FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AY/LSC/2020/0387**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**Flat 20 Raisbeck Court, 24 Rosendale Road, London SE21 8DR**
Applicant	**:**	**Ms. Sandra Pini**
Representative	**:**	**In Person assisted by an interpreter**
Respondent	**:**	**Rosendale Properties Ltd.**
Representative	**:**	**Edward Blakeney (Counsel)**
Type of application	**:**	**For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985**
Tribunal members	**:**	**Mr A Harris LLM FRICS FCIArb** **Mr C Gowman BSc MCIEH**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**15 June 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 315 pages, the contents of which the tribunal have noted.

Decisions of the tribunal

(1) The tribunal determines Interim service charges of £500 for each of the years commencing 25 June 2019 and 25 June 2020 are payable.

(2) The tribunal determines that Contributions to the reserve fund of £500 for each of the years commencing 25 June 2019 and 25 June 2020

(3) The Tribunal determines that the lessees proportion of the cost of major works to the rear elevation in the sum of £7995.38 dated 6 December 2019 and works to the front elevation in the sum of £8488.13 dated 22 June 2020 is payable.

(4) The tribunal makes the determinations as set out under the various headings in this Decision.

(5) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of service charges and administration charges payable by the Applicant in respect of the service charge years 2019 and 2020.

The hearing

2. The Applicant appeared in person assisted by an interpreter at the hearing. The Respondent was represented by Edward Blakeney of counsel who had prepared a skeleton argument and called two witnesses, Mr R Balmforth FRICS and Mr P McCarthy AssocRICS, from Stapleton Long, the managing agents.

The background

3. The property which is the subject of this application is a four-storey mid-terrace house converted into 4 flats. The building is of traditional construction being built of brick with a rendered finish at the rear. It was common ground between the parties that the building was in a poor state of repair due to a lack of maintenance over many years.

4. Photographs of the building were provided in the hearing bundle. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

5. The Applicant holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate. The leases are drafted in a very basic form with no proper provision for service charges and require payment of costs incurred by the landlord on demand but also provide that, if substantial works are necessary, the lessee will pay such sum in advance and on account of the lessees proportion of the cost as the landlord or its agents at their discretion shall reasonably specify.

6. In response to a question from the tribunal, Mr Balmforth stated that they operated a conventional form of annual accounting with an interim service charge being collected at the start of the year and an end of year account being delivered accounting for any shortfall or surplus.

The issues

7. At the start of the hearing the parties identified the relevant issues for determination as follows:

   (i) The payability and/or reasonableness of interim service charges for the years 25 June 2019 to 24 June 2020 and 25 June 2020 to 24 June 2021 of £500 for each year.

   (ii) The payability and/or reasonableness of contributions to the reserve fund of £500 for each of the years 25 June 2019 to 24 June 2020 and 25 June 2020 to 24 June 2021.

   (iii) The payability and/or reasonableness of a contribution towards major works to the rear elevation of the building of £7995.38

(iv) The payability and/or reasonableness of a contribution towards major works to the front elevation of the building of £8488.13.

8. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

Interim service charges of £500 for each of the years commencing 25 June 2019 and 25 June 2020

9. The amounts claimed of £500 for each year were accepted by the applicant at the hearing as being payable.

Contributions to the reserve fund of £500 for each of the years commencing 25 June 2019 and 25 June 2020

10. The amounts claimed of £500 for each year were accepted by the applicant at the hearing as being payable.

Service charge item & amount claimed

11. The lessees proportion of the cost of major works to the rear elevation in the sum of £7995.38 dated 6 December 2019 and works to the front elevation in the sum of £8488.13 dated 22 June 2020.

The tribunal's decision

12. The tribunal determines that the amounts payable in respect of the major works are £7995.38 and £8488.13.

Reasons for the tribunal's decision

13. Although the amounts claimed arise in different service charge years the requests for payment were only 6 months apart. It is however convenient to take both together as the arguments made by the Applicant apply to both charges.

The Applicant's case

14. The Applicant's case is based on there having been no maintenance having been carried out for many years resulting in the building being in a poor state of repair. As a consequence of the failure by the current and previous freeholder to properly maintain the building the Applicant

argues it is not reasonable for the leaseholders to have to pay the cost of repairs and that these should be the responsibility of the freeholder.

15. The current freeholder bought the building in 2016 and should have been aware of its condition at the time of purchase. The need for major repairs is not disputed by the Applicant but the works should be staggered over a sensible period of time.

16. Service charges were collected between 2016 and 2017 to start a building reserve fund for maintenance and some temporary repairs were carried out by insertion of timber frames in window openings to prevent rendering falling off. The then managing agent, Mark Taylor Ltd commenced a section 20 consultation in 2017 for repairs to the whole of the building despite assuring the Applicant that works would be staggered. One flat owner did not cooperate resulting in no works being carried out and as a result of the disrepair water damage was occurring inside the Applicant's flat. Mark Taylor Ltd ceased management in 2018 for unknown reasons and the Applicant does not know what happened to any reserve funds which were held.

17. In March 2019 a new section 20 consultation was started for works to the rear elevation. After questioning the managing agents, the tribunal is satisfied that the section 20 consultation was properly carried out.

18. In response to the notice the Applicant stated that the works needed to be staggered over a sensible period of time and repair of the entire rear of the building at once will be too expensive. In particular the damaged rendering needs to be removed and water leaks fixed. Redecoration is not necessary at this stage. A manageable contribution per leaseholder should be discussed before entering the quotation stage and this has not been offered.

19. The Applicant obtained an independent survey which suggested that the lack of maintenance, at least 15 years but could be more. The report also commented that the poor condition of the building could affect the validity of the buildings insurance policy.

20. In the Applicant's view only a fair routine maintenance contribution can reasonably be expected from the leaseholders. The financial burden on leaseholders to repair under a one-year service charge is beyond appropriate.

21. In response to questions the Applicant stated that in her view a reasonable charge for the building would be £8000 per annum i.e. £2000 for each flat

22. The Applicant stated that when she bought the flat she was told by the selling agent that no renovation was planned and while work could be

expected in the future she anticipated it would be conducted over a period of time and financed from the reserve fund. She agreed that she would be paying but within a reasonable framework.

The Respondent's case

23. There is no dispute that the building requires significant repair. There is also no dispute regarding the scope of works proposed and the dispute is about timing and payment.

24. Evidence was given by Mr Richard Balmforth FRICS who set out the steps his firm had taken after being appointed as agents in August 2018. After an initial inspection in September 2018 concerns were raised about cracks in the rear elevation and the need for major works was identified. Stage one section 20 notices were served on the leaseholders on 5 March 2019. Observations were invited from the leaseholders and the Applicant did not raise any observations on the proposed scope of the work but objected to the landlord's intention to undertake all of the works at the same time and she requested that the works could be stage and painting deferred to a later date.

25. Mr Balmforth stated he considered the representations from the Applicant but remained of the view that the proposed works were necessary and reasonable. He explained that the setup costs and scaffolding meant that it was more cost-effective to carry out work at the same time and that splitting works would increase the costs. Tenders were received and a stage II section 20 notice was issued on 4 November 2019 setting out the observations received and reasons for not undertaking the work in stages.

26. The need for works to the front elevations and site boundaries was also identified following an inspection in August 2019 a detailed specification was prepared and set out in stage one section 20 notices issued on 10 March 2020. Again he considers that all of the proposed works are necessary and reasonable. No observations were received and the most competitive tender came from P&H who were also the preferred contractor for the rear elevation works. It was therefore propose they would carry out the work at the same time as the rear elevation. This would save money on the setup costs for the works.

27. Mr Balmforth agreed with the comments in the Applicant surveyors report about the general condition of the building. He did not agree with at the time of drawdown. Guidance budget prepared using an algorithm. He also commented that the estimates received were lower than the quotations produced by the previous agents and at that time the applicant share of the major works exceeded £27,000.

28. Mr Balmforth's evidence was supported by Mr McCarthy who drew attention to an exchange of emails with the previous agent, Taylors, which stated the applicant had taken out a mortgage with Barclays which is consistent with the charge registered on the leasehold title register. In response the Applicant stated that it was not a mortgage drawn down, but was a facility which she could draw on subject to satisfying the bank on her creditworthiness at the time of drawdown.

29. In his submissions, Mr Blakeney stated that as a matter of principle it is possible for historic neglect to affect sums payable in respect of regular service charges or major works. Such neglect does not affect the reasonableness of works if there is substantial disrepair to remedy and where the reasonableness of cost is assessed in the usual way. Historic neglect takes effect as a set off as the neglect amounts to a historic breach of the landlord's repairing covenant giving rise to a claim in damages in respect of the breach which can be offset against service charges demanded.

30. Mr Blakeney drew the attention of the tribunal to *Daejan Properties Ltd v Griffin [2014] UKUT 206 (LC)* where the Upper Tribunal said

"The only route by which an allegation of historic neglect may provide a defence to a claim for service charges is if it can be shown that, but for a failure by the landlord to make good a defect at the time required by its covenant, part of the cost eventually incurred in remedying that defect, or the whole of the cost of remedying consequential defects, would have been avoided. In those circumstances the tenant to whom the repairing obligation was owed has a claim in damages for breach of covenant, and that claim may be set off against the same tenant's liability to contribute through the service charge to the cost of the remedial work."

31. The case makes the point that the tenant must prove that the cost of the works which are eventually carried out has been increased by reason of the historic neglect and it is not enough to complain that the cost of works is now substantial. There is no evidence that the cost has been increased by any historic neglect and therefore no basis to reduce the sums demanded for major works.

32. In response to the Applicant's suggestion that routine external maintenance would be £5000-£8000 per year and she would be prepared to pay up to 2000 per year, as she has owned the flats in September 2015 and only paid £930 in service charges, on her own case

should be willing to pay up to approximately £12,000 during her period of ownership.

33. The applicant has also stated that her predecessor in title had confirmed no major external repairs have been done while he owned the flat from 2006 to 2015 and therefore on the £2000 per year principle the owners of the flat should have paid up to £30,000 in service charges but in practice very little has been paid. This shows that the owners of the subject flat have not been overcharged.

34. If the tribunal were to accept as a matter of principle that the historic neglect has increased the cost of necessary major works and or given rise to some other set off that has not been quantified in any way and the respondent submits it is impossible for the tribunal to give effect to any set off in those circumstances.

35. The applicant's own survey report suggests a figure £116,500 plus VAT to repair the building would be more appropriate. This appears to support The Applicant's Argument¶ that due to historic neglect the mere fact that the estimates are higher than annual maintenance costs renders the amount unreasonable. This is without merit. The Respondent submits there is no basis on the evidence before the tribunal for major works to be deemed unreasonable and reduced in amount.

36. On the question of whether the works should be phased, Mr Blakeney phrases the question slightly differently in terms of spreading the service charge over more than one year. He accepted as possible for the tribunal to do that and argues that the 2 invoices were spread over 2 years with the rear elevation in 2019 and the front elevation contribution in 2020. While that may be so the invoices were in fact 6 months apart.

37. However, this issue was discussed by the Upper Tribunal in *Garside v RFYC Ltd [2011] UKUT 367 (LC)*

16… In many cases financial impact could no doubt be considered in broad terms by reference to the amount of service charge being demanded having regard to the nature and location of the property and as compared with the amount demanded in previous years … If a lessee wishes to put forward a case of particular hardship by reference to their personal circumstances they may do so, though the weight to be attached to such an argument would depend on the cogency of the evidence to support it.

17. However, other considerations will no doubt be relevant and will need to be weighed in the balance when deciding whether major works should be phased and the cost spread over a longer period of time. Where, as here, the lessees do not all agree and some wish the works to be carried out in one contract as soon as possible that should be taken into account…

18. The degree of disrepair and the urgency of the work or the extent to which it can wait are likely to be relevant. These considerations may be important in the context of the present case where there has been a history of neglect, some work at least is urgently required … Another relevant consideration may be the extent of any increase in the total cost of the works if carried out in phases as opposed to in one contract…

19. These are only examples of factors that may or may not be relevant and there may be others to take into account. All are factual issues and matters of judgment for the LVT to weigh up against the hardship of substantial increased costs when deciding on the evidence before it whether the service charge costs are reasonably incurred…

20. It is important to make clear that liability to pay service charges cannot be avoided simply on the grounds of hardship, even if extreme. If repair work is reasonably required at a particular time, carried out at a reasonable cost and to a reasonable standard and the cost of it is recoverable pursuant to the relevant lease then the lessee cannot escape liability to pay by pleading poverty…"

38. Mr Blakeney goes on to argue that service charges have been historically low for a property of this type. The Applicant has not put forward any evidence of hardship or her personal circumstances. Additionally, the applicant wants the works carried out immediately and the actual case is that the cost should be borne by the Respondent not that they should not be incurred at all. Accordingly, the Respondent submits that there is no basis to hold that the works and payments should be staggered. The Applicant has produced no evidence of an inability to pay and the fact that she can raise a mortgage and the

existing charge on the flat suggests the opposite. Both parties agree that the works are urgent and must be seen to immediately.

The tribunal's decision

39. There is no dispute that the building is in need of urgent repair or as to the overall scope of the works. The tribunal agrees with that assessment based on the evidence before it and confirmed by the Applicant's own survey report.

40. The tribunal also accepts the evidence of Mr Balmforth that the works need to be carried out immediately, and while it would be possible to split the front and rear elevation works, this would increase the cost due to the need to set up the site twice. The estimate for the front elevation works, being the later estimate was prepared on the basis that all of the works would be done together.

41. The tribunal notes that the building is in disrepair due to the failure of successive freeholders to properly manage the building and also that even 5 years after purchase, a reserve fund has not been established towards the cost of these works.

42. While the tribunal has some sympathy with the position of the leaseholders of having to find a substantial sum of money in a relatively short period, it has no evidence before it as to the condition of the building when the flat was purchased or of whether the condition at that time was reflected in the purchase price. The tribunal makes no finding on this. However, it does note that over a substantial number of years no service charge payments have been made and considers that a prudent leaseholder would have made provision against future expenditure, and indeed the Applicant confirmed that she had done so, but not at a sufficient level to fund these works.

43. The tribunal has considered the factors set out in the Garside decision quoted above and accepts the evidence that the works are urgent and would cost more if phased.

44. On balance therefore the tribunal finds that the works are necessary and that it is reasonable to carry them out in the manner proposed. It also finds that the costs are reasonable and payable based on the evidence before it.

Administration charges

45. The tribunal is of the view that taking legal action at the point when it was commenced was unduly aggressive as the previous 3 months had been spent in the first lock down due to Covid. There is no evidence of an attempt to discuss ability to pay or agree a timescale. The tribunal

has therefore decided to exercise its discretion and disallow recovery of costs under Schedule 11 of the 2002 Act.

Application under s.20C and refund of fees

46. At the end of the hearing, the Applicant made an application for a refund of the fees that she had paid in respect of the application/ hearing[1]. Having heard the submissions from the parties and taking into account the determinations above, the tribunal orders the Respondent to refund any fees paid by the Applicant within 28 days of the date of this decision.

47. In the application form the Applicant applied for an order under section 20C of the 1985 Act. Notwithstanding that the tribunal finds that the works are necessary, the tribunal considers the application was reasonably brought. Having heard the submissions from the parties and taking into account the determinations above, the tribunal determines that it is just and equitable in the circumstances of the extensive delays and failures to establish a reserve fund by successive freeholders for an order to be made under section 20C of the 1985 Act, so that the Respondent may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

Name: A Harris **Date:** 15 June 2021

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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 regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

[1] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

If the application is not made within the 28-day time limit, such 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 such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. 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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).