FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**MAN/00BR/LSC/2010/0036**
Property	**:**	**155 Olivia Court, Asgard Drive, Salford, M5 4TR**
Applicant	**:**	**Regent Park (Salford) RTM Company LTD**
Representative	**:**	**WHN Solicitors ref 58933 557/EL**
Respondent	**:**	**Mr Anthony McGrath and Mr Derrick Clarke**
Representative	**:**	**None**
Type of application	**:**	**Landlord & Tenant Act 1985 - Section 27A(1)**
Tribunal member(s)	**:**	**Judge J White** **Valuer Ms S Latham**
Venue	**:**	**Northern residential Property First-tier Tribunal, 1 floor, Piccadilly Exchange, 2Piccadilly Plaza, Manchester, M1 4AH**
Date of determination	**:**	**20 June 2020**
Date of Decision	**:**	**29 July 2020**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the sum of £3,282.92 is payable by the Respondent in respect of the service charges for the years 1 July 2017-30 June 2018 (£1750.88) and 1 July 2018-30 June 2019 (£1532.04).]

(2) The tribunal determines that the Respondent does not have a claim for set off within this Application.

(3) The tribunal makes an order that not all of the landlord's costs of the tribunal proceedings may be passed to the Respondent directly or lessees through any service charge. The costs payable are to be fixed at £3791.20 (£3,066 plus VAT of £613.2and £112 fees).

The Application

1. On 7 May 2019, the Applicant made an Application for a determination that the final service charge for the year 1 July 2017-30 June 2018 (£1750.88) and estimate for 1 July 2018-30 June 2019 (£1532.04) totalling £3,282.92 is payable by the Respondents.

2. The first Respondent, Mr McGrath has disputed the claim and made a claim for equitable set-off in respect of disrepair.

3. The Applicant has made a claim for costs. The first Respondent states that these costs are excessive.

The Background to the Case

4. On 22 January 1990, the Respondents became the owners Flat 155 Olivia Court, Regent Park, Salford, M5 4TR (the Property). The lease is for 125-year lease from 19 February 1985. The Applicant is Regent Park (Salford) RTM Company LTD. They became the Right to Manage Company (RTM) in May 2011 following a dispute with the then Management Company. They employ Block Property Management Ltd (Block).

5. Following the Application Directions were made on 28 June 2019. On 17 July 2019, the Applicants supplied a Statement of case and supporting documents in compliance with the directions. Despite extending the deadline twice the respondents failed to submit a statement of case by the third deadline of 7 September 2019.

6. The Applicant invited the tribunal to proceed to make a determination on the basis of the Applicants evidence alone and requested that the

tribunal refuse to hear any evidence which may subsequently be adduced by the applicant and strike out the Respondents case (by letter dated 22 August 2019).

7. On 12 September 2019 Mr McGrath emailed the tribunal stating that he had just received and read the witness statement of Eleanor Longworth dated 10 September 2019 and had not received the bundle referred to. However, he did state that he had received notification that there was a package to collect. A second bundle was sent to Mr McGrath. However, he stated that he had contacted the directors and arranged a site inspection with them that was had on 5 September 2019.

8. He compiled a witness statement and raised issues in relation to neglect and high charges as set out below. He did not submit either a Response or Statement of Case

9. In two emails dated 4 October and 8 October 2019 Mr McGrath stated that he had only received a copy of the bundle on 4 October, on receiving a notification from the post office that a package too large for the letter box. He asked for more time to compile his case and raised further issues set out below.

10. The matter was set down for an inspection and paper determination for 19 November 2019. The Applicants made an application to strike out his case and for a wasted costs order. Following the inspection, the Tribunal made a decision not to strike out the application and not to make a wasted costs order. It gave further Directions. Part of the reasons were

    (i) Mr McGrath had raised some serious issues of disrepair that was clearly evidenced at the inspection. He had some potentially arguable issues in relation to the payability of service charge and it was taken into account that he had no legal representation.

    (ii) The costs claimed by the Applicant appear disproportionate in relation to the service charge at issue and some of these costs may cover work that should have been more properly carried out by the Respondent company.

    (iii) The Applicant has itself not cooperated with the tribunal by not allowing access to the cellar during its inspection.

    (iv) The sum owed as part of this application is a small proportion of the service charge as a whole.

11. Unfortunately, Mr McGrath did not comply with the directions. On 10 March 2020, at a CMC DRJ Holbrook allowed a further 2 weeks and made an Unless Order. Mr McGrath then submitted 2 Witness Statements dated 20 March 2020 and 4 April 2020. The Applicant submitted a Response together with further Witness Statements and supporting documents.

12. Neither party has elected to have an oral hearing and the Tribunal has determined that it can hear the matter fairly considering the issues, evidence, and proportionality. It is in the interests of justice to do so.

The Law

13. Section 18 of the 1985 Act provides: (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.

14. Section 19 provides that – (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period – (a) only to the extent that they are reasonably incurred, and (b) where they are incurred on the provision of services or the carrying out of works only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly. (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

15. Section 27A provides that: (1) an application may be made to an 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 date at or by which it is payable, and (d) the manner in which it is payable. (2) Subsection (1) applies whether or not any payment has been made. (3) ..... (4) No application under subsection (1)...may be made in respect of a matter which – (a) has been agreed by the tenant..... (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

16. In *Veena SA v Cheong [2003] 1 EGLR 175*, Mr. Peter Clarke concluded that the word "reasonableness" should be read in its general sense and given a broad common sense meaning. He referred to the two-stage test and said that the landlord needs to demonstrate both that the action taken was reasonable and that the costs incurred in taking that action were reasonable. The issue to be addressed is whether the method adopted was a reasonable one in all the circumstances, even if other reasonable decisions could have been made.

17. The right of equitable set-off, applies to service charge cases only in clear cut cases. Where a landlord is in breach of an obligation under the lease (for example, a landlord's repairing obligations) the lessee may set off against the service charge a claim for liquidated or unliquidated damages for breach of that obligation. (*Filross Securities Ltd v Midgeley [1998] 3 E.G.L.R. 43*; *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd [1980] 1 Q.B. 137*). However, the lessee must show that the cross-claim is so closely connected with the landlord's demand for payment that it would be manifestly unjust to allow the landlord to enforce its demand without taking the cross-claim into account (*Geldof Metaalconstructie NV v Simon Carves Ltd [2010] EWCA Civ 667; [2010] 4 All E.R. 847*).

The Applicants Case

18. The Applicants case is clearly set out in their statement of case and First Witness Statement of Mr Habib [85-90 of the first bundle]. He is a director of Block. They are appointed to act as agent on behalf of the Applicant who is a RTM Company appointed after a long history of poor management and neglect.

19. In summary the monies due for the service charge years 1 July 2017-30 June 2018 (£1750.88) and 1 July 2018-30 June 2019 (£1532.04) totalling £3,282.92 remains unpaid.

20. The second Witness Statement of Mr Habib sets out their response to Mr McGraths items in dispute, together with supporting evidence. He also states that Mr McGrath has not notified the Applicant about any disrepair. The Applicant only becomes liable for disrepair once they have had notification and so he is not entitled to a set off. His second Witness Statement together with that of Mr Rust, sets out a history of neglect by the former Management Company, and that since the Applicant has taken over they have begun a programme of works and prioritised work in consultation with the Lessees at AGMs. Mr McGrath has not participated in these meetings. Any claim against the RTM Company affects the Lessees who are shareholders. He has not stated that lack of payment has delayed works.

21. There is also referred to an unpaid debt of £4228.28 from a county court judgement in default for the service charge years 1 July 2011-30 June 2017 plus costs.

22. In addition, they claim costs of £14,148.9 (£12,714.86 plus £2,210.68 VAT) and £112 fees.

23. In accordance with Clause 3 of Part One of Schedule Eight of the Lease, Clause 16 Part C of the Sixth, and paragraph 13 (1) (b)(ii) of The Tribunal Procedure (First Tier Tribunal) (Property Tribunal) Rules 2013. This is broken down to in 3 schedules supported by 2 Witness Statements of Eleanor Longworth of WHN Solicitors and Mr Habib from Block.

The Respondents Case

24. The Respondents case is less clear. Mr Clarke has not participated at all in the proceedings. Mr McGrath is generally dissatisfied with management of the Respondent. He states that since they have become the management company the service charges have increased substantially, and this is due to unwise decisions.

25. On 19 August 2019 he states that "this is also a criminal matter…" though provides absolutely no evidence to support any investigation or criminal matters.

26. His Witness statement dated 17 September 2019 and 20 March 2020 sets out his personal circumstances and that he is concerned by the excessive legal fees. He points out the numerous serious financial difficulties he has both personally and in relation to his business affairs. He states these were not of his own making. He is embroiled in other legal proceedings.

27. He states in general terms that since Regents Park Residents Association was appointed expenditure has gone up by 50% and it is unclear where this has been spent. He stated that vast amounts of money had gone missing. Since the move to the RTM and appointment of Block the quality of work and mismanagement has been appalling and he wishes to remove them. On 5 October 2019 he has written to each Leaseholder but has been unable to garner any support. He states this is due to the proportion of properties that are let out on short term tenancies.

28. He states that he has raised issues and recently met with the directors Mr Rust, Ms Naylor, and Mr Habib on site on 8 September 2019. He has requested an inspection of documents. He states that each time he

asks for information he only receives a further demand from the Respondents solicitors.

29. It appears that he has particular concerns regarding 5 elements of disrepair:

(i) Dampness: There is "severe damp and mould in his property" and he has been unable to rent it for 21 months.

(ii) Water penetration into the cellars: He inspected the cellars "noting severe ingress of water after rainfall. The puddles were approximately 2 inches high. All this water has travelled up my walls and into my property". £600 per year is charged for "drain inspection" and this has not been adequately carried out.

(iii) Overflowing hot water storage tank: causing "severe brick water penetration" and staining.

(iv) Dilapidation of a concrete window sill because it has not been painted.

(v) Rat infestation: There are continuing signs of infestation. There are no bait boxes despite an annual charge of £2000 for pest control.

30. Mr McGrath was also concerned with the 10% management fee. That despite the appointment of the Applicant as a Right to Manage company in May 2011, and the subsequent increase in the service charge, the historic neglect had not resolved, and it had not been well spent.

31. He requests that the tribunal orders that the Regents Park Residents Association allocate funds for an audit amounting to £10,000 and that fees are allocated for his time to analyse 20 years of historical data.

32. Following the second set of directions Mr McGrath inspected the invoices for the relevant years. He produced 2 Witness Statements stating that disrepair had been long standing and that there had been historic inspections. He stated that he has attempted to canvass view of other Leaseholders, but most properties are rented. He produced a Witness Statement dated 28 March 2017 presumably connected to the county court debt stating in general terms that there was dilapidation and works carried out were cosmetic in nature only. He set out other items in dispute and he produced an excel spreadsheet with some details of the amounts in dispute. He produced a number of invoices dated 2017 in relation to works carried out by Martin Squire Electrical.

He produced a Section 20 Notice dated 9 February 2007 with details of major work including a repointing below the DPC. He produced a letter dated 8 October 2017 from WHN detailing the outstanding service charge payments in dispute together with details of a county court judgement dated 30 June 2017 and connected costs of £4904 plus VAT.

33. He has provided no further evidence of notice or his loss as directed.

The Inspection

34. The inspection was carried out on 26 November 2019 between 10.05 and 11 am. In attendance was Judge White, Valuer Ms Latham and the respondent Mr McGrath. The Applicant was not in attendance. During the inspection the estate manager, Ms Deborah Heard was asked for access to the cellar. She did not have authority and made a phone call where permission was refused. She stated that the cellar was not flooded, and access was restricted to contractors due to health and safety issues.

35. Olivia Court is a four-storey block by the side of Regents Road opposite a retail park. The entrance is via a cul de sac which ends at Olivia Court. The block is red brick with rendered balcony areas and tiled roofs. There are grassed areas with trees and a car park. There is a fenced off bin area.

36. There are two entrances to Olivia Court numbered 155 to 170. Entrance is by individual bells and intercomms with individual postboxes. There are stairs internally. The entrance area was carpeted and had been recently decorated. The entrance has a porch canopy suspended from the building. There are 5 similar blocks all part of the same RTM with spacious grounds and ample car parking. There was evidence of some external works sometime in the past including patch repairs to balconies. Many of the brick pillars at the entrance areas had stepped cracking to the mortar and were in disrepair.

37. The grounds were well maintained. There were signs of vermin traps in the grounds. Ms Heard stated that she signed the monthly council pest control visit log and that the infestation was to be expected due to the proximity to the canal and fast food outlets. There was no evidence of service charges claimed and not spent.

38. Mr McGrath's flat is the end flat on the ground floor nearest to Regent Road. He has replaced and painted his windows and painted the balcony area at the back. On the front elevation there are some water stains from the overflow from the flat above. There was evidence of deteriorating mortar to the brickwork .

39. Internally the flat is unoccupied. It consists of one bedroom, bathroom, an open kitchen living area, a second open living area partitioned by a concertina door used as a second bedroom. There are clear signs of rising damp up to one metre from the ground, with associated mould growth causing a strong smell of dampness. The cause of the damp is clearly within the Applicant's responsibility. Any water that may be in the cellar may be a contributory factor but there is evidence that the damp proof course has failed. There were some small areas of black mould to the upper corners of the rooms.

40. An apparent leak from the overflow of the flat above had caused staining to the external brickwork.

Our Determination

Issue 1: Payablity of the service charge

41. Mr McGrath has included in his first witness statement a number of general and historic concerns as well as his own personal circumstances and issues in relation to other court proceedings. This application just relates to the payability of the service charge for the years 1 July 2017 and 1 July 2018. Due to jurisdiction or remit of the application other matters, cannot be considered apart from any claim for a set off relating to those 2 years.

42. There is no qualifying work during the periods. Most of the charges relate to annual maintenance costs. There have been additional works to the balconies and to renew and repair lights. The lease allows for recovery of the service charges claimed as set out in Applicants Statement of Case. This is not at issue. At paragraph 1 (a) of the Seventh Schedule each proportion is stated to be 0.54%.

43. Mr McGrath has not provided persuasive evidence in order to establish that costs are not either reasonably incurred or works to a reasonable standard. He has not requested a variation of the lease on the grounds that it does not make satisfactory provision for calculation of a service charge.

44. Under the two-stage test the Respondents needs to demonstrate both that the action taken was reasonable and that the costs incurred in taking that action were reasonable. It is well established that any service charge cost may well be reasonable, even if a cheaper alternative is available and it is not the Tribunal's duty to replace a reasonable charge with what it might consider a more reasonable one. This was not a case where there has been any significant expenditure beyond general maintenance.

45. The Applicants have provided a copy of the minutes of the general meeting on 26 June 2019[76-84]. Mr McGrath was not in attendance. There were 7 lessees present. The purpose was to review its performance in the previous year and its strategy and budget for the following year. "This enables leaseholders to control the way the estate is managed, maintained and insured, which has resulted in the estate looking vastly improved, addressing historic maintenance in a controlled manner to ensure the quality and cost of repairs properly controlled. Mr Habib/Mr Pugh explained that proactive management had led to significant price reductions"[77]. The meeting went through property and accounting for that year in depth; providing reasons for any unusual expenditure[79-83]. There are further AGM minutes from 2016 and 2017 of a similar nature. This includes complaints by another leaseholder whose claim was struck out for abuse of process [44] and clear frustration expressed due to the time and expense of that and this ongoing dispute.

46. Further Mr Habib states that of the 170 apartments there has only been two leaseholders over nine years who have challenged the process [paragraph 16 at page 5 of second Witness Statement]. There is no reason to dispute Mr Habib's credibility or the minutes of the meetings. Mr McGrath has failed to obtain any support from the development during the life of this matter that has spanned over 12 months. He has failed to obtain alternative quotes. Though he states that this is due to Covid-19 restrictions; those only came into force on 23 March 2020, 13 days after the final order had been made, a day before the final deadline and almost a year after the Application. He has not been prejudiced in any way, and to the contrary Mr McGrath has been provided with numerous extensions of time to comply with the directions. It would not be proportionate to extend the time again, particularly as at the CMC on 10 March 2020 he was barred from taking part in proceedings unless he complied with further directions in pursuant of rules 9(3)(a) & (b) and 9(7) of the Tribunal Procedure Rules. He only partly complied and failed to do so in relation to the counterclaim.

47. Mr McGrath has raised a number of more specific issues that are dealt with as follows;

48. **Appointment of Block Management:** It was first appointed by leaseholders following the RTM process in August 2011. This followed a number of years of neglect as set out in the statement of Mr Rust. It has been reappointed at each subsequent AGM. The Applicant's appointment is not within the remit of this Tribunal. The Applicant may appoint a firm of managing agents in accordance with Clause C.7 of the Sixth Schedule. Its charges are allowed as standard management charges and additional charges as set out in Mr Habib's second Witness Statement at paragraph 80 [22].

49. **Lack of audited accounts and VAT payability:** The Applicants have provided a certificate of accounts for the year 17/18 including variance explanations[40-55]. In relation to the year 18/19 they have provided an estimate. The accounts are certified, as opposed to audited and Mr McGrath has raised issue with this and what he says are VAT irregularities. This does not in itself make the service charges unpayable. He has not stated with any specificity why he considers this invalidates the payability. He has not stated that the items are not backed by relevant invoices. At a meeting on 25 November 2019, the RMC were to discuss obtaining audited accounts [65].

50. The name on the invoices includes Block. VAT is payable by them at 20%. They are not exempt. The position is explained in the Upper Tribunal (Lands Chamber) decision of 15 September 2015 in the case of Mrs Janine Ingram (2015) UKUT 0495(LC) as set out in Revenue and Customs Brief 6 (2018) and VAT Information Sheet 07/18.

51. **Pest Control:** The annual pest control cost of £32136. is disputed. The minutes included an explanation as to the pest control costs and this includes bait or clearance. At the inspection the caretaker provided an valid explanation of why pest control costs were required as set out above and this was accepted by the Tribunal. She confirmed that traps were set and checked in the grounds.

52. **Management Fees:** The lease allows for management fees up to 10% of the service charges in accordance with clause 2 of Part Two of the eighth schedule. However, the minutes refer to a fixed fee. On the face of it a percentage may be unreasonable providing lack of certainty. However, the minutes state that the fee has subsequently been fixed and has been charged at less than 10% allowable in the lease. This is confirmed by the accounts. The additional costs are explained and justified by Mr Habib.

53. **Drains:** Mr McGrath disputes the drainage costs. He states that repairs to the drains are not of reasonable standard. He has provided no evidence beyond his own observation. The Tribunal found no obvious defects to the drain repairs during the inspection. Mr Habib explains that they employ a specialist drainage company to carry out an annual inspection and to inspect and repair any inevitable blockages. Blocked drains contribute to the intermittent flooding of the cellars, as well as downspouts allow water ingress during excessive rain. This has been estimated at £1302 and the actual cost for 2017 was £672. An annual inspection and repair are a reasonable cost.

54. **Decoration:** Mr McGrath states that an inspection of the stairwell prior to painting a charge of £1500 plus VAT to paint stairwells were unreasonable, though has not provided alternative quotes. An inspection prior to work is a reasonable cost to avoid additional costs

after decoration. Mr McGrath states that the cost is unreasonable as external pointing should be prioritised over patch repairs and decoration and will prevent additional costs in the long run. This covers up the dampness to the external walls and salt contamination coming through. The Applicant states that pointing and other work is prioritised and focused where particular issues are identified either through inspections or checks. This keeps costs to a minimum. Though pointing and other works are necessary, as found by the surveyor's reports disclosed (as set out below), this does not mean the cyclical decoration costs carried out during the disputed periods are unreasonably incurred. A cycle of redecoration of common parts are reasonable and within the obligations set out in the Lease in accordance with Schedule 6, Part B, Paragraph 2.

55. **Cleaning/caretaking:** Mr McGrath disputes a number of additional costs on top of the onsite cleaner salary cost amounting to £21,556.82. He says these should be carried out by the onsite cleaner and caretaker. These are set out in a brief schedule. Mr Habib responds to each item and says in general that the cleaner is not employed to do high risk tasks such as using specialist equipment and chemicals. These costs are reasonably incurred.

56. **Electric repairs:** The electricity charges disputed in Mr McGraths second statement largely relate to Block buying lights at different prices and asking why the cost varies per block. This is explained by Mr Habib, in that some of the blocks had a different number of emergency fittings. They were supplied at wholesale cost. They have provided comparisons that show their supplier is experienced and competitive. The type of lights is justified by the electrician in an email where he sets out his experience [95 of the Applicant's second bundle]. The cost of the electrician and the type of work is fair and reasonable. The work is permitted in accordance with Clause C.15 of the Sixth Schedule.

57. The cost of the 5 yearly electricity inspection is also disputed as this was carried out before the works. Upgrading lighting was approved at the AGM on 5 September 2016, with two quotes having been obtained [42]. The timing is found to be reasonable as carrying out an inspection before works can help highlight works required and the inspection is a statutory requirement within a 5-year period and so the timing is not flexible.

58. **Balcony repairs:** Charging £1400 plus VAT to repair each balcony soffit is also disputed as Mr McGrath states that he replastered it himself at a cost of £100 plus £30 for paint. Mr Habib has explained how costs were managed and the schedule of works at exhibit MHE7 of his second statement [109-119] sets out a schedule of works that includes much more extensive works to the balconies, justifying the cost. This included breakout out defective concrete soffits colonnades

and beams, repairs to walls, repairing defective downpipes and gullies, and removing and repairing flooring. The 2019 AGM minutes show that the original sum of £5000 per balcony had been reduced.

59. **Insurance:** The cost of insurance at £47,715.88 is disputed by Mr McGrath. He states that it is considerably more than the £17,000 previously charged. He has not provided any alternative quotes. In accordance with *Cos Services Limited v Nicholson & Willans* [2017] UKUT 382 (LC) it was obtained through a broker on the open market. At MNE8 the insurance broker explains that the insurance is higher as they had been unable to obtain alternative insurance due to the history of claims, particularly at Oliver Court. They list a number of companies that they have approached and have refused cover. Mr Habib sets out the basis of the insurance premium. He explains it includes rebuilding costs, as opposed to saleable value. This is in accordance with Schedule 6 Part B paragraph 7. Though apparently substantially higher than previous years Mr McGrath has not made out that it is unreasonably incurred.

60. The decision making process under the lease must be rational, made in good faith and consistent with the contractual purpose as well a bearing in mind that the cost is to be borne by the lessees (see for example, *Waaler v Hounslow LBC* [2017] EWCA Civ 45). The content of both the minutes together with the Witness Statements provide a reasoned and rational explanation of each disputed item of expenditure within the bounds of a reasonable decision. This included a consultation with lessees at the meetings. Together with the inspection and expertise of the tribunal and in absence of any clear reasons or alternatives provided by the Respondent has led the tribunal to determine that the sums are payable.

Issue 2: Set off

Relevant Defects

61. Clause 1 of Part B of the Six schedule states that the landlord is responsible for;

> *" Repairing rebuilding repointing improving or otherwise treating as necessary and keeping the Maintained Property and every part thereof including substantial repair order and condition and renewing and replacing all worn or damaged parts thereof"*

62. There are clearly ongoing issues of dampness, not all of which the RTM are responsible for, as evidenced by the Tribunal inspection on 29 November 2019 and two survey reports disclosed and commissioned by Block on 17 December2012 [67-93] and 31 July 2013 [129]. The

inspection showed some evidence of ad hoc work being undertaken and Mr Habib states that work is carried out when a leaseholder notifies them of particular issues. There has also been some programmed works. The 2012 survey dealt with defects to the entrance, balconies, and flat roof guttering. Much of this work has been completed, though there were still some defects noted to the entrances of other blocks. There were issues of cold bridging causing some damp.

63. The 2013 survey of Olivia Court specifically refers to general issues of dampness inside flats and was in response to issues raised by flat 166. The dampness identified is complicated by design defects and includes lack of cavity walls and poor ventilation. The pattern of dampness did not show rising dampness. Three flats were surveyed to give a broad scope of the severity and cause. Flat 164 was the only ground floor flat inspected. Some penetrating dampness from a leak above and condensation were identified. Though there were high levels of dampness found under the kitchen units it was not found to be as a result of a defective DPC. In flat 166 there was also some penetrating dampness from localised perished mortar joints as well as condensation. The perished mortar was the only relevant work as it relates to the Maintained Property.

64. By the time of inspection on 19 November 2019, there was evidence of rising damp. The pattern of damp rising to approximately one metre to the external front walls and external inspection showed possible DPC failure together with some areas in need of pointing. Both these are within the Applicants obligations in relation to this clause. The areas of damp and mould in the top corners of the room as a result of condensation are likely to be secondary to this. The lack of heating and ventilation being contributory factors as well as the fact that the property has been empty for a considerable period .However, Mr McGrath has replaced his windows himself and is responsible for ventilation and heating.

65. Of the other issues raised above, the rat infestation is dealt with above and it has not been established that it is the result of lack of action by the RTM. The staining to the brickwork from overflow leakage is a factor to be claimed from the insurers of the flat above, if it is found to be covered under the insurance. Furthermore, Mr McGrath confirmed that he had installed and painted his own windows. It has not been sufficiently shown that damp in the Property was caused by any leakage to the cellar although the tribunal was not permitted to enter this area for inspection.

Notice

66. Clause 1 of the Tenth Schedule states:

"Carry out the works and do the things set out in the 6th schedule hereto as appropriate to each type of dwelling Provided:- (a) The management company shall in no way be held responsible for any damage caused by any want of repair to the maintained property or defects therein for which the management company is liable hereunder unless and until notice in writing of any such want or repair or defect has been given to the management company and the management company has failed to make good or remedy such want of repair of defect within a reasonable time of receipt of such notice."

67. The Applicant contends that Mr McGrath did not give notice until after proceedings were issued. When he met with all three directors together with the director from Block on 8 September he did not raise issues of disrepair. There is no reason to doubt, that Mr McGrath only raised an issue of dampness inside his Property until after the 30 June 2019. As this is after the service years in dispute, the Tribunal finds that Mr McGrath has not given notice either before or during the service charge periods in the Application as required by Clause 1 of the Tenth Schedule. Since directions of 29 November 2019 Mr McGrath has not responded to invitations to an internal inspection.

68. The Tribunal could find that they have been put at notice in accordance with this clause following the survey reports as Notice does not have to be given by the lessee. However, it finds that apart, from mention of repointing where required, the defects to the Maintained Property are different to those found in the reports.

69. Clearly there has been an ongoing issue for a number of years as evidenced by the S20 Notice dated 9 February 2007. This included works to the defective DPC and repointing. However, this was prior to the Applicant becoming the RTM company and Mr McGrath does not state if this work was carried out. There was also a witness statement of Mr McGrath dated 28 March 2017, presumably in connection with previous proceedings. However, this just refers to general dilapidations and it is noted that no order for specific performance was obtained. A person cannot litigate the same issue again. The Tribunal found that they have not been put on notice by the survey reports they commissioned as they did not, at that stage, result in actional defects in relation to the Property.

70. In conclusion notice was not given until the service of the witness statement of Mr McGrath dated 27 September 2019.

Damages

71. Where a landlord is in breach of an obligation under the lease the tenant may set off against the service charge a claim for liquidated or unliquidated damages for breach of that obligation. The Tribunal does not need to decide this matter as notice as not been provided. However, the Tribunal did go on to consider this matter.

72. Damages can be for liquidated and unliquidated damages so Mr McGraths failure to provide more specific information excepting that he has been unable to let the property for 21 months from the date of his Witness Statement dated 27 September 2019, is not necessarily fatal. He has provided no more information on his loss, including specific loss or distress and inconvenience. He has not resided in the Property himself and it is presumed he let it as a short term let prior to the 21 June 2017. It was empty during the inspection. This provides a timescale for any loss from 30 June 2017 and includes the two years of the non-payment of the service charge in this matter. The Tribunal determined that the loss of rent would be £625 per month for an unfurnished 1-bedroom property of this nature. However, the Property is not unnecessarily unlettable.

73. Mr McGrath has not provided any evidence in support of a cross- claim. For example, he has not provided any information in relation to advertising, attempting to contact the RTM or Block or other ways to mitigate his loss. He appears to have done nothing. This may well be due to other matters he has referred to in his statement. Nevertheless the Tribunal has got to find that lessee must show that the cross-claim is so closely connected with the landlord's demand for payment that it would be manifestly unjust to allow the landlord to enforce its demand without taking the cross-claim into account.

74. We cannot find it manifestly unjust. Even though there is notice in the form of the report Mr McGrath had failed to engage with the Applicant or pay his service charge for a number of years; as evidenced by the county court judgement in default. He has not provided any evidence to the contrary. He has not arranged a time for inspection as requested by Block. Block states that the first notification was during these proceedings and he has failed to engage with Block to make arrangements for an inspection. They state that water ingress is an insured peril and so an internal inspection is imperative to carrying out repairs. The Tribunal has also taken into account unless order made by the Tribunal on 10 March 2020, that he be barred from taking part on proceedings if he did not provide the information as so directed. Mr McGrath, though he provided a witness statement before the deadline of 24 March, did not do so in relation to notice or details of loss as directed by the Tribunal on 19 November 2019.

Issue 3 Costs

75. The Applicant has made a claim for costs as an administration charge and service charge in accordance with Clause 3 Part One of the Eighth schedule and Clause 16 Part C of the Sixth. These allow for costs, including legal costs to be recovered in contemplation of forfeiture and as part of the service charge. Mr McGrath has stated that these costs are excessive.

76. Paragraph 5A of schedule 11 to the Commonhold and Leasehold Reform Act 2002 makes provision for the Tribunal to reduce or extinguish the lessee's liability to pay such contractual costs. Paragraph 20A. Section 20C of the 1985 Act, so that the Applicant may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge. It may make whatever order on the application "it considers just and equitable".

77. In addition, costs are a variable administration charge and payable only to the extent that the amount of the charge is reasonable.

78. The Applicant has provided three schedules of costs totalling £14,148.9 (£12,714.86 plus £2,210.68 VAT) and £112 fees.

79. The first is for the period 25 April 2019 to 17 July 2019 at £2,520.30 plus VAT of £504.06 totalling £3024.36 and disbursements of £112 totalling £3136.36 . These costs are excessive and include 44 units for letters to the Applicant. The second schedule is for the period 18 July 2019 to 10 September 2019, at £1,362.90 plus VAT of £272.58 totalling £1635.48. This period includes an unsuccessful application for a strike out and liaising with the Applicant. The final schedule is for the period to 16 April 2020. This amounts to an extraordinary £7,170.20, including a £600 fee to counsel and 88 units in attendance on the applicant. It does not include a figure for VAT that would be £1,434.04. It is unclear why counsel was instructed for a straightforward CMC. No specific legal argument was submitted in the skeleton argument, which largely includes a chronology of events. It is unclear why a partner undertook some of the work.

80. Most of the legal work was undertaken by Eleanor Longworth who was a grade C fee earner until 30 April 2019 when her hourly rates increased from £146 per hour to £177. Most of the other work could have been undertaken by a Grade C fee earner. Importantly the Applicant has not broken down the work in a full schedule, despite directions to do so, and is only a summary which makes it unclear whether the work is reasonable or just and equitable. In fact, most of the work could have been undertaken by the Applicant or its agent. It was a straightforward payability of service charge application. Block are solely dedicated to and are experienced in managing the legal, accounting and

maintenance of residential and commercial developments and should be part of the management fee. This includes preparation of the application, witness statements and liaising with the parties.

81. On the other hand, costs have increased due to the Respondent delaying and not complying with directions in time, that necessitated a CMC for example. In addition, not all of the Respondents documents were entirely clear, and he added a set off claim. However, he is a litigant in person and the Tribunal process is a no costs jurisdiction. The tribunal has determined that the costs are to be fixed at £3,066 plus VAT of £613.2 and disbursements of £112 plus are payable by the Respondents. This totals £3791.2. It represents 21 hours work at £146 per hour that may be reasonable for additional advice due to any complexity, the claim for set off and attending the CMC. It is proportionate to the service charge claimed.

82. In additions the Applicant claims costs under rule 13(1) (b) (ii) of the Procedure Rules. The tribunal has determined that, although the Respondent has delayed, the Applicants have not established the high threshold required for a wasted costs order. The Respondents have not acted unreasonably in defending these proceedings in accordance with Rule 13.

Judge J White
29 July 2020

RIGHTS OF APPEAL

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.