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

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| **Case Reference** | **:** | CHI/00HD/LSC/2022/0064 |
| **Property** | **:** | 37 Gallivan Close, Little Stoke, Bristol BS34 6RW |
| **Applicant** | **:** | Emma Gerrish and Michael Gerrish |
| **Respondent** | **:** | Clay Croft Management Limited |
| **Type of Application** | **:** | Sections 27A and 19 of the Landlord and Tenant Act 1985 (the Act); Section 20C of the Act and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (CLARA) |
| **Tribunal Members** | **:** | Judge C A Rai (Chairman) |
| **Date type and venue of Hearing** | **:** | 29 November 2022<br>Paper determination without a hearing |
| **Date of Decision** | **:** | 13 December 2022 |

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**DECISION**

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## Decision

**1. The Tribunal finds that the Applicant is liable to pay the service charges of £7,692.30 demanded by the Respondent in 2021 "on account" of the costs of the major works.**

**2. The Tribunal has invited the parties to make further representations in relation to the applications under section 20C of the Act and paragraph 5A of Schedule 11 of CLARA.**

**3. The reasons for the Tribunal's decision are set out below.**

## Background

1. The Applicant made three applications to the Tribunal dated 8 June 2022. The section 27A application referred to the Applicant's liability to pay the sum of £7,692.30 demanded on 19 July 2021 on account of service charges to fund major works following a consultation process undertaken by HMLPM Limited (HML) the managing agents for twelve flats at Clay Croft, 38 – 41 Gallivan Close, Little Stoke, Bristol. BS34 6RW. The other two application are for orders under section 20C of the Act and paragraph 5A of schedule 11 to CLARA. The Respondent is Clay Croft Management Limited.

2. In its application to the Tribunal the Applicant described itself as the leaseholder of the Property, 37 Gallivan Close, but provided no other evidence or information about its ownership.

3. The Application bundle contained a copy of the lease dated 31 March 1994 made between Birse Homes Limited (1) Wendy Hilda Godfrey (2) the Respondent (3) (the Lease) of the Property, a flat within a block of twelve purpose built flats constructed in 1993/1994. It is a tripartite lease made between the landlord, tenant and the Respondent. The Lease demised the Property to the tenant for a term of 999 years at a peppercorn rent from 1 January 1993.

4. The Tribunal has made three assumptions. Firstly, in the absence of contrary submissions, it has assumed that the Lease in a similar form to the leases of the other flats within the block. Secondly it has assumed that the Respondent is a leaseholders' management company as the Lease requires that on every transfer of the lease, the transferee must apply to become a member of the Respondent (Paragraph 8 of the Fourth Schedule to the Lease) [58, 174]. Thirdly it has assumed, although neither party confirmed this that the Respondent is the current freeholder.

5. Following receipt of the application, Mr W H Gater, Regional Surveyor, issued directions dated 18 July 2022 that the application was suitable for determination without a hearing and the Tribunal would not inspect the Property. Neither party subsequently objected to the directions.

6. On receipt of the hearing bundle the Tribunal reviewed the documents and confirmed that the application would be determined without a hearing. The first bundle provided to the Tribunal was corrupted. Subsequently Tribunal received another copy of the bundle in two parts, the first part (117 pages)

comprised the Respondent's documents and the second part (244 pages) the Applicant's documents. Numbers in square brackets refer to the pdf page numbers of the pages in each bundle; a second number refers to the electronically marked page numbers in the second bundle.

7. HML, sent a notice of intention dated 29 June 2018 to undertake works, identified as replacement of windows and Sky installation. The notice was addressed to "all the lessees at Gallivan Close" [87, 203] and accompanied by a letter addressed to the Applicant which explained why the notice had been issued, stated the reserves were likely to be insufficient to fund the works and that the cost of the proposed works, which would be split between the leaseholders, would result in contributions of more than £250 each. The Applicant was given until 8 August 2018 to make observations and was invited to nominate a contractor. That letter advised the Applicant that following the expiry of the notice, HML would issue a schedule of works and formal tender to any nominated contractor and to the contractors on its approved list (of contractors), inviting tenders.

8. The notice stated that a Schedule of Estimates would be issued with at least two quotations, a summary of any comments received and information about where the tender specifications could be inspected.

9. HML sent a further letter, dated 7 November 2018, which referred to it enclosing "notices of intention". No copy of the notice(s), which the Tribunal has assumed were sent with the letter, are in the bundles, but the letter referred to "the window replacement, rainwater goods, minor roof repairs and external redecoration at Gallivan Close Little Stoke Bristol BS34 6RW". The Tribunal has assumed that the notice was in a similar form to the earlier notice save and expect for the expanded and changed description of the works. The expiry date for the second notice was Friday 12 December 2018 [128, 244].

10. HML prepared a Specification and Schedule of Works for "External refurbishment window replacement and roof repairs" at Clay Croft 38 – 41 Gallivan Close dated 24 February 2019 [130, 246].

11. Five tenders were received from different contractors. Although not all the copies of the tenders in the bundles are dated, these would appear to have been received between February 2019 and 24 June 2020. At the end of July 2020 Peter Davies, assumed by the Tribunal to be one of the current leaseholders, and member of the Respondent, sent an email to Hilary Portch of HML, with a photograph, reporting that the brick work on the top elevation of the building was potentially dangerous [105].

12. On 26 August 2020 Notice of the Annual General Meeting of the Respondent (AGM) was sent to the Applicant, presumably in common with all the other leaseholders. The letter in the bundle stated that an agenda, service charge accounts, minutes from the last AGM and a nomination form and directors consent to act form were enclosed (although these are not in the bundle) [94].

13. The Respondent has provided a copy of a note of the AGM which took place on 21 September 2020, which recorded that a representative from Shaws

and Company Chartered Surveyors attended. The Minutes (which are in the bundle) recorded that PD (assumed to be Peter Davies) asked for HML to collect the levy from each leaseholder over a period of 10 months. "Clay Croft Management Company agreed this decision, due to leaseholders unable to contribute within the normal 14 days from the date of the demand sent" [95]. The minutes of the AGM (21 September 2020) recorded the attendees as Hilary Portch (HML) and Ben Hudnott (BH) (Shaw and Company) and three named leaseholders (including Peter Davies). It was also stated that BH explained the section 20 procedure, the costs and the specification and also discussed the dangerous brickwork identified by PD. Under AOB there is a note that "leaseholders who has replaced their window to provide their BBA certificate and guarantee".

14. On 12 March 2021 HML sent a letter to the Applicant about the section 20 consultation. It stated "Further to our Notices of Intention which were issued on 7th November 2018 please find enclosed a Notice of Statements and Estimates. You will note from the enclosed Notice that it is the intention of the Management Company to appoint Westside Contracting Ltd to undertake the proposed works". The letter also stated that additional funding would need to be raised for the works to proceed. The cost was estimated to be "an additional" £7,700 per leaseholder. The letter stated "Demands will be issued upon expiry of the enclosed Notice. Once all funds have been received, we will liaise with the contractor to agree a suitable start date of the works and will notify you of this date accordingly" [102].

15. The notice listed five estimates from different contractors ranging between £61,250 + VAT and £91,812.00 + VAT. It stated that HML would send copies of the tender document by email on request and that the works would include:-
    (1) Minor roof repairs,
    (2) Replacement of softwood windows with UPVC double glazed units (including French doors),
    (3) Renewal of all rainwater goods, possibly over-clad fascia's (sic) with UPVC,
    (4) Replacement cladding to entrance canopies with UPVC product,
    (5) Redecoration of all previously painted/stained external elements, and
    (6) Various joinery repairs as necessary.

16. The notice also stated that it was intended to appoint Westside Contracting and set out the expected total cost of this proposal which was £69,930 plus HML Contract Administration Fee @10% of £6,993 which together with the VAT would total £92,307.60 [102]. The leaseholders were invited to make observations by 16 April 2021 [103].

17. A demand for payment of £7,692.30, dated 19 July 2021 was sent to the Applicant [107] by HML. It was accompanied by a letter stating that the amount "re-charged to your account today is payable over 10 months. That was clarified further by a further statement:- "It would be 10x payments of £769.23 from July 2021 to April 2022" [109].

18. A copy of an email from Hilary Portch (HML), the date of which is not clear, records a conversation with Mrs Gerrish (although the email is addressed to

Mr and Mrs Garrett), and stated "Further to our conversation regarding replacing the windows, to replace any windows at Clay Croft you would require a LTA [licence to alter]. As you have already replaced the windows without permission from Clay Croft Management Company Limited are in breach of the terms of your lease (sic). You informed me, that you will not be paying the required amount towards the cost of the Section 20 works, The RMC can take action against you. Clay Croft Management Company may remove the new windows when all the other windows are replaced" [111].

## **The Applicant's case**

19. The Applicant accepted and agreed that the section 20 works are required [32,244]. However, it has submitted that it is not liable to pay the sum of £7,692.30, its share of the costs of the proposed major works demanded from it by the Respondent in July 2021.

20. The Applicant has complained about the length of the consultation process, suggesting that it has not been followed correctly and objected to being pursued for outstanding costs when the total cost of the works is still unknown. It said that it has not received replies to its concerns raised with the managing agents and that it received no response when it requested that the consultation process be started again.

21. The bundle includes copies of letters dated 24 May 2022 from the Respondent to Katie Langley and Hilary Portch at HML which stated that Mrs Gerrish believed (after taking legal advice) that the section 20 process was not followed correctly and that it should be started again. The Applicant stated that it had made no payments for the reasons set out in the letter. It recorded that other service charges had been paid in full. The Applicant claimed that it had not received any reply to emails sent to HML between April 2021 and 22 July 2021.

22. The Applicant set out six specific questions for the Tribunal, in the application which are summarised below:

    (1) The Section 20 process was started on 7 November 2018 and has not been completed. Is the consultation process valid and should leaseholders contributions be reduced "given that the works now required are likely to be more expensive due to further deterioration of the building?"
    (2) Following the Respondent's notification that the second most expensive contractor would be appointed invoices were issued but no formal confirmation of the appointment was received although "we were sent invoices for payment on 19th July 2021 based on this contractor's quotation". Is it correct to assume therefore that this contractor has been appointed?
    (3) If so, the leaseholders have not received the third notice to explain the reasons for the appointment. Does this invalidate the Section 20 process which should limit the leaseholders' contributions?
    (4) Since part of the major works included replacement of the windows in all the flats and the Applicant has already replaced its windows

should its share of the final costs of the works be reduced to take account of the cost of the replacement windows?

(5) Due to non-payment of the charges in dispute the managing agents are adding additional fees to the service charge account and commencing debt collection proceedings. Can the managing agents reasonably carry out this process if the section 20 process was not followed correctly and "that we do not know the total costs involved now, due to the contractor having to re-quote for the works?

(6) The Applicant pays a quarterly service charge, separately from the disputed section 20 works charge. These have been paid but the credits are being allocated against the outstanding section 20 demand which means that the quarterly service charge liability is now outstanding. Are the managing agents allowed to do this?

23. In its statement of case the Applicant also submitted that "Due to the long time-frame of approx 3.5 years we believe, that at the very least, leaseholders' contributions should be significantly reduced given the works now required are likely to be more expensive due to further deterioration of the building and increased costs of labour and materials" [78, 194]. The correspondence in the bundle showed that it questioned the validity of the section 20 process before it made this application because none of the contractors who originally quoted are willing to carry out the works in accordance with those quotations. It said it therefore believed that the process should be started again because it took longer than it should have done for the quotations to be obtained and shared with it and the other leaseholders [116, 232]. It submitted that the Respondent's managing agents fees for supervising the works should be waived "or at least significantly reduced".

24. The Applicant complained that the Respondent had indicated that it would accept the Westside tender, which was not the lowest, without giving any reasons.

25. The Applicant has also claimed that it is entitled to "set off" of the costs it incurred in replacing the windows in the Property (£1,896).

26. Finally, the Applicant submitted that the Respondent had ignored its application for mediation.

## The Respondent's case

27. HML responded to the Application on behalf of the Applicant. It explained the person within its organisation with responsibility for the dealing with the application had been unwell which was the reason for it having missed the deadlines for submission of evidence.

28. Ms Portch, who has the conduct of the matter on behalf of HML, stated that although the "Major Works Team" dealt with the section 20 works it does not manage or deal with tribunals. She has provided a timeline setting out the dates on which notices were sent out, estimates were received, and leaseholders were updated.

29. The Respondent submitted that the Applicant had previously complained to HML following its unsuccessful attempts to sell the Property in October 2020 [216, 332] at which time it alleged that Ms Portch was unhelpful. The Respondent claimed that the Applicant refused to pay for a Management Pack [216, 332]. In an internal email to Theo DeLemos dated 22 October 2020, Ms Portch said that the Applicant was aware of the section 20 notice and that all leaseholders would be required to contribute between £6, 000 - £8,000 and had told her it was selling the Property because it was unable to afford the repairs

30. Ms Portch submitted that the Covid-19 pandemic lockdown resulted in all five of the contractors who originally responded to the tender exercise subsequently reviewing and withdrawing their tenders.

31. HML had confirmed, in subsequent written communication with the leaseholders, that additional service charge contributions would be needed to fund the works. The leaseholders were given ten months to pay their contributions. This was discussed at the AGM and the decision is recorded in the minutes. Only three of the twelve leaseholders at the Property attended the AGM; the Applicant did not attend.

32. Following the demand for payment of the additional service charges, the Applicant telephoned HML and told it that it would replace the windows in the Property and would not be paying its contribution towards the cost of the major works.

33. The Respondent submitted that the delay to starting the works was in part caused by insufficient funds being available. The request by the leaseholders, made at the AGM, to spread the service charge payments for the works over a ten month period delayed the appointment of a contractor That was why it had become necessary to obtain updated quotations. The Applicant has not contributed any money towards the cost of the section 20 works. Therefore, there are still insufficient funds in the service charge account to enable HML to appoint a contractor and start the works.

34. No third notice (explaining why the appointment was made) was sent to any leaseholder because Westside Contracting (the chosen contractor) withdrew.

35. The Respondent also suggested that that the Applicant had always intended to replace the windows in its Property despite being aware of the section 20 consultation. It said that windows were replaced without its permission and during the period it was chasing contributions from the Applicant to fund the works [244, 360].

36. A copy of a "Final Reminder" demanding the outstanding service charges on the Applicant's service charge account was sent to the Applicant on 24 May 2022, which referred to the addition of an arrears collection fee of £85 plus VAT to the Applicant's service charge account and stated that failure to pay the arrears would result in the debt being referred to a debt collection agency [112/113, 228/229].

37. A later email sent by the Respondent (Ms Portch) to the Applicant, although wrongly addressed to Mr and Mrs Garrett, [215] referred to a conversation about the Applicant replacing the windows and to the absence of a LTA. Ms Portch stated as quoted in paragraph 18 above.

38. The Respondent submitted that the problems it had encountered with obtaining two tenders on account of the pandemic and the subsequent delay to the commencement of the works related to lack of funds had inevitably extended the consultation process but both those factors were beyond its control. It could not instruct a contractor until the service charge funds received were sufficient to pay for the works.

## The Lease

39. The Lease was granted by Birse Homes Limited (landlord) to the original lessee. Clay Croft Management Limited, defined as the "Management Company" was party to it.

40. The Property, described in the Lease by reference to "the Plan" "including the internal surfaces of all walls floors and ceilings dividing the dwelling from other parts of the Buildings and including the whole of the internal doors and their frames and all pipes wires and cables solely serving the dwelling (but excluding the Common Parts)" [51, 167]

41. The Common Parts are defined as "the Management Land and the main structures of the Building (including window frames and glass and sills on all external walls) and all other parts of the Building not comprised (or intended to be comprised) in the Leases."

42. The Management Land is shown edged blue on the Plan [69]. The Building is defined as "the building or other structure erected on the Management Land but excluding any garage comprised in the Leases"[52, 168].

43. The lessee covenanted with Birse in the terms set out in the Third Schedule (which relates only to title covenants in the property registers). In addition, it covenants exclusively with the Management Company (after the first five years of the term) and with the present or future owners of other dwellings on the Management Land ….in the terms set out in the Fourth Schedule (covenants relating to decoration and repair of the Property and use).

44. The Management Company's covenants with the lessee are in the Sixth and Seventh Schedules [61/62, 177/178] and include references to the Maintenance Charge.

45. Paragraph 11 of the Fourth Schedule includes a covenant not to alter the Property whereby the lessee covenants "Not except strictly in accordance with detailed plans previously approved in writing by the Management Company to whom shall be paid for approving the same a fee of £25 (or such higher sum as the Management Company may from time to time reasonably require) plus value added tax at the rate then prevailing): 11.1 to make any structural alteration to the Property……" [58, 174].

46. Paragraph 7 of the Fourth Schedule is a covenant by the lessee "Not to transfer the Property without requiring the transferee to apply in writing contemporaneously with such transfer to become a member of the Management Company" [57/58, 173/174].

47. The Seventh Schedule states that the lessee shall .... "on the usual quarter days being 1 April 1 July, 1 October and 1 January in every year during the continuance of the demise pay to the Management Company on demand on account of expenses incurred or to be incurred by the Management Company in respect of the matters specified in the Eighth Schedule such payment to be made within fourteen days of demand" [62, 178].

48. The Eighth Schedule lists the expenditure to be recovered by means of the Maintenance Charge and includes all sums spent by the Management Company in and incidental to the observance and performance of its obligations in the Sixth and Seventh Schedules. It includes (paragraph 9) "the costs incurred in bringing or defending any actions or other proceedings "and (paragraph 11) "such sum as the Management Company shall determine as desirable to be set aside in any year towards a reserve fund to make provision for expected future substantial capital expenditure which it anticipates including (but not limited to) the external decoration of the Buildings".

49. In summary, the definition of the Property **does not include** the windows which are Common Parts, the ownership of which is retained by the Management Company. The lessee cannot alter the Property without the written consent of the Management Company. The Maintenance Charge is payable in quarterly instalments on account of expenses incurred or **to be incurred** and is payable within fourteen days of being demanded.

**<u>The Law</u>**

50. Three applications have been made to the Tribunal under the Act and Schedule 11 of CLARA. The primary application relates to the service charge demanded as the Applicant's share of the cost of the proposed works (Sections 27A and 19 of the Act). The two supplementary applications are for orders limiting of the Applicant's liability for costs relating to these proceedings. Neither party has made submissions about the supplementary applications.

51. The Applicant also referred to section 20 of the Act, which contains the consultation requirements and is supplemented by the Service Charge (Consultation Requirements) (England) Regulations 2003 [SI 1987] (the Regulations).

52. Extracts from the relevant parts of Sections 27A, 19, 20 and 20C of the Act, Schedule 11 of CLARA and the Regulations are set out in the Appendix to this decision.

53. The jurisdiction of this Tribunal is contained in the Act. In summary and in the context of this application it can determine if service charges demanded are reasonable and payable. It can also address the Applicant's questions with regard to whether the consultation process undertaken by the Respondent was followed correctly and decide whether that will impact on the Applicant's liability to pay its service charges. For reasons, explained later, it has also considered the Applicant's claim to "set-off" of the cost of the windows it replaced, against its liability to pay the service charges demanded.

**Reasons for the Tribunal's decision**

54. The Respondent started consultation with the leaseholders in relation to major works to the Building in 2018. The requirements are set out in the Regulations and were agreed between the parties in *Daejan Investments Ltd v. Benson* [2013] 1 W.L.R. 854 and summarised by Lord Neuberger in the Supreme Court judgement (paragraph 12), which summary is set out below.

> *Stage 1: Notice of intention to do the works*
> Notice must be given to each tenant and any tenants' association, describing the works, or saying where and when a description may be inspected, stating the reasons for the works, specifying where and when observations and nominations for possible contractors should be sent, allowing at least 30 days. The landlord must have regard to those observations.
> *State 2: Estimates*
> The landlord must seek estimates for the works, including form any nominee identified by any tenants or the association.
> *Stage 3: Notices about estimates*
> The landlord must issue a statement to tenants and the association, with two or more estimate, a summary of the observations, and its responses. Any nominee's estimate must be included. The statement must say where and when estimates may be inspected, and where and by when observations can be sent, allowing at least 30 days. The landlord must have regard to such observations.
> *Stage 4: Notification of reasons*
> Unless the chosen contractor is a nominee or submitted the lowest estimate, the landlord must, within 21 days of contracting, give a statement to each tenant, and the association of its reasons, or specifying where and when such a statement may be inspected.

55. The parties agree that the stage 1 notice was issued (for a second time) on 7 November 2018. No observations were made by the leaseholders. The application does not refer to a tenants association but all the leaseholders are entitled to be members of the Respondent. The Applicant has not referred to this, or disclosed if it is a member, but paragraph 7 of the Fourth Schedule to the lease (set out in paragraph 46 requires that any transferee of the lease applies to become a member of the Respondent). That is the reason for the Tribunal's assumption that all the leaseholders are members of the Respondent. Furthermore, the letter which accompanied the notice of the AGM enclosed nomination and consent (to act) forms for directors of the Respondent. The closing date for observations was 12 December 2018.

56. The parties agreed that the works are necessary. The Respondent's time-line contained a reference to a change of the Property Manager at HML in February 2019. The tender specification is dated 24 February 2019 which, coupled with the Christmas holiday, may explain the short delay between 13 December 2018 and the end of January 2019.

57. The Respondent obtained five estimates. The process was undertaken during the Covid-19 pandemic which impacted on the tenders received because despite five contractors responding to the invitation to tender and estimating costs of the works, soon after the Respondent sent out the Notices about the estimates, the three contractors, who had made the three lowest quotations, had withdrawn.

58. It should also be noted that following receipt of the five estimates, the last of which was received on 24 June 2020, Shaw & Company Chartered Surveyors were instructed to analyse the tenders. It appears to the Tribunal from the Respondent's response to the application that all of the contractors withdrew and that the Respondent subsequently asked Bath & Bristol Property Maintenance to retender as they had initially withdrawn because of the difficulties encountered during the Covid-19 pandemic and the periods of government lockdowns, and it presumably assumed that they might now be able to undertake the works.

59. The Respondent's AGM took place on 21 September 2020. The notice which preceded it dated 6 August 2020 included the Agenda. The section 20 works were an agenda item. The minutes recorded that a representative from Shaw and Company attended the meeting, the section 20 procedure was discussed and the costs were explained. "PD asked for HML to collet (sic) levy from each leaseholder over a period of 10 months". Only three leaseholders attended the meeting. The Applicant was not present.

60. The Stage 3 notice was dated 12 March 2021 and gave the leaseholders until 16 April 2021 to make observations. It recorded that the Respondent intended to appoint Westside Contracting Ltd. There was no indication that any of the other contractors had withdrawn. Whilst more than two years had elapsed since the issue of the Stage 1 notice, the AGM which took place in the preceding September offered all the leaseholders an opportunity to obtain further information. The Applicant declined this opportunity. The subsequent delay between the AGM and the demand for payment seems to be attributable, in part, to the leaseholders' request to spread the service charge contributions over 10 months.

61. The Respondent subsequently demanded payment from the Applicant and presumably all the other leaseholders. The demand was dated 19 July 2021 and accompanied by a letter confirming that the total demand for £7,692.30 was charged to the service charge account but payable over 10 months between July 2021 and April 2022. This reflected its agreement to the request from Peter Davies recorded in the AGM minutes.

62. The Applicant has not paid any of the sum demanded to fund the works. It said that it has continued to pay the regular quarterly service charges, separately demanded, and that it objected to the fact that these payments were credited against its liability to contribute towards the works.

63. The Tribunal accepted that the evidence disclosed confirmed the Respondent's submissions about its problems finding a contractor to carry out the works, since all of the contractors who originally provided written quotations have withdrawn.

64. Even if a contractor can be identified who is ready able and willing to carry out the works, the Respondent has not collected sufficient monies to fund the works and instruct it. The Applicant made no payments towards the cost of the works and in March 2022, almost 8 months after the issue of the demand for its contribution, it notified the Respondent that it would be replacing the windows in the Property [110].

65. As the Tribunal has already identified. the windows in the Property are a defined as common part, not part of the Property. Furthermore, the lease specifically requires that a leaseholder obtain the written consent of the Management Company before carrying out any alteration to the Property.

66. Taking into account all of the submissions the Tribunal determines that the Respondent has complied with the section 20 consultation procedure, in so far as was possible, with regard to the process undertaken. The consultation process was not completed because the leaseholders wanted to pay for the works in instalments. All the letters issued by the Respondent indicated that a contractor would only be instructed once funds were received. The Respondent is a leaseholders' Management Company so presumably wished to accommodate its members wishes. The Applicant has not paid the sum demanded. The Applicant suggested that it told Ms Portch that it could not afford the cost of the repairs, but the reason given in its application is that the consultation process was not followed correctly. The Tribunal has not found that to be the case.

67. Although it accepts that the exact cost of the works has not been crystallised and was not known at the time the demand for payment on account, was made the Respondent is entitled, under the Lease to demand a payment on account. The AGM had informed the Respondent of the leaseholders wishes to pay in instalments.

68. The Applicant also claimed that its liability to pay for the works should be limited because of the alleged failures of the Respondent with regard to the consultation process. However, these failures all appear to relate to the delay and the withdrawal of those contractors, who submitted quotes. None of these arise from the actions of the Respondent. The Applicant submitted that the failure to comply with the consultation process should result in is contribution towards the cost of the works being limited. This would not be the inevitable outcome of such a failure.

69. Had the Tribunal found that the section 20 process had not been correctly undertaken, it would have been likely to offer the Respondent an opportunity to apply to dispense with consultation requirements under section 20ZA of the Act. It would not have "automatically" limited the amount of the Applicant's contribution.

70. The authority for this is in paragraph 41 of the Upper Tribunal decision in Warrior Quay Management Company Limited and another v Joachim (and

others) 2008 WL168730. Judge Huskinson said that where there is a hearing before an LVT and there is an absence of a formal application for dispensation from a landlord (or at least from a landlord not professionally represented) the LVT should ask the landlord whether it wishes to ask for dispensation, rather than not raising the point and omitting to consider at all whether dispensation should be granted under section 20ZA of the 1985 Act.

71. Given the alleged further deterioration of the building and the increased urgency of the works, exacerbated by the difficulties experienced by the Respondent in identifying a suitable and available contractor, and the inevitably lengthy timescale it is likely to take to complete the consultation process, making an application under section 20ZA might be something that the Respondent would wish to consider.

72. Subsequently the Applicant replaced the windows in the Property. Whilst it is possible for the Tribunal to consider a claim for "set off" as a defence to a tenant's service charge liability it has not found that this remedy is available to the Applicant in these proceedings The authority for the Tribunal to consider set-off is *Continental Property Ventures Inc v. White* [2006] I E.G.L.R 85).

73. Set off claims are an equitable, not legal, remedy. The significance of that distinction is that any party making such a claim in reliance on an equitable remedy should have acted correctly. The equitable maxim is that a party seeking to rely on such a remedy must have "clean hands". In these proceedings the Applicant made no application for consent to alter the Property before replacing the windows. In addition, the windows are not part of the Applicant's property.

74. The Tribunal finds that the Applicant is not entitled to claim "set off" in respect of the costs it incurred in replacing the windows because the windows are not part of the Property and it neither applied for, nor obtained consent to alter the Property.

## The Applicant's questions

Validity of the section 20 process

75. The consultation process, started on 7 November 2018 has not been completed. None of the contractors who originally quoted appear to have been willing to honour those quotations. Even if they had been, the Respondent has been unable to collect sufficient money to fund the works. It was agreed at the AGM that the leaseholders could pay in instalments with the final instalment falling due in April 2021. Had funds been collected the Respondent would have had to obtain further quotations. The Applicant has questioned the validity of the process. However, the process not been completed; no contractor has been appointed. The Tribunal has not identified any invalidity in the process thus far. It cannot speculate on much the required works might cost now. The suggestion made by the Applicant that the costs should be reduced is unjustified. The delay in starting the works was agreed following a request made by the leaseholders at the AGM to enable them to spread the cost. The risk of the quotations becoming stale has arisen because of the delay. The lease obliges lessees to make payments

within 14 days of a demand and provides that the Management Company can demand service charges on account, before costs are incurred. The Respondent is a leaseholders' management company so its members will be responsible for funding any shortfall in its funds.

76. The evidence submitted by the Respondent shows that HML notified the Applicant that no contractor could be appointed until the funds (to cover the cost of the work) were collected [101]. The letter dated 12 March 2021 stated that it was the intention of the Management Company to appoint Westside Contracting Ltd to undertake the proposed work it also stated that once all the funds have been received, it will liaise with it to agree a start date.

Invoice, quotation and appointment of the contractor

77. Whilst the amount of the invoice dated 19 July 2021 may have been based on the Westside quotation, the contractor was not appointed by that date, nor indeed was it ever subsequently appointed. The letter which accompanied the demand stated that the payments would be due between July 2021 and April 2022. The lease entitles the Respondent to collect service charges in advance and on account.

Notice of appointment

78. As no contractor was appointed the Respondent could not issue the Stage 4 notice.

Cost of replacement windows

79. The Applicant has asked if it can set off the costs it has incurred in replacing the windows, against the cost of the proposed works. Whilst there is authority for the Tribunal to consider a set off claim as a defence to a lessee's liability to pay service charges, the windows in the Property are defined in the Lease as Common Parts and are not part of the Property. For the reasons already set out above the Applicant is not to entitled to claim to set off the cost of the replacement windows against the service charges demanded.

Additional fees

80. The Respondent has added a "late payment" fee to the Applicant's service charge account. This is an administration charge. Whilst a landlord can demand administration charge from a tenant the amount has to be reasonable. The Tribunal's jurisdiction is contained in paragraph 1 of Schedule 11 of CLARA. The Applicant has not made a formal application in relation to these charges, the Respondent has not issued a formal demand for payment. If it does so the Tribunal could consider if the charges are reasonable. On the facts disclosed, the Applicant has failed to pay any of the charges demanded in July 2021. Therefore, as this Tribunal has determined the service charges demanded are payable, and without binding the Tribunal should a relevant application be made, it may be considered reasonable for the Respondent to review its options to recover the outstanding debt and its costs in so doing and the amount of the administration charge disclosed may be considered not unreasonable given the date of the original demand.

Allocation of quarterly charges to demand for cost of works

81. Generally, credits to a service charge account will be set against the "oldest" debt. This is to ensure that if interest is due in addition, the amount payable

is minimised. The Management Company is entitled to a deal with the allocation of credits to the service charge account in the way that it has.

**Applications under section 20C and paragraph 5A**

82. The Applicant has not submitted any reasons in support of these applications. The Tribunal will consider submissions made to it by the Applicant within 28 days of the date of this decision. These submissions should be contained in a brief statement (limited to two A4 pages (font size 12)) of its reasons for requesting that the Tribunal should make orders limiting the ability of the Respondent to recover its costs in connection with these proceedings and must be sent to the Respondent and copied to the Tribunal at the same time.

83. The Respondent may reply to this statement within 21 working days of receipt. It must send its response (limited to two A4 pages (font size 12)) to the Applicant and it must be copied to the Tribunal at the same time.

84. The Tribunal will determine any application received within 28 working days of receipt of the Respondent's reply.

**APPENDIX**

**27A Liability to pay service charges: jurisdiction**

(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]2 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.

**19.— Limitation of service charges: reasonableness.**

(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.

**20C**

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court [,residential property tribunal] or leasehold valuation tribunal [or the First-tier Tribunal], or the [Upper Tribunal] or in connection with arbitration proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other persons or persons specified in the application.

| **Service Charges (Consultation Requirements) (England) Regulations 2003/1987**<br><br>Regulation 7(4)<br>Except in a case to which paragraph (3) applies, and subject to paragraph (5), where qualifying works are not the subject of a qualifying long term agreement to which section 20 applies, the consultation requirements for the purposes of that section and section 20ZA, as regards those works–<br>(a) in a case where public notice of those works is required to be given, are those specified in Part 1 of Schedule 4;<br>(b) in any other case, are those specified in Part 2 of that Schedule |
|---|
| Part 2 of Schedule 4<br>*1.*<br>(1) The landlord shall give notice in writing of his intention to carry out qualifying works–<br>(a) to each tenant; and<br>(b) where a recognised tenants' association represents some or all of the tenants, to the association.<br>(2) The notice shall–<br>(a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;<br>(b) state the landlord's reasons for considering it necessary to carry out the proposed works;<br>(c) invite the making, in writing, of observations in relation to the proposed works; and<br>(d) specify–<br>(i) the address to which such observations may be sent;<br>(ii) that they must be delivered within the relevant period; and<br>(iii) the date on which the relevant period ends.<br>(3) The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works. |

**Schedule 11 to the Commonhold and Leasehold Reform Act 2002**

**Paragraph 5A**

(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph—

(a) *"litigation costs"* means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and

(b) *"the relevant court or tribunal"* means the court or tribunal mentioned in the table in relation to those proceedings.

| ***Proceedings to which costs relate*** | ***"The relevant court or tribunal"*** |
| --- | --- |
| Court proceedings | The court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, the county court |
| First-tier Tribunal proceedings | The First-tier Tribunal |
| Upper Tribunal proceedings | The Upper Tribunal |
| Arbitration proceedings | The arbitral tribunal or, if the application is made after the proceedings are concluded, the county court." |

## **Appeals**

1. A person wishing to appeal this decision to the Upper Chamber must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision. Where possible you should send your further application for permission to appeal by email to **rpsouthern@justice.gov.uk** as this will enable the First-tier Tribunal to deal with it more efficiently.

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.