FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AU/LSC/2019/0236**
Property	:	**68b Cadogan Terrace, Hackney Wick, London, E9 5EQ**
Applicant	:	**Mr. Jared Aspinall and others**
Respondent	:	**Southern Housing Group**
Type of Application	:	**Section 27A Landlord and Tenant Act 1985 - determination of the reasonableness and payability of service charges**
Tribunal Members	:	**Mr. Mullin** **Mr. Barlow FRICS**
Date and venue of Determination	:	**11th November 2019** **Alfred Place**
Date of Decision	:	**16th December 2019**

DECISION

For the reasons given below, the Tribunal finds as follows:

- **The service charges as sought by the Respondent at the date of the hearing (£80,980.36 in relation to roof replacement and £79517.44 in relation to window replacement) are payable and reasonable.**
- **The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985, that no more than 50% of the costs incurred by the Respondent in respect of this application are to be treated as 'relevant costs' for future service charge accounts .**
- **The Tribunal makes an order that the Applicant should be refunded the application fee but should not be refunded the hearing fee.**

REASONS

Introduction:

1.) The Applicant made an application, dated 29th June 2019, under section 27A of the Landlord and Tenant Act 1985 (the 1985 Act) for a determination of the reasonableness of service charges for the 2019/20 service charge year. Included in the main application was an application for an order under section 20C of the 1985 Act. 12 other lessees have been added to the application, but none have provided any evidence or taken any part in the application.

2.) The Tribunal issued Directions in respect of these applications at a hearing on 23rd July 2019 that set out the steps that the parties had to take to prepare for the hearing. The Tribunal identified five issues to be determined:

- Whether the costs of replacing the roof to the Property should be paid for by the applicant and the other lessees given that it is asserted by the Applicant that the original roof covering, now some 25/26 years old, was inappropriate for the type of roof in question.

- Whether the costs of replacing the windows in the flats at the Property (24 flats in a four storey block) should be borne by the lessees, it being alleged that the need to replace has arisen largely as a result of the lack of maintenance by the Respondent over a period of years

- Whether the Respondent is at fault for not increasing the reserve fund to such a level (currently apparently standing at £92,393.04) as would have ameliorated the lessees liability for the costs of the works

- whether an order under section 20C of the 1985 Act and/or paragraph 5A of Schedule 11 to the 2002 Act should be made

- whether an order for reimbursement of application/ hearing fees should be made

3.) The following matters were also agreed to not be in dispute:

- The Applicant accepts that the roof and windows needed replacing

- There is no dispute as to the costs of the roofing or window works and no dispute as to the consultation process

- That the Respondent will be willing to negotiate repayment terms of any sums found to be due and owing by the Applicant, and indeed it would seem any leaseholder

- That it was anticipated that part of the reserve fun would be used to part fund the costs of the works but not definitive position could be confirmed at the CMC.

The Law:

4.) A summary of the relevant legal provisions is set out in the Appendix to this decision.

The Lease:

5.) The lease for the subject property is dated 30th November 1994 and, pursuant to a deed of surrender and regrant, runs for a terms of 190 years from that date.

6.) No particular point was taken by the parties in relation to the wording of the lease. It was common ground that the lease provided for payment of service charges and that the works which are the subject of the application are in principal recoverable by the Respondent under the service charge mechanism in the lease.

Hearing:

8.) The hearing was held 11th November 2019 at 10, Alfred Place, London, WC1E 7LR. In attendance were Mr Aspinall as the Applicant, and Mr. Evans (counsel for the Respondent) and Mr. Hapgood and Mr. Jolly (officers of the Respondent)

The Issues and the Tribunal's Determination:

9.) The Tribunal had the benefit an agreed bundle provided by the Applicant and the Respondent. Documents referred to in these reasons are referenced with the page number for the bundle.

Preliminary Issue:

10.) At the commencement of the Hearing the tribunal notified the Applicant that Tribunal Judge Mullin was a part time judge and that he practiced from the same chambers as Mr. Evans (counsel for the Respondent) and that Mr. Evans was the head of the Property team in those chambers and therefore in a senior position to Judge Mullin. The Applicant was given and opportunity to comment on this and it was made clear that there was another judge available to hear the case if he had any concerns about Judge Mullin potentially being biased or appearing to be biased in favour of Mr. Evans's case. Mr. Aspinall indicated that he had no such concerns and was happy for Judge Mullin to hear the case. The Tribunal considered that whilst Judge Mullin and Mr. Evans practised from the same chambers, they were not connected socially, did not share a room in chambers and Mr. Evans did hold any particular ability to influence Judge Mullin's practice; accordingly there was no prospect of any actual or apparent bias and that it was appropriate for Judge Mullin to hear the case.

Whether the costs of replacing the roof to the Property should be paid for by the applicant and the other lessees given that it is asserted by the Applicant that the original roof covering, now some 25/26 years old, was inappropriate for the type of roof in question.

11.) It is common ground that the roof needed to be replaced and there is no point taken by the Applicant on the standard of the works that has been carried out. In relation to this issue, the Applicant alleges that the original roof covering was inappropriate at the point of the construction of the block in the early 1990s. The Applicant's argument is that it is not reasonable for the lessees to be liable for the costs of the roofing works which have arisen as a result of a build error by the Freeholder. In his reply (p20) the Applicant relies on clause 5.3 of the lease and states that the Respondent had, until the roof renewal works were carried out recently, failed to discharge its obligation to repair or renew the roof under that clause.

12.) The Respondent recognises that the original roof design was not appropriate for the building. However, it states that the normal life expectancy of a roof of this nature, as set out in the Decent Homes Guidelines, is 30 years. This roof has been replaced after 25 years. It further states that it has agreed to cover 50% of the costs of the roof as well as a further sum of £10,619.64. This was confirmed to the Applicant in an email dated 22nd March 2019. The Respondent further relies on the case *Continental Property Ventures v White* [2002] L&TR 4 for the principal that cases of historic neglect fall outside of the scope of s.19 and 27A of the Landlord and Tenant Act 1985 and that whilst a defence set-off for a breach of covenant can be raised, it must be properly pleaded and evidenced.

13.) The Tribunal considers that the sums sought by the landlord as at the date of the hearing, i.e those subject to the discounts identified in the preceding paragraph, are reasonable. The Tribunal agrees with the Respondent's submission that historic breaches of the Respondent's repairing/renewing obligations are not relevant its assessment of the reasonableness of the services charges in this case (*Continental Property Ventures v White)*. These are works that it was agreed needed to be carried out and there is no issue taken with the costs or quality of those works. The Tribunal also agrees that there is no properly pleaded or evidenced counterclaim for disrepair that could give rise to damages that could then be set-off against the service charges sought by the Respondent. Further it agrees that there is insufficient evidence to link the original installation of inappropriate roof tiles with any failure on the part of the Respondent. In any event, even if there was such a counterclaim or evidence of a link between the installation of the tiles and the Respondent, the discounts applied to the services charges more than make up for any potential breaches of the Respondent's obligations in terms of the reasonableness of the charges.

Whether the costs of replacing the windows in the flat at the Property should be borne by the lessees, it being alleged that the need to replace has arisen largely as a result of a lack of maintenance by the Respondent over a period of years.

14.) As above, it is common ground between the parties that the windows needed to be replaced and no point is taken by the Applicant regarding the standard of work done. The Applicant's case is that the costs of the replacement of the windows are unreasonable because of the Respondent's historic failure to properly maintain the windows.

15.) The Respondent repeats their reliance on the decision in *Continental Property Ventures v White* and avers that historic neglect it outside of the proper considerations of the Tribunal under s.19 and 27A of the Landlord and Tenant Act 1985 and that whilst a defence of set-off for a breach of covenant can in principle be raised, it must be as a result of a properly pleaded and evidenced counterclaim. The Respondent has again agreed to meet 50% of the costs of the

replacement of the windows. It informed the Applicant of this in a letter dated 7th October 2019.

16.) The Tribunal considers that the service charges sought in relation to the replacement of the windows are, subject to the proposed deduction, reasonable. The tribunal considers whilst there may have been historic neglect of the windows, that is a matter outside of the proper scope of the Tribunals considerations as per *Continental Property Ventures v White*. There is no properly pleaded or evidenced counterclaim that would give the Applicant the right to raise set off as a defence. Even if there were such a counterclaim, the Tribunal considers that the proposed deduction is very likely to exceed whatever damages the Applicant would have obtained if successful on such a counterclaim. The service charges as sort are therefore reasonable.

Whether the Respondent is at fault for not increasing the reserve fund to such a level (currently apparently standing at £92,393.04) as would have ameliorated the lessees liability for the costs of the works

17.) This issue, although identified as an issue for determination in the Tribunal's directions, does not sit comfortably within the Tribunal's jurisdiction under s.27A of the Landlord and Tenant Act 1985. It is not immediately obvious how this relates to the payability or reasonableness of the service charges sought by the Respondent. How this issue is said to fall within the Tribunal's jurisdiction is not expressed in clear terms in the Applicant's statement of case (p26). The Applicant's case appears to be that the Respondent should over the years have sought more payments (or larger payments) from the lessees into the reserve fund to account for the entirety or vast majority of the service charges that are the subject of this application. The Applicant alleges the Respondent is at fault for not having done so. It is not said in the application or the Applicants statement of case how this alleged failure would effect the payability or the reasonableness of the service charges.

18.) Whether or not this is within the Tribunal's jurisdiction, the Tribunal considers that this argument is unsustainable as the Applicant is incorrect in its assertion that contributions into the reserve fund should be set at a level which allows the reserve fund to cover the entirety or the vast majority of maintenance expenditure. Clause 7.4 of the lease (p206) specifies that contributions for the reserve fund are to be "*an appropriate amount as a reserve for or towards*" service charge expenditure. The use of the word "towards" necessarily implies that the amount of contributions is therefore not to be calculated on the basis that the reserve fund should meet the entirety of any particular maintenance expenditure, and the drafting of the lease does not mandate to what extent the reserve fund should be able to meet maintenance expenditure. Under the terms lease the amount of payments into the reserve fund and the level of the reserve fund are plainly matters for the Respondent.

Whether an order under section 20C of the 1985 Act and/or paragraph 5A of Schedule 11 to the 2002 Act should be made

19.) The Tribunal considers that no more than 50% of the costs incurred by the Respondent in respect of this application are to be treated as 'relevant costs' for future service charge accounts. The Tribunal considers that whilst the Applicant was unsuccessful in his challenge to the service charges sought as at the date of the hearing, the largest service charge item was the cost of the replacement of the windows and the Respondent only agreed to seek 50% of the costs of these works a month or so before the hearing of the application when undoubtedly much of the legal work had already been done. That concession resulted in a very substantial reduction in the service charges sought and was equivalent to a discount of £79,517.44. The Applicant has therefore been successful, to some degree, in achieving what he set out to achieve by virtue of this application i.e. a reduction in his service charge liability. However, the Respondent had already reduced the amount of the services charges sought in relation to the roof works 3 months before the Applicant made this application and the Tribunal considers that it is right that the Respondent should be able to recover some of its costs due to it being successful on the basis of the sums sought at the hearing. There is nothing unreasonable about the Respondent engaging a firm of solicitors to act for it in the application as opposed to acting for itself. The Tribunal therefore considers restricting the amount of costs the Respondent can recover via the service charge to 50% of those it has incurred to strike a fair balance between the parties.

Whether an order for reimbursement of application/ hearing fees should be made

20.) As set out above the Applicant has been successful to some degree in reducing his service charge liability as a result of bringing this application. He should therefore be refunded the application fee. However, in light of the concession made by the Respondent on 7th October 2019 and that the Applicant was unsuccessful on the basis of the sums sought by way of service charge at the date of the hearing, the Applicant will not be refunded the hearing fee.

Chairman: *Michael Mullin* **Date:** *16th December 2019*

ANNEX - RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.

Appendix

LANDLORD AND TENANT ACT 1985

Section 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 of the services or works are of a reasonable standard;
and the amount payable shall be limited accordingly.
(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 20 Limitation of service charges: consultation requirements

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 20B.— Limitation of service charges: time limit on making demands.

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

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

Section 20C.— Limitation of service charges: costs of proceedings.

(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 person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to the county court;

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

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

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

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to the county court.

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

Section 20ZA Consultation requirements: supplementary
(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

(2) In section 20 and this section—

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

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

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

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

(b) in any circumstances so prescribed.

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

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

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

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

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

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

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

(6) Regulations under section 20 or this section—

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

(b) may make different provision for different purposes.

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

Section 27A Liability to pay service charges: jurisdiction
(1) An application may be made to a leasehold valuation 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 it which it is payable……
(2) Subsection (1) applies whether or not any payment has been made.
(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred fro 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 it which it would be payable.
(4) No application under subsection (1) or (3) may be made in respect of a matter which
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been subject of determination by a court, or
(d) has been subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement,
(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Paragraph 5A to Schedule 11

(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	The Upper Tribunal

proceedings	
Arbitration proceedings	The arbitral tribunal or, if the application is made after the proceedings are concluded, the county court.”