FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00CJ/LSC/2019/0063**
Property	**:**	**Apartment 29, Forth Banks Tower, Forth Banks Newcastle upon Tyne NE1 3PN**
Applicant	**:**	**Stuart Donkin**
Respondent	**:**	**Triplerose Limited**
Type of Application	**:**	**Landlord and Tenant Act 1985 (the "Act")– s27A and s20C**
Tribunal Members	**:**	**Judge WL Brown** **Mr I R Harris MBE FRICS**
Date of Decision	**:**	**30 September 2020**

DECISION

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(1) The anticipated charges for the major works are reasonably incurred and reasonable in amount save that the reasonable sum for the managing agent's fee relating to the major works is capped at £11,810.81 (net of VAT).

(2) Order made under Section 20(C) of the Act.

(3) No order as to costs.

Background

1. From the papers the Tribunal learned that the Property is a self-contained apartment within a 13 storey tower block situated on a sloping site on the corner of Forth Banks and Skinnerburn Road, Newcastle upon Tyne. There are 38 flats in the building, here described as Forth Banks Tower (the "Block"). It comprises a combination of residential apartments and commercial offices.

2. By Application dated 6 August 2019 (the "Application") the Applicant made application for the Tribunal to determine the payability and reasonableness of service charges in respect of the Property for the service charge year 2019.The determination regarding service charges is made under Section 27A of the Landlord & Tenant Act 1985 (the "Act").

3. Directions were made by the Tribunal on 16 September 2019, which subsequently were varied.

4. The Tribunal convened on 18 June 2020 to consider the appeal on the papers without an oral hearing.

5. The Tribunal has determined the substantive Application following a consideration of the written representations and supporting documentary evidence provided by the parties, but without holding a hearing. Rule 31 of the Tribunal's procedural rules permits a case to be dealt with in this manner provided that the parties give their consent (or do not object when a paper determination is proposed). In this case, the Applicant gave his consent and the Respondent did not object. Moreover, having reviewed the parties' submissions, the Tribunal was satisfied that this matter is indeed suitable to be determined without a hearing: although the parties are not legally represented, the issues to be decided have been clearly identified in their respective statements of case, which also set out their competing arguments sufficiently clearly to enable conclusions to be reached properly in respect of the issues to be determined, including any incidental issues of fact.

6. Both parties produced a bundle of documents. The Respondent gave evidence through a witness statement from its managing agent, Y&Y Management Limited ("Y&Y") through Mr Yaron Hazan.

The Lease

7. The parties referred the Tribunal to the lease for the Property dated 1 August 2008. It is for a term of 125 yeas from 27 November 2006 at an annual ground rent commencing at £250 per annum and was made between Bowesfield Investments Limited ('the Landlord') (1), Mandale Residential Management Company Limited ('the Management Company') (2) and Fozia Khan ('the Tenant') (3). The Applicant is successor to the leaseholder, Fozia Khan. Title information was not provided to the Tribunal. The Application was issued naming as Respondent Bowesfield Investments Limited, but the Reply has been from the Respondent identified now in the heading to this case, which described itself as "Head Leaseholder". The Tribunal understands from the context of the documents and representations that this is to mean Landlord (ie successor to Bowesfield Investments Limited).

8. The lease provides for services to be provided by Mandale Residential Management Company Limited but pending the grant of a Head Lease (upon the disposal of all of the flats in the Block) the Landlord (ie the Respondent) is to provide the services (Schedule 5 paragraph 5). No Head Lease was produced and therefore the Tribunal has proceeded on the basis that the Respondent is successor to Bowesfield Investments Limited. No evidence was presented that the 'Management Company' is active or needs to be a party to these proceedings. The Respondent has willingly accepted the burden of replying to the Application and does not deny having responsibility for provision of services under the lease.

9. The Tribunal was informed by the Respondent that at all relevant times Y&Y has been its manager.

10. Particularly relevant extracts from the lease include leaseholder covenant at clause 3.3 to pay the Specified Proportions of the Service Charges on the terms set out in Schedule 3 to the lease. Paragraph 3.3.1 of Schedule 3 provides for payment in advance of the "tenant's" Proportion of the Service Charge on 1st January in every year and payment within twenty one days of service of an Accountants Statement for the period in question the balance by which the sums paid on account fall short of the Service Charge.

    The Services are specified in Clause 1.24, meaning the services referred to in Schedule 3 and include inter alia, include the keeping the Main Structure (as defined in clause 1.15) in good and substantial repair.

    The Specified Proportion is defined (clause 1.25) as "….the relevant fair and reasonable proportion of the Service Charges in any Account Period payable to the Management Company"

The Law

11. Section 19 of the 1985 Act states

    Limitation of service charges: reasonableness

    (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 for the services or works or are of a reasonable standard: and the amount payable should be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than as reasonable as so payable, and after the relevant costs have been incurred any necessary adjustments shall be made by repayment, reduction or subsequent charges or otherwise.

12. Section 27A of the Act states

Liability to pay service charges: jurisdiction

(1) An application may be made to the appropriate tribunal for a determination whether 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 amount which is payable
d. the date at or by which it is payable, and
e. the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for service, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the cost and, if it would, -

a. the person by whom it would be payable,
b. the person to whom it would be payable,
c. the amount which would be payable,
d. the date at or by which it would be payable, and
e. the manner in which it would be payable.

Background history to the matter

13. JGS Consulting Ltd ("JGS") chartered building surveyors, was appointed to prepare specification documents and obtain competitive tenders for various remedial and refurbishment works at Forth Banks Tower, Forth Banks, Newcastle upon Tyne, as set out in a Tender Report dated March 2019. The works involved were described by JGS in that report as "*External Decoration of rendered panels, façade repair works to replace defective glazing and associated components, remedial works to penthouse roof terrace, miscellaneous roof repairs.*" Those works are here known as the "major works".

14. The Tribunal was informed by the Applicant that the background to the Application is damage to the Block beginning in 2010 when cracking appeared in the "curtain wall". The Applicant alleges that no potential claim was pursued under the Building Warranty policy. In June 2012 further damage was caused by a storm. The Applicant

alleged that no potential claim was pursued under the Buildings Insurance policy. The parties each have confirmed that an insurance claim was ultimately processed, although they dispute who initiated this. Only a partial payment on the claim was made. The payment was made directly to the Applicant and one other leaseholder in relation to the cracked windows. The Tribunal understands that the Applicant's request is to take this issue into account when considering whether all or any of the expenses for the major works should be borne by insurance and on the question of the management fee relating to the major works.

15. Commencing in May 2019 for the matters at issue, Y&Y carried out consultation under section 20 of the Landlord and Tenant Act 1985 regarding the cost of the major works. The consultation process is not disputed by the Applicant nor the actual charges of the contractors, engaged following the tendering process.

Applicant's Case

16. The Applicant raised a number of concerns about service charge demands of him relating to the cost of the major works and about the performance of Y&Y. These are recorded particularly in his letter dated 16 October 2019 to the Respondent's lawyers, Scott Cohen, which identified the following and they are recorded here as numbered Issues. His concerns were expanded upon in his undated witness statement.

17. Issue 1 – Y&Y intend to invoice Individual Leaseholders for monies which should come from the General Service Charge provision. The Tribunal has considered this point and understands that it is a complaint that Y&Y intended to charge leaseholders an apportioned sum for the major works in proportions other than as has been the historic position and in accordance with the lease.

    Issue 2 - Y&Y has stated that they intend to demand 7.5% of the Total Cost of the Major Works. The Service Charge provisions within the Lease only allow for "sums spent".

    Issue 3 - Y&Y has manipulated the End of Year balancing Charge to artificially convert the Service Charge Account Surplus to Arrears. They then demanded the "Arrears" to be paid within the month.

    Issue 4 - Y&Y has depleted the "Reserve Fund" to provide itself "Loans" which is not permitted under law or the Lease and has not provided evidence that it has repaid the Loans taken from the Reserve Fund (2016), nor that other Loans have not been taken from Held-on-Trust accounts.

    Issue 5 - Y&Y has divided Leaseholders Reserve Fund Account monies into several Accounts contrary to the Lease provision which states "a" single account.

    Issue 6 - Y&Y has failed to provide the required information to allow the Leaseholders to examine the accounts. It delayed issuing a demand for balancing charges allowing insufficient time for leaseholders to accumulate funds to pay before receiving the following year's advance charge demand.

Issue 7 - Y&Y Management Company are not abiding by several requirements of RICS Code Section 6.

Issue 8 – regarding the Summary of Rights and Obligations accompanying the Y&Y revised 2018 Budget, these were not presented in accordance with Section 21B Landlord and Tenant Act 1985.

Respondent's Case

18. The Respondent's position was identified in its Statement of Case dated 11 December 2019 and in the document prepared as a statement from Mr Hazan.

The major works have not yet commenced. The estimated costs are as follows:

Cost of Works (CBS Ltd)	£332,230.80
Y&Y Management fees (Estimated 7.5%)	£ 24,917.31
Surveyors Costs (Estimated 11%)	£ 36,545.39
Total Cost of Works	**£393,693.50**

19. Issue 1

The Lease provides at Clause 1.25 that the proportion payable by the Applicant is the relevant fair and reasonable proportion of the Service Charges in any given account period. Y&Y apportions service charges on the basis of internal square footage and has billed service charges to the Applicant at the rate of 2.97%.

With respect to the major works the Respondent had initially proposed to apportion to the Applicant at a higher percentage the costs incurred in connection with the repair of a number of cracked windows affecting only certain apartments. That view has altered and all such additional costs are included in the cost for the major works and apportioned at 2.97%.

Issue 2

Y&Y has included an estimate of fees at 7.5% of the cost of works as a management fee for the major works. It indicates that the management of building works is a significant management task which does not occur on a yearly basis and is not included within the annual fee. The terms of the management agreement details additional management tasks for which separate fees are charged. The management agreement indicates 15% as a standard fee for management of works but the agent has initially budgeted for only 7.5% on this large project.

It listed the work involved for it as:

a. Identifying works required
b. Appointing surveyors and liaising with them including meeting if required
c. Dealing with specification of works
d. Drafting and serve first section 20 notices and ensuring it complies with legislation
e. Making facilities available for inspection of specifications
f. Liaising with leaseholders and dealing with queries

g. Keeping a record of all relevant comments in accordance with legislation for purposes of summary requirements for 2nd section 20 notices
h. Liaising with surveyor regarding any possible changes to scope of work and/or specifications after consultation with leaseholders.
i. Liaise with Surveyor with regards to estimates and agree most competitive and/r suitable estimate
j. Draft and serve 2nd section 20 notice ensuring it complies with legislation
k. Make facilities available to inspect estimates
l. Record all comments made by leaseholder, respond and keep a record
m. Draft and serve 3rd section 20 notice (if required) and ensure it complies with legislation
n. Liaise with Surveyor, Freeholder and leaseholders throughout the process
o. Bill out for work and ensure collection of funds
p. Instructing contractor and agreeing terms
q. Liaise with Surveyor and/or carry out inspections of work throughout
r. Deal with any issues throughout the work process
s. Ensure work is completed
t. Arrange payment to contractor throughout by stage payments or as otherwise agreed
u. Ensure surveyor payments are made
v. Deal with any after work issues or snagging

Y&Y stated that it has been dealing with various aspect of these works since 2013-2014. It referred to having undertaken extensive additional communications with insurers in respect of claims made as they affect the works and have issued consultation notices on four occasions. Also, the developments during this period have required significant communications with a range of parties including the leaseholders and significant planning for funding and budgeting for the works. This process is still ongoing and the management fee includes work to completion.

Surveyor's Fees 11%

The Surveyor has been involved with this project since 2013 and has made multiple attendances to inspect the Block and has prepared the specification of work and liaised with insurers in respect of the claim. The Surveyor has administered the tendering process and will liaise with contractors and supervise the works to completion.

Issues 3 and 4

The total cost of works is the sum of £393,693.50 and the Respondent through its managing agent has tried to budget for this in advance.

In 2014 the sum of £80,000 on account of the cost of the major works was budgeted for in the yearly budget, based upon an initial indication from the surveyor of the anticipated costs. When the work was not concluded in that year, instead of refunding the credit to leaseholders the sum was transferred to the Major Works fund and £5,000 was transferred to the general reserve fund.

In 2015 when the surveyor advised that the cost of the major works would be significantly higher than that budgeted for, the sum of £80,000 was allocated and

again transferred to the Major Works fund at the end of that year and again £5,000 was transferred from the reserve fund.

In the year ended 2018 provision was made in the annual accounts for the sum of £57,500 to be transferred to reserves to be added to the remainder sums held in reserves which were all required for the major works.

Within the budget for 2020 is a demand for £128,694, which is the balance required to fund the major work when added to the sums in the Major Works funds and the reserve fund.

The audited accounts in each year show the movement of the reserve fund and major works and the budgeting for the works has been transparent. A breakdown of the budgeting for the work and the source of funds appears in the second section 20 notice issued to leaseholders in November 2019. The notice gives a breakdown of costs and the deducts sums held – the figure of £105,000 comprises the balance of reserve fund and £160,000 the sums in the major works fund which left the total to be demanded of £128,693.50 inclusive of VAT.

The accumulation of funds has avoided issuing of one large bill to leaseholders, avoided a need for borrowing, incurring interest. Prioritised recovery of arrears of leaseholders and in due course the 'loan' from the reserves to the service charges was repaid and this is shown in the 2018 annual accounts where a record is kept of the running balance of the reserved fund.

Issues 5, 6, 7

The Agent believes it holds funds in accordance with the Association of Residential Managers regulations – service charge funds are held in a client account whilst the reserve fund has its own bank account. The reserve account accrues interest.

The Respondent contends that it has acted reasonably throughout by seeking to budget for the costs of works in advance and maintaining funds for a reserve. The major works are substantial and have utilized all available funds. The accounts are audited in each year by the independent accountants who note the position of the reserve in each end of year accounts.

Issue 8

In relation to the Applicant's dispute as to the font used in the summary of Rights and Obligations accompanying the 2018 revised Budget the Respondent does not dispute that 5 point font was used and that the relevant Regulations provide for 10pt font. It represents that different fonts have different applicable font size of 10 point. It relies on Roberts v Countryside Residential UKUT 0386 (LC) to say that the summary of Rights and Obligations is not invalidated by using a font smaller that 10 point – that requirement is merely indicative of the requirement that the summary be legible and it is.

THE TRIBUNAL'S FINDINGS AND DECISION

20. The Tribunal was first satisfied that the Applicant's lease provides in principle for recovery of the charges at issue (paragraph 10).

21. It is apparent from the bundles that the principal focus of the Applicant's complaint has been Issue 1. Given the concession referred to in paragraph 17 under Issue 1 the Tribunal is satisfied that the Applicant's concern as to apportionment of the service charge for the major works is agreed to be at 2.97%. This does not conflict with the lease, which does not stipulate a specific percentage (see paragraph 10). Therefore, that matter is resolved without Tribunal determination.

20. Issue 2 – the Tribunal found from the correspondence provided to it and the representations made in these proceedings that there appears to be commonality of interest between the Respondent and its managing agent. It is not clear whether that comes from diligent performance by Y&Y in performing its obligations, or that Y&Y delegates decision-making to its agent regarding not just minor matters at the Block or also major ones such as the spending of in excess of £350,000. What is clear to the Tribunal is that Y&Y has taken a lead in the matter of the major works, particularly in respect of financing of them. While the Applicant has presented a number of criticisms of Y&Y, as will become clear regarding the major works issues complained about to the Tribunal, it has not found persuasive evidence that Y&Y has mis-managed or performed in a manner suggestive of negligence. Nor has the Tribunal been persuaded that it has breached profession obligations.

21. Nevertheless, the Tribunal is an expert Tribunal and with that ability has reviewed the charging basis of Y&Y for its effort concerning the major works. The management agreement records as set out in paragraph 19 under Issue 2. The Tribunal finds that it was appropriate to instruct a chartered building surveyor to identify necessary works and prepare specification and the invitation to tender and evaluate responses. The surveyor also is identified as liaison with the contractor and project manager for the major works. Therefore the tasks of the Respondent's managing agent have been and are rather more administrative and could perhaps be better negotiated as a fixed fee. While time has been and will be involved in Y&Y performing the undertakings identified to the Tribunal (paragraph 19 under Issue 2) the Tribunal finds that if the Respondent is able to recover from the Applicant his due proportion of all of the fees of its managing agent calculated in accordance with the contractual formula of 15% of the cost of the major works – or even at the proposed reduced level of 7.5%, - the resulting sums (nearly £60,000 or £30,000 respectively) are excessive for the work involved. Further, the error identified in apportionment of the major works charges (Issue 1) is evidence of misunderstanding by the managing agent of the terms of the lease. The Tribunal determines that the reasonable sum recoverable from the Applicant, paying his due proportion of the service charge, relating to the managing agent's fee should be no more than 3% of the major works costs and more particularly should be capped at £11,810.81 (net of VAT).

22. The fee of the building surveyor has not been presented as disputed by the Applicant.

23. Issues 3, 4 and 5 are related in that they concern the way in which Y&Y has managed funds. The complaints are not within the scope of an application to the Tribunal under Section 27(A) of the Act, other than relevance to Y&Y's fee if found to be deficient management. However, to assist the parties we find that movement of funds between the Reserve Fund and Major Works funds was not inappropriate on these facts. Clause 2.16 of Schedule 3 of the lease permits accumulation of "*.....a reserve fund to make provision for expected future substantial capital expenditure.*" The Tribunal could identify no obligation to hold funds referable to the major works in a particular way with which there has been a failure to comply. The explanation provided by Y&Y (see paragraph 19) of the way it allocated funds is borne out by the accounts information as provided to the Tribunal in these proceedings in that a reconciliation of the reserve fund has taken place at the end of each financial year. Liquid funds would have been needed to instruct the surveyor and will continue to be required to make payments on account to the contractor and the surveyor during the course of the works. We find no evidence that Y&Y has made a loan to itself. We also find on the evidence presented to us that the budgeting for the cost of the major works to have been undertaken in a prudent manner overall. The Tribunal finds no reason to vary the service charge in question for any of Issues 3, 4 or 5.

24. Issues 6 and 7 concern compliance points for the managing agent. The Tribunal has inspected the demands for payments within the bundles. It finds that the Accounts Statements have been presented with sufficient clarity as to reconciliation of the expenditure. The lease does not specify how quickly after year end the Account Statement (showing any balancing payment due) should be presented. Clause 3.3.2 of Schedule 3 states that the leaseholder must pay a balancing charge within 21 days after service of the Accounts Statement. The Respondent through Y&Y has indicated that the reserve funds carry interest. As to Issue 7 the Tribunal found only one instance of a specific provision in the Service Charge Residential Management Code (3rd Edition) identified to the Tribunal by the Applicant as alleged to have been breached. That is described as in "Appendix C" and an indication that a managing agent should have a major works plan – for anticipated works likely to be carried out in the following 3 years. The Applicant states that no such plan existed and indicates in his statement of case "*.....it may have been better for the Leaseholders to pay the required Costs when the Works are scheduled to be commenced*". This would appear to mean the Applicant opposes budgeting for major works, unless a major works plan document exists. The Tribunal is of the view that a major works plan is a sensible tool to be available, not least so that budgeting can occur. On these facts we find that there has been a process of accumulating funds over time towards the cost of the major works, which is judicious planning. Therefore we find no basis to vary the service charge in question for any of Issues 6 or 7.

Overall costs of the major works

25. On this point the Tribunal received the representation of the Applicant set out in paragraph 14 concerning potential contribution from insurance and potential increasing of damage now needing repair arising from repairs not being undertaken in 2010 and 2012. The Tribunal understood the information provided to it from the parties that on the question of relevant potential works at or around those years no works were undertaken. However, the Tribunal received no professional evidence to indicate that the extent of the repairs within the major works were greater or more

complicated – and hence greater in amount - due to the point presented by the Applicant.

26. Likewise, the Tribunal received no comparable evidence to suggest that the works comprising the major works were unreasonable as to their need and / or specification, or that actual sums proposed to be charged for the major works are excessive or unreasonable.

27. In consequence, the Tribunal must find that the estimated costs involved for the major works (set out in paragraph 18) other than the fee of the managing agent are reasonably incurred and reasonable as to amount.

28. As to Issue 8, the Applicant refers to an obligation as to presentation of information to accompany a demand for payment of service charge required by section 21B of the Act. In fact, that provision allows for Regulations to be made and the relevant one is the Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007, SI 2007/1257 (the "Regulation") , which states at paragraph 3 that: "*the summary of rights and obligations which must accompany a demand for the payment of a service charge must be legible in a typewritten or printed form of at least 10 point.*" Sub-section 3 of section 21B of the Act permits a tenant to withhold payment of a service charge which has been demanded from him if there is a failure of compliance as to the form (or content) of the demand including regarding the summary of rights and obligations. While the document may be legible, there may be a technical breach if the appropriate size of font is not used (although the Regulations do not specify the particular font to be used). The Respondent refers in general terms to an Upper Tribunal case as authority that provided the document is legible strict adherence with the Regulation is unnecessary. Regarding a similar section 21B point the Tribunal notes in that case Her Honour Judge Alice Robinson stating (at paragraph 49) *"In my judgment the key requirement is that the statement be legible. Whatever the actual font size used, and different fonts with the same point can be different sizes, I consider that the statement is clearly legible and that any person with normal eyesight, corrected with spectacles where appropriate, could reasonably be expected to be able to read it clearly. Again, despite the error, the statement fulfils the statutory purpose.*" Therefore it may be that as assessment of legibility of the accompanying relevant document is all that is required to determine whether the section 21B(3) suspension of the obligation to pay the demand or demands is available to the Applicant. While the Tribunal has not had sight of the original document the Applicant has made comments upon the demand to which it refers so that, at least, must be legible. The copy of the summary of rights and obligations document at issue appearing in the bundle is found by the Tribunal to be legible. Therefore, the Tribunal finds against the Applicant on point 8.

As to Section 20C and Costs

29. The Applicant made application under Section 20C of the Act that an Order be made that the costs incurred, or to be incurred, by the Respondent in connection with the proceedings before the Tribunal should not be regarded as relevant costs to be taken into account in determining the amount of the service charge payable by the Applicant for a future year or years.

30. The Respondent objected to a Section 20(C) Order. It contended that the sums in question will be reasonably incurred and that the “”Landlord has acted reasonably throughout in budgeting for works and taking the necessary steps to have them carried out.”

31. The Tribunal was satisfied that the Respondent has not been successful in defending all of the Application. A significant adjustment to the calculation of the service charge account has been conceded (paragraph 19 – Issue 1) and as to the amount of the management fee has been ordered as a result of the proceedings. Therefore the Tribunal determined that it should make an order under Section 20C of the Act.

32. There was no application before the Tribunal concerning fees and it made no order as to costs. While the Application included a request under paragraph 5A of Schedule 11 of Commonhold & Leasehold Reform Act 2002 neither party made representations on that provision nor identified any cost to which it may apply. That part of the Application therefore has not been considered further.