13089

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BK/LSC/2017/0291**
Property	:	**220 Gloucester Terrace** **London W2 6HU**
Applicants	:	**Dr Nidhi Vaid (Flat D)** **Hugo Busby (Flat C)**
Respondent	:	**City of Westminster**
Representative	:	**Judge & Priestly LLP**
Type of Application	:	**Liability to pay service charges**
Tribunal	:	**Judge Nicol** **Mr N Martindale FRICS** **Mr P Clabburn**
Dater and Venue of Hearing	:	**15th-17th October 2018** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**27th November 2018**

DECISION

Decisions of the Tribunal

(1) The costs to be incurred for the pending project of major works to the subject property would be reasonably estimated at no more than £69,670.42 of which the Applicants' share would be £17,417.61 each.

(2) The annual service charges for the years 2014-2018 are reasonable and payable, save for one-third of the costs of the caretaking services in all years and the whole of the annual fire extinguisher service for the years 2014-2016.

(3) There shall be an order under section 20C of the Landlord and Tenant Act 1985 that the Respondent may not add the costs of these proceedings to the Applicants' service charges.

(4) The Respondent shall reimburse the Applicants their application and hearing fees (£100 and £200 respectively).

Relevant legislative provisions are set out in the Appendix to this decision.

The Application

1. The Applicants are the lessees of Flats C and D respectively, two of the four flats at the subject property, 220 Gloucester Terrace, London W2 6HU. The Respondent is the freeholder and retains the other two flats which it lets to tenants on short periodic tenancies and the basement which is let for use as an electricity sub-station.

2. The Applicants applied for a determination under section 27A of the Landlord and Tenant Act 1985 ("the Act") as to the reasonableness and payability of a number of actual and potential service charges which are dealt with in turn below.

Major works

3. The largest single item in dispute concerns a proposed programme of major works covering almost the entire terrace of properties (32 out of 34) of which the subject property forms part. On 18th January 2017 the Respondent sent out a Notice of Intention dated 17th January 2017, purportedly in accordance with the statutory consultation requirements under section 20 of the Act. It stated that the proposed works to 220 Gloucester Terrace would be £251,825, of which each Applicant would have to pay £62,956. It also stated, "reliable estimated costs will only derive from the tender exercise."

4. The Notices were not correctly addressed to the Applicants but they found out about them and obtained copies enabling them to respond within the specified period. They argued before the Tribunal that the Respondent's service errors should render the consultation invalid. However, there were no consequences to those errors in that the Applicants had a full opportunity to make their representations. Therefore, the Tribunal sees no reason why the consultation should be impugned on this ground.

5. Despite the fact that the Applicants' leases allow them to do so, the Respondent does not seek advance service charges based on estimates but only service charges arising from actual expenditure. Therefore, there was and is to be no service charge demand arising from this estimate. However, the Applicants were concerned about both the size of the potential bill and the contribution to that amount from works which appeared to them to be unnecessary, over-specified or over-priced.

6. The Applicant first set out their concerns in a letter dated 20th January 2017. They were dissatisfied with the response, including to their requests for further information and documentary evidence. Therefore, they made their application to the Tribunal, as they are entitled to do under section 27A(3) of the Act (see the Appendix to this decision).

7. The application has had an extended preparatory period requiring an unusually large number of directions orders. As directed, Scott Schedules of the various items in dispute were compiled and each party instructed an expert, Mr AC Bidgood BSc MRICS for the Applicants and Mr JG Flowers FRICS Dip Proj Man for the Respondent. The experts inspected 220 Gloucester Terrace together and sought agreement where they could. They produced their reports on 28th and 27th April 2018 respectively.

8. As a result of Mr Flowers's report, the Respondent revised their estimate of the cost of the works to 220 Gloucester Terrace and issued a fresh Notice of Proposal in May 2018 (in the bundle compiled by the Applicants for the Tribunal the covering letter is dated 18th May and the Notice 23rd May). The Notice stated that the costs to the building were now £141,773, with the Applicants each to pay £35,443.

9. The Applicants sought to inspect the relevant documents but when they attended at the appointed time at the Respondent's offices, they were inexplicably unavailable. The Respondent conceded that this rendered the May Notice invalid and issued another fresh Notice dated 3rd August 2018. This Notice stated that the costs to the building were now £112,914, with the Applicants each to pay £28,229.

10. There was confusion just before the start of the Tribunal hearing on 15th October 2018 when there was mention of a further revised estimate of around £65,000. It is noteworthy that Mr Flowers accepted this figure without question. Mr Carl Fain, counsel for the Respondent, reported to the Tribunal that it was the result of some unspecified calculation error. He clarified that the Respondent's final figure for the purposes of its representations to the Tribunal was as set out in the Scott Schedule at page 512 of the Tribunal bundle, namely £109,504.01 for the building, of which each Applicant's share would be £27,376.

11. The Applicants had a number of challenges to elements of the proposed works which are dealt with further below but they first expressed concern about how difficult it was to obtain information and documents from the Respondent so that they could understand how their proposals, including the estimated figures, had been compiled. The Respondent sought to explain to the Tribunal the proposed works and their cost with the assistance of two witnesses, Mr Mihir Vaja and Ms Katherine Swanton. Both are employees of City West Homes Ltd, an Arm's Length Management Organisation appointed by the Respondent as their agents.

12. The Respondent decided, coincidentally while this case was being heard, to stop using City West Homes and to bring their services in-house, the aim being for this to take effect on 1st April 2019. The Applicants sought disclosure of the report on the basis of which this decision was taken because they asserted that it would show a pattern of mismanagement and incompetence of which the circumstances of this case would be an example. The Tribunal refused to order disclosure so late in the proceedings because, even if there were a pattern of behaviour, the Applicants still needed to make their case on the evidence relating specifically to their situation. The report apparently makes no mention of Gloucester Terrace and so has no direct relevance to this case.

13. The Respondent explained that the process leading to the proposals made on 17th January 2017 started with the commissioning of a condition report dated 7th May 2013 from Baily Garner. Mr Vaja said that the report was partly based on desktop information regarding the age and construction of the properties but he did not give the source of his information – the report itself does not say this and Mr Vaja did not work at City West Homes at the relevant time. He later justified the additional surveys carried out on Gloucester Terrace (and discussed further below) on the basis that the information to be obtained from them was not available in the Respondent's records but that, even if it had been available, he would not have relied on it because it would be unprofessional of him to do so, even where it related to matters like window measurements which should not have changed over time.

14. Baily Garner's report states that their instructions were to undertake fabric condition surveys of selected properties but does not specify which properties were selected. The report further states that they would inspect as much of the internal and external surface area of the building as was practicable but would not inspect inaccessible parts. This implies that they would inspect the internal communal areas regularly accessed by residents in all parts of Gloucester Terrace, such as corridors and stairs, but it would seem that they only did this in some buildings.

15. Baily Garner's report contains a schedule setting out various elements to do with the roofs and elevations, prioritising work in three categories, number 1 being the most urgent. Most items were rated as 2 or 3 and described as being in "fair" condition. Windows, doors, render and stucco were rated as "poor" but the report gave no indication how many or which buildings within the terrace these comments related to. The only mention in the report of number 220 is one photo of an external step in the Appendix of some 127 photos.

16. In his evidence to the Tribunal, Mr Vaja described the further surveys carried out to Gloucester Terrace in order to scope the proposed works:

(a) A refurbishment, demolition and asbestos survey carried out by a consultant, Tersus. They surveyed about 10 properties to see if it was

likely that there was asbestos and, if so, how much. Mr Vaja said it would be a waste of resources to do more than this at the project stage.

(b) Abseilers went to sample the condition of the roofs.

(c) Lead was tested for across 10 sample properties.

(d) An intrusive render survey was carried out at ground level to number 214 on 10th August 2015.

(e) Another consultant, Helifix, tested brickwork strength at one sample property by drilling and inserting rods.

(f) Helifix also tested the render adhesion at one sample property. They carried out both tests on 7th April 2017.

(g) There was a core sample test of flat roofs.

(h) Another consultant, Sika, looked at concrete repair by a visual survey of the whole terrace on 13th March 2017.

(i) Each building has barrier matting, being special material to capture damp at each main entrance. This was inspected using a master key which provides access to all buildings in the terrace.

(j) The vinyl floor coverings were sampled.

(k) City West Homes's own surveyor looked at the metal railings on 11th August 2017. This was needed in support of the planning application which would have to be made ahead of the works. The Respondent has a guide to such railings – Mr Vaja commented that neither expert appeared to be aware of such design requirements for the conservation area in which Gloucester Terrace is located.

(l) RepairCare, specialists in conservation areas, looked at timber repairs and joinery on 4th May 2017.

(m) Each window was measured and surveyed on 2nd August 2017, although none were tested for operation. Again, this was needed for the planning application. A more detailed survey would be done by the window sub-contractor after the contract had been tendered and awarded. The Tribunal queried whether this information should already be available from surveys in past years but it was in this context that Mr Vaja said that there was no such information and, anyway, he would not have relied on it even if there were.

(n) Every building was surveyed for mechanical and electrical issues by City West Homes's specialist team, not to produce a report, but in order to assist in drawing up the works specification as part of the tender package.

(o) A fire risk assessment was carried out on 12th April 2013. The London Fire and Planning Emergency Authority subsequently sampled some of the buildings in Gloucester Terrace and served deficiency notices on 7th March 2018.

(p) A CCTV survey was carried out of the below ground drains.

17. None of these surveys looked at number 220. Their cost was included in a 20% supplement to the cost of the works which also included:

(a) A proportionate share of the 10% contingency included in the total project cost of £5.5m.

(b) Contract administration.

(c) Project management.

(d) Quantity surveying. This and the proceeding two items together were estimated to cost £191,000 as a fee to FFT.

(e) City West Homes would also have a quantity surveying fee for supervising FFT at a cost of £13,168.

(f) There would also be a separate fee of £54,355 to manage FFT's project management.

(g) Principal designer, a health and safety role costing £8,000.

(h) Party wall services for £3,000.

(i) Structural engineer for £18,000.

(j) Electrical engineer for £15,000.

(k) Architect, in case there is a change to the design which needs to be presented for planning purposes, for £15,000.

(l) Management asbestos surveys for £4,300 – this is not the same as the refurbishment and demolition survey but in order to keep the required asbestos register.

(m) Above-ground drainage survey for £1,000.

(n) Planning fees of £10,000.

(o) Staff fees of £12,900.

(p) Quality management fees (what used to be called Clerk of Works) for £110,888 to verify that the contractor is delivering by being on site for the 60-week duration of the contract.

(q) The property services communication department would charge 1% (£61,624), including for the consultation process.

(r) Legal fees payable to the Respondent of £4,000. The contract would be based on the Respondent's approved form compiled by Sharpe Pritchard solicitors and legal services would be provided by the in-house service for three boroughs, namely Hammersmith & Fulham, Kensington & Chelsea and the Respondent.

18. Mr Vaja further stated that the proposed project had to go through a number of departments, each of which had to give their approval, namely procurement, finance, leasehold operations, communications, health and safety, electrical and mechanical and legal. However, the project was to be tendered to a single contractor. Mr Vaja asserted that the advantages of having a single contractor for the implementation of the works to the terrace were:

(a) Better value for money due to economies of scale;

(b) Better control of quality standards;

(c) Consistency of communication;

(d) Delivery and certainty of costs and programme;

(e) If there were 34 individual contracts, the logistical arrangements for procurement would be administratively time consuming and the day-to-day operations and management of the site with multiple contractors would be very difficult.

19. An overall scheme specification was prepared accordingly and the Respondent advertised for tenders in the Official Journal of the European Union on 28th April 2017 on a project value of £7.3-7.4m. There were 34 expressions of interest and then a number of tenders. Following evaluation of those tenders, the Respondent chose Axis Europe Ltd's tender in the sum of £5,502,139.10. From this and the fees to be added for the matters set out above, the Respondent identified the aforementioned sum of £251,825 as the block expenditure for 220 Gloucester Terrace. The Applicants were concerned that the Respondent had just divided the total into 34 equal parts which would not have taken into account the individual circumstances of each property. The Respondent did not actually explain the apportionment but the Tribunal notes that the amount attributed to 220 Gloucester Terrace is substantially higher than that implied by an equal division between all relevant properties.

20. The Applicants' expert, Mr Bidgood, had costed the works needed for number 220 by taking the property in isolation from the rest of Gloucester Terrace and comparing it with the cost of works at a similar single property in Pimlico with which he was familiar. Mr Fain argued on behalf of the Respondent that he was not comparing like with like and so the comparison was invalid. He pointed to previous cases in which it was held that a landlord acted reasonably in awarding works contracts to a single contractor:

- In *A2 Housing Group v Taylor* (2007) LRX/36/2006 unreported Mr AJ Trott FRICS, sitting as a judge in the Upper Tribunal, stated (at paragraph 35):

> The LVT recognised that a single contract was the appellant's preferred option and did not criticise the appellant's objectives which the LVT said "were to improve the delivery of the services and also to simplify the management". It also accepted that the specification for the single contract was not "gold plated". The LVT baulked at the significant increase in costs that acceptance of such a contract entailed and determined that the appellant should have looked at other ways of providing the services through local contracts serving single estates. I agree ... that this approach is contradictory. The appellant explained to the LVT the problems that it faced by continuing to use individual

contractors for single estates and which had given rise to the objectives. The LVT said that:

> "16(iv)The Respondent [appellant] had identified several issues across its estates that needed to be addressed: problems of using small one-man outfits with lack of capacity and falling standards; lack of properly agreed contracts, performance standards or default penalty provisions; more rigorous health and safety requirements."

The appellant's unsatisfactory experience of such single estate and/or service contracts had established that their continued use would obstruct the very objectives that were tacitly accepted by the LVT. The LVT did not address these problems in its decision and failed to explain how they would be resolved by the use of individual contractors on single estates.

- In *City of Westminster v Fleury* [2010] UKUT 136 (LC) HHJ Alice Robinson stated (at paragraph 19):

> ... the LVT stated it was considering only separate contracts for the Two Blocks, not lots of separate contracts for the rest of the major project works. However, in doing so the LVT has failed to consider the question whether, if in principle separate contracts are more appropriate for the Two Blocks, why are they not appropriate for the other blocks of flats as well? Underlying this is a failure to grapple with the Appellant's evidence in the Appleyard and Trew report that a major contract was a better overall approach than lots of smaller contracts.

21. In the Tribunal's opinion, the Respondent's approach displays two inter-related flaws:

(a) The Respondent relies on *a priori* reasoning to justify its use of a single contractor. Their reasoning is logical and makes sense on its face but it is a fact of human life that what looks good on paper sometimes falls flat when it comes to be implemented in real life. When landing its lessees with large service charge bills, a reasonable landlord would keep under review whether its reasoning is actually turning out as expected.

(b) Mr Fain argued that the above-mentioned authorities decided as a matter of principle that the single-contractor approach was reasonable. It is unfortunately common that representations before a court or Tribunal confuse principle with the facts and evidence in a particular case. The above-quoted passages make it very clear that the Upper Tribunal reached its conclusions based on the evidence seen and accepted by the Leasehold Valuation Tribunal (the predecessor to the current Tribunal) in each particular case.

22. Therefore, while the Respondent's reasoning looks sound and a single-contractor approach is capable of being reasonable, it is necessary for the Tribunal to look at the actual evidence in front of it to see whether the Respondent's objectives are actually being met in this case:

(a) *Economies of scale.* Mr Bidgood reached a lower figure of £47,107.20 plus VAT for the cost of the proposed works partly because he quibbled with the necessity or price of some elements included in the works. However, his figure would have been lower than the Respondent's even if those elements had been retained (Mr Flowers accepted the contractor's rates, even when they appeared high, on the sole basis that they were the result of a competitive tender). When cross-examined, he agreed that it would be "bonkers" to use 34 separate contractors but he pointed out that, with economies of scale, he would expect the single-contractor approach to produce a lower figure than his, not higher. The Tribunal agrees with him that, although it is not in any way conclusive, the fact that the Respondent's approach has produced a significantly higher figure is indicative that something might have gone wrong – instead of economies of scale, the process has resulted in substantially higher costs. Mr Fain pointed out that economies of scale was not the only reason given by Mr Vaja for the single-contractor approach and so it should not be judged on that one criterion alone.

(b) *Better control of quality standards.* Mr Bidgood and Mr Flowers agreed that that the estimate of £251,825 for the works at 220 Gloucester Terrace was far too high in the light of the actual condition of that particular property. The Respondent has accepted this and so reduced the estimate three times to produce a figure 56.5% lower. This suggests that the Respondent had very little, if any, control over the quality of its process of estimating costs (Mr Vaja apologised for the inclusion of the statement quoted in paragraph 3 above which suggested that their estimate would be reliable). The Respondent's defence is that the initial figure of £251,825 was only an estimate which would not result in a service charge demand and would be revised once the contractor was on site and could examine each individual property in more detail, including with the assistance of scaffolding. However, the sums of money involved would be significant for any lessee and any reasonable process of estimation would allow them to make reasonable financial plans rather than inducing an unnecessary sense of outrage and worry.

(c) *Consistency of communication.* It is not clear what the Respondent means by this. However many contractors were used, both they and each lessee would be communicating principally with just the Respondent or their agents. The Respondent itself would be able to provide a measure of consistency in communications, as could the contractor employed to supervise the works across the whole terrace.

(d) *Delivery and certainty of costs and programme.* The process used by the Respondent has now taken over 5 years and produced a revised set of works and three revisions to the cost estimate totalling 56.5%. This does not suggest an efficient delivery or any certainty in either the costs or the programme. It seems highly unlikely that a project focused on fewer properties or even one property would have taken so long or been so inaccurate in its estimation of costs. The Respondent does not appear to have considered whether, amongst all the other surveys, they could have carried out individual surveys amongst some or all of the

properties, at a small cost relative to the total amount of the whole project, in order to improve this element. In relation to number 220, this is now what has happened due to the Applicants' actions in challenging the Respondent but it should not be necessary for lessees to come to the Tribunal to achieve a reasonable outcome. In paragraph 9.02 of his report, Mr Bidgood surmised from the Bailey & Garner report that some of the other properties in the terrace were in a significantly worse condition than number 220, resulting in higher costs for both repairs and overheads, of which the Applicants should bear no share. The Respondent did not even attempt to account for this possibility until challenged by this application to the Tribunal.

(e) *If there were 34 individual contracts, the logistical arrangements for procurement would be administratively time consuming and the day-to-day operations and management of the site with multiple contractors would be very difficult.* Throughout their case, the Respondent has insisted on a binary choice: one contractor or 34. This is substantially misleading. The Respondent used between 5 and 12 external contractors to draft the tender and will be using another external contractor to manage the project. The successful tenderer would use a number of sub-contractors who may use sub-contractors of their own. Moreover, the choice does not have to be between one contractor and 34 (which, anyway, is the wrong number since two properties have been removed from the project). The Respondent's evidence was that the project would be carried out in stages with scaffolding up on only one part of the terrace at a time. The Respondent appears not to have considered whether the project could be broken down into more than one part but less than 34 parts. The Respondent has failed to establish that a single contractor brings benefits which outweigh the disadvantages compared with any other realistic alternative.

23. Mr Fain argued that, if the Respondent acted reasonably in the process it used to produce the estimated cost of the works, then the outcome could also be regarded as reasonable. As can be seen from the above, the Tribunal is not satisfied that the Respondent has demonstrated that they did so act reasonably. However, as Lewison LJ stated on behalf of the Court of Appeal in *Waaler v Hounslow LBC* [2017] 1 WLR 2817,

> 37 ... whether costs have been reasonably incurred is not simply a question of process: it is also a question of outcome.

24. The reasonableness of the outcome in this case should be measured not only against price but also in the context of the Applicants' objections to elements of the proposed works which are dealt with in turn below. Although the parties provided much useful information in the form of Scott Schedules, those schedules had a large number of columns and a significant number of sub-schedules and could not be usefully replicated as part of this decision.

Floor Finish, Stairs and Internal Redecoration

25. In 2011 the Applicants complained about the condition of the communal areas at 220 Gloucester Terrace. In September 2011 City West Homes agreed that the Applicants could carry out decorative works and would share the costs equally with them. When City West Homes then cancelled this, the Applicants pursued it through City West Homes's complaints system. At Stage 2, their complaint was considered by a panel consisting of a service improvement team leader, a resident representative and a member of City West Homes's board. By letter dated 6th February 2012 the panel's decision was reported to the Applicants, including:

> The works that are scheduled to take place in 2013/14 will include roof works, fire safety works, structural works and external decorations. ...
>
> As the major works are not due to be done in the next year, I am pleased to advise that we give our approval for you to arrange for the works to the communal areas to be carried out. The terms of the original agreement remain and we will cover 50% of the costs incurred. ...

26. The current proposed works include £5,152.07 for "Floor Finish", £1,409.88 for "Stairs (Communal)" and £8,258.38 for "Internal Redecoration". The Applicants assert that these elements are unnecessary in the light of the works they carried out in accordance with the panel's decision. The team at City West Homes dealing with the proposed works were entirely unaware of the previous agreed works and seemed unable to locate the relevant documents, as a result of which the Applicants had to supply them. Even when they accepted that these works had been carried out as agreed, City West Homes questioned whether they had been done to the requisite standard, such as whether the paint was class O so as to provide the fire protection required under the Building Regulations. Again, the Applicants had to provide the evidence which should already have been on their files at City West Homes. City West Homes undertook to review the need for the proposed works but the continued inclusion of these items led the Applicants to think that no such review had been carried out.

27. The Respondent replied in the Scott Schedule that the sums had been adjusted but still included the installation of stair nosings, a covering to the basement stairs which were not included in the Applicants' works and a new heavy duty front entrance mat in order to comply with the Building Regulations.

28. While Mr Flowers accepted the Respondent's reasoning, Mr Bidgood said that the proposed works were excessive because nosings had been agreed at the time of the previous works to be unnecessary and the entrance mat was in a satisfactory condition so that it did not need replacement.

29. Mr Vaja asserted that these works were needed to comply with the Building Regulations. Mr Bidgood pointed out that the Regulations are

not retrospective but Mr Vaja asserted they needed to be applied if a sufficiently large area were affected by the works. No evidence was presented to show the Regulations would be triggered by this method but Mr Vaja pointed to the fact that some areas of the walls had been damaged and would need to be redecorated and repaired. The Applicants accepted that there was such damage but asserted that it had been caused entirely by the Respondent's contractors who were addressing (belatedly and to a poor standard) a water leak through the ceiling in the communal stairwell.

30. The Tribunal prefers the evidence of the Applicants and Mr Bidgood. Mr Vaja, as discussed further below, seemed to prioritise the convenience to the Respondent of standardising their approach across their properties over the inconvenience and cost to the Applicants without any or any sufficient justification. However, these are only estimates and the Applicants will not have to pay any service charges based on them. The Tribunal is just about satisfied that the estimates for "Floor Finish" and "Stairs (Communal)" are reasonable in that they provide for expenditure which might be needed, thus allowing all parties to plan ahead. The Respondent will have to be able to justify the works actually carried out and to establish the reasonableness of any of the resulting costs which are added to the Applicants' service charges.

31. However, the sum quoted for the Internal Redecoration seems excessive, particularly when taking into account the contribution made by the poor quality repair works to address the leak through the ceiling. In the Tribunal's opinion, a reasonable estimate for the total amount for this element should be no more than a of £2,500.

Roof

32. The Respondent originally scheduled expenditure of £29,416.99 on replacing the roof. Welsh slates were to be used because, although they were more expensive, they were required by planning conditions in this conservation area. However, this was where Mr Flowers had his largest disagreement with his client. He concluded that complete replacement was not necessary and the cost of dormer replacement should be removed because the dormers were largely sound. He allowed for a much reduced sum of £7,366.79.

33. Mr Bidgood went further. He detailed what defects there were to the roof in his report. He particularly noted that the Respondent had replaced tiles in the past using mismatching tiles. The Tribunal agrees with him that any costs arising from past defective work by the Respondent should not fall on the Applicants.

34. Mr Vaja criticised both experts for not allowing for planning requirements for this Grade II listed building in a conservation area. However, Mr Bidgood found that the roof was covered in artificial slates, some of which had been replaced with matching tiles by the Respondent. There is no requirement of which the Tribunal is aware

which would oblige the Respondent to rip up a satisfactory roof covering to install tiles more in keeping with the nature of the building or the area. It might be different if and when the replacement of the entire roof can be justified, but that is not the case here.

35. The Tribunal is satisfied that Mr Bidgood's estimate of £4,320 is more likely the reasonable one.

External walls

36. All parties agree that the exterior of number 220 requires some repair. A hammer test will be carried out to the render by the contractor in due course and, until then, the full extent of the work is unknown. In the circumstances of this case, the Tribunal can understand Mr Bidgood's scepticism about the Respondent's figure but, given the lack of certainty at this stage, the Tribunal cannot say that the estimate of £7,823.43 is unreasonable.

Windows

37. The Applicants asserted that the windows are part of their demise and, therefore, their responsibility but the Respondent is correct that only the interior faces and the glazing are so demised. The Tribunal also agrees that Mr Bidgood did not expressly take account of draughtproofing. Again, there is a degree of uncertainty as to what works may be needed and so the Respondent must be allowed a margin of appreciation in their estimation. In the circumstances, the Tribunal again cannot say that the estimate of £8,363.41 is unreasonable.

Doors

38. The Applicants challenged the sum of £399.56 for doors on the basis that the flat doors were within their demise but the Respondent clarified that only communal doors were referred to. The experts agreed the sum was reasonable and the Tribunal is so satisfied.

Electrical Installations

39. The Respondent wants to install emergency lighting in accordance with a medium (i.e. not high) priority recommendation from a 2017 fire risk assessment in order to comply with the latest standards at an estimated cost of £13,355.66. Mr Bidgood pointed out that there is no indication that there are any faults or defects and the Respondent has conceded that this is an improvement, not a repair.

40. Mr Vaja asserted that, because it does not meet current standards, the lighting must be upgraded but that is not correct. Mr Vaja's mistaken belief that this work is mandatory likely caused him to give insufficient weight to the Applicants' objections during the consultation process. Further, this work is part of a major works programme for which the Applicants will be paying a large bill in any event. The Respondent does not appear to have taken into account whether discretionary work such

as this should be included in a situation where the Applicants are going to have to pay for other costly work at the same time.

41. At this time, on the evidence available, the Tribunal is not satisfied that it is reasonable for the Respondent to incur the cost of upgrading the lighting and electrical system.

42. Further, Mr Flowers categorises the cost as "high" and Mr Bidgood calls it "excessive". The Respondent relies heavily on the fact that the works were put out to tender but these comments demonstrate that, while the process is likely to result in costs being set at a competitive rate, it does not constitute a conclusive guarantee that they are reasonable.

Protective Installations

43. The Respondent wishes to carry out fire safety improvements at an estimated cost of £13,509.77. In the Scott Schedule they sought to justify this by referring to the need for communal doors to provide the requisite compartmentalisation to manage fire risks at a cost of £7,353. However, they could only point to two relevant doors while failing to explain how this relates to the aforementioned work to the doors which it appears to duplicate. The sub-schedule gave the balance of £4,481 as being for the installation of a new fire alarm system but no justification was provided for this or what it would consist of. In evidence, there was mention of signage but a fire risk assessment in 2014 indicated that this was mostly unnecessary in a building of this type where the residents would know the exit routes.

44. The Tribunal is not satisfied that the Respondent has established what the estimated sum is actually for. At least some of it is already covered by the estimates for Doors and Internal Redecoration. Therefore, the Tribunal has concluded that it would not be reasonable to include this element in the estimate.

Communication Installations

45. The Respondent wishes to replace the entryphone system at an estimated cost of £4,566.43. Mr Vaja explained that the Respondent is attempting to standardise borough-wide by installing fob systems which can be accessed remotely rather than existing key entry systems.

46. The Applicants and Mr Bidgood pointed out that the current system operated satisfactorily. Both Mr Vaja and Mr Flowers asserted that they thought the current system was obsolete and that spare parts would be difficult to find but no evidence was presented to support this. Mr Vaja said that the maintenance records for the entryphone could be looked at but they were not provided to the Tribunal and there was no suggestion that, if they had been provided, they would have supported the Respondent's approach.

47. Mr Vaja was generally an impressive witness in that he was clearly on top of his brief. However, in relation to this item he gave the clear

impression that he did not think anything the Applicants could say or anything about their individual circumstances or those of the building could alter his or the Respondent's approach. To him, the drive for standardisation overrode all other considerations.

48. It is possible that this makes sense from the Respondent's point of view but that is far from the only consideration for the Tribunal. The Respondent may replace the system if they wish to do so but they can only put a share of the costs onto the Applicants' service charges to the extent that it can be said that they were incurred reasonably from an objective viewpoint.

49. There is an inherent potential for conflict between the individuated nature of each lessee's lease, which is their contract with the Respondent, and the Respondent's desire to manage their large housing stock in a standardised way but the latter cannot trump the former just for the Respondent's convenience. It is highly likely that at least some elements of some properties which include leased premises will be non-standard.

50. The Tribunal is not satisfied that the cost of replacing a functional system is justified by the purported benefits:

(a) It was said that it is or would become difficult to maintain the current system due to obsolescence but no evidence was provided to support that assertion.

(b) It was also said that the remote access to the fobs would allow the emergency services easier access to the building but no evidence was provided that this has ever been or would be likely to be a problem.

(c) Similarly, it was said that fobs cannot be copied like keys but the keys for the current system are safeguarded against copying.

Therefore, the cost of replacing the entryphone system would not be reasonably incurred.

External works

51. The Applicants objected to a sum of £5,477.43 being estimated for external works but the Respondent conceded that £4,494.51 was not chargeable to the lessees, being works to garages which are not part of the building. The remaining sum of £982.92 is reasonable for the anticipated works to railings and other parts of the exterior.

External Redecoration

52. The Applicants' only objection to this element, at a cost of £4,751.37, was that it appeared to overlap with the External works category but both experts and the Tribunal are satisfied that it does not.

Asbestos survey, contingency and fees

53. The schedule of works had a remaining category of "Other" at a cost of £13,989.40. Both experts allowed for an asbestos survey as a statutory requirement. Mr Bidgood allowed for a contingency within this sum whereas Mr Flowers put his in with the fees. The Applicants objected to the size of the contingency but it is sensible to put such a sum in an estimate.

54. The Respondent originally put fees for the matters set out at paragraph 17 above at £33,226.77 but Mr Flowers revised that down to £19,149.57, including contingency. Mr Bidgood allowed for 12%. The Respondent has accepted Mr Flowers's figure and the Tribunal is satisfied that it is reasonable.

Conclusion on major works

55. Mr Flowers's figures, put forward by the Respondent as their final estimate, produced a total cost of items which are chargeable to the Applicants of £109,504.01, of which the Applicants' share would each be £27,376. Mr Bidgood's figures were £56,528.64 and £14,132.16. The Tribunal has reduced the sums for Internal Redecoration and the Roof and has excluded entirely the amounts for Electrical, Protective and Communication Installations. The amount for External Works was also reduced. This produces an adjusted total of £69,670.42 and a share for each of the Applicants of £17,417.61. In the Tribunal's opinion, this is a justifiable estimate of the costs which would be reasonably incurred as a result of the proposed works to 220 Gloucester Terrace.

Service Charges

56. The Applicants have also challenged some elements of their annual service charges for the years 2014-2018.

Buildings insurance

57. The Respondent itself procures the insurance for the building. The Applicants wanted to see the policy but they now have and there appears to be no further objection.

Accountancy & Administration

58. The Applicants queried why the accountancy and administration costs, ranging from £96.58 in 2017 and 2018 to £120.83 in 2016, were charged separately from the general management fees but it is common practice to do so for the reason the Respondent has given, namely transparency. They also alleged that the total charge for management was too high when this charge was added to the supervision and management fee but there is no basis for this since the total is lower than would normally be seen in the market (see further below).

Caretaking

59. The Applicants' building doesn't have its own caretaker but the Respondent asserted that staff, previously two of them, now down to one, do provide caretaking services such as litter clearance and light bulb checking. However, the extent of their duties was unclear – there was no work specification or contract and the Respondent's witness, Mr Jonathon Winter, was not clear on precisely what they did. The Applicants complain that the service is poor with broken light bulbs, leaks, broken doors and burglaries reported but not addressed.

60. The charge has varied between £40 per Applicant for the years 2017 and 2018 and £75.12 for 2015. The Tribunal accepts the Applicant's evidence about the poor standard of the service. The charges are reasonably incurred only to the extent that the charges should be reduced by one third.

Communal electricity

61. The Applicants queried why there was a large jump in the cost of electricity between 2015 and 2016 but this was the result of the previous year's charges being based on estimates and a catch-up taking place when meter readings were actually taken.

Doors & carpentry repairs

62. The Applicants challenged whether work had been done to repair door closers and change the lock to the electrical intake cupboard. However, the evidence is that these works have been completed, e.g. Mr Bidgood observed the door closers. Whether the work was done late or not is irrelevant.

Fire safety repairs

63. The Applicants queried the replacement of a fire extinguisher in 2016 at a cost of £12.77 each. However, the reason they hadn't seen any evidence of it was that it took place within a locked electrical intake cupboard.

Pest control

64. The Applicants challenged the pest control charges on the basis that they had been told they had to pay for their own and the charges included work within the flat of one of the council tenants. However, as the Respondent has said, pest control has to extend to the whole building, rather than being limited to areas not demised. The Tribunal is satisfied that these charges have been reasonably incurred. The Respondent offered to refund amounts the Applicants had incurred on production of receipts or invoices but the Applicants did not have such documents.

Planned preventative maintenance

65. The Applicants queried whether the annual electrical test and fire extinguisher service had taken place. The Respondent provided sufficient evidence of the former but could not establish the latter, partly due to a change in contractors, and conceded that the costs (2014: £30.41, 2015: £29.51, 2016: £27.30) should not be put on the Applicants' service charges.

Roof repairs

66. As referred to above, there has been a water leak through the stairwell ceiling. It has lasted since 2015. The Applicants alleged that the cost of repair had risen due to neglect of this issue. However, they had no evidence of that – a repair done late is not necessarily more expensive and any allegation that it is has to be proved.

67. The Applicants also alleged that they had suffered losses, including an inability to rent out their flats at full market rates, as a result of the Respondent's poor service. A claim for damages for breaches of the repairing covenants can be made before this Tribunal as a counterclaim and set-off against service charges owed (*Continental Property Ventures Inc v White* [2007] L&TR 4) but the Applicants had not properly pleaded such a claim and neither party was prepared to argue it at the hearing. The Tribunal therefore has nothing to say on its validity or otherwise.

68. Therefore, the charges in relation to roof repairs must be held to be reasonable and payable.

General Repairs & Maintenance

69. The Applicants challenged the estimate of £63 for the service charge for general repairs and maintenance in 2017 and 2018. In previous years nothing was charged in this category which means, of course, that there might be no chargeable expenditure again. However, the Tribunal is satisfied that it is reasonable to estimate something in this category in case it is needed.

Supervision & management

70. The charges for supervision and management have ranged from £170.76 in 2015 to £215.82 in 2016. In the Tribunal's expert opinion, this is lower than the market rate for a management fee for a building with only two leased flats and is reasonable.

Conclusion on annual service charges

71. The Tribunal has concluded that the annual service charges are reasonable and payable, save for one-third of the costs of the caretaking services in all years and the whole of the annual fire extinguisher service for the years 2014-2016.

<u>Costs</u>

72. Unlike the courts, the Tribunal's powers in relation to costs are limited. Under section 20C of the Act, the Tribunal may, if it considers it just and equitable, order that the Respondent's costs incurred in these proceedings may not be added to the Applicants' service charges.

73. In considering whether to make an order under section 20C the Tribunal must give due weight to the fact that the right to recover costs is contained in the lease. The Tribunal must also take into account the extent to which each party has succeeded on the issues in dispute and the actions of each party which resulted in litigation, including a final hearing, rather than being settled in more expeditious way.

74. In the Tribunal's opinion, the principal reason the Applicants issued their application is that the Respondent issued an estimate for the major works which was demonstrably too high for the subject property. This is best acknowledged by the fact that they reduced it by over 50% themselves when someone actually looked at the subject property rather than a selection of neighbouring properties. The dispute was then prolonged by problems with disclosure and a succession of readjustments in the Respondent's case which were not finally clarified until the final hearing itself.

75. While it would be correct to point out that the Applicants have only been partially successful, the costs of pursuing this litigation have arisen principally due to the Respondent's own actions and so the Tribunal is satisfied that it is just and equitable that an order should be made so that the Respondent bear their own costs.

76. For the same reasons, the Tribunal is satisfied that it would be appropriate for the Respondent to reimburse the Applicants the application and hearing fees.

Name: NK Nicol **Date:** 27th November 2018

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 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.

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.