FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LSC/2022/0142**
HMCTS code (paper, video, audio)	**:**	**Face to Face**
Property	**:**	**Flat 5, 34 Gosfield Street, London, W1W 6HL**
Applicant	**:**	**Brightgem Ltd**
Representative	**:**	**Mr S Newman (Solicitor) of D & S Property Management**
Respondent	**:**	**Ms C Hansen**
Representative	**:**	**In Person**
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 S Mason FRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**27 October 2022**

DECISION

Covid-19 pandemic: description of hearing

The case was heard as a face to face hearing attended by both parties.

Decisions of the tribunal

(1) The tribunal determines that the sum of £41,426.90 is payable by the Respondent in respect of the advance service charge for the year 2022.

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

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of advance service charge payable by the Respondent in respect of the service charge year 2022.

The hearing

2. The Applicant was represented at the hearing by Mr S Newman, a solicitor, of D & S Property Management and the Respondent appeared in person.

The background

3. The property which is the subject of this application is a five-storey block of 5 flats constructed as a mid-terrace building. The building has solid brick external walls beneath a flat roof originally covered in asphalt and overlaid with roofing felt. Windows are timber.

4. The respondent occupies the basement flat, number 5 with access via the common parts. The applicants control three flats and one of the flats is occupied by a long lease holder.

5. The property is in need of repair and the other long lease holder has requested the repairs be carried out and has paid the requested service charge.

6. The tribunal did not inspect the property. Photographs of the building were provided in the hearing bundle. Neither party requested an inspection. The scope of the works was not in dispute or the issues related to a section 20 consultation and whether the works should be phased in some way.

7. The Respondent 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 issues

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

   (i) The payability of advance service charges for 2022 relating to major works

   (ii) whether a section 20 consultation had been carried out

   (iii) whether the repair works arose from previous neglect by the landlord which increased their cost

   (iv) whether the work should be phased in some way

   (v) service charge items amounting to £6,080 were not in dispute

General Management Fee	£ 1,250.00
Insurance	£ 3,080.00
Communal electricity	£ 500.00
Fire Risk Assessment of Common Parts	£ 500.00
General Maintenance	£ 750.00
	£ 6,080.00

9. 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.

Section 20 consultation

10. A notice of intention to carry out work was sent on behalf of the freeholder by D & S Property Management to the Respondent dated 18 February 2021. The Respondent denied receiving it.

11. Mr Newman, appearing for the Applicant presented a witness statement in which he said he had personally prepared the notice and sent it by ordinary first-class post and by email to the email address held by the Applicant for the Respondent. Mr Newman stated he sent the documents by ordinary post so as to take advantage of the provisions for deemed service contained in section 7 of the Interpretation Act 1978. No certificate of posting was available but Mr

Newman gave details of the post office where he said the documents were posted. Copies were also sent by email to cazarie@gmail.com and not returned as undelivered.

12. The schedule of proposed work, section 20 statement of Estimates and section 20 notice accompanying the statement of Estimates were all sent by the same means.

13. The Respondent denied having received the posted copy or the email. However in cross examination the Respondent admitted that on a subsequent trawl through the emails on that account she did find the email attaching the various documents relating to the consultation. The email account is one she did not use regularly and had replaced with her current email address.

The tribunal's decision

14. Having heard the evidence of both parties and bearing in mind the admission of the Respondent that she did have the email copy of the documents, the tribunal prefers the evidence of Mr Newman that notices were sent as set out in his witness statement and determines that the section 20 consultation has been properly carried out.

15. In addition, the Applicant referred the tribunal to the decision of the Upper Tribunal in 23 Dollis Avenue [2016] UKUT 0365 where the tribunal said at paragraph 47 "*the statutory limit under section 20 only applies to claims where work has been carried out and there is non-compliance with the 2003 Regulations*". The work in this case has not been carried out and the £250 cap does not therefore apply to the claim for advance service charges.

Major Works, Budget Cost £182,776.80

The Applicant's case

16. The tribunal heard evidence from Mr Sheldon Fry of Brightgem that in August 2020 a request was received from the other long lease holder in the building for repairs to be carried out as the roof was leaking and the staircase in the common parts was being protected by polythene sheeting.

17. D & S Property Management were instructed to arrange the necessary works and undertake a section 20 consultation with the leaseholders relating to the works. Mr Paul Henry BSc MRICS of Paul Henry and Co was instructed to prepare a specification and to tender the works. The

tribunal has in front of it the specification and priced tenders and the tender report and also heard from Mr Henry.

18. The works related to renewal of the roof coverings external repointing as necessary, external redecoration and repairs to window frames, replacement of the cold water supply system, electrical works and redecoration of the common parts.

19. Mr Henry explained that the roof is at two levels, with a higher level over the common parts and a lower level over the remainder of the roof. All of the roof surfaces were originally asphalt and have been overlaid with a roofing felt. The higher level roof over the common parts is leaking and in Mr Henry's view it was necessary to strip the whole of the roof covering and renew it as it is likely that the low-level roof was also at the end of its life expectancy and by recovering all the roof surfaces together a guarantee could be obtained.

20. Access to the roof could only be gained by scaffolding and access to the rear of the building could only be gained by going over the top of the building as there was no access to the rear of the building from the common parts. Once scaffolding was in place, due to its cost, it was more economical to carry out all the external works in one go rather than come back at different times and have to re-scaffold the building.

21. Other external works relate to patch repointing and repairs and decoration of windows.

22. For reasons which are not known, the cold water supply to all of the flats comes from a rooftop water tank which is supplied by pipework in the adjoining building. This was only recently discovered. As there is no main supply to each of the flats, it was decided this should be remedied as a matter of urgency.

23. A fire risk assessment identified the need for electrical works in the common parts.

24. Both of these sets works were likely to damage the internal finishes and decoration in the common parts which are already in poor condition so internal refurbishment and redecoration is included in the works.

25. The works were competitively tendered and five tenders were received ranging from £127,948.80 including VAT to £236,496 inclusive of VAT. The lowest tender from Happe Contracts needed adjustment as it did not include all of the works. Two tenders were at a similar level from Vesta Façade Restoration and Happe at £149,340 and £152,314 respectively. Mr Henry advised as a result that the two contractors should be invited to update their tenders to include any omitted items before a final decision was made.

26. In cross examination Mr Henry explained that much of the work was of a cyclical nature and would need to be repeated at regular intervals, particularly internal and external decoration and repairs to windows and patch repointing. Renewal of the roof was on a much longer cycle. The need for electrical works depended on whether the regulations had changed and on the results of a fire risk assessment. Replacement of the cold water system was a one-off item. If the roof, external pointing and external decoration was spread over several years and several contracts, there would be a need to scaffold on each occasion which would substantially increase the overall costs.

27. The tribunal also heard from Mr Sheldon Fry who is an employee of the Applicant landlord and who has been responsible for the general management of the building for the last 10 years.

28. Mr Fry gave evidence that repairs to the building were considered in 2014 when a section 20 consultation was started with a view to entering into a five-year maintenance contract for the building. At that time it was not possible to seek secure any reasonable proposals from contractors to phase the works and the plan was abandoned.

29. During the Respondents period of ownership of her flat, correspondence with regard to maintenance of the building has been limited.

30. Mr Fry also exhibited a copy letter from the Respondent dated 7 January 2022 which did not have an email address as part of the header. The Respondent's evidence includes a copy of the same letter with an email address added. In cross examination Mr Newman suggested that the letter exhibited by Mr Fry is the true copy and cast doubt on the Respondent's version.

The Respondent's case

31. In addition to the arguments regarding the failure to consult, the Respondent also referred to section 19 of the Landlord and Tenant Act 1985 which requires affordability and reasonableness of incurred service charges. It is averred that the freeholder is required to ensure affordability as a factor of reasonableness of major works in relation to scheduling of works over time. Reliance is placed on Garside and another v RFYC [2011]UKUT 367 LT where the upper tribunal decided that the financial impact of the service charge bill can be considered a relevant factor in determining whether a service charge has been reasonably incurred.

32. The Respondent alleges the freeholder has been negligent in its responsibility to perform maintenance repairs and upkeep of the

building over many decades and photographic evidence has been provided.

33. The identified cost of the works is unreasonable on the basis that the work could have and should have been completed as separate smaller works over recent decades, the 20% share of the cost being demanded as a service charge payment does not represent an affordable sum and the freeholder has been negligent in his responsibility to maintain the building and include these works over time within the service charge paid by previous leaseholders.

34. 34 Gosfield Street is a small building constructed in the 1920s consisting of five one-bedroom flats and the cost of the work represents the accumulation of decades worth of damage and decay to the building. The level of repairs including the major works in no way represents a reasonable or expected level of cost if the building had been maintained at an adequate level over time.

35. The Respondent proposes that a figure of £10,000 as a contribution towards major works is a reasonable service charge amount bearing in mind section 19 and the freeholder's lack of compliance with section 20.

The Applicant's response

36. The Applicant reminds the tribunal that it owns three of the five flats in the building and the other flat is owned by another long lease holder. The Applicant is not in favour of phasing the works and the other leaseholder has made no such request and has paid the requested on account service charge in full.

37. The applicant previously considered phasing the work but was unable to secure an appropriate contract. Theoretically the works could be split into internal and external works but with the external works, given the fact that scaffolding is required which is a dead cost, all high-level work should be undertaken at the same time to maximise the use of scaffolding and not incur the cost on multiple occasions.

38. With regard to internal works given the fact that at this time it would appear the cost of the works will only increase and repairs have been delayed for a significant time the Applicant considers these repairs should be carried out as part of the contract.

39. The Applicant is not unsympathetic to the financial burden being placed on the Respondent and has already offered to allow payments to be spread over the next 12 months. The Applicant would also listen to any reasonable proposals for the Respondent to spread contributions over the next 18 to 24 months but to date no such proposals have been received.

40. It is for the landlord to decide how to go about repairs and tenants cannot complain simply because the landlord could have adopted another and cheaper method of doing so. *(Fluor Daniel Properties Ltd v Shortlands Investment Ltd [2001] 2EGLR 104)*

41. In response to the claim that work should have been undertaken in smaller jobs over past decades the Applicant states that the Respondent purchased her flat in 2014 with full knowledge of the fact the building was in need of repair and the purchase price probably reflected that.

42. In *Daejan Properties Ltd v Griffin [2014] UKUT 0206 (LC)* the Upper Tribunal said

> *87. The earliest date that the respondents, or any of the original applicants to the LVT, became the registered proprietor of a leasehold interest of a flat at Crown Terrace was in 1983, when Mr and Mrs Jain became lessees of flat 11. Mr Peters' submissions on this aspect of the case are clearly correct. None of the leaseholders has any entitlement to damages referable to breaches of covenant committed by the appellant between 1973 and the date on which the leaseholder acquired his or her own interest in their lease. The assignee of a lease granted before 1 January 1996 cannot maintain an action for a breach of covenant which occurred before the assignment (see Woodfall's Law of Landlord and Tenant, para. 16.133). The same is true of a lease granted after that date by virtue of s. 23(1), Landlord and Tenant (Covenants) Act 1995.*
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> *88. As the Lands Tribunal (HH Judge Rich QC) explained in Continental Ventures v White [2006] 1 EGLR 85 an allegation of historic neglect does not touch on the question posed by s. 19(1)(a), Landlord and Tenant Act 1985, namely, whether the costs of remedial work have been reasonably incurred and so are capable of forming part of the relevant costs to be included in a service charge. The question of what the cost of repair is does not depend on whether the repairs ought to have been allowed to accrue. The reasonableness of incurring the cost of remedial work cannot depend on how the need for a remedy arose.*

43. The Respondent has had a lower service charge during her period of ownership and cannot claim a double benefit now. The Respondent must have known these works would be required at some point and she should have put money aside to cover the cost.

44. The roof has a natural lifespan, it is not been replaced since the leases were granted and its replacement is not unreasonable. Redecoration of the front and rear is a cyclical item and the repairs required do not go beyond those which will be required on that basis. The cold water supply is a necessary upgrade which is not required as a result of neglect on the part of the Applicant.

45. The applicant relies on *Continental Ventures v White [2006] 1 EGLR 85* in that the Applicant should only be responsible for the additional repair costs incurred as a result of any proven historic neglect.

46. The Applicant considers that the Respondent has failed to identify repairs which were not required as at the date she took an assignment of the lease and has also failed to identify any additional costs.

47. If the tribunal finds that the section 20 consultation has not been carried out the Applicant will hold off instructing the works and re-consult. If the tribunal determines that it is not reasonable for the entire amount to be incurred on the basis the work should be phased, the Applicant will phase the works in accordance with the tribunal's decision.

Discussion

Affordability and phasing of the works

48. The Respondent has argued that the works should be phased and that the Applicant is required as a matter of law to take into account the affordability of the works by the leaseholders. Reliance is placed on Garside and another v RFYC. In that case the Upper Tribunal said

> 11. *There was no dispute that the works for which service charges had been demanded are necessary and that that the cost of them is a reasonable amount. The issue between the parties is as to whether the action taken by the Second Respondent in requiring them to be carried out in one contract and paid for in the 2009 and 2010 service charge years was a reasonable decision i.e. the first question identified in Forcelux paragraph 40 and Veena paragraph 103.*
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> 12. *…The unavoidable conclusion is that in deciding when to carry out the works and when to charge for them the Second Respondent was taking into account, amongst other matters, the financial impact of the works on the lessees including the Appellants. Those were perfectly proper decisions for him to take in the exercise of his judgment as Manager.*
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> 14. *I accept the submissions of Mr Denehan that there is nothing in the 1985 Act to limit the ambit of what is reasonable in this context so as to exclude considerations of financial impact. In my judgement, giving the expression "reasonable" a broad, common sense meaning in accordance with Ashworth Frazer, the financial impact of major works*

on lessees through service charges and whether as a consequence works should be phased is capable of being a material consideration when considering whether the costs are reasonably incurred for the purpose of section 19 (1) (a)

15. In the present case the Appellants squarely raised with the LVT that "the scheme of works required is that which accommodates the truly pressing remedial works, and the means of the tenants on the Estate, with non-essential decorative and other work being phased over a sufficiently long period so as to be manageable in terms of cost by the tenants", paragraph 3.3 of their Statement of Case in Reply to the LVT. That was an argument which the LVT should have considered on its merits. Instead, as is conceded on behalf of the Second Respondent, in paragraphs 15 and 16 of its decision the LVT held as a matter of law that this was not a relevant consideration.

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. It is inevitable that where not all lessees agree the final decision is likely to please some and not others. That does not mean one lessee or some lessees' views have been unfairly preferred over others, rather they have all been taken into account with all other relevant considerations when reaching a decision.

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, the local housing authority has served notices requiring work to be carried out and insurance cover has been reduced because of the poor condition of the Estate. 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 of factual issues and matters of judgement for the FTT 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. In the light of the paucity of evidence submitted by the Appellants it may be

> *that if the FTT had considered their arguments on their merits it would have rejected them. However it would not be appropriate for the Lands Chamber to seek to second-guess the decision of this expert tribunal.*
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> *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 and the lessee cannot escape liability to pay by pleading poverty. ….*

49. The tribunal has considered the arguments of the Respondent in relation to the affordability argument. Garside does not lay down that the works must be affordable, but that it is one of the factors to be taken into account. The tribunal notes that the Applicant has offered to spread the service charge over a period of up to 2 years. The other leaseholder has requested the works be carried out and has paid his service charge. The tribunal accepts that it is for the landlord to decide the manner in which works are carried out.

50. The tribunal accept the evidence of Mr Henry regarding the need for the works and that they can be most economically carried out as a single contract. The Respondent has presented no expert or other evidence to the contrary.

51. In relation to historic neglect the tribunal has considered the arguments of both parties. The tribunal is bound by the decision of the Upper Tribunal that the earliest date which can be considered for historic neglect is the date of purchase of the flat by the Respondent which is 18 December 2013.

52. There is no evidence before the tribunal that the roof was leaking at any stage earlier than the recent past when works were first considered. The tribunal accepts the Applicant's arguments that the cyclical nature of many of the repairs and which have not been carried out since December 2013 means that the leaseholder has not had to incur the cost on at least one earlier occasion. The tribunal is bound by the decision of the then Lands Tribunal in *Continental Ventures* that the cost of repair does not depend on whether the repairs ought to have been allowed to accrue.

53. There is no evidence before the tribunal that costs have been increased by an earlier failure to carry out timely works by the Freeholder.

54. The tribunal notes that costs are likely to have increased since the tenders were first submitted and that the final cost of the works is likely

to be higher than the budget. However that does not invalidate the requested advance service charge budget.

55. The tribunal therefore finds that the budgeted advance service charge is payable.

Name: A Harris **Date:** 27 October 2022

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.

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).