



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

**Case Reference** : **BIR/00CN/LSC/2020/0002**

**HMCTS (paper, video, audio)** : **V: SKYPEREMOTE**

**Properties** : **Phase One & Phase Two King Edwards Wharf, 25 Sheepcote Street, Birmingham, B16 8AT**

**Applicants** : **Kew Phase One RTM Company Ltd  
Kew Phase Two RTM Company Ltd**

**Representative** : **Trowers And Hamlin LLP**

**Respondents 1** : **The leaseholders of Phase One & Two**

**Respondent 2** : **Wallace Estates Limited**

**Respondent 3** : **The Governors of the Schools of King Edward VI in Birmingham**

**Type of Application** : **An application under section 27A of the Landlord and Tenant Act 1985 for a determination of liability to pay and reasonableness of service charges.**

**Tribunal Members** : **V Ward BSc Hons FRICS – Regional Surveyor  
Regional Judge D Jackson**

**Date of Decision** : **13 May 2020**

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**DECISION**

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## **Covid-19 Pandemic: Remote Video Hearing**

This determination included a remote video hearing on the papers which has been consented to by the parties. The form of remote hearing was Video (V: SKYPEREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing/on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Under Rule 33A the Tribunal has directed that the hearing be recorded using UK Courts Skype. Any person may apply, within 28 days of the date of this Decision to the Regional Manager, First-tier Tribunal Property Chamber for the Midlands Region for an audio copy of the recording to be supplied to them electronically. A copy of the recording will be made available for the sole purpose of the fair and accurate reporting of the judicial proceedings of the First-tier Tribunal. The re-use, capture, re-editing or redistribution of the recording of the hearing in any form is not permitted. Any such use could attract liability for breach of copyright or defamation and, in some circumstances, could constitute a contempt of court.

The Applicants said that they had believed that the determination of the application (which was urgent) would be delayed due to the Public Health Emergency however they were pleased to note that the Tribunal's handling of the application had been unaffected.

## **Background**

1. On 17 March 2020, the Tribunal received an application in respect of Phase One and Two King Edwards Wharf 25 Sheepcote Street Birmingham B16 8AT. The Applicants are Kew Phase One RTM Company Ltd (the first Applicant) and Kew Phase Two RTM Company Ltd (the second Applicant).
2. The application was for a determination of the reasonableness of service charges under section 27A of the Landlord and Tenant Act 1985 (the Act) for a determination of liability to pay and reasonableness of service charges as follows:

- a) The reasonableness of the first Applicant incurring costs of up to £676,700 in undertaking remedial works to cores 3 and 4 King Edwards Wharf Phase One.
  - b) The reasonableness of the second Applicant incurring costs of up to £873,700 in undertaking remedial works to cores 8, 9 and 13 King Edwards Wharf Phase Two.
3. The Tribunal has previously issued several decisions relating to the Property:
- a) A preliminary decision dated 11 May 2016, relating to both Phase 1 and Phase 2, in which the Tribunal determined whether service charge payers or individual flat owners were liable for repair of certain structural elements of each Phase (under references BIR/00CN/LSC/2014/0011 and BIR/00cn/LSC/2014/0026), and
  - b) A decision dated 13 June 2017, relating to Phase 1 only, determining whether the service charge payer's liability determined in the 2016 decision had to be paid by service charge payers if there was another party who actually or potentially might be liable to pay (under reference BIR/00CN/LSC/2014/0011).
  - c) A decision dated 16 May 2018, under Tribunal references BIR/47UD/LDC/2018/0002 and BIR/00CN/LSC/2018/0006, confirming that proposed expenditure of £277,200 for works to Core 6 would be reasonably incurred under section 27A (3) of the Act, and granting dispensation from the necessity to consult on those proposed works, under section 20ZA of the Act.
  - d) A decision dated 25 June 2019, under Tribunal reference BIR/00CN/LSC/2019/0003 confirming that proposed expenditure of up to £202,000.00 on remedial works to Core 14 of Phase 2 as set out in the application would be payable by the Respondents through the service charge in their residential leases and would be reasonably incurred.
  - e) A decision dated 6 February 2020 under Tribunal references BIR/00CN/LSC/2019/0059 & BIR/00CN/LDC/2019/0019. The first application was for a determination of the reasonableness of service charges of £116,898.06, in relation to proposed remedial works to Cores 14 and 13A King Edwards Wharf Phase II. The second application sought dispensation from all or some of the consultation requirements imposed by section 20 of the Landlord and Tenant Act 1985 in respect of the works proposed under the application above.

4. The Tribunal was asked to fast track this application as the works are urgent.
5. Following Directions of the Tribunal on 23 March 2020, the Applicants were instructed to send the following to each Respondent and the Tribunal:
  - a) A copy of those Directions.
  - b) A copy of the application form and any accompanying documents.
  - c) A statement explaining the reasoning behind the application. The statement should also include colour photographs of the development for context and examples of the works proposed if possible.
  - d) Copies of any professional reports relating to the works proposed.
  - e) Copies of any quotations in respect of the works.

The Applicants confirmed to the Tribunal on 31 March 2020 that this had been done.

6. By the Directions of 23 March 2020, any Respondent was invited to submit a statement either in support of, or, opposing the application by 24 April 2020.
7. No submissions were received from any Respondent by this date.
8. Due to the Covid – 19 Public Health Emergency, the Tribunal advised the parties that they proposed to determination this application without an inspection.
9. The Applicants indicated that they were happy for this matter to be determined without an oral hearing i.e. on the basis of the written submissions of the parties however the Tribunal decided to hold a short hearing by Skype to assist in the determination.

### **The Submissions of the Applicants.**

#### Evidence of David Phipps (Cobalt Building Consultancy Ltd – Senior Building Surveyor)

10. King Edwards Wharf (KEW) is a development situated on the canal network in the outskirts of Birmingham city centre. The development was constructed in two stages – Phase One and Phase Two. The development consists of 14 blocks known as Cores, nos 1-14. Phase One consists of Cores 1-6 and Phase Two consists of Cores 7-14. Each Core is 7 storeys high with single ply membrane roofs. There are 243 Apartments (Phase One – 108 and Phase Two – 135).
11. The Cores were built by a different developer but each suffers to varying degrees from a myriad of defects across the two phases including the following:

- A lack of cavity trays or in some cases trays have been installed incorrectly.
  - Damp proof course insertion/rectification
  - Water ingress via the roofs or balconies.
  - A lack of fire stopping.
12. The chief issue at the development is water ingress. In the absence of properly functioning cavity trays, water is hitting the structural steelwork and other items within the cavity resulting in water ingress to the Apartments.
  13. A further problem is that the single ply membrane roofs are 15 years old and reaching the end of their useful life. Remedial work has been carried out using rope access anchored to the roofs. This has led to rope workers walking on the roof further exacerbating the situation.
  14. During the Skype hearing, the Tribunal asked Mr Phipps to give background on the problems experienced at the development and how this had influenced the proposed works, which are the subject of this application. Mr Phipps advised that the Applicant RTM Companies had initially decided to address the worst Cores first. Remedial work has been carried in relation to water ingress at Cores 6 and 14 and also, due to structural integration, an element of core 13 which was designated Core 13A. During the carrying out of that initial remedial work, a wealth of knowledge about the range of defects was accumulated.
  15. Having completed the initial phases, the Applicants now wished to move onto the next 5 worse affected Cores which are 3, 4, 8, 9 and 13 (excluding 13A). It has been decided to tackle 5 Cores in one go because this results in savings in terms of costs and also time, and further avoids the additional costs of separate Tribunal applications. Working on a number of Cores simultaneously also means that contractors are on site for a shorter period of time causing less disruption to leaseholders.
  16. The works to be carried out to the 5 Cores which are the subject of the present application will involve similar remedial work to that already carried out to Cores 6, 14 and 13A. During the Skype hearing, Mr Phipps said that as a result of the experience gained from the earlier works, a sharper and more concise specification has been drawn up with less reliance on provisional figures and contingencies to remedy the defects identified. However, the Applicants anticipate further challenges and problems and therefore have allowed a £20,000 contingency for each Core. The specification has made available to all Respondent leaseholders both via this process and also as part of the consultation exercise.

17. The Applicants sought three estimates for the works based on the specification. Mainstay Commercial were employed to manage the tender process. Quotations were invited from three companies:

- Insight Enterprises Ltd
- Peak Safety Service Ltd
- CAN Engineering Limited

18. The tenders received were as follows:

<b>Core</b>	<b>Insight</b>	<b>CAN</b>
3	274931.75	291039.41
4	<u>288929.55</u>	<u>357382.45</u>
	563861.30	648421.86
VAT	<u>112772.26</u>	<u>129684.37</u>
	<b>676633.56</b>	<b>778106.23</b>
8	231667.50	294813.88
9	210787.05	219467.39
13	<u>285575.00</u>	<u>218553.32</u>
	728029.55	732834.59
VAT	<u>145605.91</u>	<u>146566.92</u>
	<b>873635.46</b>	<b>879401.51</b>
	<b>£ 1,550,269.02</b>	<b>£ 1,657,507.74</b>

19. Peak Safety Limited declined to tender.

20. Noting that CAN were significantly cheaper than Insight in respect of Core 13, Mr Phipps interrogated CAN's tender for this Core and believed that they had deliberately priced this element of the tender low in order to gain a foothold into the project. However, as Mr Phipps emphasised during the Skype hearing, Insight had been the contractor on the previous phases which were carried out completely professionally and they had a clear understanding of the problems faced by the development, and that accordingly, he recommended the Insight quote be accepted. In any event, the Mainstay Tender Appraisal report recommended that the contract be awarded to Insight Enterprises Limited as across the 5 cores they were over £100,000 cheaper.

Evidence of Kevin Goodchild (Director – KEW Phase One RTM Company Limited)

21. As part of his witness statement, Mr Goodchild stated that as his apartment was located in Phase One, he was a Director of the first Applicant, KEW Phase One RTM Company rather than the second Applicant KEW Phase Two RTM Company

Limited. He advised that in practice the two Applicants operate jointly in terms of making decisions concerning the management of the Property as a whole. Directors of each company sit on a Joint board of the Management Companies of which he was currently Chairman.

22. On behalf of the Applicants, Mr Goodchild explained to the Tribunal that the costs of the works would be payable by leaseholders via the service charge. There is no NHBC warranty or insurance cover. The consultation procedures under section 20 of the Act have been carried out and no objections have been received.
23. The Applicants' written statement confirmed the following in respect of the section 20 Consultation:
  - The initial Notice which included details of the intended works was sent to Leaseholders on 1 November 2019.
  - The second stage Notice which included details of the tenders received was sent to leaseholders on 5 February 2020.
24. During the Skype hearing, Mr Goodchild told the Tribunal that leaseholders could see the benefit of the previous works and the difference it was making to those living at KEW. In relation to compliance with Directions, Mr Goodchild told the Tribunal that where leaseholders had already agreed to the use of email, all documents were sent by that method. Those without the facility of email (approximately 15 leaseholders) were served with hard copies in accordance with Directions. Mr Goodchild told the Tribunal that no objections have been received by the Applicants and that to the contrary, he had received a large number of telephone calls and had a number of conversations in and around the development, the tone of which was been positive and supportive. Leaseholders in Cores 3,4, 8,9 and 13 has seen the success of previous works and wanted the works carried out to their own Core and Apartments as soon as possible. Leaseholders were also worried that coronavirus would slow down Tribunal approval and the start of works.
25. Apartments are still being sold at the development although are problematic with the process taking longer due to the works being undertaken, with some buyers insisting on monies being placed in escrow accounts.
26. The Tribunal asked Mr Goodchild about the collection of service charges and was advised that all payments were up to date apart from approximately £9,000 which was the subject of payment plans.

Evidence of Andrew Smith (Director – KEW Phase Two RTM Company Limited)

27. As part of his witness statement, Mr Smith stated that as his apartment was located in Phase Two, he was a Director of the second Applicant, KEW Phase Two RTM Company rather than the first applicant KEW Phase One RTM Company Limited. He confirmed that in practice the two Applicants operate jointly in terms of making decisions concerning the management of the Property as a whole. Directors of each company sit on a Joint board of the Management Companies of which he was currently Vice - Chairman.
28. Mr Smith further confirmed that he had seen the witness statement of Kevin Goodchild and confirmed it to be accurate. He further confirmed that it properly reflected the position of the second applicant – KEW Phase Two RTM Company Limited.

Evidence of Michael Green (Trowers and Hamlin LLP – solicitor for the Applicants)

29. Mr Green confirmed to the Tribunal that the Directions dated 23 March 2020 had been complied with by the RTM Company, see above.
30. Mr Green had not been notified of any objections to the application but told the Tribunal at the Skype hearing that he had received a message from one leaseholder which did not amount to an objection (subsequently confirmed by email to the Tribunal from Mr Green dated 5 May 2020).

**The Law**

31. Sections 18 to 30 of the Landlord & Tenant Act 1985 contain important statutory provisions relating to recovery of service charges in residential leases. Normally, payment of these charges is governed by the terms of the lease – i.e. the contract that has been entered into by the parties. The Act contains additional measures which generally give tenants additional protection in this specific landlord/tenant relationship.
32. Under Section 27A (1) of the Act, an application may be made to the Tribunal for a determination whether a service charge is payable and if it is, the Tribunal may also decide:-
  - 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



33. Under section 27A (3), an application may also be made for a determination whether, if costs were incurred for ... repairs, maintenance or improvement, a service charge would be payable for the costs, and if it would be, the Tribunal may also decide:-

- 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

34. Section 19 of the Act provides that:

“(1) Relevant costs shall be taken into account in determining the amount of the 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 and the carrying out of works, only if the services or works are of a reasonable standard:

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant cost have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.”

### **The Leases**

35. The leases for both Phase One and Two are drawn on the same terms.

36. The lessees are obliged to pay a proportion (as set out in each lease) of the proposed budgeted expenditure for these works by virtue of:

- a) Clause 5 and the Tenth Schedule, which together oblige the management companies to carry out the works and do the acts and things set out in the Sixth Schedule;
- b) The Sixth Schedule which obliges the management companies to repair the deficiencies at the Property (see in particular paragraphs 1, 3, 23, and 25);

- c) Clause 7 of the Eighth Schedule, which is the lessees covenant to pay the service charge; and
- d) Clause 5 of the Seventh Schedule which allows the management companies to charge a service charge in advance for the reasonable and proper estimates of the cost of repairs in a service charge year.

### **Determination**

- 37. The Tribunal notes that no Respondent has objected to the Works being carried out or has challenged the overall cost.
- 38. It is quite clear that there have been number of significant repair issues at this development for a number of years, principally the problem of water ingress into apartments, which have generally arisen due to a poor standard of construction. The Tribunal is satisfied that remedial works as outlined in the Specification are necessary.
- 39. The Tribunal determines that expenditure on remedial works as set out in the application would be payable by the Respondents through the service charge in their residential leases.
- 40. The Tribunal is also satisfied that:
  - a) It is reasonable for the first Applicant to incur costs of up to £676,700 in undertaking remedial works to cores 3 and 4 King Edwards Wharf Phase One as the costs have been subjected to competitive tender.
  - b) It is reasonable for the second Applicant to incur costs of up to £873,700 in undertaking remedial works to cores 8, 9 and 13 King Edwards Wharf Phase Two as the costs have been subjected to competitive tender.

### **Appeal**

- 41. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

V Ward