FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HP/LIS/2020/0025
Property	:	Kenilworth Court, 3 Western Road Poole BH13 7BB
Applicant	:	Kenilworth Freehold Ltd
Representative	:	Mr Dean Quinton, Napier Management Services and Mr Rose
Respondent	:	Mehson Property Company Limited & 14 additional Respondents
Representative	:	Mr Mehson (representing Mehson Property Company Ltd only)
Type of Application	:	Reasonableness of service charges – Section 27A Landlord and Tenant Act 1985
Tribunal Member(s)	:	Judge P Letman Mr W H Gater FRICS MCIArb Mr David Ashby FRICS
Date of Directions	:	9 February 2021

DECISION WITH REASONS

Introduction

1. By application dated 18 May 2020 the Applicant sought a determination of liability to pay and reasonableness of service charge expenditure in respect of Major Works – the demolition and rebuild of a garage block - £232,600 –and the demolition and rebuild of a bin store and cycle store - £19,400. Both figures have been rounded to the nearest £100 as the figures are estimated, not actual figures.

2. Given the Coronavirus pandemic and considerations of health and the resulting suspension of all inspections and hearings in person, on 25 June 2020 the tribunal directed that the application be determined on the papers, unless within 28 days any party objected. No objection having been raised the tribunal received the Hearing bundle as directed. References to pages in the bundle are shown as [ ].

3. However, on examining the bundle and the statements of case from each party with expert evidence, the tribunal decided that it was not appropriate for this matter to be determined on the papers and that, in the interests of justice, a hearing should be fixed. In the circumstances the tribunal duly made directions for a hearing which took place virtually on 5 January 2021.

4. Unfortunately, thereafter one of the tribunal members tested positive and became unwell with Covid, for which reason regrettably there has been a short further delay in the preparation of this decision, for which the tribunal extends its apologies.

Background

5. Kenilworth Court is a purpose-built block of flats dating back to the late 1950's. It originally comprised 12 flats over 3 floors with a separate block of 12 garages and surrounding areas. In or about 2010/2011 4 new flats (numbers 13 to 16) were developed by the addition of a further storey to the building. Following completion of these 4 new flats each was sold off on a long lease. In December 2013 Kenilworth Freehold limited (KFL), which is owned by 12 of the 16 long leaseholders, acquired the freehold of Kenilworth Court from the developer of the new flats.

6. Under the original 12 leases each lessee was to contribute a rateable proportion of the service charge (see clause 1(c)(ii)) as specified in each lease. The service charge under the original leases (with which this application is concerned) comprises the expenditure incurred by the lessor incidental to the performance of its covenants under clause 6. By that clause the lessor covenants, amongst other things, to 'maintain, repair, redecorate and renew … the main structure and in particular the roofs chimneys .. etc.' of Kenilworth Court.

7. Under each of the 4 new leases as originally entered (rather than using rateable values) it was provided that each lessee would pay 1/16th of the

annual service charge expenditure incurred in the performance of clause 6 except in relation to the costs (incurred under clause 6(4) of each lease) of maintaining the lifts, in respect of which the lessees each specifically covenanted to pay an equal share divided by the number of flats entitled to use the lifts (see clause 1(c) of these new leases).

8. In addition, by deeds of variation made in early 2013 between the then freeholder and each of the lessees of flats 13 to 16, their leases were varied to provide, amongst other things, that for the avoidance of doubt the lessee should not be required to contribute towards the maintenance and repair of the 12 garages already constructed at Kenilworth Court. This was done by (clause 1.3 of the deeds of variation) inserting into clause 1(c) of each of the new leases the words 'other than the main structure the roofs the chimney stacks gutters and rainwater pipes of the 12 existing garages constructed prior to the date hereof.'

9. On 29 September 2016 the Applicant herein together with 12 leaseholders made an application to the tribunal, opposed by the same Respondent (then owner of flats 3, 8 and 10) to vary the leases of the 16 flats pursuant to section 35 of the Landlord and Tenant Act 1987. The Applicant proposed, amongst other changes, that all the leases be varied to require all of the flats to pay 1/16th toward the service charges save in respect of the garages to which the 12 original flats would contribute equally (i.e. 1/12th).

10. By a decision dated 3 April 2017 the tribunal ordered that the new leases of flats 13-16 be varied so that the words of clause 1(b) (insurance) and clause 1(c) (annual service charge) [189] were altered from 'one sixteenth' to 'a rateable proportion being such proportion as the rateable value of the demised premises bears to the rateable value of the whole of Kenilworth Court…'. The tribunal left untouched in these leases the exclusion of the garages and 'equal share divided' provision in relation those legally entitled to use the lift.

11. Yet further, by a second application dated 26 February 2020 the Applicant together with a number of lessees applied again to the tribunal to vary the original 12 leases to take account of the unintended shortfall in recovery of any maintenance or repair costs of the existing garages, resulting from the introduction by the decision above of rateable values for flats 13-16 coupled with the continuing exclusion of any contribution to such costs by those flats.

12. By a further decision dated 8 December 2020 the tribunal accepted that the leases were defective and determined that the leases of flats 1 to 12 should be varied by the addition of the following words to clause 8(1): 'save and except that the expression 'rateable proportion' shall in relation to the 12 garages belonging to Flats 1 to 12 inclusive of Kenilworth Court mean such proportion as the rateable value of the demised premises bears to the total of the rateable values of Flats 1 to 12 inclusive.'

13. The said variation secures that the costs of any maintenance, repair, redecoration and renewal works to the original garage block are met in full

by the lessees of the original 12 flats according to their rateable proportions.

The Hearing

14. As referred to above, due to the current pandemic and consequent lockdown there has been no opportunity for an inspection in this matter and the hearing of the application on 5 January 2020 necessarily took place remotely. At the hearing the Applicant was represented primarily by Mr Quinton, with additional contributions from Mr Rose both of whom attended by video on the HCTS system.

15. Mr Mehson was able to attend by telephone and represented the First Respondent (for ease referred to herein as the Respondent). The remaining respondents have taken no part in the proceedings; though they are properly joined to ensure they are bound by the tribunal's determination. The tribunal is grateful to the parties' representatives for their able, clear and constructive submissions.

The Parties' Submissions

16. By its application the Applicant seeks prior approval under and in accordance with section 19(2) of the Landlord and Tenant Act 1985 (the terms of which are set out in full at Annex A hereto) of its proposed works to rebuild the original block of 12 garages at a cost of some £232,600. Thus, the tribunal is only concerned in this case with whether the proposed costs are within the scope of the express repairing covenant and whether the proposed costs 'are no greater amount than is reasonable.'

17. At the hearing before this tribunal the Applicant confirmed that the proposed works to the garage block, so called Phase 1 works, are as appears in the drawing from Twenty Residential Design dated 19 July 2019, entitled Option 3 and numbered 3 WA/KC/010 – Option 3 [428] .(It is not clear this is the scheme permitted under the existing planning permission.) However, the Applicant also stated that it no longer intended to carry out the Phase 2 works for rebuilding the bike store and that its application in this regard was not pursued.

18. As to the costs for Phase 1, the Applicant further made clear that these are to be accordance with the tender submitted by Kennedy's Southern Ltd (Phase 1 price) in the sum of £180,078.31 excluding VAT [223] plus the additional costs set out in the Applicant's Section 20 Notice Summary Tender Sheet [307]. The latter costs therefore comprise the following:

Kennedys Southern Ltd	£180,078.31
Napier (s.20 fee)	£ 5,000.00
Surveyor/Contract Administrator	£ 4,820.83
Building Regs	£ 695.00
Arboricultural Consultant	£ 480.00
Structural Engineering Consultant	£ 1,770.00

Sub-total	£192,844.14
VAT @ 20%	£38,568.83
Sub-total	£231,412.97
Architects Fees	£ 690.00
Planning Application Fee	£ 480.00
Grand total	£232,582.97

19. By way of justification for these works the Applicant relies in particular upon a report dated 7 June 2017 by Ellard Consulting Ltd, which states that it would not be a viable option to repair the structure from garage unit 7 through to 12 due to the extent of the defects observed. Whilst in relation to units 1 through to 6, although commenting that these would be considered structurally viable, the report recommended a costs/benefit exercise be carried out to determine the benefit of repair to rebuilding. In relation to the latter 6 garages the Applicant relies upon the advice of Winkle-Bottom, Chartered Surveyors, who having considered the repairs necessary to garages 1-6, recommend that the most cost-effective solution is to replace all garages together, including new suitably designed foundations (their advice letter of 21 April 2020 refers [303]).

20. The principal objection initially raised by the Respondent to the planned works is to the proposal to replace all garages, rather than repair 6 and rebuild the rest. However, upon it being clarified at the hearing that the total costs of these works would be pooled for the purposes of recovery from the lessees of the 12 garages, the Respondent decided that the benefit to him of insisting on repair of 6 garages (including his own) would be marginal. In the premises the Respondent expressly withdrew his objection to the rebuilding of the entire garage block, save that it is for the subsidiary points referred to below.

21. One continuing point of concern for the Respondent in relation to the proposed rebuilding, is the slight relocation of each garage as a result of the rebuild. This results from the fact that the existing garages are 2771mm wide, whereas the new garages are intended to be 2823mm wide in accordance, so it was explained by the Applicant to the tribunal, with current recommended dimensions. The Respondent queried the effect on the current leases and the registered titles of each flat of the consequent migration (eastwards) of the rebuilt garages.

22. Although this is plainly a matter outside the scope of section 27A and equally the jurisdiction of the tribunal, the tribunal accepts there may be substance in this concern. Indeed, members of the tribunal have experience of the kind of difficulties that can arise, including conveyancing complications on any sale, where there is a material deviation between the position of any property on the ground and that shown by its title documents.

23. In discussions before the tribunal, however, Mr Rose helpfully confirmed that the Applicant was mindful of these potential complications and was able expressly to assure the Respondent that if any such issues did arise in

relation to his premises, or for that matter any other flat, the Applicant could and would at no cost to the affected lessee take such steps as may be required to resolve them.

24. Otherwise, and certainly within the tribunal's jurisdiction, the Applicant took issue only with the Electrics costs as priced by Kennedys [223], comprising the following:

Electrics	
Report on existing supply by NICEIC approved contractor	£ 250.00
Provisional sum to supply and fit new electrical supply	£7000.00
Supply and fit internal garage lights, power and sockets	£3,960.00
Supply and fit external light fittings and sockets	£ 850.00
Total (excluding VAT)	£12,060.00

25. Apart from the replacement of the 3 existing external lights (visible in the photos, for example, at pages [228] and [500]) which the Applicant accepts come within the scope of clause 6 [55], his case is that the balance of the proposed works are improvements for which the leases of the 12 original flats make no provision. As he points out, presently the garages do not have electricity, lights or sockets internally, nor are there sockets or 5 lights externally, or twin car charging points (page 8 of the Respondent's case refers [318]).

26. The Applicant accepts the facts set out above but disputes that the new supply, sockets and internal and external lighting are improvements. Its case is that the new electrical supply is necessary for the proper provision of the external lighting as well as the other items. As for the internal lighting Mr Rose explained that this was necessary because the new garages are designed without any rear window. Further, the Applicant contends that the additional electrical services accord with current standards and should therefore be included in any such rebuild; although the Applicant accepted that it could not point to any specific Building Regulation or Code of Practice in support.

Discussion

27. In light of the foregoing the only live issue remaining for determination by the tribunal is in relation to the Electrics and the extent to which these constitute improvements outside the scope of clause 6. Given that presently there are 3 external lights to the garage block, it is clearly the case as conceded by the Respondent that the replacement of these lights as part of the rebuild is not an improvement. Thus, where the cost of 5 lights and 3 external sockets is priced by Kennedys at £850, the tribunal is satisfied that for 3 lights a cost of £450 would be reasonable provision in accordance with section 19(2) of the 1985 Act (above).

28. Equally, it is clear that any necessary works associated with the provision of these 3 lights will not be an improvement either. In this regard the tribunal accepts, and is fortified by the technical expertise of its two surveyor members in so doing, that such necessary associated works will

include the report cost and cost of a new supply. As to the latter cost, if the services extended to the full specification the provisional sum of £7,000 might be appropriate. However, if the supply is only to support the 3 external lights, the tribunal would expect a reduced cable requirement and a reduction in cost in the order of 30%.

29. Turning then to the question whether the additional electrical services should be disallowed as improvement works. The tribunal accepts in principle that where betterment is a result of carrying out repair works in accordance with current building standards that work will not normally constitute an improvement outside the scope of any covenant to 'Maintain repair redecorate and renew.' However, in our judgement the introduction of the sockets, internal lighting and additional external lighting goes beyond these parameters so that each is properly regarded as an improvement rather than part and parcel of the accepted maintenance, repair and renewal work.

30. In relation to the internal lighting, the omission of the windows does not in our view change this conclusion. The simple fact of the matter is that presently there is no internal lighting and its introduction remains an enhancement of the existing specification, however desirable it may be. Moreover, the concession that none of these works (sockets, added internal or external lighting or charge points) is required by Building Regulations or any known Code of Practice in relation to the rebuilding of the garages, puts the matter in our view beyond doubt.

Decision

31. For the reasons stated above the tribunal accordingly determines under and for the purposes of section 27A, that the amount payable in accordance with section 19(2) in respect of the proposed rebuilding of the original 12 garage block is no greater than the sum of £224,800 including VAT; allowing £5,600 plus VAT (250+450+(0.7x7000)) rather than £12,060 plus VAT for the Electrics and rounding down appropriately.

32. This does not of course mean that the Applicant cannot carry out these additional electrical works, but like the electrification of the garage doors it will need to be funded by way of individual agreements with lessees rather than through the service charge.

9 February 2021

NOTICE REGARDING 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 RPSouthern@justice.gov.uk. 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.

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

3. 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 appeal is seeking.