9604

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/21UC/LSC/2013/0083**
Property	:	**14 Old Orchard Road, Eastbourne, East Sussex BN21 1DB**
Applicants	:	**Mr PD Webster and Mr JM Webster**
Representative	:	**Mr N Pope, Stredder Pearce, Managing Agents**
Respondents	:	**Mr R McBurney (Flat 1)** **Mrs S McBurney (Flat 2)** **Mrs E Beuzeval (Flat 3)** **Ranmove Homes (Investment) Ltd (Flat 4)** **Mrs T Webster and Mrs A Webster (Flat 5)**
Representative	:	**None**
Type of Application	:	**Sections 27A Landlord and Tenant Act 1985 ("the Act")**
Tribunal Members	:	**Judge E Morrison (Chairman)** **Mr N I Robinson FRICS (Surveyor Member)** **Miss J Dalal (Lay Member)**
Date and venue of hearing	:	**31 October 2013 at Eastbourne Law Courts**
Date of decision	:	**4 November 2013**

DECISION

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The Applications

1. On 12 July 2013 the Applicant freeholders of 14 Old Orchard Road, Eastbourne, applied under section 27A of the Act for a determination that the costs of renewing the main pitched roof covering and associated high level repair and maintenance works could be recovered from the Respondent lessees through the service charge for the year 2013-14.

2. The Tribunal also had before it an application under section 20C of the Act by the First and Second Respondents that the Applicants' costs of these proceedings should not be recoverable through future service charges.

Summary of Decision

3. Subject to meeting the requirements of reasonableness under section 19 as to amount and standard of work, and carrying out section 20 consultation, the costs of renewing the main pitched roof covering and associated high level repair and maintenance works may properly be recovered from the Respondent lessees through the service charge for the year 2013-14.

4. No order is made under s 20C of the Act.

The Lease

5. The Tribunal had before it a copy of the lease for Flat 5 and was told that leases for all the other long leasehold flats were in similar form. The lease is for a term of 99 years from 24 June 1975 at a yearly ground rent of £50.00 for the first 33 years and rising thereafter.

6. The relevant provisions in the lease may be summarised as follows:

   (a) The lessee covenants to pay a specified percentage of a "maintenance charge" which comprises the lessors' expenditure during each financial year ending 24 June on the management and maintenance of 14 Old Orchard Road, including the costs and expenses set out in the Fourth Schedule.

   (b) On account payments may be demanded on 24 June and 25 December towards anticipated expenditure in the current or next financial year.

   (c) The Fourth Schedule refers to the cost of carrying out the lessors' covenants and obligations under the lease.

   (d) By clause 5(4) the Lessors covenant to "maintain and keep in good and substantial repair and condition (i) the main structure

including the foundation walls **roof** chimney stacks gutters and rainwater pipes of the Building ...."

(e) The lease makes no provisions for a reserve fund against future maintenance charge expenditure.

The Inspection

7. The Tribunal inspected the subject property on the morning the hearing. Mr Pope and Mr Lewis from Stredder Pearce were also present. When viewed from the front, the property comprises the left hand half of an Edwardian style semi-detached house with brick and tile hung elevations under a plain clay tiled roof. There is also a single storey ground floor rear extension of brick & rendered elevations with shallow hipped and pitched concrete plain tiled roof which is of more recent construction.

8. The inspection was undertaken mainly from ground level but access was also granted to Farrington Court, an adjoining multi storey purpose built block of flats to the left side of No 14, where No 14 could be viewed from above. The main roof of the property is relatively complicated in that there is a central ridge running front to back between the two semi-detached houses with the main roof to No 14 hipped at both ends and sloping away to the flank wall with additional hipped end and gable end protrusions. In addition to the various ridges and hips, there are valley junctions, back gutters and small sections of lead lined valley gutters and flat roof areas. The clay tiles, apart from the small rear high level section, if not from the original construction, are many years old and many signs of deterioration could be seen including missing, slipped, broken, and delaminating tiles. Further deterioration could be seen to the brickwork where there is considerable amount of spalling. It is not part of the Tribunal's remit to inspect a property in detail but it could be seen that substantial expenditure was required and that further defects would be likely to reveal themselves by more detailed inspection, in particular once scaffolding is provided to give safe high level access for closer examination.

9. The house has been converted into five self-contained flats. Flats 1 and 2 are on the ground floor, Flats 3 and 4 on the first floor, and Flat 5 on the top floor. The internal common parts were inspected and it was noted that the walls and ceilings were painted and that there was a thermoplastic type tiled flooring which was starting to lift in places. During the hearing, it was stated that all the flats are sub-let and the Tribunal considered that whilst no major defects were noted internally, the condition and style of the common parts was below that which might be expected in a building where there were more owner occupiers.

The Law and Jurisdiction

10. The tribunal has power under section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when a service charge is payable. Section 27A(3) specifically provides that application may be made to the tribunal to decide whether a service charge would be payable for costs that have not yet been incurred.

11. By section 19 of the Act, where a service charge is payable before relevant costs are incurred, only a reasonable amount is payable. Once the costs have been incurred, a service charge is only payable to the extent that the costs have been incurred reasonably, and if the services or works for which the service charge is claimed are of a reasonable standard.

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

Evidence and Representation

13. Pursuant to Directions given by the Tribunal on 19 July 2013, the Applicants prepared a Statement of Case dated 8 August 2013 with accompanying documentation. Additional copy correspondence was provided on about 11 September 2013, including a letter from the Third Respondent dated 27 August 2013 which stated that she had no objection to the proposed works. The First and Second Respondents, Mr and Mrs McBurney, provided a Statement of Case dated 19 September 2013. The Third, Fourth and Fifth Respondents did not file any evidence or participate in the proceedings.

14. The only party who attended the hearing was Mr J M Webster. Mr and Mrs McBurney had advised the Tribunal that they would not be attending. The Applicants were represented by Mr N Pope, a Building Surveyor from Stredder Pearce, the managing agents. All others present were there only as observers, including Mr L McBurney, the son of the First Respondent. Accordingly only Mr Pope made oral submissions. However the Tribunal took into account all the written submissions received.

The Applicants' Case

15. Their case was simply that the covering to the whole of the main house roof, excluding the small rear section previously replaced, required renewal, that this work was part of the lessors' repairing obligations

under the lease, and that the cost could properly be recovered from the lessees via the service charge.

16. Some roof repairs had been planned in 2008 to be done alongside other exterior works, but by the time the necessary funds had been collected in early 2010 it was found that the condition of the roof covering had further deteriorated. Section 20 consultation was then carried out for renewal of the entire roof. Mr and Mrs McBurney made (late) representations objecting to the cost and scope of the proposed work.

17. Except for a small area at the rear requiring urgent attention and which was re-roofed recently, the work had not been done. In July 2013 Mr Lewis, a Chartered Building Surveyor at Stredder Pearce prepared a report on the condition of the roof. It concluded that in view of widespread and extensive defects, a full renewal of the roof covering was the most viable option for remedial work. The section 20 consultation process had then been re-commenced, with a Stage 1 notice dated 15 July 2013. Tenders had now been received and Stredder Pearce were ready to send out the Stage 2 notices to the lessees, assuming the Tribunal agreed that the work was covered by the lease and was reasonable.

18. When asked whether it was reasonable to carry out a complete renewal of the roof covering rather than do patch repairs, Mr Pope said that patching was not practicable. As many tiles would be destroyed in the process as were replaced.

19. When asked to comment on the McBurneys' complaint that they were being asked to pay for the work all at once, Mr Pope said that splitting the work into separate phases would add to the overall cost. One of the significant cost components was scaffolding. This cost would increase if the work was phased. Mr Pope also queried what would be done first: the entire roof was in a similar condition. He was hoping to get all the work done over a 4 week period during Spring 2014.

20. Mr Pope was given the opportunity to comment on the McBurneys' Statement of Case. He considered that most of the points raised were irrelevant to the application before the Tribunal and/or beyond its jurisdiction. He relied on the provisions of the lease, which obliged each lessee to pay a proportionate cost of repairs to the roof, and which made no provision for a reserve or sinking fund.

The Respondents' Case

21. Only Mr and Mrs McBurney had objected to the application. Their statement of case raised concerns about being required to pay for the work "in a big bang manner", and its unaffordability. If the work proceeded, they would need to obtain mortgage funding to finance it and this would not be possible unless the leases were extended. They asked the Tribunal to extend the leases "gratis". They acknowledged

that the roof was aged when they had purchased their leases, and submitted that it should possibly have been replaced years ago, funded by the lessees at that time, instead of by the current lessees who had shorter remaining terms. Overall, they felt that that "the cost and scope of the proposed work was not a reasonable approach to the maintenance of this property and in terms of managing costs".

22. Mr and Mrs McBurney also complained about lack of a sinking fund, poor general and roof-specific maintenance over many years, and problems with water ingress from a variety of sources which had caused them financial loss. They considered it unfair that the buildings insurance policy did not cover their loss of rental income although (they said) the freeholder's rental interest was covered, and mentioned other matters clearly outside the scope of the present application.

Discussion and Determination

23. The leases are absolutely clear that repair of the roof is an obligation of the lessors, the cost of which can be recovered from each of the lessees through the service charge. The Tribunal is satisfied from the Applicants' evidence as to the condition of the roof, and from its own observation at the inspection, that renewal of the roof covering is not only a reasonable and appropriate method of repair in this case, but it is probably the only practical course to adopt. The Respondents adduced no evidence whatsoever to contradict this view. It is a long-term solution and given that the leases still have over 60 years to run, it is a method of repair which the lessees can reasonably be expected to pay for.

24. Although liability for service charges cannot be avoided on the ground of financial hardship, the financial impact of major works on lessees through service charges and whether as a consequence works should be phased can be a material consideration when considering reasonableness: *Garside & Others v RFYC Ltd & Others* [2011] UKUT 367 (LC) . However in this case the Tribunal accepts the Applicants' case that it would not be practical or reasonable to split the roof work into phases, spreading the cost over a period of time. To do so would increase the overall cost to the lessees, because of increased scaffolding expense, and add to the overall disruption to the occupants of the building. Most of the roof area is on the side elevation and could not easily be split into different jobs. The Tribunal also bears in mind that the Respondents have known for at least 3 years that the lessors wished to carry out these works and have therefore had time to plan for the cost.

25. As to the complaints about previous poor maintenance to the roof, this would not, even if proved, mean that the cost of repair would not be reasonably incurred now. Reasonableness does not depend on how the need for repair arose: *Continental Property Ventures v White* [2006] 1

EGLR 85 (Lands Tribunal). (Any claim for damages arising out of this or other alleged breaches of the lessors' repairing obligations may be made in the county court.)

26. The Tribunal has no power to extend the McBurneys' leases as requested and their obligation to contribute to the service charges continues irrespective of the length of the unexpired terms, save insofar as this may affect the reasonableness of the type of repair, a factor already considered at para. 23 above.

27. It follows that the Applicants may raise a demand for an on account payment on 25 December 2013 to cover the anticipated reasonable costs of the proposed work. No information as to the likely amount was provided to the Tribunal and this decision does not affect the lessees' rights to make timely observations etc. on the proposed scope and anticipated cost of the work as part of the section 20 consultation exercise. Nor does it prevent the lessees making a further application to the Tribunal under sections 19 and 27A of the Act, should they see fit, in respect of the actual cost or the standard of the work once it is carried out.

Section 20C Application

28. In deciding whether to make an order under section 20C a Tribunal must consider what is just and equitable in the circumstances. The circumstances include the conduct of the parties and the outcome of the proceedings. Mr and Mrs McBurney made their 20C application on the basis that "It appears there is a conflict of interest, with disproportionate benefit in this to the freeholder and his rental property below the roof". This was a reference to Flat 5, the top floor flat, which is demised to relatives of the lessors.

29. Mr Pope opposed the application. He said the lease makes no distinctions between the flats as to who pays for what. All lessees pay for the roof, just as they all pay for the foundations. All lessees have an interest in the roof being kept in repair. Flat 5 pays the largest proportion towards the service charge.

30. The Tribunal makes no order under section 20C as it would not be just to do so. The Applicants have prevailed. It was due only to the McBurneys' longstanding opposition to the proposed works that an application was made to the Tribunal to clarify the position, so that matters could be progressed. Nor is there any evidence of a relevant conflict of interest on the part of the lessors which affects the position.

Dated: 4 November 2013

Judge E Morrison (Chairman)
Appeals

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

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

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

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