FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/22UJ/LSC/2020/0032**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**138 The Hornbeams, Harlow, Essex CM20 1PJ**
Applicant	**:**	**Mr and Mrs Jackman**
Representative	**:**	
Respondent	**:**	**Harlow Council**
Representative	**:**	**Ms Westwood (Respondent's Legal Department)**
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 S Brilliant** **Mr S Moll FRICS**
Venue	**:**	**Cambridge County Court,** **197 East Road,** **Cambridge CB1 1BA**
Date of decision	**:**	**25 January 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been not objected to by the parties. The form of remote hearing was by video V: CVPREMOTE. 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 in two bundles totalling 828 pages. The order made is described at the end of these reasons.

Decisions of the tribunal

The Tribunal determines that the sum of £15,364.92 is payable by the Applicants in respect of the major works carried out over the service charge years 2018/2019 and 2019/2020.

The application

1. The Applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of service charges and administration charges payable by the Applicants in respect of the cost of major works carried out over the service charge years 2018/2019 and 2019/2020. The Applicants also make an application under s.20C of the 1985 Act. The application is dated 27 July 2020.

The hearing

2. The Applicants appeared in person. The First Applicant is a builder by trade. The Respondent was represented by Ms Westwood of its Legal Department.

The background

3. The property which is the subject of this application is a purpose-built second floor studio flat ("the flat"). The flat is situated in a block consisting of four flats ("the building"). There are three blocks with a total of 12 flats in the immediate complex. The building contains a separate drying room for use by the tenants.

4. Neither party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

5. The Applicants hold a long lease of the property which requires the landlord to provide services and the tenants to contribute towards their costs by way of a variable service charge. The specific provisions of the lease will be

referred to below, where appropriate.

The issues set out in the directions

6. Directions were given on 5 October 2020.

7. At that time the procedural judge identified the relevant issues for determination as follows:

- The application concerns major works for which the Applicants' contribution appears to be £2,224.60. The Applicants can claim that neglect on the part of the Respondent has increased the cost of the works, with reference to louvre doors that had to be replaced and the failure to keep a tree under control which has led to damage to the Applicants' flat and the flank wall and guttering of the building in which is situated.

- The Applicants also query some of the charges in relation to the contractor's preliminaries.

- The Tribunal identified the following issues to be determined, subject to being amplified in the statement of case:

- whether the cost of the works are reasonable, in particular in relation to the nature of the works, the contract price and the supervision and management fee;

- whether any historic neglect on the part of the Respondent has led to increased costs;

- whether an order under s. 20C of the 1985 Act and/or paragraph 5A of Schedule 11 to the 2002 Act should be made;

- whether an order for the reimbursement of the application and/or hearing fees should be made.

8. In an email dated 21 December 2020, the Applicants said there had been a misunderstanding in the directions. The final bill was £18,279.52. The cost of the windows was deducted, so the sum payable became £15,884.63. The estimated cost of the works had been £18,460.01.

9. The Applicants continued:

We were hoping to claim £5,000 back. The reason for this is Harlow Council the freeholder of the Hornbeams neglected the maintenance and didn't keep oak tree under control which made a lot of damage. Because of

this we had to pay more for major works… We are also questioning the preliminaries.

The lease

10. The lease of the flat is dated 28 April 1986 ("the lease"). The Applicants took an assignment of the lease on 14 September 2018. Accordingly, as at the date of the application, the Applicants had been the tenants for a period of approximately 22 months or 95 weeks. The claim for the return of £5,000 equates to £52.63 per week. The Applicants do not live at the flat, but rent it out at £725.00 per month.

11. Clause 4(b)(i) of the lease contains a covenant by the Applicants:

> *to pay the Service Charge assessed in accordance with Schedule G to this Lease by monthly instalments in advance and on account thereof in such amounts as the Treasurer to the Council may from time to time determine*

12. Clause 7(a) of the lease contains a covenant by the Respondent:

> *to maintain and keep in repair the structure and exterior of the Flat and the Property … and to make good any defects affecting that structure*

13. Paragraph (1)(ii) of Schedule G to the lease provides:

> *The Service Charge is payable for:-*
>
> *(ii) repairs (not amounting to the making good of structural defects) carried out to the Property;*
>
> *(iii) the making good of structural defects specified in Schedule E to this lease or which the Council does not become aware within ten years from the date of this Lease*

14. Paragraph (3) of Schedule G to the lease provides in the usual way for the total amount of the service charges to be calculated at the end of the financial year, and that any adjustments to be made.

15. The works carried out by the Respondent involved both repairs and the making good of structural defects. There is no suggestion that the Respondent became aware of those defects before 1996 (10 years after the lease), so the Respondent is entitled to charge through the service charge both repairs and the making good of structural defects.

The final cost of the works

16. The Applicants' share of the costs of the works is £15,884.63 (as explained in paragraph 8 above).

The witnesses

17. The Applicants both appeared and presented their case.

18. The Respondent called:

(a) Ms Marchant, the Respondent's Major Works and Dispute Resolution Officer.

(b) Mr Prescott, an experienced Project Manager and Contract Administrator employed by Savills, who fulfilled this role for the Respondent in respect of the works.

The works

19. This was a substantial capital expenditure project. Mr Prescott sets out the background in his witness statement. There was a competitive tender in compliance with the relevant procurement rules. The value of the contract was below OJEU thresholds. Tenders were sought from five contractors. Four tenders were returned. Bids were evaluated against a predetermined evaluation model with a 30% quality and 70% price split.

20. A rigorous examination of the tenders was carried out. The tender of Durkan Ltd ("Durkan") ranked best. Its submission of £214,165.35 was £22,791.30 lower than the next lower submission, and £140,077.99 lower than the highest submitted price.

21. The brief from the Respondent was to achieve the following objectives:

- keep the properties wind, water, weatherproof and "decent";
- preserve the value, presentation and integrity of the blocks and properties therein through a planned maintenance programme, by repairing, making good or replacement of deteriorated or failing elements which are in poor repair or at the end of their life-cycle:
- reduce future maintenance and repair costs;
- ensure the health and safety of residents and visitors to the block.

22. The Respondent also undertook a review of historic work and repair records, EICR's, asbestos survey records and the Fire Risk Assessment recommendations. The latter two are of relevance as the works included the removal of asbestos and implementing fire risk recommendations.

23. In our judgment, the cost of all of this work falls to be recovered through the service charge.

24. Mr Prescott's professional opinion is that the works were diligently considered, found to be necessary and appropriate in keeping with the objectives of the contract brief and the Respondent's repair and maintenance obligations.

The issues at the hearing

25. The issues at the hearing were as follows:

(1) In respect of each item of work charged for, (a) was the work reasonably required, (b) was it reasonably carried out and (c) was the cost a reasonable one?

(2) Was the expenditure increased by reason of historic neglect?

(3) In particular, the Applicants objected to the cost of replacing the louvre panels to the drying room because they had been allowed to fall into disrepair.

(4) The Applicants also raised a complaint that the flat had suffered from damp because a tree on the Respondent's land adjoining the building had blocked the gutters so that water cascaded down and penetrated through the side wall of the building into the flat.

Historic Neglect

26. As we explained at the hearing, the only question which arises under the 1985 Act is whether the costs of the actual works carried out have been reasonably incurred. The question on whether or not the works might have cost less money if carried out earlier is irrelevant. However, in an appropriate case the Tribunal can deduct a sum for the landlord's breach of its repairing covenant if that be the case.

27. The basis of this approach is set out in Daejean Properties Ltd v Griffin [2014] UKUT 0206 (LC) where at [88-89] Upper Tribunal said:

As the Lands Tribunal (HH Judge Rich QC) explained in Continental Ventures v White [2006] 1 EGLR 85 an allegation of historic neglect does not touch on the question posed by s. 19(1)(a), Landlord and Tenant Act 1985, namely, whether the costs of remedial work have been reasonably incurred and so are capable of forming part of the relevant costs to be included in a service charge. The question of what the cost of repair is does not depend on whether the repairs ought to have been allowed to accrue. The reasonableness of incurring the cost of remedial work cannot depend on how the need for a remedy arose.

The only route by which an allegation of historic neglect may provide a

defence to a claim for service charges is if it can be shown 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. In those circumstances the tenant to whom the repairing obligation was owed has a claim in damages for breach of covenant, and that claim may be set off against the same tenant's liability to contribute through the service charge to the cost of the remedial work. ***The damages which the tenant could claim, and the corresponding set off available in such a case, is comprised of two elements: first, the amount by which the cost of remedial work has increased as a result of the landlord's failure to carry out the work at the earliest time it was obliged to do so; and, secondly, any sum which the tenant is entitled to receive in general damages for inconvenience or discomfort in the demised premises.***

28. In these proceedings there is no evidence to support a claim for breach of covenant. This is because a landlord must be notified of a lack of repair before it can be said to be in breach of its covenant. We do not accept the Respondent was notified of the lack of repair of the louvre doors or the damage occurred from the tree before the works were carried out, or sufficiently before the works were carried out to have made any difference to the costs. There has therefore been no breach of covenant or, if there had, no loss flowing from it.

29. Nor was there any evidence from the tenants of the flat as to any discomfort suffered as a result of this lack of repair. Accordingly, any claim based on historic neglect must fail.

The individual items of work

30. The parties did not provide a Scott Schedule as asked for in the directions. However, we did have the benefit of a detailed schedule of the individual items of work done and the costings between pages 531 and 535 in the bundle. We also had a breakdown and costings of the Preliminaries at page 586.

31. We now turn to those individual items which were challenged. The Applicants did accept a substantial number of the items and these are not referred to below.

Preliminaries: water for the works

32. £225.00 claimed. £100.00 offered. The Applicants' complaint about the preliminaries is that they saw very little happening on site. Durkan was also carrying out major works at another housing estate owned by the Respondent, The Hides, and most of the infrastructure required at this stage was on that site However, Mr Prescott explained that whilst the main

compound was at the Hides and the preliminary costs had been split proportionally between the two sites. We accept this analysis and allow £225.00.

Preliminaries: waste

33. £280.00 claimed. £100.00 offered. The same comments apply as above. Mr Prescott explained that just because there was not a skip on site, it did not mean that costs were not incurred in transporting the waste to the skip at the Hides. We allow £280.00.

Preliminaries: temporary accommodation siting and security

34. £302.00 claimed. £200.00 offered. The same comment apply as above. We allow £302.00.

Preliminaries: lighting and power

35. £183.17 claimed. £100.00 offered. The same comments apply as above. We allow £183.17.

Preliminaries: telephones

36. £165.08 claimed. £100.00 offered. The same comments apply as above. We allow 165.08.

Preliminaries: management and staff

37. £3,947.08 claimed. £1,500.00 offered. The Applicants were very critical of the way in which the staff conducted themselves. They were often absent and did not do their job properly. The Respondent went through four site managers. They just sat in the office at the Hides. Concrete had been left on the scaffolding which is extremely dangerous. Rubbish was left overnight. Security was poor and someone tried to break into the loft. Mr Prescott disagreed. He said that the clerk of works was always there. These costs included head office costs, so were unseen costs.

38. We accept that there were some shortcomings in the staffing, and the First Applicant had to suffer some rudeness. Some of the criticism is unfair because there are bound to be issues arising during any refurbishment which upsets the tenants but are not really the fault of those managing the works. However we accept that some justified criticism has been made and we give an allowance of 10% for this. We allow £3,552.37.

Working at height (item 20)

39. £1,719.00 claimed. £1,000.00 offered. Mr Prescott explained the need

for this. There was a full scaffold to roof level. There was a scaffold to the gable wall. This was needed to replace the soffits. It was necessary to install a firewall. In our view this work was the work reasonably required, was reasonably carried out and reasonably priced. We allow £1,719.00.

Replace defective softwood wall plate/cill and louvres (item 170)

40. £465.42 claimed. £64.00 offered (which was the estimate). The Applicants complained that the slats of the windows had been broken for years. This was in the communal room used for drying. The Respondent said that the costs increased because it was only on an inspection at the rear that it was apparent that the drying room louvre panels required replacement.

41. The Respondent replaced the wooden louvre panels with powder coated metal ones. We accept that it was appropriate for this to happen so that costs could be saved on long-term maintenance. We have already explained that there is no claim for historic neglect in respect of these louvre panels. We allow £465.42.

Balcony balustrade replacement (items 260-300)

42. £1,343.57 claimed. £500.00 offered. The estimate had been £989.31. Mr Prescott explained that a different type of construction was needed in respect of the balcony. The concrete was split and the copings were coming loose. It was necessary to remove the upstands. The First Applicant suggested that asphalt could have been used at a lower cost. Mr Prescott said that laying asphalt on a high balcony was no longer considered safe.

43. On balance, we find that it was reasonable to have the balcony replaced by a more modern structure, and that the costs incurred were reasonable. We allow £1,343.57.

Overhaul store doors (item 340)

44. £250.00 claimed. £125.00 offered. We accept that the contractors broke the Applicants' store cupboard door and deduct £125.00. We will allow £125.00.

Rebuild retaining wall (items 380 and 400)

45. £664.65 claimed. £200.00 offered. The First Applicant makes the point that was nothing wrong with his retaining wall. Other walls might have needed, replacing but why should he have to pay for his being replaced. Mr Prescott replied that the concrete was spalled and the railings were no longer compliant. In the surveyor's judgment repair work would not protect against future damage. In our view, whilst the wall could have been repaired it was a reasonable decision to rebuild and reduce long-term maintenance costs whilst

everyone was on site. We allow £664.65.

Replace defective concrete paving (item 420)

46. £162.50 claimed. £100.00 offered. The complaint here was that although the Respondent had replaced the defective concrete paving for which it was responsible, there still remained very dangerous adjacent paving on the highway. However, the responsibility for the highway is vested in Essex County Council and this complaint has no bearing on the liability to pay for the Respondent's concrete paving. We allow £162.50.

Walkway gullies (item 430)

47. £29.00 claimed. Nothing offered. The First Applicant asked why he should pay for this when he himself had cleared out the gullies. But the contractor has to check for itself as a matter of best practice. We allow £29.00.

Replacement drying area fire resisting flush doorset (item 500)

48. £155.00 claimed. Nothing offered. The Applicants said there was absolutely no need for this, situated as it is beneath the louvre panels. But this was recommended in the fire safety assessment and in our view is chargeable. We allow £155.00.

Replacement of vertical riser panel (item 510)

49. £180.00 claimed. £75.00 offered (which was the estimate). Mr Prescott explained that the estimate was increased because during the work it was found that the ducting went beyond the ceiling, so more work had to be done. In our view this is simply a normal variation in a construction contract. We allow £180.00.

Prepaid timber repairs and high level or concealed location repairs (items 540 and 550)

50. £193.75 claimed. Nothing offered. We consider it reasonable to have charged for repairs carried out before painting and for such repairs which could not have been seen before the work began. We allow £193.75.

Fire stopping works (additional works carried out)

51. £250.00 claimed. Nothing offered. The Applicant say that this sum should have been included within the price of the work. Mr Prescott pointed out that access to the relevant area had been through a hatch over the staircase so the surveyor would not have noticed it prior to the works commencing. We agree that this was a reasonable reason for the extra work. We allow £250.00.

Contract administration fee at 7.52%

52. £1,110.98 claimed. Nothing Offered. The Applicants said they should not pay for this as they were paying the same sum twice. We disagree. The matters set out in the box at page 535 which constitute the 7.52% charge have not been charged for elsewhere and are all reasonably included. The charge of 7.52% is, within our experience and knowledge, a reasonable charge.

Conclusion

53. We have reduced the amounts payable for (1) preliminaries: management and staff by £394.71 (paragraph 38) and (2) overhauling the store doors. £125.00 (paragraph 44). The sums total £519.71. Otherwise we allow the amount claimed by the Respondent. So the total due is £15,364.92.

Name: Simon Brilliant **Date:** 25 January 2021

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).