



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

Case Reference : **CHI/00HX/LDC/2021/0051
CHI/00HX/LSC/2021/0010**

Property : **Block 3, Stratford Close, Swindon,
SN5 8AE**

Applicant : **SWINDON BOROUGH
COUNCIL**

Representative : **Jack Webb (Counsel
Instructed Directly)**

Respondents : **(1) EHUD SHAPIRA
(2) SIVAN SHABETAI
(3) DAVID MORRIS**

Type of Applications : **s.27A, s20ZA LTA'85**

Tribunal Members : **Judge Dovar
Mr D Ashby DipSur FRICS**

**Date and venue of
Hearing** : **5th August 2021, Remote**

Date of Decision : **15th September 2021**

DECISION

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1. These are two applications in relation to the same works to the roof of the Property. The first, the application for a determination of payability of service charges, under s.27A of the Landlord and Tenant Act 1985 ('the Act') is dated 15th February 2021 and is made by two of the long leaseholders of the Property, Ehud Shapira and Sivan Shabetai who own flat 18 and David Morris who owns flat 28 ('the Leaseholders').
2. The Second, dated 24th May 2021, is by the Landlord ('Swindon') and is for dispensation from the consultation requirements imposed by the Act.

The Property

3. The Property is one of four blocks of flats on an estate ('the Estate'). Blocks 1, 2 and 3 each have 10 flats and block 4, 5 flats. The ownership structure of the flats is mixed. Some are owned privately on long leaseholds, other are occupied by social housing tenants of Swindon; the former a result of the operation of the right to buy legislation under the Housing Act 1985. Block 1 contains solely social housing tenants, whereas block 2 has 7 long leaseholds, block 3, 2 long leaseholds and block 4, 3 long leaseholds.
4. The Estate was constructed in around 1977 and the roof and upper parts of each block are clad in corrugated asbestos sheets which have been decorated.

The Proposed Works

5. Swindon proposes to carry out (and is in the process of carrying out) extensive roof replacement and related works to each block; to replace

the corrugated asbestos sheeting with a light weight steel tile system.
The total cost is estimated at £626,367.76.

The Statutory Consultation Process (s.20 Landlord and Tenant Act 1985)

6. On **22nd May 2019**, Swindon sent out the first notice in the statutory consultation process, a notice of intention. The works to the Estate, including the Property, were to

‘remove existing asbestos roof, wall cladding and rain water goods and to replace with a light weight steel tile effect AA fire rated system’.

7. The justification was

‘the materials are coming to the end of their life cycle and deterioration of the asbestos material used is now allowing water ingress into the roof space and possible the internal cavity’.

8. It was stated that the consultation period would end on **20th June 2019**. The letter was signed by Vicky Lodge, the Housing Right to Buy & Leasehold Officer. Ms Lodge (now Lewis) confirmed in oral evidence that she had been asked to send out this notice to all four blocks as a result of internal investigations into all the buildings. One trigger for this survey was a continual issue with water ingress to flat 18 in block 2. The instruction to send out the notice had come from Swindon’s internal major works department. She was unable to say precisely why it was considered that all four blocks should be dealt with, but assumed it was at least due to economies of scale.

9. On **7th May 2020**, Ms Lewis, as she had become, on behalf of Swindon sent out the second notice in the consultation process, the Statement of Estimates. The range from the three tenders provided for the works was £626,367.76 to £727,576.72. It was stated that the intention was to proceed with the lowest tender, the cost was to be spread across the four blocks, which each unit paying 1/35th of the cost; i.e. £17,896.22. The consultation period was said to end on 6th June 2020. One observation was recorded as having been made to the notice of intention, the response to which was

‘The Roof has now reached its expected life span. This we suspect, along with the roofing felt (also coming to the end of its life span) is causing leaking into some of the apartments and that it is only a matter of time before this starts to become an issue for other apartments too.’

10. It appears that as a result of observations received in relation to this notice, a further independent survey was carried out in June 2020. That recommended replacement of the roof to all the blocks.
11. On **1st February 2021**, Swindon gave a third notice of its intention to place the contract for the works with Hugh LS McConnell Ltd. It is not clear whether this notice was served because Swindon had decided not to contract with the lowest tendering party (in which case this was a statutory requirement) or because they simply wanted to provide greater transparency.

12. However, in this notice two further observations to the notice of estimates were noted, one of which queried why it was necessary to carry out replacement to a roof that had not leaked; i.e. the Property. The response was

‘The roof is beyond or at least coming to the end of its useful life, there have been a number of reported failings, repairs have and can be unsuccessful; it’s reasonable to foresee that failings will become more frequent and costly given the age. Replacing the asbestos roof covering and associated cladding with a more modern warranted system is the most economically advantageous long-term solution, improving the aesthetics of the building and likely adding value to the properties within.’

Expert evidence

13. Directions were given on 18th March 2021 in respect of the s.27A application. They included provision for either party to apply for permission to rely on any expert evidence. Neither party applied.

Reports

14. The Tribunal was provided with a number of reports which Swindon relied at the time in coming to its conclusion to firstly carry out the intended works and then to continue with them in the face of concern from the leaseholders.
15. The first survey, was an internal survey, by the major works team of Swindon. The Tribunal was provided with a revised report dated 15th

August 2019 (the original report seems to have been provided around April 2019), which noted an external visual inspection to ascertain the need for replacement works. It concluded

“... it was identified that 3 out of 4 blocks have had remedial works carried out to repair water ingress, this would point to the degradation of the asbestos cement roof and roofing felt on 3 out of the 4 properties. It is surmised that if the materials are starting to fail on 3 out of 4 blocks then it is only a matter of time before repair or replacement is required on the remaining block.”

16. It therefore appears that prior to serving the initial notice, Swindon had only carried out a survey using its own team of surveyors and that in light of observations received from leaseholders, it then carried out a further survey or all the blocks.
17. The Tribunal was also provided with a report on condition of asbestos cement roofs and cladding dated **18th June 2020** from Commercial Property Surveys Limited. They noted significant deterioration with ongoing leaks. However, the leaseholders were concerned that this information, which they considered had driven the conclusion to replace all four roofs, had been provided by Swindon. The report states that

‘We understand the roof and cladding is leaking from various areas and there are significant defects as highlighted in the report above throughout. The roof has been repaired historically and such repairs have been ineffective to date.’

18. The Leaseholders considered that the surveyor had been misinformed by Swindon as to historical repairs and that this had tainted the conclusion. Whilst this was to some extent correct, in that, in particular in relation to the Property, the repair history was not as set out, the surveyor had accessed the roof of each block and recorded their condition independently. It was clear from that inspection alone, that replacement was the recommended solution.
19. Given that it was provided after the notice of estimates was issued and before the contractor notice, the June 2020 survey appears to have been in response to observations to the notice of estimates. The later notice, in February 2021, may itself have been the cause of a further survey in order to address the accusation that Swindon had tainted the result with misinformation.
20. In any event, a further report was provided by Michael Kilbey Associates dated **19th April 2021** and Swindon did not provide any background information this time; this was expressly stated in the report itself. A survey was carried out for each block and the condition of the roof inspected and commented on. It was noted that the roof sheets had deteriorated and had started to break down and that although the roof could be recoated, there were risks of deterioration. In light of that, the recommendation was for replacement of the existing cladding with new metal sheeting for the Property and the other three blocks.

Leaseholders' case

21. Ehud Shapira and Sivan Shabetai provided a statement on 12th April 2021 in which they set out their objections to paying for the cost of the intended works. Mr Morris's statement is dated 11th April 2021 and is in identical terms.
22. Firstly they state that the works to their particular block, block 3 is unnecessary and extremely expensive. Secondly, they point to the failure to adhere to the consultation requirements.
23. In respect of the first, they rely on the following:
 - a. that Swindon has used the condition of the other blocks to assume that their block is also in need of repair. This is despite the fact that they know that the condition between blocks vary;
 - b. whilst block 2 has a long history of leaks, block 1 has not had a leak since 2009 and the Property since 2012;
 - c. The decision to carry out the works was reached without the assistance of a professional report and was contrary to both the historical records relating to the roof and also to an asbestos report in 2018 which stated that the risk from the asbestos in the roof was low. The independent reports supporting Swindon's approach came only after they had decided to carry out the work and after the consultation period had ended. The first independent report was also tainted by misinformation regarding the number of issues with the roof, particularly that of the Property.

24. The Leaseholders were unable to point to any pecuniary disadvantage suffered by reason of the fact that the statutory consultation process had not been followed in that too short a time had been given for responses. At best they said they may have been able to instruct surveyors if they had been given more time to respond.

Landlord's case

25. Vicky Lewis provided a statement on behalf of Swindon. She is their Right to Buy and Leasehold Officer. She also gave evidence. It was clear that not only was she not the driving force behind the decision to replace all the roofs, but that she was not privy to the decision making process. She referred to instructions she had received from the major works team to send out the statutory notices, but was unable to give much detail as to the thought process behind that. Whilst the Tribunal was told that members of that team were available to join the discussion, they had not provided any written statements in accordance with the directions and it was not appropriate to hear from them at this late stage.
26. The Tribunal was therefore left to consider the various reports provided as well as the submissions made by counsel on their behalf.

Discussion

27. The main issue is the decision to replace the roof to block 3, rather than to continue to maintain it.
28. Whether or not the cost of works are recoverable from the leaseholders is determined by two factors. The first is the lease terms, the second is the

cap imposed by s.19 of the Landlord and Tenant Act 1985. That only permits recovery of costs to the extent that they are reasonably incurred and the work to a reasonable standard.

29. It was fairly accepted by the leaseholders that the roof was in disrepair. That was clear from the reports provided. Although what was proposed was not a like for like replacement, that would be undesirable given the asbestos construction of the original roof. To that end, although it could be seen that the new roof would be an improvement on the old, it would be more in the nature of repair than improvement. In any event, the lease in this case expressly allowed for improvement. The works therefore fell within the terms of the lease, indeed given that the roof was in disrepair, there was an obligation on the landlord to repair it.
30. The leaseholders' case is that it is not reasonable to incur the costs of full roof replacement when maintenance will do for now. Their main argument was that the roof was not failing at the moment and so it was premature to replace the roof. This bordered on a submission that until it actually started to leak, there was no good reason to replace it.
31. The issue was therefore whether the cost of replacing the roof would be reasonably incurred. In the Tribunal's view it would be, for the following reasons.
32. Firstly, undoubtedly the roof was beyond the end of its natural life. That it was not leaking was not a great comfort in that it could at any moment, its condition was relatively poor and one of the other roofs, that had been constructed at the same time, had leaking issues.

33. Secondly, if the roof failed, the landlord would most likely be liable for any damage suffered by a leaseholder.
34. Thirdly, there was no doubt some economy of scale in having all four roofs replaced at the same time.
35. Finally, and importantly, it was difficult to see how it could be said that the decision to renew this roof was unreasonable. In the Tribunal's view it was well within the reasonable range of responses that a landlord could have in the circumstances. It is a trite saying in service charge cases that the landlord is not obliged to go with the cheapest option, that is not the test. The fact that the landlord may have saved money in the short term by patch repairing this roof, does not mean that it is unreasonable for the landlord to replace the roof. The leaseholders recognised that at some point in the near future the roof would eventually need replacing.
36. Therefore although the Tribunal considered that the landlord had been premature in suggesting in its notice of intention that it was going to replace all the roofs, it had listened and responded to the observations made, and commissioned further reports from which its reconsideration of that issue, meant that it was reasonable to replace the roof to all four blocks. It was through the statutory consultation process that the landlord had listened to the leaseholders' concerns, had acted on them, and in this case that confirmed its initial view as to what works were needed.

37. Insofar as there was any failure to adhere to the statutory consultation requirements, they were minor, being a matter of the consultation process being cut short by a few days. The Tribunal was not satisfied that any real prejudice had been suffered. Whilst the Applicants may have lost a few days to respond, they were unable to point to any financial prejudice they had suffered. Although the leaseholders said they may have been able to obtain their own survey in time, they didn't and they didn't instruct any experts for this hearing. Further, it was as a result of those observations that the landlord obtained further surveying evidence which confirmed its approach.
38. Accordingly, whilst there were minor errors in that insufficient time was given for observations to be made, the Tribunal dispenses with those requirements.

Conclusion

39. The Tribunal considers that the cost of replacing the roof to the Property is a cost that is reasonably incurred and dispenses with the statutory consultation requirements. Swindon is therefore entitled to charge each unit 1/35th of the total cost; being £17,896.22.

Judge Dovar

Appeals

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.

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.

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.

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.