FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/23UB/LIS/2019/0040
Property	:	Cambray Court Rodney Road Cheltenham GL50 IJU
Applicant	:	Cromwell Business Centre Management Company Limited
Representative	:	J B Leitch Ltd Solicitors Mr Simon Allison of counsel
Respondents	:	The Lessees of flats 1-56 at Cambray Court.
Second Respondent	:	Cambray Court Tenants Association
Representative of second Respondent	:	Mr John Stevens, Chair of the Association.
Type of Application	:	Service Charge: section 27A Landlord and Tenant Act 1985
Tribunal Member(s)	:	Judge Martin Davey (Chairman) Mr D Dovar LL.B Mr M Ayres FRICS
Date and venue of Hearing	:	17 December 2019, Gloucester Crown Court
Date of Decision	:	28 January 2020

Decision

The interim charges demanded by the Applicant from 1 April 2017 and 1 April 2018 in respect of the repairs to the retaining wall and ancillary works at Cambray Court are reasonable and payable by the Respondent lessees.

No charge is payable in respect of the same as from 1 April 2019.

The Application

1. Cromwell Business Centre Management Company Limited ("the Applicant"), is the freeholder Landlord of the property known as Cambray Court Rodney Road, Cheltenham GL50 1 JU. ("The Premises"). Cambray Court comprises three blocks of flats ("the Building") together with a number of garages and surrounding grounds. The freehold title is subject to 56 long residential leases of the flats, along with telecommunications leases and a number of garage leases (as to which see further below). Cambray Court is managed on behalf of the freeholder by Metro PM.

2. On 6 June 2019, the Landlord applied to the First-tier Tribunal Property Chamber ("the Tribunal") for a determination, under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act"), as to whether interim service charge demands, which it had served on the residential leaseholders of the flats were payable and reasonable. (It is not disputed that the charges in question fall within the definition of a service charge contained in section 18 of the 1985 Act). The demands were served in respect of the years 1 April 2017-31 March 2018, 1 April 2018-31 March 2019 and 1 April 2019-31 March 2020. The Applicant says that the Application relates only to those sums in the interim charge demands attributable to proposed works to a retaining wall at Cambray Court along the north-east bank of the River Chelt, together with associated ground/building works. The original Respondents to the Application were all the residential leaseholders of the 56 apartments.

Directions

3. The Tribunal issued Directions on 24 June 2019, 24 July 2019, 22 August 2019 and 07 October 2019.

4. The Directions of 24 July 2019 added Cambray Court Tenants Association ("the Tenants Association") as a separate additional Respondent to the Application. Not all leaseholders are members of the Association.

5. The Directions of 22 August 2019 stated that the case was not suitable for a hearing on the papers and that a case management hearing ("CMH") would be held on 23 September 2019.

6. Following the CMH, the Directions of 07 October 2019, which provided a timetable leading to the hearing of the Application, stated that the areas of disagreement between the parties were:

   (1) whether payment for the works is properly within the service charge provisions of the relevant leases;
   (2) whether the wall forms part of the landlord's title;
   (3) the cause of the damage to the wall and why the works are considered necessary;
   (4) whether the on account estimates were reasonable sums or not;
   (5) whether the sums demanded are payable;
   (6) whether section 20 of the Landlord and Tenant Act 1985 ("the 1985 Act") applies and if so whether there has been compliance by the Applicant;
   (7) whether there is an equitable set-off.

Inspection

7. The Tribunal inspected the relevant part of the premises on the morning of 17 December 2019. Also present were Mr Philip Bird, an Associate Director of Metro PM; Mr Simon Allison of counsel (a barrister representing the Applicant); Mr John Stevens (Chair of the Tenants Association), representing the second Respondent; Mr Roger Barton (leaseholder Flat 17); Mr Richard Shorting (leaseholder Flat 8); and Mr Paresh Parmar (leaseholder Flat 42). After the inspection a hearing was held at Gloucester Crown Court.

8. The inspection revealed that on the southwestern boundary of the site of Cambray Court adjacent to the River Chelt there is a brick built retaining wall with a concrete top beam along its length. The wall holds up the Applicant's land. At some point, the freeholder at the time would appear to have erected a (now dilapidated) wooden fence fixed to concrete posts, which had been erected next to the wall. The Tribunal noted the severe bowing of the retaining wall. The wall on the opposite side of the river appears to be in good condition and not in need of repair. It is topped by railings and retains a car park beyond the wall.

The Applicant's Case

9. The parties made written and oral submissions and produced an agreed bundle of documents, which was placed before the Tribunal. For the Applicant, Mr Allison addressed each of the areas of disagreement identified in paragraph 6 above. Before doing so he stressed that the Application related to anticipated costs and was therefore made under section 27A(3) of the 1985 Act. He said that almost all of the anticipated costs had been charged across three service charge years and that

payability of the costs was in issue. The only actual costs listed in the accounts for those years in connection with the wall related to various reports and surveys obtained by the Applicant.

10. Mr Allison then turned to the issues before the Tribunal. The first issue was whether the relevant leases permitted the Applicant to levy interim service charges in respect of the proposed works.

The Leases

11. Mr Allison explained that there were three types of lease at Cambray Court. Most were leases of a flat alone (the residential lease). Some were leases of a flat and garage and there were also some separate garage leases. Mr Allison produced the lease of Flat 56 as a sample residential lease, which he said did not differ in all material respects from the residential leases of all the other flats. (Mr Allison said that some of those residential leases had been extended and re-granted but he said that this did not alter the relevant terms). With regard to the leases comprising a flat and a garage, Mr Allison provided the lease of flat 40 and garage 16 by way of sample. This was a re-granted lease but Mr Allison stated that it did not differ in any material respect from the residential leases, save that it required the Tenant to pay in addition 15.5% of all costs incurred by the Landlord in maintaining the garage block in which the garage is located. The separate garage leases are granted on the same terms as their associated residential lease with the necessary modifications so as to apply to the garage. Mr Allison stated that any works to the garages in connection with the repair of the retaining wall would be carried out under the terms of the residential lease (or residential component of any mixed leases) and not under the garage leases or the garage component of any mixed leases. Mr Allison said that the work to the garages would thus be "making good" work ancillary to the repair of the wall and therefore would not be covered by the separate garage service charge in those leases containing such a charge.

12. The residential lease ("the Lease") of Flat 56 defines "The Building" as being the three blocks known as Cambray Court.

13. By clause 4(2)(A) of that Lease the Lessee covenants, *inter alia*, to pay in advance, by equal half-yearly instalments to be paid on the first day of April and the first day of October in each year, a specified percentage of the estimated costs and expenses and outgoings incurred or provided by the Lessors in any year in or for the carrying out of their obligations under clause 5 of the Lease. The amount to be paid is to be determined by the Lessor's surveyor or managing agent. Clause 4(2)(B) makes provision for a balancing exercise to be undertaken after the end of the service charge year. There is a proviso that permits the Lessors to put any unexpended surplus of sums sought on account towards the annual cost in a future accounting period. There is no provision in the Lease for accumulation of a reserve fund (as confirmed in earlier tribunal proceedings).

14. Clause 5(2) of the Lease contains in so far as material a covenant by the Lessors to

"take all reasonable steps to keep in good and substantial repair and condition

(i) the main structure of the Building including the principal internal girders timbers and the exterior walls and the foundations and the roof thereof with its main drains gutters and rain water pipes (other than those demised);…
(iii) the main entrances passages landings staircases and access paths roads garden and yards of the Building enjoyed or used by the Lessee in common as hereinafter provided and the boundary walls and fences of the Building."

14. Clause 5(9) contains a covenant by the Lessors to

"Employ such person or persons as shall be reasonably necessary from time to time for the performance of the covenants herein contained on the part of the Lessors on such terms and conditions as the Lessors shall in their absolute discretion think fit."

15. Clause 5(13) contains a covenant by the Lessors to

"Without prejudice to the foregoing do or cause to be done all such works installations acts matters and things as in the absolute discretion of the Lessors be necessary or advisable for the proper maintenance safety and administration of the Building and pay a reasonable proportion of the expense incurred for or towards the making supporting repairing cleansing and amending of all party walls party fence walls gutters commons sewers public sewers and drains belonging or which shall or may belong to the Building or any part thereof (but excluding those exclusively comprised in or serving the demised premises) or which shall be used in common with other premises adjoining or near thereto such proportion in case of difference to be settled by the Surveyor for the time being of the Lessors whose decision shall be final and also pay the reasonable charges of the said survey in respect of any reference to him."

16. The Applicant argues that the retaining wall forms part of the premises at Cambray Court and is a boundary wall of the Building for the purposes of clause 5(2)(iii) of the Lease. The Applicant says that the reference to a boundary wall of the Building in this context must mean a boundary wall of the site (i.e. the premises of Cambray Court) rather than a wall of the actual Building.

17. Further, or alternatively, the Applicant argues that by clause 5(13) the proposed works to the retaining wall would be works that are "necessary or advisable for the proper maintenance safety and or administration of the Building" itself.

18. The second issue is whether the wall, to which this application relates, forms part of the Landlord's title. The River Chelt runs along the south-western boundary of the premises close to the rear of the garage blocks. The wall is approximately 1.5 metres high and runs along the length of the river where it passes that boundary of the premises. The top of the wall is at the ground level of the premises. Thus it is a wall that goes down from ground level rather than up, and bounds and holds up the adjacent part of the site.

19. With regard to ownership of the wall, the Canal & River Trust confirmed on 20 July 2017 that it did not own any waterways in the Cheltenham area. The Environment Agency confirmed on 18 July 2017 that the retaining wall was not in the ownership of the Agency nor does the wall provide any flood risk benefits in the form of a raised flood defence. It considered that the wall belonged to the Applicant with whom responsibility for its maintenance lay.

20. The pre-registration title deeds to the Landlord's freehold title are no longer available. The retaining wall is situated at the boundary of the land within the registered title. Mr Allison stated that there is a rebuttable presumption that where property abuts a natural non-tidal river, the boundary of the property extends to the centre line of the water such that the property owner also owns half of the riverbed ("riparian rights"). Mr Allison said that in the present case there is no evidence to rebut the presumption with the result that the retaining wall must fall within the premises owned by the Applicant. Mr Allison says that it matters not that the retaining wall bounds and supports the site rather than forming the legal boundary, which in this case is in the centre of the riverbed. He says that it is still a boundary wall.

21. The third issue is the cause of damage to the wall and why the proposed works are considered necessary. The Applicant says that the damage is primarily attributable to the absence of proper foundations to the wall, coupled with movement over time, which has caused such damage to the wall that it is in danger of imminent collapse. The Applicant reached this conclusion over a period of time.

22. The Applicant says that in or about mid-2015, following reports of cracking in the wall and the adjacent concrete hard standing, the Applicant arranged for surveyors, engineers and geotechnical engineers to inspect, investigate and provide advice.

23. A report by Geotechnical Engineering Limited, ("the Geotech Report") which had been commissioned by the Applicant, is dated 26 June 2015. The Geotech Report found that the wall had no concrete foundations and recommended investigation of a number of possible solutions including replacement, underpinning, anchoring the existing wall or sheet piling to the front of the wall. It further recommended that "specialist piling contractors should be consulted to advise further on the most suitable pile type, installation methods and to provide working loads on their chosen systems."

24. On or about 12 August 2016 Reade Buray Associates ("RBA") – a firm of structural engineers - was instructed by Metro PM Limited to inspect, arrange a drainage survey and form opinions regarding the causes of structural damage to the retaining wall.

23. The Applicant provided RBA with a copy of the Geotech Report, together with three investigation reports of water leaks at Cambray Court, which had been repaired. Having carried out their investigations over a period of 17 weeks, RBA concluded, in their Report of 30 November 2016, that the damage to the wall was the result of escape of water from pipelines beneath Block 2, which had led to damage to the storm drains where they discharge through the retaining wall to the River Chelt. The combined effect had been to soften the ground behind the retaining wall and this had caused damage to the garages and concrete slabs on which they stand. The Report recommended that "A permanent repair solution, which is likely to be demolition and rebuilding should be researched, designed and implemented without delay" and that "A temporary shoring support system should be installed in the river between the two opposing retaining walls as soon as practicable."

25. Based on the RBA Report, the Applicant made a claim on its insurers, Allianz, who appointed Cunningham Lindsey ("CL") to report on the matter. On 25 July 2017, the Building's insurer rejected the insurance claim made by the Applicant. This was confirmed in a letter to the Applicant from CL, dated 18 October 2017 where it was stated that the policy excluded "Damage caused by or consisting of inherent vice, latent defect, gradual deterioration, fair wear and tear." The insurers considered that the damage had occurred over time, beginning long before the insurance policy was taken out, and could not be said to be attributable to a single one off accidental event. The underwriters subsequently refused to budge on their decision despite being pursued for several years by solicitors, Wright Hassell, on behalf of the Applicant, and by Mr Bird of Metro PM, most recently in a letter from Mr Bird to CL dated 13 August 2019.

26. On 10 January 2017, RBA invoiced the Applicant for professional services including "research, specification and obtaining quotations for shoring up walls to River Chelt." However, a further invoice dated 27 July 2017 referred to producing and issuing budget tender documents in respect of sheet piling, all as discussed with Mr Bird.

26. Meanwhile, in July 2017, the Applicant sought a second opinion on the cause of the damage to the wall, from another firm of chartered engineers, David Symonds Associates ("DSA"), who reported on 24 July 2017. The DSA Report concluded that the wall was unstable and there was a significant risk that it could collapse at any stage and damage the garage areas. The Report recommended propping of the wall from the opposite wall, which would require the approval of the Environment Agency and the owner of the opposite wall. The Report said "It is likely that movement of the wall has been ongoing since the time of

construction, probably with periods of relative stability followed by periods of movement." The Report also stated that a rising water table would put increased pressure on the wall and that water from the leaks referred to above could not be ruled out as a lesser contributory factor in the deterioration of the wall.

27. Mr Bird of Metro PM said that the Environment Agency subsequently refused to sanction a scheme that involved propping of the wall from the opposite bank as a temporary solution. He said that since then the Applicant has been regularly monitoring the situation but it now believes that should the wall deteriorate further the cost of repairs may increase and it is of the view that it is appropriate that the work now be undertaken.

28. Mr Bird also said that before DSA reported, the Applicant had independently engaged Clancy Consulting (structural engineers) to advise on the works and undertake the necessary tender process but Clancy, having reported in September 2017, lost interest and was subsequently replaced in November 2018 by RBA, who promised to do the same within a shorter timescale. Mr Bird said that this was agreed orally at a meeting in his office with RBA.

29. On 22 March 2019, RBA sent Mr Bird a copy of original and updated quotations for sheet piling received from 3 tenderers. Also enclosed was a programme of works that had been prepared together with an updated Budget Cost Spread Sheet Revision C. Mr Alison confirmed that none of these quotations had been accepted at this stage.

30. The Applicant says that on the basis of the reports received it had concluded that the appropriate method of repair would be to install sheet piling of the retaining wall together with associated ground building works including demolition and rebuilding of the garages. As noted above, Mr Allison said that this would not be works carried out under the garage leases. It would be works of making good that are ancillary to the wall repairs.

31. The fourth issue is whether the sums demanded are reasonable. The sums have been demanded in three tranches. The first was for £200,000, demanded on 29 March 2017 in respect of the service charge year 2017-2018. The Applicant says that at that time it considered this to be a reasonable estimate for the cheaper scheme then envisaged. The Applicant says that it demanded further sums in subsequent years because it had become clearer that a more expensive scheme would be required. The sum of £80,000 was demanded on 22 March 2018 in respect of the year 2018-19 and the sum of £360,000 was demanded on 20 March 2019 in respect of the service charge year 2019-2020.

32. The Applicant says that the current total budgeted sum of £647,881.39, (including VAT and professional fees) is based upon tendering costs and confirmation of costs as provided by various contractors and forwarded to the Applicant by professional advisers, on whose advice they were

entitled to rely (see paragraph 29 above). A schedule of proposed works was drawn up by RBA on 1 August 2019. The Applicant also provided further quotes, which it says confirms that the budgeted costs of the works fairly reflect the anticipated actual costs. The Applicant says that it obtained an opinion from a local contractor as a cross-check against the budgeted sums. The Applicant says that the insurance claim having failed, it was reasonable for the Applicant to seek the anticipated costs of the works in advance from the lessees.

33. The fifth issue is whether the sums demanded are payable. The Applicant says that they are payable because they have been demanded in accordance with the terms of the Lease and the 1985 Act and demands have been accompanied by a summary of tenant's rights and obligations as required by section 21B of the 1985 Act. (See the Service Charges (Summary of Rights and Obligations and Transitional Provision) (England) Regulations 2007).

34. The sixth issue relates to the section 20 (1985 Act) consultation procedure (as to which see the Service Charges (Consultation Requirements) (England) Regulations 2003). The Applicant says that it started a consultation in March 2019 but since engaging with the Tenants Association, which had not been served, it has restarted the process and has completed the first stage. However, Mr Allison argued that the payability of on account charges is not in law contingent on section 20 consultation having taken place (see *23 Dollis Avenue (1998) Limited v Nikan Vejdani, Nahideh* Echragi [2016] UKUT 0365).

35. The final issue is whether there is an equitable set off. The Applicant says that there is not, because the damage stems, not from any failure on the part of the Applicant but, from the underlying issues with regard to the absence of foundations to the wall.

The Respondents' cases

(1) The Tenants' Association

36. Mr Stevens, the Chair of the Tenants' Association, presented the case for the Association. With regard to issues one and two, Mr Stevens accepted that the freeholder owned the retaining wall but denied that it was a boundary wall for the purposes of the Lessor's repairing obligations in the Lease. Mr Stevens said that there was no mention of riparian rights in the Lease. However, he says that even if the freeholder's ownership extended to the middle of the River Chelt, the retaining wall could not be described as a boundary wall. He said that the only boundary structure, along the riverside of the premises, that marked the edge of the common parts thereof, was the fence, mounted on concrete posts, which was set back from the wall.

37. Mr Stevens also drew attention to the lease of Flat 19, which is not in the same form as the lease of flat 56 provided by the Applicant. The

lease for Flat 19, granted by the Applicant to Jane Rosamund Smyth, on 3 November 2018, defines the "Building" as the three Blocks known as Cambray Court and the "Estate" as the land including the Building and all other structures (including boundary walls and fences) erected on that land and the pedestrian ways, forecourts, car parks, landscaped areas and other external parts of the Building." He says that whilst that lease makes the Applicant liable for the repair of the Building and the Common Parts (and for the costs thereof to be payable by way of service charge) it does not make provision for repair of the Estate, which must therefore fall on the Applicant and be outside the service charge.

38. As to issue three, Mr Stevens accepted that the retaining wall was in need of repair but queried why a 100-year guarantee was required, save for purposes of insurance. Mr Stevens also argued that the principal cause of the disrepair was water leakage over a period of years, which had destabilised the ground adjacent to the wall and thence the wall. He referred to the evidence adduced by the Applicant with regard to water leaks, especially the RBA Report [of 30 November 2016], and Mr Bird's letter to CL of 19 August 2019 when he relied on that Report for the purposes of an insurance claim in respect of damage to the wall. Mr Stevens said that this conclusion was also supported by the fact that there was no evidence of similar damage to the wall on the opposite side of the river adjacent to the public car park. He also said it was significant that following repair of the cold and hot water pipes and drains at Cambray Court the wall had not moved (as confirmed in Mr Bird's letter to CL referred to above). Furthermore, the DSA Report was produced in only 4 days, as compared with the 17 weeks taken to compile the RBA report which, Mr Stevens suggested, indicates little in the way of detailed investigation, and in any event the DSA Report did not discount the possible impact on the wall of leaks from around the site.

39. Mr Stevens produced Mr Barton, who had made some calculations, which were presented to the Tribunal and the Applicant [for the first time] on the day, as to the volume of water that, Mr Stevens says, must have escaped as a result of the water leaks. Mr Barton did so by reference to meter readings at the relevant times. Mr Stevens said that this proved the significant contribution that the leaks must have made to the deterioration of the wall and damage to the adjacent garage areas.

40. With regard to issue four, Mr Stevens said that the Applicant had been presented, in the reports that it had commissioned, with two possible repair options. The first and most expensive option was sheet piling. The second less expensive and less disruptive option was a bored pile solution, which would appear to offer a reasonable solution. Mr Stevens said it was not clear why the Applicant had opted for the former, save that it offered a 100 year guarantee, the need for which, as noted above, was questioned by Mr Stevens. Mr Stevens

queried why removal and rebuilding of the garages, and the incurring of an inordinate expense relating to the same, would be required.

41. Mr Stevens also drew attention to the fact that the budget estimates had increased dramatically from 8 July 2016, when provision of £70,000 was made for "slippage behind garages and repairs to the cement hard standing", to 22 March 2017, when this was replaced by provision for £200,000 for "River Wall/drainage repairs," to 22 March 2018, when a further provision of £80,000 was made towards "the cost of repairs to the river wall", to a letter of 20 March 2019, informing leaseholders that the total cost was now estimated at £647,881 and requiring a further provision of £360,000.

42. With regard to issue five; Mr Stevens drew attention to two earlier [leasehold valuation] tribunal determinations, in 2006 and 2012, with regard to Cambray Court, in which, he said, the tribunal had held that the cost of any repairs during a financial year should be collected in arrears in accordance with the lease. The second tribunal had also confirmed that the lease did not make provision for a reserve fund and had urged the parties to consider an application to the tribunal for variation of the lease.

43. Turning to issue six, Mr Stevens argued that the section 20-consultation procedure was applicable, but that the present procedure should be stayed to enable a consultation to take place using a bored pile solution. Mr Stevens also queried why there had been no consultation on the various professional reports that had been commissioned by the Applicant at a cost of around £30,000.

44. Finally, with regard to equitable set-off, Mr Stevens said that the problems with the retaining wall were longstanding and had been evident since at least 2003-4. He said that the Applicant had not at any stage conducted routine maintenance of the wall, including removal of vegetation, and cracked drains, nor had it investigated or otherwise dealt with, in a timely fashion, the causes of subsidence under the garage blocks after it first appeared in 2003. Mr Stevens asked why major leaks had gone unrepaired for three years. He also stated that if maintenance of the wall was the responsibility of the Applicant, as it claimed, it had singularly failed to comply with its covenant to the detriment of the leaseholders who were now faced with much larger costs than would otherwise have been the case. Mr Stevens said that since the wall was identified in 2014 as leaning to such an extent that it was in danger of imminent collapse, no temporary or permanent measures had been taken to deal with the problem.

(2) Mr Parmar (Flat 42)

45. Mr Parmar argued that the Application was premature. He said that the evidence relied on by the Applicant was confused and conflicting as to the cause of the damage to the wall and in any event even if the wall

collapsed it would only affect the garages which was of no concern to leaseholders who did not have a garage. He said that no evidence has been produced to establish that the Building would be threatened. Mr Parmar said that responsibility for maintenance of the garages is dealt with by the specific service charge provisions of the leases that relate to garages and is therefore of no concern to non-garage owning leaseholders. He said that when his lease was renewed and the garage was thereafter omitted his service charge of 1.81% was unchanged

46. Mr Parmar also questioned whether it was correct to say that there was no public authority liability for the wall. He referred to works to alleviate flood risk that he said had been carried out to the River Chelt, including the section adjacent to Cambray Court, by the local authority and Environment Agency, following floods in 2007. He was far from satisfied that the Applicant had done enough to establish the liability of those authorities for the condition of the retaining wall.

47. Mr Parmar considered that the south-western boundary of the premises, as far as his lease is concerned, is the fence constructed by the freeholder. He said that he was never made aware of any potential liability for the retaining wall, which he says, the Applicant has failed to maintain or properly insure against risk due to flood or other perils.

48. Mr Parmar said that the section 20 notice(s) served on him were of no effect because he had never received notice of change of address of Metro PM. Furthermore, he said that they did not cover all the professional charges raised to date by consultants in respect of this matter. [The Applicant says in response that the service charge demands show the Applicant's new address].

49. Mr Parmar also queried the extent to which the damage is attributable to water leaks and if it were why the situation was allowed to persist for three years. He said that the damage was caused by many contributory factors, including water leaks and lack of maintenance by the Applicant.

50. Mr Parmar said that the charges made were not for routine maintenance costs and therefore amounted to sinking fund charges, which are not permitted by the Lease.

51. Mr Shorting also said that the current insurance policy must have been unfit for purpose, given that an insurance claim had been paid in 2005 for subsidence.

The Applicant's Reply

52. Mr Allison argued for the Applicant, that the retaining wall is part of the Estate in the case of the lease of Flat 19. He says that paragraph

10(1) of that lease provides that the Landlord's Expenses (which are recoverable by way of Service Charge) are "the costs….of or in connection with the Services and all or any of the following items:"

53. The items include

"(o) any other works, services or facilities which the Landlord reasonably considers desirable for the purpose of maintaining, improving or modernising the services or facilities in or for the Building or which shall be used in common with other premises adjoining or nearby……. and which are for the general benefit of the occupiers of the Building and are in accordance with the principles of good estate management.

54. Services is defined as including a number of matters including

(a) maintaining repairing, furnishing, decorating and lighting the Common Parts
(b) maintaining, repairing, rebuilding and replacing the Structural Parts

55. Structural Parts are defined as any part of the Building except (a) Common Parts (b) the Property, and (c) any other parts which are let or intended for letting.

56. Common Parts is defined as

"Where applicable, the entrance lobbies, halls, stairways, landings, corridors, lifts, lavatories, refuse areas, internal and external fire escapes, other internal areas of the Building (except the Property) and any other parts of the Building which are let or intended for letting) *and the areas and amenities in the Estate available for use in common by the tenants and occupiers of the Building"* (emphasis supplied).

57. Mr Allison says that the wall falls within the definition of Common Parts by virtue of the italicised words above.

58. With regard to the cause of the damage to the wall, Mr Allison said that all the expert evidence, including that of the insurer's loss adjusters, pointed to the water leaks being at best a contributory factor, the main factor being the absence of foundations. He said that Mr Barton is not an expert and his calculations have to be taken in context. He suggested for example that it is difficult to distinguish the volume and effect of leak water from that of rainfall over a year. He also said that any comparison with the wall on the opposite bank is bedevilled by the fact that we do not know the history of that wall. The Applicant further denied that it had neglected the wall and stated that it is inspected on a monthly basis.

59. As to whether the estimates were reasonable, Mr Allison said that the Applicant had obtained a lot of estimates from a lot of engineers. With regard to the method of repair, Mr Allison said that it is for a landlord to choose the method and provided the choice is reasonable there is no obligation to choose the cheapest option. He said that the method of sheet piling was an informed decision and there was no evidence that the Landlord's choice was unreasonable. The Applicant says that in the opinion of RBA it is the only viable option if the garages were to be retained.

60. Mr Allison said that with regard to the previous tribunal decisions referred to by Mr Parmar, the 2006 decision was that an *ad hoc* interim demand could not be made mid year whilst the 2012 decision was that the lease did not permit a reserve fund, neither of which was applicable in the present case. Mr Allison said that when the initial demand was made it was not an attempt to build up a reserve fund but a reasonable estimate of costs likely to be incurred in the coming year or the subsequent year.

61. Mr Allison said that there was no room for an argument of equitable set off. He said that there was no evidence of loss to any Respondent stemming from a breach of covenant by the landlord. Mr Allison also said that not all residents had been there from the outset. They had acquired their leases at different stages. He said that this would make it impossible to calculate any set off even if there had been a breach of covenant by the Applicant, which was denied.

62. In response Mr Stevens said that the issue of the wall had first arisen in 2005 and yet investigations did not begin until 2014 and had only speeded up in the last couple of years. He said that had action been taken earlier the costs might not have been so extensive.

Discussion

63. The rationale of service charge schemes on long leasehold developments, such as that at Cambray Court, is that the Landlord will perform specified services for the benefit of the building or buildings and the estate and the tenants will be obliged to pay for the costs of those services by way of service charges levied on them by the landlord in a accordance with the terms of the lease. Some leases, as in the case of Cambray Court permit the landlord to collect service charges before any expenditure has been incurred with necessary adjustments being made on completion of the works in question. Because the landlord is thus enabled to spend the tenants' money the scheme must be operated in accordance with the terms of the lease and the legal framework that is designed to protect tenants from unreasonable charges.

64. Section 27A(3) of the Landlord and Tenant Act 1985 provides that "An application may…be made to [the Tribunal] 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 which it would be payable and (e) the manner in which it would be payable.

66. The purpose of this provision is to enable an application to be made to the Tribunal before any costs are actually incurred. As Mr Allison recognised, if the costs that are subsequently incurred turn out to be more or less than the sum determined there is nothing to prevent either party from applying to the Tribunal under section 27A(1) of the 1985 Act for a determination of the payability and reasonable of the new sums.

Section 19(1) of the 1985 Act provides that "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".

Section 19(2) provides that "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 are being incurred any necessary adjustments shall be made by repayments, reduction or subsequent charges or otherwise."

"Relevant costs" are defined for these purposes by section 18(2) of the 1985 Act as "the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

67. At the heart of the section 27A(3) application before this Tribunal, and dated 6 June 2019, is a single issue. In 2017, 2018 and 2019, the Applicant freeholder of Cambray Court Cheltenham, served advance service charge demands on the long leaseholders of the flats. Those demands were based on estimated service charge costs for the years ending respectively on 31 March 2018, 31 March 2019 and 31 March 2020. The matter that the Tribunal is asked to determine is the payability and reasonableness of one element of the sums demanded in each of those years. That is to say the estimated costs of repairing the retaining wall at Cambray Court and associated ground works. The total estimated costs in the three years amounts to £640,000.

68. This single issue raises a number of disputed matters on which the Applicant and many of the Respondents, either individually or through the Tenants' Association, have made the written and oral submissions, summarised above. The Tribunal's findings on each of these matters, with its reasons, are set out below.

Whether the Cost of Repair of the Wall is a Service Charge Cost

69. The first matter is whether the expense of repairing the wall is a service charge cost. This turns on the construction of the Lease. By clause 4(2)(A) of the Lease the Lessee covenants, *inter alia*, to pay in advance, by equal half-yearly instalments to be paid on the first day of April and the first day of October in each year, a specified percentage of the estimated costs and expenses and outgoings incurred or provided by the Lessors in any year in or for the carrying out of their obligations under clause 5 of the Lease. The Respondents suggested that the advance payments demanded by the Applicant amounted to the creation of a sinking fund. The Tribunal does not agree. Although the Lease does not permit the accumulation of a long term sinking fund, it does provide that any surplus of advance payment over expenditure in any one year shall be accumulated by the Landlord and applied in or towards the annual cost the next succeeding or future accounting period (clause 4(2)(B) proviso).

70. Clause 5(2) of the sample residential lease produced by the Applicant (that of Flat 56) contains (in so far as material) a covenant by the Lessors to

> "take all reasonable steps to keep in good and substantial repair and condition
>
> (i) the main structure of the Building including the principal internal girders timbers and the exterior walls and the foundations and the roof thereof with its main drains gutters and rain water pipes (other than those demised);
> (ii) all such gas and water pipes drains and electric cables and wires in under and upon the Building as are enjoyed or used by the Lessee in common with the owners and lessees of the other flats;
> (iii) the main entrances passages landings staircases and access paths roads garden and yards of the Building enjoyed or used by the Lessee in common as hereinafter provided and the boundary walls and fences of the Building."

"The Building" is defined in the Lease as being "the three blocks known as Cambray Court."

71. The Applicant argues that the retaining wall is owned by the Applicant and is properly described as a boundary wall of Cambray Court for the purposes of clause 5(2)(iii). It says that in the context of this sub-

clause the reference to boundary walls of the Building must mean the boundary of the site around the Building.

72. Mr Stevens accepts that the wall is owned by the Applicant, but says that it does not bound the grounds of Cambray Court, which in his submission is bounded by the fence. Mr Parmar also appeared to argue that in constructing the fence the Applicant (or its predecessor in title) had marked the boundary of the grounds of Cambray Court for the purposes of the Lease.

73. The Tribunal finds that however the fence might be described, this in itself does not prevent the retaining wall being a boundary wall for the purposes of Clause 5(2)(iii). The Tribunal agrees with the Applicant that the reference to boundary walls in Clause 5(2)(iii) must be to a boundary wall of the site surrounding the blocks of flats.

74. This raises the question of whether the retaining wall is such a boundary wall. Mr Allison said that the wall, which clearly holds up the site, is owned by the Applicant as part of its freehold title to the property known as Cambray Court (registered at HM Land Registry under title number GR167574). He argued that the wall is therefore a boundary wall because it bounds the site and is owned by the Applicant. He says that the fact that the riparian ownership presumption would extend the legal boundary of the land owned by the Applicant to the centre of the river does not affect the function of the wall as a boundary wall of the physical site of Cambray Court.

75. The title plan shows the south-western boundary of the Applicant's land to run along the extremity of the land beside which the river flows at a lower height, although the plan is not sufficiently exact to show whether this includes the retaining wall. As Mr Parmar stated, we do not know for certain the circumstances in which the wall was constructed or by whom. However, the wall undoubtedly supports the land on which Cambray Court and its grounds are built. This suggests that it is part of that land and is therefore within the Applicant's ownership, in the absence of any evidence that somebody else owns it. Mr Parmar says that public authorities are liable for maintenance and repair of the wall. However, there is no evidence that the wall is in the ownership of any authority or Agency or that they have a contractual or statutory obligation to repair the wall. Further, the Tribunal agrees with Mr Allison that the wall can be a boundary wall without having to sit on the exact line of the boundary, nor be above ground level. The wall in question not only bounds the premises, but also marks the edge of the land on one side. The Tribunal therefore finds that the retaining wall is a boundary wall of Cambray Court and as such the Applicant is obliged to maintain and repair the wall by virtue of Clause 5(2)(iii) of the Lease and the leaseholders are obliged to contribute to the cost of the same under clause 4(2) of the Lease.

76. At the hearing we were shown a copy of the lease of flat 19, being we are told, one of two leases which are in a different form to the lease of flat 56

and the leases of other flats in a form identical to that lease. The lease of flat 19, is a modern lease. It defines the "Building" as the three Blocks known as Cambray Court and the "Estate" as the land including the Building and all other structures (including boundary walls and fences) erected on that land and the pedestrian ways, forecourts, car parks, landscaped areas and other external parts of the Building."

77. The lease provides that the advance estimated service charge is a proportion of the landlord's estimated expenses. These are defined in clause 10.1 of the lease. The definition encompasses (1) the costs of or in connection with the provision of the Services (as defined) and (2) of all or any of a list of items.

78. "Services" is defined as including 14 listed matters. The first two are (a) maintaining, repairing, furnishing, decorating and lighting the Common Parts and (b) maintaining, repairing, rebuilding and replacing the Structural Parts.

79. In turn Structural Parts are defined as any part of the Building except (a) Common Parts (b) the Property [i.e. the flat], and (c) any other parts which are let or intended for letting.

80. Common Parts is defined as

> "Where applicable, the entrance lobbies, halls, stairways, landings, corridors, lifts, lavatories, refuse areas, internal and external fire escapes, other internal areas of the Building (except the Property) and any other parts of the Building which are let or intended for letting) *and the areas and amenities in the Estate available for use in common by the tenants and occupiers of the Building"* (emphasis supplied).

81. Mr Stevens argued that whilst that lease makes the Applicant liable for the repair of the Building (and for the costs thereof to be payable by way of service charge) it does not make provision for repair of the Estate, which must therefore fall on the Applicant and be without the service charge.

82. Mr Allison said that the Applicant was liable for repair of the boundary wall because it was part of the Estate as defined and also fell within the definition of the Common Parts. However, the lease does not provide expressly for the costs of repairs or works to the Estate in general and in that regard the Tribunal does not agree with Mr Allison. On the other hand the Tribunal does consider that the wall falls within the last part of the definition of Common Parts. The wall is used in common by all the leaseholders as a means for maintaining the stability of the Estate, which is to all their benefit. Similar situations arise where a porter's flat or boiler room is used for the benefit of the leaseholders and considered a common part even though the leaseholders cannot physically access those spaces. The Tribunal's construction of this clause and its width is assisted by the fact that at the time this lease was granted, the majority, if

not all, of the other flats were subject to leases which provided for a contribution to the cost of maintaining the boundary wall and there appears no reason why this lease would provide otherwise. On that basis, as the boundary wall falls within the definition of Common Parts, there is an obligation on this leaseholder to contribute to the cost of repairing and maintaining the same.

Cause of Damage to the Wall and Remedial Works

83. The next issue was the cause of the damage to the wall and why the works are considered necessary. The Applicant says that the expert evidence leads to the conclusion that the wall has been deteriorating over a long period of time because of movement. It says that the primary cause is the fact that the wall was built without foundations and thereafter it was always going to be under sustained pressure from the land retained.

84. The Applicant says that the works are considered necessary because it has been advised that the wall is now leaning to such an extent that it must be considered unstable and there is a significant risk that the wall could collapse at any stage, which would not only cause damage to Cambray Court and the garages, which are supported by the wall, but would greatly increase the cost of any remedial works.

85. Mr Stevens accepted that the wall was in disrepair. However, he said that expert evidence commissioned by the Applicant confirmed that the cause of the disrepair was long term escape of water from pipes coupled with the failure and collapse of the storm water drains serving the grounds and the hard standing areas. This is a reference to the RBA report of 30 November 2016.

86. The Tribunal agrees that the wall is in a state of disrepair. It is clearly bowing and the contrast with the wall on the opposite bank is stark. There is ample evidence of disrepair. Although the expert reports and the parties disagree as to the principal cause of the disrepair it seems likely that there are multiple causes, principally the lack of foundations to the wall which has meant that lateral pressure on the wall has weakened the wall and caused subsidence to the adjoining slab and garage area. Hydraulic pressure from ground water and leaking pipes and drains would also appear to be at the least a contributory factor. The Tribunal is not convinced that the evidence of water leaks is sufficiently strong to establish that it is the primary cause of the damage to the wall.

87. As to why the proposed works are considered necessary, the Tribunal agrees that all the professional advice received supports the conclusion that action is required and has been for some time. The question that is unresolved as far as the parties are concerned is whether sheet piling is the appropriate solution. The Geotech Report of 26 June 2015 had recommended that specialist piling contractors should be consulted further to advise on the most suitable pile type, installation method and to provide working loads on their chosen system. This appears not

to have happened. Instead RBA has more recently obtained quotations for a sheet piling solution from 3 contractors, the lowest of which was from Sheet Piling UK, and reported on the same to the Applicant on 22 March 2019.

88. Mr Stevens suggested that a less expensive bored piling solution had not been explored. The Applicant says that RBA had advised that sheet piling was the most suitable option to address the issues. It says that this was due to ground conditions, the requirement for the garages to remain, the condition of the wall and the method to be used for driving the sheet piles, which would have to be driven into the ground hydraulically to minimise the chance of the wall collapsing.

89. The Applicant did not provide details of this advice or supporting evidence. In these circumstances the Tribunal is not satisfied that sufficient investigation of less expensive options, such as bored piling, has taken place. This leads on to the next issue of whether the on account estimates were reasonable sums or not.

90. The initial estimated costs in respect of the wall repair, as contained in the budget for 2017-18, were £200,000. The Landlord's agents notified the leaseholders of these estimated costs by a letter dated 29 March 2017. That letter was accompanied by the budget and a demand for the first half yearly advance service charge payment, payable on 1 April 2017. The letter sought to soften this blow by stating "The major portion of the increase is due to the £200,000 provision for major repairs to the river wall. This figure is a worst-case scenario budget and we hope that any repairs will come in significantly below this figure." The letter continued, "As you may be aware the wall currently (*sic*) subject to an insurance claim and we hope to recover some or all of the money for the required repairs."

91. By 29 March 2017, the Applicant had the Geotech report of 26 June 2015 and the RBA report of 30 November 2016. The Geotech Report had recommended investigation of a number of possible solutions including replacement, underpinning, anchoring the existing wall or sheet piling to the front of the wall. Both the Geotech report and the RBA Report suggested that appropriate solutions should be researched and implemented without delay. Neither report had made any estimate of the likely costs of any solution. On receipt of the RBA Report on 30 November 2016 Mr Bird asked RBA to research, specify and obtain quotes for shoring up the wall. The Tribunal finds therefore that as at 29 March 2017 it was reasonable to make provision in the budget estimate for action in the coming financial year, and £200,000 was a reasonable estimate at the time as advised by RBA in its discussions with Metro PM. The Tribunal is satisfied that the sums were properly demanded.

92. On 22 March 2018, the agents wrote to leaseholders and enclosed a copy of the budget for 2018-2019 and an advance service charge demand for the first half yearly advance service charge payment, payable on 1 April

2018. The accompanying letter stated that, "we have had to make further provision of £80,000 towards the cost of repairs to the river wall." The letter also informed leaseholders that the insurers were denying liability in respect of the wall under the policy. By 22 March 2018, no remedial works had been carried out and the Applicant had received the DSA Report of 24 July 2017 and the Cunningham Lindsey findings of 18 October 2017, together with quotations obtained by RBA (which we have not seen) for shoring up the wall.

93. The DSA Report said that "the report from Geotechnical Engineering suggest that bored piles will be required for any remedial solution given the ground conditions and this is likely to be the most effective solution." The writer of the Report went on to state that he had sent some photographs and outline details of the ground conditions to a specialist contractor to see if there was any solution whereby the assisting wall can be retained and strengthened in place. Mr Bird said that the Applicant had received nothing further.

94. The Tribunal considers that in the circumstances prevailing at the time, it was reasonable to make further provision for the expected cost of repairs and £80,000 was not unreasonable. The Tribunal finds that the sums requested were properly demanded.

95. On 20 March 2019, by which time no remedial works had been done on the wall, the agents wrote to leaseholders and enclosed a copy of the budget for 2019-2020 and an advance service charge demand for the first half yearly advance service charge payment, payable on 1 April 2019. The letter stated that it had proved necessary to make further provision in respect of the river wall repairs. It informed leaseholders that based on advice from structural engineers and the Environment Agency the Applicant had come to the conclusion that sheet piling the full length of the wall was the most suitable option.

96. The letter continued, "Following meetings with four sheet piling contractors, structural engineers are now working up a scope of works to enable a full competitive tender process for the sheet piling and associated works. The engineers have obtained accurate budget costs from the various contractors for the required works recently obtained a budget cost for the works of £647,881 inc. VAT however we hope to make savings during the tender process (sic).

    As we have collected contributions towards the wall in previous years, these have been carried forward as an unexpended surplus in accordance with the terms of the lease. Therefore we currently hold £325,000 in a fund to be allocated against the works.

    Although we hope to make savings during the tender process we are significantly short of the £647,881 budgeted by the engineers and therefore we have made a provision of a further £360,000 in the 2019/2020 service charge budget."

97. This raises the question of what had happened between 1 April 2018 and 20 March 2019. We know that on 29 March 2017 a firm of structural engineers, Clancy Engineering, was instructed by the Applicant to give another opinion. It was engaged from 29 March 2017 until 16 November 2018. Clancy's invoice of 17 September 2018 stated that it had received further instructions on 19 September 2017 "with regards obtaining costs for repair works, commencing enquiries with Platipus Earth Anchoring Systems and Target Fixings Ltd." Clancy's invoice of 30 November 2018 stated that Clancy had been asked to review RBA's sheet piling option.

98. However, as stated above, no evidence had been produced as to why sheet piling had been chosen as the preferred method of solution. The Geotech Report of 26 June 2015 recommended investigation of a number of possible solutions including replacement, underpinning, anchoring the existing wall or sheet piling to the front of the wall. It further recommended that specialist piling contractors be consulted to advise further on the most suitable pile type and installation method. There is no evidence that this has happened. Furthermore, the DSA Report of 24 July 2017, which the Applicant says was commissioned on 20 July 2017 in order to obtain a "second opinion", had recommended a bored pile solution. Nevertheless, on 27 July 2017, RBA invoiced the Applicant for their fees in respect *inter alia* of production of a budget and tender documents for a sheet piling solution all as discussed and agreed with Mr Bird between 11 November 2017 and 31 July 2017.

99. Mr Bird told us that Clancy, whose report appears not to have advanced matters any further, dropped out of the picture, but not, the Tribunal notes, before it had charged fees of £13,000. When questioned at the hearing by the Tribunal, Mr Bird said the Applicant Landlord had appointed Clancy independently of Metro PM (although we note that invoices were sent by Clancy to Gray's Inn Estates Group). However, it is clear from the invoices that Clancy had meetings on site with Mr Bird throughout their appointment, at the same time as RBA were working on the matter of the wall. All this suggests a duplication of services and costs.

100. Since then RBA, who were reappointed in November 2018, has sought and obtained quotes from sheet piling contractors and checked them with a local (unidentified) contractor in order to produce the latest budget forecast of £647,881 and subsequently drawn up a schedule of works dated 1 August 2019. Mr Allison says that it is for the landlord to choose the method of repair but that is still subject to the reasonable test in section 19 of the 1985 Act. In these circumstances the Tribunal sees no justification as at 20 March 2019 for the Applicant to have demanded a further large sum from the leaseholders, based on a sheet piling solution, in the absence of evidence as to the viability of a less expensive alternative solution such as a bored piles solution. A reasonable landlord would not tie up his own money in this way in such circumstances. The Tribunal therefore concludes that no further sum was payable by way of advance service charge as of 1 April 2019.

Section 20 consultation

101. With regard to the section 20-consultation process, this was begun by the Applicant by a stage one notice dated 29 March 2017. A further stage one notice was issued on 20 March 2019. However, because of delay in starting the works a fresh notice was served on 13 September 2019. That notice (as did the notice of 20 March 2019) described the proposed works as "sheet piling of retaining boundary wall (River Chelt) and associated ground/building works". The Applicant says that since it had received nominations for contractors from the Respondents and is re-tendering for all of the works in accordance with the consultation process, including obtaining tender prices from at least one contractor nominated by the Respondents. However, Mr Allison argued that the payability of on account charges is not in law contingent on section 20 consultation having taken place (see *23 Dollis Avenue (1998) Limited v Nikan Vejdani, Nahideh* Echragi [2016] UKUT 0365). The Tribunal agrees that the statutory limit applied by section 20 does not apply to on account charges. However, as noted above the Tribunal does not consider it reasonable to have demanded a further £360,000 as at 1 April 2019.

102. The Respondents also argued that the Applicant should have consulted on the professional fees charged by the various consultants engaged by the Applicant in recent years in relation to the matter of the wall. These fees, which were considerable, have been charged separately as a separate service charge cost over the years from at least 2015-16. Their payability and reasonableness is not of course the subject of the present Application, which relates only to the advance payments. However, section 20 of the 1985 Act only applies to qualifying works if "relevant costs incurred on carrying out the works exceed an appropriate amount. "Qualifying works" means "works to a building or any other premises" (section 20ZA(2) of the 1985 Act). The section 20 Notice must describe the relevant works.

103. The statutory provisions are not well drafted. The consulting fees are certainly relevant costs for the purposes of section 18(2) of the 1985 Act, being costs incurred by or on behalf of the landlord, "in connection with" the matters for which the service charge is payable." It is however, less obvious, that those costs were incurred on carrying out "the works" for the purposes of section 20 of the 1985 Act. Furthermore, by regulation 8 of schedule 4 of the Regulations the Notice must describe "the works" for which tenders are to be invited. This would appear to exclude the services provided by the professional consultants in the present case.

104. In *Marionette Limited v Visible Information Packaged Systems Limited* [2002 EWHC 2546 (Ch), (a decision on section 20 as enacted before the changes introduced by the Commonhold and Leasehold Reform Act 2002), Mr Justice Warren stated (at paragraph 95) that " 'works' are, in my judgment, restricted to the physical works involved in repair or maintenance and the cost of those works is the charge made by the contractor carrying out those works for doing so. This is also very much

the flavour given by subsection (4)(c) requiring a description of the works to be carried out to be given in the notice which has to be served on the tenants: that provision seems to me to be inapposite to cover professional services provided by an independent person as part of the works which need to be described." (The reference to 'subsection 4(c)' is now to regulation 8 since the changes made by the 2002 Act).

105. The Tribunal finds therefore, that the professional services provided in this case were not 'works' that were subject to the statutory consultation process. It follows that section 20 would not limit the recoverable fees in respect of those services, which are undoubtedly relevant costs for the purposes of a service charge demand. The leaseholders do however have the protection of section 19 of the Act whereby the fees have to be properly incurred and be reasonable in amount. The present case is brought by the Applicant and relates only to the anticipated costs of repairing the wall and associated works. It is not an application by the leaseholders challenging the reasonableness of the consultancy fees, which is a separate issue.

Equitable set off

106. Finally, the Respondents argue that it is only because of the Applicant's breach of covenant in failing to maintain the wall and the non-repair of water leaks that costs will now have to be incurred in repairing the wall and that there should be a set off in respect of these matters. Mr Allison says that not all of the leaseholders owned their flats at the time of the leaks even if it could be established that the leaks were the principal cause of the damage to the wall.

107. In the Upper tribunal case of *Hazel St Claire Oliver v Sheffield CC* [2015] UKUT 0229 (LC) it was stated that

"In *Daejan Properties v Griffin* [2014] UKUT 0206 (LC) the Tribunal considered the circumstances in which a history of neglect of a landlord's repairing obligations might have the effect of limiting the cost of remedial work which could be recovered through a service charge. At paragraph 88 we agreed with the decision of the Lands Tribunal (HH Judge Rich QC) in *Continental Ventures v White* [2006] 1 EGLR 85 that a history of neglect is not of direct relevance to the question posed by s. 19(1)(a) of the 1985 Act, 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 need to incur the cost of repairs and the reasonableness of that cost does not depend on whether the repairs ought to have been carried out earlier" (per Martin Rodger QC Deputy President).

Thus if the repair works in question were only necessary because of a previous breach of the landlord's repairing covenant, which was not dealt with, or not dealt with properly at the time, it does not follow that the cost of the later repair works were unreasonably incurred.

But if the earlier breach would give rise to a claim for damages, and where the breach means that further disrepair has occurred which is now being rectified, the damages in respect of that earlier breach can be set off against the service charge payable.

> "The only route by which an allegation of historic neglect may provide a defence to a claim for service charges is if it can be shown that, but for a failure by the landlord to make good a defect at the time required by its covenant, part of the cost eventually incurred in remedying that defect, or the whole of the cost of remedying consequential defects, would have been avoided. In those circumstances the tenant to whom the repairing obligation was owed has a claim in damages for breach of covenant, and that claim may be set off against the same tenant's liability to contribute through the service charge to the cost of the remedial work. The damages which the tenant could claim, and the corresponding set off available in such a case, is comprised of two elements: first, the amount by which the cost of remedial work has increased as a result of the landlord's failure to carry out the work at the earliest time it was obliged to do so; and, secondly, any sum which the tenant is entitled to receive in general damages for inconvenience or discomfort if the demised premises themselves were affected by the landlord's breach of covenant" (*Daejan Properties v Griffin* [2014] UKUT 0206 per Martin Rodger QC, Deputy President).

108. Even if the Respondents were able to make out a case of breach of repairing covenant on the part of the Applicant, they have not provided any evidence of the extent to which the costs of repairing the wall have increased, if at all, as a result of any such breach of covenant. It is therefore not possible for the Tribunal to take this claim into account when assessing the payability of the on account sums demanded.

Martin Davey
Chairman of the Tribunal

RIGHTS OF APPEAL

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

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, that 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.