Y TRIBIWNLYS EIDDO PRESWYL (CYMRU)

THE RESIDENTIAL PROPERTY TRIBUNAL (WALES)

LEASEHOLD VALUATION TRIBUNAL

Reference:	LVT/0040/10/19
Tribunal:	Dr Christopher McNall (Lawyer – Chairperson) Mr Roger Baynham MRICS (Surveyor Member) Mrs Carole Calvin-Thomas (Lay Member)
Applicants:	Miss Yvonne McIndo Julian Groucutt Jane and Gary O'Brien Paul Foster Philip Peard Jacqueline Bate Michael Bader Neil Tamplin Mr Peter Evans and Mrs Angela Evans (All represented by Mr Peter Evans, assisted by Mr Alan Slade)
Respondent:	Bron Afon Community Housing Limited (Represented by Ms Sian Jones, Solicitor, of Blake Morgan)
Hearing:	Heard on 11 August 2020, via the Tribunal's Video Platform, but as if heard at the Tribunal's office, Oak House, Cleppa Park, Celtic Springs, Newport NP10 8BD
Property:	Blocks 1 and 2, St Dials Court, Oak Street, Old Cwmbran NP44 3LY
Applications:	Liability to pay service charges. Sections 19, 20C and 27A of the Landlord and Tenant Act 1985

Decision

The Application made on 28 October 2019 under sections 19 and 27A of the Landlord and Tenant Act 1985 is dismissed.

The Application under section 20C of the Landlord and Tenant Act 1985, not being opposed by the Respondent landlords, is allowed. The costs incurred by the Respondent landlords in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by any of the Applicants.

REASONS

Summary

1. The applicants all hold long leases of flats and maisonettes spread across two blocks in the development at St Dials Court. They argue that their landlords should not be able to recover, by way of service charge for 2017-18 and 2018-19, the significant costs incurred by the landlords in works done to the flat and mansard roofs and Velux windows in both blocks.

2. We have unanimously concluded that this part of the lessees' application should be dismissed. That means that the landlords can lawfully recover, as against the applicants, the sums which have been claimed.

3. The landlords confirmed that the lessees' application for an order under section 20C of the Landlord and Tenant Act 1985 is not opposed, and we consider it just and equitable to make such an order. The costs incurred by the landlords in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by any of the applicants.

The hearing

4. This application was originally listed to be heard conventionally - 'face to face' - at the Tribunal's offices on 22 April 2020. That hearing was postponed due to the Covid-19 restrictions. However, given that the parties were already prepared for the hearing (including the preparation and distribution of hard copy hearing bundles) it was agreed, in consultation with the parties (i) that the hearing should take place, as soon as reasonably practicable, using the Welsh Tribunals' video platform, with all participants taking part remotely, and (ii) that the Tribunal's panel did not need to visit the buildings (because the works in question had already been done, and there were sufficiently good 'before and after' photographs provided to us). We were happy with the arrangements made. We are confident that all parties who wished to take part were able to do so, fully and fairly, and we were able to deal with this dispute fairly and justly.

5. Mr Peter Evans, assisted by Mr Alan Slade, represented all the Applicants. We are grateful to both of them for their succinct and well-focussed presentation of the applicants' case. They have made the points which can reasonably have been made in support of the application. We have considered everything

which they have said. Even if we do not refer to an argument which was made, we have considered it.

6. Ms Sian Jones, a solicitor in the employ of Blake Morgan, represented the Respondent landlords. She had also provided a useful Skeleton Argument/written outline of the Respondents' case.

7. At the beginning of the hearing, the Chairman raised with the parties the fact that he had, on at least one occasion in the last few months, been instructed, as a barrister, by the landlords' solicitors, Blake Morgan, in relation to a commercial dispute about the interpretation of a contract (not a landlord and tenant dispute, and not involving either of these parties). He asked whether either party objected to him hearing this application. Ms Jones informed the hearing that Dr McNall had been instructed by a member of her team (although Dr McNall was unaware of this until Ms Jones told him) and that the landlords did not object to him continuing to hear the case. Mr Evans and Mr Slade told the Tribunal that they had no objection to Dr McNall's continuing involvement with this application.

8. Although it is not entirely a matter of the parties' consent, the Tribunal considered, applying the usual guidance as to apparent bias (see *Porter v Magill* [2002] 2 AC 357) that the fair minded and informed observer, having considered the facts, would not conclude that there was a real possibility that Dr McNall was biased. The circumstances were of the kind described by the Court in *Locabail v Bayfield Properties Ltd* [2000] QB 451: instructions to act for or against any party, solicitor or advocate engaged in a case before a judge are not such as usually to give rise to any appearance of bias.

The evidence

9. We considered witness statements from Mr Simon McCracken, and Mr Craig Allford, dated 7 February 2020. We heard oral evidence from Mr Allford via the video platform, and from Mr McCracken by way of audio via the video platform. Both witnesses were cross-examined by Mr Evans and Mr Slade.

10. Mr Allford and Mr McCracken are both employed by the Respondent. Mr Allford is a Project Manager and Mr McCracken is a Leasehold Manager. Both gave evidence truthfully, making it clear where they did not know something, and both making sensible concessions. Mr Allford was briefly recalled to give evidence in relation to a factual matter which had emerged in the course of submissions relating to the structure and composition of the roof of Block 1.

11. We have also considered all the documents contained in the three files making up the trial bundle, including some documents provided shortly before the hearing (being a Schedule of the payments made or agreed to be made by various people), during the hearing (being a copy of a survey of one of the flats made in June 2016 by a Mr Hollings under the The Housing Health and Safety

Rating System (Wales) Regulations 2006: SI 2006/1702 ('**HHSRS**')), and some additional explanatory documents which were provided by Ms Jones, at our request, after the hearing and which were copied at the time to Mr Evans.

The law

12. Insofar as relevant to this dispute, section 19 of the Landlord and Tenant Act 1985 reads:

Limitation of service charges: reasonableness.

(1) Relevant costs shall be taken into account in determining the amount of a 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 or 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 costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise."

13. Insofar as relevant to this dispute, section 27A of the Landlord and Tenant Act 1985 reads:

Liability to pay service charges: jurisdiction

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to—

(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.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

(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.

(4) No application under subsection (1) or (3) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

14. We were provided with a bundle of legal materials, and reported cases. We were also referred by Mr Evans to the decision of the Court of Appeal in the case of Hounslow LBC v Waaler [2017] EWCA Civ 45, which we have considered.

15. It was helpfully confirmed that the Applicants accept that the Respondents complied with the consultation requirements set down by the law, and that the Applicants accept that the Respondents' service charge demands (whilst maintaining the challenge to the sums in them) were formally in conformity with the law.

16. The lessees' challenge is that many (although not all) of the works were not needed at all - on the basis that there was no disrepair at all - or that, if there was some disrepair, the works went too far and that the landlords should have addressed disrepair in some other, cheaper, way.

'Disrepair'

17. The lessees' argument means that we should say something about the legal meaning of disrepair. Something is in disrepair when it is damaged or its physical condition has deteriorated. This has to be looked at in a common-sense way, and in the light of the totality of the evidence. Here, the Tribunal is an expert Tribunal, and is empowered to decide applications of this kind by using its particular skill and knowledge. This panel of the Tribunal is one which includes a surveyor with extensive experience of buildings in south Wales.

18. The extent and nature of the work which can reasonably be expected of a landlord where there is disrepair will depend on the facts of each case. Work to remedy disrepair can sometimes present a choice between 'patching up' or

replacing the damaged or deteriorated parts. Where there is such a choice, it is generally the case that the party responsible for carrying out the repair (here, the landlord) has the choice whether to 'patch up', or to execute the some longer-term repair/replacement, and can do either, so long as the immediate result of either course of action will be to put the dilapidated or damaged item back into proper repair: McDougall v Easington District Council (1989) 58 P & CR 201. At page 206 of that case, Lord Justice Mustill said that he did not see any reason to distinguish between where there was "a choice between two ways of putting an immediate problem right once and for all" and one "where it is between a further temporary method of alleviating the symptoms of a chronic problem and a more radical cure of the underlying cause." There are many reported decisions which illustrate the application of this principle. For example, in Manor House Drive v Shahbazian [1965] 1 WLR 336 the Court of Appeal held that a landlord could validly decide to replace a whole roof with a new zinc roof rather than patching up with cheaper bitumen in the places where it was leaking. In Waaler (already referred to) the Court of Appeal said (at Paragraph [37]) that if the landlord has chosen a course of action which leads to a reasonable outcome, then the costs of pursuing that course of action will have been reasonably incurred, even if there was another cheaper outcome which was also reasonable.

The Leases

19. The Applicants hold under two types of leases, described to us as Type A and Type B leases. The leases were acquired by the then-secure tenants under the right to buy provisions of the Housing Act 1985. The leases as originally granted are for 125 years. There is an argument that the works done were not in any event 'repairs', but were improvements, and hence were not rechargeable as service charge under some of the leases.

Type A

20. We were shown the lease of Flat 6, dated 9 April 1990, between Torfaen Borough Council (the Respondents' predecessors in title) and Mr and Mrs Pritchard. This is a Type A lease. We were told, and it was not challenged, that all the Type A leases are in materially identical form (i.e., identical in substance, except as to identification of the parties and the property). The structure and exterior of the property remains in the ownership of the lessor.

21. Insofar as material, Clause 6(ii) is that the lessee shall contribute and pay one equal seventh part of the costs expenses and outgoing incurred by the landlord in respect of the matters set out in Clause 7E.

22. Insofar as material, Clause 7E provides that the lessor shall (subject to contribution and payment as hereinbefore provided) *"maintain repair decorate and renew (a) the main structure and in particular the roof chimney stacks gutters and rainwater pipes of the Property [...]"*

Type B

23. We were shown the lease of Number 16, dated 16 December 1996, between Torfaen Borough Council (the Respondents' predecessors in title) and Mr Howard. This is a lease of a maisonette and not a flat, but nothing material turns on that.

24. This is a Type B lease. We were told, and it was not challenged, that all the Type B leases are in materially identical form (i.e., identical in substance, and except as to identification of the parties and the property). The structure and exterior of the property remains in the ownership of the lessor.

25. Type B is materially identical to Type A except the lessor's covenant contained in Clause 7E (and the lessee's corresponding obligation to pay) relates to 'maintain repair *improve* renew and decorate': i.e., Type B leases do not only refer to maintain, repair, renew and decorate, but also to improvement.

26. Even a simple covenant to 'repair' (and repair only) will usually, by implication, include a certain amount of rebuilding and replacement of elements of the building which have deteriorated. Here, neither the Type A nor Type B leases are limited to 'repair'. Both, by making reference to 'renewal', widen the scope of the work covered beyond repair to other things. We agree with the landlords that all the work done was work of renewal (rather than something else) and hence is within the relevant covenants both in the Type A and the Type B leases. We disagree that if something can be said to be an improvement, that it cannot also be said to be a renewal or a repair. The categories are not mutually exclusive.

<u>The Facts</u>

27. On the basis of the evidence which we have heard and read, we make the following findings of fact.

<u>The Properties</u>

28. This dispute concerns two freestanding part two-storey part three-storey blocks of flats and maisonettes. Block 1 contains Numbers 1-12; Block 2 contains Numbers 13-24.

29. The blocks were built in the early 1980s, and were originally owned by the local authority, Torfaen BC. Following the right to buy reforms introduced by the <u>Housing Act 1985</u>, many of the then-tenants bought 125 year leases. The freehold of the blocks was transferred in about 2008 from Torfaen to the Responden. We were not shown any maintenance or repair records from the period of Torfaen's ownership.

30. The blocks are next to each other. They are externally almost identical. They are of identical or near-identical construction using identical or near-identical materials. There are some internal differences between the layout of the blocks because of the distribution of accommodation between flats and maisonettes, but those differences are not material to this case. There was also some difference, which we shall discuss, as to the actual condition of the wooden sheeting of the flat roofs when they came to be stripped.

31. Both blocks have flat roofs with some slanted non-opening glass metal-framed skylights which are on timber upstands of a few inches. The flat roofs of each block are on two levels - 'high level' and 'low level'.

32. Where there are three storeys (high level) the exterior of the upper storey is a so-called 'Cornish' style construction. This is a very steeply pitched (85 degree) mansard roof or facade, which is hung with coloured concrete (not slate) roofing tiles. The mansards feature pivoting wood-framed 'Velux' windows. The mansard tiles are nailed to horizontal wooden battens, which are on felt and a wooden sheet understructure. The Velux windows sit in flashes, set into this structure, and in a tunnel through its thickness.

The works done

33. On 6 July 2016, the landlord conducted a leaseholder review for the major external works programme. The review had before it Icopal reports from June 2016, dealing with the roofs, and the HHSRS report already referred to. That review addressed replacement of the roofs, replacement of the hanging tile facade, replacement of the skylights and replacement of the upper windows. In relation to each, 'repair' was recommended, with the costs being described as reasonably incurred. The review was rational and the decision to replace and not patch up was reasonable.

34. An initial tender exercise which was done was not considered to have attracted tender prices which showed value for money, and the landlords decided to retender.

35. Six contractors were invited to submit a price. Three failed to tender. Of the three which did tender, the landlord proposed to accept the lowest estimate (which was about £87,000 less than the highest estimate).

36. The works actually done were major works. They were the removal and replacement of the flat roofs on both blocks (albeit preserving some decking on Block 1) and the removal and replacement of the mansard roofs/facades and Velux windows in both blocks. The works involved the erection of extensive scaffolding around, and wrapping, each block.

37. The total recharged cost of the works done was £129,794 (Block 1) and was £152,127 (Block 2). An 8% administration charge was applied.

Discussion

The landlord’s decision to deal with both blocks together

38. The landlord has treated these two blocks as one unit. This is consistent with the two blocks being (we were told) treated as a single 'asset' on the landlord's asset schedule. It is clear that the landlord did not regard the two blocks separately, and that they did not (for example) consult in relation to each block individually, or obtain quotes or tenders in relation to each block individually.

39. However, we consider the landlord’s approach to have been rational. The two blocks were built at the same time, of the same materials, in the same way, in the same place, and were exposed to the same weather and other environmental conditions. If one block was in disrepair of any kind, it is extremely likely that the other block (if not already showing the same signs of disrepair) shortly would. We reject the Applicants' argument that doing the works in this way - both blocks at once - was a 'blanket approach' (in the sense that this was not an approach which was genuinely justified). We reject the Applicants' argument that "... it is almost inconceivable that both blocks of flats could have required exactly the same remedial works at the exact same time". We consider the contrary to be the case - it is very likely that both buildings would have been deteriorating at the same rate, even if the outward signs of deterioration were different.

40. Furthermore, there will have been some economy of scale (even if not articulated in the quote) in having both blocks dealt with at the same time.

41. None of the Applicants advanced any contrary evidence to show that it would have been cheaper to have dealt with the two blocks separately.

The landlord’s approach to other properties

42. We were invited to treat the landlord’s approach at another block, Plas Craig (where the landlord had apparently not sought to recharge the cost of replacing the roof to the tenants, as set out in their letter of 17 October 2016), and had treated other works (e.g to the windows) as improvements and not repairs: see the works programme for Plas Craig dated 12 October 2016.

43. We do not consider the landlords' treatment of other properties as determinative for the purposes of this application. We must be careful to deal with the landlords' approach to these blocks, and not to any others. There may well be facts and circumstances applying to those other blocks which we do not know about and which would therefore involve us in speculation, which we must avoid.

The roofs

44. The roof of each block has a higher level area and a lower level area. The landlord obtained reports from Icopal in June 2016 which identified significant deterioration, arising from water penetration. There was algae and/or moss on the roofs. The landlord later obtained a second report from Alumasc Roofing Systems dated 22 August 2016 which recommended removal of all the chipboard, except on the higher level of Block 1 (which was identified as plyboard). The landlord was told that patch repairs would only provide a short-term solution and, if done, that further patch repairs would be expected with increasing frequency.

45. The roofs of each block were said to be comprised of a chipboard deck (but a plywood deck for the higher level of Block 1), felt layer with chippings, a polystyrene 'sep layer' and EDPM and ballast. We accept that the description of 'chipboard' as 'fragile' (regardless of its condition or robustness) is correct.

46. The Applicants accepted (except in relation to the skylights) that the roof of Block 2 was in disrepair, and that the works undertaken were reasonable. There was abundant evidence of this. There were logged reports of rotten 'attic joints'. The photographs show the roof to be undulating or 'rippling'. This can be seen from the presence and shape of puddles of standing water in the troughs. This ripple effect is not part of the design of the roof. It is caused by the wooden sheeting below the outer membrane soaking up water and warping. The integrity and water-excluding effect of the outer sheeting was obviously compromised in many locations across the roof by vents (for heating boilers) and cables (e.g for aerials). The roof showed evidence of patching, not all of a visibly high quality. A photograph of the roof of Block 2 during the course of removal shows the wooden decking 'tearing' or 'ripping' unevenly, rather than coming off in intact sheets. It was obviously in very poor condition.

47. We are also satisfied that the roof of Block 1 was in disrepair when the works were done, although its history is different. The Icopal report for the roof of Block 1 reports that the core samples for the high level roof were "saturated" (moisture probe reading = 26.9%) "damp" (17.2%), and "dry" (none). Hence, Icopal did identify some water penetration to the decking, in 2 out of the 3 locations sampled. All the samples should have been 'dry', without any moisture, and two were not. Icopal also identified factors as 'potentially detrimental to the waterproofing integrity of the roof' (being the high level roof of Block 1), being deterioration of the waterproofing, which was in poor condition, algae and moss, splits in the perimeter roof trim, and some ponding. Icopal's view was that the waterproofing had reached the end of its serviceable life and would therefore only provide short term protection. Alumasc agreed. Their view was that the membranes surrounding pipe penetrations had in areas become weak and poor, and that the detailing had broken down.

48. The original roof was built at the same time as Block 2, but in evidence, we heard that some work had been done (by the landlords' predecessors in title)

on Block 1 about 20 years ago (say, in about 2000) when the roof there had (already, after about 20 years) been failing. The outer membrane and the decking were both replaced at that time. This accounts for the different appearance in the roofs of Blocks 1 and 2 when the outer covering was stripped, and in particular the presence of regularly spaced 'dots' left by adhesive on Block 1. Much was made of photographs taken after the ballast had been removed and the covering stripped, showing that some of the underlying wood sheeting of Block 1 - put in about 20 years ago - was in decent condition (which it seemed to be). That wooden sheeting did not need to be replaced. It was preserved and was over-boarded and the lessess in that block were not charged for it. But the fact that the underlying layer of wooden sheeting (plyboard and not chipboard) was not replaced does not establish that the works done on the roof did not need to be done at all. There were still significant problems with the waterproofing membrane. It simply meant that the works did not need to be as extensive as had originally been contemplated.

49. We reject the assertion that Mr Allford's lack of awareness that there were attic spaces 'incurred unnecessary additional costs'. We were not taken to any evidence to support this assertion.

The skylights

50. We reject the Applicants' argument that there was no disrepair to the skylights. The skylights of both blocks were in disrepair:

50.1 Icopal's report is that a number of skylights were damaged and should be repaired;

50.2 Photographs show that at least two of the skylights were in disrepair - one had been wrapped in plastic sheeting (Flat 2, Block 1, work done in June 2016) and one had cracked glazing (perhaps Flat 16, Block 2);

50.3 In January 2016, there was a logged report of a leak at Number 23 (Block 2) where the occupant needed to put a bucket under it when it rained;

50.4 A leak was reported around the bathroom skylight in Number 14 (Block 2);

50.5 The HHSRH report for Flat 20 (Block 2) shows the interior of a skylight which shows it to be in disrepair. It was logged as having cracked due to high winds and the occupant was concerned that the window might fall through. There are obvious signs of water and damp ingress;

50.6 We also note the logged reports of the skylight of Number 3 (Block 1) in July 2009 and May 2012;

50.7 The photographs of the roofs when stripped show the wooden upstands themselves in poor condition due to water pooling around them and water ingress;

50.8 We reject the argument that the cracked (and apparently fixed, but not replaced) pane is not an example of disrepair, but is an example of repair. A cracked pane with filler in it is not as designed and installed. It has deteriorated. It is no longer a single, uninterrupted, sheet of glass but has a join in it which could fail.

51. We also accept the landlord's position that the skylights were integral to the roofs and that the works to the skylights were, in any event, integrated with the works to the roofs, and it was reasonable to do these at the same time as the other works to the roofs, rather than (for example) to replace the roofs and patch up those skylights which were failing.

The mansards

52. The mansards of both blocks were in disrepair. The photographs show that a significant number of tiles had fallen from each block. We do not regard these as 'very few'. There were also several reports of 'hanging' tiles (which must have been different tiles to the ones shown as missing on the photos).

53. The photographs show that the tiles were not falling from a single place, or elevation, but from different and random places across the whole face of the facades on each block (described, fairly, by Mr Allford as 'a game of Russian roulette'). Mr Allford's estimate, which we accept, was that tiles were missing in more than 50 different areas. This is indicative that the fixings and/or the battens were failing, systemically, in several locations, and hence were nearing or at the end of their natural lives.

54. A photograph of one of the corners shows a structural weakness of another kind, with the tiles being pushed out of alignment across the whole visible height of the mansard. The likeliest explanation for this, and we so find, is because of water penetration and consequent swelling/expansion of the battens. The mansards were obviously in poor condition and were at risk of more extensive failure.

55. We reject the challenge made to the adequacy of the inspection which led to the decision to replace the mansard. Although that inspection was conducted from ground level, it was plain to the naked eye, even from ground level, that a significant number of tiles, in random locations, had fallen off the mansards.

56. We do not accept that the landlord should first have removed a section of the tiles to assess the condition of the underlying battens. All that would have shown is the condition of the battens in that location. It would not have shown whether the battens elsewhere were failing. Inspection of battens in one area

(a form of sampling) would not have allowed anyone to conclusively presume that the condition of the battens elsewhere would have been the same. We were not shown any evidence that this would have been an acceptable method of approaching the problem of tiles falling off the mansards.

57. The single photograph of some battens after removal, or the photographs of the stripped mansards showing the battens in situ do not establish that the battens were all sound and or 'in good condition' and did not require replacement.

58. We reject the suggestion that the missing tiles are solely attributable to 'wind damage' (which carries with it the suggestion that there was nothing wrong with the fittings or the battens). Whilst it can be windy in south Wales, and unusually high winds might (perhaps) explain, over several decades, the loss of a single tile (or - at the most - a very small number of tiles) that is not the case here. Many more tiles are missing. Moreover, the argument ignores the fact that if the wind is able to get behind tiles so as to blow them off the facade, then the fixings or the battens have deteriorated or are damaged. The mansard was not designed so as to allow the wind to blow tiles off it. We do not find the log of reported faults of much assistance here. Whilst it is correct that there were only a few reports of loose or missing tiles, there were, in reality, and on any view, many more missing tiles from more locations than were actually reported. The reports are therefore under-reports and do not accurately reflect the number of tiles actually missing.

59. Each tile is about 8 inches by 12 inches by about 10 to 15mm thick and (doing the best that we can) would weigh (at least) a pound. The tiles are mounted on the steep mansards, where (unlike on a less steeply pitched roof) a tile is likelier to fall rather than slip and be caught by the ones around it. The tiles which did fall were falling from a height of (at least) about 30 feet. Due to the steep pitch of the mansard, these were falling more or less straight down outside the building, landing in close proximity to the blocks - their external doors, pavements, and parked cars. It is not an answer to say that because the landlord did not fence off areas or put up signs warning of the risk of falling tiles then there cannot have been a risk. The landlord's lack of activity in this regard does not prove the absence of risk.

60. We reject the Applicants' argument that because the landlord had, some years earlier (in January 2015) replaced some battens and re-fixed some tiles that this was what the landlord should have done on this occasion, instead of the major works. The landlord was faced with a choice as to whether to continue patching and mending, or whether to grasp the nettle and remove and replace the whole lot. Given the condition of the mansards, the landlord was entitled to do what it did. Since this required scaffolding, it made sense for this work to be done when the roofs were being dealt with.

<u>The Velux windows</u>

61. The Velux windows were an integral part of the structure of the mansard/facade. It was reasonable and appropriate for the landlord to deal with these at the same time that they were dealing with the mansards: this meant that the windows would be dealt with as part of the same project, using the same contractor, one set of scaffolding, and incurring one set of administrative costs.

62. The Velux windows were wooden-framed, and were at least 34 years old. They were at or approaching the end of their useful lives.

63. In response to the landlord’s consultation, one of the lessees had written "It's about time this work was carried out as roof leaking into my bathroom for the last 4 years despite repairs being carried out and bedroom velux window has not been shut for the last 3 years due to catch being broken".

64. A photograph (at page 12 of 18 behind Tab 3 of the hearing bundle) gives a good view of two Velux windows from above: both are very scruffy with stained housings. The HHSRS report which we were shown contains photographs of the interior of the Velux in one maisonette. The Velux is obviously in disrepair, being in poor condition and showing evidence of water/damp ingress. Even if (for example) all the other Velux windows could be shown to have been in better decorative order, they were still of the same age and exposed to the same weather and the same other environmental conditions. We are not satisfied that piecemeal replacement would have been better (or cheaper) than what was done.

65. There was no evidence from the Applicants that (for example) the glazed panels / glazing units could realistically and cost-effectively be replaced whilst retaining the frames and the other fittings. Again, there will have been an economy of scale. There was no evidence before us as to any cost-saving which would have been accomplished by replacing the mansard(s) now and leaving the windows to another day.

Other factors: landlord’s motivation not repair

66. We reject the Applicants' argument that the landlord's motivation in undertaking the works was not, in fact, disrepair, but was the landlord's need to comply with the Wales Housing Quality Standards. The Housing Quality Standards were not in the papers before us, but were provided after the hearing. Although it is correct that two of the properties appear to have been in technical non-compliance with the Standards, we otherwise reject the Applicants' argument. Coincidence does not mean causation. The state of disrepair of the properties gave rise to the need to repair them and, in doing so, the need to meet the Housing Quality Standards.

'Improvement'

67. The Applicants argued that what had been done was not in fact repair, but was improvement. The law is that the landlord - in repairing a thing - is not obliged to make a new and different thing. A standard example given in the books is that replacement of a lino floor with marble would not be a repair but would be an improvement. But there is an exception to this rule where the work must inevitably be carried out in a way which exceeds the original standard because of current building practice, or where it is reasonable to install an improved version of a particular item. Reported cases give relevant illustrations of this. The replacement of a rotten wooden door with an aluminium sealed door is repair, and not improvement (<u>Stent v Monmouth District Council</u>), as is the replacement of rotten wooden-framed windows with double-glazed maintenance-free windows (<u>The Sutton (Hastoe) Housing Association v Williams</u> (1988) 20 HLR 321).

68. If work of repair (including for these purposes renewal) is necessary because of damage or deterioration, then it must normally be done in accordance with the principles of good building practice at the time the work is done. If this involves a degree of updating, it will nevertheless be considered to be within the repair. There is no notion of 'betterment' where the work can only properly be done with a degree of improvement.

69. Insofar as that is the case here, when it goes to insulation of the roofs, we accept that the landlord had no choice but to allow roofs to be insulated, as part of the method adopted by Alumasc, and without which Alumasc may well have refused to give a guarantee. We also observe that it is not without significance that Alumasc have given a 25 year guarantee as to the materials, which provides a useful yardstick as to the expected lifespan of the modern materials used in the works, let alone the lifespan of the materials which had been used in the early 1980s or 2000. Insofar as it went to the Velux windows, the thermal efficiency of new windows exceeds the thermal efficiency of the old windows because building standards no longer permit the installation of single glazed panels in dwellings. The landlord could not have replaced single glazing with single glazing even if they had wanted to.

70. We therefore reject the argument that any of the works done were not repairs, but were improvements. All the works done were works of renewal allowable under either type of lease. Even if that were wrong, both types of leases provide for maintenance and repair and these things were both maintenance and repair. The approach to contractual interpretation of the Type B leases so that works of improvement cannot be repair is artificial. The activities are not mutually exclusive categories.

The administration charge

71. An administration charge of 8% was levied by the landlord on the Applicants in relation to the landlords' administration and management of the works. This charge was not squarely challenged. However, we have also considered it, and consider it to be fair and reasonable.

72. We accept the explanation given in evidence that this contributes towards the costs of the landlord’s employees involved in the commissioning of the works, the procurement process, the administration of the consultation process, the day to day management of the contract. This was a big project, where the landlord had gone to considerable lengths in tendering (indeed, had rejected the original tenders and had re-tendered) and consultation. Thereafter, the project was one which would have required proper attention from the landlord, given that it was not being undertaken on empty buildings on a secured site, but was being undertaken on occupied buildings in a location which had to remain open to residents and other members of the public.

Dated this 16th day of September 2020

C McNall
Chairman