FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/00ML/LSC/2019/0109**
Premises	**:**	**Links Close, Portslade, Brighton, East Sussex BN41 1XN ('Links Close')**
Applicant	**:**	**The Brighton Estates Limited**
Representative	**:**	**Deacon Crickmay Asset Management**
Respondents	**:**	**Leaseholders of flats 1, 2, 3, 3a, 4, 4a, 5, 6, 8, 10, 12A, 15, 16, 18, 20 and 23 Links Close (as set out in the attached schedule)**
Representative	**:**	
Type of Application	**:**	**Liability to pay service charges - Section 27A of the Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Judge RE Cooper**
Date of Decision	**:**	**20.03.2020**

DECISION

The costs of creating additional car parking spaces and the building of a new bin store are not recoverable from the lessees under the service charge provisions.

Background

1. The Tribunal received an application on 4th November 2019. The Applicant sought a determination under s27A of the Landlord and Tenant 1985 as to whether the costs of works it proposes to carry out are recoverable under the service charge provisions of the lease and the

reasonableness of the costs. The proposed works that are the subject of this application are the creation of additional car parking spaces and the building of a new bin store ('the Proposed Works').

2. The Applicant is the freehold owner of Links Close, which comprises four purpose-built blocks with a total of 26 self-contained flats ('the Property'). The Applicant is also noted to be the leasehold owner of flats 7, 11, 12 and 24.

3. The 16 Respondents are the lessees of flats in Links Close who responded to the application and either opposed it or requested to be a respondent, or are lessees who did not respond.

4. On 12th November 2019 directions were given by Judge J Brownhill for a copy of the application and the directions to be sent to the lessees of all the 26 flats. Those directions also provided for mediation and if such mediation were unsuccessful (or declined) for the application to proceed for case management.

5. On 3rd December 2019 Judge D Witney gave further directions following the responses received to the directions and application. 16 of the 26 lessees were identified as Respondents to the application, the remainder of the leaseholders either being the Applicant (owner of flats 7, 11, 12 and 24) or those who agreed the application and did not want to be a Respondent. As there was no consensus amongst the Respondents regarding mediation, directions were then given to the parties that have largely been complied with.

6. It was directed that the application would be determined on the papers without a hearing in accordance with rule 31 of the Tribunal Procedure Rules 2013, unless any party objected in writing. There has been no objection and as a result there has not been a hearing. An inspection of the Property was not required.

The Issues for the Tribunal

7. The issues for the Tribunal to determine were identified in the directions of 3rd December 2019 as follows;

   (i) Are the proposed works such that under the terms of the lease they may be recovered as a service charge item?

   (ii) Have any and all appropriate consultation exercised been undertaken?

   (iii) Are the costs proposed reasonable?

The Law

8. The law relevant to this application is set out in the Appendix to this decision. Under s27A(3) of the 1985 Act the Tribunal has the jurisdiction to determine whether if costs were incurred for services, repairs,

maintenance, improvements, insurance or management, a service charge would be payable, and if it would be;

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

9. Section 20 of the 1985 Act limits the amount of contribution that is payable by leaseholders by way of service charge in respect of any qualifying works unless either the consultation procedure ('s20 consultation') has been be complied with or dispensed with.

The Applicant's case

10. The Applicant's case is set out in the application and the written statement of Marcus Staples on behalf of the Applicant.

11. In summary, the Applicant says the maintenance and upkeep of Links Close has been challenging for a number of years. A problem with suspected subsidence in 1996 and dispute with the insurers resulted in subsidence cover being withdrawn. That led to a reduction in the value of properties, uncertainty about the development's future and a deterioration in its condition.

12. From 2007 a long-term maintenance plan was developed in an effort to restore the development to an acceptable standard. Monitoring works between 2007 and 2012 demonstrated no ongoing movement and structural engineers (Philip Goacher Associates) put forward a scope of work seeking to address the condition of the metal fire escapes, external render and décor and the areas of hard surfacing (including the access road and parking area). Works commenced in 2013 (as set out in paragraph 3.4), and subsidence cover was restored to the insurance policy in 2014. The next phase of work involved the roof coverings which was completed in 2016, and there has been clearance of the back slope to enhance the amenity.

13. Although the resurfacing of the access road and parking areas has been required for a number of years, other works have taken priority.

14. A s20 consultation was conducted in 2018/19 which included the creation of additional parking at the front of the development and the creation of a bin store at the rear of the development ('the Proposed Works') in addition to the re-surfacing of the access road and existing parking areas. The Applicant says responses to the consultation indicate that most leaseholders support the re-surfacing and associated drainage works, but the Proposed Works go beyond this (paragraph 4.2).

15. The Applicant also accepts the Proposed Works go beyond being 'repairs' (paragraph 4.2), but says they are desirable for a number of reasons;

- there has been a shortage of parking spaces for the development for a number of years,
- control of the parking area has been difficult (due to the lack of well maintained parking area with marked and allocated spaces and non-residents taking advantage),
- the lack of a designated bin store area has contributed to regular fly tipping and reports of non-residents using the bins and fly tipping adjacent to them,
- removal of such items increases the service charge costs, and
- the current location of the bins in the access road detracts from the appearance of the development.

16. The Applicant submits that '*Clause 2 3 (1) e) and f)*' (sic) of the lease provides that service charge funds can be applied for *'building'* as well as for repairing, cleansing and maintaining the development suggesting that this permits the creation of something for the benefit of the development. (The clause cited does not contain those provisions, but the Tribunal accepts the Applicant intended to refer to Clause 2(3)(i)(a) and (b) (which are set out at [21] below))

17. The Applicant seeks confirmation from the Tribunal that the Proposed Works will be recoverable as service charge before committing to carry them out using funds held in the service charge account.

The Respondent's case

18. Although there are 16 Respondents to this application only one has provided a response of any substance, namely Hilary Condy (the lessee of flat 1 Links Close). In summary she says the application is of concern to other Respondents and occupiers for the following reasons;

(i) the lack of information regarding the Proposed Works in the s20 consultation document dated 14th November 2018; although this information was requested on a number of occasions the proposed plan was only sent with a copy of the Applicant's case on 30th January 2020 so there could not be a reasoned response to the s20 consultation.

(ii) the location of the proposed new parking places; the new parking places would be directly in front of the windows of Flat 1, would replace what is currently a well-maintained area of lawn and shrubbery, and would affect the amenity of a number of flats (but Flat 1 disproportionately). She questioned whether there was a need for new parking.

(iii) the location of the proposed new bin store next to Flat G-21 would create problems with noise from refuse collection trucks entering and negotiating around cars on the development, and there is nothing from the Local Authority as to their view of the proposal. Other solutions to the problem of fly tipping could be explored.

(iv) the question of whether the parking spaces and bin store would be paid for through the service charges; the Proposed Works amount to an improvement and were not recoverable as a service charge.

The Tribunal's determination

19. The principle issue for the Tribunal concerns the proper construction (or interpretation) of the Respondents' leases, and whether the costs of the Proposed Works would be recoverable from the leaseholders through the service charge.

The lease

20. The Applicant has provided with the application a copy of a lease dated 8th August 1985 for flat 12a Links Close for a term of 99 years from 25th December 1981. The parties to that lease are the Applicant (as Lessor) and John Philip Holmes. No other lease has been provided to the Tribunal, but in Clause 3(4) the Lessor covenants that every other lease granted should '*impose the same or substantially the same covenants and conditions*' and this decision works on the assumption that the leases of all the Respondents to this application contain the same (or substantially the same) provisions.

21. Clause 2 sets out the Lessee's obligations under the terms of the lease. Clause 2(3)(i) requires the Lessee to pay a service charge equal to an unspecified proportion of specified expenses. The specific clauses relevant to this application are the following;

(a) repairing cleansing building and maintaining the main walls and timbers of the Building (including the joists on which the floors of the Flat and the other flats in the Building are laid) and the roof chimney stacks gutters and rainwater pipes used or to be used in common by the occupiers of the Flat and the other flats in the Building

(b) repairing cleansing building and maintaining all party walls or party roads fences pathways passages sewers drains pipes watercourses and other easements serving the Flat and the Building

(c) cleansing decorating repairing and lighting the common passageways staircases entrance halls landings and access ways to all the flats in the building

(d) the upkeep of the gardens surrounding the Building

(e) ……. (k)……..

22. 'The Building' is defined as being *'the buildings known as Links Close Links Road Portslade-by-Sea in the County of East Sussex'* (Clause 1)

23. Clause 2(3)(ii) of the lease provides the mechanisms by which the service charge is ascertained, certified and collected each year (which runs from 7th April to the 6th April of the next year) and for the supply of information regarding the expenses and outgoings to the lessees. It allows for an interim payment every half-year with a balancing payment (or credit) at the end of the year, and there is provision for a reserve fund for anticipated future expenditure.

24. The Lessor's covenants are contained in Clause 3 which provides *inter alia;*

    (1) Subject to the Lessee paying the contribution towards the cost…to keep in good and tenantable repair order and condition the roof main walls… and main structure of the Building together with all party walls or party roads fences pathways and other easements service the Flat and Building… the gardens the common entrance hall staircase landings and passages of the Building and to keep the said entrance hall staircases landings and passages clean and tidy and adequately lighted.

25. Part 1 of Schedule 1 provides the rights included in the demise to the Lessee. These include

    (1) The right in common with the Lessor and the lessees or occupiers…….for the purpose of access to and egress from the Flat the entrance hall staircase landings and passages of the Building and the roadway and paths leading thereto

    (2) The right to use the garden area edged in green on the said plan for recreation purpose only in common with other lessees and occupiers of the other flats in the Building

    (3) The right to use the area coloured brown on the plan annexed hereto for the purposes of keeping or storing a refuse bin or using the communal refuse bin (if any) and kept in the said area coloured brown…'

26. Part 11 of Schedule 1 contains the Exceptions and Reservations for the Lessor which include, *inter alia;*

    (2) The right for the Lessor at any time hereafter to build or rebuild on any adjoining or neighbouring land or to alter any adjoining or neighbouring building according to such plans and in such manner as the Lessor shall think fit notwithstanding any inconvenience thereby occasioned to the access of light or air to the Flat.

Discussion and conclusions

27. The Tribunal starts with general principles of interpretation and the specific clauses of the particular lease in this case and its context.

28. The Supreme Court in *Arnold v Britton* [2015] UKSC 36 has given definitive guidance on interpretation. Lord Neuberger (with whom the majority agreed) set out at [15] the approach that courts or tribunals should follow;

> *"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean'.... And it does so by focussing on the meaning of the relevant words ... in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions".*

29. Lord Neuberger proceeds (in paragraphs [17] to [23]) to emphasise seven particular factors which can be summarised as follows;

    (i) Parties to a contract have control over the language that is used, and 'commercial common sense' or the 'surrounding circumstances' should not be invoked to undervalue the importance of language actually used [17],

    (ii) The less clear the centrally relevant words are (i.e. the worse the drafting) the more readily a court can properly depart from the natural meaning of the words [18].

    (iii) Commercial common sense should not be invoked retrospectively. A contract that has worked out badly for one party is not a reason for departing from the natural language [19].

    (iv) A court should be very slow to reject the natural meaning of a provision simply because it appears to be an imprudent term for one of the parties [20].

    (v) A court can only take into account facts or circumstances which existed at the time the contract was entered into and which were known or reasonably available to the parties [21].

    (vi) In cases where an event occurs which, judging from the language, was clearly not anticipated at the time of the contract, if it is clear

what the parties would have intended the court will give it effect [22].

(vii) There is no special rule of interpretation for leases and no requirement that terms in a lease should be construed restrictively [23].

30. As the Applicant accepts that the Proposed Works do not amount to *'repairing'* (and presumably also cleansing or maintenance) the only issue is whether the deliberate addition of the word *'building'* in clauses 2(3)(i)(a) and (b) of the lease allows the Lessor to not only recover the costs of repairing or maintaining existing structures and features of the Building, the access roads, pathways (and so on), but also the costs of improving or changing them and introducing amenities not previously there.

31. Most service charge clauses in leases only allow for the repair of items that are in a state of disrepair. However, the cost of improvements can be recoverable if expressly referred to in the lease. For example in *Sutton (Hastoe) Housing Association v Williams* (1988) 20 HLR 321 the term of the lease *'..maintaining, repairing, renewing...and in all ways keeping in good condition the Block...'* and of *'carrying out such additional works and providing such additional services as may be considered necessary by the Lessor'* was held by the Court of Appeal to allow for the replacement of rotten windows with UPVC double glazed units, the costs of which were recoverable.

32. By including the word *'building'* in Clause 2(3)(i)(a) and (b) it is not wholly clear what was intended, but it does indicate that items of work over and above simply repairing, cleaning and maintenance were in the contemplation of the parties when they entered into this lease. 'Building' in its natural meaning denotes the creation of some structure that was not previously there, and I am satisfied that it indicates therefore that the lease may allow for recovery of the costs of improvements or changes.

33. That '*building*' was in the contemplation of the parties at the time the lease was entered into is evident from other clauses in the lease. In addition to Clause 2(3)(i), there is express reference to '*building or rebuilding*' in Part 11 of Schedule 1 which allows the lessor to build or rebuild on adjoining land or to alter any adjoining or neighbouring building at his or her absolute discretion regardless of interference with access to light or air for an individual flat.

34. No information has been provided about the origins of the development by either party; when and whether all four blocks were built at the same time. It may be that this term was included because Links Close was developed in phases or indeed that the developer may have owned land to the rear and sides of the estate that they wished to develop at a later stage. It would be speculation to reach a conclusion in the absence of evidence of these matters.

35. However, whilst I accept that lessees may be liable to contribute towards items of work over and above repair and maintenance of existing structures, I have reached the conclusion that the word *'building'* in the phrase *'repairing cleansing building and maintaining all party walls or party roads fences pathways passages sewers drains pipes watercourses and other easements serving the Flat and the Building'* (Clause 2(3)(i)(b)) does not allow for recovery of the costs of creating new parking spaces to the front of the development through the service charge. This conclusion is reached by looking at the lease as a whole and on the basis of the clearly defined rights of each flat owner over parts of the remainder of the estate.

36. Clause 3(1) requires the Lessor to keep in good and tenantable repair the gardens and Clause 2(3)(i)(d) requires the Lessee to contribute through the service charge to the *'upkeep of the gardens surrounding the Building'*. There is no mention of '*building'* or of a contribution towards changes or improvements to the garden structure or layout.

37. The copy plans of the development provided by both parties are undated and, apart from the coloured markings that they have each used to illustrate their case, do not contain the original coloured marking referred to in the lease. The lease that accompanies the application refers to Flat 12a being identified '*edged in red*' (Clause 1) and refers to the Lessees' right to use the garden area '*edged in green'* and the *'area coloured brown'* for the purpose of keeping or storing a refuse bin (Schedule 1, Part 1 (2) and (3)).

38. Despite the absence of the original colours, it is clearly apparent from both plans both that individual flat (i.e. the subject of the particular lease) and four areas in front of the buildings were delineated by hand. I am satisfied when looking at the evidence as a whole that that the four delineated areas in front of the blocks of flats comprise the areas of maintained grass referred to in the Respondents' response. I infer they were the areas marked in green on the original plans and identified as *'the garden area'*.

39. *Pennock v Hodgson* [2010] EWCA Civ 873 confirmed (in the context of boundary disputes) that in construing the lease the tribunal must ask itself what the purchaser with the plan in their hand, on the day of the grant of the lease, would think they were buying (at [12]). This approach has recently been approved in *Buttermere Court Freehold Ltd v Goldstrom and Parissis* [2019] UKUT 225 (LC) when construing whether meter cupboard doors fell within or outside the demised property. I am satisfied that such an approach is also relevant to the question of the common parts or amenities.

40. If it was in the contemplation of the parties when they executed the lease, that changes could be made to or structures could be built on the four delineated areas of grass in the front of the four blocks of flats (and for such works to be paid for out of the service charge account), then I am satisfied that clearer words would have been required. Such matters would clearly have the potential to impact on the lessees' rights to enjoyment and

use of the garden area, and therefore what the lessees might have thought they were buying.

41. In relation to the creation of a new bin store in the position marked in yellow on the plan submitted by the Applicant, whilst the lease allows for the recovery of moneys expended for 'building' (in Clause 2(3)(i)(b)), this is not a free-standing right to create any structure, it is expressed to be in respect of *'roads fences pathways passages sewers drains pipes watercourses and other easements'*. A concrete bin store as envisaged in the Proposed Works does not fall within the natural meaning of a road, pathway or passage.

42. I have concluded, therefore, that costs of creating new car parking spaces out of the grassed garden area at the front of the blocks of flats, and the building of a new bin store at the south eastern rear of the development are not recoverable from Lessees through the service charge provisions.

43. Having reached that conclusion, there is no need to consider the other questions, namely the reasonableness of the proposed costs and whether the s20 consultation was sufficient.

Judge R.E. Cooper
20.03.2020

Note: Appeals

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.

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.

If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

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.

SCHEDULE

Respondents to the Application

Flat 1	**Mrs H Condy**
Flat 2	**Mrs M Nightingale**
Flat 3	**Mrs M Evans**
Flat 3a	**Mr S Ring**
Flat 4	**Mr K Buhagier**
Flat 4A	**Powis Property Investments Ltd**
Flat 5	**Ms C Yates**
Flat 6	**Mr A Dorrington**
Flat 8	**Dr Banerjee**
Flat 10	**Mr A Sullivan**
Flat 12a	**Mrs J Black**
Flat 15	**Mr D Golding**
Flat 16	**Ms H Ross**
Flat 18	**Mr and Mrs Pragnell**
Flat 20	**Mr L Harding**
Flat 23	**Mrs D Banfield**

APPENDIX

THE RELEVANT LEGISLATION

The Landlord and Tenant Act 1985 Act (as amended) provides:

Section 18 Meaning of "service charge" and "relevant costs"

18(1) In the following provisions of this Act 'service charge' means an amount payable by a tenant of a dwelling as part of or in addition to the rent—

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are 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.

(3) For this purpose—

(a) 'costs' includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

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 if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

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

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 27A Liability to pay service charges: jurisdiction

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to –

(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal 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 is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and (e) the manner in which it is payable.

(4) No Applications 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 the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken as having agreed or admitted any matter by reason only of having made a payment.