



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

Case Reference : CHI/00HN/LSC/2019/0124

Property : Flat 4, Wootton Towers,
1a Wootton Mount, Bournemouth BH1 2PJ

Applicant : Castlepoint Estates South Limited

Representative : Frettens LLP

Respondents : Hollist Oag Limited

Representative : Bo Hollist

Type of Application : Service charges

Tribunal Member(s) : Judge D. Agnew

Date and venue of CMH :

Date of Decision : 29 March 2021

DETERMINATION

The Application

1. The Applicant is the freehold owner of Wootton Towers, 1a Wootton Rise, Bournemouth BH1 1PJ (“the Property”). The Respondent is the lessee of Flat 4 at the Property under a lease dated 16 June 1995 as extended by a Deed of Variation dated 15 July 2013. The original lease was for a term of 99 years from 15 July 1995. The Deed of Variation extended the term to 125 years from 15 July 1995 and it included certain other terms that are important in this case and which will be referred to in more detail hereafter.
2. In April 2019 the Applicant’s managing agents issued an invoice for the Respondent to pay a sum on account of service charges to be incurred on major works at the property. When this was not paid the Applicant issued proceedings against the Respondent in the County Court claiming unpaid service charges, ground rent and costs. Judgment in Default was entered in the sum of £16,312.73 plus costs of £734.07 but the Respondent successfully applied to have the judgment set aside and for the case to be transferred to the Tribunal. The order of Deputy District Judge Spooner in Claim number F7QZ8H94 is dated 8 October 2019 and provided as follows:
“1. The judgment dated 19 June 2019 be set aside
The case be transferred to the First-Tier Tribunal property Chamber (Residential Property) for case management and further directions.”
3. On 3 December 2019 I issued Directions for a Case Management Hearing by telephone which took place on 14 January 2020. In those Directions I noted that questions to do with service charges would be matters falling within the jurisdiction of the Tribunal. Other matters, such as ground rent and costs were matters which remained within the jurisdiction of the County Court but that the Tribunal Judge sitting as a County Court Judge would be able to determine such matters under the Deployment provisions consequent to the amendment to the County Courts Act 1984 whereby Tribunal Judges are constituted Judges of the County Court.
4. At the telephone Case Management Hearing I was told that the demand for service charges upon which the Court proceedings had been based had been withdrawn, that a new consultation procedure under section 20 of the Landlord and Tenant Act 1985 (“the Act”) had been initiated but not concluded, and that in the meantime, the Respondent had issued its own application under section 27A of the Act direct to the Tribunal. That section provides for an application to be made for a determination as to whether a service charge under a lease of residential premises is payable and is reasonable. As a result of these developments I was informed that the County Court proceedings were, in effect, redundant and the parties agreed that there should be a three month stay of proceedings to allow the new section 20 procedure to be completed. The stay was duly granted.

5. At the end of the stay the parties were still in dispute and, after a regrettable delay due to the Covid-19 pandemic, Directions were issued to bring the case to a hearing. Statements of case were served. The Respondent sought permission to adduce expert evidence of a surveyor and this was granted on 20 February 2021. There is a report from chartered surveyors, Bennington Green, instructed by the Respondent in the determination bundle.
6. No doubt influenced by the comments with regard to the continuing effectiveness of the County Court proceedings, subsequent Directions have stated that the case would proceed solely on the question of payability and reasonableness of the service charge for the section 20 works and whether any order with regard to costs should be made under either section 20c of the Act or paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 which are all matters exclusively within the jurisdiction of the Tribunal. I have therefore confined myself to dealing with those matters as a Tribunal Judge. However, as far as I am aware, the County Court proceedings are still live, albeit dormant, and will need to be disposed of. I hope that this will be possible by way of a consent order or a withdrawal after the parties have received this determination.
7. On 5 March 2021, only 20 days before the case was due to be determined by way of written representations under Rule 31 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 (“the Tribunal Rules”) the Applicant’s solicitors applied to the Tribunal to disallow the Respondent’s surveyor’s report on the ground that it was biased and the surveyor in question had based his report on incomplete information and limited access on site. Further the application sought permission for the Applicant to adduce its own expert report which it exhibited to a witness statement from a director of the Applicant company. Judge Dobson refused the application to disallow the Respondent’s surveyor’s report but because he was not in possession of all the relevant information (the determination bundle not yet having been received) he said that the Applicant’s surveyor’s report could be included in the bundle but that it would be for the Judge deciding the case as to whether this evidence should be allowed to be adduced. I will deal with that later in this decision.
8. In Directions it was provided that the case would be determined without an oral hearing on the basis of evidence and submissions in writing under Rule 31 aforesaid. There has been no objection to this by either party. I have reviewed that Direction on receipt of the determination bundle. I have concluded that it is still appropriate to proceed without an oral hearing. Both parties have been given the opportunity to state their case in detail and although the Applicant would like me to allow into evidence via an exhibit to a witness statement from Mr East an expert report, which I will not allow for the reasons stated in paragraph 31 below, Mr East has dealt fully himself with the matters raised by the Respondent’s surveyor. I note that Mr East is the contract administrator for the works at the Property. He is

therefore well versed in such matters. In my view there would be nothing to be gained by an oral hearing and therefore the Direction for a paper determination stands although I have asked the Respondent's representative for some further information just to clarify his case.

The issues

9. The issues with regard to the service charge demand made by the Applicant are:
 - a) Whether it has taken into account, or fully taken into account the provisions of the Deed of Variation of 2013
 - b) Whether any of the section 20 works on which the demand has been based have been rendered unnecessary or impossible or have been superseded by certain development work currently taking place at the property
 - c) Whether some of the section 20 costs should be shared with the landlord due to the development works, and
 - d) Whether some of the section 20 costs are solely for the benefit of the landlord's development and should not be borne by the lessees.

Background

10. At the date of the Deed of Variation in 2013 it was evidently the then landlord's intention to redevelop Wootton Towers by adding two new flats to the existing four flats. The new flats would be added to the roof space and retained parts of the Property. At the same time, repairs and renovation would be carried out to the remainder of the Property which was in a very poor state. No doubt this would have been necessary to attract buyers to the new flats. It is, perhaps significant that the freeholder at the time was James William Laverell, who is the son of Ms Joanna Oag, a former Director of the Respondent company. Mr Laverell was declared bankrupt in 2016. His trustee in bankruptcy sold the freehold to the current landlord, the Applicant, who had previously had a professional relationship with Ms Oag. Ms Oag is no longer a Director of the Respondent. Mr Hollis, who is also a former director has been authorised to represent the Respondent in these proceedings. That is alright for these Tribunal proceedings but not for any residual Court proceedings.
11. I say that it may be significant that the freeholder in 2013 was Ms Oag's son because the Deed of Variation was evidently effected with the redevelopment in mind. Planning permission had been applied for in 2012 and the Deed of Variation provides that the landlord will contribute up to £10,000 of the lessee of Flat 4's costs of the works set out in Schedule 4 of the Deed, labelled Section 20 works. It seems that the other three flats do not have this £10,000 concession. The Deed of Variation also provides that once the redevelopment has been completed the lessee's contribution to service charges will change from one-quarter to one-seventh of the costs.

12. After the Applicant acquired the freehold in December 2018 they set about implementing the repair and refurbishment of the existing parts of the Property and implementing the development of the two new flats. A section 20 procedure was commenced. A Notice of Intention was served and they went out to tender. The Respondent nominated a contractor to be approached. I have not seen the statement of estimates but I gather from the papers that two estimates were received. That from the Respondent's nominated contractor was lower than that of the company that was awarded the contract by the landlord. An explanation has been given as to why the cheaper estimate was not accepted. I will refer to this in more detail later.
13. The total cost of the proposed section 20 works including supervision costs and a retention came to £59,491.84. One quarter of this was £14,872.96 and it was this sum that the Applicant demanded of the Respondent by way of a demand dated 17 April 2019. This was not paid and so proceedings in the County Court were commenced. This sum was paid, however, on 26 July 2019.
14. After the original section 20 procedure of February 2019 was withdrawn a fresh Notice of Intention was served in November 2019. This, although worded differently, was much the same as the original Notice of Intention save that two extra items were added. This led to a further demand which, in my papers is undated, for £5061.61 in respect of the proposed section 20 works.
15. Throughout this case the Respondent has been saying that the Applicant has not taken into account the provisions of the Deed of Variation because it has not given credit for up to £10,000 referred to therein. At first, in correspondence dated 24 May 2019, the Applicant denied that as a successor in title to the landlord at the time the Deed was entered into that it was bound by it. Subsequently, when solicitors became involved for the Applicant, they agreed that the landlord was bound by the provisions of the Deed of Variation. However, no amendments were made to the amount claimed from the Respondent until February 2021 when the supplemental invoice was amended from £5,061.61 to £3,152.11, a reduction of £1,909.50, which, they say takes into account the provisions of the Deed of Variation.
16. By an invoice dated 15 April 2021 a total of £4,304,01 is said to be owed by the Respondent to the Applicant. This includes the £3,152.11 for the section 20 costs. There is no explanation for the difference and the Respondent has not commented on it, which is not surprising as the Tribunal has already ruled that this determination is limited to the section 20 costs. If the Respondent does not dispute this difference, it should be paid. If it does and this cannot be resolved, it will have to be the subject of a fresh application. However, in view of the relatively small sum involved, it is to be hoped that this can be resolved without further litigation.

17. Apart from the issue with regard to the Deed of Variation, the Respondent suspects that the Applicant has been diluting the cost of the development of the two new flats to a certain extent by the contributions of the lessee by way of the service charges for the section 20 works. By that I take it to mean that the development costs are being subsidised to a degree by the service charges. The Respondent says that some of the works charged for in the section 20 costs will not now be incurred because of the work to the new flats and other work has been rendered impossible. Some work will benefit the new flats as well as the existing ones and so should be shared. Other work is totally to the benefit of the new flats. The Respondents say that they accept that they have to pay something towards the section 20 costs but not as much as demanded (or, indeed, already paid).

The Lease and Deed of Variation.

18. The lease is commendably short and concise. There is no dispute that the lease provides for the landlord to carry out the works stated in the section 20 procedure and that the lessee is required to contribute towards the cost by way of service charge. The landlord's obligations are set out in the Seventh Schedule to the lease and the lessee's contribution to the cost is set out in paragraphs 19 and 20 of the Sixth Schedule. Paragraph 20 of that Schedule provides for interim payments on account to be made by the lessee "within fourteen days of receiving a written demand from the Lessor or its servants or agents setting out how such interim payment is calculated". As there is no dispute about this I do not propose to set out these provisions in extenso.
19. By the Deed of Variation, in addition to extending the term to one of 125 years, and to reducing the lessee's contribution to service charges to one-seventh instead of one quarter, once the development of the two new flats is complete, it is provided as follows:-
- a. Consent is given to certain tenant's works, subject to conditions
 - b. The landlord agrees to carry out certain works and pay the tenant's contribution payable under the lease for certain other works which the landlord is to carry out at the property.

This case is not concerned with the tenant's works. The landlord is required to observe certain conditions in carrying out the landlord's works. Landlord's works are defined as "the section 20 Works and the works to be carried out at the Property which are referred to in Schedule 1 to the Deed.

20. By clause 7 of the Deed the landlord agrees to pay on demand:
- 7.1 the total of the tenant's contribution towards the landlord's works set out in Schedule 1
 - 7.2 The total of the tenant's contribution payable in respect of point 10 of the Section 20 Works
 - 7.3 With regard to the remainder of the Section 20 Works, the first £10,000 of the tenant's proportion of the costs due under the Lease.

21. Schedule 4 to the Deed is headed “Section 20 notice” but in fact it is a specification for works for the contractor. Interestingly, the contract administrator, even at this stage, is expressed to be Mr Julian East. There are 14 items in the schedule of works. Item 10, referred to in clause 7 of the Deed involves the installation of waterproofing system to the walls of the basement. The Planning Application referred to in the Deed is for two new two bedroom flats and is dated 4 April 2012.

The law

22. By section 27A(1) of the Act:-

An application may be made to a [First-tier Tribunal (Property Chamber)] 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.*

23. By section 27A(4) of the Act

An application may be made to a [First-tier Tribunal (Property Chamber)] for a determination as to 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.”*

24. When the original demand was made in 2019 the works had not commenced and the costs had not yet been incurred. Consequently, the demand was for an on-account payment of costs to be incurred. Subsequently, some of the works have been carried out and a revised invoice was served in February 2021 but some of the section 20 works are still outstanding (and the new flats are still in course of construction). I am therefore going to determine the case under section 19 of the Act which provides as follows:-

“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”.

This means that I only have to determine whether the on-account charges are reasonable, not whether they have been reasonably

incurred and are of a reasonable standard. Thus, references to the standard of workmanship referred to by the Respondent's surveyor, will not be considered in this decision. As the works have not been completed it would not be appropriate to do so in any event. If there is still an issue as to the standard of work when the works are complete then the Respondent can make an application to the Tribunal at that time accompanied by relevant evidence. Once again, however, if the parties can reach an agreement about this they should do so to avoid further litigation.

The Applicant's case

25. The Applicant's case is presented by Mr Julian East who is the sole Director of the Applicant Company. He is an experienced property developer and property manager. There is also in the bundle a short witness statement from Lee Burchell of Right 2 Manage (Southern) Limited, the Applicant's managing agents.
26. The Applicant's case is simply that the section 20 procedure was carried out correctly. It bases its claim on the Notice of Intention issued in November 2019 and the specification sent out to contractors on which to base their estimates or quotations. The specification included a pricing matrix so that each item of work was to be costed separately. Blumariin were selected for the award of the contract. Although they were "marginally" more expensive than the contractors nominated by the Respondent, they were chosen because a) they used the pricing matrix whereas the Respondent's contractor did not, b) they tendered a fixed price contract whereas the other company did not, and c) they responded in a timely manner whereas the other company sought and were granted extensions of time.
27. Construction work on the additional two flats commenced in October 2020. They say that all the costs associated with this work have been borne in their entirety by the Applicant. There has been no "dilution" of the cost by contributions from the lessees albeit that they have benefitted from some additional facilities such as a new bin store, a bike store, a completely new roof and enhanced insulation. They say there is no overlap between the new development and the original building as demised.
28. The Applicant says that the provisions of the Deed of Variation have been taken into account in seeking the balance of the second demand which has been reduced from £5,061.81 to £3,152.11 to account for any overlap between the items listed in Schedule 4 to the Deed of Variation and the section 20 works contained in the November 2019 Notice.
29. The detail of the Applicant's position with regard to the individual items on the section 20 list in the Deed of Variation are as follows:-

Item 1: Intercom door panel. The Respondent has not been charged anything.

Item 9: Guttering and downpipes. The Respondent has been charged nothing.

Item 10: Flat roof inspection. The Respondent has been charged 25% of the inspection cost but not for any consequent repairs.

Item 15: Electrical installation. The Respondent has been charged a contribution of £1992.50.

Item 18: Entrance hall floor: The Respondent has been charged a contribution of £1518. It has not been charged anything for the decoration of the entrance hall which was what the Deed of Variation related to.

Item 19: Water main. The Respondent has been charged a contribution of £953. The water supply to the new flats is completely separate and no contribution has been sought from the lessees in respect thereof.

30. In response to the Respondent and their surveyor's claim that some of the works contained in the November 2019 section 20 notice have been superseded or rendered impossible by the landlord's development of the new flats the Applicant says the following:

- A) External steps (Item 1): the steps are to be re-built in exactly the same position as the original steps, despite what it says in the architect's plans. The steps need to be replaced for health and safety reasons, the existing steps were "worn out and broken". It was impossible simply to repair the steps. The new handrail has not been charged to the lessees and so the cost of that item has been apportioned to the freeholder.
- B) External lights (item 2 on sec 20 list, and 6 in Deed of Variation Schedule): the original security lights were not working. The re-siting and replacement of these two lights has not been charged to the lessees. Four additional lights, required for additional safety for lessees, have been charged.
- C) Door intercom panel (item 3 on sec 20 list and 7 in Schedule 4 of the Deed: There has been no charge to Flat 4.
- D) Rainwater connection points (item 4 in sec 20 Notice): only one point has been relocated due to the development and the relocation has not been charged to lessees.
- E) Blown and friable bricks (item 5 on sec 20 list): The Applicant denies that this work has been superseded by the development as the brickwork within the new staircore is to remain as a feature and blown bricks are on external elevations. The cost of extra height to scaffolding has not been passed on to lessees.
- F) Pointing (item 6 on sec 20 list): Repointing is necessary to areas of brickwork that will remain exposed.

- G) Rendering and stone detailing (item 7 on sec 20 list and 6 in Schedule 4 of the Deed): the Respondent has not been charged for the rendering and rendering repairs but the remainder of this item refers to retained external surfaces. The stonework was not included in the Schedule 4 list.
- H) Fascia and soffits (item 8 on sec 20 list and 1 in the Deed schedule): the Respondent has not been charged for the removal of the existing rotten fascias and soffits but has been charged for repairs to rotten rafter ends which was not included in Schedule 4 of the Deed.
- I) Guttering and Downpipes (item 9 on the sec 20 list and 1 in the Deed of variation: there has been no charge to the Respondents.
- J) Flat roof inspections (item 10 in sec 20 list and 3 as to roof repairs only in Deed of Variation): there has been no charge to the lessees for the removal of the tower and brickwork but there has been a 25% charge for a structural engineer's report, flat roof inspection, use of temporary restraining straps and removal of loose masonry.
- K) Stairwell and emergency lighting (item 11 in sec 20 list): these works serve the existing common parts and are not affected by the development of the new flats
- L) Stairwell skirting (item 12 on sec 20 list): existing rotten skirting was replaced as it could not be matched. Consequent painting of skirting not charged to the respondent under the Schedule 4 list.
- M) Stairwell handrail (item 13 in sec 20 list): the old handrail was not properly affixed and was a safety risk.
- N) Service riser and meter cupboard (item 14 n sec 20 list and 12 in Deed of Variation): the existing situation was unsatisfactory in several respects and it was cheaper to rebuild than try to repair unsatisfactory material. There is no benefit to the development from these works.
- O) Landlord consumer unit (item 15 on sec 20 list and 11 in Deed of Variation): the Respondent's surveyor has mistakenly reported on the old unit, not the newly installed one. The test certificate, included in the Schedule 4 list in the Deed of Variation, has not been charged to the Respondents.
- P) Common parts carpet (item 16 in sec 20 list): this has been replaced. The Applicant denies that its contractors have dirtied it as the development is entirely separate.
- Q) Common parts decoration (item 17 in sec 20 list and 4 in Deed of Variation): there has been no charge to the Respondents as per the Deed of Variation.

- R) Entrance hall floor (item 18 in sec 20 list): the existing floor was in danger of collapse due to water ingress over time having rotted the timbers. This has been replaced with a concrete block and beam floor.
- S) Water mains (item 19 in sec 20 list): existing water pipes were leaking and in danger of bursting. They have been replaced and the lessees have been charged the cost of this. There is a separate water supply to the two new flats.
31. Exhibited to Mr East's statement is a report and Scott Schedule prepared by Ellis & Partners which is said to support the Applicant's position as set out by Mr East. This is an expert's report and is an attempt to circumvent the fact that the Applicant failed to apply for permission to adduce expert evidence within the timescale laid down in the Tribunal's directions. I have therefore not taken that report into account in my determination in this case. In my view, Mr East is someone with extensive knowledge and experience of property development and management of property and has an intimate knowledge of Wootton Towers and the work being carried out. He has been well able to respond to the Respondents and their surveyor's case without the support of Ellis & Partners' report and I have therefore disregarded it.
32. The Applicant has asked the Tribunal to make an order for costs in its favour against the Respondent. In Tribunal proceedings the only power the Tribunal has to award costs against another party is if that other party has acted unreasonably in bringing, defending or pursuing proceedings before the tribunal (Rule 13 of the Tribunal Rules). I will deal with costs in my determination below.

The Respondent's case

33. The Respondent, having set out the history of this matter has consistently queried whether the Applicant has taken into account the terms of the Deed of Variation in charging it for the works itemised in the section 20 procedure, as now charged pursuant to the November 2019 Notices. The Applicant first denied that it was bound by the Deed of Variation. Although the Applicant's solicitors subsequently corrected this, no adjustment was made to the amount demanded from the Respondent until February 2021.
34. The Applicant's position is set out in the statement of case of Mr Hollis, a former Director of the Respondent and authorised to represent the Respondent, dated 3 March 2021 together with what purports to be an expert report by Bennington green, chartered surveyors dated 1 March 2021. I say "purported expert's report" because it does not comply with Rule 19 of the Tribunal Rules. I have therefore treated this report with caution, recognising that it has been prepared for the Respondent without the usual safeguards that Rule 19 is designed to provide.

35. Mr Hollis compares the November 2019 section 20 items with those in Schedule 4 of the Deed of Variation and asserts that nine items totalling £30,437.56 correspond. It logically follows that one quarter of this amount, namely, £7,609.56 of the £10,000 provided for in the Deed of Variation should be borne by the landlord. However, in his additional submission of 26 March 2021 Mr Hollis says that the whole of the £10,000 landlord's contribution set out in the Deed of Variation should be deducted from the amount claimed leaving £9934.57 as payable. In fact, only £1,909.50 has been allowed. On Mr Hollis's case the Respondent owes nothing towards the second section 20 charge of £5,061 because it would have overpaid the first demand.
36. However, the Respondent's case goes further than that because Mr Hollis alleges that certain of the section 20 demand was unreasonable because the work has been rendered impossible by the development of the new flats or the section 20 works have been superseded in whole or in part by the landlord's development. Referring to Bennington Green's report he says that 4 items on the section 20 list totalling £9787.00 are not capable of being completed due to the development and a further eight items totalling £23,588.50 have been wholly or partially superseded by the development. Next, he says that the landlord should share in the cost of Item 15 as this covers the landlord's supply of electricity and also the new communal areas. With regard to the Entrance Hall Floor he maintains that the damage was caused by water leaks which should have been covered by an insurance claim, that the contractors may have been paid for work to replace water pipes that was not carried out. Finally, if the section 20 works cost is reduced, the amount of the 12% supervision fee will also need to be revised.

Determination

37. As stated in paragraph 24 above, this determination is being carried out under the terms of section 19 of the Act on the basis that the two demands for payment were on-account demands for works to be carried out and the costs were to be incurred. Therefore, I must determine whether at the time the demands were made, they were reasonable bearing in mind the works that the landlord had in contemplation. I am not concerned with the quality of the work that was actually carried out subsequently. If, after receipt of this decision, and completion of the works the Respondent is dissatisfied with the quality of the works it can make an application to the Tribunal supported by appropriate evidence to the effect that it has been charged an unreasonable amount for that quality of work.
38. I have approached this determination in two stages. The first stage is to consider the effect of the Deed of Variation on the amount sought from the Respondent for the section 20 works. I then consider, at the second stage, the affect that the landlord's development of the Property by adding two additional flats has had on the proposed works under

section 20 of the Act (that is, the major works) for which the lessees have been charged.

39. I should say at this stage that Schedule 6 to the lease and in particular paragraph 20 thereof does entitle the landlord to seek from the lessees a payment in advance of expenditure that it incurs in executing its duties under Schedule 7 of the lease, to keep the Property in good repair. This includes the ability to replace items that the landlord is required to maintain.
40. The effect of the Deed of Variation, and in particular Schedule 4 thereto is to require the landlord to do the works set out in Schedule 2 at its own cost up to a figure of £10,000. The list of items is set out in what is termed a section 20 Notice. There is no significance to this nomenclature as no section 20 procedure was put in hand in 2013 when the Deed of Variation was executed, save that it was contemplated that at some stage section 20 consultation would be required for the major works specified. It must also have been contemplated at the time the deed was entered into that the planning application referred to in the deed would be pursued. That would involve significant works to the Property, no doubt involving a considerable amount of disruption to any occupier, if the development were to take place. It would also involve a restatement of the contributions from lessees towards the service charges, and indeed, the document states that as far as Flat 4 is concerned, that contribution would change from one quarter to one-seventh of the costs.
41. It is clear that initially, the effect of the Deed of Variation was not taken into account by the landlord and its managing agent when the initial service charge was claimed from the Respondent because exactly one quarter of the quoted costs for the work was claimed by the invoice of April 2019. Even when the fresh section 20 proceedings were initiated, when the scope of the section 20 works was expanded and a new invoice for the quoted cost was served on the Respondent in March 2020, there was still no allowance for the Deed of Variation in respect of Flat 4. This was not put right until February 2021 when a credit of £1,909.50 was made.
42. The Applicant says that this remedies the situation and that £1,909.50 is an appropriate allowance under the Deed of Variation. The Respondent does not accept this. In answer to a query from me the Respondent says that after taking into account the £10,000 referred to in the Deed of Variation, the section 20 demands should have totalled no more than £9,934.57 and that the Respondent has therefore overpaid by almost £5,000.
43. The Deed of Variation has to be construed as at the date of its execution. In my judgment it is not right to assume the works thought to be necessary in 2013 are the same as those requiring to be carried out in 2020 or 2021. Conversely, some works that were included in Schedule 4 to the Deed of Variation have either not been carried out or

have been superseded by the development works. I am thinking in particular of the repairs to the towers which have been taken away. Further, the Schedule 4 works were not individually costed but a global maximum figure of £10,000 was stated, so one cannot compare the cost of works contemplated in 2013 directly with individual items costed in the major works that are in course of being carried out. Also, the likely cost of the works contemplated by the Deed of Variation will have increased since 2013. In my judgment, therefore, it is not right simply to deduct £10,000 from the current demands to reflect the provisions of the Deed of Variation.

44. I have therefore considered carefully the Applicant's evidence as to how they have arrived at the figure of £1,909.50 which they have, somewhat belatedly, allowed for the Schedule 4 allowance and, taking all things into consideration, I conclude that £1,909.50 is a reasonable sum for the Applicant to have allowed for the Schedule 4 works.

45. I turn now to consider the Respondent's further arguments as to the effect the development works have had on the section 20 costs claimed. I will take each item in turn.

Item 1: external front steps.

I have seen the photographs of these in their current state. They are in a very poor condition. I consider that they do require replacement and that a mere repair would be unsatisfactory or impossible. The lease does provide for the recovery of replacements. The issue as to whether they would be replaced in exactly the same place or in a different place seems to me to be irrelevant. There need to be steps to the front entrance. The cost charged in the section 20 costs is for replacement and I consider that the proposed cost is reasonable for an on-account charge.

Item 2: external lights.

The existing lights do not work and need to be replaced. The fact that these two lights will be replaced in a different position (due to the development works) is immaterial. The cost of the two lights (which is all the Respondent has been charged for) is reasonable.

Item 3: Intercom panel The Respondent has not been charged for this.

Item 4:

Drain connection points. Allowance has been made for the one downpipe referred to by the Respondent's surveyor. The remaining charge is reasonable and payable.

Items 5,6 and 7: brickwork, pointing and rendering/stone detailing.

In the section 20 notice it was said that this work was necessary to prevent water ingress and dampness penetrating through the exterior of the building. As I understand it from the papers, some of the areas in question are to be internalised by the new core staircase for the new development. If that is so, then the need for this work is questionable.

It appears that it is to be carried out now in the internal areas as a cosmetic exercise to improve the appearance of what will be a feature of the new development. That seems to me to be something that should be borne by the freeholder as it will be more attractive to buyers of the new flats. There may, however, still be some external areas that will need to be attended to in order to prevent water penetration. In all the circumstances I consider the best approach to these three items, seeing that the information as to what areas are internal and which external is scant, that the cost of them should not be sought in an advance payment. Once the work has been done and the external areas' costs quantified, it may be legitimate for the landlord to seek to recover the external cost. The parties should endeavour to agree this if possible (they both have surveyors at hand) to avoid further litigation.

Item 8: fascias and soffits.

As I understand it the Respondent has not been charged for the removal of these items, only for repair to rotten rafter ends, which is perfectly reasonable.

Item 9 guttering:

There has been no charge to the Respondent.

Item 10 Flat roof inspection:

It is debateable whether an inspection is "works to a building" and therefore does not come within section 20 at all. However, it would still be a service charge item and it is reasonable for an inspection to be charged as part of the on-account costs.

Item 11: Stairwell and emergency lighting.

The Respondent's surveyor's comments on this are to do with the quality of the work and so, as previously mentioned, this is not something for this determination. It is to be hoped that the Applicant will take the surveyor's comments on board and if they are found to be legitimate, matters can be remedied without further action being necessary.

Item 12 Stairwell skirting:

Again the Respondent's surveyor has commented on the quality of the work, which will not be addressed in this decision. It is to be hoped that if the Applicant accepts these comments that matters will be rectified without further ado.

Item 13 Stairwell handrail:

The Respondent's surveyors make no comment relevant to this determination.

Item 14 Service riser and meter cupboard:

The Respondent's surveyor makes no relevant comment for this determination.

Item 15 Consumer unit etc:

Again the Respondent's surveyor makes no comment relevant to this determination. It is a reasonable cost for inclusion in an on-account demand.

Item 16 Common parts carpet:

It was clearly appropriate to replace the old carpet. The only complaint about this is that it has become dirty due to dust from the development. Clearly, the cost was appropriate to be included in the demand. Under the lease the landlord is responsible for cleaning the common parts. I suggest that once the development works are complete that a deep clean is effected. Whether or not it would be reasonable for the landlord to seek recovery of the cost from the lessees is a matter that would have to be considered if necessary once the clean has been carried out and a future service charge levied. It is to be hoped that this could be resolved without litigation. If it came to a future Tribunal, it may well be the case that the Tribunal would find that, even if the workmen on the development have no need to access this part of the building, the general dust and dirt generated by the development of this nature might well result in it being brought into the part where this carpet is laid. But that would be entirely a matter for any future Tribunal.

Item 17 Common parts decoration:

The Respondents have not been charged for this.

Item 18: Entrance hall floor.

There is insufficient evidence to show that this repair was brought about by a leak or leaks which should have been part of an insurance claim. The rot to the timbers would seem to suggest that the problem had been deteriorating over a number of years. The Respondent's surveyor does not suggest that the work was not necessary but that it was effected too early in the process of the development. This is not an argument for the cost not to be included in the on-account demand. If, when all the works are completed it transpires that some costs have been incurred unnecessarily due to the floor being repaired too soon then that is something that can be considered at some future time under a fresh application.

Item 19: Water mains work

The Respondent's surveyor makes no relevant comment for this determination. Whether or not the work has been carried out at the time of this determination has no bearing on whether it was reasonable to include the cost of the proposed works under the on-account charge.

46. The Respondent's surveyor questions the section 20 procedure as carried out by the Applicant with regard to the choice of Blumariin to carry out the works as opposed to the Respondent's choice of contractor, notwithstanding that Blumariin were more expensive. The Applicant has given its response to this. They say that the difference was marginal but that Blumariin gave a fixed price, they provided the cost matrix requested by the Applicant and responded within the stated time period, none of which the Respondent's choice of contractor

did. It seems to me that these are extremely good reasons for the choice made and I do not find the procedure flawed for that reason.

Conclusion

47. I find that by its demand of 15 April 2020 the Applicant had taken appropriate account of the terms of the Deed of Variation dated 15 July 2013.

48. A reasonable sum to seek on account of the service charge to be incurred for the major works in February 2019 and November 2019 would have been a total of £13,068.94. This is calculated as follows:

Feb 2019 invoice: £14,872.96
Plus Feb 2021 invoice £3152.11
Less items 5,6 and 7 totalling one quarter of £12,697
Less 12% of items 5,6 and 7 (for supervision)

49. This means that the Respondent, having already paid £14,872.96 was in credit by £1,782.13 as a result of the on-account demands. If, however, the Applicant can show, after all the works have been completed, that there was an element of items 5,6 and 7 which remain external then a fresh charge for that area of the work can be made. I recommend that it be supported by transparent calculations which, if sufficiently significant, might justify input from surveyors.

Costs

50. As stated above the Applicants' solicitors have sought an order for costs but it is not clear whether that application is made under Rule 13 of the Tribunal Rules or under the County Court Acts. There is no provision in the lease that would entitle the Applicant to seek contractual costs.

51. The Tribunal has only limited jurisdiction to order a party to pay costs to another party to the proceedings. That jurisdiction is conferred by Rule 13(1) of the Rules. This states as follows:-

“ The Tribunal may make an order in respect of costs only-

a) [not applicable]

b) If a person has acted unreasonably in bringing, defending or conducting proceedings in-

(i) [not applicable]

(ii) a residential property case

52. Thus, proceedings in residential property cases (of which this is one) are usually cost-free unless a party has acted unreasonably.

53. Guidance as to how the Tribunal should approach cases involving applications for costs was given by the Upper Tribunal in the case of *Willow Court Management Company (1985) Limited v Alexander and others [2016] UKUT 0290 (LC)*. The Upper Tribunal said that there should be a three stage approach. The first stage is for the Tribunal to decide objectively whether the conduct was unreasonable. Only if the Tribunal decided that it was objectively unreasonable should the Tribunal proceed to decide whether it ought to exercise its discretion to order costs. The third stage is to determine the amount of costs to be ordered, again using its discretion in all the circumstances.
54. The Upper Tribunal considered the meaning of unreasonable conduct when the first stage of the process is applied. It approved an earlier dictum which held that it “includes conduct which is vexatious and designed to harass the other side rather than advance the resolution of the case.” Put another way, is there a reasonable explanation of the conduct complained of?
55. Whilst acknowledging that it is not possible to be prescriptive of the sort of behaviour which might satisfy that test, the Upper Tribunal said that the mere fact that a party loses the case does not amount to unreasonable conduct. It also disagreed with the proposition that failure to prepare adequately for a hearing, failure to adduce proper evidence in support of a case, a failure to state a case clearly or seeking a wholly unrealistic or unachievable outcome would amount to unreasonable conduct. The standard should not be set at an unrealistic level.
56. I do not find that the Respondent has acted unreasonably in these proceedings. It has succeeded in achieving a reduction in the amount sought by the Applicant and has conducted the proceedings perfectly well in compliance with Directions. That being the case, the Applicant fails at the first stage of the Willow Court process.
57. If the Applicant’s solicitors were intending to seek costs under the County Court Acts, it is important that the County Court jurisdiction is kept quite separate from the Tribunal jurisdiction and the earlier Directions made it clear that the case would proceed under the Tribunal’s jurisdiction. If the Applicant’s solicitors wish to make an application under the County Court jurisdiction (and assuming that the County Court proceedings have not been concluded), they will have to do so separately. As I have already intimated, it does not seem as though the original County Court proceedings have yet been disposed of, although they ought now to be. I would only venture to point out that costs in the County Court usually follow the event, and, as they Applicant has not succeeded in the proceedings, it would no doubt think hard before progressing along those lines.
58. As for the Respondents’ application under section 20C of the Act, this is a matter entirely within the discretion of the Tribunal. Although success in the proceedings is not the only criterion, it is an important

one. The Respondent has achieved some success in the proceedings, albeit perhaps not as much as it would have hoped for. Nevertheless, it is sufficient for the Tribunal to exercise its discretion in favour of the Respondent and an order under section 20C is hereby made. That means that the landlord's costs of these proceedings are not to be regarded as relevant costs which may be claimed in any future service charges rendered by the landlord.

59. I have already noted that there is no provision in the lease to enable the landlord to claim contractual costs in respect of these proceedings. However, had there been, it would have been appropriate for the Tribunal to make an order under paragraph 5A of Schedule 11 to the 2002 Act.

Dated the 29th March 2021

Judge D. Agnew.

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 by email to rpsouthern@justice.gov.uk 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.

