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

Case Reference : **LON/00BK/LSC/2017/0402**

Property : **Flat 3, 168 Sutherland Avenue,
London W9 1HR**

Applicant : **Oakleaves Association of Freeholders
Ltd**

Representative : **Mr S Oram of counsel**

Respondent : **Ms Kimberley Ishola**

Representative : **Mr J Smith of Rubinstein Phillips
Lewis Smith Solicitors**

Type of Application : **For the determination of the
reasonableness of and the liability to
pay a service charge**

Tribunal Members : **Tribunal Judge Prof Richard Percival
Mr P S Roberts DipArch RIBA**

**Date and venue of
Hearing** : **5 March 2018
10 Alfred Place, London WC1E 7LR**

Date of Decision : **13 April 2018**

DECISION

The application

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 (“the 1985 Act”) as to the amount of service charges payable by the Respondent in respect of the service charge from 2014 to 2016.
2. Proceedings were originally issued in the County Court at Willesden under claim number D38YX798. The claim was transferred to this Tribunal by order of a District Judge Kumrai on 25 September 2017.
3. The relevant legal provisions are set out in the Appendix to this decision.

The property

4. Flat 3 is a first floor one bedroomed flat, one of seven flats at 168 Sutherland Avenue. The building is a terraced Victorian house that was converted into flats in the 1980s.

The lease

5. The lease is for a term of 125 years running from 1985. The respondent acquired the leasehold interest in 1996. The applicant company is owned by the leaseholders, and acquired the freehold in 1992.
6. The lessee covenants by clause 3(2) to pay a service charge, that is, her proportion of the expenditure required of the lessor by the second schedule to the lease. The lessee’s proportion was set at 12% by a consent order on an application to vary the lease under Landlord and Tenant Act 1985, sections 37 and 38 approved by the Tribunal on 20 July 2016.
7. The lease makes detailed provision for the service charge in clause 3(2). By clause 3(2)(a), the amount of the service charge is to be ascertained and certified by a certificate signed by the lessor’s auditors, as soon after the lessor’s financial year as practicable, and relating to that year. (the lessor’s financial year was changed from one ending on 29 June to one coinciding with the calendar year for the year ending December 2015). The certificate is to contain “a fair summary of the expenses and outgoings incurred by the Lessor during the Lessor’s Financial Year to which it relates together with a calculation of the service charge”.
8. Clause 3(2)(e) states that the expression “the expenses and outgoings incurred by the Lessor” in clause 3(2)(d)

“shall be deemed to include not only those expenses outgoings and other expenditure hereinbefore described which have been actually disbursed incurred or made by the Lessor during the year in question but also such reasonable part of all such expenses outgoings and other expenditure ... which are of a periodically recurring nature (whether recurring by regular or irregular periods) whenever disbursed incurred or made ... including a sum or sums of money by way of reasonable provision for anticipated expenditure in respect thereof as the Lessor or its accountants or managing agents ... may in their discretion allocate to the year in question as being fair and reasonable in the circumstances”

9. By clause 3(2)(f), the lessee may be required by the lessor to pay (on the usual quarter days) a sum “in advance and on account of the service charge as the Lessor ... shall specify at their discretion to be a fair and reasonable interim payment”.
10. Paragraph 13 of the second schedule includes among that which may be charged to the service charge

“Such reasonable sum or sums from time to time as the Lessor shall consider desirable to be retained by the Lessor by way of a Reserve Fund as a reasonable provision for the prospective costs expenses outgoings and other matters mentioned or referred to in this Schedule or any of them”.

11. Clause 5(1) is the lessor’s repairing covenant, and covers the structure, common parts and boundary walls.

The hearing and the issues

Preliminary

12. The applicant was represented by Mr Oram of counsel, attended by Ms Stuart of Dean Wilson LLP, solicitors. Mr J Smith of Rubinstein Phillips Lewis Smith Solicitors, represented the respondent.
13. Witness statements having been served, evidence was given for the applicant by Ms A Mooney ARICS MIRPM of the managing agents, Westbury Residential Ltd; Ms K Lovering, one of the directors of the applicant; Mr S O’Sullivan, the chair of the applicant; and Mr S Dove MRICS of Finley Harrison Ltd. The respondent Ms K Ishola gave evidence.

The issue

14. The parties confirmed that the only element of the service charge in issue between them was that demanded between 25 December 2014

and 26 September 2016 to build up a reserve fund to pay for major works.

The evidence

15. Although we heard extensive oral evidence in addition to the witness statements, there was comparatively little by way of factual dispute that was both relevant to the decision before us and contested. In particular, there was evidence of the poor relationship between some of the individuals concerned, which, while no doubt of some significance as a matter of background, did not assist us beyond that in coming to our conclusion.
16. The respondent had been a director of the applicant until April 2014, and during that period had managed the maintenance of the building. For most of that period, she was compensated for doing so by an informal agreement that she would pay no service charge herself. In April 2014, Ms Mooney, of the managing agent appointed by the applicant, became responsible for the management of the building and of the service charge.
17. At the April 2014 meeting of the applicant company, at which the respondent's resignation as a director was taken, the applicant agreed that "a dilapidation survey should be undertaken to establish condition of the building and provide a short, medium and longer term programme of works to maintain the building in good condition and to underpin future reserve planning" (from the exhibited minutes of the meeting). The respondent was not present at the meeting.
18. The result was that the managing agents appointed a Mr Francois of Finley Harrison Ltd to undertake the survey. He produced two reports. The first is stated to be a 12 year capital expenditure plan. The report sets out broad conclusions on the condition and state of repair of various elements of the structure. At paragraph 8.9, Mr Francois states that he had "prepared a 'Gold Standard' capital expenditure plan to assist in planning likely expenditure over the next 12 years", which was attached.
19. The second report was a detailed schedule of defects.
20. A schedule was included with the reports (the 12 year forward plan) which provided for a total expenditure of £287,576 by 2025/26, of which £84,235 related to 2018/19. The evidence of Mr O'Sullivan was that this schedule did not distinguish between major works and routine maintenance, and that the front and rear elevations would be subject to repair (and therefore require scaffolding) at separate times (as had been the practice under the respondent's management). As the scope of the work included changed somewhat over time, it is more convenient to summarise it at paragraph 30# below.

21. The reports are dated May 2014.
22. The reports were forwarded to (it appears) all of the leaseholders on 5 August 2014 by Ms Mooney in an email in which she wrote "this report represents the 'gold standard' and the figures are quite steep. Both the Directors and I have discussed with Jonathan [Francois] and he is working on a revised plan which will be tailored more to the level of expenditure we were anticipating". A meeting would be arranged in the autumn.
23. At some time, a telephone conversation took place between the respondent and Mr Francois. It is convenient to summarise the competing evidence as to that conversation at this point.
24. The respondent said that the conversation took place in August 2014, and that Mr Francois said to her during the conversation that the figures in the 12 year capital expenditure plan were at least 50% too high. She said that Mr Francois said that the annual figure for the reserve fund would be £24,000, and that when she said that that was outrageous, Mr Francois repeated that the figures were too high and he would revisit them.
25. An account by Mr Francois of the conversation was provided in an email to Ms Mooney dated 23 April 2015. It is evident from the context that the conversation took place after the circulation of the expenditure plan. Mr Francois' account was that he had said that the budget estimate could be halved but only if the work specified were halved, that is, if only the front elevation were attended to. The respondent said this account was fabricated.
26. The further meeting of the freehold shareholders/leaseholders promised was held on 4 October 2014. The minutes were before us. Mr Francois proposed changing the approach so that major works to both elevations and to the roof should take place at the same time, and would be required in 2018/19. The minutes record his opinion as being that to do so would be both more economical in the long run and would be better in terms of quality of repair. The meeting is noted as approving this approach.
27. The minutes go on to record that the meeting agreed that Mr Francois indicated that the initial estimate of costs for 2018 was approximately £84,000 (including VAT and professional fees); and that it was agreed that Mr Francois would review the plans and provide an updated capital expenditure plan.
28. In her evidence, the respondent contested the account of the meeting recorded in the minutes. There had been no mention of figures, she said. She had objected to this version of the minutes in an email at the

time, but could not produce it because it was from a now defunct account.

29. At some time in November, the revised version of the 12 year forward plan was circulated. Under this, the cumulative total was now £179, 807 in 2025; but the figure for 2018 had increased to £107,816. The changes as explained by Mr O'Sullivan represented the now separate treatment of routine maintenance, and the fact that the major works to both elevations and the roof would take place together in 2018, rather than at different times.
30. In broad summary, the works proposed were, first, part renewal and repair to the roofs. There are two roofs, a flat roof currently asphalted, and a slated mansard roof – the principal works relate to the flat roof. Repairs were also included to the chimney stacks, dormer windows, eaves and soffits. Other work included the repair, repointing and cleaning of brickwork on both elevations, together with crack repairs and re-rendering of a small section. Further repairs were set out in relation to windows, other joinery and metalwork, and repair or replacement of soil and waste plumbing, rainwater goods etc. A small amount related to internal decoration of the communal areas.
31. Mr Francois left Finley Harrison Ltd in 2016. The applicant engaged Mr Dove of that company to report on the forward plan produced by Mr Francois, for the purposes of this dispute. Mr Dove had also been retained to prepare a specification of works to be undertaken in 2018, under the terms of the plan, on the exterior of the building. We were told that that specification was now complete, but was still subject to consideration by the applicant's solicitors (we surmise in connection with the consultation process to be undertaken under section 20 of the 1984 Act). We were not given a copy.
32. Mr Dove's report was accordingly prepared with knowledge of the building. He also relied on his experience of undertaking work on another, larger building in the same street, at number 160/162.
33. Mr Dove concluded that the defects and repairs, and the sequencing thereof, indicated in the original report were "typical and reasonable. I can assert that since, broadly speaking, they correlate with defects I have found on the exterior envelope of the property following my inspection in 2017 and the suggested repairs likewise are in line with my own specification ... One or two areas are different, including repairs to the flat roof ...".
34. In cross examination, Mr Dove said that he did not know what "gold standard" in relation to the quality of the work recommended by Mr Francois meant.

35. Mr Dove was taken to a schedule prepared by the respondent. This schedule sought to contrast estimates for work provided by the respondent with what were described as the applicant's estimates, drawn from the forward plan. The respondent's estimates were based on four quotations by three builders for elements of the work to be undertaken, all of which were exhibited.
36. In respect of the respondent's figure for scaffolding – £5,000 – Mr Dove said that it was inadequate. He could not determine from the short quotation supplied whether it was sufficient in terms of security and alarming, and said that the applicant's estimate of £12,900 was more realistic. In relation to two other items – elements of the roof repairs, and the application of stucco render – it proved impossible to reconcile that which was being priced in the respondent's quotations and the estimate in the forward plans. For the reasons set out below at paragraphs 53 to 53#, we do not consider it necessary to outline in detail the differences apparent.
37. An issue that arose in cross-examination was whether the figures for repairs to a front mansard window reflected a contribution from the relevant leaseholder on the basis of the extent of demise in relation to window frames. The applicant's estimates did not make such an allowance, for which the respondent contended. This issue became the subject matter of submissions by the parties at the close of the evidence.
38. The question of the timing of consultation under section 20 of the 1985 Act and the Service Charges (Consultation Etc)(England) Regulations 2003 arose a number of times. The overall effect of the evidence was that the applicant had made it clear that a section 20 consultation would take place from an early stage in the process. The managing agents were of the view that the appropriate time to conduct the consultation was once the full specification was available. The specification now being in hand, the applicant anticipated serving the notice of intention to carry out works shortly after the hearing.
39. The respondent gave evidence.
40. The respondent's evidence was that the figures used in Mr Francois' original report had no basis in fact and were "plucked out of the air". She related her account of the conversation with Mr Francois set out above.
41. The respondent relied on the estimates she had received as constituting a more reasonable basis for the calculation of the service charge.
42. The first estimate was dated 6 February 2015, from ADM Property Services Ltd. In fact, it provided a short commentary on what the writer

considered necessary works, with some being costed individually (and not summed), and others subject to further investigation. It dealt primarily with the roof and redecoration. This document was annexed to the respondent's defence in the County Court.

43. The second two documents were quotations, from, we were told, the same company, although the company's name and details had been redacted. One, dated 16 February 2018, related to the provision of scaffolding, the decoration of both elevations, and the renewal of the mansard roof, to a total of £20,450; and repairing a dormer window, for £3,700.
44. The other quotation from the anonymised company related to repairs to chimney stacks, soffits, rainwater goods etc, and the repair of the asphalt roof, to a total of £11,695.
45. The final document was an invoice dated 3 March 2018 from DB Decorating Specialists. It related to the erection of scaffolding, repairs to a chimney stack, soffits, and flashings, repointing, provision of new rainwater goods and painting of the roof.
46. In cross examination, the respondent also relied for her contention that the surveyors' figures were unreliable on her long experience of the business, both as manager of 168 Sutherland Avenue for a number of years, and her 30 years' experience as an interior designer.

Discussion and determination

47. There was no dispute, nor could there be, that the lease provided for a reserve fund against expenditure of the type anticipated. Both parties also agreed that the sums demanded to build up the reserve fund were subject to a contractual requirement of reasonableness. Such demands are also subject to the statutory requirement in section 19(2) of the 1985 Act, and it was not argued that the contractual requirement was in any way different from the statutory one.
48. Mr Oram referred us to the work *Service Charges and Management*, by Tanfield Chambers, at paragraph 16-019, and in particular the statement that section 19(2) "means that the landlord will usually need to be able to point to some rational basis for the amount demanded". We agree with this proposition, if it is meant to convey that the decision making of the landlord must be reasonable. It is only by considering the decision making process that it is possible to characterise the level of service charge payable in advance of the incurring of relevant costs as reasonable in amount, as required by section 19(2).
49. Mr Oram urged that the lease places the initial discretion in relation to the reserve fund in the hands of the landlord. While clearly correct, this consideration adds nothing in practice to the well understood principle

that it is for the party upon which an obligation to which a service charge relates is placed to choose the means by which the obligation is discharged, provided it is one of the class of those that are reasonable.

50. The overall question therefore for us is: was the decision making of the applicant in demanding interim service charges from 2014 for the purpose of building up a reserve fund reasonable? Our clear conclusion is that it was.
51. The applicant engaged a properly qualified chartered surveyor employed by a reputable firm to advise it as to necessary provision over a reasonable period. Exercising its responsibilities as a professional client through its managing agents, the applicant considered and proposed amendments to that programme, as a result of which some overall savings were identified by virtue of changes to the scheduling of the work. It subsequently commissioned a further report which broadly endorsed the original work, as amended following discussion with the client.
52. On the face of it, this was a thorough and planned process engaging expert assistance as necessary. No doubt it is possible for the outcome of such a process to be, nonetheless, unreasonable; but there is nothing to suggest that it was in this case. The respondent's attack on the process fails on all counts.
53. First, the use of tradesmen's quotations or estimates in 2018 to attack the reasonableness of budgeting sums in 2014 is misconceived. As Mr Oram submitted, prices will have changed in that period, and there may have been developments in products or practice. Further, we cannot be sure that the work as described in the report is the same as that set out, in brief form, in the quotations/estimates.
54. More fundamentally, the figures set out in the 2014 report are there to provide a reasonable basis for the applicant to budget for a reserve fund. To contrast those with figures for (ill-defined) spot repairs now is not to compare like with like.
55. The quotation, with some narrative, procured in 2015 may have been, at least in theory, more relevant. It comprises a single sheet of paper, containing short, unsupported assertions as to the work necessary, with only partial particularisation of costs. It does not engage in any way with Mr Francois' report. It does not contain the author's name or qualifications, although the respondent has referred to the quotations/estimates as deriving from local tradesmen. Standing alone, it is quite incapable of founding a conclusion that the detailed, fully argued and expert reports by both Mr Francois and Mr Dove are not within the reasonable range.

56. As to the contested conversation between Mr Francois and the respondent, we consider it unlikely that Mr Francois would have simply said that his figures were out by half. Both parties were attempting to recall a conversation after some considerable time gap, and no doubt the nature of the conversation allowed for misunderstandings or misconceptions on both sides. But even if, in one telephone conversation with one leaseholder, Mr Francois had said something of the nature alleged, we do not consider that in context that could possibly undermine his report, nor the subsequent process of revision and discussion.
57. Mr Smith, in his submissions, accepted that the approach that the applicant had taken to the section 20 consultation process was not unlawful, but it was, he submitted, unfair for the start of the process to be so delayed. This, he said, was indicative of the approach of the applicant.
58. We reject this submission. It may be that other landlords would have served the notice of intention to carry out work at an earlier stage in the process, but we do not consider that any substantive unfairness has been occasioned. On the contrary, the history of meetings and communications between the parties shows that there have been ample opportunities for the respondent to put her case. That technically these were qua shareholder in the applicant rather than qua lessee, does not detract from this fact. The respondent's concern, at root, is not that she has not been heard, but that the applicant has not agreed with her.
59. Mr Smith argued that allowance should have been made for the leaseholder's repairing responsibilities in relation to repairs to windows. The lease demises "window sashes and furniture (but excluding the window frames fitted in such walls other than the internal surfaces thereof) and the glass fitted in such doors and windows" (clause 1(2)(b)(i)). The detail available as to what repairs may be necessary to windows is not such as to allow us to come to a determinate conclusion as to what proportion might come under each parties' repairing obligation. It seems, however, unlikely that there would be anything other than a very marginal engagement of the lessees repairing obligations. Accordingly, we do not consider that this factor should have featured in the calculation of the budget figures presented in the chartered surveyors' reports.
60. The result is that we find the interim service demands referable to the reserve fund reasonable and payable.

Name: Tribunal Judge Professor Richard Percival **Date:** 13 April 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 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.]