



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

Case Reference : **CHI/00ML/LSC/2022/0023**

Property : **Apartment 3, The Galleries,
52 Palmeira Avenue, Hove
BN3 3FH**

Applicant : **(1) Mr and Mrs Pendry
(2) Mr and Mrs R Plumbley
(3) Mr Woolfe**

Respondent : **The Galleries (Palmeria Avenue)
Limited**

Type of Application : **Section 27A**

Tribunal : **Judge Dovar**

Date of Decision : **3rd October 2022**

DECISION

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1. This an application for the determination of the prospective payability of service charges in respect of works to the roof terrace to the Property, which have been subject to a partial consultation process in accordance with s.20 of the Landlord and Tenant Act 1985.
2. The Tribunal gave directions on 19th April 2022, in which it identified the issues for determination, being:
 - a. Whether the consultation process was properly adhered to, if not, then, in the absence of dispensation from that process, the Respondent is limited to recovering £250 from the Applicant for the said works;
 - b. Whether the works were necessary, i.e. were they reasonably incurred, with the result that if they were not, their costs should be capped in accordance with s.19 of the 1985 Act;
 - c. Should some of the cost have been covered by guarantees;
 - d. Whether the cost was reasonable (again, with the result that if it is not, should it be capped under s.19);
 - e. Whether the Respondent has considered the financial impact on the leaseholders and whether to offer a repayment plan.
3. Further directions were given on 6th June 2022 and the Tribunal then indicated that it intended to deal with this matter without a hearing under the Tribunal Procedure Rules 2013, r.31, unless any party requested a hearing within 28 days, none have, and this matter has been dealt with on the papers.

Background

4. The Property was constructed around 2002. It is a five storey residential block with 24 flats, many with balconies and the flats on the top floor, have roof terraces.
5. The roof terraces to flats 1 and 2 leak.
6. As part of the process of remedying the leak, the Respondent states that the section 20 process was commenced in 2018 with the service of a notice of intention. However, that has not been provided to me and is not relied on by the Respondent in this application. I do not know what the scope of that notice was, but note that a notice was re-served in April 2022 and that is the notice which I take as being the one relied on for this application.
7. On 13th August 2020, Sussex Surveyors provided a report on a number of defects at the Property related to water ingress, particularly around the roof terraces. The inspection was carried out by Luke Field BSC (Hons) MRICS. In that report, the following was noted:
 - a. There were issues with water ingress with all the roof terraces which have been constructed incorrectly and to a poor standard;
 - b. *‘The roof terrace deck has been installed in line with the doors which in itself creates a severe risk of water ingress as there is no upstand in place to prevent ponding and this detail provides a bridge for water to travel internally.’* The narrow water channels

which had been installed were not sufficient given they did not drain away properly;

- c. The occupants only wanted the essential works to be carried out in the short term due to budgetary constraints. However, *'Ideally, given the raised height of these roof terrace decks and the inadequate means of drainage, they should be completely stripped and re-built ... As you are concerned with the cost of the works and it is not guaranteed that the membrane has failed, firstly, new drainage channels should be installed to prevent water ingress through the external doors. The terraces and flats below should then be monitored over time to see if this has addressed the issues. If not, then the roof terrace build up will need to be removed and replaced.'*

The roof terrace build up (tiles, grout, adhesive, screed) are in a poor condition and will need replacing in the near future, regardless of if the new drainage channels solve the issues in the short term. You should anticipate major works and high cost expenditure within the next 5 or so years.'

Prior to the balcony repair works, we recommend that the gutters, fascias and rainwater downpipes are replaced/repared.'

8. Mr Field set out under the heading 'Repair Works and Budget Costs' the following

1.	Installation of new ACO drainage channels in front of external doors and to the roof terrace deck draining to the external wall mounted hopper heads and outlets.
2.	Removal of stone filling to the perimeter gutter of the roof terrace to flat 2 and install new ACO drainage channel.
3.	Replacement of existing rainwater downpipes to external walls with wider profile downpipes and outlets. 6no downpipes.
4.	Replacement of existing rainwater downpipes to roof with muffled downpipes. To include the installation of wider outlets. 6no.
5.	Removal of existing box gutter lining, plywood deck and replace with new deck and gutter lining system.
6.	Removal of existing fascia boards and replace with new.
7.	Heating Engineer Inspection.
8.	Fire Safety Inspection.

9. I will refer to this list of works as the Initial Works.
10. On 10th March 2021, Garland Company UK Limited, provided an inspection report for Sussex Surveyors on the roof section of flats 1 and 2. They set out the following
- a. *'We would recommend that should promenade tiles and "aco channelling" undergo a refurbishment that the long term*

viability of the waterproofing is considered for upgrade/replacement at the same time'

b. *'leaks evidenced internally can be strongly linked to aco channels and balcony tiles breaching up-stand terminations and door thresholds.'*

11. Sussex Surveyors drew up a specification for tender at an unknown date, but presumably around the end of 2021. That included the following entry:

"The project works broadly comprise the following:

- Full replacement of the terrace build up to Flat 2 with a new StressPly Flex – Bituminous Waterproofing System by Garland.*
- Replacement section of roof terrace to flat 1.*
- Replacement of box gutters to penthouse roofs. Both Flat 1 and 2.*
- Removal of internal downpipes to penthouse downpipes and wrapping of downpipes in acoustic insulating wraps."*

12. I will refer to these works as the Specified Works.

13. It therefore appears that at some point they considered that the initial works they had set out in their August 2020 report needed to be widened. They have provided a letter for these proceedings dated 4th

July 2022, in which they say that they had not initially appreciated the many issues that had been experienced over the years with the construction of the Property. They say that *'after working closely with Garland UK, we determined that wholesale replacement of the terrace to Flat 2 and a partial change out of the northern section to Flat 1's terrace would be the better option.'*

14. In January 2022, CPL, a specialist leak detection company, were instructed to investigate the issue and concluded that the water ingress was due to *'a combination of badly fitted threshold drainage system and no proper designed system ... to allow water on the patio to drain water away.'* They recommended

'1. The patio and its drainage system have to be completely redesigned to carry water away from the property and make allowance for water getting through the patio surface. This should drain away and not just sit there because it will eventually penetrate the wall into the building.

2. The slab in Flat 2 will have to be dried out using an injection system to get passed the underfloor heating. This will have to wait until the issue with patio is resolved.

15. Also in January 2022, following the drawing up of a tender package, Sussex Surveyors provided a tender report on the four contractors who had bid for the works, the range of costs was £183,072 to £201,492. It was noted in that report that the tenders had initially gone out in November 2021. Although the report does not itself specify the works

that were to be undertaken, the sums are significantly in excess of Initial Works. It is clear that these works included additional and significant items, in particular the resurfacing of the majority of the terraces.

16. On 27th April 2022, the Respondent, through its agents, Pepperfox Limited, re-served a notice of intention under s.20 of the 1985 Act. It having become apparent that not all the leaseholders had been served with the initial notice in 2018. That stated that *'The works are as per Sussex Surveyors report and include the following works for flat 1 and 2 roof terraces'*:

- a. the installation of new drainage channels;
- b. removal of stone filling to the perimeter gutter;
- c. replacement of downpipes and the gutter lining and fascia boards;
- d. heating engineer inspection; and
- e. fire safety inspection.

It was said to be necessary to carry out those works *'to keep the building in good order and maintain property values'*.

17. The works specified, including that of the two inspections, are the same as those set out in the August 2020 report, being the Initial Works.

18. In their statement of case dated 6th July 2022, the Respondent confirms that as at that date, no notice of estimates had been served.

Consultation

19. The first challenge is that it is said the Respondent did not comply with the statutory consultation requirements in that it did not correctly describe in general terms the works proposed as a significant proportion of the works were omitted; in particular:
 - a. The partial removal and replacement of the terrace to flat 1; and
 - b. The full removal and replacement of the terrace to flat 2.
20. Further, although the notice referred to the Sussex Surveyor's report, that was not provided with the notice and so any reference to those works in that report are said not to be sufficient to save the notice.
21. The Respondent denies this defect and states that the notice of intention '*would never include a full and detailed review of works ...*' Further that in any event, '*the leaseholders have the legal right to request a schedule of works or attend Pepperfox offices in person to view tender documents.*'
22. The timing of this application, coming as it does before the notice of estimates, means that my focus is on what the notice of intention could potentially cover if the Respondent's were to rely on it to satisfy their consultation obligations and overcome the cap imposed on cost recovery under s.20 of the 1985 Act if consultation is not properly carried out.
23. Further, as this application has been made before the notice of estimates has been served or any demand made for the cost of the proposed works, I have assumed that the works are the Specified Works and that the

Respondent does intend this consultation process to include the more extensive works than the Initial Works.

24. However, it is not clear which Sussex Report the notice of intention is referring to, it does not say. There were two. The first was that of 13th August 2020, which was equivocal as to the extent of the works that should be carried out. It raised the possibility of carrying out works to the entire terrace or just to the drainage channels. Whilst it suggested the latter was possible in the short term and in the interests of cost, it did point out that the former would be needed in the near future. It also set out the Initial Works, from which it would be inferred that that was the approach they were then advocating. Indeed the works mentioned in the notice mirror those specified in this report.

25. The second report is the tender report of January 2022. As far as it is possible to discern, whilst that suggests costs significantly higher than those in the 2020 report, it does not actually set out what the works are. Further, there are two problems with this report:

- a. It is not a report on the need for the works, but on the tenders received; and
- b. It is premature given that the revised notice of intention had not been sent out at this point. Before issuing the specification for tender, the statutory consultation process envisages that the landlord will first take into account observations made by the leaseholder on matters including the scope of the works. These observations are to be made in the period following the notice of

intention. As the notice of intention had only been given in April 2022, this report could not have taken into account observations made in respect of that notice. Further, in this particular case, it is more than apparent that had the notice of intention referred to the more extensive works, the Specified Works, some of the leaseholders would have observed that those works were not necessary at this stage and would increase the cost considerably.

26. I am not aware of any other reports from Sussex Surveyors. There were none in the bundle provided to me. Their letter of July 2022 also suggests that their view on the necessary works evolved over time, but they do not mention any other reports being provided by them.
27. It follows that the omission in the notice to say that the works were to include the removal of significant parts of the terrace was a material omission, notwithstanding that the notice only need set out in general terms what works were intended. In the present context it was potentially misleading to the leaseholders not to specify in the bullet points the more extensive works that the Respondent intended the notice to cover. Any leaseholder looking at the notice in the context of the August 2020 report would reasonably consider that the works were the Initial Works. They would no doubt feel financially relieved at that point and would not have been prompted to make any observation about the more costly works to replacing the terraces.
28. Therefore, the notice of intention is not sufficient to permit the full Specified Works, but could only form part of the consultation process

which dealt with the Initial Works identified in the August 2020 report from Sussex Surveyors.

Necessary?

29. The next challenge is that it is said that not all the works are necessary. I take this as a challenge not to whether or not the cost of any works are recoverable under the lease terms, but whether or not the intended works are actually necessary to remedy the defects in the terraces. In that regard this is an issue as to whether if those works were carried out, the recovery of any costs should be capped by s.19 of the 1985 Act on the basis that they were not reasonably incurred.
30. Again I take the works the Respondent wishes to carry out pursuant to the consultation procedure to be those for which the tenders have been received and reported on by Sussex Surveyors in January 2022; i.e. the Specified Works.
31. In particular it is pointed out by the Applicants that the specialist reports place the cause of the water ingress with the drainage channels. The Applicants contend that it is therefore **not** necessary to carry out works to the downpipes, or fascia boards as these are not causative of the ingress. Further it is said that the heating engineer inspection and fire safety inspection are not warranted. Finally they rely on the August 2020 report to support their claim that the significant works to the terraces are not necessary.

32. The necessity for the works challenged is more than justified by the various reports commissioned. The August 2020 report makes specific reference to the need to repair the fascias and downpipes, it also recommends a fire safety survey and an inspection of the heating and water system. Whilst the latter are not necessary in order to remedy the water ingress, they are sensible and reasonable surveys to undertake in terms of good property management.
33. Further, whilst the August 2020 report says works to the terraces could be omitted, that is only in the short term and Garland have recommend undertaking them at the same time. Sussex Surveyor's subsequent letter of 4th July 2022 also explains why they are now of the view that the more extensive works are necessary. Therefore, although the reports focus on the issue with the drainage channels, their recommendations are far wider and justify more extensive works.
34. Although oddly, it is notable that the Respondent in its statement in reply has stated that the section 20 consultation was not intended to cover the fascias, fire safety survey or the heating inspection despite those items being expressly included on the notice.
35. Therefore, subject to consultation, the Specified Works are necessary in terms of being reasonable to incur under s.19 of the 1985 Act.

Guarantee cover

36. Whilst this was a challenge, the Applicants' outline of their case in May 2022 stated that *'This may be checked when the final scope of the works*

has been determined'. It also does not appear in the Applicants' statement of Case dated 21st June 2022. Accordingly, I have not dealt with this in this determination.

Reasonableness of fees and costs

37. Queries were initially raised by the Applicants over the managing agents' fees for the works; but they have now said they will not charge any. Instead it is said Sussex Surveyors will charge a fee for overseeing the works. The Applicants now seek full clarity of those fees and costs.
38. The Respondent has stated that Sussex Surveyors are charging 10% of the cost of the works, capped at £10,000, for a project management fee. This appears unobjectionable and 10% is a common fee for project management. In principle therefore this fee is reasonable.

Consideration of financial impact

39. The final challenge is the failure of the Respondent to properly take into account the leaseholders' means and cushion the cost of the works. The Respondent has intimated that it will use the reserves to fund these works and then build up the reserves again over time.
40. The Applicants resist the use of the reserve fund to cushion the cost of the works. Instead they seek a payment plan to spread the cost of these works over the years. That is not something that the Tribunal has power to order.
41. Further given the conclusion above on the extent of the notice of intention, this issue does not arise; not least until a new notice of

intention is issued which clarifies the full extent of the works and permits observations. Following the Court of Appeal decision in *The London Borough of Hounslow v Waaler* [2017] EWCA Civ 45, there may be an obligation on the Respondent to take into account the leaseholders finances where what is proposed is an improvement (and a discretionary item of work) rather than a repair.

Conclusion

42. Given the wording of the notice of intention, that is only effective to cover the Initial Works identified in the August 2020 report. The Respondent is not entitled to rely on that notice as part of a consultation process for the Specified Works. Save for that, the Specified Works are reasonable given the various reports that recommend them, as are the intended project management costs. Given the limit on the consultation at present, it is premature to deal with any issues of funding that might arise.

JUDGE DOVAR

Appeals

A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email 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.

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.

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.