11871

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AC/LSC/2016/0200**
Property	:	**1-20 Cheyne Close** **London NW4 3NH**
Applicants	:	**Ranjana Shandip Popat (Flat 12)** **Raymond Gordon Oliver (Flat 14)** **Manoj Patel (Flat 17)** **Katayoon Kashefi-Naini (Flat 19)** **Valentina Fernandez (Flat 20)**
Representative	:	**Mills Chody LLP**
Respondent	:	**Places for People Homes Ltd**
Type of Application	:	**Liability to pay service charges**
Tribunal	:	**Judge Nicol** **Mr H Geddes RIBA**
Venue	:	**10 Alfred Place, London WC1E 7LR**

DECISION

Decisions of the Tribunal

(1) As a preliminary issue, the Tribunal refused to permit the Applicants to raise new claims on the morning of the hearing, as detailed in the reasons below.

(2) The service charges imposed by the Respondent in relation to the roof works completed in 2013 are reasonable and payable by the Applicants.

(3) The supervision fees of 10% for the 2013 roof works and 5% for the proposed roof works are reasonable.

(4) The Tribunal decided to make no order under section 20C of the Landlord and Tenant Act 1985.

Relevant legislation is set out in the Appendix to this decision.

Reasons for the Decision

1. The Applicants are the lessees of five of the 20 flats in the subject building. The Respondent is a housing association and the head lessee. Seven of the flats are let on assured or protected tenancies and the rest on long leases. The Respondent is responsible for the maintenance of the building, including the roof, and the Applicants are liable to pay the reasonable costs of that maintenance through their service charges under their respective leases.

2. On 3rd April 2012 the Respondent notified the Applicants and the other lessees that they intended to carry out roofing, decoration and other associated minor works to the building. A further notice dated 3rd August 2012 stated that the tender process had been completed and that Seddons Property Services would carry out the work at a cost of £166,892.21 which, with management fees at 10% and VAT, came to a total of £220,297.72.

3. According to a record of a homeowners' meeting held on 22nd August 2012, the Respondent provided an Asset Management Plan which indicated that there would be works to all parts of the roof at a total cost of £220,300. This figure is almost identical to the figure given in the 3rd August notice, despite the fact that it relates only to the roof, not the other works included in the notice, and allegedly does not account for management fees or VAT. This is at least one of the factors which led the Applicants to believe that the works referred to in the 3rd August notice included works to the entire roof.

4. In fact, it is possible to regard the roof as having two parts, a larger part which is above most of the flats, and a smaller area above flats 16 and 17. The smaller area is divided from the larger area by a parapet and is one storey lower. There is apparently no fixed means of getting from one roof area to the other.

5. At the hearing of the application on 19th September 2016, the Respondent provided three witnesses:

   (a) David Hann is a senior area manager with Langley Waterproofing Systems Ltd, a manufacturer of roofing membranes. His evidence was that the Respondent instructed him to prepare a specification for the main roof and the roofs of the stairwells, entrance, canopies and caretakers office at the subject building. On 5th March 2012 he made a site visit with a representative of the Respondent. They went onto the roof and, according to Mr Hann, the Respondent's representative indicated clearly that the area of roof to be addressed in the upcoming works consisted only of the main roof area. At the time, Mr Hann was

unaware that the lower roof area was part of the same building or the responsibility of the Respondent. As a result, his specification was drawn up with only the main roof area in mind. After the works to the main roof had been completed, in October 2013 he was asked to draw up a condition report on the lower roof area, preparatory to a separate programme of works. He says he also drew up a specification for that but the Tribunal was not provided with a copy.

(b) Tony Ronayne is the Operations Manager for the south east region of Novus Property Solutions Ltd, previously known as Seddons Property Services. His evidence was that, by letter dated 15th June 2012, his firm was asked to tender for work relating to a roof renewal, internal and external decoration and associated works to the subject building. He had a site meeting with a representative from the Respondent and the roofing sub-contractor, Thameside Roofing Ltd. Like Mr Hann, he said that the Respondent's representative indicated clearly that the area of roof concerned consisted only of the main roof area and did not include the lower roof area. The roofing sub-contractor measured the area and priced their work accordingly. Mr Ronayne quoted a fixed price based in part on the roofing sub-contractor's input. After his firm was chosen as the main contractor, during the works, he attended on site several times where he also met the Respondent's representatives. At no time was he instructed to carry out any work to the lower roof area. He says that, if he had, the price would accordingly have been larger.

(c) Nurul Huda is a Contract Delivery Manager for the Technical Services Team at the Respondent. He was asked to take over supervision of the roof and other works in 2013 when his predecessor left (that person has since passed away). His evidence was that he understood from his predecessor and his conversations with others involved, including the contractors, that the only roof area involved was the main roof. The freeholder provided a dilapidations report which alleged that the lower roof area was in need of maintenance and so Mr Huda had Mr Hann carry out the aforementioned condition report for that area, leading to a proposal for a further works programme to address it. (Apparently, the freeholder is considering erecting further storeys to this part of the building and it is possible the further works will not go ahead, but that has yet to be finalised.)

6. One of the Applicants, Mr Oliver, gave evidence to the Tribunal. The Tribunal was also provided with a witness statement from Mr John Fernandez, the husband of one of the Applicants and manager of her property, but he did not attend the hearing. For both of them, the effect of their evidence was that they had gained a clear impression that the scope of the 2013 roof works contract should have included the lower roof area but they had no direct evidence of whether it did because they were not privy to any relevant conversation, including those involving the Respondent's above three witnesses.

7. The works were carried out between January and October 2013 at a final cost of £161,776.25 (lower than the tender) plus the 10%

supervision fee and VAT. The Applicants' case, as put forward at the hearing by their counsel, Mr Jeff Hardman, was that the contract works had at all times included works to the lower roof area, within the price quoted. He said that the failure to do those works was a mistake of the contractors. This mistake would mean that the service charges were unreasonable, having included the cost of works not carried out, and charges for the further proposed works to the lower roof area would constitute double-charging.

8. When the Tribunal pressed Mr Hardman on this claim, he did not appear to have worked through the consequences. The scenario he proposed included no-one noticing the mistake at the time and the acquiescence of all parties when they did discover the mistake. No reason was apparent or proposed for why Mr Hann's response should be to lie about what happened rather than to reject responsibility for the error. More significantly, no reason was remotely apparent or proposed for why the Respondent should have accepted the mistake, the result of which would have been their paying for works not carried out in respect of the seven flats let on assured or protected tenancies. Essentially, the Applicants' case was that there was a criminal conspiracy to cover up a mistake, to their financial cost, and that one of the victims, the Respondent, took part in that conspiracy.

9. The Applicants' claim is inherently incredible. It would require compelling evidence in support, including a sound case as to why the Respondent's witnesses should not be regarded as credible. While the Applicants were able to point to evidence which indicated that the Respondent might have initially intended to include works to the lower roof area, they had no other evidence to support their case and gave no reasons as to why the Respondent's witnesses should not be believed. The Tribunal has no hesitation in accepting the Respondent's evidence: whatever the Respondent's original intention, the works as notified to the lessees, specified by Mr Hann and carried out by the contractors were priced and completed on the basis that only the main roof area was included.

10. The Applicants challenged the supervision fees of 10% for the 2013 works and 5% for the proposed works to the lower roof area on the sole basis of the aforementioned alleged mistake. In particular, it was said that, if the Respondent had not noticed the contractors' mistaken omission of works to the lower roof area, the supervision would clearly have been defective and would not have justified the fee of 10% while the further fee of 5% would be part of the double-charging. Since the Tribunal has rejected the claim that there was any such mistake, the challenge to the supervision fees falls away.

11. When the application was originally issued, the Applicants also challenged the quality of the 2013 works. However, by letter dated 11th July 2016 the Applicants' solicitors dropped that claim and used that to explain why they were not producing a Scott Schedule in accordance with the Tribunal's directions. The parties' solicitors followed this up by

letters dated 12th and 14th July 2016 to limit the issues in the proceedings to those already covered above, plus an application under section 20C of the Landlord and Tenant Act 1985 which is dealt with below.

12. However, on the morning of the hearing on 19th September 2016, Mr Hardman sought to introduce issues not previously raised. He did so verbally, without any written submissions. He alleged that the Respondent's intention was to include works to the lower roof area and the failure to carry that through invalidated the consultation process under section 20 of the Landlord and Tenant Act 1985 and increased costs by splitting works unnecessarily into two phases. Although paragraph 4 of the Applicants' Legal Submissions, which constituted the Applicants' pleading in these proceedings, alleged the Respondent's intention, Mr Hardman conceded that these points had not otherwise been pleaded or raised in correspondence.

13. The Tribunal asked Mr Hardman what evidence he had to support these claims. He said he intended to adduce evidence of the additional cost by obtaining Mr Hann's expert evidence in cross-examination. Mr Kester Lees, counsel for the Respondent, pointed out that Mr Hann was not present as an expert and no direction had been given permitting the use of expert evidence. Mr Lees also pointed out that the Respondent had not considered disclosure of any documents relevant to these new issues because they had not been part of the case they had been required to meet.

14. The Tribunal pointed out that the lateness of the Applicants' claim that the consultation was defective meant that the Respondent had had no opportunity to consider or make an application for dispensation under section 20ZA of the Landlord and Tenant Act 1985. In turn, the Applicants had had no opportunity to consider or obtain evidence of prejudice arising from the allegedly defective consultation in accordance with the Supreme Court's decision in *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854.

15. Both parties were asked, and took time, to consider their approach if the new issues were allowed in. Neither wanted the wasted time or expense of an adjournment. Mr Lees submitted that the new issues should be excluded while Mr Hardman argued that they should be allowed in and the hearing should continue as best it could on the material available, to be followed later by further written submissions.

16. The Tribunal considered this as a preliminary issue, before the evidence was heard. The parties were informed at the hearing that the Tribunal's conclusion was that the Applicants would not be permitted to raise the new issues. The Tribunal's reasons are that:

(a) The new issues were never pleaded or raised in correspondence prior to the hearing.

(b) The new issues did not arise from existing material but were entirely new so that there had yet to be relevant disclosure or witness statements addressing them.

(c) If the new issues were to be allowed in, the only fair approach would be to adjourn on an entirely new set of directions. This would be contrary to the fair and effective administration of justice, involving extensive delay and expense which could not wholly be compensated for by an order against the Applicants to pay the costs thrown away.

(d) The parties between them had in correspondence expressly limited the issues in these proceedings.

(e) The Applicants had no positive case or evidence in support but intended to rely entirely on cross-examination to put in expert evidence for which there was no permission.

(f) The Tribunal tries to conduct itself flexibly and informally and to take into account the difficulties encountered by unrepresented and inexperienced litigants. However, the Applicants have been represented by solicitors and counsel throughout.

17. The Tribunal could see the beginnings of a case on behalf of the Applicants arising from the evidence that the Respondent had originally intended, and the Applicants had gained the impression, that works to the lower roof area would be included within the 2013 works. However, Mr Lees pointed out that the Respondent did not accept that that had been their original intention, let alone that there had been any mistake in not following that through, and that they had had no opportunity to establish their case. He urged that the Tribunal should, therefore, reach no conclusion on this issue.

18. More significantly, the Tribunal cannot see that any such error would be relevant. The evidence was that the Applicants were charged the appropriate price for the work carried out. There was no evidence that having the work to the two areas of the roof carried out at different times had led to any increase in cost above that which would have been incurred if they had been done at the same time. Therefore, there is no evidence that any such error caused any financial loss to the Applicants.

19. The Applicants sought an order under section 20C of the Landlord and Tenant Act 1985 that the Respondent should not be permitted to add their costs of these proceedings to the service charge. Mr Hardman argued that it had been necessary to bring the proceedings in order to reveal the aforementioned error in failing to include works to the lower roof area in 2013. However, he did not establish that there had been any such error or that, if there were, it had any relevant impact. In the light of all the above findings, it would not be just or equitable to make such an order and the Tribunal declines to do so.

Name: NK Nicol **Date:** 20th September 2016

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
(c) in the case of proceedings before the Upper Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
(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.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(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.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means 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, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or 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 costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, 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.

(2) The application shall be made—
   (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
   (aa) in the case of proceedings before a residential property tribunal, to that tribunal;