



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

Case Reference : **LON/00AU/LSC/2019/0478**

HMCTS code : **P: PAPER REMOTE**

Property : **6 Manor Mansions, 455 Holloway Road,
London N7 6LR**

Applicant : **Harris Johnson Developments Ltd**

Representative : **Mr E Harris**

Respondent : **(1)Mr E Esterson of Trent Park
Properties (Manager)
(2) Mr A Treviso (Flat 7)
(3)Mr KL Lee (Flat 2)**

Representative : **Mr E Esterson**

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

Tribunal Members : **Tribunal Judge Prof R Percival
Mr L Jarero BSc, FRICS**

Date of Decision : **21 July 2020**

DECISION

Covid-19 pandemic: description of determination

This has been a remote determination on the papers which has been consented to by the parties. The form of remote hearing was P:PAPERREMOTE. A face-to-face hearing was not held because the issues could be determined on paper. The documents that we were referred to are in a bundle of 180 pages, the contents of which we have noted.

The application

1. The Applicant leaseholder seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 (“the 1985 Act”) as to whether a service charge is payable in respect of repairs undertaken by him, in the circumstances set out below.
2. The relevant legal provisions are set out in the Appendix to this decision.

The property

3. The property is a ground floor two bedroom flat in a three storey Edwardian purpose built block consisting of five flats. The block is one of two in the development, each containing five flats.

The lease

4. The lease commenced in February 2008 and was made between the freeholder, Kernberg Holdings Ltd, and the Applicant. The term is 166 years.
5. The lessee covenants to repair and decorate the demised premises (clause 3(4) and (5)).
6. The lessor covenants to “as often as may in the opinion of the Surveyor be necessary wash and paint ... (a) all the outside wood iron ... of the Building ... and (b) all inside walls ceilings wood and iron work of the common parts of the Retained Property the use of which is common to the Lessee and the lessees or occupiers of other parts of the Lessor’s Property AND ALSO at all times during the said term to keep the walls ceilings and floors of the Retained Property (but excluding those of any flat for the time being not demised by a lease ...) and the whole of the structure roof balconies foundations and main drains of the Building and the walls rails fences and gates appurtenant thereto in good repair and condition” (Clause 6A).
7. The demised premises are defined in the first schedule to the lease. The demise includes the plaster on the walls bounding the flat, doors and windows and their frames etc, all of the partitions within the flat, but walls separating the flat from other internal parts of the building being party walls. Similarly, it includes the plaster on the ceilings, and the floorboards and other surfaces to floors. It also

includes conduits in any part of the Building that exclusively serve the flat, and fixtures and fittings.

8. The demise expressly excludes parts of the Building lying above or below the surfaces of the ceiling and floor, and “any of the main timbers and joists of the Building or any of the external walls (except such ... as are expressly included in the demise)”. Similarly excluded are non-exclusive conduits.
9. Detailed provision for the service charge (“maintenance provision”) is made in the fourth schedule. It appears (see the reference in the opening words of clause 6) that the lessee’s covenant to pay the maintenance charge is contained in clause 4 of the lease. Unfortunately, the relevant page – page 11 – of the lease was missing from the bundle supplied to us.
10. Part I of the fourth schedule sets out the basis for calculating the charge: “the annual Maintenance Provision shall consist of a sum comprising the expenditure estimated as likely to be incurred in the Maintenance Year by the Lessor for any of the purposes mentioned in Part II of this Schedule” (paragraph 2). After the end of the Maintenance Year, the accounts are audited, and the lessee is required to pay towards a shortfall, or to be credited an overpayment.
11. The expenses subject to be reimbursed via the service charge are set out in Part II of the schedule. They include “the performance by the Lessor of its obligations in Clause 6(A) of this Lease”.

The preliminary issue

12. At the case management hearing, held on 18 February 2020, the procedural judge identified the following as a preliminary issue:

Whether the works are within the landlord’s/manager’s obligations under the lease and whether the costs of works are payable by the other leaseholders of the block of which the property forms part under the terms of their leases; noting in particular that the costs claimed are in relation to works carried out by the tenant applicant and not by the manager.
13. As will be apparent, in the outcome, we have somewhat adapted the terms of this preliminary issue.
14. On 23 August 2018, the first Respondent was appointed manager by the Tribunal after a hearing of both an application to appoint a manager under section 24 of the Landlord and Tenant Act 1987, and an application by the landlord under section 27A of the 1985 Act (LON/00AU/LSC/2017/0460 and LON/00AU/LAM/2018/0001), the latter being effectively stayed as being academic in the circumstances).

15. It appears from that decision that management of the development had been problematic for a number of years, with several attempts at major works being frustrated between 2011 and the service of a demand in 2017 (presumably for the advance “maintenance contribution” provided for in the fourth schedule). It appears that major works were accomplished after the appointment of the first Respondent as manager. The history involved some disagreements between the leaseholders, with Mr Treviso and Mr Lee (the second and third Respondents in this application) originally opposing the appointment of a manager. In its August 2018 decision, the Tribunal accepted that there had been breaches by the landlord of its repairing obligation under clause 6A.
16. This application concerns works to the Applicant’s flat and a drain behind it in 2016/17. The Applicant explains in his statement that he commissioned a report by Academy Remedial Surveyors in May 2016 on damp within his flat (which had been tenanted for many years). Following the departure of a tenant in 2017, and a further follow up report, work was undertaken to damp proof the flat, in accordance with one of the methods outlined in the report. The work involved hacking off plaster affected by damp and raking out the mortar joints to the internal face of the external wall of the flat and re-plastering the wall with a waterproof render to a thickness of 24mm, with a final skim coat of 3mm. The cost of the two reports was £460, and that of the works themselves £4,284, including VAT.
17. The report attributed the dampness in the flat to a combination of older building practices and defects in external maintenance.
18. The Applicant also relates that what he describes as a communal drain to the rear of the property had caused problems. He commissioned a drains survey in 2017. Securing the report required clearing the drain. The report, which showed faults with the drain, and was passed to the first Respondent. The cost of the report, and clearing the drain, was £500.40.
19. We record that the Applicant primarily relies on the argument that the damp in the flat, and the problems with the drains, were the result of many years of neglect of maintenance by the freeholder, in breach of its repairing covenant in clause 6A (we also note that the Applicant relies on the covenant of quiet enjoyment in clause 5).
20. We observe that, on the face of it, the damp proofing works seems to have involved at least a technical interference with the structure of the building beyond his demise, in the form of the raking out of mortar, but whether this is so, and whether doing so without (it appears) consent amounted to a breach of covenant by him would require further evidence and submissions. The drain is clearly not part of the demised premises. We do not, however, need to come to conclusions on these matters.
21. The total cost of these works is £5,244.40. In the application form, the Applicant puts the question for the Tribunal as follows:

“The investigation and damp works to Flat 6 were necessary because of decades of neglect to the external communal parts of the building. I would like the Tribunal to decide whether the Applicant (leaseholder of Flat 6) should recover the money spent on resolving the damp issue in this flat through the 2020 service charges.”

22. The basis of the Tribunal’s jurisdiction on this application is section 27A of the 1985 Act, which is reproduced in full in the appendix hereto. The section is broadly drafted. While subsection (1) relates to “whether a service charge is payable”, which presupposes a charge, subsection (3) also allows a determination of whether “if costs are incurred for services, repairs, maintenance ... a service charge would be payable for the costs, and, if it would, as to – (a) the person by whom it would be payable; [and] (b) the person to whom it would be payable”.
23. In this case, the Applicant has incurred costs, and is asking the Tribunal whether a service charge would be payable in respect of those costs. The answer to that question must start with the lease or leases.
24. We assume that the leases of the other flats in the building are in similar terms to the Applicant’s. We do not have the exact terms of the covenant to pay the service charge (see paragraph [9] above), but it is clear from the fourth schedule that the relevant obligation is to reimburse the lessor for “the performance *by the lessor* of its obligations in Clause 6(A)”, emphasis added.
25. In respect of the works in issue, the lessor has incurred no costs. They were incurred by the Applicant. There is therefore no foundation for the proposition that a service charge is payable under the leases of the other leaseholders.
26. The Applicant’s position is that the first Respondent *should* have incurred those costs, and he may be right (we make no determination). But for the purposes of our statutory jurisdiction, that does not give us the power to order that the first Respondent should be considered to have incurred the costs.
27. Were the Applicant to establish that the first Respondent was liable to him for the costs, and to obtain a money judgment, the first Respondent would incur the cost of satisfying the judgment at the point at which he paid the sum over (or, possibly, when he became liable to do so). It would then be a matter for the first Respondent to consider whether he could pass that cost on to the leaseholders as a body via the service charge, and on what basis. But the money judgment step is not one that falls within the jurisdiction of the Tribunal.
28. We note that even if the costs incurred by the Applicant were to count as “costs incurred by the lessor”, they would have been incurred either at the time that the invoices for the works were presented to him, or on payment (*Burrr v OM Property Ltd* [2013] EWCA Civ 479). They would only have been recoverable through a service charge demand served within 18 months of being incurred, by

section 20B of the 1985 Act. So they would (at least in all probability) now be time barred.

29. **Decision:** The Applicant may not recover the costs contended for through a service charge demand.

Application for an order under section 20C of the 1985 Act

30. The Applicant applies for an order under section 20C of the Act that any costs incurred by the first Respondent should not be recoverable through the service charge.
31. We consider this application on the assumption that such costs are recoverable under the lease, but without determining whether they are or not. If that question is disputed, the issue remains open and amenable to an application under section 27A.
32. An application under section 20C is to be determined on the basis of what is just and equitable in all the circumstances (*Tenants of Langford Court v Doren Ltd* (LRX/37/2000). The approach must be the same under paragraph 5A, which was enacted to ensure that a parallel jurisdiction existed in relation to administration charges to that conferred by section 20C.
33. Such orders are an interference with the landlord's contractual rights, and must never be made as a matter of course. We should take into account the effect of the order on others affected, including the landlord: *Re SCMLLA (Freehold) Ltd* [2014] UKUT 58 (LC); *Conway v Jam Factory Freehold Ltd* [2013] UKUT 592 (LC); [2014] 1 EGLR 111. We do not know what costs the first Respondent has incurred, although on the face of it they will have been minor. His contribution to the written material was negligible, although he did attend the case management conference. Any costs of the second and third Respondents are not in any event recoverable under the leases.
34. The success or failure of a party to the proceedings is not determinative. Comparative success is, however, a significant matter in weighing up what is just and equitable in the circumstances. In this case, the Respondents have been successful.
35. We conclude that it is just and equitable that no order should be made.

Rights of appeal

36. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the London regional office.

37. The application for permission to appeal must arrive at the office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
38. If the application is not made within the 28 day time limit, the application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at these reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
39. The application for permission to appeal must identify the decision of the Tribunal to which it relates, give the date, the property and the case number; state the grounds of appeal; and state the result the party making the application is seeking.

Name: Tribunal Judge Richard Percival **Date:** 21 July 2020

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 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.

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.

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

- (a) in a particular manner, or
- (b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—

(a) complied with in relation to the works or agreement, or

(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal.

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

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

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

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or

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

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

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

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount

prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.

Section 20ZA

(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

(2) In section 20 and this section—

“qualifying works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

(a) if it is an agreement of a description prescribed by the regulations, or

(b) in any circumstances so prescribed.

(4) In section 20 and this section “the consultation requirements” means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—

(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,

(b) to obtain estimates for proposed works or agreements,

(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) Regulations under section 20 or this section—

(a) may make provision generally or only in relation to specific cases, and

(b) may make different provision for different purposes.

(7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Section 20B

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

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

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal² or leasehold valuation tribunal or the First-tier Tribunal³, or the Upper Tribunal⁴, 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 the county court ;

(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal;

(c) in the case of proceedings before the Upper Tribunal⁴, 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 the county court.

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

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule “administration charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—

(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

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

(3) In this Part of this Schedule “variable administration charge” means an administration charge payable by a tenant which is neither—

(a) specified in his lease, nor

(b) calculated in accordance with a formula specified in his lease.

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

Schedule 11, paragraph 2

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

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—

- (a) the person by whom it is payable,
- (b) the person to whom it is payable,
- (c) the amount which is payable,
- (d) the date at or by which it is payable, and
- (e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

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

(4) No application under sub-paragraph (1) may be made in respect of a matter which—

- (a) has been agreed or admitted by the tenant,
- (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
- (c) has been the subject of determination by a court, or
- (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

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

- (a) in a particular manner, or
- (b) on particular evidence,

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