

Y Tribiwnlys Eiddo Preswyl
Residential Property Tribunal Service (Wales)
Leasehold Valuation Tribunal (Wales)
E-mail: rpt@gov.wales

Landlord and Tenant Act 1985 S27A

Premises: Flat 8 95-97 Cathedral Road, Cardiff CF119PG (“the premises”)

LVT/0001/05/23

Applicants: Mr and Mrs Fairclough

Respondent: Mr Brynley Morgan

**Tribunal: Judge Shepherd
Mr R. Baynham FRICS
Mr K. Watkins FRICS**

DECISION AND REASONS OF LEASEHOLD VALUATION TRIBUNAL

1. In this case Gavin Fairclough and Amanda Fairclough (“The Applicants”) are seeking a determination pursuant to section 27A of the Landlord and Tenant Act 1985 as to the reasonableness of costs incurred by their landlord Mr Brindley Morgan (“the Respondent”). The service charges challenged are for the years 2021-2024 inclusive and relate to major works.
2. The Respondent owns the freehold of 95 - 97 Cathedral Rd, Cardiff, CF11 9PG (“the premises”). The premises consist of two semi-detached houses constructed around 130 years ago which have been combined and converted into a mixture of commercial and residential accommodation. The ground floor and basement levels are let for commercial purposes and the rest of the building comprising eight flats are on long-term leases.
3. The Applicants are the registered proprietors of flat eight which was let under a lease dated 8 April 1993 for a term of 99 years. The Applicants became the proprietors on 11 December 2006. They do not live at the premises but let them out until the latter part 2018 when they say the premises have been unlettable due to water ingress.
4. This is the second set of proceedings. In the first the Tribunal made a decision on 5th November 2021 allowing proposed major works costs in full and dismissing a claim of set off. Following this case major works were carried out as proposed. The Applicant challenges the cost of the major works which he says exceeded the estimated costs agreed by the Tribunal in the previous decision. In his application he states that:

the final account for the s.20 works has been received and paid in full but we have serious concerns with regards to the final actual cost, the scope of the works, the delays in completing the works from the commencement of the consultation in May 2019, the fact that the Respondent misled the Tribunal regarding the recovery of the service charges for the repairs to our flat, the following of the consultation procedures and the prejudice we have suffered as a result .

5. In his witness statement and in submissions by his counsel, Mr Sibley, the Applicant summarized his case as follows:
 - a) the s.20 consultation process carried out by the Respondent was inadequate.
 - b) the Works were in a number of respects improperly carried out, not carried out to a reasonable standard or not carried out at all.
 - c) the building control fee was unreasonable.
 - d) the standard of service offered by Roger North Long and Partners (RNL) was below a reasonable standard.
 - e) the legal fees associated with the previous proceedings were too high and unreasonable. This was conceded at the hearing.
 - f) the fees of the Austin Partnership (of whom the Applicant is a director) had already been paid.

The consultation issue

6. The consultation issue in paragraph a) above was contentious from the outset. The Respondent said that it had not been raised at the previous hearing and there was no mention of it in the decision. Essentially the Applicant said that the consultation was inadequate because of the delay between the notice of intention, dated 5 February 2020 and the works starting in January 2022, during which time the costs of the works increased and changed in scope, both occurring without consultation, applying by analogy *Jastrzembski v Westminster City Council* [2013] UKUT 0284. It was also said that the Applicants were given inadequate time to make comments on the detail of the work and that the surveyor instructed by the Respondent discouraged one of the Applicants' chosen contractors from participating. The Applicant further claimed that variations to the works tendered for namely the addition of asbestos removal, the rebuilding of a chimney, re-rendering the gables meant that a further consultation was required.
7. Unsurprisingly the Respondent's counsel, Brittany Pearce argued the consultation issue was an abuse of process as it should have been raised as part of the previous case before the Tribunal determined the issue.

8. She said that the Applicants' previous application was issued on about 2 April 2021, after the completion of the section 20 process. Any concerns that the Applicants might have had concerning the process could, and should, have been litigated as part of the 2021 proceedings. Challenging the section 20 process now was *res judicata* and/or an abuse of process under the rule in *Henderson v Henderson*. The LVT had already pronounced on the recoverability of the Works (subject to arguments concerning the quality of the works, or concerning the variations).
9. In her response to the allegation that there should have been further consultation by virtue of the additional works Ms Pearce said the question was whether the variations constitute a separate set of works. She said that the variations were predominantly the result of the discovery of asbestos in the roof, and the need for more extensive work to the roof covering structure, chimney and to coping stones than had been anticipated. The case of *Phillips v Francis* [2015]1 WLR 741 determines the factors that need to be considered when deciding if further consultation is required. Ms Pearce said that the variations concerned an enlargement of the Works, with the need for enlargement coming about as a result of what was revealed on close inspection; the Variations were part of the same contract; it was wholly appropriate to carry out the Variations at the same time; and the Variations were connected to, and of the same character as, the Works. The contractor could not proceed with planned roof repairs without dealing with the asbestos; it could not proceed with the chimney repairs, once the chimney was deemed beyond repair, if it was not permitted to rebuild, instead of repair, the chimney; and could not have carried out the planned repairs to the roof structure if the associated variations were not permitted. The Variations were closely related to the Works; they did not concern separate, or different, matters and therefore it was not necessary to carry out a second section 20 process.
10. I gave a verbal indication at the hearing that the Tribunal did consider that the consultation arguments were an abuse of process. They should have been raised in the previous case but were not. The fact that there was a delay in starting the works did not alter this position. There is a public interest in obtaining finality in litigation. The Applicants had the opportunity to raise the criticisms they now seek to raise at the previous hearing but didn't do so. It is not fair on the Respondent to have to defend this matter further. In any event the arguments put forward by Ms Pearce in response to those criticisms are clear and compelling and may well have succeeded.
11. In relation to the separate issue of whether there should have been a further consultation on the extra works identified the Tribunal considers that the works were part and parcel of the original planned works. It is not unusual for additional works to be identified when works of this nature are carried out. It was prudent of the Respondent's contractor to attend to the works at the same time as the main contract. Indeed, it would have been strange if they had not done so. The asbestos slates had to be safely removed by a specialist firm and disposed of. The chimney arguably had to be replaced and the gable re-rendered. In any event if the Tribunal is wrong and the works were not within the realms of the original contract it is very likely that dispensation would have been given had it been applied for.

Remaining issues

12. Once the consultation issues are removed the focus of the Tribunal is on the quality of the works and the reasonableness of the costs of the works and services. Initially there was a question about the addition of 20% in projected costs but it was accepted that this was dealt with at the previous hearing.

The chimney

13. Mr Bond the Respondent's surveyor said that it became clear during the works that the chimney had to be rebuilt. Additional scaffolding was required for this work to be carried out. In an inspection the Tribunal had identified water ingress in the Applicants' flat. The Applicants said this had worsened since the chimney works had taken place. The Tribunal invited further submissions from the parties as to the connection between the water ingress and the chimney works. Mr Knott for the Applicant provided a detailed report with photographs and plans. He said:

Following rebuild of the chimney stack it is apparent that the new construction detailing has failed leading to significant problems of water ingress and damage noted to be considerably worse than prior to rebuild.

14. The cause of the water ingress in Mr Knott's opinion was:
- *Incorrect positioning of lead trays*
 - *Incorrect folding of lead trays to create upstands and downstands. Lead trays are usually provided with upstands inside the roof space and downstands on the outside. This is to allow for collection of water on the inside and drainage to the outside.*
 - *Incorrect folding of lead trays to create upstands around the flues inside the chimney or upstands not being sufficiently high. In my experience upstand heights of 50-75mm are preferred.*
 - *Buildup of mortar at back of lead tray upstand positions to cause blockage and prevention of water drainage.*
 - *Lack of appropriate weep vents to vertical brickwork joints above the line of each lead tray to allow water escape.*
 - *Incorrect or defective lead detailing at the back gutter position where the stack merges into the roof covering on the left side.*
15. Roger North for the Respondent in a much less impressive report said:
- 4.1 i) *It is agreed there is evidence of damp penetration which has affected the plaster to the chimney breast. On the balance of probabilities it is likely the damp penetration is occurring between the roof, lead gutter and chimney stack. The damp penetration had not been reported for a period of 18 months after construction of the chimney stack. It is my opinion on the balance of probability that the damp penetration may be as a result of storm damage. The remedial work cannot be determined without further investigation.*

16. In the Tribunal's view the report of Mr Knott is to be preferred. Mr North's report lacked detail and credibility. There was no basis to arrive at the storm damage conclusion. Whether the defect was reported or not it had patently worsened following the works to replace the chimney. Mr Knott identified a number of defects that caused the water ingress. All appear possible, indeed likely causes. On a balance of probabilities we find that the chimney works caused or worsened the water ingress in the Applicant's property. In these circumstances the Respondent should not be entitled to claim any sums associated with works which have caused a significant worsening in the disrepair in the flat. We disallow the sums claimed for the new chimney and scaffolding associated with that, a total sum of **£6741.10**.

Reasonableness of cost of works in general

17. The cost of the planned works were approved by the Tribunal previously. Accordingly, the focus of the Tribunal must be on the variations carried out to the contract other than the chimney that has already been dealt with above. Mr Fairclough also made a number of complaints about the quality of the works. For instance he said that the valley rafter had not been repaired in accordance with his own plans. He was instructed to design these works in the guise of the Austin Partnership. It is clear that he was correct about this but neither expert indicated particular concern about the integrity or safety of the building as a result of this variation and we consider they were correct in this regard. Indeed the Certificate of Compliance with the Building Regulations, dated 26th April 2022 issued by Total Building Control Ltd of Swansea, confirms that the works completed complied with the Building Regulations, even though these works were not compliant with the original design prepared by the Austin Partnership. The asbestos removal works were necessary and prudent. Mr Fairclough identified a comparator but it was not clear whether the price given was for the same works carried out here. The works were generally adequate in the Tribunal's view.
18. Mr Fairclough accepted that the re-rendering of the gable wall had to be done. His objection was that it was not consulted on. This is dealt with above. There were other variations which caused the Tribunal some concern however. It appeared that extra scaffolding for the purposes of removal of the asbestos was over - charged. On page 2 of the variations there was a charge for additional scaffolding for the removal of asbestos but this should have been included within the overall sum of £5500 shown on page 3. This sum should have been adequate to cover the additional work. Accordingly the sum of £2190 should be deducted. There is a further charge for scaffolding included within the overall sum of £1482 for repairs, repointing etc. This also is excessive as the scaffolding should have been included within the overall sum. We deduct £365 from the total sum of £1482 to represent one weeks worth of hire of scaffolding.
19. The total deductions from the Schedule of Works amount to £9,296.10 taking into account the chimney and the over charge for scaffolding thereby producing a cost of works figure excluding value added tax of £99,245.62.

RNL Fees

20. There were a number of concerns about the fees charged by Mr Bond. It became clear during the hearing that he had not issued any formal variation orders and that the documentation and site supervision in general was inadequate. The method of accounting in taking items out and then putting them back in elsewhere was not clear or transparent. We consider that a deduction in fees of 25% is appropriate. RNL's fees would normally be 10% of the contract sum i.e. £9925 . We deduct £2481.14 from this amount.

Building control fee

21. Mr Fairclough was critical of this fee because it did not appear to include all of the works carried out. Nonetheless we consider that the fee was reasonably incurred and is payable in full at £660.

Austin Partnership fee

22. The fee of £1320 is reasonable and payable.
23. In summary the Tribunal's determination is as set out in the table attached.

s.20C Landlord and Tenant Act 1985

24. Mr Fairclough's challenges were reasonable ones to bring and he achieved some success. We will exercise our discretion and make an order under s.20C which prevents the Respondent from recovering legal costs from the service charge.

Dated this 9th day of May 2024

Tribunal Judge Shepherd

95 and 97 Cathedral Road, Cardiff

Collection Summary

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108,541.72

**LESS items on Variation
Schedule**

Additional Scaffolding	2,327.50	
Dismantle chimney	4,413.60	
Extra hire on Scaffolding	2,190.00	
Repair Scaff as required	<u>365.00</u>	<u>9,296.10</u>
		99,245.62

ADD

RNL's fees at 10 %	9,924.56	
Deduction of 25 %	<u>2,481.14</u>	<u>7,443.42</u>
		106,689.04
Vat at 20 %		<u>21,337.81</u>
		128,026.85
Building Control fee	660.00	
Austin Partnership	<u>1,320.00</u>	1,980.00
Total cost of works		130,006.85