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RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

REFERENCE: LVT/0017/08/15 - Ocean Reach

In the matter of Applications under section 27A and section 20C of the Landlord and Tenant Act 1985

TRIBUNAL: Dr Christopher McNall (Lawyer–Chairperson)
Mr Roger Baynham MRICS (Surveyor–Member)
Mr Mark Taylor MRICS (Surveyor-Member)

APPLICANTS: Mr Martin Paul Haven and Mrs Rosemary Haven

RESPONDENT: Charlton Nominees Limited

PROPERTY: 227, Ocean Reach, Havannah Street, Cardiff CF10 5SG

DECISION

1. The Tribunal determines that the proposed works to the roof of Ocean Reach, Havannah Street, Cardiff, as set out in Paragraph 2 of the Notice dated 25 June 2015, are works which fall within the terms of Paragraph 2 of Part I of Schedule 6 of the Underlease to the Applicants dated 30 March 2005, and that the costs of those said works are relevant costs to be taken into account in determining any service charge.

2. The Tribunal also determines that the Respondent is entitled to treat the costs of and incidental to this Application, limited to £2,300, as relevant costs to be taken into account in determining the amount of any service charge.

REASONS FOR THE DECISION

The Parties and the Property

1. Mr and Mrs Haven are the registered leasehold proprietors of a penthouse flat, 227 Ocean Reach, Havannah Street, Cardiff CF10 5SG (**'the Flat'**). The Flat is one of 49 apartments in a nine storey-block (**'the Block'**) constructed in 2003 at a prestigious location in Cardiff Bay.

2. Their interest arises under the terms of an underlease dated 30 March 2005: **'the Lease'**. The Applicants also own another flat in this Block, albeit that their application was formally made only in respect of their ownership of 227.

3. The freehold reversionary interest was transferred to the present respondent on 27 April 2007.

The Intended Works

4. On 25 June 2015, the respondent landlord, through its duly authorised agent, Mainstay Residential Limited, gave the applicants the requisite statutory written notice of intention to carry out certain work to the roof. The works to be carried out were described as follows:
"Replacement of the single ply membrane lining of the main gully and provision of access equipment to allow the works to be completed safely and in accordance with manual handling regulations."

5. The notice went on to say that the landlord considered it necessary to carry out the works as there were water leaks into several apartments on the top floor (including the Applicants') and the communal areas.

6. Also on 25 June 2015, the landlords, through Jean Brown, their agents' Property Manager, circulated a two-page letter to all owners and residents providing an update in relation to a number of ongoing issues at the Block. The first section of that letter was headed 'Leaks from the main roof'. It said that this had been a protracted process since the landlord had to instruct surveyors to carry out investigative work, to draw up a specification of works and obtain quotations. The surveyors had identified that the total cost of the work required would be in excess of £70,000. The landlord proposed to split the work into two phases, the first being the replacement of the lining of the main gully at a cost of approximately £20,000.

7. On 18 July 2015, the Applicants applied to this tribunal to seek a determination of service charge for the year 2015/2016. They initially sought a determination in respect of a proposed charge of £20,000 in the year 2015/16 (of which the Applicants' proportion payable in relation to the Flat comes to £547).

8. The Applicants sought a determination on the following basis:

"Defective roof since completion of development therefore does not fall under the classification of general maintenance and wear and tear. It should not be recoverable via the service charge. Other more appropriate parties should be responsible for this expenditure."

9. On 23 July 2015, Mr and Mrs Haven wrote that they proposed to refer the cost of the roof repairs to this tribunal "*on the basis that the leaseholders are not responsible for the inherent problems with the roof, which has leaked for a number of years".*

10. On 23 August 2015, Mr Haven wrote to the tribunal as follows: "*it would on closer scrutiny appear that the intended second phase which would cost in excess of a further £50,000 and could come into the 2015/2016 financial year. I would therefore feel that it would be prudent to ask for determination on the whole amount of £70,000 plus.*"

11. On 26 August 2015, the Tribunal wrote to the applicants as follows:

"It is unclear from your application who you consider are 'the other more appropriate parties' who should be responsible for the repairs. Can you please clarify this point so that the tribunal can consider directions to dispose of the matter."

12. On 9 September 2015, the applicants responded as follows:

"I believe any costs relating to the repair or replacement of the roof and gully envisaged to be within the £70,000 expenditure should be left to the freeholder and/or the developer to determine their respective liabilities in this regard and not the leaseholders."

13. On 16 September 2015, the procedural chairman gave Directions for the further management of the application. Those Directions included provision for disclosure by the Respondent of a surveyor's report detailing the works required as detailed in the initial notice to carry out work accompanying the letter dated 25 June 2015 and set out in that letter under the heading 'leaks from the main roof'.

The Hearing

14. Mr and Mrs Haven were both present at the hearing before us, and Mr Haven presented their application. Mr and Mrs Haven had prepared and filed a spiral-bound 'Response to Respondent's Bundle'. Section 3 was a witness statement from Mr Haven.

15. The respondents were represented by Mr Alexander Siegel, the regional general manager of Mainstay Residential, accompanied by Ms Brown, who had given a witness statement, to be found in Section 3 of the comb-bound Bundle.

16. We have carefully considered the submissions made to us at the hearing, as well as the content of the respective parties' bundles.

17. This Application did not involve a site visit. Neither party invited us to undertake a site visit, and, in any event, the actual condition of the roof of the Block was not in dispute.

18. At the very outset of the hearing, Mr Haven conceded that he did not seek to challenge the works in principle. Quite the contrary, he considered that the state of the roof positively required works of the type and scope contemplated by the landlord.

19. It was explained on behalf of the landlord that, although the consultation process had begun, no contractor has yet been chosen.

The Defect

20. The crux of the Applicants' case and argument was that the cost should not be recoverable by way of service charge. Viewed in that way, the dispute is a narrow one.

21. The Applicants placed heavy reliance on their contention that the roof had been leaking - and therefore defective - from the very beginning. We were invited to conclude that the roof was *inherently* defective. This was challenged by the Respondent. Much of the evidence and the hearing was occupied with the parties' arguments on this point.

22. Insofar as we need (or are able) to determine that point, we are not persuaded, on the basis of the limited evidence before us (and without having received or heard any evidence from the architect, builder, or developer) that the roof was *inherently* defective. The Applicants purchased the Flat without the benefit of a survey, and so are not able to point to any condition report from the time of their purchase. Moreover, as a matter of practicality, the Block was handed over by the builder to the freeholder, which must have satisfied itself that the Block was of appropriate quality.

23. The earliest references to a leak come from 22 April 2005 (that is, about 18 months after the coming into effect of the Lease, and 3 weeks after the formal execution of the Lease) when there is a note of a leak in the kitchen ceiling, reported as a fault. On 25 April 2005, there was a report of a water leak in the lounge at the corner window. On 5 July 2005, there is the first explicit mention of the roof: 'ongoing roof problem'. The landlord was going to put dye onto the roof to see where the leak was coming from. At that point, no-one knew whether there was a single, isolated, leak, or whether there was something intrinsic or inherent in the very design or construction of the roof which meant that it was destined to fail substantially.

24. Having said that, there is absolutely no doubt that the roof is defective, and has been so for a number of years. As well as the matters already referred to, there are repeated references to water leaks in the kitchen throughout 2006 and 2007.

25. We do not accept the landlord's argument that this only became a consistent issue in 2008. There is considerable evidence that the roof was leaking before then. Our attention was drawn to the service charge account which indicates that Crosby Homes

Limited (the builders) made a compensation payment to the Applicants of £538 in December 2006. That payment is referred to in an email from Mainstay to Crosby in October 2007. In October 2007, the Applicants' then-tenant, a Mr Clarke, wrote to Mr Haven complaining about the roof, albeit the thrust of his complaint was wind noise/vibration. He referred to a leak in the kitchen roof, 'when it rained hard', as a 'secondary issue'.

26. Over the years, a number of attempts were made to fix the leaks. A survey was undertaken by Stiles Harold Williams in December 2009, following an external inspection in October 2009. It criticised the position of the Automatic Open Vent (AOV) units. Localised repairs to the AOV units and an access hatch were undertaken between 2011 and 2013. The cost of those works (which was modest, and, we were told, below the consultation threshold) was passed on through the service charge, without any objection.

27. Those repairs represented an incremental (and, in the tribunal's view, justifiable) approach to addressing the problem of water ingress. Unfortunately, the problems persisted, although it remains unclear whether the repairs themselves, or their execution, played any part in the continuing leaks. We do however reject any suggestion that the landlord had deliberately drawn out the works so as to make the cost of those works more readily recoverable under the terms of the Lease. Whilst the Applicants may firmly believe this (as Mr Haven told us) there is absolutely no evidence to support the contention. Moreover, in our view, it flows from a misunderstanding of the meaning and effect of the Lease.

28. In November 2014, the landlord contracted a surveyor, PMBC, to undertake a full visual survey of the roof. PMBC's initial report on the high level roof found that some of the detailing, both at the perimeters, and around the hatches, was poor, with liberal use of waterproofing compounds such as mastic, expandable foam and silicon (some of which had failed) and some retro-fitted metal profiled sections designed to attempt to provide a weatherproof flashing. Their initial report on the low level flat roof to the valley was that there were failures in the jointing which, although small, have allowed water to enter the building and track along the structure.

29. In March 2015, PMBC provided a fuller report. It considered that the budget would be in the region of £66,000 plus VAT for the entire works. Its letter of 1 July 2015 (which, we note, comes after the Notice of Intended Works) sets out in considerable detail the proposal to replace the central valley gutter. They noted many patches to the roof, and observed that water penetration had saturated the insulation below the single-ply membrane. PMBC recommended replacement of the main gutter and its upstands and reinsulation of the 9th floor triangular roof. The respondent proposes to follow the surveyor's recommendations. We agree that it is not reasonable to continue with patch repairs.

30. A temporary repair was undertaken in May 2015, but the landlord did not anticipate that this would last beyond the winter. We were told by Mr Siegel, and we accept, that it is possible that at least some of the damage to the roof was caused by contractors working on the roof, for instance some of the holes in the lining of the gully caused by the placement of ladders to scale the 1 metre upstand onto the main parts of the roof.

31. The Notice of Intention to undertake works was issued on 25 June 2015. It was obvious - both from the papers, and also at the hearing - that considerable acrimony had come about by the landlord making the description of the works available only for inspection at its agents' offices in Worcester. The description of the works which we have seen is a short document, capable of being quickly and cheaply photocopied. We do not understand why it could not have been sent to the owners and occupiers with the circular letter of 25 June 2015. It contributed to an impression on the part of the Applicants that the landlord was being obstructive and had something to conceal. On the other hand, neither Mr and Mrs Haven, nor any of the other owners or occupiers, seem to have written to the agents to request a copy, when to have done so would likewise have been very easy to do. The parties propelled themselves to an unnecessarily antagonistic position when even a modest degree of co-operation could well have gone some way (i) towards allaying the Applicants' concerns as to the works being proposed, and (ii) could possibly have generated some support for the works from the other owners. Ultimately, that aspect of the dispute, which generated much heat, and absorbed a considerable proportion of the resources not only of the parties but also the tribunal was unproductive.

32. The consultation was open until 27 July 2015. We accept the landlords' case that it did not receive any written responses to the Notice of Intention. The only opposition which has been articulated has been through this Application.

33. Two peculiarities emerged during the hearing. The first was that the PMBC report relied upon postdates the Notice of Intention, although that report may have been the last iteration of earlier drafts. The second is the apparent lack of reconciliation between the £70,000 initially mentioned (even if staged) and the two estimates received for the works on the gutter and 9th floor triangular roof: one for £26,211.55, and the other for £52,900 plus VAT.

34. However, neither the consultation process, nor the sum are formally in dispute.

35. We have regard to the Applicants' request, contained in Mr Haven's letter of 23 August 2015, that we do not limit our deliberations and determination to the 2015/16 service charge year, but that we should take account of the whole of the intended works. We accede to that application. Section 18 of the Landlord and Tenant Act 1985 provides that 'relevant costs' can include those 'to be incurred', whether in the period for which service charge is payable 'or in a later period': see section 18(3)(b). Accordingly, our findings in relation to recoverability go to the whole of the

sum to be incurred in relation to the intended works (that is, as set out in Paragraph 2 of the Initial Notice to Carry out work and (insofar as different) the letter from PMBC dated 1 July 2015, being works to the 'Main Gutter' and the '9th Floor Triangular Roof') whether charged for in service charge year 2015/16 or in any subsequent service charge year (but being recoverable only insofar as lawful under the 1985 Act). For the avoidance of doubt, we make no findings as to any works other than those referred to above.

The Lease

36. Ultimately, we do not consider that the nature of the defect, and whether it could be described as 'inherent' or not, is determinative, for the following reasons.

37. In our view, the appropriate starting point for any analysis of whether a particular cost is or is not recoverable in principle by way of service charge is to look in detail at the terms of the Lease.

38. The Lease is dated 30 March 2005. It is for a term of 125 years from 31 December 2003. Clause 4.7 deals with the obligation to pay service charge. The tenants' share of total expenditure in relation to this Flat is 2.87% of the Estate Service Charge (equating to £574 against an expenditure of £20,000 in 2015/16). The Estate Service Charge means the proportion of Total Expenditure attributable to the provision of the Estate Services: Clause 1.8.

39. By clause 7.2, the landlord covenanted to carry out or provide the Services. The Sixth Schedule deals with the Services. Part 1 of Schedule 6 is headed 'The Estate Services'. Insofar as material, Paragraph 2 of that Part of that Schedule (to be found at page 34 of the Lease) reads:

"Renewing repairing maintaining .... rebuilding replacing and keeping free from and remedying all defects whatsoever the main structure ... roof ... of the Building".

40. The extent of the Applicants' liability under the covenant depends upon its interpretation.

41. The thrust of the Applicants' challenge was limited to whether or not the contemplated works were works of *repair* or not. But the repairing covenant is drawn in (conventionally) wide terms. Leaving aside the question of 'repair', we consider that the contemplated works can easily be said to fall within renewal, maintenance, or rebuilding, or replacing. The landlord is obliged to renew, maintain, rebuild, and replace the roof, and to keep it free from defects. As such, the contemplated costs are being incurred by the landlord in relation to its provision of the Services, and are recoverable under the service charge.

42. But, and addressing the Applicants' argument square-on, even if the covenant had only made reference to 'repair' (that is, without any reference to 'renewal' etc) we nonetheless consider that the works contemplated fall properly within the scope of that covenant.

43. Even if the Applicants' case was taken at its highest, and the condition of the roof could properly be described as *inherently* defective, for whatever reason, such that it was causing damage to the rest of the property from the very beginning, and where the only practicable way to repair it would be to correct the inherent defect, this is nonetheless capable, as a matter of law, as falling within the scope of a repairing covenant of this kind.

44. For example, in Ravenseft Properties Ltd v Daystone (Holdings) Ltd [1980] QB 12, there was an inherent defect where the building, a relatively new one, was built without any expansion joints. It had not been appreciated that the different co-efficients of expansion of the stone-cladding and the concrete structure would make such expansion joints necessary. The cladding became loose. Forbes J. held that the works (which were extremely substantial in nature) fell within the scope of the repairing covenant.

45. Similarly, in Elmcroft Investments Ltd v Tankersley-Sawyer (1984) 15 HLR 63, there was physical damage from rising damp in the walls of a flat, which was due to an inherent defect in that, when the flat had been built, the slate damp-proof course had been put in too low and was therefore ineffective. The remedial work was replacement of the damp course with silicone, and repair of the walls. That fell within the repairing covenant. As a matter of degree, it did not involve giving the tenant a different thing from that which was demised.

46. On the facts of this case, we note that the intended works do not in fact involve replacing the entire roof. They extend only to replacing certain parts of it. As an expert tribunal, and assessing the proposed works as a matter of fact and degree, we do not consider that the intended works will make the Block, or even the roof, 'a new and different thing' from what existed at the beginning of the Lease. Put another way, we do not consider that these intended works, to this roof, will result in the Block as a whole becoming (or even the Flat becoming) sufficiently different from that demised so as to prevent the landlord from recovering the cost through the service charge. That conclusion remains the same even if the 2009 report (which identified incorrect siting of the AOV units as the root cause of the water ingress) was correct.

47. Therefore, and for the above reasons, we consider that the Respondent landlord is entitled to treat the cost of the intended works as a relevant cost for the purpose of the service charge.

Costs

48. We have also considered an application by the applicants under section 20C of the Landlord and Tenant Act 1985 that all or any of the costs incurred by the respondent in connection with this application should not be regarded as relevant costs to be taken into account in determining the amount of any service charge.

49. Section 20C(3) provides that the tribunal can make such order as it considers just and equitable in the circumstances.

50. The landlord has incurred costs in responding to the Application which it estimates at about £4,600 (being 40 hours at £115 per hour, excluding VAT). We find that wholly credible, given the work which has obviously gone into the witness statement and the bundle. Nonetheless, it was confirmed to us that the landlord's agent, on behalf of the landlord, limits its claim to costs to half that sum = £2,300.

51. We have concluded that the costs incurred by the Landlord in connection with the proceedings before the tribunal are to be regarded as relevant costs to be taken into account in determining the amount of service charge payable by the tenants, but that this sum should be limited to £2,300. This is because a point of importance to all the owners of flats in the block has now been resolved, at the instance of the Applicants. As such, we consider it just and equitable that the landlord should be able to treat its costs, limited as above, as relevant costs for the purposes of service charge.

52. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 20 of the Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004. Any such application must be received by the Tribunal not later than 21 days after this decision is sent to that party.

Dated this 10th day of February 2016

Chairman