FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BE/LSC/2022/0200**
Property	**:**	**Various flats at Carlton Grove and Meeting House Lane, Peckham, London SE15**
Applicants	**:**	**See attached list.**
Representative	**:**	**Mr Tim Wilson, joint leaseholder of 1 Beechdene**
Respondent	**:**	**London Borough of Southwark**
Representative	**:**	**Mr Peter Cremin**
Type of application	**:**	**For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985**
Tribunal members	**:**	**Judge H Carr** **Mr J Naylor MRICS FIRPM**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**5th January 2024**

DECISION

Decisions of the tribunal

(1) The estimated charges for the major works which are the subject of this application are payable in full.

(2) The tribunal makes the determinations as set out under the various headings in this Decision

(3) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") [and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act")] as to the amount of estimated major works service charges [payable by the Applicants in respect of the service charge years 2020/21. .

The hearing

2. The Applicants were represented by Mr Tim Wilson and Mr Sam Fiddler (previously Sam Wright) at the hearing and the Respondent was represented by Mr Stephen Evans of Counsel. Accompanying him was Mr Peter Cremin, Mr Yasha King, the contract manager, Ms Sonia Foster, the consultation officer, Mr Abi Khan and Mr Michael Dobson, both enforcement officers, Mr Charles Kingsley Building Surveyor and Mr David Pescod a quantity surveyor.

3. The parties agreed that the 2 applications from freeholders, Ms Catherine Johnson (12 Hollydene) and Mr Polliner Chukwuma (22 Beechdene) should be struck out as the tribunal has no jurisidcation to determine the service charges of freeholders. Those applications are therefore struck out.

The background

4. The properties which are the subject of this application are all within the Acorn estate which is made up of a number of blocks of flats maisonettes and dwelling houses located in Peckham South East London and is a purpose built council development dating from the 1960s. The typical construction is made up of a traditional brick construction with flat roofs across the estate. Each of the blocks is typically 2 /3 storeys high.

5. Neither party requested an inspection, and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

6. The Applicants hold long leases of the properties which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

7. The dispute arises as a result of major works carried out to the estate and charged to the Applicants in 2020 – 2021. The Respondent provided a useful chronology of the preamble to the works commencing which is set out below. The numbers in brackets refer to page numbers in bundle.

8.

Date	**Event**
2012	Term partnering agreement (following tender process) for basket rates. Apollo/Keepmoat/Engie (now Equans) becomes partnering contractor for Area 3 of the Borough, under QLTA
June 2018	Blakeney Leigh Ltd (Building Surveyor) engaged by Engie Ltd to undertake a feasibility study into major works on the Acorn Estate
Aug 2018	Stage 1A Feasibility Report by Engie [339-430]
Oct 2018	Feasibility Report reviewed by Calford Seaden consultants
Oct 2018- Feb 2019	Revisions to Feasibility Report
Feb 19	Feasibility Report sent by Calford Seaden to Respondent's Major Works Team (Yasha King/Marc Surtees), who issue an Order 1B for a detailed design
Feb 19 to c. 28.6.19	Engie prepare Task Order Price [486-609] 25.7.19 Calford Seaden issue TOP review report to Respondent's Major Works Team
Jul/Aug 19	Major Works Team send proforma instruction to Home Ownership Team (includes Sonya Foster) to commence s.20 consultation procedure
30.8.19	Section 20 notices issued to leaseholders by Sonya Foster: e.g. Mr Wilson [210-221], Mr Wilson [916-927]

18.10.19	Consultation period ends
c.Nov 19	Order 2 approval by Director of Housing/cabinet for major works scheme
2020	Works begin. Calford Seaden to project manage (surveying, CDM, clerk of works etc.)

The issues

9. At the start of the hearing the parties identified the relevant issues for determination as follows:

   (i) The payability and/or reasonableness of estimated service charges for 2020- 2021 relating to major works carried out in particular

      a. Whether the installation of perimeter railings, maintenance walkways and galvanised ladders to the roofs of the buildings are an improvement for which no charges should be payable under the applicants' leases?

      b. Whether the cost of the roof system, including surface and insulation layer that was installed, is reasonable in amount?

10. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

Was the installation of the perimeter railings, maintenance walkways and galvanised ladders a repair or an improvement?

11. The relevant clauses of the lease are as follows:

> Clause 4(2) To keep in repair the structure and exterior of the flat and of the building (including drains gutters and external pipes) and to make good any defect affecting that structure
>
> Clause 4(3) To keep in repair the common parts of the building and any other property over or in respect of which the Lessee has any rights under the First Schedule hereto[…]
>
> Clause 4(5) the Respondent will ' provide the services more particularly hereinbefore set out under the definition of "services" to or for the flat and to ensure so far as practicable

that they are maintained at a reasonable level and to keep in repair any installation connected with the provision of those services'

Paragraph 6(1) of Schedule 3

The Service Charge payable by the Lessee shall be a fair proportion of the costs and expenses set out in paragraph 7 of the Schedule incurred in the year

Paragraph 7 of Schedule 3

The said costs and expenses are all costs and expenses of or incidental to the carrying out of all works required by sub-clause (2) to (4) inclusive of clause 4 of this lease

Providing the services hereinbefore defined [...]

(6) the maintenance and management of the building and the estate (but not the maintenance of any other building comprised in the estate)

(7) The employment of any managing agents appointed by the Council in respect of the building or the estate or any part thereof PROVIDED that if no managing agents are so employed then the Council may add the sum of 10% to any of the above items for administration

(8) All value added or other tax payable in respect of any of the costs and expenses mention in this paragraph

(9) the installation (by way of improvement) of:

a. double-glazed windows (including associated frames and sills) in replacement of any or all of the exiting windows o the flat and of the other flats and premises in the building and in common areas of the building; and

b. an entry phone system [...]

12. The tribunal notes that whilst there are two forms of leases the relevant terms are very similar. It should also be noted that the Applicants did not provide full copies of the various leases but extracted relevant clauses. Both parties were agreed that the clauses provided were accurate and relevant.

13. The Applicants argue that the installation of perimeter railings maintenance walkways and galvanised access ladders falls outside of the Respondent's covenant 'to keep in repair the structure and exterior' because there were no such installations or equivalents prior to the Respondent's works. The previous absence of the railings, walkways and galvanised access ladders was not a 'defect affecting the structure' that required remedy by the Respondent.

14. The Applicants refer to the Approved Document K of the Building Regulations – 'protection from falling, collision and impact' which sets out requirements for guarding in areas used for maintenance. K2 3.4 provides, ' if access will be required less frequently than once a month, it may be appropriate to use temporary guarding or warning notices'. They say that as access to the flat roofs is not required at a frequency or once per month or more often there is no need for the installations provided.

15. They argue that as the installation of permitter railings, maintenance walkways and access ladders was not a repair, and was not required to remedy a defect affecting the structure or to meet Biding Regulations and was not required for the maintenance and management of the buildings on which they were installed the costs of that installation are not payable under the Applicants' leases.

16. They say that the works were improvements, relying on *Holding & Management Ltd v Property Holding & Investment Trust plc* [1990] 1 EGLR 65 because the works cannot be regarded as 'repair' in the context of the Applicants' leases, and with regard to the state of the particular buildings at the date of the leases. They also argue that the works have no effect on the value and lifespan of the buildings and are not required by current building practice as per Approved Document K.

17. The Applicants argue that the following sums, together with the equivalent proportion of professional fees overhead etc should be deducted from the estimated service charge demand made of each of the Applicants:

1-8 Ashdene - £4,893.57

9-13 Ashdene - £4,374.56

14-27 Ashdene – Nil

1-28 Beechdene - £24,361.93 (plus £1059.21 for 6-9 Beechdene)

1-2 Hollydene - £4,300.41

2-18 Hollydene - £8,563.75

1-19 Oakdene - £10,302.25

11-17 Pinedene - £12,233.93

18-21 Pinedene - £3,262.38

1-28 Willowdene - £33,845.48 1

5-53 Carlton Grove - £19,277.70

53-89 Meeting House Lane - £8,198.87 91-129 Meeting House Lane - £19,277.70

131-145 Meeting House Lane - £4,893.57

147-157 Meeting House Lane - £4,893.57

18. The Respondent makes two arguments in connection with this issue.

19. The first argument is that the works that the Applicants object to are within the scope of Clause 4(5) read in conjunction with Schedule 3 para 7(6). The perimeter railings, maintenance walkways and galvanised ladders to the roofs are in fact and in law works of maintenance. They are ancillary to, but closely connected to the repair of the roof covering itself and were provided to assist future maintenance.

20. The walkways are referred to as maintenance walkways. Yasha King told the tribunal that access is required to monitor/repair water tanks as well as the roof and the gutters. The Respondent argues that the safety standard to adopt is left to the building owner, that there may well be a requirement for access of more than once a month as frequency of access to such areas invariably depends on occurrence of repair issues as well as scheduled inspections. It also points out that the safety standard to adopt is left to the building owner by the Building Regulations.

21. The Respondent also referred the tribunal to evidence from Calford Seaden that the roof guarantee conditions require that sufficient maintenance is undertaken. Alternatives to the works that the Applicants object to would require both training and certification of operatives and scaffolding at least twice a year at a considerable cost.

22. Moreover the perimeter railings, maintenance workways and galvanised ladders to the roofs are not substantial in the overall scheme of the roof repair, albeit that they are new items.

23. The Respondent's second argument is that, if it is wrong to assert that the works are works of maintenance, then it is open to the tribunal to find that the perimeter railings, maintenance walkways and galvanised ladders to the roofs are works of 'repair' properly construed. Its argument is that these are matters ancillary to, but closely connected to, a physical deterioration which has necessitated the repair of the roof covering itself.

24. The Respondent says that what the law requires is consideration of the precise terms of the lease and deciding whether on a fair reading of those terms the items in dispute are or are not improvements. The Respondent cites *Holding & Management Ltd v Property Holding and Investment Trust* Plc.[1990] 1 AER 958 (CA) and *Waaler v Hounslow London Borough Council* [2017] EWCA Civ 45 CA to argue that in this particular case the works are additional subsidiary elements which do not affect the character of the building or its lifespan. The Applicants have provided costings for these elements totalling about £160,000 for the whole estate which are insignificant in the context of major works of £7.89m of which £ 3.5m appears to be roof works and the value of the buildings. The Respondent argues that these are prophylactic measures taken to avoid the recurrence of the deterioration so may properly constitute repair.

25. The Respondent rejects the argument made by the Applicants about building regulations as a red herring, quoting from *Waaler,* that 'the use of better materials or the carrying out of additional work required by building regulations or in order to conform with good practice does not preclude works from being works of repair'. Moreover, building regulations provide that barriers shall be provided where necessary to protect people from falling. The Respondent says that it should not be criticised for providing a safe system of working which appears to go beyond the bare minimum requirements of the BR guidance even if it did not accept that the use of these new items would be as frequent as suggested by the Respondent.

26. In summary it argues that work is properly chargeable.

The tribunal's decision

27. The tribunal determines that the installation of the perimeter railings, maintenance walkways and galvanised ladders are payable under the terms of the lease.

Reasons for the tribunal's decision

28. The tribunal agrees with the Respondent's arguments that the installation of the perimeter railings, maintenance walkways and galvanised ladders are works provided to assist the future maintenance of the estate and therefore the costs are payable under the lease. The installation of these is designed to ensure the future maintenance of the roof and in addition are required by the guarantee.

29. If the tribunal is wrong on these being works of maintenance, it would agree with the argument of the Respondent that the works are works of 'repair' properly construed. It notes the proportionately low cost of these works compared with the project as a whole and also that the works are clearly additional subsidiary works which do not affect the character of the building or its lifespan and therefore fall within the legal definition of repair.

30. It also agrees with the Respondent that the Building Regulation argument is not relevant to the resolution of this dispute. The Respondent is entitled, within reason to provide a safe system of working, and one that is likely in the long run to be cost effective.

Is the cost of the roof system used reasonably incurred?

31. The state of the roof to each block was found to be in very poor condition in 2018 requiring renewal and upgrade of insulation to primary secondary and tertiary roofs. The Applicants do not dispute that the surfaces to the flat roofs to the buildings reasonably required replacement. They note that the previous roofs were uninsulated but agree that the replacement of the roof surfaces needed to include insulation. However the Applicants do not accept that the cost demanded was reasonably incurred. This is primarily because the Applicants consider that the system chosen for insulation was too expensive and that the steps necessary to protect the interests of the leaseholders were not taken.

32. The roof system recommended by Engie Limited and adopted by the Respondent was SWS Plutivec Gold-shield Quantum system inclusive of Kingspan Optim-R insulation to clerestory window roofs, and SWS Plutivec Gold-shield Quantum system with INNOtorch insulation in flat areas. ("the System").

33. They argue Engie Ltd appear to have only considered products from SWS (GB) Ltd (distributors of Plutivec), who had carried out surveys, inspections and core samples and had failed to engage an independent specifier or designer. There is no comparison with products from alternative manufacturers or suppliers within Engie's Design Statement, as adopted by the Respondent.

34. The Respondent explained to the Applicants that the reason for the standard of insulation used was to meet the requirements of Building Regulations for "renovation of a thermal element" at paragraph 5.8 of Approved Document L1B (as then in force). Such a renovation should meet the required Improved U-value at Table 3 column (b), which for a flat roof is 0.18. However the Applicants point to paragraph 5.9 of Approved Document Part L1B which states:

> If achievement of the relevant U-value set out in column (b) of Table 3 is not technically or functionally feasible or would not achieve a simple payback of 15 years or less, the element should be upgraded to the best standard that is technically and functionally feasible and which can be achieved within a **simple payback of no greater than 15 years**. (emphases added).

35. 'Simple Payback' is defined at Section 3 of L1B as follows:

> The amount of time it will take to recover an initial investment through energy savings, calculated by dividing the marginal additional cost of implementing an energy efficiency measure by the value of the annual energy savings achieved by that measure taking no account of VAT.

36. The Applicants say that there was no evidence of a payback calculation of the system adopted or the alternative system Engie considered, meaning that the system used might be considered economically unfeasible. There is no evidence that Engie Ltd, or the Respondent addressed themselves to whether the achievement of a U-value of 0.18 was in fact required under Building Regulations. Neither Engie Ltd nor the Respondent considered alternative, lower specification and cost options as assessed against the 15 year or less payback test. There was therefore no consideration of whether the system adopted was value for money.

37. The Applicants' expert report - the Langley report – suggests that the Respondent could have used the more expensive system in those areas which required it and not for the rest of the work.

38. The Applicants therefore seek a 25% discount on the roof system costs as a whole and consequentially the same discount on the professional fees.

39. The Respondent points out that the question for the tribunal is not whether the expenditure is the cheapest available but whether the charge that was made was reasonably incurred (*Forceux v Sweetman*[2001] 2 EGLR 173).

40. The Respondent points out that the selected roof system came with a 30 year guarantee. The insulation chosen was Kingspan Optim R, 40 mm

think essential to minimise the impact of the roof overlay systems when considering roof level windows, vents and access hatches.

41. The Respondent says in response to the criticisms of the Applicants that:

(i) The Engle Design Statement shows that alternative options were considered.

(ii) Whilst it is probably correct that the Respondent could have selectively used the more expensive system, it is moot whether such an exercise can be done sensibly on a block rather than a house. In any event the lack of a calculation of comparative costs does not make the costs unreasonable. The Applicants have not provided their own calculation. The Respondent points out that only 1 of the alternatives given by Langley – the experts of the Applicants - was cheaper than Engle and the guarantee for this alternative (Proteus) is unknown. Accordingly the Applicants have not shown that the Respondent's roofing solution in unreasonable.

(iii) The costs for the supply and installation of the insulated Goldshield quantum system 30 felt overlay roofing system had been tendered and therefore priced in competition thus demonstrating best value. The installed system has been re-measured by Calford Seaden and final quantities agreed with Equans, the main contractor, in accordance with the term partnering contract. The rate, quantities and ultimate costs for the installed roofing system were considered to be reasonable in amount.

(iv) The Respondent also points out that the email from Sonia Foster in response to s.20 observations by Mr Wright sets out how the Respondent ensures continued best value in terms of quality and price. The partnering contract requires the appointed contractors to review key building components under a process known as price harmonisation. This required the partnering contractors to carry out a further tender process with roofing manufacturers with a view to obtaining competitive costs without reducing quality or workmanship considerations.

42. The Respondent also points to the limits of the Applicants expert evidence from Langley.

(i) First Langley are quantity surveyors and therefore unable to comment on the suitability of the final selected design from a functionality/|FFP point of view.

(ii) They did not do a payback calculation but merely recommended a surveyor do it.

(iii) Like for like quotations were not possible.

(iv) Only three contractors responded to them. Of the three quotes only 1 (Proteus) was below Engie's and used an alternative system for insulation.

(v) The contractors approached by Langey were not engaged in the exercise knowing there was no job it in at the end of the day.

(vi) Langley could not get prices for INNO torch standard IPR insulation where used.

43. The Respondent points to the conclusion and summary of the expert report which ultimately concluded that,

> Savings could potentially have been realised using an alternative waterproofing system as opposed to the SWS Pluvitech Goldshield Quantum system. However the relative value of the 30 year guarantee provided by the system would need to be taken into consideration if using a product that provided a shorter guarantee.

The tribunal's decision

44. The tribunal determines that the charges for the roof system were reasonably incurred.

Reasons for the tribunal's decision

45. The Applicants have failed to demonstrate that the costs for the roof system were not reasonably incurred. As the Respondent argued it is not sufficient for the Applicants to claim that the costs could have been cheaper, they have to show that the decision of the Respondent was unreasonable and they have not done this. The expert report the Applicants provided was not conclusive. The Langley report only pointed to the potential for savings; it did not identify actual savings. The report also noted the value of the 30 year guarantee which applied to the system that was chosen.

46. It was unfortunate that the Applicants' expert was not available for the tribunal hearing. The tribunal understands that the Applicants had no funds to pay for his attendance but it weakened the evidential value of the report. But even if he had attended it is unlikely that his conclusions would have varied from the written report.

47. The tribunal accepts the evidence from the Respondent that it had some measures in place to ensure cost control, that it considered alternatives and that it was reasonable for it to use the system it did. The tribunal therefore determines that the costs were reasonably incurred.

Application under s.20C and refund of fees

48. In the application form, the Applicants applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the tribunal determines not to make an order to be made under section 20C of the 1985 Act.

Name: Judge H Carr **Date:** 5th January 2024

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix 1 - Applicants

Tim and Nichola Wilson	1 Beechdene
Mosebolatan Johnson	17 Beechdene
Xiaoyan Ou	19 Beechdene
Paul Kelly	13 Ashdene
Arthur Almeida	19 Ashdene
Narmen Maulod	24 Ashdene
Georgina Opoku	18 Pinedene
Florence Kaate	21 Pinedene
Tinuola Odeku	16 Willowdene
Mosun and Olusola Popoola	71 Meeting House Lane
Jenny and Ola Onafowokan	99 Meeting House Lane
Zoe and Sam Fidler	119 Meeting House Lane
Emmanuel Oyewole and Oluranti Feyisetan	127 Meeting House Lane
Deirdre McGale	147 Meeting House Lane