FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00CN/LSC/2019/0003**
Property	**:**	**Phase 2, King Edwards Wharf, Sheepcote Street, Birmingham, B16 8AT**
Applicants	**:**	**Kew Phase Two RTM Company Limited**
Representative	**:**	**Trowers and Hamlin Solicitors**
Respondents	**:**	**The lessees listed in the Schedule of lessees of Phase 2 sent to the Tribunal by the Applicants' Representative on 23 May 2019 (1)** **Wallace Estates Limited (2)** **The Governors of the Schools of King Edward VI in Birmingham (3)**
Type of Application	**:**	**Application for a determination of liability to pay and reasonableness of service charges under sections 27A and 19 of the Landlord and Tenant Act 1985 ("the Act")**
Tribunal Members	**:**	**Judge C Goodall LLB** **Deputy Regional Valuer V Ward FRICS**
Date and venue of Hearing	**:**	**Paper determination**
Date of Decision	**:**	**26 June 2019**

DECISION

Background and history of these proceedings

1. King Edwards Wharf ("the Property") is a residential development in Birmingham. There are two separate buildings which are separated by part of the Birmingham canal network known as Ozells Loop. The building on the east side of the canal is known as King Edwards Wharf Phase 1 ("Phase 1") and it is accessed from Sheepcote Street. The building on the west side of the canal is known as King Edwards Wharf Phase 2 ("Phase 2"). Phase 2 has 126 apartments and is accessed from Browning Street.

2. Phase 2 is managed by an RTM company called Kew Phase Two RTM Company Limited ("the Applicant"). Phase 1 is managed by Kew Phase One RTM Company Limited ("KP1"). Legally, the lessees in each Phase are responsible for only their own Phase.

3. Residential leases were granted in the period 2003 – 2006 approximately for the 126 apartments in Phase 2 which expire in 2126. The lessor was the developer, which held a headlease. The headlease is now held by Wallace Estates Ltd, the Second Respondent. The freehold is owned by the Third Respondent. Although the Second Respondent and the Third Respondent have been served with the application the Tribunal is considering, they have taken no part in these proceedings.

4. The Tribunal has previously issued three decisions relating to the Property:

   a. A preliminary decision dated 11 May 2016, relating to both Phase 1 and Phase 2, in which the Tribunal determined whether service charge payers or individual flat owners were liable for repair of certain structural elements of each Phase (under references BIR/00CN/LSC/2014/0011 and BIR/00cn/LSC/2014/0026), and

   b. A decision dated 13 June 2017, relating to Phase 1 only, determining whether the service charge payer's liability determined in the 2016 decision had to be paid by service charge payers if there was another party who actually or potentially might be liable to pay (under reference BIR/00CN/LSC/2014/0011).

   c. A decision dated 16 May 2018, under Tribunal references BIR/47UD/LDC/2018/0002 and BIR/00CN/LSC/2018/0006, ("the 2018 decision") confirming that proposed expenditure of £277,200 for works to Core 6 would be reasonably incurred by under section 27A(3) of the Act, and also granting dispensation from the necessity to consult on those proposed works, under section 20ZA of the Act.

5. In effect (and the actual decisions need to be read for their full effect), the upshot of the first two decisions referred to was that the management

company for each Phase was responsible for repairing the major defects to the roofs, structural parts of and immediately below any terraces, roofs of the winter garden bay window stacks, and the structural parts of certain balconies in both Phase 1 and Phase 2. The 2018 decision then confirmed that the proposed expenditure by KP1 on a pilot scheme to carry out repairs to Core 6 of Phase 1 would be reasonably incurred, and thus would be legally payable by lessees of Phase 1 in accordance with their service charge payment obligations in their leases.

The application

6. The Applicant has now applied for a determination that if costs of £202,000, inclusive of VAT, were incurred for repairs, maintenance and improvements to Core 14 of Phase 2, a service charge levied on the leaseholders of Phase 2 would be payable for those costs.

7. A director of the Applicant has provided a statement explaining that the directors of the two management companies work together, on a joint committee, to resolve management issues at the two phases. The Applicant has applied the experience from the work on Core 6 of Phase 1 to the proposed works to Core 14 of Phase 2. Whilst the Core 6 works were initially intended to be carried out by CBRE, the quotations they obtained exceeded the authorised expenditure in the 2018 decision. KP1 therefore reviewed their approach and appointed Mainstay Residential Ltd ("Mainstay") to manage the repair works. The repair works were carried out by a contractor called Insight Enterprises Ltd ("Insight"). There was a significant cost saving because this company carried out the required high level works using rope access rather than scaffolding. The works to Core 6 were successfully completed on 9 April 2019.

8. The Applicant says that the next step is to move on to repairs to other parts of the Property. After liaison with lessees, it (in conjunction with KP1), intends to carry out remedial works in stages over the next 3-5 years. The remedial work to Core 14 of Phase 2 has been selected as the next stage. Hence this application, in which the Applicant is seeking confirmation that the costs of proceeding with the proposed work to Core 14 would be reasonably incurred.

Inspection

9. The Tribunal inspected the Property on 24 June 2019. Phase 2 comprises seven cores, which each contain flats from ground level to 6th or 7th floor level, depending on which core is being considered. All flats in a core are accessed from one staircase.

10. The Tribunal was accompanied on the inspection by representatives from Mainstay and Insight and directors of the Applicant. The Tribunal firstly inspected a flat in Core 6 of Phase 1, which had similar problems to those said to exist in Core 14 of Phase 2. The Tribunal was able to note

that the main work had been to the external terraces of the flats on the sixth floor of Core 6. The parapet walls had been cavity walls, but water ingress into the cavities had caused both water damage and risk of structural instability. Work had therefore been undertaken to fill or strengthen the cavities and re-cap the wall. The floor of the terraces at that level had been fully excavated, with new drainage systems created, and then relined with waterproof material and reinstated. The new lining had been laid so that it prevented water ingress behind the timber cladding to the external walls of the apartments.

11. The Tribunal then inspected Core 14 of Phase 2 from ground floor level and noted that three flats at fifth floor level in that Core were designed in a similar way to the apartment that we had inspected in Core 6. We were told that the proposal was to carry out similar works to Flats 1441, 142, and 1443 in Core 14 as had been carried out to Core 6, to cure the water ingress issue.

The Works

12. The works proposed are set out in a specification which was made available to all leaseholders of Phase 2 ("the Specification"), and on the basis of which quotations have been obtained. In very broad terms, the works comprise:

    a. Lifting and setting aside of surfaces to balconies/terraces installed by residents;

    b. Stripping off of materials forming the existing inverted roof system; and installing a new waterproof system supplied by Alumasc and carrying a 20 year warranty, and reinstatement of a finished surface;

    c. Work to ensure a waterproof seal of the upstand to patio doors and glazed screen cills:

    d. Ensuring adequate drainage from the balcony/terraces;

    e. Works to brickwork parapets to remove decaying render, removal of concrete copings, installation of a new 330mm DPC to the top of the cavity wall and reinstating:

    f. Works to doors and windows at courtyard and road elevations to investigate and resolve water leaks where they have been identified;

    g. Check and undertake works necessary to fire stopping within the Core;

    h. External and Internal repairs and redecoration.

13. A fuller description of the proposed works, including contractual provisions about quality standards, terms and conditions, and health and safety obligations, is contained in the Specification which was referred to in the Intention of Carry Out Works Notice served on residential lessees as part of the Applicant's consultation exercise on the proposed works.

Consultation and contracting

14. The application does not request dispensation from consultation. It is said that statutory consultation has been conducted with lessees. Following initial notice of its intention to carry out works, dated 15 March 2019, the Applicant sought three estimates for the works based on the Specification. In its statement of estimates, it confirmed that quotes were provided as follows:

Insight Enterprises Ltd	£150,060.40 plus VAT
Prime Access Limited	£258,050.00 plus VAT
Peak Safety Service Ltd	declined to tender

15. Additional professional fees will also be incurred, being (with VAT included):

Mainstay contract administration fee	£19,000.00
Stroma Approved Building Inspector costs	£850.00
Principal designer and CDM coordinator	1,980.00

16. If Insight is contracted, the total potential expenditure is therefore £201,902.48. The Applicant has asked for approval of expenditure up to £202,000.00. Insight's costings contain a total of about £60,000 for provisional sums and contingency.

The terms of the Leases

17. In its decision of the 16 May 2016, the Tribunal held that the leases should be interpreted as requiring that the management companies' obligation to repair includes an obligation to repair the parts of the Property which the Tribunal understands the Applicants are now proposing to repair. Nothing in this determination should be treated as extending the scope of the 16 May 2016 determination. The proposed costs can only be charged to service charge holders if they are works to the parts of the building identified by the Tribunal as falling within the management companies' repairing obligation.

18. The lessees are obliged to pay a proportion (as set out in each lease) of the proposed budgeted expenditure for these works by virtue of:

    a. Clause 5 and the Tenth Schedule, which together oblige the management companies to carry out the works and do the acts and things set out in the Sixth Schedule;

b. The Sixth Schedule which obliges the management companies to repair the deficiencies at the Property (see in particular paragraphs 1, 3, 23, and 25);

c. Clause 7 of the Eighth Schedule, which is the lessees covenant to pay the service charge; and

d. Clause 5 of the Seventh Schedule which allows the management companies to charge a service charge in advance for the reasonable and proper estimates of the cost of repairs in a service charge year.

The Law

19. Sections 18 to 30 of the Landlord & Tenant Act 1985 contain important statutory provisions relating to recovery of service charges in residential leases. Normally, payment of these charges is governed by the terms of the lease – i.e. the contract that has been entered into by the parties. The Act contains additional measures which generally give tenants additional protection in this specific landlord/tenant relationship.

20. Under Section 27A(1) of the Act, an application may be made to the Tribunal for a determination whether a service charge is payable and if it is, the Tribunal may also decide:-

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

21. Under section 27A(3), an application may also be made for a determination whether, if costs were incurred for … repairs, maintenance or improvement, a service charge would be payable for the costs, and if it would be, the Tribunal may also decide:-

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

22. Section 19 of the Act provides that:

"(1) Relevant costs shall be taken into account in determining the amount of the 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 and 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 cost have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise."

The position of the lessees of Phase 2

23. In its directions dated 14 May 2019, the Tribunal directed that all leaseholders of Phase 2 must be served with notice of the application and copies of the supporting documentation. Leaseholders were directed that if they objected to the application, they were to notify the Tribunal in writing by 7 June 2019. In default, they would be treated as agreeing that the proposed service charge to cover the cost of the Works was considered by them to be reasonable and payable.

24. No leaseholders have objected to the carrying out of the proposed Works or to the cost of them. One leaseholder has raised the question of spreading the payment across more than one years' service charge. She says "[The cost of the remedial works] is a huge cost and to be asked to pay it in one go is difficult and instead this should be spread over a few years."

Discussion and determination

25. The Tribunal determines that expenditure of up to £202,000.00 on remedial works to Core 14 of Phase 2 as set out in the application would be payable by the Respondents through the service charge in their residential leases.

26. The Tribunal is satisfied:

    a. that remedial work is necessary to Core 14 of Phase 2;

    b. that the Specification sets out the necessary extent of the proposed Works in a professional manner; and

    c. that the cost is reasonable bearing in mind that it has been subjected to competitive tender.

27. The Tribunal notes that no Respondent has objected to the Works being carried out or has challenged the overall cost.

28. The Tribunal has carefully considered the objection to the costs being incurred in one service charge year, rather than being spread out over a few years. We do not accept the objector's argument for these reasons:

    a. The need for remedial works to Phase 2 to resolve water ingress issues has been known for some considerable time. Certainly, since the first Tribunal decision in May 2016, the liability of the Respondents to pay has been known. This should have allowed some time for lessees to plan for increased expenditure in forthcoming years;

    b. In fact, the proposed cost of the Works will only resolve problems in one Core of Phase 2. The work to resolve problems in the other Cores will apparently be progressed over the next 3-4 years, so there is already a spreading out of the costs to be incurred in the future;

    c. The Tribunal was informed at the inspection that the proposed expenditure on Core 14 would be funded largely from reserves, but the Respondents had voted on a proposal to pay increased amounts of service charge in forthcoming years so that the service charge account would always be in funds to pay for the remedial works as repairs were carried out in each Core. As the Tribunal therefore understands it, this decision will not result in a one-off request for funds this year, but ongoing service charges over some years will be increased to enable collection of reserves to fund future repairs, in effect spreading out the cost;

    d. It has been established that the limited financial means of service charge payers cannot be put forward as a valid reason for a service charge not to be payable – see *Garside v RFYC Ltd and Maunder-Taylor* [2011] UKUT 367 (LC) paragraph 20.

Appeal

29. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
First-tier Tribunal (Property Chamber)