Y TRIBIWNLYS EIDDO PRESWYL

RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0058/02/17

IN THE MATTER OF: 21 Station Road, Rhoose, Vale of Glamorgan, CF62 3EY

AND IN THE MATTER OF an application under section 27A Landlord and Tenant Act 1985

B E T W E E N:

Applicant GERALD BRYAN

Respondent THE VALE OF GLAMORGAN COUNCIL

ORDER

Hearing: 12th July 2017, Residential Property Tribunal, Wood Street, Cardiff (after inspection of property at 9.30 a.m.)

Tribunal: Mr E W Paton (Chair)
Mr J Singleton (Surveyor)
Mrs C Calvin-Thomas (Lay member)

UPON the Applicant's application dated 4th February 2017

IT IS ORDERED THAT:

1. No service charge shall be payable by the Applicant in relation to the items numbered 1, 2, 3, 4, 6 and 7 in the Respondent's Schedule accompanying its "Notice of Major Works" dated 26th September 2016; on the basis that such items did not fall within the relevant covenants of the Applicant's lease and were not "reasonably incurred" for the purposes of section 19(1)(a) Landlord and Tenant Act 1985.

2. Service charge shall be payable by the Applicant in relation to item 5 in the said Schedule, on the basis that:-

i) in the events which happened, this consisted chiefly of the repainting of the exterior of the building, and was both within the covenants of the lease and “reasonably incurred"

ii) no charge has yet been made for this work via service charge, and the Applicant retains the right to challenge the reasonableness of the cost of such work and/or its standard.

3. The Tribunal will give further directions for any submissions as to costs under section 20C Landlord and Tenant Act 1985 only if the Council gives notice to the Applicant and the Tribunal of its intention to attempt to recover its costs of these proceedings via service charge.

Dated this 19th day of July 2017

Chairman

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DECISION

Hearing: 12th July 2017, Residential Property Tribunal, Wood Street, Cardiff

Tribunal: Mr E W Paton (Chair)
Mr J Singleton (Surveyor)
Mrs C Calvin-Thomas (Lay member)

For the Applicant: Mr C Bryan (son of the Applicant)

The Respondents: Ms Ceri Morgan, in house solicitor

1. The Applicant, Mr Gerald Bryan, is the owner of the long leasehold interest in 21 Station Road, Rhoose, having purchased it in 2005. It is the ground floor flat in a block of two. The upper flat (no. 22) remains in Council ownership and is occupied by a Council secure tenant. No. 21 was the subject of a ‘right to buy’ lease in 1984 by its then occupier. The lease is dated 13th February 1984 and is for a term of 125 years with an annual ground rent of £10. The lease also contains a covenant to pay service charge to the landlord, the most relevant part of the covenant being at clause 5(2)(A):

"....to pay to the Council upon demand without any deduction the further sums (hereinafter called "the service charge") being a proportion of the reasonable expenses and outgoings incurred or anticipated by the Council in respect of the repair maintenance and renewal of the structure and exterior of the building and in respect of the other matters specified in the Third Schedule hereto."

2. The Third Schedule contains various items for which the landlord must or may incur costs and expenditure, of which the most relevant for present purposes are:

"1. Subject to the provisions of sub-subclause 5(2)(C) hereof the cost of keeping in repair the structure and exterior of the flat and of the building (including the structures and exteriors of all other flats [in?] the building and drains gutters and external pipes and any external stairway and any balconies (including the railings thereof) and the windows and exterior doors and the foundations and roof of the building) and of making good any defect affecting that structure.

2. The cost from time to time as and when necessary of cleansing and/or redecorating the exterior of the building and of all parts thereof including gutters and external pipes and any external stairway and any balconies (including the railings thereof) and the windows and exterior doors."

3. This application arises from a section 20 Landlord and Tenant Act 1985 Notice of Major Works served by the Council on Mr Bryan on 26th September 2016, under its Qualifying Long Term Agreement with a contractor in relation to a large scale programme of works on the Council's properties in its borough. The letter gave notice that the Council's contractor, Lovells, would be carrying out works to numbers 21 and 22 Station Road, Rhoose, at a total estimated cost of £24,232.68, of which Mr Bryan would be expected to pay a proportion of 50%, estimated at £14,297.28. The reason given for the works was as follows:

"The reason for this work is that the Council is undertaking the Housing Improvement Programme and this work [sic] is needed to protect the block from water ingress and to remedy defective guttering."

4. The works and their estimated costs as set out in an accompanying Schedule consisted of (by numbered point):

- 1. Scaffolding (£3808.20)
- 2. Ecology Survey (£88.00)
- 3. Asbestos Surveys (£285)
- 4. Installation of new roof, loft insulation, fascia, soffits and rainwater goods (guttering): (£16,192.50)
- 5. Render and painting to external walls (£3368.68)
- 6. Enabling works (£490.30)
- 7. Legals and certificates (£259.31)

5. These works have now been carried out. The roof and associated works were completed by about March 2017, and the external painting was completed by late May 2017. The final costings have not been determined, and no service charge invoice has yet been served on Mr Bryan. Some of the costs may eventually be less than the original estimates.

6. By an application dated 4th February 2017, Mr Bryan challenged the reasonableness and recoverability of the cost of these works by the Council, under sections 19 and 27A Landlord and Tenant Act 1985. At that time, the whole of the works and the proposed sum sought to be recovered (£14,297.28) was challenged. It was clear from his application and the accompanying documents that he disputed the recoverability of the cost of the works under the lease covenants; the reasonableness of the Council's decision to incur such costs; and the amounts.

7. By the time of the hearing, the works had only just been completed, but final costs had not been calculated or invoiced. The parties were therefore in agreement that the hearing would not concern the reasonableness of the amounts incurred by the Council (if the costs were otherwise recoverable), as to which amounts Mr Bryan could make a further challenge if and when he received an invoice. The issues were therefore:

   - whether the works fell within the covenants at all; and

   - under section 19 LTA 1985, whether they were "reasonably incurred" i.e. the reasonableness of the Council's decision to carry out such works on this property.

8. It also became apparent during the hearing that Mr Bryan, who in his absence through illness was ably represented by his son Mr Christopher Bryan, that in relation to the exterior works to the render and walls:-

   i) the actual work done was primarily a repainting of the exterior walls, with hairline cracks filled and painted over in the course of that. There were not any significant works of re-rendering.

   ii) Mr Bryan did not really have any objection to the repainting as such, or the decision to carry it out, given that the property had not been painted during Mr Bryan's ownership and given also the "redecoration" clause 2 of the Third Schedule to the lease.

   iii) the final costs of that item are likely to be significantly lower than the original estimate.

   iv) a scaffold was re-erected for the purpose of carrying out that painting work (the previous scaffold erected for the roof works having been taken down) but the Council (through Mr Andrew Treweek) indicated that this would not be the subject of a further charge via service charge.

9. We are therefore concerned primarily with item 4 on the Council's schedule – the installation of a new roof, loft insulation, fascia, soffits and guttering. The remaining items (the ecology and asbestos surveys and enabling works etc.) are, it seems to us, predominantly associated with these works and so 'stand or fall' with them.

10. The Council owns the freehold of a large number of properties, many of which remain part of its social housing stock let to secure tenants. Many properties will, however, be held on long leaseholds acquired by 'right to buy' tenants, on leases such as the lease in this case. Sometimes, as here, the two will be combined in a single building. There will be times when, whether driven by grant funding or a general policy, the Council wish to carry out general works of improvement or updating to buildings in the borough as a whole. In relation to long leasehold owners, however, who occupy under leases such as the lease in this case, with service charge covenants tied to the cost of the landlord performing its obligations under that lease, the recoverability of the costs of such works against them via service charge must be carefully considered - just as it would in any other private landlord and tenant relationship. The Council as landlord must show that the works fell within the covenants in the first place. It is then subject to the requirements of the Landlord and Tenant Act 1985 – such costs are only recoverable via service charge to the extent that they are reasonably incurred and reasonable in amount. The Council cannot simply carry out general and wholesale works of improvement in the area, to a number of properties, then send long leaseholders a service charge bill for a proportion of the costs of those works.

11. That means that the works done to this property, 21 Station Road, must be carefully looked at on the above points, just as if this was the only property to which such works had been done. The Council is essentially in the same position as any private freeholder which chooses to replace a roof (and associated items) then bill a leaseholder via service charge for a proportion of the cost of the works.

12. As a matter of law, consideration of such a case involves the following stages:-

    i) was the subject-matter of the covenant – the roof and associated items – in disrepair, in that there was a specific deterioration from a previous condition?

    ii) if so, what was that disrepair, and what is the evidence for it?

    iii) if, and only if, there was such disrepair, what were the available means of remedying it?

    iv) in particular, was it capable of remedy by localised or 'patch' repairs or similar, or was the deterioration and disrepair so severe that the only, or at least a reasonable, means of economic repair was a wholesale renewal and replacement of the roof and other items?

    v) was the landlord's decision e.g. to carry out a wholesale replacement a reasonable one, so that the costs of such an exercise were "reasonably

incurred" for the purposes of section 19 LTA 1985 and so in principle recoverable via service charge (subject to any challenge as to reasonableness of amount, or standard of work)?

The present case

13. When those stages are considered and applied in the present case, what is striking is the dearth –in fact, almost a complete lack – of evidence from the Council to support such a decision in relation to this property.

14. We neither heard nor read any evidence from either any expert surveyor, whether independent or employed by the Council, as to the condition of this roof prior to the decision to carry out these works. No witness who had inspected the roof gave any evidence before us. The most the Council could provide was a tabular 'scope of works' document generated on a spreadsheet by a Mr John Rees on 1st September 2015, which simply set out (by the word "item") works which would be included in relation to this property. This document said nothing at all about the specific condition of the property at that time. For example, what is presumably the key item in this regard says just this:

    " Pitched Roofing RE Roof Property complete to Vale of Glamorgan Specification inclusive of flashing valleys and secret valleys to Adjoining Properties also to include for any Defective Roof Structure Found once revealed"

    then under "Dimension/Area": "Measures to be confirmed by QS"
    [emphasis added]

15. It was said in evidence by Mr Treweek that Mr Rees did, or must have, "inspected" the property, but at its highest this can only have been a fairly cursory external viewing of the roof from ground and street level. There is no evidence that Mr Rees or anyone else actually went up on the roof to inspect it, let alone going inside the building to inspect the internal roof space. None of the witnesses who actually gave evidence (Mr Treweek, Mr Price and Mr Ingram) had, or could have had, any direct knowledge of the condition of this property and its roof.

16. There was not a single contemporaneous photograph of the condition of this property, taken by Mr Rees or anyone else from the Council for the purpose of making its decision on the above issue. The best with which the Council could come up – after the event, and in fact printed out in May of this year – were photographs from "Google Earth", apparently showing the condition of the property and its roof in May 2016. These were said to show some missing or cracked roof tiles. If they do, they are barely visible. There is also said to be some moss on the roof. That may be so, but there is no evidence as to its extent or effect on the state of repair and water tightness of the roof. One witness, Mr Price, sought to argue that looking at a better quality Google Earth image, it might be possible to see a crack in one of the soffits, although this might just have been the joint between two soffits.

17. Whether a handful of missing tiles, or some moss, can be seen by squinting at a "Google Earth" photograph now is, however, beside the point. There is no evidence that any such findings of specific disrepair informed the Council's decision to carry out these works at the time. The Council's witnesses were reduced to speculating that this "would have" informed such a decision at the time, albeit that they could not say by whom such a decision was made. At times they came close to asserting that this roof was in disrepair or subject to "water ingress" simply by extrapolating from general observations about properties and roofs of this age generally. It was said by Mr Price that roofs of this sort generally had an expected life of about 60-65 years, and that a 2008 Savills survey of 10% of properties in the borough – not including this property – had recommended roof replacements in 2015-16. Needless to say, we were not provided with this survey, but in any event it was accepted that this was a general recommendation and not one based on the condition of this specific property.

18. It was accepted that there was not a single logged incident of either the leasehold owner of no. 21 Mr Bryan, or his predecessor in title, or the secure tenant of the upper flat no. 22, making any complaint about any disrepair, defect, failure or water ingress from the roof, guttering or any associated items.

19. In the face of such an evidential void, our clear decision is that we simply cannot find that the roof and associated items (such as guttering) were in disrepair at the time the Council took the decision to carry out these works. In the course of argument we asked the following hypothetical question: suppose that the positions were reversed, that there was no service charge covenant and that this was a case of a lessee calling on a landlord to replace a roof at its expense. The lessee would be asserting that the roof was in disrepair, that the landlord was in breach of covenant by not repairing it, and that a wholesale replacement of the roof was the only reasonable economic mode of repair. What would a Court then make of a lessee who advanced such a case at a hearing without any direct oral or photographic evidence of the condition of the roof, or any expert surveyor's evidence, in circumstances where the roof had never even been inspected? Would an indistinct image from Google Earth suffice? We think not.

20. We consider that Mr Bryan, in his application and associated documents, was close to the mark when he formed the view that in truth this was simply part of a general and wholesale programme of "Housing Improvement" in the borough, affecting a large number of the Council's properties (occupied by both leasehold owners and secure tenants), in which no or no sufficient specific consideration was given to the individual condition of this particular property. As the Council freely admitted, there are and were "economies of scale" in carrying out such a large programme of works at the same time, to a range of properties, with a common contractor. That may be so, but that does not obviate the need to show that in the case of a particular property, part of which is owned on a long lease containing a service charge covenant, that the proposed works to that property fall within the scope of the service charge covenant; in that they are works of "repair maintenance and renewal of the structure and exterior.." required under the landlord's covenant because the

structure and exterior is in disrepair, for which the lessee must then pay a proportion via service charge.

21. We therefore conclude that there is no, or sufficient, evidence that the roof and associated items at no. 21 were in disrepair at all. Even if we had formed the view that there was some disrepair, by extrapolation from a "Google Earth" photograph after the event, we could not have reached a conclusion that it was anything other than minor or de minimis. If a roof is missing a couple of tiles it is not in any significant state of disrepair. As stated, there was no evidence and there were no complaints as to failure of the roof or other items, or (as was attempted to be asserted by the Council, on the basis of no evidence) "water ingress" to the building. Even if we had reached the view that this was disrepair, there was no evidence, lay or expert, before us as to whether that could have been remedied by very minor patch repair and tile replacement, as opposed to replacement of the entire roof and associated items at an estimated cost of potentially over £20,000 (once the cost of scaffolding and other items is included). The Council has made no effort to justify such a decision by providing evidence of the thought process behind it. In the end, their position more or less came down to saying that because they replaced the roof, it must have needed replacing. That is simply not good enough.

22. We therefore find that items 1, 2, 3, 4, 6 and 7 in the Council's schedule were not "reasonably incurred", and did not fall within the scope of the Council's lease covenants. The largest item is number 4 - that of the roof and associated matters - and as stated it seems to us that in practical terms the ancillary items 1 (the initially erected scaffold), 2 and 3 (ecology and asbestos surveys), 6 (enabling works) and 7 (legals and certificates) were all in substance tied to that item 4. The Council will be able to recover the reasonable costs of painting the exterior and filling in any hairline cracks when doing so, and has already indicated that it will not be claiming the separate scaffolding cost for that, although some scaffolding for such a painting job would generally be a reasonable and necessary cost to incur. We are not persuaded that any significant element of items 2, 3, 6 and 7 related to that painting work.

23. We therefore grant the Applicant's application to that extent. We do not know whether the Council will later attempt to recover any of its legal costs relating to this application via service charge (for example under the Third Schedule paragraph 12 of the lease). If it indicates that it intends to do so, we would be likely to direct that we would then hear argument on whether we should make an order under section 20C Landlord and Tenant Act 1985 disallowing any such recovery. If the Council informs us that it does not intend to do so, then no further directions or hearing would be required.

Dated this 19th day of July 2017

E.W. Paton
Chairman