Y TRIBIWNLYS EIDDO PRESWYL

RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL
[Section 20C, 20ZA & 27A Landlord and Tenant Act 1985 the "Act"]

Reference: LVT/0025/09/20 and LVT/0008/06/20

Property: Joyce Close, Gaer, Newport, NP20 3JD

Landlord: Newport City Homes Housing Association Limited

Tenants: Mrs June Paginton
Ms Victoria Collier
Miss Hammett
Ms Adrianne Murphy
Mr Paul Tinkler
Rev. Jennifer Mole
Mrs Jane Brand
Mrs Jean Tinkler
Mr William Bedborough
Mr & Mrs Preece
The Estate of Mr P W Halford
Ms Yvonne Christensen
Mrs Glenys Ray

Tribunal:

Chairman	J Rostron
Surveyor	A M Lewis FRICS
Lay Member	Dr A Ash

ORDER

The Landlord's dispensation sought from compliance with section 20ZA of the Act 1985 is granted subject to the following conditions:

1. **The 12.5% claimed as overhead costs is reduced to 5%.**
2. **The proposed improvement to insulate the main concrete soffit areas is disallowed.**

The Tenants' application for determination under section 27a of the Act is stayed until service charge demands are served.

No order is made under section 20C of the Act following Landlord's agreement.

REASONS FOR THE DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

BACKGROUND

1. By application received on 17th June 2020 the Tenants seek a determination under section 27A of the Act as to the amount of the service charges payable for the service charge year 2020 - 2021. The service charges are primarily for the removal of the existing failed coverings on the flat roofs of four blocks of flats and replacing them with new roof coverings. The Landlords have agreed not to challenge an order under section 20C of the Act regarding costs of proceedings. The Landlord has made an application for dispensation under section 20ZA of the Act concerning the consultation exercise relating to the works.

2. The Tenants' case involves a dispute regarding the costs of re-roofing flats, sheds and bin stores, replacement of rainwater goods, fascias and soffits, other work connected – chimneys, soil pipes and scaffolding. The amount in dispute is £14,476.40 and £13,580.81 per leaseholder, the former being for three blocks of 12 flats and the latter being for a block of 18 flats. No service charge demands have yet been made by the Landlord.

3. On 2 November 2018 Newport City Homes Housing Association Ltd. (NCH) wrote to the leaseholders under the provisions of Section 20 of the Act, advising them of their intention to undertake external works at the premises. These included erection of scaffolding, removal of existing satellite dishes/aerials and refixing, if necessary, removal, of the existing flat roof covering, including the timber boarding, repair/renewal of timber structures where required, removal and disposal of existing soffits, fascia, downpipes and gutters, renewal of soil pipe where required, installation of an insulated flat roof covering and replacement of fascia soffits and associated products, installation of replacement uPVC gutters and downpipes, removal of redundant chimneys or repair existing "live" chimneys, repair works and renewal of roof coverings to porch canopy and shed areas, and removal of scaffolding. The leaseholder's observations were invited by NCH to the proposed works, and also to provide details of contractors who they wished to be invited to provide an estimate. No response was received by NCH.

4. NCH obtained a report from Alumasc, (a manufacturer of flat roof coverings) on the condition of the existing main flat roofs to the blocks of flats on 30th November 2018. NCH proceeded with

the sourcing of prices for the various works employing the Welsh Procurement Alliance (WPA) framework whereby the contractor would be an Alumasc approved contractor using their flat roof product for the main roof of the blocks. The original advertisement was placed on 22nd October 2019, with the lowest resultant price of £916,285.39. NCH reviewed these bids internally and considered that they were too high for the works. Thereafter on 18th November 2019 a second advertisement was placed on the WPA framework with a revised specification and this resulted in a lower price of £567,114.73 being received for the proposed works.

5. On 13th December 2019 NCH wrote to the leaseholders informing them that three prices had been received for the proposed works, listing the contractors and prices, but not identifying which price related to which contractor. Within the letter it provided an estimate of the cost of the works and likely service charge for each leaseholder. It specified the construction cost allocated to the leaseholder's particular block, plus 12½% for fees and VAT. NCH informed the leaseholders that they may inspect the estimates at their offices by prior appointment. NCH invited the leaseholders to make written observations in relation to the estimates by 14th January 2020. On 2nd January 2020 NCH wrote again to the leaseholders extending the consultation process to 31st January 2020.

6. A consultation meeting occurred at the offices of NCH which was attended by a number of leaseholders on 29th January 2020 with representatives of NCH.

7. On 5th February 2020 the contract was let by NCH to Rateavon Ltd.

8. On 14th February 2020 NCH wrote to the leaseholders summarising their observations together with their response, and informing them that the contract had been let to Rateavon Ltd.

TENANTS' STATEMENT OF CASE

9. The salient issues raised by the Tenants is concisely presented in the completed Scott Schedule, which summarises their case as follows:

    9.1 In a letter from Newport City Homes (NCH) dated 13/12/2019 – costs to each leaseholder for renewal of flat roofs is as stated above for the two types of blocks of flats. The Tenants comment that for comparable work on blocks of flats identical in construction and number in 2016/17 the cost per leaseholder in a block of 12 was; £7,354.61. An estimate received by the Tenants from Jamie Burley, Roofing Contractor quoted £80,340 for a block of 12 flats.

    9.2 In a letter from NCH dated 13/12/2019 it is stated 'the estimates obtained may be inspected…by appointment'. Four leaseholders went to Nexus House (NCH) by appointment on 29th January 2020 but the estimates were not available as they were classed as confidential by NCH. Copies of estimates have not been provided and the Tenants believe this is in contravention of section 20 of the Act. In an email to leaseholders on 18/02/2020 NCH stated that the leaseholders who attended the meeting were able to view the estimates and the breakdown of costs submitted by the five contractors who tendered. The Tenants state they did not see estimates only a computerised presentation on a large screen which showed the figures submitted by one contractor. In a letter from NCH dated 14/02/2020 it states that NCH is not obliged to provide hard copies. The Tenants feel this is also in contravention of section 20 of the Act.

Supervision fees of 12.5% appear excessive, especially as that would amount to £70,889.04 for the project. The Tenants further state that such fees are inappropriate as employees of NCH are already paid salaries.

9.3 Leasehold Property Enquiries (L.P.E.) forms with figures supplied to solicitors by NCH when a property is being purchased, stated that reroofing would take place in the future. Estimates given were per flat; in September 2013 £2,675.00 (block of 18), in July 2019 £2,800.00 (block of 12) and February 2020 £14,4000 (block of 12) The Tenants ask why did NCH not update the figures before February 2020? Several leaseholders were prepared to pay between £8,000 - £9,000 and some only willing to pay the estimates provided in their L.P.E. Forms.

LANDLORD'S STATEMENT OF CASE

10. The Landlord has replied to the Tenants' comments in the Scott Schedule as follows:

10.1 With regard to the comments at paragraph 9.1 above the Landlord states that comparison with works undertaken to different blocks of flats in 2016/2017 is not relevant because; the works were not identical, tendered five years ago and there have been significant price increases since 2015 regarding labour and materials. The Jamie Burley comparison is not a like for like comparison because it relates to one block only, no survey of the roof was carried out, it is for the installation of a different product and not Alumasc approved so no warranty would be given. And it is a one-man company with limited assets.

10.2 In relation to the comments in paragraph 9.2 above the Landlords state that the estimates were shown to the leaseholders and formed part of a presentation and all details save for the name of the contractors was made available and the leaseholders were able to take notes. The Landlord accepts that hard copies were not made available to the leaseholders. Regarding supervision fees, these are NCH management and administration costs and they fall within the general scope allowed.

10.3 Concerning the comments made at paragraph 9.3 above the Landlord says that the accuracy of the L.P.E. Forms is not a matter for consideration by the Tribunal. The 2013 response is seven years old and the July 2019 response was undertaken before the detailed works went out to tender. NCH considers that all costs are payable. It instructed the cheapest compliant contactor after two rounds of tendering and seven bids.

11. The Landlord provided a further statement of case for the hearing, including legal submissions, the relevant parts of which are restated below: -

"NCH has not to date, issued formal demands for payment to the leaseholders for their contribution towards the costs of the Works…

NCH also seeks an order under section 20ZA of the Act to dispense with part of the consultation requirements…

11.1 <u>The terms of the leases</u>
The leases are all in the same form so far as is material to the application save for the relevant percentage. The relevant provisions in the lease for Number 28 Joyce close are:

11.1.1 Clause 4

The tenant hereby covenants with the Council and with and for the benefit of the owners and lessees from time to time during the currency of the term hereby granted of the other flats comprised in the Building that the tenant will at all times hereafter during the said term.

(1)…….

(2) contribute and pay annually one eighteenth part towards the costs expenses outgoings and matters mentioned in the fifth Schedule hereto.

11.1.2 Fifth Schedule

All costs and expenses incurred by the Council for the purposes of complying or in connection with the fulfilment of its obligations under the sub-clauses (4) (5) and (6) of Clause 5 of this Lease….

(4) That (subject to the contributions and payment as here before provided the Council will maintain and keep in good and substantial repair and condition: -

(i) The main structure of the Building including the foundations and the roofs thereof with gutters and rain water pipes….

11.2 The Works

The roofs of each of the blocks were in disrepair…
When dealing with disrepair it is a matter for the Landlord to determine how best to repair the building – *McDougall v. Easington District Council (1989) 58 P & CR 201*….

Neither the requirements for the works nor the method of repair have been challenged by the Tenants and are not therefore issues before the Tribunal...
There were no observations made in response to the Notices of Intention.

Sections 47/48 Landlord and Tenant Act 1987.
Section 47 of the Landlord and Tenant Act 1987 is not relevant to this application as no service charge demands have been issued….

11.3 Section 20 Landlord and Tenant Act 1985…

The Applicants have alleged that they have not been given hard copies of any of the Estimates received. This is accepted…...

11.4 NCH's position…in summary…is: -

a. It is accepted that section 20 applies to the costs of the works.
b. The relevant regulations governing the steps to be taken are set out in *Part 2 of Schedule 4 of the Service Charges (Consultation Requirements) (Wales) Regulations 2004/684*…
c. NCH sent written notices of intention to carry out the Works to each of the leaseholders…No challenge is raised by the Tenants in respect of this stage…
d. No contractors were nominated by the leaseholders to the Notices of Intention with the relevant period…
e. No observations were received by NCH to the Notices of Intention.

f. NCH sent written Notices of Estimates…
g. NCH made available for inspection all the estimates received from the second tender exercise. These were made available electronically at meetings on 29th January 2020 and 2nd March 2020 in electronic format. The leaseholders were shown, or had the opportunity to see, all of the estimates received but with the names of the contractors removed.
h. NCH responded to the observations received in response to the Notice of Estimates.
i. NCH entered into a contract with the lowest bidder (Rateavon Limited) …
j. There is a factual dispute regarding the meetings on the 29th January 2020 and 2nd March 2020….

11.5 Dispensation Order

NCH seeks an order under section 20ZA of the Landlord and Tenant Act 1985 ("a Dispensation Order") in respect of the need to have provided hard copies of the estimates to the leaseholders and in respect of any other matters where the Tribunal finds NCH has not fully complied with section 20.

The application is dated 8 September 2020….
The Tribunal can make a Dispensation Order if it is "satisfied that it is reasonable to dispense with the requirements".
The approach which the Tribunal must make in considering whether or not it is reasonable to make a Dispensation Order is set out in the Supreme Court's decision on *Daejan Investments Limited v. Benson [2013] 1 W.L.R. 854.* The Tribunal must: -

a. Consider the purpose of section 19 which is to ensure that the tenants are not required either to pay for unnecessary or defective services or to pay more than they should for necessary services to an acceptable standard.
b. Focus on the extent to which the tenants were prejudiced in those respects by the landlord's failure to comply with the requirements.
c. Take account of the fact that compliance with the Regulations is not an end in itself.
d. The distinction between serious breaches and lesser breeches was only relevant to the question of what prejudice had been suffered.
e. The prejudice flowing from the breach is the main and normally the sole question for the Tribunal…

11.6 Section 20C Application

NCH does not challenge the application made by the Applicants.

11.7 Section 21 B

Section 21 B is not relevant to the estimated costs which are the subject of this application. No service charge demands for the costs of the works have been issued by NCH.

11.8 Costs of the Works

Section 19 of the Act requires that relevant costs (defined in section 18 as the costs or estimated costs incurred or to be incurred by or on behalf of the landlord…in connection with the matters for which service charge is payable).
The costs must be reasonably incurred. There is no challenge to the need for the works….

There is a two-stage approach to reasonableness.

a. Whether the decision-making process was reasonable.
b. Whether the sum to be charged is reasonable in light of the evidence – *Southall Court (Residents) v. Tiwari [2011] UKUT 218 (LC)*

The leading case on reasonableness is *London Borough of Hounslow v. Waaler [2017] 1 WLR 2817*…."it must be borne in mind that where the landlord is faced with a choice between different methods of dealing with a problem in the physical fabric of a building…there may be many outcomes each of which is reasonable…. the Tribunal should not simply impose its own decision…

Waaler...sets out three factors which a Landlord should consider which are: -

a. The extent of the lessee's interests and in particular the remaining unexpired terms – in this case the leases are for 125 years from various dates in the 1980's….
b. The lessees view…
c. The financial impact of the works on the lessees."

12. Following further directions dated 30th November 2020 the Tenants were granted a request to seek a detailed upscaling of the estimate from Jamie Burley for reroofing. An upscaling estimate however was not forthcoming.

13. The Landlord in a letter dated 12th February 2021 states: -
"1. The quote provided by Mr Burley dated 3 March 2020 …for one block is of little evidential value to the Tribunal. It relates to a different product and does not comply with NCH's tender specifications and is defective in many aspects. It was not received in the extended relevant period specified in the Notice of Estimates.
2. It is not a question of simply multiplying the Burley Quote by four to reach the likely figure for the four blocks…. In order to update the Tribunal, whilst the works to the four blocks have been completed, the actual costs have not been finalised as works are continuing to the low level shed roofs. The costings remain as estimates at the current time…. a reduction in the estimates for each leaseholder…£825 per flat…the reduced estimates for the leaseholder's costs…
Block of 12 flats (Blocks 1,2 and 4) – Initial Estimate £13,580.81 - £825.00 = £12,755.81
Block of 18 flats (Block 3) – Initial estimate £14,476.40 - £825.00 = £13,651.40"

14. The Tenants response dated 15 February 2021 to the Landlord's letter dated 12 February 2021 is stated as follows: -
"…at the time Mr Burley provided his first quote, NCH had refused to show leaseholders any tender documents, so Mr Burley had nothing to base his estimate on other than the fact that the roof covering needed to be replaced and he was quoting for a product which would have achieved the same outcome of a high standard watertight roof. We, as leaseholders, only received the full specification as part of the information being given to the Tribunal hearing.

Now that the main scaffolding has been struck, we can see that besides replacing the flat felt roofs, the whole profile of the building has been changed by the new soffits and fascias. If NCH wish to enhance the look of their properties, surely that should be paid for by them and not by leaseholders and tenants who, in this case were just expecting a like-for-like replacement roof covering, albeit, insulated according to regulations….

…we observe that the figures stated in your letter for the individual blocks are incorrect…

We make one observation about the project's fees percentage. If this incudes salary for NCH staff and office equipment usage, why is this so? NCH is a not-for-profit organisation so should not be looking for extra money from such a project".

15. The Landlord in a letter dated 15 February 2021 responded to the Tenant's letter of even date by accepting a mistake existed in the recorded costs. The corrected figures are as follows: -
Block of 12 flats (Blocks 1,2 & 4) – Initial Estimate £14,476.40 - £825 = £13,651.40
Block of 18 flats (Block 3) – Initial estimate £13,580.81 - £825.00 = £12,755.81

THE LAW

16. Section 18 of the Act defines what is meant by "service charge". It also defines the expression "relevant costs" as:

> *the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.*

17. Section 19 of the Act limits the amount of any relevant costs which may be included in a service charge to costs which are reasonably incurred, and section 20(1) provides:

> *Where this section applies to any qualifying works … the relevant contributions of tenants are limited … unless the consultation requirements have been either–*
> *(a) complied with in relation to the works … or*
> *(b) dispensed with in relation to the works … by the appropriate tribunal.*

18. "Qualifying works" for this purpose are works on a building or any other premises (section 20ZA (2) of the Act), and section 20 applies to qualifying works if relevant costs incurred on carrying out the works exceed an amount which results in the relevant contribution of any tenant being more than £250.00 (section 20(3) of the Act and regulation 6 of the Regulations).

19. Section 20ZA (1) of the Act provides: *Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works … the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.*

20. Reference should be made to the Regulations themselves for full details of the applicable consultation requirements. In outline, however, they require a landlord (or management company) to:

- give written notice of its intention to carry out qualifying works, inviting leaseholders to make observations and to nominate contractors from whom an estimate for carrying out the works should be sought;

- obtain estimates for carrying out the works, and supply leaseholders with a statement setting out, as regards at least two of those estimates, the amount specified as the estimated cost of the proposed works, together with a summary of any initial observations made by leaseholders;

- make all the estimates available for inspection; invite leaseholders to make observations about them; and then to have regard to those observations;

- give written notice to the leaseholders within 21 days of entering into a contract for the works explaining why the contract was awarded to the preferred bidder if that is not the person who submitted the lowest estimate.

21. Section 20C of the Act provides that: -

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred by the landlord in connection with proceedings before a leasehold valuation tribunal, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant…

22. Section 27(a) of the Act provides that: -

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to: -

(a) the person to whom it is payable
(b) the person by whom it is payable
(c) the amount which is payable
(d) the date at or by which it is payable
(e) the manner in which it is payable

(2) Sub-section 1 applies whether or not any payment has been made….

INSPECTION & HEARING

23. The inspection was carried out on 15th December 2020 by Mr A M Lewis FRICS. The inspection was carried out unaccompanied by the other two Tribunal members in view of the Covid 19 pandemic. The inspection of the flat roof of one block was undertaken by Mr Lewis with the site manager of Rateavon Ltd. which was basically complete, with all the main flat roofs to the other blocks of flats having already been completed. Thereafter, Mr Lewis along with Rev Mole (and a few other leaseholders) together with Mr Timothy Adams of NCH (and a few other officers of NCH) visited the sites of the other blocks of flats referred to by the parties where similar works had been completed in 2016/2017 at Buchan Close and Shakespeare Close. In addition, they externally viewed the works of refurbishment that were ongoing at Gaer Shops by NCH at that time, which also included renewal of the flat roof covering.

24. The hearing took place by remote video conferencing on 24th November 2020. The Landlord was represented by Sian Jones Solicitor, Timothy Adams (NCH) and Venessa Duggan (NCH). Oral evidence was given by Venessa Duggan, the Landlord's Homes and Income Manager. It was based on her witness statement dated 9th September 2020. The witness statement is detailed and it is not considered necessary to restate its contents. Her salient oral evidence emphasised the consultation exercise which was presented in considerable written detail in paragraphs 11 – 22 of her witness statement. In essence she believed that a thorough consultation exercise had been carried out in terms of the information provided and meetings held.

25. The second witness for NCH to give oral evidence was Timothy Miles Adams the Landlord's Capital Works Manager. His oral evidence was based on a detailed witness statement dated 9th

September 2020 which explained in considerable depth; description of the properties; need for the roof repairs; tender exercise; consultation, Jamie Burley Quotations; works carried out by the Landlord on other blocks of flats; and site supervision costs. The Tribunal are grateful for the thoroughness of Mr Adams' witness statement. His salient oral evidence largely revolved around the consultation exercise meeting on 29th January 2020. He explained that the procurement process was presented from a lap top projected onto a screen and he observed that the leaseholders had taken detailed notes. He emphasised that the tender process was based on the established public sector procurement process and framework; the list of contractors was recommended and had previously been used; they were all Alumasc approved; and NCH accepted the lowest tender. The successful tender was let on 5 February 2020 to Rateavon Limited. Mr Adams explained that the 12.5% supervision fee was to cover the in-house costs of the Landlord.

26. The Tenants were mainly represented by Reverend Jennifer Mole who reiterated the concise written evidence which the Tribunal found helpful. Her salient oral evidence was; that many of the Tenants were on relatively low incomes and the proposed costs would place many of them in financial difficulties; that she had contacted the Landlord on several occasions before the meeting on the 29th January 2020 to secure further information but found the Landlord unresponsive; at the meeting on 29th January 2020 the Tenants asked for copies of the estimates but were not provided with them; in view of the two tendering stages undertaken by the Landlord which resulted in the discounting of tenders received for the first stage and subsequent need to delay the procurement process, it would have been reasonable for appropriate consideration of the Tenants' suggested contractor; that the information provided by the Landlord in the L.P.E. of 2019 for £7,500 for similar works brings into question the value for money of the subject works; the NCH proposed payment schedule may extend to 24 years; and Tenants sales have and will be prejudiced.

27. The Tenants' oral evidence was supplemented by written statements from J E Hughes, J Hughes, A Murphy and D Jenkins. The following people attended the hearing in person or where represented: - W Bedborough, J Bland, A H Jones (Acting by Power of Attorney for Mrs Preece), G Ray, Y Christensen and P Tinkler. Their evidence although limited largely reiterated the concerns expressed by Reverend Jennifer Mole. The Tribunal is grateful for their assistance.

DISCUSSION ON THE FINDINGS

28. The application under section 27A of the Act dated 15th June 2020 by the Tenants for determination of the reasonableness of the service charges in relation to the replacement roof cannot be considered because service charge demands have not been issued to the Tenants. Determination of such is therefore stayed until such demands have been served on the Tenants and the final detailed service charge costs ascertained.

29. The application under section 20ZA of the Landlord and Tenant Act 1985 dated 8th September 2020 by the Landlord for dispensation under the Consultation Regulation has been considered by the Tribunal which has come to the following conclusions.

30. Having heard the evidence, the Tribunal considers that the consultation undertaken by the Landlord upon receipt of the second estimates was superficial and lacked a genuine attempt to consult with the leaseholders. According to the witness statement of Reverend Jennifer Mole after receipt of the invitation to inspect estimates on the 13th December 2019 the only date offered was 29th January 2020. The Tribunal considered the delay in offering a suitable date, even taking account of the Christmas holiday, was unreasonable. The timetable of the

consultation meeting and the speed at which the contract was let to the preferred contractor reinforced the view that the consultation process was merely a box ticking exercise.

31. The tribunal find the admitted failure by the Landlord to provide any hard copy documentation regarding the Tenders to be deplorable. The timely provision of appropriate documentation would have allowed the Tenants time to fully consider the proposals in detail and possibly seek an alternative quotation. The presentation of limited information by Power Point clearly did not facilitate a meaningful dialogue between the Tenants and Landlord. The Tribunal was particularly surprised that NCH could not provide a copy of the Power Point presentation for review by them. Further, the lack of any meaningful recording of the meeting held on 29th January 2020 was considered by the Tribunal to constitute a significant failing in undertaking the consultation exercise.

32. The emails provided by NCH show that on 15th January 2020 Mrs Vanessa Duggan had been inundated with telephone calls from leaseholders concerned at the level of costs NCH was attempting to recover via the service charge. She further stated that there was a short timescale for the awarding of the contract. Significantly, there was no record available of any internal meeting at NCH where the leaseholder's observation on the estimates was reviewed after the meeting on 29th January 2020.

33. As already stated, the Tribunal considers that the consultation process was flawed. The Landlord advanced the argument: - "NCH accepts that section 20 of the Landlord and Tenant Act 1985 applies…and the relevant regulations are *Part 2 of Schedule 4 of the Service Charges (Consultation Requirements) (Wales) Regulations 2004/684* (the "Regulations"), NCH contends that it complied with the Regulations up to and including the service of Notice of Estimates. It accepts that it did not do so in respect of providing paper copies of the estimates. Therefore, a dispensation order is sought by NCH.

DISCUSSION ON THE LAW

34. The Landlord provided an excellent skeleton argument outlining the questions which the Tribunal needs to address: -

    a. Was it reasonable to choose the Alumasc roofing system and award the contract to Rateavon?
    b. Were the construction costs reasonable?
    c. Repairs or improvements?
    d. Were the fees element of the costs reasonable?

35. <u>Was it reasonable to choose the Alumasc roofing system and award the contract to Rateavon?</u> The Landlord has cited the cases of*; Post Office v. Aquarius [1987] 1 All ER 1055* applied in *McDougall & Another v. Easington District Council (1989) 58 P & CR 201*; *Daejan Investments Limited v. Benson [2013] 1. WLR 2817* paragraph 45); *Waaler v. Hounslow LBC [2017]* 1 WRI 2817 paragraphs 37, 38, & 39. The cited quotations all point to the finding that it is ultimately the Landlord who has the right to decide who they wish to carry out the repairs even if they are not the least expensive.

36. <u>Were the construction costs reasonable?</u> The Landlord makes the following statement regarding reasonableness of costs and their choice of the cheapest quotation received from the tendering exercise… "NCH was under no obligation to obtain the cheapest price possible. The Land's Tribunal, in *Forcelux Limited v. Sweetman [2001} 2 EGLR 173* confirmed that "the

question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred" ...." NCH had undertaken a full tendering exercise through a well-established procurement framework and received five bids. It awarded the contract to Rateavon Limited, the lowest bidder. The Burley quotation was for a different product and received after the award of the contract.""

37. Following the site inspection on 15th December 2020, NCH provided details of the costs associated with the recovering of the flat roof of Gaer Shops. These costs illustrate that the rate employed in the subject reference by Rateavon Ltd. was below those for the Gaer Shops. The leaseholders were unable to advance an updated/upscaled estimate from James Burley, and therefore the Tribunal accepted that the Landlord had followed in the main the correct and appropriate procedure in awarding the contract, if a little too speedily, to Rateavon Ltd.

38. Repairs or improvements? The leaseholders have advanced the argument that some of the works were improvements. The Landlord states that insulation in the new roof does not amount to improvement and is no more than a repair. They argue that NCH was obliged to install insulation in the new roof in order to comply with current building regulations. The Landlord supports this argument quoting the authorities; *Ravenseft Properties Limited v. Davstone (Holdings) Limited [1980] QB 12)*; *Postel Properties Limited v. Boots the Chemist Limited [1996] 2 EGLR 60*; *Lurcott v. Wakely [1911] 1 K.B. 905*. These authorities offer slightly differing definitions of what a repair as opposed to improvement consists of in different situations. The Tribunal is therefore aware that certain improvements can be undertaken as a useful part of a scheme of repair. Taking these authorities into account the Tribunal accepted that upgrading of the insulation to the flat roofs in accordance with the building regulations was a necessary part of the reroofing.

39. However, the Tribunal noted during its inspection of the flats at Buchan Close and Shakespeare Close, that the concrete soffit of the main flat roofs had not been insulated as part of the reroofing scheme. Therefore, the Tribunal determined as a finding of fact that the proposed insulating of the main concrete soffit area is not an essential element of the repair but constitutes an improvement. Furthermore, the lease only provides for repair and not improvement. If an improvement is to be recharged to a leaseholder as part of the service charge in this instance, this should have been brought specifically to the attention of the leaseholders, and their agreement sought on this point. Clearly this did not happen. Accordingly, the dispensation order will exclude the recovery of cost for this aspect of the works.

40. Were the fees element of the costs reasonable? The tenant made the point that the fees element of the costs was inappropriate as they relate to the costs of employment of NCH staff. The Landlord argues "The site supervision costs are payable under the terms of the leases. Whilst described as site supervision costs, these are overheads, NCH relies on the following: (a). The covenant is to pay the costs of repair and maintenance of the building, (b). Section 18(3) of the Landlord and Tenant Act 1985 confirms that overheads are "costs"…The Upper Tribunal in *London Borough of Southwark v. Paul & Others [2013] UKUT 0375* stated.. "the issue as to whether indirect costs properly form part of the service charge is an issue of principle which we consider to be now well established".

41. The Tribunal sought further information on how the 12½% addition had been established. In evidence the Tribunal was informed by Mr Adams that no external consultants had been employed by NCH for the project. Indeed, the specification had been prepared by the manufacturer of the roof covering material, presumably at no cost to NCH, and the WPA

framework employed in seeking prices. Monthly valuations of the work were undertaken by the inhouse quantity surveyor.

42. In the further information advanced by NCH on this point the Tribunal were informed that:

a) The planned maintenance salary costs of a percentage of the total costs of NCH amounted to 5%

b) The total overhead/back-office cost of NCH was £10,388,405

c) Therefore, overhead/back-office cost attributable to planned maintenance 5% of £10,388,405 = £519,420.25

d) Planned maintenance staff salary costs + overhead costs = £1,371,454

e) The total of £1,371,454 is divided by the planned maintenance budget cost for the year and expressed as a percentage, i.e., 12½%

(It was noted that the planned maintenance budget was not included within the calculations by NCH.)

No detailed records were advanced of hours employed by staff of NCH on the repair scheme to support the charge of 12½%. The Tribunal found the lack of detail provided wholly unacceptable. If the Landlord which is a Housing Association with public responsibilities considers that such crude and simplistic means of budgeting is acceptable it should take a moment of reflection on the impact such an approach has on their Tenants who are people of limited financial means. The Tribunal considered a percentage of 12.5% fees to be applicable to the appointment of consultants involved in designing and supervising construction work which would entail the use of a full range of professionals such as architects, quantity surveyors, structural engineers, building control officers etc. In this instance the level of costs incurred by NCH had been minimal, due to the procurement method already detailed above.

43. The Tribunal considered that whilst the costs of undertaking the consultation exercise could reasonably be considered to be included in the proposed charge it was not carried out to an appropriate standard. Indeed, the Tribunal were very concerned at the approach taken by NCH to the consultation process of December2019/January 2020.

44. The Tribunal were particularly concerned that the imposition of such a large sum of money for "fees" on some Tenants who it is understood are of limited means was inappropriate. In arriving at this conclusion, the Tribunal were conscious of Lewison L J's statement at paragraph 45 in the Court of Appeal case of *Waaler v. Hounslow LBC [2017] 1 WLR 2817*… "the landlord must take into account the financial impact of the works….in broad terms the landlord is likely to know the kinds of people lessees in a particular block or on a particular estate…Lessees of flats in luxury block of flats in Knightsbridge may find it easier to cope with a bill for £50,000 than lessees of former council flats in Islington; In many cases financial impact could no doubt be considered in broad terms by reference to the amount of service charge being demanded having regard to the nature and location of the property and is compared to the amount demanded …Reasonable people can be expected to make provision for some fluctuations in service charges but at the same time would not ordinarily be expected to plan for substantial increases". The leaseholders had relied upon the information provided solely by NCH in their replies to the Leasehold Property Enquiries when they had acquired their flats. NCH had the opportunity of

updating their costs in their replies to the purchasers as re-covering of flat roofs had already been undertaken at Buchan and Shakespeare Closes. However, NCH failed in their duty to the leaseholder, which substantially prejudiced their understanding of the likely costs of the roof recovering, and probable service charge.

45. Further, no evidence was put before the Tribunal by NCH concerning how the "fees" element of the overall costs had been explained to the leaseholders at the consultation meeting.

CONCLUSION

46. The approach which the Tribunal must take in considering whether or not it is reasonable to make a Dispensation Order is set out in the Supreme Court's decision in *Daejan Investments Limited v. Benson [2013] 1. W.L.R. 854*. A condition attached to a Dispensation Order must be reasonable and must compensate for the "relevant prejudice" suffered by the leaseholders. At paragraph 71 of Daejan Lord Neuberger summarises the position as… "In so far as tenants will suffer relevant prejudice as a result of the landlord's failure, the LVT should, at least in the absence of some good reason to the contrary, effectively require the landlord to reduce the amount claimed as service charges to compensate the tenants fully for that prejudice".

47. The Tribunal has decided to grant the Dispensation Order but attach two conditions. The first condition relates to disallowing the costs associated with the installation of the proposed improvement to insulate the main concrete soffit, which is an improvement and not a repair.

48. The second condition relates to the "fees" element of the costs. No evidence was made available to the Tribunal to convince them that this information had been explicitly made clear to the Tenants. Further the "costs" had been arrived at in a simplistic manner, devoid of any supporting evidence. Also, the Landlord had failed repeatedly in replying to Leasehold Property Enquiries with accurate projected costs when parties were acquiring their flats, and thereby prejudiced them. When such large sums of money are being potentially charged to Tenants some of whom are on relatively limited financial means they need to be provided with accurate projected costs. Therefore, the Tribunal as a condition of the dispensation reduce the 12.5% claimed to 5%.

Dated this 15th day of April 2021

J Rostron

Chairman