UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – reasonableness - repair and renewal – whether like for like renewal required – materials for replacement roof

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

THE LONDON BOROUGH OF LAMBETH

Appellant

and

MS GERLINDE GNIEWOSZ **Respondent**

Re: 21 Bodley Manor Way,
London,
SW2 2QH

Judge Elizabeth Cooke
8 September 2020
Royal Courts of Justice

Mr Desmond Kilcoyne for the appellant
The respondent presented her case herself

The following cases are referred to in this decision:

Co-operative Insurance Society Limited v Fife Council [2011] CSOH 76
Credit Suisse v Beegas Nominees Limited [1994] 1 EGLR 76
Proudfoot v Hart (1890) 25 QBD 41

Introduction

1. This is an appeal from a decision of the First-tier Tribunal ("the FTT"), in exercise of its jurisdiction under 27A of the Landlord and Tenant Act 1985, about the reasonableness of a service charge for the replacement of part of the roof of the respondent's flat. The respondent holds a long lease of flat 21, 1 – 51 Bodley Manor Way and the appellant is the freeholder.

2. The appeal was adjourned, because of the pandemic, from 12 May 2020 to 8 September 2020 and was heard at the Royal Courts of Justice. I am grateful to Mr Kilcoyne, counsel for the appellant, and to the respondent who presented her own case very skilfully.

3. In the paragraphs that follow I set out some factual background and the relevant terms of the lease and then explain the FTT's decision before setting out the arguments on the appeal and my conclusions.

The factual background and the lease

4. 1 – 51 Bodley Way comprises three blocks of purpose-built flats, and is about 40 years old; the respondent is the assignee of a long lease of her one-bedroomed flat. She made an application to the FTT in June 2018 for a decision about the reasonableness of service charges demanded by the appellant for the years 2013/14 to 2018/19. She challenged the reasonableness of dozens of items in the service charges over those years; the only one in issue in this appeal is the demand for an advance payment for the replacement of part of the roof in 2018/19.

5. The part of the roof in question is the front, south-facing roof over the respondent's kitchen and bathroom, over a shared staircase, and over part of one other flat. The parties agree that it is seriously defective and requires replacement; it has been covered with a tarpaulin, held in place by sand bags, for two years. The original roof was zinc, and the appellant proposes to replace it with glass-reinforced plastic ("GRP"). The total cost is said to be £5,659.64, and the respondent's share has not yet been decided but is likely, Mr Kilcoyne told me, to be at most 2.5% of the cost. Before the service charge was demanded a consultation under section 20 of the Landlord and Tenant Act 1985 was carried out.

6. The lease is dated 12 April 2004. It uses the term "the Building" to refer to the whole of 1 – 51 Bodley Manor Way. It demises the flat (defined to exclude structural walls and the roof, roof-space, timbers and joists) to the tenant for a term of 125 years from 12 February 1990. The tenant covenants to pay:

> "2.2 … a rateable and proportionate part of the reasonable expenses and outgoings incurred by the Council in the repair maintenance improvement renewal and insurance of the Building and provision of services therein … as set out in the Fourth Schedule… ("the Service Charge").

7. Clause 3.2 of the Lease contains the landlord's obligations, as follows:

> "3.2 Subject to the payment by the Tenant of the rents and the Service Charge and provided that the Tenant has complied with all the covenants agreements and obligations on his part to be performed and observed to maintain repair redecorate renew amend clean repoint and paint as applicable and at the Council's absolute discretion to improve
>
> > 3.2.1 the structure of the Building and in particular but without prejudice to the generality hereof the roofs foundations external and internal walls (but not the interior faces of such part of the external or internal walls as bound the Flat or the rooms therein) and the window frames and timbers (including the timbers joists and beams of the floors and ceilings thereof) chimney stacks gutters and rainwater and soil pipes thereof…"

8. Crucially therefore the appellant as landlord is required to "repair … renew … and [at its discretion] improve … the roof."

9. Clause 3.8 obliges the landlord "To redecorate externally the Flat and Building of which it forms part … in a good and workmanlike manner with good quality materials to the reasonable satisfaction of the Tenant"; the respondent has referred to it in her grounds of opposition, but it relates only to redecoration and is not relevant to this appeal.

10. The Third Schedule reserves to the landlord the right to "rebuild alter or change the use of" other buildings but not the Building itself; the respondent argued that this prevents the landlord from carrying out a repair that amounted to an alteration of the Building, and that a new roof made of GRP would be an alteration. However, that provision simply preserves the landlord's rights as regards other buildings and does not regulate what it can do with the Building itself. What it must or can do is defined by the landlord's obligations, of which the relevant ones are set out above.

11. The Fourth Schedule sets out the expenditure that the landlord can recover from the tenant by way of service charge, and at paragraph 1 expressly includes the cost of complying with clause 3.2.

The FTT's decision

12. In the FTT the respondent was the applicant; I am going to refer to the parties as "Ms Gniewosz" and "the landlord" for the avoidance of confusion. Ms Gniewosz challenged the proposed expenditure on the roof on a number of grounds, which are not all reflected in the FTT's decision. Her first basis for challenge was that the replacement of the roof in GRP rather than zinc would be a breach of the landlord's covenant in the lease.

13. Her other grounds of challenge relate to her view that a like-for-like metal roof would be better value for money than a GRP roof, to the detail of the section 20 notice, to the timing of the work (which she says should have been done at the same time as the renewal of

other parts of the roof a few years ago), the need to aggregate the work with the replacement of other roofs on the estate, the insufficiency of warranties and guarantees in the contract proposed and the likely poor workmanship, and potential breaches of building regulations and planning policies.

14. The FTT, which had to deal with a huge volume of material in connection with challenges to a great many charges, found in Ms Gniewosz's favour on her first point, about breach of covenant, and therefore did not deal with the other issues and did not make findings on all the evidence it had heard (paragraph 79 of the FTT's decision). Ms Gniewosz was, I believe, expecting that I would hear argument about all her grounds, so that the Tribunal could substitute its own decision for that of the FTT on the charge for the roof. That is not possible. The appeal was a review not a re-hearing and therefore the Tribunal has heard no evidence about the unresolved challenges, and the FTT did not set out in its decision the evidence it heard on the grounds of challenge that it did not determine. I explained at the beginning of the hearing that if the appeal succeeds the challenge to the charge for the roof will have to be remitted to the FTT for a re-hearing.

15. I have to set out the FTT's decision in some detail because there is dispute about what it actually decided and the basis on which it did so.

16. At paragraph 80 and following the FTT observed that the parties agreed that a new roof is needed and that the dispute was as to whether the roof should be replaced with zinc or with GRP. It was agreed that a zinc roof would be the more expensive, but that zinc would last for 40 years whereas GRP would last about 20 years.

17. The FTT recited the terms of clause 3.2 of the lease and Ms Gniewosz's argument that the proposed work must fall under one of the three obligations to "repair", "renew" and "improve". It recorded (at paragraph 87) her view that "the appropriate heading is "renewal", which would import an obligation to replace with like-for-like materials"; that the substitution of GRP for zinc "is not such replacement, but a lower quality and less attractive alternative" and is therefore not within the repairing covenant so that the cost of it is not payable.

18. At paragraph 88 the FTT rehearsed the landlord's argument that the work proposed is a repair or, alternatively, an improvement, and that the lease does not require like-for-like replacement and that the landlord has a discretion as to the materials it uses.

19. The FTT went on to say at paragraph 91 that it was immaterial whether the proposed work was repair, renewal or improvement, but added that, in the light of the conclusions it was going to reach, improvement was not the relevant head. It then asked itself at paragraph 93 whether this specific proposed replacement is one that the landlord is entitled to effect under the lease. If it is, said the FTT, then the cost can be passed on as a service charge unless it fails to pass the statutory test of reasonableness.

20. Next, the FTT looked at the appearance of the proposed work and considered the evidence of the landlord; it rejected the argument that GRP would provide "an almost identical aesthetic outcome as that of zinc" (paragraph 97) and recorded its view, on the basis of a

photograph of a GRP roof next to a zinc roof on another part of the estate, that a GRP roof has a "plastic finish" and "could not be said to enhance the appearance of the buildings" (paragraph 98). At paragraph 99 it recorded the evidence of Mr O'Flaherty who said that he had initially recommended a zinc roof but had amended that because of the regeneration plans. "If regeneration was not going ahead, he said, he would be using zinc".

21. At paragraph 100 the FTT said

> "We conclude at this stage that, if one ignores the regeneration plans, the use of GRP rather than zinc to replace the roof would amount to a breach of the covenant contained in clause 3.2/3.2.1. We accept the applicant's arguments in terms of the quality of a zinc roof, both per se and in terms of it being more in keeping with the character and age of the building. … we consider that Mr O'Flaherty would have been right to have recommended a zinc roof … and that would have been justifiable as the only method that would have met the obligation on the respondent in the lease."

22. The FTT then said at paragraph 101 that the reasonable leaseholder who bought a lease of a flat with a zinc roof would be entitled to take the view that a GRP roof would be "a diminution of that purchase".

23. The FTT went on to consider "the effect, if any, on this conclusion of the regeneration plans for the estate." In paragraphs 103 to 108 the FTT discussed the plans and concluded at paragraph 109 that they were "not a sufficient factor to negative what would otherwise be, as we have found, a breach of covenant." It went on at paragraph 112 to say that the GRP replacement would be a breach of covenant on the grounds of its shorter life-expectancy, and also "on grounds of aesthetic quality and the extent to which it is in keeping with the building".

24. At paragraph 117 -8 the FTT said:

> "Our conclusion is that it can never be reasonable to incur expenditure in breach of a landlord's covenant. It must be the case that section 19 reasonableness only becomes an issue if the expenditure is properly incurred under the lease."

The landlord's arguments

25. The grounds of appeal can be summarised as follows. It says that the FTT did not sufficiently explain its conclusion that the replacement of the roof in GRP would be a breach of covenant. It did not explain whether it thought the proposed work was a repair or a renewal; nor did it give a proper explanation of its view that the work could not be an improvement.

26. The landlord argues that this was a repair. The words "repair" "renew" and "improve" reflect a "torrential" drafting style that commonly groups together numerous verbs under the heading "repair" and, Mr Kilcoyne argued, none of them adds to the general repairing

obligation. He acknowledged that in *Credit Suisse v Beegas Nominees* Limited [1994] 1 EGLR 76, upon which Ms Gniewosz relied, the words "renew" and "repair" bore different meanings; but more usually they are subordinate to the general purpose of the repairing clause, as they were in *Co-operative Insurance Society Limited v Fife Council* [2011] CSOH 76. That being the case, the FTT should have identified the legal basis on which it decided that the proposed repair would be a breach of covenant; and it should have used, and did not use, the test in *Proudfoot v Hart* (1890) 25 QBD 41.

27. The Court of Appeal in *Proudfoot* had to determine the meaning of "tenantable repair"; it said at page 52:

> "'Good tenantable repair' is such repair as, having regard to the age, character and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it".

28. The appellant says that that is the test for whether a specific repair is or is not a breach of covenant.

29. The FTT was not referred to the test in *Proudfoot v Hart* and, Mr Kilcoyne argues, did not apply it. Instead, he says, the FTT appears to have decided that the use of GRP for the roof would be a breach of covenant on the basis either of an undisclosed legal test, or on the basis of a comparison between zinc and GRP. It accepted an argument that renewal must be on a like-for-like basis when there is no authority for that. The meaning of the "diminution of the purchase" in the FTT's paragraph 101 is unknown.

30. Furthermore, the FTT's findings of fact about the aesthetic quality of GRP were made on the basis of a single photograph; it was offered no expert evidence, and no valuation evidence and it did not undertake a site visit. Its conclusion was not open to it on the basis of the scant evidence before it.

31. Finally, says the appellant, the FTT was wrong to discount the possibility that the work would be an improvement, given the evidence it heard from Mr O'Flaherty about the better insulating qualities of GRP and greater energy efficiency than the current zinc roof.

Ms Gniewosz's arguments

32. Ms Gniewosz does not argue in this appeal that only a like-for-like replacement will do. She regards the work proposed as renewal rather than repair, and in her grounds of opposition cited a number of authorities in support of that, notably *Credit Suisse* (above); but at the hearing she conceded that that was not a crucial distinction. She argued that if this is a repair, the FTT did apply the test in *Proudfoot v Hart;* moreover that if the matter is remitted to the FTT it could not reach any different conclusion in applying that test.

33. Ms Gniewosz points to paragraph 100, and the words quoted above; the FTT did look at the "character and age of the building." True, it did not refer specifically to any of the evidence it heard about the locality of the building, but it heard ample evidence about that,

and it said at its paragraph 79 "We have, of course, considered all the evidence before us in reaching our conclusions.". She produced for the Tribunal the bundle that was before the FTT, and referred to her evidence about the special architectural merit of the building, and its location next to Brockwell Park and the conservation area. As to the third element of the *Proudfoot* test, she points out that whereas the FTT referred at its paragraph 101 to "a reasonable leaseholder", by contrast the "reasonably-minded tenant" referred to in *Proudfoot* as being likely to take a lease of a flat in the building would be more discerning than most and would be even less likely to be content with a GRP roof than would leaseholder in general.

34. Turning to the evidence of the aesthetic quality of a GRP roof, Ms Gniewosz pointed out that although only one photograph showed the FTT the contrast between GRP and zinc side by side, it had been shown a number of photographs of zinc roofs. Moreover, this was an expert tribunal; the members who sat with the FTT were an architect and a chartered surveyor and they were well-qualified to make an assessment. A site visit would not have shown anything further.

35. Ms Gniewosz relied upon the fact that Mr O'Flaherty, the landlord's key witness, would have recommended a zinc roof had it not been for the regeneration, which in itself indicated that GRP was not suitable.

Discussion and conclusion

36. I have no difficulty in finding that the FTT did not give a sufficient explanation for its decision. It did determine that it did not matter whether this was regarded as a repair or a renewal (while dismissing the possibility of improvement); but it did not say what was the legal test it employed in order to decide whether the proposed replacement roof would be a breach of covenant. It appears that the FTT was unimpressed with the GRP replacement, and took the view that zinc would be better as well as longer lived, and that the reasonable leaseholder would be unhappy with GRP. But that goes nowhere near to a statement of the legal test and an explanation as to why that test was not met.

37. Ms Gniewosz did – it would appear from the FTT's decision – at first instance make the argument that only like-for-like replacement would be a compliance with the covenant; there is no legal authority for such an argument and plenty of authority to the contrary. She very reasonably refrained from making that argument on appeal, but the FTT was clearly attracted to it (see the FTT's paragraph 100, quoted above) and hence made a finding that zinc was the "only method" that would do.

38. Beyond that, the FTT appears to have decided that a replacement with GRP would be carried out in breach of covenant because it did not like what it saw in the one photograph to which it referred in its decision; because of the lifespan of the material; and because of what it thought a "reasonable leaseholder" would think. The FTT looked at the contrast between zinc and GRP rather than at GRP in itself; it may well be that zinc would be "more in keeping with the character and age of the building" (paragraph 100, quoted above), but that does not mean that GRP was *not* in keeping with that age and character. It made no mention of locality.

39. It is therefore clear that the FTT was not applying the test in *Proudfoot*.

40. Was that the test it should have applied? I do not think it is necessary or useful for me to go into the authorities on the meaning of repair and the contrast, if any, with renewal because Ms Gniewosz at the hearing very helpfully accepted that *Proudfoot* was the appropriate test. But I accept the landlord's argument that the proposed work was a type of repair and that the covenant in paragraph 3.2 of the lease was a generic repairing covenant. There may be occasions when the use of the word "renewal" in such covenants is useful to counter an argument that the work that is needed goes beyond repair; but that does not detract from the generic nature of the obligation.

41. The question whether the quality of the work proposed, which everyone agrees is necessary work, is a breach of covenant is not the usual issue in an application under section 27A of the Landlord and Tenant Act 1985. In circumstances such as these the FTT would usually be asked to go straight to the analysis of reasonableness pursuant to section 19. Understandably, in response to Ms Gniewosz's argument the FTT asked itself, not whether the proposed work would be reasonable as required by section 19, but whether the work would be a breach of covenant by virtue of the material used. That question should have been answered using the *Proudfoot v Hart* test. That test is a relatively low threshold and it is highly unlikely that it would be failed on the basis of the lifespan of the material or the level of aesthetic concerns that were expressed here (even without the additional assurances the landlord is prepared to give about matching the colour and ribbing of the zinc roof in the GRP).

42. As I said above, that was not the test the FTT used.

43. Further, the FTT made an aesthetic judgment on the basis of what was clearly inadequate evidence. I accept that the bundle contained a lot of evidence about the architectural quality of the building but it is not known what if anything the FTT had in mind in reaching its decision other than the one photograph to which it referred; its catch-all phrase proviso that it had looked at all the evidence does not mend matters. I accept that this was an expert panel, but an unexplained decision based on inadequate evidence cannot be justified on that basis.

44. That does not, of course, mean that just anything will do. Ms Gniewosz argues that if she is wrong then even the current tarpaulin would meet the test. That is manifestly not the case, and tarpaulin will not do. But the fact remains that the GRP replacement has been found to be a breach of covenant on the basis of incorrect reasoning.

45. As a result the decision of the FTT must be set aside and the matter remitted to the FTT for a re-hearing. At that re-hearing all the grounds on which Ms Gniewosz objects to GRP will have to be examined. If she wishes to pursue the argument that the use of GRP would be a breach of covenant, that will have to be determined on the relatively low threshold test that *Proudfoot* imposes; the real issue will be reasonableness under section 19 of the Landlord and Tenant Act 1985, where Ms Gniewosz has serious arguments that have not yet been considered, in particular about value for money. I say that not because I take a view either

way but because it is an important issue that will need to be considered in the light of the lifespan of the material and the available evidence about its response to heat.

46. The aesthetic effect of GRP will no doubt be an issue, and since the panel at the first hearing has already formed a view about that it would be helpful to all concerned if a differently constituted panel were to conduct the re-hearing. The FTT in giving directions may wish to discuss with the parties what sort of evidence might be offered on that issue.

47. As to the regeneration plans, the FTT correctly found that such plans cannot make something that is a breach of covenant into something that is not a breach. But if the proposed work is not a breach, the correct question to ask is whether the expense projected for the renewal would be reasonably incurred. The regeneration plans are necessarily a relevant consideration, because if the landlord is intending to demolish the building well within the lifespan of a zinc roof then that is going to have a bearing on whether it is reasonable for the landlord, who has a choice of materials, to spend extra (and charge the lessees extra) for a roof that will last far longer than the projected life of the building.

48. There will also have to be proper consideration of the landlord's argument that GRP would in fact be an improvement.

Conclusion

49. In conclusion, the appeal succeeds; the decision of the FTT is be set aside and the matter remitted for a re-hearing.

Judge Elizabeth Cooke

14 September 2020