FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LSC/2019/0336**
HMCTS code (paper, video, audio)	**:**	**P: PAPER REMOTE**
Property	**:**	**357-361 Harrow Road, London W9 3NA**
Applicant	**:**	**Notting Hill Home Ownership Limited**
Representative	**:**	**Devonshires Solicitors**
Respondents	**:**	**The lessees listed in the application (1) Mr Sarfraz Khan Kiani (2)**
Representative	**:**	**Mr Simon McLouglin of Counsel instructed by DMH Stallard LLP**
Type of application	**:**	**For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985**
Tribunal members	**:**	**Judge N Hawkes** **Mr L Jarero FRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**24 September 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote determination on the papers which has been consented to by the parties. The form of remote hearing was P:PAPERREMOTE. A face-to-face hearing was not held because it was not practicable and no-one requested the same. The documents that we were referred to are contained in a bundle of 570 pages, the contents of which we have noted. The order made is described below.

Decisions of the Tribunal

(1) The service charge costs which form the subject matter of this application are payable by the First Respondents.

(2) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 that 90% of the Applicant's costs in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by any of the First Respondents.

The application

1. By an application dated 3 September 2019, the Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the First Respondents in respect of proposed cyclical maintenance works ("the Works"). The Works form part of the Applicant's 2018-2019 Leaseholder Cyclical Maintenance Programme.

2. The parties have consented to a paper determination and the Tribunal is satisfied that this application, which primarily concerns the interpretation of a lease, is suitable for a paper determination.

The background

3. The Applicant holds a long leasehold interest in the upper floors of the buildings at 357 to 361 Harrow Road, London W9 3NA ("the Property") pursuant to a lease for a term of 999 years from 25 March 1988, dated 29 June 1988, between Direct Heath Limited as landlord and Kerrington Properties Limited as tenant ("the Headlease").

4. The Applicant has granted a number of sub-leases of residential flats out of its leasehold interest in the Property and the First Respondents are the current sublessees.

5. The Second Respondent has been the registered proprietor of the land containing the buildings at 357 to 361 Harrow Road, London W9 3NA since 9 October 2000. The land consists of three adjoining terraced buildings with

commercial units on each of the ground floors of the buildings and residential properties on the first, second and third floors.

6. As part of the Applicant's *'Leaseholder Cyclical Maintenance Programme for 2018 to 19'*, a schedule of works was prepared following an inspection which took place on 11 May 2018. The total estimated cost, inclusive of VAT, for the Works which form the subject matter of this application is £108,560.86 and the proposed work includes remedial roof work.

7. No party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been practicable to carry out an inspection in light of restrictions related to the coronavirus pandemic.

The issues

8. An oral case management hearing took place on 12 November 2019 and, at this stage, the issues in dispute were:

   (i) Whether the estimated costs for the proposed works are reasonable.

   (ii) Whether the cost of work to the roof would be recoverable under the First Respondents' leases if carried out by the Applicant.

9. However, following service of the First Respondents' Statement of Case, the issues narrowed. There is currently no dispute between the Applicant and the First Respondents in relation to the reasonableness of the estimated costs for the proposed works. However, it remains to be determined whether or not the Applicant is responsible under the Headlease for repairing and maintaining the roof of the building and the First Respondents seek an order under section 20C of the 1985 Act.

The payability of the service charge costs

10. By clause 2 of the Headlease the Landlord demised to the Tenant *"the demised premises"*.

11. By clause 1(d) of the Headlease, *"'the demised premises' means the property described in Part 1 of the Schedule hereto and includes any additions thereto and all landlord's fixtures and fittings in and upon the said property"*.

12. Part 1 of the Schedule to the Headlease is in the following terms:

"All those upper floors above the ground floor shops at 357 359 and 361 Harrow Road Paddington in the London Borough of the City of Westminster including the roof space (if any over the ground floor units TOGETHER WITH

the access way and staircase leading from the street to the said upper floors and including the plaster on the walls and ceilings and any non-structural walls the glass in the windows and the window frames and the surface of the floors but not the joists upon which the floor rest together with the roofs of the building of which the demised premises form part and any replacement roofs to be constructed"

13. By clause 2 of the Headlease, the demise is expressly:

"…SUBJECT to all rights and easements now or at any time hereafter existing over the demised premises TOGETHER WITH and in particular the rights and easements/ matters set out in Part 1(a) of the Schedule hereto EXCEPT AND RESERVED unto the Landlord the rights set out in Part 2 of the Schedule hereto…"

14. By paragraph 3 of Part 1A of the Schedule to the Headlease, the Tenant has:

"The right to carry out any alterations (whether or not of a structural nature) to the demised premises including the right to build any extra floor or floors or replace or add to the roof subject to the Tenant indemnifying the Landlord against any costs claims or actions arising out of such works…"

15. The Tenant covenants are contained in Part 4 of the Schedule to the Headlease. In particular, the Tenant covenanted:

    (i) By paragraph 7, *"Throughout the term hereby granted to keep the demised premises both internally and externally in good and tenantable repair and condition and when necessary renew or rebuild to the reasonable satisfaction of the Landlord (damage by any of the insured risks excepted)"*

    (ii) By paragraph 9, *"To pay and contribute a fair and proper proportion of the expenses of making or repairing any roofs walls foundations gutters sewers watercourses drains structures entrances ways and things which are now or may at any time during the said term belong to or be used in common with any premises adjoining or near to the demised premises including (if applicable) the remainder of the building of which the demised premises form part"*

16. The Landlord covenants are found in Part 5 of the Schedule to the Headlease. By paragraph 3 of Part 5, the Landlord covenanted *"To maintain the foundations and main structure of the buildings of which the demised premises forms part"*.

17. The Applicant submits that the definition of the demised premises in the Headlease can be interpreted as either including or excluding the roof of the building. The Applicant's position is as follows:

"Whilst the Applicant does not deny that the Head Lease could be interpreted in the way proposed by the Freeholder, the Applicant avers the Head Lease could equally be interpreted in an alternative manner whereby it is the Freeholder who is responsible for these parts of the Building. The Applicant therefore does not accept that the drafting of the Lease is sufficiently clear in its current form for both the parties to the Head Lease and the Applicant's Sub-Lessees (to whom it is relevant in relation to the extent of their service charge liability) to be certain that this is what the Head Lease provides for.

Accordingly, the Applicant maintains that a determination from the Tribunal as to the extent of the repairing obligations of the Freeholder and the Applicant under the Head Lease is required in order to provide certainty for all parties for the management of this Building in the future."

18. Mr McLoughlin makes the following submissions on behalf of the Second Respondent.

19. The general approach to the construction of documents, including leases, is now well settled. Per Lord Neuberger in *Arnold v. Britton* [2015] AC 1619 at [15]:

"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", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] A.C. 1101, para 14. And it does so by focusing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, 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."

20. The Tribunal was also referred to paragraphs [17] to [22] of *Arnold v Britton,* to *Wood v. Capita Insurance Services* [2017] UKSC 24 at [10] to [13] (Lord Hodge), to *Investors Compensation Scheme Ltd v. West Bromwich BS* [1998] 896, 912-913 (Lord Hoffman) and to *Rainy Sky SA v. Kookmin Bank* [2011] 1 WLR 2900 (Lord Clarke).

21. Mr McLoughlin notes that, as stated above, the Headlease was granted on 29 June 1988 and that the original parties were Directheath, as landlord, and Kerrington, as tenant. However, he has referred the Tribunal to a witness

statement dated 1 July 2020 prepared by Mr Harris, a solicitor who has acted for the Second Respondent on various property matters.

22. In this witness statement, Mr Harris explains that a planning application dated 23 November 1987 discloses that Kerrington was in fact previously the freeholder of the Property, as it then stood. The planning application also discloses that the Property was then comprised of ground floor shops, with vacant upper parts previously used for office accommodation. Kerrington's planning application was for permission for *"conversion and extensions to upper parts to provide nine flats"*. Those works included works to the roof.

23. The planning decision notice dated 15 July 1988, granting permission with conditions, discloses that:

    (i) there was a revision to the planning application on 10(or 20).6.88;

    (ii) the proposal was for *"Alterations including extensions at roof level and first and second floor rear, in connection with the conversion of the first, second and third floors to form ten self-contained flats"*;

    (iii) condition 5 was that Kerrington submit detailed drawings for approval for various items, including the dormer windows.

24. Mr Harris observes that Kerrington's initial status as the freeholder of the Property with an extant planning application for permission to carry out a residential development to the upper parts, together with Kerrington's appearance as the original tenant under the Headlease (with Directheath instead named, by 29 June 1988, as landlord) is consistent with a typical sale and leaseback situation permitting Kerrington to carry out its intended development as tenant under the new, 999-year Headlease.

25. When the Second Respondent acquired the freehold interest in the Property in 2000 (by which time it was owned by Great Western & London Limited) he was informed by his then property agent, Mr Michael Richman, that when the residential parts were sold to Notting Hill Housing Trust (i.e. when the term of the Headlease was assigned), they had *"carried out substantial improvement works to the structure of the building including the…roof void and roof covering"*. The Tribunal notes that this factual account has not been agreed by the Applicant.

26. Mr McLoughlin states that the Applicant's repairing covenant in paragraph 7 of Part 4 to the Schedule to the Headlease is expressed in wide terms. It *is "…to keep the demised premises both internally and externally in good and tenantable repair and condition and when necessary renew or rebuild."* Thus,

on its face, the Applicant is required to keep in repair etc all aspects of the "demised premises", whether internal or external.

27. Further, the *"demised premises"* are in broad terms, *"all those upper floors"* at the Property above the ground floor shops and the Headlease proceeds to make clear that that demise of *"all those upper floors"* also includes the following:

(i) any roof space (immediately) above the ground floor units;

(ii) the access way and staircase leading from the street to the upper floors;

(iii) the plaster on the walls and ceilings;

(iv) any non-structural walls;

(v) the glass in the windows and the window frames;

(vi) the surface of the floors *"but not the joists upon which the floor rest…"*;

(vii) *"…together with the roofs of the building of which the demised premises form part";*

(viii) *"and any replacement roofs to be constructed".*

28. Mr McLoughlin states that, by the Headlease, the Landlord is quite coherently demising to the Tenant all the property above the ground floor at the Property (save for the joists supporting the floor), together with the common parts at street level and the staircase providing the Tenant with access to the upper floors.

29. In response to the Applicant's suggestion that the definition of the demised premises in the Headlease can be interpreted as either including the roof of the building of which the demised premises form part or excluding that same roof, Mr McLoughlin makes the following submissions.

30. The most obvious and natural way to read the language of the demise in Part 1 is to read the exclusion of the joists as a 'carve out', or as in parenthesis. Thus, the demise includes:

"… the surface of the floors (but not the joists upon which the floor rest) together with the roofs of the building of which the demised premises form part and any replacement roofs to be constructed"

31. That construction gives consistent effect to the 'together with' formulation as the means by which the draftsman *includes* elements of the Property within the demise in Part 1, rather than excludes them (which would be an unnatural use of a 'together with' formulation in any event). Indeed, had the draftsman wished to *exclude* the roofs of the building from the demise, the natural way to express such an exclusion would be as follows:

"…the surface of the floors but not the joists upon which the floor rest ~~together with~~ nor the roofs of the building of which the demised premises form part ~~and~~ nor any replacement roofs to be constructed".

32. However, that is not the formulation the draftsman adopted.

33. Mr McLoughlin submits that it is clearer still that the draftsman did not intend to exclude the roofs when one considers the physical relationship between the three constituent parts of the Property in question: 'the surface of the floors', 'the joists upon which the floor rest[s]' and 'the roofs of the building'.

(i) The joists are plainly referable to (and might otherwise form part of) 'the floors'. Thus, when describing the extent of the demise of that element of the Property, the draftsman is making clear that it is only the surface of the floors, 'but not' the joists that are included.

(ii) The roofs are not a related or proximate element of the Property in the same way. They did not need to (and do not) form part of the exclusion introduced by the 'but not' formulation. Accordingly, absent the draftsman expressly clarifying the extent to which the floors would be demised, the clause would read *"including…the surface of the floors together with the roofs of the building of which the demised premises form part…"*

(iii)

34. A further indication that the draftsman intended to *include* the roofs *within* the demise is the specific reference to the *"…roofs of the building…and any replacement roofs to be constructed*" having regard to the Tenant's express right in paragraph 3 of Part 1A of the Schedule *"to carry out any alterations (whether or not of a structural nature) to the demised premises including the right to build any extra floor or floors or replace or add to the roof…".*

35. The Tenant's right is to carry out alterations to the demised premises, including to the roof. Mr McLoughlin submits that it would make little sense to grant the Tenant a right to alter property not demised to the Tenant. He states that, rather than regarding the express inclusion in paragraph 3 as redundant (or as in addition to a right to alter the demised premises), it is wholly unsurprising, given how significant such works would be, to find that the parties have within

the broad permission for alterations to the demised premises included express permission for the addition of extra floors to the Property and/ or the replacement of the roof(s). The extent of that demise specifically echoes that right.

36. Under paragraph 9 of Part 4 to the Schedule to the Headlease, the Tenant is liable to contribute to:

"the expenses of making or repairing any roofs walls foundations gutters sewers watercourses drains structures entrance ways and things which are now or may at any time during the said term belong to or be used in common with any premises adjoining or near to the demised premises including (if applicable) the remainder of the building which the demised premises forms part".

37. However, Mr McLoughlin submits that, the present case, that clause is of only limited assistance in understanding the scope of the Applicant's repairing obligations under the Lease:

(i) First, the clause is an example of torrential drafting, listing all elements of property *"which are now or may at any time"* used in common with the demised premises;

(ii) Secondly, it does not follow from the fact that Landlord has a *right* to recover a contribution from the Tenant on account of its expenses of carrying out certain work that the Landlord has a correlative implied *obligation* to carry out those works (*Duke of Westminster v. Guild* [1985] QB 688, 699-700 (Slade L.J.)); and

(iii) Third, though the Headlease must be construed as a whole, in considering the extent of the demise and the Applicant's repairing obligations the Tribunal should be hesitant before attributing significant weight only to 'indications' or implications present elsewhere in the Headlease, but somewhat divorced from the clause of the obligations in question (*Credit Suisse v. Beegas Nominees Ltd* [1994] 4 All ER 803, 819 (Lindsay J.)).

38. By paragraph 3 of Part 5 of the Schedule to the Headlease, the Landlord covenants to *"maintain the foundations and the main structure of the buildings of which the demised premises forms part."* Mr McLoughlin accepts that, in different circumstances, the "main structure" of a building might be apt to include some constituent parts of its roof and/ or the load-bearing walls. However, he states that in the present case:

(i) Paragraph 7 of Part 4 of the Schedule to the Headlease expressly obliges the Tenant to keep the demised premises

"both internally and externally" in good and tenantable repair and condition, which, on any view, extends to *"all the upper floors"* of the Property, and, the Second Respondent submits, the including the roofs, windows and glass in the windows;

(ii) So far as concerns the Tenant's obligation to keep the demised premises in repair *"externally",* the exterior will *prima facie* include all external parts of those premises.

(iii) As to whether the roofs (or any part of them) fall within the Landlord's maintenance obligation, where the draftsman intended to refer to the 'roof' or 'roofs' (or include them in an element of property described) the draftsman has done so expressly elsewhere in the Headlease and, where, as in paragraph 3 of Part 5 of the Schedule to the Headlease, express reference to the roof or roofs is absent, the natural inference is that the draftsman did not intend that maintenance of the roof of the building fell within the Landlord's obligation in paragraph 3;

(iv) In construing repairing obligations in leases, the courts will not readily find an overlap in the parties' respective obligations (*Toff v. McDowell* (1995) 69 P&CR 535, 540-541 (Evans-Lombe J.); *Petersson v. Pitt Place (Epsom) Ltd* (2001) 82 P & CR 21 at [34] (Laws L.J.)).

(v) Thus, in light of the above, and insofar as it is already tolerably clear that the Tenant is obliged to maintain the exterior of all of the upper floors of the Property, including the roof, when the Headlease is construed as a whole the Landlord's maintenance obligation (i) should not be read as overlapping with the Tenant's repairing obligations and (ii) does not extend beyond the foundations and other internal, main structural elements of the Property, such as the floor joists.

39. Mr McLoughlin states that that the Landlord's maintenance obligations are limited under the Headlease is unsurprising: that conclusion is wholly consistent with the grant to the Tenant of a 'virtual freehold' in the form of a 999-year lease. Indeed, it is the Tenant, the Applicant, that has in fact and for a number of years been carrying out repairs to both the exterior and interior parts of the upper floors of the Property.

40. The Second Respondent's primary case is that the ordinary meaning of the words is clear enough on their own. However, Mr McLoughlin also submits that that the roof, in particular, is within the property demised to the Tenant under the Headlease is the only way to construe the Headlease having regard to the

factual background prevailing at the time of the grant and, in particular, Kerrington's then intended development of the upper parts as Tenant.

41. The Tribunal accepts Mr McLoughlin's submission that the ordinary meaning of the words is sufficiently clear and that the roof is within the property demised to the Tenant under the Headlease. We have placed no weight on factual assertions, which may be disputed, concerning work which has in fact been carried out to the Property by the Applicant and we have not found it necessary to have regard to the factual background prevailing at the time of the grant.

42. The Applicant seeks a determination that the costs to be incurred in relation to the Works are in principle within its repairing obligation as landlord under the sub-Leases. The Applicant has informed the Tribunal that the sub-leases are in three different forms but that they contain a near identical repairing covenant on behalf of the Applicant. Accordingly, the Applicant has simply referred the Tribunal to a specimen sublease which provides:

"The Landlord hereby covenants with the Leaseholder as follows: -

...

(3) That (subject to payment of the rent and service charge and except to such extent as the Leaseholder or the tenant of any other part of the Building shall be liable in respect thereof respectively under the terms of this Lease or of any other Lease and except to such extent as the Superior Landlord shall be liable in respect thereof under the terms of the Headlease) the Landlord shall maintain repair redecorate and renew or procure the maintenance repair redecoration and renewal of

(a) the roof foundations and main structure of the Building and all external parts thereof including all external and load-bearing walls the windows and doors on the outsides of the flats within the Building (save the glass in any such doors and windows and the moveable parts of the windows and the interior surfaces of walls) and all parts of the Building which are not the responsibility of the Leaseholder under this Lease or of any other leaseholder under a similar lease of other premises in the Building. Provided always the Landlord shall redecorate or procure the redecoration as necessary of the outside door of the Premises"

43. The Tribunal accepts Mr McLoughlin's submission that, under the Headlease the landlord (the "Superior Landlord") is not liable to maintain (or to repair, decorate or renew) any parts of the Property extending beyond the foundations and other internal, main structural elements of the Property, such as the floor joists. None of the proposed works concern those parts of the Property.

44. Accordingly, the extent of the Landlord's liability under the terms of the Headlease does not represent a bar to the Applicant recovering its costs of the proposed Works via the service charge machinery in the sub-leases. Whilst

reference has been made by the First Respondents to a contribution to the cost of the roof work being payable by the commercial tenants, the Tribunal has not been referred to any covenant requiring the commercial tenants to contribute to the costs which form the subject matter of this application.

45. As stated above, the First Respondents no longer challenge the reasonableness of the proposed costs and the Tribunal finds that the costs which form the subject matter of this application are payable by the First Respondents.

Application for an order under section 20C of the 1985 Act

46. The First Respondents are seeking an order under section 20C of the 1985 Act ("section 20C").

47. Section 20C provides that a tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a residential property tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

48. "In *Tenants of Langford Court v Doren Ltd (LRX/37/2000)*, HHJ Rich QC stated at [28]:

"In my judgement the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances …"

49. The First Respondents submit that an order should be made under section 20C because these proceedings concern a dispute between the Applicant and the Second Respondent. They have referred the Tribunal to correspondence in which they were informed by the Applicant that costs relating to the dispute between the Applicant and the Second Respondent would not be passed on to residents.

50. The Applicant submits that an order under section 20C should not be made because this application was initially brought by the Applicant as a result of the First Respondents disputing the reasonableness of the proposed service charge costs.

51. The Tribunal accepts that, initially, the reasonableness of the service charge costs was in issue. However, it would in any event have been necessary for the Applicant to issue an application in order to obtain a determination on the issue of whether the extent of the Applicant's liability under the terms of the Headlease represents a bar to the Applicant recovering its costs of the proposed Works via the service charge machinery in the First Respondent's subleases.

52. The Tribunal accepts that the Applicant will have incurred some costs in addressing the issue of reasonableness in its Statement of Case but, following service of the First Respondents' Statement of Case on or about 27 February 2020, it would have been clear that the reasonableness of the proposed costs was no longer in dispute.

53. In all the circumstances, the Tribunal finds that it is just and equitable to make an order under section 20C that 90% of the Applicant's costs in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by any of the First Respondents.

Name: Judge N Hawkes **Date:** 24 September 2020

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).