



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference	:	CHI/24UJ/LSC/2022/0102
Property	:	Forest Court 5 – 11 Salisbury Road, Fordingbridge. SP6 1EG
Applicant Representative	:	Forest Court Management (Fordingbridge) Ltd Aileen Lacey-Payne, Napier Management Services Ltd
Respondent	:	Leaseholders of Flats 1 – 20 Forest Court
Type of Application	:	Service charges section 27A of the Landlord and Tenant Act 1985 (the Act)
Tribunal Members	:	Judge C A Rai Mr M C Woodrow MRICS
Date type and venue of Hearing	:	13 February 2023 Paper Determination without a hearing
Date of Decision	:	20 February 2023

DECISION

1. The Tribunal determines that the Respondent is liable to pay the service charges for major works described in the section 20 notice as “External redecorations to the balconies, a replacement balcony and associated repairs”. Each tenant is liable to pay the Tenant’s Proportion referred to in the Lease as 1/20 of the expenditure.
2. The reasons for the Tribunal’s decision are set out below.

Background

3. The Applicant, represented by its managing agent Napier Management Services Limited, (Napier) is the freeholder of Forest Court, Salisbury Road, Fordingbridge (the Property), a three storey building containing twenty flats built in or about 1997. Ten flats have balconies accessible only from the flats. Some, possibly all, of the ground floor flats have patios or porches.
4. The balcony in front of Flat 13, located on the first floor at the front of the building, was surveyed by I W Price and Partners (described on its website as structural and civil engineering consultants based in Ringwood Hants) following what has been described by the Applicant as “an apparent vehicular impact”.
5. I W Price and Partners had been instructed by Napier and their short report dated 26 October 2021 was disclosed in the bundle. The report is not on headed paper and contained no information about the partnership expertise or any indication of the qualification of the signatory who is assumed to be the person who carried out the inspection. That report, which specifically referred to damage resulting from apparent vehicle impact, recommended that the entire balcony be replaced [80].
6. The Applicant’s statement of case, made by Brenda Maddy on behalf of Napier explained the background to the application.
7. The I W Price Report recommended that the that balcony be replaced and consideration given to the timber members being replaced with galvanised steel. A “new” leaseholder questioned whether the costs of the repair or replacement would be a service charge.
8. Napier instructed Laceys solicitors to advise it on the interpretation of the Lease. Laceys provided a report, based on the Lease of 8 Forest Court, which broadly concluded that the structural parts of the balconies are not part of the flats. The Applicant decided to ask the Tribunal to make a determination whether or not the service charges it intended to incur in carrying out major works to some balconies and other external works would be recoverable.
9. Following the Application to the Tribunal, Judge Tildesley OBE directed that a bundle containing further and better information should be sent to the Tribunal.
10. The Tribunal has received a paginated bundle of documents comprising 130 pages which includes the a copy of the freehold title registers and the official plan, the lease of Flat 8 (a first floor flat with a balcony) and the documentation relating to the section 20 consultation undertaken by Napier in respect of the proposed works being both general decoration and structural works to the Property. References to numbers in square brackets in this decision are to the electronically numbered pages in the bundle.

11. The Tribunal decided that the application was suitable for determination on the papers and written representations. Neither party has asked for a hearing or requested or suggested an external inspection of the Property was necessary.
12. As well as considering the papers within the bundle, the Tribunal has viewed available on-line photographs of the Building.
13. No formal statement or response to the application has been submitted by the Respondent.

The Applicant's case.

14. It said that the Application was prompted by a leaseholder at the Property questioning Napier as to whether costs of repairing or replacing the balcony of Flat 13 were service charges.
15. Napier instructed Laceys solicitors who prepared a report headed "Balcony repairs responsibilities at Forest Court" dated 18 August 2021 [61]. The report stated that several leaseholders had questioned whether they were individually responsible for the repair and maintenance of the balconies. Laceys said its instructions recorded that, historically, the cost of repairs had been paid by leaseholders individually and that the owner of Flat 8 had replaced the balcony in 2020. Napier had been unable to identify other previous balcony repairs as these were undertaken some time ago.
16. Laceys said it was instructed that the majority of the balconies were constructed in timber and fixed to the building but that several had metal columns and beams. Floors were timber beams finished with timber decking without screed. Some balconies had a further surface covering and one is boarded and tiled whilst others are covered by astroturf.
17. The Laceys report, signed by Byron Sims, Solicitor, dealt with two specific questions:
 - a. Whether the balconies formed part of the flat?
 - b. Who was responsible for "upkeep" generally (which Laceys concluded was described in the tenant's and landlord's respective covenants) [62].
18. It is appropriate to record that Laceys were provided with, and based its report on, the Lease of Flat 8 and prefaced its report with the assumption that the other leases are in identical terms so far as relevant. It recorded that "rather unhelpfully, as you will no doubt have seen, the balconies are not specifically mentioned in the Lease." It stated that "the Flat is edged red on the plan and the red line appears to entirely encompass the balcony".

19. Laceys referred to specific clauses and paragraphs within the lease and concluded that the structural parts of the balconies were excluded from being part of the flat and therefore likely to be the landlord's responsibility. Since the lease provided that floor coverings are the responsibility of the tenant, that would apply to surface coverings of the balcony floors. Therefore, anything below the floorboards is likely to be a retained part. Other external parts of the balcony including balustrades are likely to form part of the exterior the decoration of which was the landlord's responsibility.
20. Laceys concluded that "costs for general decoration and any necessary structural work will come from the service charge".
21. The Applicant stated that Laceys was uncertain if a tribunal would agree with them and said "and in order to avoid the risk of the company incurring cost which may be challenged by the Tribunal afterwards, we advise that if any substantial cost is to be incurred, to be recovered under the service charge the flat owners are asked to confirm that they agree with it being part of the service charge, and if any do not, then an application is made to the Tribunal for a determination before the cost is incurred"[24].
22. Following receipt of the Laceys' Report, the Applicant instructed Winkle-Bottom Ltd (Chartered Surveyors) to prepare a general specification "for external redecorations, to the balconies, a replacement balcony and associated repairs to the balconies" [24]. This specification, (marked "Issue No. One-Rev A" in the bundle) was dated 14 February 2022 [82].
23. The Applicant stated that the section 20 consultation commenced on 2 March 2022 with the issue of the first notice. Winkle-Bottom were instructed to tender the works and subsequently provided a tender report following which the second section 20 notice was issued with details of the estimates received, including the associated fees, which together totalled £54,228 ex VAT. At the same time it notified the leaseholders of its intended application to this tribunal .
24. Paragraph 10 of the Applicant's statement confirmed that due to risks associated with the condition of the balcony at Flat 13, works have been carried out "to remove the existing rotted balcony and replace with newly formed Juliette balcony built insitu and bespoke to the client's requirements at a cost of £1,022.50".
25. The bundle contains further documents including a report by Winkle-Bottom dated 14 September 2021 headed Balcony Schedule of Condition [65] but described as a balcony survey [66], the section 20 notices including the specification for the works [82] and the tender summaries.

The Respondent's case.

26. The Applicant has provided copies of correspondence sent to the Respondent but has not included any submissions from the Respondent in the bundle. The Tribunal has assumed that none of the leaseholders have made separate submissions or comments.
27. The Tribunal is satisfied in reliance on having seen copies of pro forma letters provided by the Applicant [25, 26, 110, 123 and 128] that the Respondent is aware of this application and was issued with notices under the section 20 consultation procedure.

The Lease and the Law

28. The Application was made for a determination under section 27A of the Act. The Applicant is seeking to establish that the costs of the major works intended, which will result in contributions from the twenty leaseholders of sums in excess of £250, can be recovered from the Respondent. This application has been made because the Applicant, despite obtaining legal advice to assist with the interpretation of the Lease, remained uncertain whether or not the cost of the proposed works to some of the balconies at the Property will be recoverable as service charges. Doubts seems to have been expressed by some of the leaseholders (collectively the Respondent) whether these costs should be borne by every leaseholder, as ten of the twenty flats do not have balconies.
29. Section 27A enables the Tribunal to decide whether a service charge is payable, and if it is by whom and to whom it is payable and also how much of it is payable and when it is payable. Section 19 of the Act also provides the Tribunal with jurisdiction to consider and determine the reasonableness of the service charge and, where these relate to works, the reasonableness of the standard of those works. Extracts from the sections are in the Appendix to this decision.
30. An official copy of the Lease of Flat 8 has been provided but does not include the plan showing the extent of the flat demised. The Tribunal has been provided with official copies of the Applicant's freehold title which includes a copy of the Title Plan. The supplementary title plan shows the layout of the twenty flats with numbering, which when cross referenced with the information in the schedule of notices of leases [29 – 31], has enabled the tribunal to identify each flat by its number.
31. The Flat is described in Part 1 of the First Schedule to the Lease as having the number and on the floor described in the particulars and for identification only edged red on the Plan which premises include:-
 - (1) all cisterns tanks and the Service Installations solely serving the premises
 - (2) all windows window frames doors door frames and all internal non-load bearing walls
 - (3) the linings and surface finish including lath plaster and board of the interior of all walls
 - (4) the linings and surface finish including lath plaster and board of ceilings together with the boards or other surface finish including

- screed of the floors (sic) but excluding the floor and ceiling joists beams or slabs
- (5) all fixtures and fittings in the premises at the date of this Lease being the Landlord's fixtures and fittings and all replacements and renewals
BUT EXCLUDE all parts of the structure and the roofs and foundations of the Building the walls (other than interior linings and surface finish) which are load bearing or enclose the premises [54].
32. The Particulars [37] define the Flat as "Flat number 8 on the First Floor as described in Part 1 of the First Schedule".
33. The "Retained Parts", defined in clause 2.5, are "those parts of the Estate including the Building and the Service Installations apparatus plant machinery and equipment and roads (if any) serving the Retained Parts not included nor intended to be included in this demise or a demise of any other part of the estate by a lease in a form similar to this Lease" [39].
34. "The Building" means all buildings on the Estate for the time being erected (clause 2.4).
35. "The Estate" is described in the Particulars (clause 1.2) as Land off Salisbury Road, Fordingbridge for the purpose of identification only edged blue on the Plan.
36. The Tenant covenants to pay contributions byway (sic) of Service Charge to the Landlord equal to the Tenant's Proportion of the amount which the landlord may from time to time expend and as may reasonably be required on account of anticipated expenditure on rates setvices (sic) repairs maintenance or insurance being and including expenditure described in the Third Schedule.
37. The Tenant's Proportion is 1/20th (clause 1.10) [38] of the expenditure described in sub-clause 7.1 and in the Third Schedule. The Third Schedule sets out the Service Charge Expenditure, defined as meaning expenditure on, amongst other things, the performance and observance of the landlord's covenants and obligations in the Lease [57].
38. The tenant covenants to keep the Flat in good repair "(but not to decorate any part of the exterior of the Flat including the exterior of external doors and windows of the Flat)" (clause 7.4 (a)) [42].
39. The landlord covenants (clause 8), that subject to the tenant paying the service charge to "take reasonable care to keep in good and substantial repair reinstate replace and renew the Retained Parts" subject to a proviso that the landlord will bear no liability for a defect which it does not know about or for defects which are tenant responsibilities [48].

40. The lease contains no specific reference to balconies or indeed to patios or any other part of the demise outside the envelope of the building. The lease contains a specific covenant by the tenant not to damage or injure structural parts of the flat or roof or walls or make structural alterations or additions to the flat (clause 7.8) [43].
41. The supplemental title plan for the freehold title numbered HP368552 [33] shows the balcony areas of Flats 8, 9, 10, 11, 12 and 13 on the first floor and 15, 16, 17 and 18 on the second floor. All, save for the balcony of Flat 15, are shown with a solid line dividing the balcony from the external wall of the building. There is no solid line between the flat wall and the balcony of Flat 15. Excepting for the plan of Flat 16 there is a connecting symbol “~” over the dividing line between balcony and flat.

Reasons for the Tribunal’s decision

42. The Tribunal has concluded that the Applicant’s case disclosed some confusion on the part of Winkle-Bottom with regard to its identification of the flats with balconies.
43. All of the documents disclosed to the Tribunal consistently refer to ten flats with balconies. The Application stated that the works described in the Winkle-Bottom Schedule relate to the balconies of Flats 9,10,11,12,13,14,15,16,17 and 18 [7]. This is inaccurate. Flat 14 does not appear to have a balcony. Flat 8 has a balcony but it has already been replaced so no further works are required or proposed.
44. The Winkle-Bottom balcony survey dated 14 September 2021 referred to a Schedule of Condition of the balconies of Flats 8,9,10,11,12, 13, 15, 16,17 and 18 [68] (10 flats). It contains photographs of the balconies of Flats 9 [70], 10 [71], 11 [72], 12 [73], 13 [74], 15 [75],16 [76], 17 [77] and 18 [78] (9 flats).
45. The Schedule of Works [94] in the Winkle-Bottom Specification for the works dated 14 February 2022 (para 3) described works relating **only** to the balconies to Flats 9,10,11,12,13,14,15,16,17 and 18 (10 flats) [94]. This cannot be correct. The balcony to Flat 8 has been replaced and Flat 14 does not have a balcony. The same error is repeated in the title description on the following page [95]. There is no reference to works to Flat 14 or the balcony of Flat 18 in the description of the redecorations.
46. Appendix A to the Specification contains 10 photographs of balconies. Photograph 6 [107] is labelled “Flat 14 Balcony and canopy”. That photograph shows a first floor flat balcony which the Tribunal suspect might be a photograph of Flat 8.
47. The Winkle-Bottom Tender Report dated 9 June 2022 shows the estimated costs for works to Flats 9,10,11,12, 13, 15, 16 and 17 (8 flats) in Appendix A – Tender Evaluation [120]. Whilst Flat 18 has a balcony, it does not appear from the Balcony Survey and Schedule of Condition that it has any structural defects [78]. None of the sums described in the tender evaluation relate to works to Flat 18 [121].

48. Whilst none of the anomalies identified above has influenced the Tribunal's decision, these have caused confusion.
49. The Tribunal has assumed, on the basis of the documents disclosed, that it is the Applicant's intention to carry out major works, being the repair of eight balconies including the replacement of the balcony at Flat 13, as well as other external decorative works relating to the entire building. The Applicant's statement suggested that some temporary works have already been carried out to the balcony of Flat 13 but the description of the proposed works show that further work is proposed. No explanation as to the reason for the damage has been disclosed or whether the damage has been caused by an insured risk.
50. The Applicant has asked that the Tribunal determine if the cost of the works, which costs have been subject to a recent (and documented) section 20 consultation, will be recoverable from the Respondent. Under section 20 of the Act the Applicant is obliged to consult the Respondent with regard to the costs of the works, which it has. The Respondent has not raised any questions of this Tribunal regarding the consultation carried out by the Applicant. The Tribunal has therefore assumed that the Respondent is satisfied that the consultation has been properly undertaken.
51. The Tribunal determines that the balconies are demised to the tenants of ten flats with balconies, the numbers of which it has identified above and are 8-13 and 15-18. The description of the flat in the First Schedule to the Lease of Flat 8 refers to a red line on the plan and there is agreement from both Lacey's and the Applicant, that the red line on the plan includes the balcony. The Tribunal has not been provided with a copy of the Flat 8 Lease plan but has instead examined the land registry official plan relating to the freehold title. The Tribunal also examined the wording in Part 1 of the First Schedule to the Lease and is satisfied that the description of the flat excludes anything structural (including load bearing walls).
52. The flat balconies have been described in full detail in the Winkle-Bottom survey as "a mixture of timber construction and metalwork. Some of the balconies are cantilevered and others supported from the ground via metal posts" [69].
53. The Tribunal is satisfied that all of the balconies have structural elements, which are not within the definition of the flat, and determines that these fall within the definition of the Retained Parts of the Building. It determines that it is the landlord's responsibility, in accordance with its obligations in clause 8 of the Lease, to keep those parts of the balconies, which are "Retained Parts" in good and substantial repair and reinstate replace and renew them.

54. The costs of the section 20 works will be recoverable by the Applicant as service charges and each of the Respondent tenants is obliged under the terms of their respective leases to contribute 1/20 (the Tenant's Proportion) of the costs.
55. There is one caveat to the Tribunal's determination. Any coverings above the balcony floors are likely to belong to the tenant and replacement or renewal will be at the individual leaseholder's expense.
56. The Tribunal reached this conclusion because of the obligation in paragraph 7 of the Fourth Schedule for the tenant to cover the floors "with carpets rugs or other suitable materials with sound dampening qualities". Lacey's stated that the Applicant's instructions to it had referred to one of the balconies being boarded and tiled and others covered with astroturf.
57. Paragraph (4) of Part 1 of the First Schedule of the Lease includes the floor screed within the definition of the flat but not joists (which when applied to the balconies should be interpreted as excluding the supports and columns, which are structural parts).

Judge C A Rai (Chairman).

Appendix

27A Liability to pay service charges: jurisdiction

- (1) An application may be made to [the appropriate tribunal] for a determination whether a service charge is payable and, if it is, as to—
 - (a) the person by whom it is payable,
 - (b) the person to whom it is payable,
 - (c) the amount which is payable,
 - (d) the date at or by which it is payable, and
 - (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to [the appropriate tribunal]² 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.

19.— Limitation of service charges: reasonableness.

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—
 - (a) only to the extent that they are reasonably incurred, and
 - (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

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 leasehold valuation tribunal [or the First-tier 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 persons or persons specified in the application
- (2)
- (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

Appeals

1. A person wishing to appeal this decision to the Upper Chamber must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision. Where possible you should send your further application for permission to appeal by email to **rpsouthern@justice.gov.uk** as this will enable the First-tier Tribunal to deal with it more efficiently.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.