11697

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AU/LSC/2016/0142**
Property	:	**31 Ritchie House Hazellville Road London N19 3LX**
Applicant	:	**London Borough of Islington**
Representative	:	**Mr Sachin Israni-Bhatia**
Respondent	:	**Ms Keiko Matsusaki**
Representative	:	**Brady Solicitors**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Judge Carr** **Mrs H Bowers BSc (Econ) MSc MRICS** **Mrs H Gyselynck MRICS**
Date and venue of hearing	:	**1st August 2016**
Date of decision	:	**9th August 2016**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the monies demanded in respect of the service charges relating to a major works project carried out between 2000 and 2009 are reasonable and payable.

(2) The tribunal determines that the administration charge of £20 in respect of a fee levied for the recovery of arrears is not payable.

(3) The tribunal makes the determinations as set out under the various headings in this Decision.

(4) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

(5) Since the tribunal has no jurisdiction over county court costs and fees, this matter should now be referred back to the County Court at Clerkenwell and Shoreditch.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of a major works project carried out between January 2000 and 2009. An estimated invoice was sent on 26th May 2009 and the final account invoice was set to the Defendant on 13th February 2013.

2. Proceedings were originally issued in the County Court Business Centre under claim no. OQK20036. The claim was transferred to the County Court at Clerkenwell and Shoreditch and then in turn transferred to this tribunal, by order of District Judge Parker on 9th March 2016.

3. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

4. Mr Sachin Israni-Bhatia, a litigation lawyer with the Applicant, represented the Applicant at the hearing. Also in attendance for the Applicant were Mr John Lloyd, Projects Manager (Housing Property Services) and Mr Richard Powell, Projects Office (Home Ownership Department). The Respondent attended the hearing together with her husband, Mr MalachyBrophy. The Respondent was represented by Mr Chris Green, solicitor.

The background

5. The property, which is the subject of this application, is a three bedroom maisonette in Richie House which is one of three "U" shaped, five storey brick built blocks which together make up the Hornsey Rise Estate.

6. Photographs of the building and of the relevant works were provided in the hearing bundle. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

7. The Respondent holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge.

8. A copy of the lease was provided in the bundle. It is dated 26 March 1990 and the parties are the Mayor and Burgesses of the London Borough of Islington as the landlord and Ms K.Matsusaki as the tenant. The lease is for a term of 125 years from 29 September 1984.

9. Clause 5 sets out the relevant arrangements for the service charge mechanism.The relevant sections of clause 5 are reproduced below:

"THE Service Charge referred to in Clauses 1 and 3(1) shall consist of (so far as permitted by the Landlord and Tenant Acts 1985 and 1987 and the Housing Act 1985 as amended by the Housing and Planning Act 1986:

(1) Expenses which relate solely to the demised premises and referred to in Clause 5(2)(e)(ii) hereof; and

(2) A proportion of the expenses and outgoings incurred or to be incurred by the Council of those items set out in the Third Schedule hereto and which comprise

(i) the repair maintenance renewal and improvement of the Building and any facilities and amenities appertaining to the Building and the Estate

(ii) the provision of services for the Building and the Estate (if any)

(iii) other heads of expenditure

PROVIDED THAT such expenses and outgoings may include expenses and outgoings incurred prior to the grant hereof SAVE THAT AND SUBJECT to the following:

(a) The amount of the Service Charge shall be ascertained on an annual basis in accordance with sub-clause (f) hereof and certified by a certificate (hereinafter called "the Certificate") signed by the Council's Director of Finance or some other duly authorised officer (at the discretion of the Council) acting as an expert and not as an arbitrator in the manner hereinafter mentioned

(b) The Council's current financial year (hereinafter referred to the "Financial Year") shall mean the period from the First day of April in the year preceding the issue of the Certificate to the Thirty First day of March of the next year or such other period of accounting as the Landlord may from time to time determine

(c) The Certificate shall contain a summary of the Landlord's expenses and outgoings incurred or to be incurred during the Financial Year to which it relates together with the relevant details and figures forming the basis of the Service Charge due credit being given therein for all payments made by the Tenant in accordance with Clause 5(2) hereof in respect of the said year and upon furnishing such Certificate showing such adjustment as may be appropriate the Tenant shall pay to the Council the amount of the Service Charge as aforesaid or any balance found to be payable or the Council shall allow to the Tenant any amount which the Tenant may have overpaid as the case may require

(d) .....

(e) The Tenant shall pay the Service Charge without any deductions whatsoever within 14 days of the receipt of the Certificate PROVIDED ALWAYS THAT

(i) the Tenant shall if the Council so requires pay to the Council on each quarter day such sum in advance and on account of the Service Charge as the Council shall specify to be a fair and reasonable interim payment which such shall not exceed one quarter of the Council's estimate of the likely amount of the Service Charge for that particular Financial Year

(ii) Any expenditure other than insurance under Clause 7(2) hereof which both relates solely to the demised premises and is of a non-recurring nature shall be reimbursed by the Tenant on the quarter day next after such expenditure has been incurred by the Council

(iii) in the event of the Council giving notice under sub-clause 5(2)(g) hereof the Tenant shall pay the amount of any payments there under in advance or in arrears or annually or any of the usual quarter days or otherwise at the absolute discretion of the Council

(f) .....

(g) ....

(vi) The Council shall not prior to the signature of the Certificate be entitled to re-enter under the provisions in that behalf contained in Clause 9 hereof by reason only of non-payment by the Tenant of the Service Charge or any part thereof PROVIDED THAT nothing herein contained shall preclude the Council from maintaining an action against the Tenant in respect of non-payment of the Service Charge or any part thereof as aforesaid notwithstanding that the Certificate had not been signed at the time of the proceedings subject nevertheless to proof in such proceedings by the Council that the amount of the Service Charge or any part thereof or interim payment demanded and unpaid is of a fair and reasonable amount in accordance with the clauses hereinbefore contained".

The issues

10. As part of the preparation for the hearing the parties agreed a Scott Schedule. This identified all specific items that are included in the disputed amount of £8,972.46. From the case bundle and confirmed at the hearing various items on the Scott Schedule were agreed leaving only the following items in dispute:

Charge	Unit Costs in £
Scaffolding, hoist, temporary protection etc	731.69
Windows (renewal)	3,817.82
Underpinning (charge capped)	1,000.00
Roofing	1,034.64
Framework Discount (6.48%)	-573.55
Professional fees (11%)	910.52
Arrears Recovery fee	20.00
TOTAL IN DISPUTE	**6,941.12**

11. The parties agreed that the issues between the parties could be summarised as follows:

    (i) Whether the Applicant had complied with the relevant statutory consultation procedure.

    (ii) Whether all the works carried out in the major works project were necessary. In particular the Respondent argued that there was no need for the Applicant to carry out the underpinning works, the roof works or the replacement windows.

12. The Tribunal raised the issue of the payability of the £20 administration charge for the recovery of arrears. The Applicant conceded that the charge was not payable under the terms of the lease.

13. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

Compliance with the statutory consultation requirements

14. The Applicant argues that it complied with the requirements of Schedule 3 of the Service Charges (Consultation Requirements) (England) Regulations 2003/1987. This Schedule was the appropriate schedule as they were works carried out under a long term qualifying agreement. In addition to the statutory consultation it also carried out further consultation including a number of consultation meetings.

15. The Respondent's representative conceded that although the statement of case prepared by the Respondent's solicitors argued that there were defects in the consultation process, the defects referred to there related to a different schedule – Schedule 4 – of the statutory instrument. Nonetheless the argument was made by the Respondent that there was insufficient information provided in the consultation documentation to comply with the requirements of Schedule 3. The Respondent argued that in particular the reference to 'roofing' works was misleading.

The tribunal's decision

16. The tribunal determines that the consultation procedures were complied with.

Reasons for the tribunal's decision

17. Schedule 3 of the Service Charges (Consultation Requirements) (England) Regulations 2003/1987 places relatively light requirements upon a landlord in respect of the details to be provided of the proposed works. In particular the requirement is that the landlord describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected.

18. The notice provided by the Applicant described the proposed works in general terms and gave information about where more details about the proposed works could be inspected.

19. The tribunal therefore determines that the statutory consultation requirements have been complied with.

The necessity for the underpinning works

20. The Applicant described how there was extensive disrepair to a number of properties within Ritchie House. The bundle included photographs in support of this. The problems of disrepair meant that properties were being left empty and the Applicant was facing a number of potential legal challenges from its tenants in connection with disrepair.

It argues that the underpinning works were a reasonable response to the disrepair in Ritchie house. The Applicant also provided a history of attempts to deal with issues of cracking on the Hornsey Rise estate.

21. The Respondent argues that the underpinning works were not necessary, and that other, cheaper options should have been explored. In particular the Respondent considers that there was insufficient independent evidence to support the Applicant's decision to carry out the most costly option.

22. In particular the Respondent drew the attention of the tribunal to a report prepared by Conisbee in anticipation of the major works which suggests there were three courses of possible action in relation to the cracking in the properties:

    (i) Carry out no repairs, monitor the premises for at lease 18 months to determine whether the block has stopped moving (returned to equilibrium) or whether further damage from clay heave is taking place.

    (ii) Carry out repairs (without underpinning) and accept that future cracking will occur.

    (iii) Carry out full addition underpinning to the NE corner, including internal walls and ground slab replacement, followed by crack repairs. This is described by Conisbee as the fail-safe option.

23. The Respondent asked that the Applicant to produce evidence of a reasoned decision which set out its justifications for taking the expensive, third, fail safe option.

24. Mr Lloyd, giving evidence for the Applicant, acknowledged that there was no reasoned decision in the bundle provided to the tribunal, and that although a decision to that effect was made he was not able to provide evidence of it.

The tribunal's decision

25. The tribunal determines that the amount payable in respect of the underpinning is reasonable and payable.

Reasons for the tribunal's decision

26. The bundle provided to the tribunal provided extensive evidence of the necessity for some remedial works to be carried out to Ritchie House.

Although – and this is unfortunate – no specific document could be produced to the tribunal which explained the Applicant's reasoning for deciding on the underpinning option, the tribunal determined that, taking into account all of the evidence presented to it, it was a reasonable decision to choose the third, fail safe option, in response to the need to keep the building in good repair.

27. The tribunal notes that the Applicant restricted the charges for underpinning for lessees to £1000 – a figure that represented the excess charge on the lessees' building insurance.

28. The tribunal also notes that the Respondent had no evidence to support its argument that one of the other two options available to the Applicant would have been a more reasonable response to the problem than the one it chose, nor did the Respondent produce evidence that the course of action taken by the Applicant was unreasonable.

The necessity for the replacement windows

29. Mr Lloyd for the Applicant explained that in 1986 the original single glazed timber windows were replaced with double glazed aluminium powder coated windows. By the time these were replaced, in 2009, they were 22 years old, nearing the end of their projected 25 year life.

30. The original intention had been to carry out repair rather than replacement work. However following a site survey, a specialist report and listening to feedback from a residents meeting, it decided to replace the windows. The Applicant referred to health and safety concerns when heavy sash windows fail.

31. The Applicant obtained a number of estimates. The estimates contained references to an 'option 2' which was clearly cheaper than the chosen option. Mr Lloyd was not able to provide a definitive explanation for this, but noted that the works required planning approval and he believed this ruled out option 2. He said that if he had known this issue would be raised he would have obtained the relevant documentation.

32. The Respondent's case is that the replacement of the windows was unnecessary and that repair and renewal, particularly of the springs, would have been the reasonable course of action. The Respondent considers that the Applicant was over-influenced by anecdotal evidence and points to the easy and cheap availability of replacement springs.

The tribunal's decision

33. The tribunal determines that the amount payable in respect of window replacement is reasonable and payable.

Reasons for the tribunal's decision

34. The tribunal considers that the decision to replace 22 year old windows which were causing residents problems was a reasonable decision. Repair work may well have been expensive and would only have deferred the need to replace the windows for a short period of time.

35. The Respondent has produced no evidence to suggest that the alternative of repair that she supports would have been a reasonable decision.

36. The tribunal accepts the explanation of the Applicant in relation to option 2.

37. The tribunal also notes that the Applicant replaced the front door of all lessees' properties free of charge.

The necessity for the roofing works

38. The Applicant accepts that describing the works done under the major works contract as roofing works is a little misleading. The works were in effect works to the parapet gutters and small flat roof sections over the stairwells and rear corners and not works to the main roof, except for some minor replacement of broken or dislodged tiles and localised reinstatement of lead flashings.

39. The Applicant carried out an initial inspection of the guttering and obtained a report from an expert contractor, Langley's. The Report detailed that the previous reinforced liquid coating/mesh system to the parapet gutters and small flat roof sections over stairwells was showing signs of advance deterioration and that the previous waterproofing system had reached the end of its useful life.

40. The Applicant therefore decided to repair the parapet inner faces and the parapet gutters and flat roof areas were sealed/made watertight.

41. The work has the benefit of a 20 year guarantee.

42. The Respondent's argument related to the roof works carried out in 2000 when the pitched mansard roof was fully retiled, the roof insulation upgraded and ventilation improved to meet current building regulations. The Respondent considered that if those works had been carried out property the works in 2009 would not have been necessary.

43. The Applicant explained that in 2000 the existing asphalt gutters were line with a plastic coating and that by 2009 this was showing signs of failure. The Applicant provided photographs to substantiate this. The

Applicant did not know how long those initial works should have lasted and did not investigate.

The tribunal's decision

44. The tribunal determines that the amount payable in respect of 'roofing' works is reasonable and payable.

Reasons for the tribunal's decision

45. The tribunal were satisfied on the basis of the evidence of Mr Lloyd and the photographs and documents provided that the works were necessary.

46. The Respondent has provided no evidence to suggest that an alternative course of action would have been more reasonable and more affordable.

Application under s.20C and refund of fees

47. In the statement of case the Respondent applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the tribunal determines not to make an order under s.20C.

The next steps

48. The tribunal has no jurisdiction over ground rent or county court costs. This matter should now be returned to the County Court at Clerkenwell and Shoreditch.

Name: Judge Carr **Date:** 9th August 2016

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are 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.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(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 provisions 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.

Section 27A

(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.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(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 court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, 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 or any other person or persons specified in the application.

(2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
- (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
- (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
- (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
- (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).