or other of these heads will include some or all of

the following: the nature of the building, the terms of the lease, the state of the building at the date of the lease, the nature and extent of the defects sought to be remedied, the nature, extent, and cost of those remedial works, at whose expense the proposed remedial works are to be done, the value of the building and its expected lifespan, the effect of the works on such value and lifespan, current building practice, the likelihood of a reoccurrence if one remedy rather than another is adopted, the comparative cost of alternative remedial works and their impact on the use and enjoyment of the building by the occupants. The weight to be attached to these circumstances will vary from case to case.

This is not a comprehensive list. In some cases there will be other matters properly to be taken into account".

63 The lease provides that subject to the tenant contributing one third of the cost of doing so, the landlord is *"to well and substantially repair, uphold, support and maintain the roof …"* (clause 3(1)(a)). If the roof is in need of repair and/or maintenance it is for the lessor to carry out such works of repair/maintenance. That duty is not removed as Mr Crowsley suggests in his Statement of Case by the proviso at the end of clause 3(1) of the lease that the landlord is not required to put the roof, main structure and foundations of the building in any better condition than they are now in (fair wear and tear excepted). That proviso does not prohibit the Applicant from carrying out works to the roof that may put it into a better condition than it was at the start of the leases nor in the view of the Tribunal does it restrict or reduce the Applicant's obligation to do so.

64 The Tribunal bears in mind that the leases are on any definition long leases. They are each for a term of 999 years. The reality is that the Respondents and their successors in title will enjoy the full benefit of the proposed works. The Tribunal has not been provided with any alternative to the proposed works. Indeed, Mr Crowsley says, very reasonably in his supplementary Statement of Case, that the proposed works are *"a reasonable resolution to the faults in the roof"*. The Tribunal bears in mind that certain elements of the proposed works are required, for example the erection of a dormer, in order to comply with current Building Regulations. Clearly if the works are not carried out, the roof is in fairly imminent danger of collapse. The proposed works, all being well, should prevent any reoccurrence of the failure of the roof, certainly in the foreseeable future. That although clearly expensive, the anticipated cost of the works is in the view of the Tribunal proportionate to the value of the building and to its expected lifespan. The works will no doubt have a positive effect upon the value of the building and upon its lifespan. Nor does the Tribunal consider that the new roof will be a roof which is so different to the current roof that it should be regarded as an improvement. Having regard to the condition of the roof at the date of the leases, the terms of the leases and the nature and extent of the works which

the Applicant proposes to carry out, the Tribunal is satisfied that the proposed works can fairly be termed repair.

65 The Respondents suggest that the nature and extent of the works that are proposed would not have been necessary had the Applicant or its Managing Agents carried out periodical inspections of the roof (which the Respondents say it should have done) and spotted the defects (the inherent defects) with the roof at an earlier date. Firstly, the Tribunal is not satisfied that such additional or further inspections should have been carried out by the Applicant or its Managing Agents. Secondly, it is by no means clear that had further inspections been carried out, the defects with the roof would have come to the Applicant's notice. Thirdly, the Tribunal agrees with the submissions of the Applicant that had the defects been brought to the Applicant's attention at some earlier date, that would not have substantially altered the nature and extent of the works that the Applicant now proposes to carry out (save possibly that the costs since such earlier date may have increased by reason of inflation). The nature of the inherent defects with the roof are such that at whatever date they may have come to the Applicant's notice, the works that would be required to remedy the defect (given that the defect is of a structural nature) would have been the same as or substantially the same as those which are now proposed by the Applicant.

66 The Tribunal has great sympathy for the position that the Respondents now find themselves in. They are facing what will clearly be substantial service charge demands in relation to the proposed works through no fault of their own. They no doubt took all reasonable steps they could to address the condition of the Property and to protect themselves at the time of their respective purchases. Mr Fancy commissioned a report from a Surveyor, an RICS Home Buyer's Report. They effectively find themselves in the same position that they would be in the case of an individual purchasing a freehold interest in a residential house who later finds that significant works of repair are required to the roof of the house by reason of inherent defects.

67 Mr Fancy perhaps understandably suggests at the end of his supplementary Statement of Case, that the problem occasioned by the missing purlins is a matter for Mr Crowsley and for the Applicant. That it is unreasonable he suggests for him to be expected to contribute to the cost of the works so that the rooms in the loft forming part of Mr Crowsley's flat may be suitable for habitation. The fact is that the Property as a whole benefits from repairs to the roof. Further, Mr Fancy is bound by the terms of his lease which as set out above provide that he will be responsible for paying one third of the costs incurred by the Applicant (providing they are reasonably incurred) in carrying out works of repair and/or maintenance to the roof.

68 Mr Crowsley contends that the Applicant is in breach of the covenant for quiet enjoyment. The Tribunal does not agree. The actions complained of by Mr Crowsley, the removal of purlins and struts, appear to have taken place prior to the date of his lease; prior to the date of the covenant for quiet enjoyment. An act occurring prior to the covenant cannot constitute a breach of that covenant. Further, for there to be a breach, there must be a substantial interference with the tenant's possession of the premises. A failure on the part of a landlord to repair a building (if that is Mr Crowsley's case) does not in itself amount to a breach of a covenant for quiet enjoyment. Mr Crowsley makes reference in his supplementary Statement of Case to **Southwark LBC v Mills (1999) 3 WLR 939 HL** and the Judgment of Lord Hoffmann in which His Lordship makes the point that the covenant is concerned to prevent an interruption of the tenant's lawful possession. The fact that the need for the proposed works to the roof has arisen and that unfortunately there will be a degree of noise and disturbance suffered by the Respondents, in particular as regards Flat A whilst the works are carried out, does not constitute in the view of the Tribunal a breach of the covenant for quiet enjoyment.

69 Mr Persaud makes reference to the provisions of the Sale of Goods Act 1979 and to Consumer Rights legislation. That does not assist him. As the title suggests, the Sale of Goods Act relates to the sale of goods. The term 'goods' is defined in section 61 of the Act as *"all personal chattels other than things in action and money….."*. The granting of a lease or the assignment of a lease is not a sale of 'goods'.

70 Mr Persaud also enquires as to whether some form of duty of care was owed to the Respondents. The Tribunal agrees with the Applicant that there is no duty of care which would assist the Respondents. Neither the Applicant or the Respondents were parties to the original leases. The purchase of their respective flats and the doctrine of caveat emptor (buyer beware) applies.

71 In all the circumstances, the Tribunal determines that if the works proposed by the Applicant to the roof as set out in the specification attached to the Applicant's supplementary Statement of Case are carried out, then the costs thereby incurred by the Applicant, provided they are reasonably incurred, may be recovered by the Applicant from the Respondents as part of the service charge payable by the Respondents under the terms of their respective leases. For the avoidance of doubt, the Tribunal does not make a determination either way as to whether or not the estimated cost of those works would be reasonable. The actual costs of the proposed works are not yet known. The Tribunal notes that the works have been subject to a consultation process pursuant to section 20 of the 1985 Act and it is understood that as part of that consultation process, the Respondents have put forward the name of a contractor or contractors for the consideration of

the Applicant from whom it is understood that priced tenders may be received.

72 **Applications pursuant to section 20C of the 1985 Act and Schedule 11 of the 2002 Act**

73 As stated at the start of this Decision, the Respondents make an Application to the Tribunal that any costs incurred by the Applicant 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 charge payable by them (the section 20C Application). Further, that if the Applicant seeks to recover from the Respondents any costs incurred by it in respect of these proceedings as an administration charge under the terms of the lease, then the Tribunal should make an Order reducing or extinguishing the Respondents' liability to pay such administration charges (the Schedule 11 Application).

74 The Tribunal omitted to raise these Applications with the parties at the end of the hearing and the Respondents omitted to pursue the Applications at the end of the hearing.

75 In the circumstances, the Tribunal directs as follows:

a. The Applicant shall by **4.00 pm on 8 June 2021** send to the Tribunal and to the Respondents a Statement saying whether or not it seeks to recover from the Respondents the costs that it has incurred in relation to these proceedings either as part of the service charges payable by the Respondents under the terms of the leases, or as administration charges payable by the Respondents under the terms of the leases. In that event, it shall in its Statement specify the provisions in the leases upon which it relies to recover such charges from the Respondents.

b. The Respondents shall by **4.00 on 22 June 2021** send to the Tribunal and to the Applicant its response and set out the grounds upon which they ask the Tribunal to make an Order in respect of the section 20C Application and/or the Schedule 11 Application.

c. The Applicant may by **4.00 pm on 29 June 2021** send to the Tribunal and to the Respondents a response to the Respondents' submissions.

The Tribunal will thereafter make a determination on paper as to both the section 20C Application and the Schedule 11 Application unless any of the parties within 28 days of receiving this Decision objects in writing, in which case the Tribunal will list the said Applications for a short hearing.

76 **Summary of Tribunal's Decision**

77 The Tribunal determines:

a. That if the Applicant carries out the proposed chimney works as outlined in paragraph 22 of the Applicant's Supplemental Statement of Case dated 18 September 2020, then provided the costs of doing so are reasonably incurred, such costs may be recovered by the Applicant from the Respondents as part of the service charge payable by the Respondents.

b. That if the works proposed to the roof of the Property as set out in the Specification and Schedule of Works dated February 2021 prepared by Merrileas Property Management are carried out, then the costs thereby incurred by the Applicant, provided that they are reasonably incurred, may be recovered by the Applicant from the Respondents as part of the service charge payable by the Respondents.

c. As to the Applications made by the Respondents pursuant to section 20C of the 1985 Act and Schedule 11 of the 2002 Act, the Tribunal has set out Directions above.

Dated this 20th day of May 2021

Judge N P Jutton

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 by email to rpsouthern@justice.gov.uk 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.