**Y TRIBIWNLYS EIDDO PRESWYL**

**RESIDENTIAL PROPERTY TRIBUNAL**

**LEASEHOLD VALUATION TRIBUNAL**

Reference: LVT/0023/08/15

In the Matter of 47 Jenner Road, Barry, Vale of Glamorgan, CF62 7HP

In the matter of an Application under Section 27A of the Landlord & Tenant Act 1985

**TRIBUNAL** Mr S Povey
Mr R Baynham
Ms A Ash

**APPLICANT** Michaela Tolcher-James

**RESPONDENT** Vale of Glamorgan Council

**DECISION**

1. Save for the proposed roof insulation and canopy removal, the works proposed by the Vale of Glamorgan to the block which includes 47 Jenner Road ('the block') are reasonably required.

2. There is no basis upon which any sums can be lawfully set off by Mrs Tolcher-James against any subsequent service charge demanded of her arising out of the actual costs incurred in undertaking the proposed works to the block.

3. Mrs Tolcher-James' application under Section 20C of the Landlord & Tenant Act 1985 is refused.

## REASONS FOR THE DECISION

### Background

1. The Applicant, Mrs Michaela Tolcher-James ('the Leaseholder') was the secure tenant of 47 Jenner Road, Barry ('the property'). The property is one of four flats in a converted block ('the block'). The property was owned and let by the Respondent, Vale of Glamorgan Council ('the Vale'). In 2000, the Leaseholder exercised her right to buy the flat from the Vale. On 18th December 2000, the Vale granted a 125 years lease of the property from 25th September 2000 at a cost of £14,950 ('the lease').

2. On 19th August 2015, the Vale served the Leaseholder with notice under section 20 of the Landlord & Tenant Act 1985 ('L&T Act 1985') of works it intended to carry out to the block. The notice included a schedule of the proposed works and estimated costs. These estimated costs equated to an estimated contribution by the Leaseholder of £13,058.

3. On the same day, the Leaseholder wrote to the Vale and objected to the estimated costs. She claimed that the proposed works had either arisen as a result of the Vale's failure to keep the block in repair or were unnecessary and unreasonable. She also contended that she had incurred costs herself in the region of £17,000 by reason of the Vale's failures to repair. The Leaseholder also applied to the Residential Property Tribunal ('the Tribunal') under section 27A of the L& T Act 1985 for the reasonableness of the estimated charges and her liability to pay the same to be determined. She relied upon the same ground as raised in her letter to the Vale. That application was received by the Tribunal on 21st August 2015.

### The Inspection & Hearing

4. The Tribunal inspected the property and the block on 16th December 2015. The hearing followed at the Tribunal's Cardiff offices, where we heard evidence from the Leaseholder and her husband. We also heard evidence for the Respondent from Andrew Treweek (Operational Manager – Building Services) and from Mike Ingram (Operational Manager – Public Housing Services), as well as oral submissions from the Leaseholder and oral and written submissions from Mr Paget of counsel for the Vale.

5. We were also provided with a paginated bundle of documents, to which we were referred throughout the hearing. There was a preliminary issue at the start of the hearing regarding the admissibility of documents provided by

both parties after the deadline set earlier by the Tribunal. It was agreed that all these documents could be taken into account by the Tribunal.

6. In addition, a query was raised by the Tribunal regarding consultation requirements for the proposed schedule of works. After some discussion and clarification, it was accepted by the Tribunal that the proposed works formed part of a larger qualifying long term agreement and the same had been properly consulted on. It was not therefore an issue that was relevant to these proceedings.

7. At the end of the hearing, we afforded both parties the opportunity to send in written submissions on the discrete issue of the application of the Limitation Act 1980 to any set off being pursued by the Leaseholder. We subsequently received submissions from both parties.

8. In addition, after the hearing, the Tribunal sought submissions from both parties regarding the Leaseholder's application (contained with her application form to the Tribunal) under section 20C of the L&T Act 1985.

**Relevant Law**

9. Section 19 of the L&T Act 1985 imposes a requirement that expenditure that is sought to be recovered by way of a service charge is reasonable. Such expenditure can only be recovered to the extent that it has been reasonably incurred and, where the expenditure relates to works or services, where those works or services are reasonably required and of a reasonable standard.

10. By virtue of section 27A of the L&T Act 1985, the Tribunal has the power, upon application, to determine whether, if costs were incurred for repairs and maintenance, a service charge is payable for those costs and, if it is, the amount which is payable. Specifically, section 27A(3) permits an application to the Tribunal where costs have yet to be incurred but to determine whether a service charge would be payable if those costs were incurred in the future (and the amount payable). In determining the amount payable, the Tribunal will apply the provisions of section 19 of the L&T Act 1985 as to reasonableness (set out at Paragraph 9, above).

11. Costs incurred by a freeholder (e.g. the Vale) arising out of a breach of the freeholders own obligations to repair that resulted in further disrepair and which imposed a liability on a leaseholder to pay a service charge are not costs reasonably incurred and the leaseholder has a defence to their

recovery. Such a defence is in the form of an equitable set off: Continental Property Ventures Inc v White [2007] L. & T.R. 4

12. Any claim by a leaseholder for set off based upon historic neglect or a breach of the obligation to repair by a freeholder goes to the amount payable under the service charge (as determined under section 27A of the L&T Act 1985). It has no effect on the reasonableness of whether the work is required: Continental Property Ventures [2007]

13. Section 20C of the L&T Act 1985 gives the Tribunal, upon application, the power to determine whether all or any of the legal costs incurred by the Vale in connection with these proceedings can be included in future service charges and payable by the Leaseholder. The Tribunal may only prevent or limit such a recovery of costs if the same is not permitted by the lease or, where the lease does permit recovery, where it is just and equitable to prevent or limit recovery.

**The Property**

14. The property is situated in a purpose built 1930's block of four flats located on a busy thoroughfare in a popular area of Barry and within walking distance of all amenities. There are a total of 17 similar blocks of flats on this road.

15. The block is of conventional design with exterior cavity brick walls which have been cement rendered to the first floor and side and rear elevations. It has a slate roof with plastic rain water goods and UPVC double glazed windows and doors. The property is located on the first floor although the Leaseholder has extended into the roof space to provide further accommodation. It is understood that this ingress into the roof space was without the Vale's consent.

16. The block has been maintained to an acceptable condition. The slate roof is in reasonable order as is the majority of the cement render although some render has fallen off on the rear elevation. There was evidence of other minor cracking. In addition, some repointing to the brick work is required.

17. The access to the property is via an external staircase which leads to the front door. On this level, there is an entrance hall which leads to a hallway, a living room, two bedrooms (one of which is utilised as an office), a kitchen and a bathroom. There are metal stairs leading from the kitchen to the rear garden. On the second floor (i.e. the roof space area) there are two further

bedrooms both with en-suite showers and WCs. The property has been maintained and improved to a high standard and also has the benefit of gas central heating.

18. The front garden of the block is in lawn, with the property having a designated grassed area. The rear garden is reached either by a pedestrian side entrance or by the metal staircase from the first floor kitchen. The rear garden is of a good size and laid in lawn with a paved patio. There is a substantial garden shed / summer house at the end of the garden.

## The Matters in Dispute

19. The parties agreed that the following issues required determination by the Tribunal:

    19.1. The reasonableness of the work proposed as indicated in the schedule of works served on the Leaseholder on 19th August 2015 ('the proposed works');

    19.2. The proposed amounts payable by the Leaseholder in respect of the proposed work, including whether any sums could be set off against such payment by reason of the Vale's alleged historic neglect and breach of repairing obligations;

    19.3. The Leaseholder's application under section 20C of the L&T Act 1985.

## The Tribunal's Decision

20. Having regard to the evidence we have seen and heard, the Tribunal has reached the following conclusions on the issues before us.

### Are The Proposed Works Reasonably Required?

21. The Vale concedes that the proposed insulation to the roof is an improvement and should not form part of the service charge (as it is not a repair). Therefore it is accepted that the Leaseholder is not liable for the costs of this work. In addition, the Vale does not propose to seek the costs of the canopy from the Leaseholder through the service charge or at all. As

such, when those works are completed and the costs incurred by the Vale, they cannot be passed on to the Leaseholder through the service charge.

22. As for the remaining proposed works, the Tribunal has decided to reach conclusions on the reasonableness of the proposed work but not on the reasonableness of the estimated costs, for the following reasons:

    22.1. They are estimates, subject to change and may not reflect the final costs incurred by the Vale and demanded from the Leaseholder;

    22.2. The estimates served on the Leaseholder and relied upon by the Vale are not specific to the property or the block. They are generic estimates. Many of the measurements upon which the estimates are based require confirmation and will be block specific. We do not have sufficient information to make specific findings regarding the costs likely to be incurred by the block or the property;

    22.3. The reasonableness of the actual costs incurred by the Vale can be challenged again by the Leaseholder once they are formally demanded as part of future service charges.

<u>The Roof</u>

23. The Tribunal found, on balance, that the works proposed to the roof were reasonable. We only had evidence from the Vale as to its condition and life span. The roof dates from the 1930s. Whilst the Tribunal queried why works were being proposed now, we accept that as a large scale project, the work is likely to benefit from economies of scale. In addition, the Leaseholder accepts (after some clarification on the distinction between a repair and improvement) that the roof needs replacing and such a replacement would constitute a repair.

24. We also find that the associated proposed works with the roof (fascias, soffits, bargeboards, guttering and repointing of the chimney) are reasonably required to this block.

25. We reiterate that we are not saying that the costs estimated for replacing the roof are in themselves reasonable, only the proposed work. Again, there is insufficient detail in the estimates for us to reach a conclusion on whether the estimated costs are reasonable for this block and this property.

<u>The Other Proposed Works</u>

26. Based upon the evidence before the Tribunal, coupled with our own inspection and expertise, we also conclude that the following proposed works are reasonable:

    26.1. Hacking off and renewing render as required. We saw evidence of where render had come away from the block during our inspection. It was accepted by the Leaseholder in evidence as needing to be done;

    26.2. Clear out cavity wall. The Leaseholder accepted that it was reasonable for the Vale to clear out the cavity wall as there are concerns that the damp proof course (which was installed by the Leaseholder without consent) may be bridging and causing water ingress;

    26.3. Remove and renew rainwater goods. From our inspection, this work is reasonably required and the Leaseholder did not appear to object to the same;

    26.4. Structural, ecological and asbestos surveys. These are reasonably required, permitted under the lease (structural survey) and requirement of the law for work of this nature (ecological and asbestos surveys);

    26.5. Enabling works, save those that relate to the removal of the canopy (as the costs of the same are conceded by the Vale not to be recoverable from the Leaseholder);

    26.6. Scaffold. This is a reasonable requirement particularly for the roof and rainwater goods and render replacement;

    26.7. Repointing. This is reasonable, to the extent that, as set out in the schedule of work, it is undertaken as required and where the existing mortar has deteriorated, to prevent future damp problems;

    26.8. Painting of render and plinths. The work itself is reasonably required, given the work to be undertaken first to the rendering;

    26.9. Finishing. Again, this is reasonably required given the extent of the work to be undertaken to the block.

27. The Tribunal reiterates again that we are not saying that the amounts being estimated for the above works are in themselves reasonable. We take no

view on that, for the reasons set out above (that the estimates are insufficiently block specific for us to make an informed determination of the reasonableness of the costs likely to be incurred and sought from the Leaseholder through the service charge). When such costs are incurred and demanded from the Leaseholder, she will have another opportunity, if she so wishes, to challenge the reasonableness of those costs.

28. For all the above reasons, with the exception of proposed insulation of the roof and the removal of the canopy, we find that the work proposed by the Vale is, for the purposes of section 19 of the L&T 1985, reasonably required.

**What Amounts, If Any, Are Payable?**

29. Although we are not making findings on the estimated costs contained within the Vale's proposed schedule of works, we are still required to consider whether, once the actual costs are demanded from the Leaseholder, she is entitled to resist payment of all or part of those actual costs.

30. Two issues have been raised by the Leaseholder – historic neglect and costs she has incurred regarding the property. We address each in turn.

Historic Neglect

31. The Leaseholder claims that some of the proposed work has only arisen because of neglect by the Vale. She cites and relies upon a number of examples in her letter of 18th August 2015 to the Tribunal.

32. Save for the historic issues the Leaseholder relies upon regarding the roof leaking (and addressed below), all of the works she has undertaken and any associated costs incurred were either her responsibility upon becoming the leaseholder of the property in 2000 or (in respect of a leak to the boiler which was reported on or around 19th June 2000) arose when she was a tenant and became her responsibility upon assuming the leasehold in December 2000.

33. The Leaseholder submitted that the Vale had agreed to maintain the property for the first five years of the lease (i.e. from December 2000 to December 2005). In the Tribunal's judgment, that was not the case. The Leaseholder relied upon a letter dated 10th August 2000 from the Vale, which was a response to her right to buy application. The letter alerted the Leaseholder to the fact that any successful right to buy application would result in a liability to pay service charges as a leaseholder. An estimated

annual amount was provided. The letter does not state that the Vale would maintain the property for five years. Rather, the Vale agreed to cap the annual service charge at the estimated amount for five years.

34. It follows that any neglect, damage or resultant financial outlay was not the legal responsibility of the Vale and cannot be relied upon to offset or reduce any aspects of the service charge, whether now or in the future.

Costs Incurred & Set Off

35. However, the above conclusion does not apply to the roof, since it forms part of the exterior of the property for which the Vale retains responsibility under the lease (per Clause 3 of the Third Schedule) for maintaining and keeping it in repair. The Leaseholder points to three occasions (in 2001, 2002 and 2009) when she claims that, as a result of the Vale's neglect and its failure to comply with those obligations under the lease, the roof leaked and she incurred financial loss. We consider each in turn:

    35.1. The roof leaked in early 2001. The Leaseholder claims that she was charged by the Vale for repairing the roof (through the service charge) but that she subsequently received a service charge refund and when she queried this, was told that the repair had never been carried out. It is claimed that the Leaseholder incurred £865 worth of damage as a result of the leak. She relies upon a job record (ref 812623) and the service charge demands dated 7th September 2001 (when the cost of the repair was included) and dated 12th July 2002 (when the cost was refunded as it had been "*incorrectly charged*").

    Upon considering the evidence before us, with respect to the Leaseholder, we believe she is mistaken. Job record 812623 relates to a call out regarding the roof on 25th November 2000 (as evidenced is the repairs history and exhibited to the statement of Mike Ingram at pages 221 and 239). The cost incurred with this job arose while the Leaseholder was still a tenant of the property. As such, she was not liable under the lease or through the service charge to pay anything towards the costs incurred. In error, she was charged for this job (in the 2000/01 service charge). When the error was identified, she was rightly reimbursed that same amount in the 2001/02 service charge. This job record does not relate to the 2001 leak.

    Instead, the repairs history shows that on 3rd February 2001, the Vale undertook a temporary repair and inspected the side roof following a

call out (at pages 221 and 238 of the bundle). The Tribunal finds that the Vale did respond to the Leaseholder's reporting of a leak in 2001 and did affect a repair. The Vale did not raise a cost for the call out or the temporary repair and there is no evidence that the same was levied in any subsequent service charge demand. But that does not detract from the fact that there is clear evidence of the Vale responding to the call out within a reasonable time and affected a repair.

That finding is further supported by the Leaseholder's own evidence of the loss she incurred as result of the leak (an invoice dated 3rd May 2001 from Lambert Property Maintenance). The invoice describes work undertaken as a result of "*water penetration from leaking roof."* It does not detail any repairs carried out to the roof itself. If the Leaseholder didn't repair the roof, who did? In our judgment, the answer is provided by the above job records. The Vale repaired the roof and did so upon being alerted, by call out, to the leak.

On that basis, we find that there was no breach of the Vale's obligations under the lease to keep the roof in repair by the events of 2001;

35.2. In 2002, there was another leak from the roof. The Leaseholder's evidence is that the water ingress was contained with a bucket, the matter reported to the Vale who eventually affected a repair. The Leaseholder accepts that there was no damage caused or expense incurred as a result. The Tribunal finds that there was no breach of the lease by the Vale. In the alternative, if the lease was breached in any way, there was no loss incurred by the Leaseholder as a result;

35.3. In 2009, the roof leaked again. The Leaseholder contacted the Vale on the evening of 27th January 2009. A Mr H Griffiths from the Vale attended the property that same evening but was unable to affect a repair. As such, workman returned the following day and repaired the roof (the leak was caused by a defective slate which was replaced). A proportion of the cost of the call out and the work was charged to the Leaseholder in her 2008/09 service charge demand (dated 16th July 2009). This is accepted by the Leaseholder. Her complaint is why the repair couldn't be carried out on the evening of 27th January 2009. As a result, she claims to have incurred costs in excess of £400, although there is no evidence before the Tribunal to support this assertion.

The Tribunal finds that the Vale acted reasonably in how it addressed the 2009 roof leak. It was simply not practical to repair the roof on the evening of 27th January 2009. It would have been dark, wet and far too dangerous to attempt to inspect and repair the roof. Instead, the Vale completed the repair at the first available, reasonable opportunity, namely the following day. As such, we again conclude that there was no breach of the Vale's obligations under the lease to keep the roof in repair. Even if we are wrong and there was a breach of the Vale's repairing obligations, we have seen no evidence to support the Leaseholder's claim as to the extent and amount of loss incurred or that the same was caused by the roof leak.

36. As a result of the above findings, we conclude that any expense incurred by the Leaseholder by reason of the roof leaks detailed above were not caused by any failings on the part of the Vale to comply with its obligations under the lease. As a result, such expense cannot be relied upon to reduce or off-set any current or future service charge liabilities.

37. In respect of the rest of the proposed works, and for the sake of completeness, there is in our judgment little evidence of any historic neglect. The render which has come away from the block is over 20 years old. It has had a reasonable life span. The other proposed works relate to items which have reached or are nearing the end of their reasonable life span or have arisen for reasons other than deterioration (for example, the need to clear out the cavity walls).

38. The Leaseholder also relies upon what she claims was misleading information provided to her by the Vale regarding the buildings insurance policy. Her evidence is that she was told on a number of occasions that water damage to the property was not covered by the policy. However, when she attended a leaseholders' meeting on 21st October 2015, she claims that she was finally made aware that in fact such damage was covered. She claims that she was misled by the Vale and, as a result, incurred costs which, had she been given accurate information, would have been claimed under the insurance policy. She seeks to off-set those sums against the service charge which will arise out of the proposed works.

39. The Tribunal had a number of difficulties with the Leaseholder's assertions in this regard, as follows:

39.1. There is no evidence of whom she spoke to or any documentary evidence to support her contention that she was misled by the Vale. There is no evidence other than the Leaseholder's assertion;

39.2. By her own admission, the Leaseholder had a copy of the buildings insurance terms and conditions but did not check them herself as to what was covered. It was reasonable for the Leaseholder to check the policy herself, rather than rely solely on what she claims she was told by the Vale;

39.3. The Tribunal has not seen a copy of the buildings insurance policy. We have no evidence of whether and to what extent the losses claimed by the Leaseholder were covered by the policy in force at the relevant times.

40. For those reasons, the Tribunal is not satisfied that there was any actionable misrepresentation by the Vale, still less a basis upon which the Leaseholder could seek to claim that any future service charge liability should be offset as a result.

41. As such, the Tribunal finds that there is no basis for any kind of set off against current or future service charge demands. The grounds relied upon by the Leaseholder for such an assertion were either her responsibility (and therefore there can be no liability on the Vale), were not made out (the claimed insurance misrepresentation) or where they were the Vale's responsibility, there was no breach of the lease (as regards the roof repairs). It follows that as the Vale has not acted in breach of the lease, there is no basis in law for the Leaseholder to set off any losses she has incurred as none of them are attributable to the actions of the Vale.

42. As we have concluded that no set-off arises in this case, it is not necessary for the Tribunal to go on and consider the further issue of limitation in respect of the same.

**Conclusion: Proposed Works**

43. For all those reasons, the Tribunal finds that, save for the proposed insulation to the roof and the removal of the canopy, the works proposed by the Vale and contained within the aforementioned schedule of works is reasonably required. We further find that as and when the works are carried out and a demand is made of the Leaseholder via the service charge to

contribute to those costs, there is no basis upon which those costs may be reduced by reason of set-off or historic neglect.

44. However, we reiterate that whilst we have found the proposed works to be reasonably required, we have made no findings on the reasonableness of the estimated costs (for the reasons set out previously). As and when those costs are incurred and the appropriate share is demanded via the service charge, it remains open to the Leaseholder to challenge, if she wishes, the reasonableness of those actual costs.

**Section 20C Application**

45. The Leaseholder indicated in her application to the Tribunal that she wished to rely upon the protection afforded by section 20C of the L&T 1985. She asks the Tribunal to limit the legal costs recoverable by the Vale under the lease. For their part, the Vale has indicated that they intend to recover the costs of defending these proceedings from the Leaseholder, via the service charge (and as permitted by Paragraph 12 of Schedule 3 to the lease).

46. In reaching our conclusions on the section 20C application, the Tribunal had regard to the provisions of section 20C, the legal authorities in respect of the scope and application of section 20C and the evidence in this case. In particular, we reached the following conclusions:

    46.1. The lease clearly permits recovery of legal costs incurred by the Vale in L&T 1985 proceedings by way of the service charge;

    46.2. Therefore, recovery of those costs is a contractual right, which should only be interfered with in accordance with s.20C (i.e. only if it is just and equitable to do so). This includes considering the conduct and circumstances of the parties as well as the outcome of these proceedings;

    46.3. The Tribunal should only interfere with the lease if we conclude that recovery by the Vale of their costs would be unjust, even if the same had been incurred reasonably and properly;

    46.4. Unreasonable costs in themselves can be challenged under s.19 of the L&T 1985 when levied as part of the service charge. A leaseholder will never have to pay excessive legal costs unreasonably incurred by reason of the protection under s.19;

46.5. Save for two concessions by the Vale, we found in the Vale's favour on the main issues before us (the reasonableness of the work proposed and the historic neglect/equitable set-off arguments).

47. The Leaseholder has concerns regarding the costs which may have been incurred by the Vale, why she should be required to bear them and the fact that she was not aware that she could be liable for any legal costs. She claims that she was informed by the Tribunal that it provided a free service with no additional charges being levied (save any application fee).

48. As set out above, the lease clearly permits the Vale to recover its costs for such applications from the Leaseholder (via the service charge). It is a binding term of the contract and one to which, when she entered into the lease, the Leaseholder agreed to be subject to. It is clear from the evidence that the Leaseholder was advised on a number of occasions to seek independent legal advice prior to completing her purchase of the property and entering into the lease. As such, the Leaseholder was reasonably put on notice of her potential liability for the Vale's legal costs prior to bringing this appeal.

49. The advice she received from the Tribunal only related to the charges levied by the Tribunal for utilising its services. The costs being sought by the Vale are distinct and separate, arising as they do under the lease. In addition, the Tribunal must remain impartial. It is not part of its remit to advise parties to a dispute about the merits or consequences of bringing their claims or using the Tribunal's services.

50. The issue under s.20C is whether the right to recover costs enshrined in the lease should be denied, irrespective of the amount of those costs. We are not being asked (and do not have jurisdiction until the service charge demand is made) to consider the reasonableness of those costs as a service charge. We don't know whether all or part of any costs will be claimed. The amount of costs is more properly a matter for an application under section 19 L&T 1985 as to the reasonableness of any subsequent service charge demand. Only then will the Leaseholder know the precise amount being recovered from her, be entitled to a breakdown of the same and to have the reasonableness properly considered by the Tribunal.

51. On the basis of the contractual right contained in the lease to recover costs through the service charge and given our findings on the substantive issues in this case, the Tribunal does not find that it would be appropriate to interfere with the lease and prevent the Vale seeking to recover its legal

costs by way of the service charge. How much the Vale will be entitled to recover is a matter which the Leaseholder has the right to challenge (by reason of section 19 L&T 1985) as and when the demand for payment is made through the service charge.

52. For those reasons, the Leaseholder's application under section 20C of the L&T 1985 is refused.

Stephen Povey
Chairman
4th March 2016