

12865



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CAM/11UF/LSC/2018/0012
County Court Claim No : D9QZ560H

Property : 8 Gilbert House, Green Street, High Wycombe HP11 2RL

Applicant : Red Kite Community Housing Limited

Representative : Jonathan Radcliffe (with Kara Tomes)

Respondent : Muzzafar Suhail

Representative : Mr Shokrolla Zahed [Flat 7]

Type of Application : for determination of reasonableness and payability of service charges [LTA 1985, s.27A]

Tribunal Members : G K Sinclair, M Wilcox BSc MRICS & N Miller BSc

Date and venue of Hearing : Wednesday 30th May 2018 at High Wycombe Magistrates Court

Date of decision : 26th June 2018

DECISION

© Crown Copyright 2018

1. By Order dated 21st December 2017 Deputy District Judge Perry, sitting in the County Court at High Wycombe, transferred the claim to this tribunal "to assess reasonableness". The tribunal interprets that as meaning "reasonableness and payability", to the fullest extent of sections 19 and 27A of the Landlord and Tenant Act 1985.

2. For the reasons which follow the tribunal determines :
 - a. That the work done was carried out to a reasonable standard
 - b. That the use of fixed scaffolding at the front of the building, by the street, was both reasonable and necessary
 - c. That it was legitimate, from the wording of the section 20 consultation, for the lessees to have expected moss removal, etc to be focused on the roofs of the main building; not on the front half of the garage roofs to the rear
 - d. That, save for the cost of the partial moss removal, the sum demanded is reasonable
 - e. The amount payable by the respondent (net of statutory interest, court or tribunal costs) is therefore £1 858.24.

Background

3. Built probably in the late 1970s or 1980s, Gilbert House was designed to provide social housing for the local authority close to the town centre. A number of the flats were later purchased by tenants exercising their Right to Buy and, with the encouragement of central government for local authorities to divest themselves of their housing stock and transfer it to independent and often newly created social landlords, Wycombe District Council in December 2011 transferred this building together with the rest of its entire housing stock to the applicant, Red Kite Community Housing Ltd.
4. Following a condition survey of its newly-acquired estate prepared by Savills chartered surveyors a maintenance plan was drawn up and, as the potential volume of work was so large, the applicant considered that it would be obliged to seek tenders in accordance with EU public procurement rules. It could not split the work into development-specific projects, or even item-specific ones such as roof repairs and/or guttering and downpipes, so arranged to enter into a qualifying long term agreement, within the meaning of the Service Charges (Consultation Requirements) (England) Regulations 2003¹ and then consulted on specific projects.
5. The applicant landlord therefore undertook a section 20 consultation exercise, having previously consulted residents on what level of services they wanted and were willing to pay for. Responses to the latter revealed an unwillingness by the leaseholders who bothered to reply (which did not include the respondent) to pay for regular cleaning services in this block. As for the major works, these included exterior painting, replacement of gutters and downpipes and the removal of large areas of moss from roofs.
6. The respondent challenges both the cost incurred and the quality of this major works contract. The landlord sought by County Court proceedings to recover from Mr Suhail his due proportion of the cost. This was then transferred to the tribunal, as explained in paragraph 1 above.

The lease

7. The lease in the instant case is a Right to Buy lease dated 20th November 1989, made between Wycombe District Council as landlord and Iris Ceinwen Martin as tenant. The term granted is 125 years from 21st December 1987, at :

¹ SI 2003/1987

- a. an annual ground rent of £10, plus
 - b. an additional rent payable annually in advance to cover the cost of the landlord's buildings insurance, plus
 - c. another additional rent being a fair proportion of the costs and expenses incurred by the landlord in fulfilment of its obligations under sub-clauses (4) to (8) of clause 4 of the lease, subject to the provisions of paragraph 18 of the Sixth Schedule of the Housing Act 1985.
8. By clause 4(4) the landlord covenants to maintain and keep in good substantial repair and condition the retained parts and the main structure of the demised premises, including the roof, with its gutters and rain water pipes.
9. The tenant's covenants at clause 3 include a covenant to pay the rents specified in the Fourth Schedule at the times and in the manner therein mentioned. The service charge element of the rent is payable in two annual advance instalments, which may include an element for the purpose of providing a reserve fund.
10. As is typical of so many Right to Buy leases, no provision is made either for payment of contractual interest upon arrears of rent or for recovery of any legal costs (save those incurred in or in contemplation of proceedings under sections 146 and 147 of the Law of Property Act 1925).

Relevant statutory provisions

11. Section 18 of the Landlord and Tenant Act 1985 defines the expression "service charge", for the tribunal's purposes, as :
- 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...
12. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :
- 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.
13. The tribunal's powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.
14. Insofar as qualifying long term agreements are concerned, ie those in respect of which the annual contribution of any tenant liable to pay towards the service charge will exceed £100, then section 20 provides that the relevant contributions of tenants are limited to that amount unless the consultation requirements have been either complied with in relation to the works or dispensed with by (or on appeal from) the appropriate tribunal. As the applicant is a "public body" for the

purposes of the Public Contracts Regulations 2015² (implementing the European Public Contracts Directive³) the consultation requirements prior to entry into a qualifying long term agreement are those appearing in Schedule 2 to the Service Charges (Consultation Requirements) (England) Regulations 2003⁴ (as amended). Insofar as the later major works which are subject to a qualifying long term agreement were concerned, Schedule 3 applies.

Inspection and hearing

15. The tribunal inspected the common parts of the building, including external landings and guttering, and the rear car park and garages at 10:00 on the morning of the hearing. Also present were representatives of the landlord and the respondent and his fellow-lessee, Mr Zahed. The party assembled in the long, narrow car park to the rear of the development, which comprises a long three-storey block of 20 flats running along the northeastern side of Green Street. Some garages back on to and form part of the structure of the building. The rest of the garages form two blocks in a line along the rear boundary with adjoining gardens, separated in the middle by a car parking area for about half a dozen cars.
16. The building is predominantly of red brick construction, with walls on the second storey and all projecting windows on the first and second storeys faced with slate hanging tiles. The pitched roof is also of slate. An interesting architectural detail is the row of brick buttresses at ground floor level to the front of the building and, smaller in scale, at first floor level at the rear. The ground floor buttresses, two bricks thick near ground level, are for the most part split vertically into two columns a single header brick thick, deep enough to conceal a downpipe in the recess between them. At the rear these take surface water from the second floor walkway down to first floor level, where it then discharges and flows down the sloping roofs of the connected garages and thence to further downpipes. At one location the applicant showed the tribunal where rainwater flowing down such a sloping roof discharged through a gap just beyond the end cap of a gutter and down the wall directly above and on to a bulkhead light. Mr Radcliffe, on behalf of the applicant, photographed and recorded it.
17. Despite Green Street being on a bus route it is very narrow, as is the pavement immediately in front of the building. Had work to the front of the building been carried out using a cherry picker then it would have been necessary to close one lane, causing serious inconvenience to traffic. Vehicular access to the car park is obtained by a narrow entrance at the southeastern end of the building, while two passageways at ground floor level – each about one quarter of the way along from each end – provide unhindered pedestrian access from the street to the rear car park. Access to the main stairs and a rather gloomy central entrance lobby is secured by locked doors at front and rear. Although a ceiling light was visible there were no obvious switches for turning on lights either to the ground floor lobby or on the concrete stairs.
18. The stairs lead to a tiled, open landing at the rear on both first and second floors,

² SI 2015/102

³ Directive 2014/24/EU of the European Parliament and of the Council

⁴ SI 2003/1987

from which access is gained to the flats. A large section of the wooden ceiling at one end of the first floor was missing. The standard of cleanliness throughout the development was poor.

19. At the hearing the applicant was represented by Mr Radcliffe but his principal witness, project manager Jonathan Rose, was taken ill and unable to attend. The tribunal therefore had his witness statement at page 445 but neither it nor the respondent were able to question him about the contract. The only other witness for the applicant was Kara Tomes, its Asset and Leasehold Manager. She is responsible for day to day management and was able to explain that after asking the tenants' views less than half responded; all saying that they did not want the landlord to put in place a regular cleaning contract.
20. Despite the tribunal's directions the respondent had filed no witness statement, but his statement of case appeared at page 235 in the bundle. In a nutshell his case, supported by some photographs he had taken but not by any professional evidence, was that :
 - a. The work carried out was of poor quality, and some jobs, e.g. replacement of broken downpipes, were not done
 - b. The main roof had not been cleared of moss entirely
 - c. While the front slope of the roofs of the garages by the rear boundary fence were cleared of moss the rear slope was not
 - d. It was unnecessary and too costly to use fixed scaffolding along the entire front of the building, when a cherry picker would have sufficed
 - e. When challenged, the attitude of the applicant's staff was to defend the contractor rather than apply firm, independent supervision.
21. During the hearing the tribunal explained to Mr Suhail that the task before it was to determine whether he was liable to pay the amount claimed for the work actually done; not to discuss what work was desirable.
22. On the subject of the work actually contracted to be done Mr Radcliffe referred the tribunal both to Mr Rose's statement and to the applicant's supplemental statement of case at page 241, especially concerning the precise locations where moss was to be (and was) removed (at paragraphs 7.4 and 7.5 on page 243). The total area mentioned in the specification was 338m², and that was carried out. The specification is at page 253 and the locations where moss was removed were shown on an annotated aerial photograph at page 254. It was removed where it was thickest; mainly in the middle of the roof, and not everywhere. Mr Radcliffe argued that removal of moss from the rear slope of the garage roofs would be difficult and expensive using scaffold, as it was right next to the boundary with adjoining property. The cost would be around £600 per flat.
23. Mr Suhail argued that the specification only identified a measured area, not the locations concerned. He and others would assume that the work was intended to be on the main building, and that removal of moss from the front only of the garage blocks was money wasted.
24. Questioned about the use of scaffold to the front of the main building rather than a cherry picker, Mr Radcliffe explained that if scaffold was not used then it would be necessary to close off parts of the road. There was just enough space to erect

scaffold without encroaching on the highway, and it enabled the work to be done more easily. A cherry picker was used at the rear, from the car park. It was hired on a day rate, whereas scaffold is charged for on a different basis.

25. Other points covered in evidence included :
- a. That if major works were invoiced separately from normal service charge costs it was easier to place aspects of major repairs in a VAT shelter, which is not possible for responsive repairs. If successful, this reduces the overall cost to lessees as there is no VAT element to pass on.
 - b. That when the housing stock passed from Wycombe District Council to the applicant in December 2011 none of the project managers and surveyors transferred over, so the staff were unfamiliar with the estate and problems with particular developments
 - c. That the applicant landlord was familiar with pursuing debtors through the County Court, had little experience of service charge disputes before tribunals.

Discussion and findings

26. The specification before the tribunal, if it can be called that, comprises a table on a single page. On the issue of moss removal it simply says :

| Gilbert House | Quantity | Unit | Rate | Total |
|-----------------------|-----------------|----------------|-------------|--------------|
| Remove moss from roof | 338 | m ² | 9.30 | 3143.40 |

Nowhere is there any indication that moss might be removed other than from the main building. It is said that moss was removed where it was heaviest. Sadly, there are no photographs showing the condition of the building, and its roof, before the work was undertaken (or any specification drawn up). One might then understand if the view were to be taken that the work was concentrated on those places most visible from ground level, namely the long rear slope in the middle of the building (over the staircases), and the front slope of the garages backing on to the rear boundary. Nothing else would be seen.

27. So far as the other contract works are concerned the tribunal saw nothing to indicate, this long since they had been undertaken, that they were carried out other than properly. Some other maintenance to the building, such as repairing the missing section of ceiling and ensuring that water does not pour down on to an electric light fitting, needs to be done, and the property looks dirty because the tenants did not want to pay for a cleaning contract. It is the landlord's building, however, and ultimately it is for it to decide how best to keep the property in good condition and clean if the occupiers are not prepared to look after it themselves.
28. The tribunal is satisfied that the use of scaffold at the front of the building was a reasonable decision for the landlord to take, and the cost is also reasonable.
29. The bulk of the work is reasonable, as is the cost of scaffolding. The real question is whether lessees were misled concerning the moss removal, and its cost. If more had been undertaken the job would have been more thorough, but at a cost. Does the poor quality of the rearmost garages justify such expenditure? In the

tribunal's view that is debatable, as there may be other repair issues there that should be tackled first. However, what the tribunal must determine is the proper cost of the work that was carried out, not what extra might have been charged to the lessees under their leases.

30. Had the specification been explained with greater accuracy then perhaps it may have provoked a better response. The respondent and others may feel that they are being asked to pay for a job half done, and which therefore may have to be repeated sooner than if done properly. A fair compromise can be achieved by deducting from the overall contract price the actual cost of clearing the moss. This has been calculated by the applicant as the sum of £188.60 per flat. That reduces the overall cost for the respondent's flat to £1 858.24.
31. Shortly before the hearing the parties sought to introduce further evidence. This included evidence of meetings and discussions between the parties, including an offer made by the applicant to delete the cost of the moss clearance. This was ignored by the tribunal until raised by them, as it was unclear whether this was an open offer or one made "Without Prejudice". Had either party engaged the services of a solicitor then this would have been identified and steps taken either to be up front with the offer or else ensure that the tribunal did not come to hear of it. The applicant should take care in future.

Dated 26th June 2018

Graham Sinclair

Graham Sinclair
Tribunal Judge