FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/00HN/LIS/2018/0040**
Property	:	**17 Malvern Road, Bournemouth, BH9 3AE**
Applicant	:	**Tyrell Investments Inc.**
Represented by	:	**Napier Management Services Ltd**
Respondents	:	**Miss F Beck & Miss H Beck** **Miss N L Wood**
Type of Applications	:	**Landlord and Tenant Act 1985, section 27A(1)**
Tribunal Members	:	**Judge M Davey** **Mr J Reichel BSc FRICS** **Mr M Ayres FRICS**
Date and venue of Hearing	:	**30 November 2018 Poole Magistrate Court**
Date of Decision	:	**19 December 2018**

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DECISION

The Tribunal determines that the costs which the Applicant proposes to incur in renewing the flat roof covering at the property would be reasonably incurred

REASONS

The Application

1. The building known as 17 Malvern Road, Bournemouth, BH9 3AE is divided into a ground floor and a first floor flat; Flats 17B and 17C respectively ("the Flats"). By an application dated 31 July 2018, the freeholder of the property, Tyrell Investments Inc., c/o Ian Newbery & Co, 81-83 High Street, Poole, BH15 1AH ("the Applicant"), sought a determination by the First-tier Tribunal (Property Chamber) ("the Tribunal") under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act"). The Application related to the service charge for the year 30 November 2018 to 30 November 2019 in respect of the leases of the Flats. More specifically it relates to the costs of the proposed replacement of the flat roof of the single storey extension forming part of Flat 17B.

2. Judge J.A. Talbot issued Directions to the parties on 30 August 2018 setting out a timetable leading to the hearing of the Application.

3. The lease of Flat 17B was made on 30 December 1985 between Philip David Oram (1) and Peter Michael Regan and Lynda Jane Regan (2) for a term of 99 years. A lease of Flat 17C was made on 10 January 1986 between Philip David Oram (1) and Maurizio Ricino and Julie Malthouse (2). That lease was replaced by a Lease dated 10 February 2012 and made between Tyrrel Investments Inc (1) and Simon Charles Dursley (2) for a term of 189 years from 21 December 1985. The Respondents to the present Application are the current lessees of the Flats; viz. Miss F Beck & Miss H Beck (Flat 17B) and Miss N L Wood (Flat 17C).

The Inspection

4. The Tribunal, accompanied by their case officer, Mrs. Joanne Taylor, inspected the property, externally and internally, on the morning of 30 November 2017 in the presence of Ms. Fenella Beck and Ms. Harriet Beck (lessees of Flat 17B) and Ms. Aileen Lacey-Payne (Managing Director) and Mr. Dean Quinton (Major Works Co-ordinator) both of Napier Property Management Ltd, ("Napier") the Applicant's property manager. The inspection focused on the rear sitting room to Flat 17B, the roof of which is agreed by all concerned to be so defective as to render that room uninhabitable. The walls and ceiling to the room suffer from extensive damp penetration. The roof has obviously failed and is at present covered by a tarpaulin sheet.

5. Following the inspection the Tribunal conducted a hearing at Poole Magistrates' Court at which Ms. Lacey-Payne represented the Applicant and the Respondent lessees of Flat 17B appeared in person. The Tribunal was handed a letter from Miss Nicola Wood, lessee of Flat 17C, in which she explained that she was unable to attend the hearing and was content for her views to be presented by the lessees of Flat 17B.

The Leases

6. The leases are in all material respects in identical terms. For ease of reference they will be referred to hereafter as "the Lease". Clause 4(1) of the Lease contains a covenant by the Landlord "as and whenever necessary during the term hereby created maintain repair and renew: - (i) the roof (including the timbers) the gutters rainwater pipes and chimneys of the building….."

7. By clause 2(4) of the Lease the Tenant covenants to "contribute and pay to the Landlord from time to time within seven days of demand and in addition to the rent hereinbefore reserved one-equal part of the costs and expenses incurred by the Lessor in….(b) carrying out the works referred to in Clause 4….."

The Law

8. The relevant statute law is set out in the Annex to this decision.

The material facts

9. Both Applicants and Respondent made written and oral submissions to the Tribunal from which the Tribunal made the following findings of fact.

10. The Respondents informed the Landlord's managing agents, Napier, of the first signs of the roof problems at the property on 4 November 2017. Napier responded on 6 November 2017 requesting photographs, which the Respondents duly provided. Napier then commissioned a Condition and Recommendations (Defect) Report regarding flat roof replacement works at the Property. The Report, dated 15 November 2017, was prepared by Bennington Green Limited ("BG"), a local firm of building surveyors. It found that the flat roof, to the single storey extension at Flat 17B, had failed and recommended that a core sample should be taken from the roof by a waterproofing manufacturer such as ICOPAL to enable the extent of the necessary works to be determined. BG instructed ICOPAL to carry out the tests. ICOPAL duly carried out the tests on 22 November 2017 and reported that the existing deck required complete replacement.

11. By a letter and enclosed notice, dated 18 December 2017, Napier, on behalf of the Landlord, gave the Respondent Lessees "Part 1 Notices",

under section 20 of the 1985 Act, and Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the 2003 Regulations"), of intention to carry out qualifying works to the Property. The Notice stated that it was necessary to replace the flat roof covering because the roof was deteriorating to such an extent that it required replacement to ensure that the fabric of the property was protected and a good overall standard maintained and to comply with the obligations in the Lease. The consultation period was stated to end on 22 January 2018. Paragraph 4 of the Description of Works section of the notice invited the recipients to propose, within 14 days from the date of the notice, the name of a person from whom the landlord should try to obtain an estimate for the carrying out the proposed works described in the notice. No such proposal was made within that period.

12. The Respondents instead sought a quotation from Quality-1st Roofing for roof recovering and insulation works to the extension. The sum quoted, in a quotation dated 5 February 2018, was £3,775.00 plus VAT. The system proposed was a Firestone EPDM single ply rubber roofing system and insulation installation. Quality-1st Roofing measured the roof as being approximately 32 metres squared.

13. BG drew up a specification, including an ICOPAL specification, for the necessary works, dated 14 February 2018. It then carried out a tender procedure and reported the outcome to Napier in a letter dated 11 April 2018. Tenders were received from all four contractors invited to tender. They were

Contractor	Offer	Amended offer
C & D Roofing Ltd	£10,735.29	£11,735.29
Pallard Contracts Ltd	£12,898.97	N/A
Hardie Roofing Ltd	£10,567.70	£11,567.00
Quality 1st Roofing Ltd	£3,955.00	£6,423.00

14. After adjustment, to take account of matters in the specification that had not been covered in the tender but were to be added; the tender sums came to the amounts shown in column 3 above. BG stated that it considered the roofing system proposed by Quality 1st Roofing Ltd to be sub-standard to that specified and therefore not sufficient to meet the specification requirements. They also concluded that the tender offer from Quality 1st Roofing was not competitively priced. The alternative system proposed by Hardie Roofing Ltd was considered to be a like for like replacement for the ICOPAL system that met the project requirements. It being the lowest tender of the three remaining tenders, BG recommended that the tender of Hardie Roofing Ltd be

accepted. The sums would be exclusive of VAT and all associated professional fees which when added produce a total contract cost of £15,981.24 made up as follows:

Hardie Roofing Limited	£11,567.70
Surveyor/Contract administrator	£ 1,250.00
Napier s.20 fee	£ 500.00
Total	£13,317.70
VAT @ 20%	£ 2,663.54
Grand total	£15,981.24

15. By a letter and enclosed notices, dated 17 April 2018, Napier gave a "Part 2 Notice" under section 20 of the 1985 Act, and Schedule 4 of the 2003 Regulations, to the Respondent lessees. The notice enclosed the tender analysis report and stated that the landlord had accepted the surveyor's recommendation and proposed to instruct Hardie Roofing Ltd. It explained that the tender return from Quality 1st Roofing Ltd had not priced the specification correctly and had submitted costs for material below the specified standard. The consultation period was stated to end on 18 May 2018. The notice invited the recipients to make written observations in relation to any of the estimates within 30 days from the date of the notice.

16. The Respondents made such observations in a written response dated 14 May 2018. The response focused on BG's tender analysis report of 11 April 2018. More specifically it questioned BG's criticism of the Quality 1st tender (as summarised in paragraph 13 above). Dean Quinton of Napiers responded in an email dated 17 July 2018, which enclosed an email from BG together with enclosures dealing with each of the points raised by the Respondents in their response.

The Applicant's case

17. The Applicant submits that it is agreed by all parties that the roof is in serious disrepair, has reached the end of its life and is urgently in need of replacement. The Applicant says that once it became aware of the state of the roof it obtained independent advice from BG, a reputable firm of building surveyors who recommended replacement of the failed roof with a new roof manufactured by ICOPAL, who had conducted a survey of the existing roof at the invitation of BG.

18. BG drew up a specification, including the ICOPAL specification and a schedule of works, and invited tenders from four contractors, including one suggested by the Respondents. The tender analysis concluded with a recommendation that the tender of Hardie Roofing Limited be accepted on the basis that it was the lowest comparable tendering

contractor. The analysis stated that although Quality 1st Roofing limited had provided a quotation for roofing works at a lower price they had not priced the works as specified and the considered system substitution was below the specified standard. They emphasised however that the choice of contractor was ultimately for the client landlord.

19. The Applicant believes that it has followed the section 20 procedure correctly and that, having taken independent professional advice, the tender of Hardie Roofing should be accepted. Because the parties were unable to agree on which system should be used the Applicant seeks a determination from the Tribunal under section 27A(3) of the 1985 Act as to whether the proposed costs would be reasonably incurred were the tender to be accepted.

The Respondents' case

20. The Respondents submitted that they were not disputing the fact that they were obliged to pay their proportion of the overall cost of works to repair the flat roof or the fact that the work needed doing. However, they did dispute the length of time that the overall process has taken since the matter was first reported to Napier. They say that all parties had agreed at the outset that the condition of the roof was high risk and the need for the repair work required was urgent for both the structural integrity of the building and the health of the residents. Due to the length of time the process had taken so far, one room in the flat has been uninhabitable 11 months with all furniture ruined. The Respondents also dispute the proposed cost of the roof repair. The quote that they had obtained from Quality-1st Roofing was less than half the cost of the contractor proposed by the Applicant. The Respondents considered that the reasons given by BG for not recommending the quotation provided by Quality-1st Roofing were not wholly factually correct for a number of reasons. The Respondents considered that a whole single story extension could be built for the sum quoted by the preferred contractor for the roof replacement.

Discussion

21. The dispute is simply stated. It concerns the payability and reasonableness of the service charge for 2018-19 in so far as it relates to works, which the Applicant landlord proposes to carry out on the roof of the rear extension at 17 Malvern Road.

22. All parties agree that the existing flat roof is in need of urgent replacement. The dispute relates to the scope and cost of the project and specifically the extent of the contribution recoverable from the Applicant leaseholders.

23. The necessary works are clearly within the Landlord's repairing obligation, under clause 4 of the lease, and therefore the costs of

those works, including associated costs, are recoverable by way of service charge under the terms of clause 2(4) of the Lease being costs and expenses incurred by the Lessor in.........(b) carrying out the works referred to in Clause 4.....”

24. The dispute centres on what precise works are necessary. The Landlord says that the independent surveyor, BG drew up a specification based on an ICOPAL manufactured roof system. The tenderer Hardie Roofing had proposed a different system, Soprema Waterproofing system. Bennington Green accepted that this offered the same quality product as the one specified and therefore approved this waterproofing system to meet the project requirements. Hardie Roofing’s adjusted estimate came to £11,567 plus VAT. This compares with estimates of £11,735.29 + VAT from C & D Builders and £12,898.27 plus VAT from Pallard Contracts Ltd.

25. The fourth tenderer, who had been suggested by the Respondents, was Quality-1st Roofing, whose adjusted estimate came to £6,423 plus VAT. Perhaps not surprisingly the Respondents considered that this was by far the lowest estimate and should have been accepted by BG and the Applicant.

26. BG explained that they had rejected the tender of Quality 1st for the following reasons. First, that the roofing system proposed did not meet the tender process specification because the Firestone RubberGard EDPM single ply roofing system quoted for does not offer the correct insulation or membrane, which had been specified; viz: an ICOPAL three layer felt system. As such they considered the Firestone system not to amount to an equivalent material change. They considered the proposed system to be below the specified standard and not sufficient to satisfy the project requirements. Second, that the guarantee of the single ply system is 25 years but it was unknown whether Quality-1st are approved contractors for installing the system. If they are not the manufacturer’s warranty would be void. The only guarantee would be that of the installers and if they were to go into liquidation the client would have no redress should the system fail. Third, the tender of £6,423 does not appear to be competitively priced. BG recommended that the tender of Hardie Roofing Ltd be accepted because it was the lowest *comparable* tender (emphasis supplied).

27. The Respondents take issue with BG’s analysis. They say that Quality-1st Roofing is a reputable company that is a member of the Competent Roofers Scheme through the National Federation of Roofing Contractors and offers a further insurance backed 25 year guarantee. They further submit that the Firestone RubberGard EPDM system is a premium grade product that is more than adequate for the necessary roof replacement at the property. They consider that the more expensive system specified by Bennington Green is more than is required for covering a relatively straightforward roof of only 32 square metres.

28. The Respondents are also concerned that the roof failed in November 2017 at which time they promptly reported the matter to the Applicant landlord's agent. Over a year later the matter is still unresolved. The Respondents point out that during that time the sitting room under the roof has been uninhabitable and unhealthy with damp and mould on the walls and ceiling and the furniture in the room has been ruined. The Applicant says that it has acted as expeditiously as possible complying with the section 20 notice procedure and referring the matter to the Tribunal when the parties were unable to agree on a choice of contractor.

29. The present circumstances are such that the costs of re-roofing the extension have not yet been incurred. As and when those costs are incurred and the Applicant seeks to recover them from the Respondents, the latter may well argue that they have been prejudiced by an alleged breach of contract on the part of the landlord, and have suffered loss, which should be offset against the costs of the works. However, that is a matter for that occasion and not one for the purposes of the present proceedings, which are concerned with the cost of the proposed works.

30. The law on the matter of whether service charge costs are recoverable by a landlord is tolerably clear. The first issue is whether the lease provides for their recovery. In the present case the landlord is entitled under the terms of the Lease to recover the costs and expenses incurred in carrying out maintenance repair or renewal of the roof. However, this is subject to the relevant requirements of the Landlord and Tenant Act 1985, which applies to a variable service charge as defined in section 18 of the Act. The service charge in this case falls within that definition, the costs being "relevant costs" as defined in section 18(2) of the Act. Section 19(1)(a) of the Act provides that relevant costs shall be taken into account in determining the amount of a service charge payable only in so far as they are reasonably incurred. Section 27A of the Act permits an application to be made to the Tribunal for a determination as to whether if costs were to be incurred they would be payable and if so the amount which would be payable. Section 20 places another constraint on the landlord, by way of a statutory consultation process, where works on a building are involved, the costs of which would mean that an individual lessee would be obliged to pay more than £250 by way of service charge. This is why the landlord in the present case carried out the consultation process.

31. The Tribunal has no difficulty in agreeing that it would be reasonable for the landlord to incur costs in dealing with the roof disrepair by way of re-roofing and to recover those costs. Indeed as noted above the lessees do not dispute this. The issue is whether or not it would be reasonable for the landlord to incur the costs, which it proposes to incur by accepting the tender of Hardie Roofing. As a matter of law it is clear that in circumstances where more than one solution may be reasonable it is for the landlord to choose between them provided the

choice is a reasonable one. The Landlord says that it has carried out the section 20 consultation process and accepted the recommendation of its appointed professional expert, who advised that the specified (or acceptable alternative) system was the most appropriate. It says that in these circumstances it has properly tested the market. The lowest tender was not accepted because it was considered that the tenderer did not tender in accordance with the specification or a comparable specification. That it was why it was excluded. The Respondents challenge the specification itself as being an unreasonably sophisticated and expensive solution for what is needed. However, they do not provide evidence of the same, save for the quotation for a less sophisticated system from a single contractor.

32. The context in which the decision as to whether the costs in question would be reasonably incurred is to be taken includes of course the fact that it is the lessees under the long leases who will ultimately be required to pay for those costs and not the lessor. However, whilst taking that into account, the Tribunal is unable to conclude that the Landlord's choice can be considered to be unreasonable given the market testing exercise which it carried out and the absence of sufficiently compelling evidence to suggest that it would be unreasonable to accept the quotation from Hardie Roofing Limited. The Tribunal therefore determines that should the Applicant accept that quotation the costs therein would be reasonably incurred.

Martin Davey
Chairman

RIGHTS OF APPEAL

1. 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.

2. 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.

3. If the person wishing to appeal does not comply with the 28 day time limit, that 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.

4. 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.

Annex: The statute law

Landlord and Tenant Act 1985

A "service charge" is defined in **section 18(1) of the 1985 Act** as:

"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."

Section 19(1) of the 1985 Act, provides that:

"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 provision 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".

"Relevant costs" are defined for these purposes by **section 18(2)** of the 1985 Act as "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.

Section 20 provides that

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—

(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) [the tribunal].

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.

The appropriate amount is set at £250. Thus if the landlord fails to comply with the consultation requirements the amount that a tenant is liable to pay is limited to £250 unless on application to the Tribunal under section 20ZA the need to consult is dispensed with.

Section 20ZA (2) defines "qualifying works" as "works to a building or any other premises."

Section 20ZA(1) permits the Tribunal to dispense with all or any of the consultation requirements in relation to any qualifying works where it is satisfied that it is reasonable to dispense with the requirements.

Schedule 4 Part 2 of the Regulations sets out the consultation requirements in the case of qualifying works where no public notice is required. The present case is such a case.

Section 27A provides that

(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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.