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

| | | |
|---|---|---|
| **Case Reference** | **:** | CHI/23UB/LSC/2019/0128 |
| **Property** | **:** | Charlton Lawn, Cudnall Street, Charlton Kings, Cheltenham, Gloucester GL53 8AA |
| **Applicant** | **:** | Charlton Lawn Management Company Limited |
| **Representative** | **:** | J B Leitch Limited |
| **Respondents** | **:** | Jacqueline Brown (Flat 8)<br>Sarah Penn (Flat 2a)<br>Melissa Antonious (Flat 1)<br>Jane Monckton-Smith (Flat 10) |
| **Representative** | **:** | |
| **Type of Application** | **:** | Liability to pay service charges |
| **Tribunal Member(s)** | **:** | Mr D Banfield FRICS |
| **Date of Decision** | **:** | 14 April 2020 |

---

DECISION

---

**Summary of Decision**

**The Tribunal determines that the Lessor's repairing covenants do not include works to the floor and non-load bearing walls as defined in paragraph 57 of this decision and that if damp proofing works were undertaken to Flat 8 the sum of £29,412 would be payable by the Lessees by way of Service Charge.**

## Background and submissions

1. The Applicant seek a determination under Section 27A of the Landlord and Tenant Act 1985 as to whether service charges in respect of the anticipated cost of basement damp works are payable and/or reasonable.

2. The works were budgeted for year 2018/19 but are likely to be carried out in 2019/20, the amount at issue is said to be £39,605.56.

3. The Tribunal made directions on 16 December 2019 indicating that unless a party objected the matter would be determined without an oral hearing in accordance with Rule 31 of the Tribunal Procedure Rules. No objection has been received and the matter is therefore determined on the papers.

4. Further directions were made on 4 and 11 February 2020 amending dates for compliance and permitting Respondents to send to the Applicant brief comments in regard to any Reply sent by the Applicant pursuant to paragraph 6.

5. The matter concerns works to damp proofing in Flat 8 and whether the costs incurred should be paid by the lessees of the flat or charged to the service charge and met by all of the lessees.

6. Statements of Case have been received from the lessees listed on the front page as Respondents, those lessees who did not serve a statement of case have been removed as Respondents in accordance with paragraph 5 of the Directions of 16 December 2019. Jacqueline Brown of Flat 8 supports the Application.

7. I have read all of the comprehensive bundle prepared by the Applicant but in my determination I only refer to those documents which have assisted my decision their page numbers being shown in [ ].

8. The issues the Tribunal are asked to determine are;

    1. Whether the works are chargeable to the service charge.
    2. Whether the works are excessive and whether S.20 consultation has been satisfactorily carried out.

## Whether chargeable to the service charge?

### Applicant

9. In the Applicant's statement of case [54] it is said that the lessee's repairing obligations extend to *the interior walls and interior surfaces of external or structural walls* (Clause 2(4) whereas the Lessor's obligation is in respect of *the exterior walls structural walls foundations and roof of the building including all additions thereto* (Clause 6(ii).

10. The lessees' obligation to pay the Lessor's costs are contained at Clause 4 (a)(i) and the definition of the flat supports the respective repairing obligations referred to above.

11. A joint survey by Rentokil concluded that existing damp proof course had failed and had been incorrectly installed. [56, paras 7 & 8] As such it was the Lessors obligation to carry out repairs.

12. In a Witness Statement by Philip Bird, Associate Director of Metropolitan PM Limited [103] he confirms the Applicant's statement of case and says that a report from Bob Boulton from Rentokil confirms the existing damp proof course to be insufficient and not installed to the correct thickness. He appends the email referred to dated 11 December 2018 [118] in which it is stated "none of the cement/Sands in the samples taken are showing waterproofing qualities as they are not dense enough. We would expect a true tanking backing coat to be far denser. The obvious grey layer, that we discussed on site' from its constituents is an unidentifiable product, which if it were a tanking layer, we would expect it to be dense and Hard and applied to a dense render"

**Respondents objecting**

13. In their statement of case [130] the Respondents say that the omission by the Applicant of the words *and all additions thereto*...from the Lessee's covenants at 2(4) gives an inaccurate impression of the Lessee's repairing obligations and that the tanking that has failed constitutes an addition to an interior surface and as such is a the responsibility of the Lessee.

**Applicant's response**

14. At the date of the lease (16 October 1992) it is likely that the existing damp proofing system was already in place as it was unlikely that a flat would have been created without and as such it is not an addition to the surface of the wall. [198]

15. The commercial construction of the lease places liability upon the lessee for additions that post-date the lease and are limited to additions to the surface thereof.

## Whether the works are excessive and S.20 consultation satisfactorily carried out

**Applicant**

16. The works are described as [57]
    1. Preparatory works to basement walls
    2. Removal of plaster

3. Installation of a single membrane waterproofing system (walls and floors)
4. Installation of a drainage channel and sump pump
5. Making good
6. Redecoration of walls

17. The costs including VAT comprise;
    1. Rentokil works £19,407.88
    2. P&S Prep & Making good £25,440.00
    3. Metro PM Fee @ 10% £4484.00

18. Listed Building consent was granted on 11 January 2019 and must be started within 3 years. [95]

19. An initial estimate of £39,605 was included in the 2018/19 budget [122] and has been demanded from the leaseholders.[102]

20. The existing damp proof system is based on render tanking and requires replacement every 10 years. The system has failed, damp is present, and a new system is required.

21. The Works include consequential making good but do not include items which are the responsibility of the Lessees of Flat 8.

22. The new system will have an economic life of around 100 years and represents the most cost-effective long-term solution. They are not obliged to accept the cheapest option and that proposed falls within an acceptable range.

23. The proposed solution will avoid the costs and intrusion caused by replacing the existing render system every 10 years.

24. In support of a long term rather than a "patching" procedure the judgement of Ackner LJ in Elmcroft Developments v Tankersley-Sawyer is cited.

25. Whilst initially more expensive in the medium to long term costs will be significantly less than the repeat costs of the existing system [61]

26. Referring to Mr Bird's witness statement at para. 19 he refers to an estimate from P&S dated 26 July 2018 [107] a copy of which he states is at PB3. At PB3 however the P&S estimate is dated 12 January 2020. At para 24 he says that Rentokil have told him the proposed system will last for approximately 100 years and at PB4 [122] is the Budget for 2018/19 including £39,605.56 in respect of "Basement Damp Works"

27. The Lessee of Flat 8 has submitted a Statement of Case [123] and Witness Statement [125] supporting the Application and indicating that the estimated cost of £49,407.88 is reasonable.

28. In her witness statement she says that when seeking Listed Building consent Cheltenham Borough Council required an enhanced scheme to Rentokil's original report and because of this the 21 December 2018 Rentokil report was produced. In view of the enhanced scheme Listed Building consent was granted on 11 January 2019.

29. A letter from the former owner of Flat 6 is also exhibited [128] however as Mrs Puddle is not a party to the proceedings the contents have not been taken into consideration.

**Respondents objecting**

30. The Rentokil survey referred to by the Applicant is dated 21 December 2018 and is not that initially obtained and dated 15 May 2018. The earlier report required the provision of a single membrane waterproof system to the walls at a total cost of £10,565.05 and it was on this report [138-152] that consultation with the lessees was conducted. The December 2018 report [153-170] extended the scope of the work to include the provision of a membrane to the floor, drainage channels and a standard pump "at your specific request" at a total cost of £19,407.88.

31. The listed building consent obtained by Metro on behalf of the Lessee of Flat 8 predates the December Rentokil report and does not therefore include the works to the floor and provision of a pump.

32. At pages 178 to 191 is an application form and design and access statement in respect of the insertion of a vertical damp proof system, the product sheet for a Delta sealed membrane system and an exchange of emails with the Council confirming that a pump would not be employed.

33. The lessees were unaware of the extension of the works until the current proceedings, no consultation has taken place and in the absence of final costs the application to the Tribunal is premature particularly in respect of the cost of the extended works.

34. The works do not relate exclusively to either external or structural walls. The west facing walls of Flat 8 are internal and non-structural as is the wall containing the chimney breast.

35. Inconsistencies in the P&S estimates are highlighted; that referred to by Mr Bird in his statement as dated 26 July 2018 is actually dated 12 January 2020, the day before his statement of case. The amount of the estimate (£21,200 + VAT) is the same as is included in the Notice of Estimates some 18 months earlier at a time when the only estimate from P&S available was dated 26 July 2018 for £19,550 + VAT [192].
It is also noted that this estimate includes upgrading ventilation which is the lessee's responsibility.

36. Contrary to the Applicant's assertions that the sealed system would only last for 10 years the documentation attached to the listed building application refers to "an effective barrier for the life of the structure in which it is installed." The Rentokil reports of both March and December 2018 refers to "Your protection lasting 30 years" not the 100 years claimed by the Applicant.

37. It is also noted that the Rentokil reports state that the cost of a full waterproofing system may not be economically justifiable and as such it is "entirely reasonable for the Applicant to go with the initial recommendation of Rentokil as per the May 2018 report and go for the sealed system …"

38. In a witness statement from Sarah Penn [194] confirms the Respondent's statement of case and notes the omission of the March 2018 Rentokil report from the Applicant's statement. Ms Penn also notes that the additional works in the later report are indicated as "At your specific request"

**Applicant's response**

39. The Applicant accepts that the consultation process has not been completed [200] but that it is an ongoing process for which the Tribunal's determination on payability is required in the absence of agreement between the Directors and shareholders of Charlton Lawn. Final estimates have been received and the Applicant is continuing with the consultation process.

40. The quotations annexed are;

- Rentokil £19,990.10 inc VAT
- Guardian Waterproofing £6,230.00 + VAT
- Battery back-up for pumps £1,265.00 + VAT
- P&S £22,522.00 +VAT
- Keitone Building Ltd £25,092 + VAT

41. The Applicant relies on Mr Bird's statement regarding the additional works necessary to obtain Listed Building consent and in any event the works are not unreasonable.

42. It is denied that the chimney breast wall is not structural and confirms that all of the proposed works are attributable to the amelioration of the damp problem. The P&S quote now excludes the cost of a bathroom extractor fan and cooker hood.

43. It is admitted that Rentokil's guarantee is for 30 years with installation guarantees of 10 years although the Applicant has been advised that the system will last a lifetime.

**The Law**

44. Reference to the law is contained in the appendix to this determination.

**Relevant Lease Extracts**

45. The Lessee's covenant at 2.(4) is *....to keep the Flat including the interior wall and interior surfaces of the exterior or structural walls and all additions thereto and the Lessor's fixtures and fittings .....*

46. The Lessor's covenant at 6 (ii) are *To maintain repair and renew in a good and substantial condition:-*
    a) *the exterior walls structural walls foundations and roof of the Buildings including all additions thereto including .....other than those serving only one flat in the Development*
    b) .....
    c) .....
    d) *all other parts of the Development as are not included in the foregoing paragraphs (a) (b)and (c) and not included in this demise or other demise of any other flat.*

*47.* The demise is indicated in the SECOND SCHEDULE as *All that Lower Ground Floor Flat known as number 8 Charlton Lawn.....including (a) the ceilings and floors of the flat and the joists and beams on which the floors (i)... (ii).....and (b) the interior non-load-bearing walls and the interior surfaces of the exterior or structural walls of the flat but excluding the foundations of the Building*

**Decision**

48. This application is in respect of works yet to be carried out and the Tribunal's jurisdiction therefore falls squarely into Section 18 (2) of the Landlord and Tenant Act 1985 being "*costs or estimated costs incurred or to be incurred".*

49. The S.20 Consultation process is ongoing and until completed I am unable to determine whether it has been satisfactorily conducted. However, when considering an application in respect of prospective works such a determination is not required as the issue is whether the budgeted amount is reasonable.

50. It is unclear upon what assumptions the budget for 2018/19 of £39,605.56 was calculated but I have assumed that it bears some relation to the specifications used to obtain the estimates listed in the Statement of Estimates dated 16 July 2018 the sum of the lowest estimates being very similar.

51. For the reasons given below I have not needed to consider the later estimates but would comment that no evidence has been produced in support of the claim that the December Rentokil works will last 100

years. Neither has evidence been produced as to the requirements of the Listed Building Authority.

52. Turning now to the construction of the lease I accept that the draftsman's reference in both Lessors' and Lessee's covenants to "all additions thereto" may be imprecise. However, I also accept that it is unlikely that at the time of the grant this flat did not have some form of damp-proofing, of whatever specification. The cost of the repair and/or renewal of damp proofing to those areas that fall within the Lessor's repairing covenants may therefore be met from the service charge account.

53. In examining the lease, it is noted that Clause 6(ii) (d) excludes from the Lessor's repairing covenant parts of the development included in the demise of the flats as described in the Second Schedule which clearly includes non-load-bearing walls and the floor excluding foundations.

54. The Lessor's repairing covenant is not to provide a damp free flat but is limited to the provision of damp proofing to the structural and external walls only.

55. The freedom given to the Lessor by Ackner LJ in Elmcroft Developments v Tankersley-Sawyer, to select a long-term rather than a patching approach to repair can only apply to those obligations provided by the lease which in this case excludes works to the floor and non-load bearing walls.

56. As the December 2018 Rentokil report includes the floor which is outside the Lessor's obligations I have taken the May 2018 report which includes the walls only as a starting point in determining those costs that are in respect of the Lessor's repairing covenants.

57. Looking at the plan attached to the report which indicates where treatment is proposed, the external walls can be clearly identified. I also accept that the "chimney wall" must be load bearing. In the absence of any other evidence and given the thickness of the other walls indicated on the plan I determine that the remaining walls are internal and therefore outside the Lessor's covenant to repair.

58. Using the plan as a guide I determine that approximately 20% of the proposed works relate to matters not within the Lessors' covenant and therefore make that deduction from the quotation dated 15 May 2018 giving a total including VAT of £8,450.

59. I also accept that costs consequential upon the Rentokil works will be chargeable. Using the P&S quote of 26 July 2018 as a starting point I deduct £500 to reflect the cost of the extractor fan and ducting to the cooker hood and a further 20% for the reason referred to in the above paragraph arriving at the sum of £18,288.00 inclusive of VAT.

60. The addition of Metro PM's fees @ 10% mean that the total cost chargeable will be;

| | |
|---|---|
| Rentokil | £8,450 |
| P&S | £18,288 |
| Total | £26,738 |
| Metro fees@10% | £2,674 |
| Grand Total | **£29,412** |

61. **The Tribunal therefore determines that the Lessor's repairing covenants do not include works to the floor and non-load bearing walls as defined in paragraph 57 of this decision and that if damp proofing works were undertaken to Flat 8 the sum of £29,412 would be payable by the Lessees by way of Service Charge.**

D Banfield FRICS
14 April 2020

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. 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.

2. 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.

3. 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.

## Appendix of relevant legislation

### Landlord and Tenant Act 1985 (as amended)

### Section 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

(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 provisions 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.

### Section 20

(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**

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

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been 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 to have agreed or admitted any matter by reason only of having made any payment.