FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00HN/LSC /2020/0015
Property	**:**	Flats 1-14 Snowdon Mount, 4 Snowdon Road, Bournemouth BH4 9HL
Applicants	**:**	Lydia Turnbull and 11 other lessees
Representative	**:**	Lydia Turnbull
Respondent	**:**	RMB 102 Limited
Representative	**:**	J B Leitch Solicitors
Type of Application	**:**	Determination of service charges: section 27A Landlord and Tenant Act 1985
Tribunal Member(s)	**:**	Judge E Morrison
Dated	**:**	20 July 2020

DECISION
with respect to proposed set-off claim

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1. The applicant lessees seek, pursuant to section 27A Landlord and Tenant Act 1985 ("the Act"), a determination as to whether service charges demanded on account in respect of major works are reasonable and payable. The sums in dispute are substantial.

2. Snowdon Mount is a purpose-built block of 14 flats built in 2008. It is suffering from very serious building defects. The Respondent acquired the freehold interest in July 2014. Between July 2018 and January 2020 a total of £408,435.05 has been demanded in service charges to pay for the necessary repairs. Work commenced in April 2019 but was halted in June 2019 when the contractors discovered more severe problems requiring a revised specification, which in turn led to the most recent demand for £207,929.00. All occupiers have to vacate the flats before the work can be carried out; it is scheduled to re-start shortly and estimated to take four months.

3. The parties (save for two non-participating lessees) have provided detailed statements of case. In this decision "the Applicants" refer to those ten lessees who are represented by and include Ms Lydia Turnbull.

4. The Applicants contend that the majority of the total sum demanded on account, including the entirety of the final demand, is unreasonable under section 19(2) of the Landlord and Tenant Act 1985, which provides that "Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable …".

5. In their statement of case the Applicants set out two grounds of challenge:

   (1) the third demand is excessive because there should be funds left over from those demanded for the works contemplated by the first demand and second demands, not all the monies collected having been spent as specified;
   (2) had the work been carried out earlier the scope of repair work would be significantly less, a saving would have been made and fewer consequential losses would have been incurred by the Applicants.

6. The second ground is in effect a claim of equitable set-off based on an alleged breach of the Respondent's repairing obligations, and is generally referred to as a "historic neglect" defence. The Respondent denies there has been any historic neglect.

7. In its statement of case the Respondent submitted that the Tribunal should not consider the set-off claim as part of this application. At a case management hearing on 22 June 2020 the Tribunal directed that there should be an opportunity for further submissions on this issue, which would then be decided as a preliminary matter. The outcome will affect whether detailed expert evidence is required, and the length of any hearing.

8. Written submissions have been received from each side and considered by the Tribunal. The Respondent's submissions were directed to be served first, with the Applicants then responding.

The Respondent's submissions

9. It is conceded that the Tribunal has the jurisdiction to determine set-off claims based on historic neglect; however, the Tribunal has a discretion as to whether it chooses to do so: *Continental Property Ventures v White* [2006] 1 EGLR 85.

10. As explained in *Daejan Properties v Griffin* [2014] UKUT 0206 (LC), in order for the Applicants to prove an entitlement to set-off for historic neglect, they will need to show that, but for a failure by the landlord to make good a defect at the time required by its covenant, part of the cost eventually incurred in remedying that defect, or the whole of the cost of remedying consequential defects, would have been avoided.

11. At the on account stage the Tribunal is only concerned with whether the sums demanded are a reasonable estimate for the work that is anticipated; it is not concerned with actual costs or what sums demanded have so far been spent on.

12. The Respondent submits that until the work has been completed, and its full extent and cost ascertained, it will not be possible for the Tribunal to assess any damages for historic neglect – either for any increase in the cost of the works, or for the consequential losses also claimed by the Applicants. The scope of the work may yet be subject to change as further areas are opened up.

13. Addressing the set-off claim at the stage of considering on account demands will substantially increase the cost of the proceedings (due to the need for expert evidence) and the length of the hearing. This would not be proportionate if it does not resolve all the Applicants' claims.

14. The set-off claim is better suited to court procedures than the Tribunal process, but in any event if the set-off claim is not considered now it can be raised later by the Applicants – either in court proceedings or in tribunal proceedings challenging the final costs under section 27A of the Act.

15. Accordingly the Tribunal should decline to exercise its jurisdiction to determine any set-off claim in respect of the on account demands.

The Applicants' submissions

16. The Applicants reiterate their assertion that there was deterioration at the property between 2017 and 2019 which has led to more extensive and costly work being required.

17. The Tribunal cannot decide whether a service charge is reasonable and payable unless it considers the evidence of historic neglect. Reference is made to a passage in *Continental Property Ventures v White* (above), where it was said that the Tribunal has jurisdiction to determine any issue essential to determining whether a service charge is payable. Expert witnesses will say which works would not have been required if done earlier.

18. It is accepted that "the work is required and the estimated costs put forward by the Respondent's experts [sic] are reasonable amounts for that work".

19. The costs will be lower if the issue is dealt with in the tribunal proceedings than if there are separate court proceedings.

20. Given there is a known date for the works to restart and they are scheduled for four months "the additional consequential losses due to uninhabitable properties are in a known amount".

21. Reference is made to two first instance Tribunal decisions, in 2011 and 2012, where the issue of historic neglect was considered with reference to on account demands.

Discussion and determination

22. It is agreed that the Tribunal has jurisdiction to deal with the set-off claim in these proceedings if it chooses to do so. That discretion must be exercised rationally.

23. The Respondent's assertion that the court process is more suitable is not accepted; the Tribunal has the procedures and expertise to deal with issues of historic neglect.

23. That said, the Tribunal concludes that, in the circumstances of this particular case, it is neither proportionate nor otherwise desirable to address the set-off claim when considering the reasonableness and payability of the on account demands.

24. The claim that the increased cost of the works is due to a breach of the landlord's repairing covenants is strenuously disputed. The Applicants appear to believe they have only to establish that, over a period of time, the property deteriorated and the cost of the repair increased as a result. However, it is also necessary to establish that the failure to repair in the relevant period was a breach of covenant i.e. the landlord should have carried out the repairs earlier. The Respondent's case is that it has acted within a reasonable period of being on notice of the disrepair in question. The only delay conceded by the Respondent is between March and July 2018, and it is not accepted that this delay led to an increase in the scope of the works. The Respondent states it was not on notice of the full extent of the structural issues at the property until August 2019, and it has thereafter proceeded promptly.

25. Against this background, it is obvious that detailed expert evidence will be required on the issue of historic neglect. There have been numerous professional surveys and reports on the property over the years; it was the Applicants' chosen surveyors who prepared the original specification in 2017. Due to the very large sum in dispute, the parties should be entitled to their own experts. The cost of this expert evidence is likely to be substantial.

26. If this Tribunal was persuaded that the entire issue of historic neglect as a set-off claim could be fairly and finally determined in these proceedings it would be minded to deal with it. The difficulty is that this is most unlikely to be the case, for the following reasons:

- Expert evidence will need to deal not only with the long history of investigation into the defects, but also with what steps should have been taken at particular points in time having regard to the Respondent's state of knowledge and its obligations under the lease. If earlier action should have been taken, the expert will need to calculate what difference it would have made to the scope and costs of the works.

- Until the works are completed, the final cost is unknown. So is the extent of the works. The works have already been attempted once, only to be abandoned because, when further areas were exposed, more defects were found. The revised specification now includes a contingency of £50,000.00 "for unforeseen repairs and alterations". While the Applicants object to the size of this contingency, it is clear evidence that the building professionals who prepared the specification, after receiving an expert structural engineers report, do not rule out the real prospect of additional works being necessary.

- The Respondents submit that final accounts for the project are unlikely to be available for at least another year.

- These factors mean that it will simply not be possible for the experts to make any final calculations of the impact on cost by the time this application is determined, even assuming that historic neglect is established.

- A set-off claim must be quantified with respect to any special damages (financial losses). If the Tribunal finds itself in a position where it cannot be satisfied as to the proper sum of damages, it is likely that it will either make no award at all or award a sum significantly lower than would be the case if all the losses were properly quantified.

- The Applicants may then wish to challenge the final costs in section 27A proceedings, and seek to raise the issue of historic

neglect once again in respect of further matters that may have come to light during the works. This would involve further expert evidence and additional costs.

- On the other hand, if the issue of historic neglect is considered by the Tribunal (or a court) once the works are complete and the final scope and costs known, the experts will be able to reach final opinions and make final calculations. Furthermore, the experts, if instructed in a timely manner, will have the opportunity to inspect during the works to assist them in reaching their conclusions.

- Although it may well be right for the Tribunal to determine the issue of historic neglect as a set-off against the final costs otherwise payable, it is not necessary for it to do so in the context of a demand for on account demands. The Applicants concede the works are required and that the estimated costs put forward are in a reasonable amount for the works. In *Continental Property Ventures v White* a very clear distinction is made between the issue of reasonableness and a set-off claim raised as a defence. In that case the relevant section was section 19(1) of the Act (because the costs had already been incurred) but the reasoning applies equally to section 19(2). At paragraph 11 of the decision it is stated:

  The question of what the cost of the repairs is does not depend upon whether the repairs ought to have been allowed to accrue. The reasonableness of incurring costs for their remedy cannot, as a matter of natural meaning depend upon how the need for remedy arose.

- Although the Applicants have located two first instance Tribunal decisions (both pre *Daejan Properties v Griffin*) where the issue of historic neglect was briefly considered in the context of on account demands, in neither of those cases did the lessees put forward any expert evidence. In one case the issue is simply mentioned as a "concern" of the lessees and dealt with in a single sentence. In the second it is dealt with summarily, the lessees having no evidence. These decisions do not establish that it is appropriate to consider complex issues of historic neglect in a section 19(2) case, and the Tribunal is unaware of any appellate authorities where this approach has been endorsed.

27. The Tribunal also notes that its approach will not have any impact on the actual execution of the works, as these are scheduled to recommence shortly.

28. In conclusion, and for all the reasons set out above, the Tribunal declines to exercise its jurisdiction to consider the set-off claim in these proceedings.