FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/29UG/LSC/2022/0120**
Property	**:**	**Fountain Walk, Gravesend, Kent, DA11 9LA**
Applicants	**:**	**Trevor Butler (Flat 46)** **Rita Cook (Flat 16)** **Jasmine Hamid (Flat 71)** **Paul Watson (Flat 52)**
Respondent	**:**	**Gravesham Borough Council**
Representative	**:**	**Ms Thomas (Counsel, instructed by Medway Council & Gravesham Council Legal Services)**
Type of Application	**:**	**Section 27A, LTA'85**
Tribunal Members	**:**	**Judge Dovar** **Mr Davies FRICS** **Ms Wong**
Date and venue of Hearing	**:**	**14th April 2023** **Havant Justice Centre**
Date of Decision	**:**	**24th May 2023**

DECISION

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1. This an application for the determination of the payability of service charge in respect of major works to a number of the roofs to the Property.

2. The Property is in an estate of 9 building plots comprising 7 blocks of flats and two terraces of houses. The estate was built around 1960 and the blocks of flats are divided as to: Block 1-12, 13-21, 22-33, 43-57, 34-42, 58-69 and 70-81. The houses are: 82-88 and 89-95.

3. The works were carried out in 2020 and the cost for each long leaseholder is between £10,000 and £12,500. Mr Butler, as a leaseholder of a flat within block 43-57 has received an invoice for £10,965.87 as his contribution towards the re-roofing programme to renew the main roof of his block. Miss Hamid, the lessee of a flat in Block 70-81 received an invoice for £11,588.02. Mrs Cook a leaseholders in block 13-21 has an invoice for £10,552.36 and Mr Watson a leaseholder in block 43-57 has received an invoice for £10,965.87. It is those invoices for those three blocks which are challenged in this application.

4. The Applicants have raised the following challenges to those costs:

    a. Breach of Contract, in that the Respondent has failed to adhere to its own policies which direct it to carry out regular inspections and only to carry out re roofing works when a roof it at the end of its lifespan;

b. Failure to control the costs of the works, in that the Respondent did not have proper reports carried out and failed to carry out any necessary work earlier, with the result that the costs have risen from around £6,000 per flat to around £11,000;

c. There was disparity in treatment and cost between the flat owners and the house owners, with the latter paying much less for more roof work.

Lease Terms

5. The Tribunal was provided with a lease of Flat 46, which is taken as representative of the leases on the Estate. Clause 7 (1) of the lease contains the Respondent's obligation to '*maintain repair redecorate renew and clean … (a) the structure of the building and in particular … the roofs …*'. There is a linked obligation on the leaseholder to pay a share of the cost of those works.

6. It is therefore clear and not in dispute, that the obligation to maintain and keep in repair the roofs falls on the Respondent and the Applicants each have a liability to contribute to the cost of the same.

The Gravesham Borough Council DSO Building Management Repairs & Maintenance Policy ('the Policy')

7. In addition to the terms of their leases, the applicants relied on the above policy. The Policy is dated September 2020, but was created in April 2017 and has been updated in September 2020.

8. It sets out the objectives of the Respondent with regard to the management or repairs to its housing stock. It states that '*This policy is based on our legal obligations as a landlord…'* that is said to be drawn from both from legislation and the terms of the leases and the Respondent says it has considered governmental guidance in the area. It also confirms that it has responsibility for keeping the roof of properties in good repair.

9. The Applicants relied specifically on paragraph 25, dealing with Planned Works Programmes and Maintenance which sets out the following

> "*The council undertake programs of improvements to our properties to ensure that they meet the expectations of our residents and will look to renew certain aspects and component parts of our properties that have or are reaching the end of their useful life. Please see table below for expected life cycles: … Flat Roof Minimum Expected lifecycle 20 years …*
>
> *Estimates are based on a minimum lifecycle and no replacements will be considered until the component reaches its minimum expected life cycle. Near to the end of the expected life cycle, the council will contact the tenant to arrange an inspection of the component at which point the surveyor will decide whether a replacement is needed at that point in time. If a component does not need replacing, the surveyor will estimate a revised life expectancy and the council's systems will be updated. No replacements will be made if there is sufficient*

life left in the component or if the life expectancy can be extended by way of a minor repair."

Various works to the roofs over the years

10. The parties had attempted to piece together the history of roof repairs over the years. This had been mostly prompted by Mr Butler's attempts to get the Respondent to provide evidence of what work had been done. From that the following picture emerges.

11. Having been built in around 1960, the first documentary evidence of work to the roof after that is in the early 1990s. There is a 20 year guarantee for roof works to **blocks 1-12 and 70-81** dated 24th February 1994 and earlier documentation dated 24th September 1993 referring to an order for the renewal of roof covering to those blocks.

12. There is a variation instruction from Gravesham Borough Council dated 15th June 1994 referred to a quotation dated 6th June 1994 for £25,250 for roof renewal to **blocks 22-33 and 58-69**, a certificate of practical completion dated 3rd January 1995 and a 20 year guarantee for the works to those blocks.

13. Similar documentation has been provided for block 34-42 in around 1996 with a certificate of practical completion dated 12th August 1996 and a 20 year guarantee.

14. The certificate of service charge for the year ending 31st March 1996, dated 2nd September 1996 for 46 Fountain Walk (which is in **block 43-**

57) which has a line for Roof Renewal total costs £14,828.10 of which £999.90 was charged to the block and then 1/15th to the flat owner.

15. It therefore certainly seems that between 1994 and 1996, **blocks 1-12, 22-33, 34-42, 43-57, 58-69, and 70-81** had roof works and most likely full replacements. There is nothing then until 2017.

Reports

16. On **30th August 2017,** Bauder produced a roof survey report of **43-57, 58-69 and 70-81**. Although in fact, they had only surveyed **70-81**, as they said they could not access the other roofs. The report does not provide their credentials, but they appear to be the maker of a proprietary roof covering, Bauderflex Roof system.

17. From the inspection they considered:

    a. The decking was in good condition;

    b. The waterproofing system was in a reasonable condition, with some isolated defects and that '*some remedial works are required to maintain integrity and on-going serviceability. It is worth investing in this work now before the current defects have the opportunity to deteriorate further.*'

    c. The drainage was adequate.

18. Under proposals they stated "*The existing decking is to be re-used. The condition of the existing waterproofing is considered suitable for receiving an overlay system."* Although the body of the report did not

say as much, it appeared that they were recommending their system be used to overlay what was already in situ.

19. On **16th November 2020**, Bauder provided another roof survey report, this time in relation to **block 13-21**. As with the previous report, it was noted that the decking was in good condition '*to be reused as part of the roof refurbishment*', the existing waterproofing system '*appears to be in reasonable condition, but with some isolated defects*' with some '*remedial works … required to maintain integrity and on-going serviceability. It is worth investing in this work now before the current defects have the opportunity to deteriorate further.*' Unlike the previous report it was stated that '*The thermal performance of the existing roof build-up is poor and falls below the above standards'.* This latter comment arose in this report and not the former, because of changes to building regulations.

20. As a result the following recommendations were made:

    a. The existing decking was to be reused;

    b. The existing waterproofing was to have an overlay system; and

    c. The insulation was to be upgraded with new drainage chutes.

Consultation

21. On 29th January 2019, the Respondent gave notice of intention to enter into a qualifying long term agreement (under s.20 of the Landlord and Tenant Act 1985), being the signing up to a consortium for the joint procurement, with other local authorities, of major works. Following

that process the Respondent entered into the long term agreement for the provision of major works.

22. Between 22nd September 2020 and 12th March 2021, the Respondent wrote to the residents on the Estate providing them with a notice of intention under s.20 of the Landlord and Tenant act 1985 to carry out specific works in accordance with that long term agreement. The letter to Mrs Cook of no16, which is representative of the letters that were sent out, stated

> "*…The works to be carried out … Re-roofing programme to re-new the main roof. …*
>
> *We consider it necessary to carry out the works programmed and as stated in your lease agreement to maintain the structure of the building, as the main roof is beyond its life span of 20 years and there is no longer a guarantee.*
>
> *We have now obtained estimates in respect of the works to be carried out, which are as follows: Breyer Group Plc £80,316.02 of which your proportion approximately will be £8,924.00 for block 13-21 Fountain Walk.*
>
> *As a leaseholder your contribution will be based on a proportion of the cost which will amount to approximately £11,601.20 …"*

23. In response to queries by Mr Butler as to the basis upon which the works were said to be needed, Jill Rogers of the Respondent emailed him on 1st July 2022, stating that

> "*Based on report finding from block 70-81, with the knowledge that the bocks were constructed at the same time, and that the flat roof was previously replaced at the same time and with the same specification, it was considered reasonable that all roofs would be in a similar condition.*

24. The Tribunal was also shown some correspondence with one of the house owners, in which her contribution to the roof works for the terrace in which her property sits, was £2,170.

25. On 2nd February 2022, the Respondent sent out the invoices for each leaseholder's contribution to the cost of the roof works to their block. As stated above, it is those invoices which are challenged in this application.

26. At the hearing the Respondent asserted that in fact in 2017 all the blocks had been physically surveyed and that in 2020 two blocks had been surveyed again in order to take core samples. This was a surprising assertion given that there had been no mention of these surveys in the Respondent's evidence to date, neither in their disclosure, nor in the two witness statements that had been provided. They had also failed to provide copies to the Applicants or the Tribunal. The content of the surveys appears to have been the same as with the one that was provided.

Costs reasonably incurred?

27. Before considering the Applicants' challenges, the first question the Tribunal will address is whether, but for those challenges, the costs are recoverable through the service charge; particularly whether they fall within costs that are recoverable under the lease and if so, whether notwithstanding that, they should be capped in line with s.19 of the Landlord and Tenant Act 1985 on the basis that they either have not been reasonably incurred or the work is not to a reasonable standard. The latter is not in contention, no challenge has been made to the quality of the works.

28. Ostensibly they are recoverable under the terms of the lease. As set out above, the obligation to keep the roofs in repair falls on the Respondent and they are entitled to recover the costs of the same from the Applicants, as leaseholders. The Tribunal did not accept the Applicant's contention that the obligations under the leases had been varied by the Policy. Instead, as counsel for the Respondent submitted, it was an indication as to how the Respondent would approach its obligations. It did not, in the Tribunal's view, prevent them from re-roofing, unless there was evidence that only that approach would suffice. Further the fact that the Respondent may have failed to follow the Policy in terms of the timing of inspections and the work undertaken, was not relevant for the purposes of establishing whether sums were recoverable under the service charge. Any relevance would arise under a challenge based on a breach of contract having caused some loss to the leaseholders which could be offset against their liability for service charges.

29. The first query the Tribunal had was whether there was sufficient evidence of disrepair and if so, whether that warranted the works that were carried out (ignoring at this stage whether or not the disrepair was wholly or partly the fault of the Respondent). The 2017 and 2020 reports did highlight both disrepair and the latter, the need for upgraded insulation to comply with building regulations. On scrutiny of the actual works carried out, it was to a.) upgrade the insulation and b.) apply a further covering over the roof in situ. The decking remained the same and the original roof covering was left in place.

30. In the Tribunal's view this was warranted on the evidence as:

    a. The sample roofs had shown signs of wear and deterioration in 2017 and that situation was only likely to have got worse since then;

    b. It appears that there had been no works to the roofs since around the mid 1990s and so they were all out of guarantee and past their life expectancy;

    c. Although the Tribunal did not have the full set of reports, it was likely that they were all in a similar condition;

    d. Given the works took place in 2020, the need for upgrading insulation was justified by the change in building regulations.

31. No alternative quotes had been provided and the consultation process through s.20 meant that there already had been some control over pricing.

32. Accordingly, subject to the challenges brought by the Applicants, the sums claimed were ostensibly payable.

Breach of Contract

33. The first challenge by the Applicants was based on breach of contract. They focused their challenge under this heading on the Policy document and the reflection of the landlord's obligations under their leases to maintain the roof. They complained that the Respondent had not adhered to their policy of inspecting the flat roofs every 20 years as set out in the Policy. They also queried, whether in respect of block 43-57 there had ever been a replacement roof. From the evidence provided to the Tribunal, set out above, it was satisfied that there had been re-roofing works for blocks 43-57 and 70-81 between 1994 and 1996. The Applicants argued that the evidence was not sufficient to draw that conclusion, however, although there was not much in the way of documentation, from what there was, it was a reasonable inference to draw that it had been re-roofed.

34. That covered three of the four applicants; however there was no evidence in respect of any works having been carried out to block 13-21. That block was the subject of the roof survey report in 2020.

35. Given those that had been replaced in around 1994-1996, and the 20 year expected life span, they should have been reinspected around 2014-2016. The only report the Tribunal were provided with around that date was the Bauder report in August 2017 in respect of block 70-81. As set out above, that recommended at least some patch replacement works to

maintain the effectiveness of the roof and prevent the situation getting worse. Those works were not carried out. As Ms Thomas for the Respondent conceded this put the Respondent in breach of their repairing covenant in the leases.

36. The Respondent had intended to carry out works then and had sent out letters indicating the cost would have been around £6,000. There was some dispute as to whether invoices for that amount had been sent or merely letters indicating that that was the likely cost. However, it was agreed that the figure of £6,000 per leaseholder had been put forward in respect of the cost of the roof work, which had now risen to over £10,000.

37. The Respondents initially contended that although they accepted they were in breach of covenant by reason of the disrepair, the leaseholders had not suffered because of that. Further that there was no time line set for when they would have to carry out those repairs. It was asserted by their counsel that the timeline was what was reasonable in the circumstances. The reason why the works were not carried out in 2017, was because the Respondent wanted to tie them up with cyclical repairs that were on the horizon for painting and windows and so the works were put off until then.

38. However, in the meantime, the costs had increased because not only had the cost of materials and labour increased, but the change in building regulations meant that the insulation needed to be upgraded. The

Respondent argued that this increase could not have been foreseen and so should not be counted against them.

39. The Tribunal does not agree with that approach to the rising cost. More simply put, the Respondent was in breach of covenant at least by 2017. Had it carried out the work then, it would have cost around £6,000. It did not do so. Had it complied with its obligations then, the leaseholders would have paid less. Accordingly, by reason of the continued breach, the cost of the works has risen.

40. The Tribunal therefore sets-off against the sums claimed by the Respondent, against each Applicant the sum of £3,000 to take into account the following:

    a. The difference between the estimated amount in 2017 and the actual amount in 2020 (i.e. around £4,000 less);

    b. The fact that the estimated amount was only an estimate and might have been increased by unforeseen costs at the time (which justifies some reduction of the £4,000);

    c. The leaseholders have had the benefit of not paying for the works and so keeping the money (or not having to borrow the money) for 4 years (which justifies a marginal reduction of the £4,000);

    d. The inclusion of insulation, which although being a benefit to the leaseholders, would not have been necessary from a regulatory perspective and from the comments by the Applicants

was not actually necessary in these blocks as there are no issues with insulation (the issue is therefore neutral).

Lack of Control over Costs

41. The Applicants clarified at the hearing that in essence this head of challenge was the same as the previous one in that had the works been carried out in 2017, they would not have cost as much.

Parity

42. The final challenge relates to the fact that the terrace house owners paid less for the works than the flat leaseholders.

43. The Tribunal accepts the Respondent's defence to the claim of unequal treatment with the house owners, in that the obligations vis a vis repairs and maintenance are, by the lease/contractual terms, different between the leaseholders and the house owners.

Conclusion

44. Accordingly, the Tribunal determines that each of the invoices levied by the Respondent on each Applicant is payable save that the amount payable is reduced by £3,000 to account for the breach of covenant by the Respondent. Mr Butler and Mr Watson are therefore liable to pay £7,965.87, Miss Hamid, £8,588.02 and Mrs Cook, £7,552.36.

45. The Tribunal also makes an order under s.20C of the 1985 Act preventing the Respondent from recovering the cost of these proceedings from the Applicants through the service charge. Not only have the

Applicants been partially successful in their challenge and achieved a reduction in the sum payable, but the Tribunal also took into account the lack of information provided by the Respondent in respect of these works, in particular, the failure to provide all the reports and the failure to set out the fact that the 2017 works were stalled due to other cyclical works.

JUDGE DOVAR

Appeals

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 .

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.

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.

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.