FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/22UN/LSC/2018/0078 & 0079**
Property	**:**	1 & 2 Brannam Court, High Street, Dedham, Essex CO7 6DE
Applicant	**:**	Mary Nicolette Hart (otherwise Mann) in person, but with Michael Port IRPM [her new property manager]
Respondent	**1** **2**	John Johnson Katie Fenton
Representative	**:**	Amanda Gourlay (counsel) instructed by Coles Miller Solicitors, Bournemouth [ref MPL]
Type of Application	**:**	to determine reasonableness and payability of service charges for the years 2017–2021 [LTA 1985, s.27A]
by cross-application	**:**	for an order that the landlord's costs are not to be included in the amount of any service charge payable by the tenants [LTA 1985, s.20C]
Tribunal Members	**:**	G K Sinclair, S E Moll FRICS & R Wayte
Date and venue of Hearing	**:**	Friday 3rd May 2019 at Holiday Inn Express Colchester
Date of decision	**:**	3rd July 2019

DECISION

---

1. In these two applications the lessor sought determination of the reasonableness and payability of the service charge for the years 2017 to 2021. At the outset the tribunal made clear that it would not touch future accounting period 2020–2021, and as it had seen neither a budget nor a demand for 2019-20 that period would also fall by the wayside.

2. In respect of each year the applications pose five questions :
   a. Are the interim and service charges payable respectively at the beginning/ end of the accountancy period?
   b. Are the anticipated costs in the interim charge demands of 2017/2018 (and 2018/2019) reasonable?
   c. Is the intention to create and maintain a sinking fund of £20 000 reasonable following the completion of the pending works programme and the roof repairs?
   d. Should the added administrative costs of section 20 consultation be charged to the residential leaseholders as this legal requirement does not apply to the commercial leaseholders?
   e. Does the fact that the residential leaseholders approved the selection of the building firm to carry out the qualifying works (a firm which one of them nominated) constitute evidence that they have agreed that the qualifying works are necessary and should go ahead?

3. For the reasons set out below the tribunal determines that :
   a. Despite the point ably made by Ms Gourlay in her skeleton argument that the Fourth Schedule is defective and contains no operative provisions by which an interim charge may be demanded (and which, as between the parties or as between the tenants if they acquire the freehold, may require some later amendment of the service charge provisions) the respondents at paragraph 28 of their statement of case expressly do not dispute the applicant's ability to recover the interim and service charge from them. Further or alternatively, the levying of an interim charge before the final expenses have been incurred and calculated is clearly envisaged by the lease and accords with commercial common sense. However, nothing is yet payable due to the failure to comply with section 47 by providing an address for service on the landlord in England and Wales and, until the more recent demands, to accompany them with the prescribed summary of the rights and obligations of tenants of dwellings in relation to service charges).
   b. The tribunal has dealt with the actual service charges incurred for the accounting periods 2017/2018 and 2018/2019. The shares of expenditure attributed to each flat (and in relation to estate costs each property) by the landlord's managing agents are accepted by the respondents and deemed reasonable by the tribunal, and the amounts set out in paragraph 43 below would be recoverable once validly demanded. The anticipated costs for the major works, already subject to two section 20 consultations, are reasonable to the extent of the final selected tender.
   c. Without professional evidence of further anticipated expenditure and a time line for a programme of works it is not reasonable for the applicant to maintain a £20 000 sinking fund (just in case) after the major works to the roof have been completed.
   d. The tribunal has not seen the terms of the two commercial leases for the

ground floor units but, if their terms simply replicate the service charge provisions in the subject leases, then no such differentiation in terms of a contribution to the costs of consultation is warranted.

e. As it was conceded during the hearing that the actual major works to the roof are justified, there is no dispute as to the need for them. Until a tender for the works has been awarded and they (and any essential items of work revealed upon opening up the roof) have been completed it is premature to seek to determine the reasonableness of the actual costs to be incurred.

4. By cross-application the respondent lessees seek an order under section 20C of the 1985 Act to the effect that the landlord's legal costs incurred in connection with the main application should not be taken into account when calculating the service charge payable by the respondents. The tribunal determines that no such costs are recoverable under the lease in any event, that the applicant has incurred only issue and hearing fees but no legal costs as she acted in person, but that the disputatious attitude evinced by the respondents challenging every possible point – seemingly without regard of the fact that it is the state of their building that is deteriorating due to want of funds to carry out repairs – would justify the tribunal in making no such order.

Background

5. The freehold reversion to the premises under title number EX528852 was vested in the applicant on 9th February 1995. For the reasons which follow she receives no income from the premises but has felt obliged to incur considerable expense in attempting to stop it falling into disrepair, usually with leaseholders showing complete disinterest.

6. According to the background information provided by the applicant at page A26 in the hearing bundle :

> Brannam Court is a grade II* listed building. It is very old and has witnessed several modifications and additions over past centuries. These 'add ons' have created a complex combination of sloping roofs, brick parapets, gutters and gullies not easily accessible and which pose a challenge for even routine maintenance. Current ongoing roof repairs have required the erection of scaffolding from the National Trust who own the neighbouring building.

7. The fact that the building is listed imposes severe restrictions on the methods that can be adopted for repair and maintenance of the structure. Starting in 2007, a series of surveys of the building have revealed that ties between the older part and the more recent brick facade have deteriorated; with the most significant manifestation of this being a fracture in the west flank and movement in the facade fronting the High Street.

8. The 2007 survey was instigated by the landlord's then managing agents, Boydens of Colchester, after the sale of one of the flats collapsed following the intending purchaser's receipt of an adverse survey report. When no leaseholders attended a meeting arranged to discuss the implications of the report the managing agents resigned. The applicant then struggled to find anyone willing to take on the role of managing agent, with Whybrows eventually being the only firm prepared to do

so. It has a surveying department, but at times it has had to call on the services of MLM, a firm of structural engineers. Whybrows reported on the need for some external repairs, which were undertaken, in 2011. The more serious roof works required by the building were reported on by MLM in October 2009, December 2014, and again in March 2016.

9. Not one but two separate section 20 consultations have been carried out with regard to these substantial qualifying works, the engineers having advised a likely cost in the region of £20 000. As yet no funds have been recovered from either of the two respondents, thus preventing this work from starting.

10. However, due to a sudden ingress of water through the roof during a storm in July 2018 emergency repairs were required. Due to their nature, and difficulty and cost of gaining access, these would be qualifying works to which section 20 would apply. To mitigate the damage and speed the process an application was made to the tribunal under section 20ZA, seeking dispensation from some or all of the usual consultation requirements. By its decision dated 28th September 2018 [document R6] the tribunal noted that consultation had taken place for the main repairs and three tenders received, and at paragraphs [17 & 18] observed :

> 17. It is self-evident that repair works were and are required. The Tribunal therefore finds that there has been little or no prejudice to the Respondent lessees from the lack of consultation. Dispensation is therefore granted. Having said that, this approval cannot dictate what work is actually undertaken. The present evidence would suggest that the more extensive remedial works are needed. However, this is not an application for the Tribunal to determine the reasonableness of the works themselves or the cost thereof.
>
> 18. If there is any subsequent application by the Respondents for the Tribunal to assess the reasonableness of the extent of the work and/or the cost, the members of that Tribunal will want to have clear evidence of any comparable cost and availability of experienced contractors at the time of the repairs. They will also want clear expert evidence that the work undertaken was not justified.

The tribunal then urged the respondent lessees to reflect on those matters.

The leases

11. There are two residential leases :

1	dated 3rd July 1992 : MB & G Spray to JDR & DJ Farrar	EX466506
2	dated 14th September 1993 : MB & G Spray to D Bower	EX493662

12. The first respondent became registered proprietor of the leasehold interest in flat 1 on 30th May 2003; the second respondent of flat 2 on 11th September 2015. In each case the term granted was 999 years from the date of the lease, at an annual rent of one peppercorn plus the required contribution to the service charge.

13. Details of the ground floor business tenancies were not included in the bundle, but the tribunal was informed that they were also let for a similar term and at a peppercorn rent. The service charge provisions in these leases are unknown.

14. The lease for flat 2 appears at page [A8] in the bundle, although that copy fails to include the vital floor plans which would enable the tribunal to make sense of the complicated internal layout of the building. Fortunately a complete copy was provided separately. A copy of the lease for flat 1 appears at page [R4.2]. While their provisions are similar the numbering of the two leases differs. As it draws attention to a particular error identified by Ms Gourlay this decision shall therefore refer to the numbering in the lease of flat 1 unless stated otherwise.

15. In this lease the service charge provisions can be found in clause 3(11) [R4.10] and Schedule 4 [R4.22]. The provisions allow for the costs to be split between Building Expenses and Estate Expenses (as explained in more detail in Parts II and III respectively), a reserve fund, but not for the recovery of legal costs.

16. By clause 3(11) the tenant covenants "to pay the Interim Charge and the Service Charge (as defined in the Fourth Schedule) at the times and in the manner provided in the Fourth Schedule". The Service Charge is defined in paragraph 1(3) of Part 1 of the Fourth Schedule :

> "The Service Charge" means the aggregate of such fair and reasonable proportion of the Building Expenses and of the Estate Expenses respectively as the Landlord may from time to time determine to the intent that the Building Expenses shall be fully paid for in fair proportion by the occupiers of the Building and that the Estate Expenses shall be fully paid for in fair proportion by the various parties entitled to use and enjoy the Common Parts and the services ancillary to the use and enjoyment of the Estate.

17. At paragraph 1(4) the Interim Charge is defined thus :

> "The Interim Charge" means such sum to be paid on account of the Service Charge in respect of each Accounting Period as the Landlord or its managing agents shall specify to be a fair and reasonable interim payment

18. However, after paragraph 1(5) the next paragraph number is 5, followed by 6. Where are paragraphs 2, 3 and 4?

19. Paragraph 5 of Part I reads :

> If the Service Charge in respect of any Accounting Period exceeds the Interim Charge paid by the Tenant for that period the deficiency shall be paid by the Tenant to the Landlord within 28 days of service of the said certificate.

20. In the lease for flat 2 the numbering moves from paragraph 1.5 straight to 2, and then 3 (thus masking the error), but the wording is exactly the same. The point which Ms Gourlay sought to make was that paragraph 1 of Part I was merely a definitions provision; not an operative one. The Fourth Schedule contained no mechanism identifying how or when an Interim Charge was to be levied. Nor was there one for service of any certificate. Any such provisions, presumably to be found in the missing paragraphs 2, 3 and 4 (of the flat 1 lease) had somehow been forgotten.

Material statutory provisions

21. Section 18 of the Landlord and Tenant Act 1985 defines the expression "service

charge", for the tribunal's purposes, as :

> 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…

22. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :
    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.

23. The tribunal's powers to determine whether an amount by way of service charge is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

24. In this case a point is taken on section 27A(6), which provides that :

> An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination-
> (a) in a particular manner, or
> (b) on particular evidence,
> of any question which may be the subject of an application under subsection (1) or (3).

This, argued Ms Gourlay, prevents the landlord from deciding upon the proper apportionment of building expenses (i.e. 9.8% for the boutique, 29.6% for the Pharmacy, 31% for flat 1 and 29.6% for flat 2) as between the flats. It is a matter for the tribunal. In support of this proposition she relied upon the wording of the sub-section as applied by Briggs LJ in *Sheffield City Council v Oliver*[1].

25. Insofar as major works are concerned, ie those in respect of which the contribution of any tenant liable to pay towards the service charge will exceed £250, then section 20 provides that the relevant contributions of tenants are limited to that amount unless the consultation requirements have been either complied with in relation to the works or dispensed with by (or on appeal from) the appropriate tribunal. The consultation requirements, in the instant case, are those appearing in Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003[2] (as amended).

[1] [2017] EWCA Civ 225; [2017] 1 WLR 4473; [2017] L&TR 35, at [13] and [53–56], affirming the decisions of the Upper Tribunal (Lands Chamber) in *Windermere Marina Village Ltd v Wild* [2014] L & TR 30 and *Gater v Wellington Real Estate Ltd* [2015] L & TR 19 (both UT decisions by Martin Rodger QC, Deputy President)

[2] SI 2003/1987

26. Two further provisions, concerning demands for payment of service charge, have been put in issue or are relevant to this case. First, by section 47 of the Landlord and Tenant Act 1987, where any written demand is given to a tenant of premises for rent or other sums payable under the lease (which expression would include a demand for payment of service charge), the demand must contain the name and address of the landlord and, if that address is not in England and Wales, an address in England and Wales at which notices (including notices in proceedings) may be served on the landlord by the tenant. If the demand does not include such information then any part of the amount demanded which consists of a service charge or an administration charge ("the relevant amount") shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant.

27. Secondly, since 1st October 2007 section 21B of the 1985 Act provides that a demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges. The content of that summary is prescribed by the Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007.[3] The document must contain the prescribed heading and text and must be legible in a typewritten or printed form of at least 10 point.[4]

Inspection and hearing

28. The tribunal inspected the exterior only of the subject premises at 10:00 on the morning of the hearing. Also present were the parties, the respondents' counsel, and (slightly late) Mr John Greenwood, a structural engineer whom the applicant had instructed to investigate the cause of movement in the building and report.

29. The premises, a Grade II listed building located opposite the parish church on the High Street in the centre of the historic village of Dedham, comprise a 16th or 17th century timber-framed building with a later, 18th century painted brick facade and low parapet wall. Facing roughly southwards, the eastern end of the ground floor comprises a large open-plan retail unit with plate glass windows, internal walls having been removed and replaced by cast iron columns supporting the upper floors. On the western end, and accessed by a door opening into a passage allowing cars to reach a double courtyard and parking areas, is a much smaller shop unit. Between the two sits a large front door leading to one or both of the residential units.

30. An important feature of this case is the roof, which has been the subject of various surveys, a proposed renewal for which a section 20 consultation process was undertaken, and some emergency repair work to stop a serious leak in 2018. Essentially the roof structure comprises a hipped roof at the front, behind which is a central valley lying east–west, and a rear hipped roof with a return at each end where the building has rear projections, the larger being on the west by the passageway.

31. Inspecting the passageway, the tribunal's attention was drawn to a large vertical

3 SI 2007/1257

4 *Op cit*, reg 3

crack just to the rear of a substantial chimney stack, as if the brick facade was peeling away from the timber-framed structure behind. Near this point is a modern inspection gully with metal cover, which vehicle tyres would struggle to miss when driving through the passageway.

32. The first rear courtyard is flanked by two converted buildings now occupied as homes. The applicant and her husband own the freehold of one, with a parking space in the courtyard and two others to the rear, and the other house is also held freehold. Each enjoys the use of the courtyards for passage and parking.

33. At the hearing the tribunal had before it a thick spiral-bound file of documents with the applicant's case marked with several blue tabs, documents which she had appended marked with yellow tabs, and the respondents' cross-application, case in response to the main application, their leases and some other documents marked red. Page numbering was confusing, beginning with pages prefaced B, then A (for appendices), RA (for the cross-application under section 20C), and finally R. In addition the tribunal was presented with a Land Registry copy of the lease for flat 2 (with plans), Ms Gourlay's skeleton argument, and (during the day) some further financial documents that had been forwarded from Whybrows' office.

34. There were no formal witness statements by any of the parties, nor from Mr John Greenwood, whom the applicant had asked to attend. He was released. With all of the evidence in documentary form, including budgets difficult to read and statements of account difficult to reconcile, the hearing proceeded by trying to explain to the applicant that, due to procedural failures, no valid demands had yet been made and hence no arrears accrued – frustrating though the lessees' refusal to put the landlord in funds to carry the works may be – and to tease out of the respondents just what they were prepared to admit.

35. Following the production of receipts for insurance premiums etc by Mr Porter of Whybrows (who had only that week been put in charge of management of this property), oral explanations and discussion with the tribunal the respondents were prepared to agree that :
    a. The insurance premium was reasonable
    b. As the premium was based on the reinstatement cost of the main building, and public liability for the outside areas (the estate) was at no additional cost, the apportionment of liability for estate charges and building charges (assessed by Whybrows on the basis of internal floor area) was acceptable
    c. Emergency roof repairs carried out by Maguire (for which dispensation had been granted) were needed, an insurance claim was not possible as the repairs were essential works that had to be done, and the cost actually incurred (falling into the current accounting period) was reasonable
    d. The main roof repairs (yet to be undertaken) were required, the section 20 process had been undertaken properly, but tenders received were now out of date due to the landlord not proceeding until put in funds.

36. There were further exchanges concerning the repair of a manhole cover in the passageway, unblocking a drain, car park costs, the size and reasonableness of Whybrows' management fees, and the need for a sinking fund (and its size).

37. Ms Gourlay also raised the issue whether the landlord's repairing obligation in clause 4(3) of the lease was "Subject to payment by the tenant of the service charges" or an independent commitment. In support she referred briefly to *Yorkbrook Investments Ltd v Batten*[5], *Winchester Park Ltd v Sehayak*[6], and *Bluestorm Ltd v Port Vale Holdings Ltd*[7] (which went the other way).

Discussion and findings

38. This is a case where, as the tribunal granting dispensation for emergency roofing repairs noted, there had been acrimony between the parties for some years and a refusal by lessees to respond constructively to reports into the condition of the building and to section 20 consultations, and a refusal to pay the very large sums demanded (but not validly) in order to ensure that the landlord would be in funds to thus able to commit to a major works contract.

39. It is therefore gratifying to note that agreement was reached on the points set out in paragraph 34 above during the hearing. But that is not all.

40. On the question whether paragraph 1(3) of the Fourth Schedule imposes a means of determining how the service charge should be apportioned, in breach of section 27A(6), in *Sheffield City Council v Oliver* Briggs LJ, affirming the decisions of Martin Rodger QC in the Upper Tribunal (Lands Chamber) in *Windermere Marina Village Ltd v Wild*[8] and *Gater v Wellington Real Estate Ltd*[9], held at [54] that :

> In my view those cases were rightly decided, for the reasons given by the Upper Tribunal in each of them, to which I have already referred. The Upper Tribunal was careful in both those cases to distinguish between a situation where the determination was to be carried out in a prescribed manner (for example by a person with discretion as to the result), and a situation where a particular determination was the only possible consequence of the application of an agreed formula. The former provision falls foul of section 27A(6), whereas the latter does not, because the precise amount to be paid has been determined by the parties' agreement: see section 27A(4)(a).

41. In the instant case, however, this is rendered academic by the fact that during the hearing – after learning how the insurance premium was assessed by reference to rebuilding costs of the main building and indemnity cover was provided for the car parks comprising the estate at no additional cost – the proportionate shares of costs for both the building and the estate were not disputed.

42. On the question whether the landlord's obligation to repair the building is conditional upon the lessees paying their contributions to the service charge, a point that might be used as the basis for an argument that the work involved – and hence the cost – is more serious than it would have been had the landlord not

5 [1985] 3 EGLR 100; (1986) 18 HLR 25

6 [2016] EWHC 1216 (QB)

7 [2004] EWCA Civ 289; [2004] 2 EGLR 38

8 [2014] L & TR 30

9 [2015] L & TR 19

delayed carrying it out, this tribunal merely observes that :

a. Determination of the amount payable for the main roofing works is not a matter for this tribunal as fresh tenders are required, the work specified may on closer investigation require upward adjustment, and the quality of any such work cannot yet be assessed
b. Should it be necessary, another tribunal can decide whether to prefer the approach adopted in *Yorkbrook Investments* or that in *Bluestorm*
c. The argument that a reversioner receiving no income from a building held by its lessees under 999 year leases at a peppercorn should shoulder the entire cost of timeous repairs because lessees have objected for some years to paying their respective shares by way of service charge does not attract immediate sympathy.

43. As to the questions posed by the applicant, first, nothing is yet payable because no demands have been served which strictly comply with section 47 of the 1987 Act by providing an address for service on the landlord in England and Wales and in only the more recent cases has the demand been accompanied by the required summary of tenants' rights and obligations concerning service charges. The point whether an interim charge may be demanded has been conceded, but in the absence of agreement between the parties an application may be required to vary the lease under section 36 of the Landlord and Tenant Act 1987 on the grounds that the service charge provisions are defective – including those providing for computation by the landlord of fair and reasonable proportions due from lessees from time to time, which may breach section 27A(6).

44. Secondly, when valid demands are issued the following will be recoverable :

a. The insurance premiums paid each year
b. The cost of gutter maintenance
c. The cost of the emergency roof repairs – in the relevant accounting period
d. The £900 incurred in repairing the manhole cover in the passageway next to the side door of flat 2 – in the estate account for 2018–2019
e. Management fees and disbursements for 2017–2018 of £900 for issue of the section 20 notices, £576 for professional services (MLM) concerning the refurbishment works, a planning/listed building application fee of £264 in connection with reducing the height of the brick parapet, and a further £1 152 for ongoing services provided during the refurbishment works. However, the standard contractual fee of a further £1 500 is not allowed : no service charges are payable due to the failure to serve proper demands
f. Management fees for 2018–2019 are allowed at the £1 500 contract rate
g. £240 for work carried out in the car park in 2017–2018 is disallowed, and in fact was waived by the applicant
h. When an acceptable tender prices obtained for the major works then the appropriate proportions shall be recoverable by way of interim charge.

45. Thirdly, when the section 20 works to the roof and structure are completed and the managing agents (themselves or assisted by structural engineers) can put together a timed programme of regular maintenance and refurbishment then the size and allocation of a sinking fund or funds may be considered. At this stage there is no evidential basis for selecting a figure of £20 000 for that purpose.

46. As the tribunal has not had the benefit of studying the relevant service charge provisions in the commercial leases it can only say that, unless they diverge to a marked degree from those in the residential leases then there is no justification for imposing the cost of the section 20 procedure solely upon the respondents.

47. While the fact that the respondents may have approved the selection of the firm selected to carry out the major works could have some evidential value, the fact which is of much greater significance is that they agreed at the hearing that the nature and cost of the works is reasonable. While tender prices may need to be adjusted for inflation this provides a useful starting point for further agreement.

48. For the reasons given in paragraph 4 above the tribunal makes no order on the respondent's cross-application under section 20C.

Dated 3rd July 2019

Graham Sinclair
First-tier Tribunal Judge