FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/45UG/LSC/2018/0061
Property	**:**	1-46 Tower House Close, Cuckfield, West Sussex RH17 5EQ
Applicant	**:**	Retirement Lease Housing Association
Representative	**:**	Ms Louise O'Sullivan, Operations Director
Respondent	**:**	Tower House Close Residents Association
Representative	**:**	Miss Alexandra Adam, Gregsons Solicitors
Type of Application	**:**	Service charges and administration charges
Tribunal Member(s)	**:**	Judge Tildesley OBE Mr B H R Simms FRICS Mr T Sennett
Date and Venue of Hearing	**:**	Crawley Law Courts 26 February 2019
Date of Decision	**:**	8 April 2018

DECISION

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Decisions of the Tribunal

I. The Tribunal decides that it does not have the jurisdiction to determine Issue One: Are the Works Required and Reasonable?

II. The Tribunal determines that the Applicant is not entitled to recover the costs of the proposed works, namely, "to erect compartment walls/floors up to a satisfactory level throughout the loft space" from the service charge.

III. The Tribunal determines that it is just and equitable in the circumstances for an order to be made under Section 20C of the 1985 Act, so that the Applicant may not pass any of its costs incurred in connection with the proceedings before the Tribunal through the service charge.

Reasons

Background

1. The Applicant is a not-for-profit Freehold and Management Company specialising in leasehold housing for retired people. The Applicant owns the freehold of Tower House Close Estate which is comprised of five flats, estate manager's flat, guest suite located in Tower House and 25 semi-detached bungalows.

2. The Respondent is the recognised Residents Association at Tower House Close and its membership comprises 23 lessees. The Association has a Committee of six members of which Mr Gerry Larner is the Chairperson.

3. The dispute related to the costs of proposed remedial works to the loft space in Tower House. The remedial works were described as "to erect compartment walls/floors up to a satisfactory level throughout the loft space".

4. The Applicant says that the remedial works are necessary to ensure the safety of residents in Tower House in the event of a fire breaking out. The Applicant states that it operates a Stay Put policy in Tower House which requires adequate compartmentation of the flats. The Applicant obtained a report from Chris Hilder of Cardinus Risk Management ("Cardinus") (9 March 2018 Report) which was limited to an inspection of the roof void in Tower House. Mr Hilder found that the fire resisting construction and compartmentation of the loft area in Tower House were not of a satisfactory standard and represented a medium risk to the safety of occupants. The Applicant contended that the costs of the proposed works were recoverable from the leaseholders under the terms of the leases.

5. The Respondent challenged the Applicant about the necessity for the works. In the Respondent's view, the Applicant had not established its case for the works, and had failed to identify the particular clause in the lease which authorised the recovery of the costs as service charges.

6. The Applicant had embarked upon the first stage of statutory consultation with the leaseholders on the proposed works by issuing a Notice of Intention dated 27 April 2018. This generated responses from 26 leaseholders objecting to the proposed works which constituted the body of leaseholders currently residing at Tower House Close Estate because the remaining four properties were empty at the time of the consultation.

7. The Applicant explained that its intention was to make application to the Tribunal to determine the dispute. However, the Applicant believed by completing the first stage of the statutory consultation it provided the Tribunal with a complete understanding of the case with the inclusion of the leaseholder's observations in the hearing bundle.

8. The Applicant asked the Tribunal to determine two questions:

   i. Are the works required and reasonable? and

   ii. If so are the costs recoverable via the service charge?

9. The Applicant stated that it had not sought estimates in view of the objections received from the leaseholders and was not at this stage requesting a determination on the reasonableness of the costs to be incurred.

Hearing

10. The Application was heard on 26 February 2019 at Crawley Law Courts. Miss Louise O'Sullivan, Head of Operations, presented the case for the Applicant. Mrs Lorraine Collis, Chief Executive, was in attendance.

11. Miss Alexandra Adam, Partner of Gregsons Solicitors represented the Respondent. Mr Gerry Larner, Chair of the Residents Association gave evidence. Several leaseholders attended as observers.

12. The Applicant supplied a bundle of documents which was admitted in evidence.

13. Prior to the hearing the Tribunal inspected the property in the presence of Mrs Collis, Miss O'Sullivan, Mrs Rosie Longhurst, the Resident Estate Manager, and Mr Larner.

14. The Tribunal inspected the interior and exterior of Tower House and then walked around the site where it saw the semi-detached bungalows.

15. The Tribunal learnt that Tower House was built in 1874, and that the original owner used the tower as an observatory. The Tribunal was told that the observatory dome was eventually replaced by a flat concrete roof.

16. The Tribunal entered the building through the residents' door. At this side of the building there are three residents' flats on the ground floor. One of the ground floor flats is a single storey extension mostly outside the footprint of the building. The other two ground floor flats are accessed from the hallway. There is wide dog leg staircase which leads to the two upstairs flats. There is a small laundry room just off the half way point of the staircase. The Tribunal was shown the inside of the two upstairs flats. After visiting the flats, the Tribunal went to the rear of the building where there was a separate entrance leading to the Manager's Office and laundry on the ground floor, and then stairs up to the Manager's accommodation located in the main building, and then up a further flight of stairs to a guest suite and the Manager's bedroom both of which were located in the tower.

17. The Tribunal observed that in the hallway of the residents quarter there were grade D smoke detectors connected to the mains supply which the Tribunal understood were tested and maintained annually by a competent contractor and tested monthly by the Estates Manager. There was also emergency lighting.

18. The Tribunal saw that there were smoke detectors in the two upstairs flats and a pull cord system linked to Careline. The Tribunal also noted in the two upstairs flats that a sprinkler system had been installed which the Tribunal was told had been put in at the request of previous residents and was no longer functional. The Tribunal was shown the smoke detectors in the Manager's accommodation and guest suite.

19. The Tribunal noted that the fire risk assessment prepared by Cardinus in March 2017 reported no hazards regarding the adequacy of provision of self closing fire resisting doors (March 2017 Report). The report, however, did not cover the entrance doors to the individual flats, and the escape routes within the flats. The Tribunal observed that the escape route from the bedrooms within the upper flats necessitated passing by the kitchen doors. The Tribunal also noted that the guest suite and the Manager's bedroom were above commercial accommodation in the form of the Manager's office.

20. Miss O'Sullivan explained that if a smoke detector and or the pullcord were activated, the Estate Manager would respond first if

it happened during her working hours of 08.00 to 15.00 Monday to Friday otherwise Careline would be notified and take appropriate action.

Issue One: Are the Works Required and Reasonable?

21. The Applicant described the works as erecting compartment walls/ floors up to a satisfactory level throughout the loft space in the Tower House and any associated works. The Applicant considered it was necessary to carry out the works to comply with recommendations in the roof void inspection carried out by Cardinus, and meet its obligations to take reasonable steps to improve fire safety. The Applicant pointed out there was no roof void fire resisting construction and compartmentation in the loft space above the two upstairs flats and the Manager's flat.

22. Mr Larner told the Tribunal that the residents first learned of the proposed works when they received the budget for 2017/2018 which included a sum of £20,000 for the provision of fire screens in the roof space in Tower House.

23. In October 2017 Mr Larner and the residents held a budget meeting where they objected to these works being undertaken at the leaseholders' expense. The Applicant's area manager told them that works were necessary to comply with "legislation". When challenged about the legislation the residents were referred to "Fire Safety in Specialised Housing" published by the National Fire Chiefs Council ("NFCC Guide"). The Residents were not convinced. Their reading of the "NFCC Guide" was that compartmentation was not necessarily required and alternatives could be considered such as evacuation.

24. When Mr Larner put the resident's concerns to the Applicant, Mr Kennedy, the then Operations Director, stated that in order for a Stay Put policy to be effective flats must be self-contained to withstand smoke and fire and the lack of compartmentation in the roof space at Tower House undermined this principle. Mr Kennedy asserted that it remained the Applicant's view that compartmentation was required for this reason but also to restrict the spread of fire throughout the building and critically keep free any means of escape. Mr Kennedy advised that an assessment of the roof void could be carried out by Cardinus to confirm this at a cost of around £450 plus VAT.

25. Mr Kennedy also stated that it would be a dereliction of responsibility by the Applicant not to act now that the risk had been identified, and that any change in the Stay Put policy required building control consent. Moreover according to Mr Kennedy the alternative policy of a simultaneous evacuation policy would require the installation of a fire alarm system with sounders in each

property in order to alert residents in the event of a fire the cost of which would exceed the cost of compartmentation.

26. Mr Larner informed Mr Kennedy that it was not for the Resident's Association to give its consent or otherwise to an assessment by Cardinus. Mr Larner opined that if the Applicant considers it necessary to have an inspection of roof voids to meet its statutory responsibilities then it should do so.

27. Mr Larner told Mr Kennedy that the Applicant had originally informed the residents that the sole justification for a budget of £20,000 for the provision of fire screens was the requirements of the "NFCC Guide". Mr Larner asserted that the residents made their position clear on the "NFCC Guide" and in his view the Applicant had resiled from its original justification and was now seeking expert advice before incurring such a significant cost.

28. The snapshot of the exchanges between Mr Larner and the Applicant's employees highlighted the difficulties faced by the Tribunal in assessing whether the proposed works are required and necessary. Although the Tribunal is an expert Tribunal, it can only act on the evidence before it. Miss O'Sullivan in presenting the Applicant's case stressed that it was reasonable for the Applicant to implement the recommendations of its expert and that at this stage the Applicant was not seeking a determination on costs. The Tribunal's difficulty with Miss O'Sullivan's presentation was that it contradicted the evolution of the dispute which started with the proposed costs followed by the justification. In this respect it gave the impression to the Tribunal that the original proposal was not properly evaluated, and the Applicant's case was in effect a rationalisation of its initial proposition.

29. The Tribunal now turns to the Applicant's evidence. The Applicant insisted that a Stay Put policy operated at Tower House. The Applicant maintained that all residents were told of this policy in the welcome pack provided when they purchased their home. Mr Larner denied that he was aware of a Stay Put policy.

30. The Respondent produced a copy of the Applicant's recommended Fire Precautions which gave instructions for residents to leave their homes if a fire broke out in their home or in another part of the building. The document only gave advice to persons who are disabled not to panic if they could not leave their home and that it would usually be safe for the disabled resident to stay in his/her home. The Applicant said that the document produced by the Respondent was not a current one. The Applicant, however, was unable to supply a copy of it.

31. The Applicant referred to the March 2017 Report which stated that the evacuation strategy for the property was Stay Put. The Tribunal, however, notes that Cardinus identified no hazards in respect of fire

separation and compartments albeit restricted to the common parts and made no recommendations for works to be carried out.

32. The Applicant relied on the NFCC guide for its decision that a Stay Put policy was appropriate for the Estate given the age demographic of the residents and that Tower House was a converted building. Miss O'Sullivan cited paragraph 76.6 of the NFCC guide:

> "In existing blocks, if compartmentation is not present within roof voids, measures should be taken to provide fire-resisting barriers within the roof void in line with every compartment wall between flats. A simultaneous evacuation strategy would, in theory constitute an alternative strategy. However, this is not normally suitable in premises in which staff are not available at all times to manage and assist with evacuation, unless it is certain that residents would not need such assistance. Moreover as the occupants of the flats are within their own private accommodation simultaneous evacuation cannot be forced upon them, and there cannot be enforcement action against the Responsible person if residents fail to evacuate".

33. Miss O'Sullivan acknowledged that the Applicant had not sought the advice of the Fire Service in respect of its proposals.

34. Mr Larner highlighted the following facts which the Respondent said questioned the necessity for the works:

- The number of occupants in the residents' part of Tower House was relatively small, normally around six, most of whom lived on the ground floor.

- The two upstairs flats have a staircase for exit, fire doors, fire alarms and smoke detectors. Each flat has a cord pull to call for help and a loud speaker to speak to the Manager or the Care Line when the Manager was off duty.

- The Manager was resident in the building. The Manager's accommodation and the guest suite were also located on the Upper Floor of the building but in a separate part of it with its own means of escape, detection system and connection to Care Line.

35. Mr Larner pointed out that the Stay Put policy advocated in the NFCC Guide applied to purpose built blocks of flats. Mr Larner asserted the NFCC Guide advocated the use of simultaneous evacuation in sheltered or extra care housing with inadequate compartmentation. Mr Larner disputed the need to upgrade the alarm and detection system if a policy of evacuation was applied instead.

36. Mr Larner stated that the Applicant had not considered other options to improve the compartmentation of the upstairs flats such as fire boarding the attic floor or the ceilings of the upstairs flats.

37. Mr Larner emphasised that the Respondent was not against works which improved fire safety per se. According to Mr Larner, the Respondent's position was that it was not convinced that the proposed works were reasonably necessary given the small number of occupants at risk in Tower House and the comprehensive nature of the existing fire safety precautions in place.

38. The Tribunal's jurisdiction under section 27A of the 1985 Act is to determine whether a service charge is payable. In answering this question the Tribunal shall take into account relevant costs only to the extent that they are reasonably incurred and where they are incurred on the carrying out of works only if the works are to a reasonable standard. Relevant costs are defined as the costs or estimated costs incurred or to be incurred by or on behalf of the landlord in connection with the matters for which the service charge is payable

39. This dispute asks questions of whether the costs to be incurred on the building works to the roof void are relevant costs and if they are whether the costs are reasonable.

40. Issue One (Are the Works Required and Reasonable?) can only be answered by the Tribunal within its jurisdiction if it is part of the wider question of the reasonableness of the costs. The Applicant has chosen to detach the question of costs from Issue One, which means that the Issue loses its identity as a service charge dispute.

41. In essence the Applicant under Issue One is requesting the Tribunal to determine its dispute with the Respondent about the adequacy of the current fire safety measures and the appropriate fire safety policy for Tower House and the surrounding Estate. This is a decision for the Applicant in accordance with its legal responsibilities for fire safety of its residents and employees and cannot abdicate its legal obligations to the Tribunal.

42. The Tribunal's jurisdiction under section 27 is only engaged through the prism of costs. The Applicant's decisions to abandon the question of estimated costs for the proposed works and not to complete the statutory consultation process has complicated matters and deprived the Tribunal of any standing in relation to Issue One.

43. If the Applicant had presented its case on the basis that it was intending to recover costs X from leaseholders for proposed works which had been the subject of consultation, the issue of the necessity of those works would have fallen within the wider question of reasonableness of the costs to be incurred. The

Applicant has not followed this path and the decision they are requiring is one for the Applicant as a landlord and not one which is within the Tribunal's jurisdiction under section 27A of the 1985 Act.

44. The Tribunal decides that it does not have the jurisdiction to determine Issue One: Are the Works Required and Reasonable?

Issue Two: If so are the costs recoverable via the service charge?

45. Issue Two is not dependent on reaching a determination on Issue One. Issue Two is about relevant costs not reasonableness of costs, and should have been the first question posed by the Applicant. Under Issue Two it is not necessary to quantify the costs.

46. The question for the Tribunal under Issue Two is whether the costs of the proposed works are recoverable as service charge under the terms of the lease. The proposed works were described as "to erect compartment walls/floors up to a satisfactory level throughout the loft space".

47. The Tribunal starts with the terms of the lease.

48. The hearing bundle included a specimen lease for 3 Tower House Close which the Tribunal understood to be representative of the leases of the properties on Tower House Close.

49. The Tribunal was advised that the Applicant's solicitors drafted the leases and that buyer's solicitors were not permitted to suggest amendments to the terms of the leases.

50. Clause 2.9 of the lease restricts the right of a leaseholder to assign the lease. Essentially the Applicant requires a leaseholder who wishes to assign his/her lease to surrender it so that the Applicant can sell all leaseholds on new leases. Further the lease may not be passed to a member of the family save to a resident spouse or other resident family member who meets the requirements.

51. Clause 6 sets out the requirement to give notice to the Applicant when a leaseholder wishes to sell the property and surrender the lease or on the leaseholder's death. On receipt of notice the Applicant shall take responsibility to procure the grant of a new lease to a suitable person for the highest consideration obtainable in the open market. Under the terms of clause 6 the Applicant is entitled to make deductions and retain the same from the consideration received for the new lease leaving a balance (net repayment sum) which is then given to the previous leaseholder or his/her personal representative.

52. Clause 6.2(iii) identifies one of the deductions as

> "0.25 per centum of the said consideration for each full years ownership of the demised premises whether as Lessee relative of the Lessee or member of the Lessee's household such sum to be calculated from the date of commencement of such ownership as a contribution towards a contingency fund for the cost or anticipated cost of renewal replacement or improvement of any part of the structure of the Property or its services and other items capital expenditure as are not covered by the Management Service Charge including the fees and disbursements of any professional person employed to advise on any work to be carried out pursuant to this sub-clause and interest paid on any money borrowed by RHLA ("the Applicant") to defray any expenses incurred hereunder".

53. Clause 2.1 of the lease requires the leaseholder to pay the Management Service Charge in accordance with the provisions of the Third Schedule.

54. Clause 1(d) of the Third Schedule defines the Management Service Charge as the specified proportion of the service provision rounded up to the nearest pound.

55. The specified proportion is the percentage contribution stated in each lease that an individual leaseholder is required to make towards the overall service charge in any specific year.

56. Clause 1(c) of the Third Schedule defines service provision as the sum computed in accordance with Clauses 2 and 3 of the Third Schedule. Clause 2(1)(b) enables the Applicant to set aside an appropriate amount as a reserve for or towards such of the matters specified in Clause 2(2).

57. Clause 2(2) states that the expenditure to be included in the Service Provision shall comprise all expenditure of the Applicant in connection with the repair management maintenance and provision of services for the Property and shall include (without prejudice to the generality of the following):

a) The cost of the warden's salary and the provision of accommodation for the warden at the property and all other direct costs in connection with the provision of the warden's service together with twelve and one half per cent of the aforesaid costs as a contribution towards the cost of administering the wardens service.

b) The cost and expense of the decoration and maintenance and repair of the exterior of the demised premises and of the retained parts of the property.

c) The cost and expense of the maintenance repair and cultivation of the paths drives gardens and lawns of the property

d) The cost and expenses of the maintenance and repair of the interior of the demised premises and the other units of accommodation (other than decorative repair) and of the retained parts of the property including the mechanical and other services and the communal hot water system (if any).

e) The cost and expenses of lighting heating and cleaning the areas used or available for use in common by the Lessee and other Lessees of RHLA any rates taxes charges and other outgoings payable in respect of the retained parts.

f) The expense of insurance in accordance with the provisions hereof of insurance of the retained parts and such contents as are for use in common by the Lessees of RHLA and such other insurance as shall be thought reasonable by RHLA.

g) All fees charges and expenses payable to any solicitor accountant surveyor valuer architect managing agent or other person whom RHLA may from time to time reasonably employ in connection with the management or maintenance of the Property including costs of preparation of the Management Service Charge.

h) Fifteen per cent of all amounts (other than this present item) comprised in the service provision as a contribution towards the general administration costs of RHLA or at the discretion of RHLA such sums as shall when taken account is taken of similar contributions by tenants of other properties belonging to RHLA represent a reasonable contribution by the tenants of the Property towards the general administration costs of RHLA[1].

58. Clause 3 of the Lease sets out the Applicant's covenants. Clause 3(1)(a) details the Applicant's repairing covenant as follows:

> "During the said term to keep in good and substantial repair and decorative order the demised premises (except internal decorative repair thereto) and the interior and exterior of the retained parts and all drains and water pipes and sanitary and water apparatus serving the demised premises (.....) and the common halls staircases passenger lifts (if any) alarm system (if any) and all other services provided by RHLA and all apparatus equipment plant and machinery serving the said services and all landings passages drives paths and ways thereof provided....."

59. Clause 3.2 (a) requires the Applicant to insure and keep insured the demised premises and all other buildings in the Property comprehensively in the full reinstatement value with an insurance office of repute.

[1] Note the Sub-paragraphs do not precisely follow that in the specimen lease which does not include a 2(f).

60. Under the terms of the lease the property is the freehold land and buildings at Tower House Close. The demise is the units of accommodation occupied by the "elderly retired persons". The parts of the property retained by the Applicant included those parts of the property used in common by the Lessees of the said units and the Applicant and also the walls roofs and foundations of all buildings.

61. The Tribunal now deals with the parties' submissions about whether the costs of the proposed works are recoverable through the lease.

62. The parties accepted that the roof void in Tower House formed part of the retained property, and fell within the Applicant's repairing responsibilities.

63. The Applicant contended that the proposed works were within its repairing covenant under clause 3, namely, to keep the interior and exterior of the retained parts in good and substantial repair and decorative order. The Applicant stated that it was entitled to recover the costs of repair through the service charge under sub-clause 2(2) of the Third Schedule and more particularly sub-clauses 2(2)(b) and (d).

64. The Applicant also stated that it was unlikely to obtain insurance for the building if it did not carry out essential fire safety works. Miss O'Sullivan acknowledged that the Applicant had not spoken to its insurer about the proposed works. In that respect the Applicant considered that the works in roof void might come within 2(2)(g) as a service in connection with the management and maintenance of the property.

65. The Respondent argued that the proposed works were not in the nature of repair and, therefore, could not be caught by the charging provision enabling the Applicant to recover its costs incurred on carrying out its repairing covenant through the service charge.

66. The Respondent pointed out that the lease contained no sweeping up clause which might enable the Applicant to recover costs of works not specifically defined in the charging provisions. The Respondent also noted that there was no provision which permitted the Applicant to recover costs of complying with the requirements of statutory bodies such as local authorities and fire authorities.

67. The Respondent suggested that the proposed works constituted improvements. In this regard the Respondent relied on the Applicant's admissions that there was no requirement to bring older/converted buildings up to current building regulation standards, and that the works were an improvement to fire safety by complying with current guidance and best practice. The

Respondent asserted that the cost of improvements could not be included in the Service Provision.

68. The Respondent placed weight on the overall tone of the lease and the circumstances of its making and execution. The Respondent stated that the drafting of the leases was all in the hands of the Applicant. There was no negotiation possible as to its terms. In the Respondent's view, if the Applicant had wanted the leaseholders to contribute to the costs of improvement through the service charge it would have said so explicitly in the lease.

69. The Respondent stated that the only reference in the lease to renewal, replacement or improvement of any part of the structure of the Property was found in clause 6.2(iii). This related to expenditure from the contingency fund comprising the 0.25 per cent of the consideration for each full year's ownership received by the Applicant when a leaseholder surrendered his lease. The Respondent submitted that the clear inference to be drawn from the terms of the lease was that the Applicant was liable to pay for any improvements to the property using monies from the contingency fund rather than from the reserves in the service charge account.

70. The question for the Tribunal to determine is one of construction, namely, whether the costs of the proposed works to the roof void fell with within the terms of clause 2(2) of the Third Schedule.

71. Lord Neuberger in *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619 at paragraph 15 set out the approach that courts and tribunals should follow when interpreting a lease:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions".

72. Lord Neuberger at paragraph 23 was unconvinced by the notion that service charge clauses are subject to any special rule of interpretation, and in particular whether they should be construed restrictively.

73. The Tribunal is determining a question of law when deciding the correct construction of the lease which is confirmed by *Woodfall* at para 7.163.1:

> "The construction of a lease is a matter of law and there is no evidential burden on either party: thus, it was held to be incorrect for a leasehold valuation tribunal to determine that the relevant leases were uncertain and therefore that the landlord and a management company had failed to discharge the onus of showing that the service charges claimed were recoverable under the terms of the leases." [Footnoted to Redrow Regeneration (Barking) Ltd v Edwards [2012] UKUT 373 (LC); [2013] L & TR 8.]".

74. The Tribunal starts with the ordinary and natural meaning of clause 2(2) of the Third Schedule which includes all expenditure of the Applicant in connection with the repair management maintenance and provision of services for the property within the service charge. The Tribunal considers that the wide nature of clause 2(2) is given definition by the various sub-categories of expenditure which formed part of clause 2(2).

75. The parties relied on sub-clause 2(2)(b): the cost and expenses of the decoration and maintenance and repair of the exterior of the retained parts. Arguably these works were to the interior of the retained parts in which case sub-clause 2(2)(d) applied: the cost and expenses of the maintenance and repair of the interior of the retained parts. The principal difference between the two sub-clauses is that the costs of decoration do not apply to the interior of the retained parts. The Tribunal is satisfied that difference is not material because the proposed works would not fit the description of decoration.

76. The critical question is whether the proposed works are maintenance and repair. Before any question of repair arises, it must be asked whether the retained parts are in disrepair which means deterioration from some previous state or condition. In this case the proposed works comprised the erection of new walls within the roof void. The Tribunal finds that the works amounted to the construction of a new and different structure which was not included in the building when the leases were granted. The Applicant adduced no evidence that the works were necessary to prevent a deterioration of the existing condition of the building. The Tribunal is satisfied that the Applicant's justification for the proposed works was to improve the fire safety of the upstairs resident' flats, and the manager's accommodation.

77. In view of the findings in paragraph 76 above, the Tribunal is satisfied that the proposed works do not fit comfortably within the ordinary and natural meaning of repair and maintenance.

78. The Tribunal's agrees with the Respondent's description of the works as an improvement. The Tribunal observes that an obligation to repair is not an obligation to improve for "neither a landlord nor tenant is bound to provide a better house that there was to start with"[2]. The Tribunal acknowledges that there is no bright line between repair and improvement and that on occasions repairs can only be effected by making some improvements to the property. The Tribunal, however, is satisfied that this was not the case with the works to the roof void of Tower House because the proposed works involved no repair to the existing structure of the building.

79. The question that now arises is whether there are any other provisions in clause 2(2) of the Third schedule which would enable the Applicant to recover the costs of these works through the service charge.

80. Miss O'Sullivan for the Applicant suggested that the works fell within the definition of clause 2(2)(h) of the Third schedule because they involved fire safety which formed part of the Applicant's management responsibilities. The Tribunal disagrees with Miss O'Sullivan's submissions. The Tribunal construes clause 2(2)(h) as giving authority to recover the costs of specific persons with expertise to assist the Applicant with its management responsibilities. The Tribunal acknowledges that clause 2(2)(h) may cover the cost of Cardinus in carrying out the fire safety assessments of the property but it does not extend to the costs of the works arising from those assessments.

81. The Tribunal agrees with the Respondent's observation that the service charge provisions included no specific reference to the costs of complying with the requirements of statutory bodies. In any event, the Applicant accepted that it had not sought the advice of the Fire Service in connection with the proposed works.

82. The Respondent contended that the service charge provisions included no sweeping up clause which would enable the Applicant to recover costs not specifically mentioned in the charging provisions. The Tribunal considers the Respondent may have overlooked the structure of clause 2(2) of the Third schedule which starts with a wide description of the costs caught within the charging provision followed by specific examples of those costs.

83. The Tribunal considers it necessary to examine whether the costs of the proposed works falls within the general description "of all expenditure of the Applicant in connection with the repair management maintenance and provision of services for the property". The Tribunal finds that general wording is still confined to repair and maintenance and does not include improvements.

[2] *Quick v Taff Ely Borough Council* [1986] QB 809

84. The Tribunal is satisfied that if the parties had intended for clause 2(2) of the Third schedule to include the costs of improvements they would have explicitly stated that within the wording of the clause. In this regard the Tribunal relies on the explicit reference to the cost or anticipated cost of renewal replacement or improvement of any part of the structure of the Property in clause 6.2(iii) of the lease. The Tribunal infers from the inclusion of clause 6.2(iii) in the lease that the Applicant is responsible for funding improvements from the contingency fund established from the 0.25 per cent contributions from the consideration for the surrender of leases, and not from the service charge account.

85. The Tribunal determines that the Applicant is not entitled to recover the costs of the proposed works, namely, "to erect compartment walls/floors up to a satisfactory level throughout the loft space" from the service charge.

86. The Tribunal emphasises that its decision is limited to determining whether the leaseholders pay for the costs of the proposed works to the roof void through the service charge. The Tribunal's decision should not be interpreted as supporting the proposition that the works are not to be carried out. This is a matter for the Applicant which may decide that the works are essential and necessary to fulfil its obligations towards its residents and members of staff.

Application under S20C

87. Although the Applicant indicated that no costs would be passed through the service charge, for the avoidance of doubt, the Tribunal nonetheless determines that it is just and equitable in the circumstances for an order to be made under Section 20C of the 1985 Act, so that the Applicant may not pass any of its costs incurred in connection with the proceedings before the Tribunal through the service charge.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands 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.

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.

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 for a period payable -
  (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 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.