FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**BIR/00FN/LIS/2021/0012**
Properties	**:**	**Flats 19, 25 and 27, The Albany, 240 London Road, Leicester LE2 1RH**
Applicants	**:**	**Harjinder Sandhu (1)** **Urvashi Chotai (2)** **Hansa Madhani (3)**
Representative	**:**	**Nirupa Mawby (to 18 March 2022)**
Respondent	**:**	**Peppercorn Property Investment Ltd**
Representative	**:**	**Mr Martin Nathan, Director**
Type of application	**:**	**Application for determination of liability to pay and reasonableness of service charges under sections 27A and 19 of the Landlord and Tenant Act 1985; Application for an order under section 20C of the Landlord and Tenant Act 1985; Application under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 for an order reducing or extinguishing a tenant's liability to pay an administration charge in respect of litigation costs**
Tribunal members	**:**	**Judge C Goodall** **Mr D Satchwell FRICS**
Date and place of hearing	**:**	**22 March 2022 by video hearing**
Date of decision	**:**	**06 April 2022**

DECISION

Background

1. The Albany is a development of 27 residential flats in Leicester arranged in three blocks. The Applicants in this case are the long leaseholders of flats 19 (the Third Applicant), 25 (the Second Applicant) and 27 (the First Applicant). The Third Applicant has at all times been represented by her sister, Ms Nirupa Mawby.

2. On 19 February 2021, the First Applicant made this application for determination of the liability to pay and reasonableness of service charges levied by the Respondent in respect of her flat. At a Case Management Conference on 12 April 2021, the issues were identified as:

    - Inaccuracy of service charge accounts for the years from 2013 to 2021, and

    - A challenge to the cost of roof works totalling £9.647.26 per flat owner ("the Roof Replacement Bill"), to be undertaken in 2021, on the grounds that roof works had been carried out in 2009 which had been supported by a 25 year guarantee and thus the cost of the further works should be claimed from the guarantor rather than the service charge payers.

3. Following the Case Management Conference, the Second and Third Applicants were joined in the claim as Applicants. Directions required the parties to provide statements of their cases in respect of the two issues identified.

4. The case was listed for a hearing on 14 December 2021 before this Tribunal. We did not consider that the statements of case provided for that hearing adequately set out the cases that each party was putting and we adjourned that hearing for further statements to be provided clearly identifying the issues in dispute and setting out the parties cases.

5. The Applicants provided a further statement of case on 28 January 2022, and the Respondent replied on 22 February 2022. The application was at that point listed for hearing on 22 March 2022.

6. On 9 March 2022, the Applicants provided an additional statement of case. The Respondent objected to consideration of this further statement by the Tribunal. The Respondent was informed his application would be considered as a preliminary issue at the hearing on 22 March 2022.

7. On 18 March 2022, the Second and the Third Applicants notified the Tribunal that they had withdrawn from the case. They were notified that the applications for withdrawal (for which the Tribunal's consent is required) would be considered at the hearing on 22 March 2022.

8. The hearing on 22 March 2022 therefore proceeded as a video hearing as listed. Only the First Applicant and Mr Nathan on behalf of the Respondent attended. We had explained that the requests to withdraw by the Second and Third Applicants would be considered at the hearing, but these parties did not initially attend. We understand that later in the day of the hearing they did attempt to join the hearing, but unfortunately both they and the Tribunal were defeated by the technology, and they never made it into the hearing room.

9. This decision records the determinations made by the Tribunal at the hearing on 22 March 2022 and the reasons for them.

The Applicants' case

10. The written documentation which sets out the Applicants case is contained in:

- The Application Form, which raised payability of the Roof Replacement Bill, but without specifying the grounds, and also stated that service charges for years from 2013 to 2021 were challenged, but without giving details of the challenge;

- A document headed "September 2021" containing 3 sections on respectively the 2009 guarantee for roof repairs (1), the accounts for 2013 – 2020 (2), and the sinking fund (3). The point made concerning the roof repairs was that the cost should have been funded through enforcement of the guarantee. Complaints concerning expenditure in the service charge years in dispute were that there was a lack of clarity in the accounts and the Applicants did not understand some of the receipts (without specifying which or copying them to the Tribunal), and the complaint concerning the sinking fund was that there was no provision in the lease allowing one to be set up, and the amount accrued to the fund was disputed;

- The bundle of documents dated 28 January 2022. Despite the Applicants being directed to provide clear explanations of the case the Applicants were making in relation to the cost of the roof replacement works, any issues with consultation, and specific issues the Applicants had in relation to the service charge years they were disputing, this bundle mainly listed some further documents, none of which identified the Applicants case satisfactorily. It was discernible though that the Applicants did challenge:

    - Administration costs of £540.00 for seeking payment of service charges alleged to be outstanding:

    - The balance in the sinking fund, though the Applicants appeared to accept a revision to the amount previously stated to £84,677.42;

- The practice of making demands for service charges in advance, as these were not permitted under the leases of the flats;

- The additional statement dated 9 March 2022. This document did provide some explanation of the Applicants' challenges on which it wished the Tribunal to make determinations. In particular, the Applicants challenged:

  - Whether they should have to pay the Roof Replacement Bill because of the previous guarantee;

  - Whether there was adequate consultation on the 2021 roof replacement;

  - Whether a demand for payment in advance for the roof repairs was permitted;

  - Whether some of the sinking fund should have been used for the 2021 roof repairs.

Law on service charges

11. Sections 18 to 30 of the Landlord & Tenant Act 1985 ("the Act") contain statutory provisions relating to recovery of service charges in residential leases. Normally, payment of these charges is governed by the terms of the lease – i.e. the contract that has been entered into by the parties. The Act contains additional measures which generally give tenants additional protection in this specific landlord/tenant relationship.

12. Under Section 27A of the Act, the Tribunal has jurisdiction to decide whether a service charge is or would be payable and if it is or would be, the Tribunal may also decide:-

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

13. Section 19(1) of the Act provides that:

    "Relevant costs shall be taken into account in determining the amount of the 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 and the carrying out of works, only if the services or works are of a reasonable standard:

and the amount payable shall be limited accordingly."

14. Section 19(2) of the Act provides that:

"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. The construction of the lease is a matter of law, whilst the reasonableness of the service charge is a matter of fact. On the question of burden of proof, there is no presumption either way in deciding the reasonableness of a service charge. If the tenant gives evidence establishing a prima facie case for a challenge, then it will be for the landlord to meet those allegations and ultimately the court will reach its decisions on the strength of the arguments. Essentially the Tribunal will decide reasonableness on the evidence presented to it (*Yorkbrook Investments Ltd v Batten [1985] 2EGLR100 / Daejan Investments Ltd v Benson [2011] EWCA Civ 38*).

16. In relation to the test of establishing whether a cost was reasonably incurred, in *Forcelux v Sweetman* [2001] 2 EGLR 173, the Lands Tribunal (as it then was) (Mr P R Francis) FRICS said:

"39. ...The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred.

40. But to answer that question, there are, in my judgement, two distinctly separate matters I have to consider. Firstly, the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Second, whether the amount charged was reasonable in the light of that evidence. The second point is particularly important as, if that did not have to be considered, it would be open to any landlord to plead justification for any particular figure, on the grounds that the steps it took justified the expense, without properly testing the market."

17. A tribunal may make a determination that service charge payers should not have to pay for expenses which are properly recoverable from a third party (*Continental Property Ventures v White* [2006] 1 E.G.L.R. 85)

18. If expenditure on works on a building is intended, section 20 of the Act requires that the lessor consult the lessees as required in the Service Charge (Consultation Requirements) (England) Regulations 2003 ("the Consultation Regulations") if the works will cost more than £250 per lessee. Failure to consult, where required, or to obtain dispensation from consultation, means that the sum payable by each lessee is limited to £250.00.

19. The Consultation Regulations require, in brief, service of a notice of intention to carry out works, describing the works and explaining the reasons for proposing to carry them out, saying where details of the works can be inspected, and inviting observations from lessees. Lessees are to be informed they are entitled to suggest contractors for the works. The lessee then supplies a statement setting out a summary of the estimates for the works which have been obtained, and giving the lessees the opportunity to inspect the estimates. Unless the contract is then awarded to the lowest bidder, or to the lessees nominated contractor, the lessees must be given notice of the award of the contract.

The leases

11. There is no real controversy over the terms of the leases in this case. We understand that all the Applicants' flats were originally demised under leases dated around 1970 for terms of 99 years, at a premium and a ground rent of £25.00 per year. The leases are two party; landlord and lessee. The landlord covenants to keep the roof in good and tenantable repair (clause 4(2)). The lessees covenant to:

    "pay to the Landlord in respect of each year ending on the twenty fifth of March a sum of money equal to one equal twenty seventh part of … the amount expended by the Landlord (as certified by the Managing Agent) in performing the covenants on its part hereinafter contained in … carrying out works … whether or not the Landlord has covenanted to incur such expenditure …" (Clause 3(3).

12. It is the Tribunal's understanding that all the Applicants have since extended their leases by agreement, but no changes to the substantive provisions regarding payment of service charges were made in the variations.

13. The Tribunal's interpretation of the leases is that they do not permit a demand for a service charge in advance. Clause 3(3) is clearly retrospective; payment is required at the end of the year to reimburse money expended. The Respondent argued that a practice had arisen of demanding payment in advance which had been accepted by the lessees so that they are estopped from now arguing this point. For reasons which will become clear below, the Tribunal did not make a determination on this point.

The hearing

14. There were two preliminary issues to resolve at the start of the hearing. The first was the status of the Second and Third Applicants. The notifications of withdrawal did not comply with the requirements of Rule 22(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber Rules 2013 ("the Rules"). No reason had been given for withdrawing. As the Tribunal must consent to withdrawal, we wished to hear from the

Second and Third Applicants on their reasons for withdrawal. They were not able to join the hearing. We therefore did not provide consent to withdrawal, and the hearing proceeded on the basis that these Applicants were still parties, though of course they played no part in the proceedings, and they are still parties as at the date of this decision.

15. The second issue was whether to admit the Applicants' further statement dated 9 March 2022. Mr Nathan resisted this, on the basis that it was not allowed under the directions issued following the first hearing of this case in December 2021. He had not read the statement. His challenge was therefore purely on the basis of breach of process, rather than that it contained any content that affected his case.

16. We decided to admit the statement. It assisted us, as it did provide some explanation of what outcome the Applicants were seeking, so addressing, at least to an extent, the difficulties we had in understanding the Applicants' case. We did not consider that any content of the statement was impossible for the Respondent to deal with at the hearing. In having regard to the overriding objective in Rule 3 of the Rules, our view was that it would be more fair and just for us to consider the Applicants case to the fullest extent that they had set out in documentation.

17. On this basis, we decided that the issues which we would seek to address at the hearing were:

- Whether the works on the roof in 2009, which had the benefit of a 25 year guarantee, meant that there was no basis upon which the 2021 works were reasonably incurred;
- Whether there may not have been sufficient consultation on the proposed roof repairs;
- Whether the demand for a contribution towards the lease repairs in 2021 may not be permissible under the leases of the flats, as there appeared to be no provision for seeking a payment of service charge in advance;
- Whether a sinking fund held for the lessees at the Albany should have been used, in part, to fund the roof works;
- Whether administration charges had been levied for non-payment of the claim for payment towards the roof costs which the Applicants may wish to challenge.

The 2009 guarantee

18. The Applicants had provided a copy of a guarantee dated 19 December 2009 from a company called Phoenix Roofing. They had carried out works to the three flat roofs of the three blocks under their contract numbered

252A. They guaranteed their work against defects in in the materials or workmanship which resulted in water ingress for a period of 25 years.

19. The specification for the contract was not available and Mr Nathan told us it had not been transferred to the current manager. We were informed that the cost of the 2009 works was approximately £9,000.00 plus VAT per block.

20. In around 2019, the Respondent had arranged for removal of some redundant water tanks on the roofs. We were given very little detail of these works. The Applicants had not challenged the carrying out of these works in any of their documents. At the hearing, the First Applicant said she did not recall being properly consulted on the removal of the water tanks. Mr Nathan's view was that the work on the water tanks would have provided Phoenix Roofing with a reason not to honour the guarantee in any event, as their work had been disturbed.

21. In 2020, the Respondent decided to replace all three roofs with a new proprietary roofing system, as there had been ongoing problems with water ingress through the old roof coverings. The First Applicant told us that there were problems with water ingress through the roof. Mr Nathan had exhibited a copy of the contract documents for the new roof, which consisted of a professionally prepared specification and tender form. A section of the specification identified the condition of the existing roof, which was as follows:

    "Constructed in 1970, three storey brick and block construction under a flat roof of asphalt over timber decking with recent failed covering of 2 ply torch on felt."

22. The new roof was to be a proprietary product supplied by IKO, which included preparation of substrate, priming, installation of an air and vapour control layer, insulation, underlay, a cap sheet, and new rain-water outlets. We were not shown any pricing documents, but we were told the contract price was in excess of £250,000.00.

23. Mr Nathan told us of his understanding that his agents had contacted Phoenix Roofing to ascertain their willingness to do the work under the guarantee, but their response had been they could not afford to replace the roof under the guarantee. He understood they were now in liquidation.

24. Mr Nathan's explanation for not seeking to enforce the Phoenix Roofing guarantee was:

    a. The works required in 2021 were wholly different in scope from the 2009 works. He believed the 2009 works had simply been a replacement of a layer of 2 ply asphalt on to an existing timber layer, whereas the new roof was a modern, highly specified quality roof;

b. Absence of the contract for the 2009 works made it difficult to anticipate success in persuading Phoenix Roofing to carry out or pay for the new work;

c. He did not believe the guarantee would have been honoured in any event;

d. Phoenix Roofing would have been likely to have successfully challenged any attempt to enforce the guarantee in any event because of the work on the water tanks.

Discussion on the roof guarantee issue

25. The Respondent's case was not made as robustly as it could have been. It would have been helpful to hear from the managing agent who organised and supervised the 2021 works. The evidence on Phoenix Roofing's financial position was weak.

26. On the other hand, the First Applicants case was no better prepared. It boiled down to an assertion that the undoubted existence of a 2009 guarantee should have meant no payment should have been required in 2021.

27. Doing the best we can with the evidence and submissions that we did receive, we think it is likely that the roof did require renewing in 2021, which we concluded as a result of perusing the contract documentation for the 2021 works. It is abundantly clear, not least from the huge disparity between the cost of the works in 2009 and 2021, that the 2021 work was of a wholly different order to that carried out in 2021. It had been professionally scoped and tendered.

28. Our view is therefore that the 2021 works were reasonably required. On balance, we agree with Mr Nathan's view that the Phoenix Roofing guarantee would not have been enforceable for the reasons he gave us.

Consultation

29. The First Applicant told us she thought the consultation on the 2021 roof works was inadequate. She said there had only been one meeting, and she recalled receiving a letter through the post. She did not offer any basis for suggesting that the Respondent had failed to comply with its statutory consultation obligations under the Consultation Regulations, which she said she was not aware of and so had not read.

30. In their document dated 28 January 2022, the Applicants had exhibited a letter dated 20 November 2020 from the Respondent's property manager with a section headed "Section 20 consultation". Reference was made to a "section 1st notice" dated 27 March 2020, and a "section 20 2nd notice"

enclosed. There is also a letter dated 24 May 2021 which is a notification of the award of the contract.

31. In giving her evidence, the First Applicant accepted that she had received the documents referred to in these letters.

32. In their 9 March 2022 submission, the Applicants raised, for the first time, whether there had been adequate consultation on the works required when the water tanks were replaced. No evidence was available from either party on this point.

Discussion on consultation

33. Whilst the Tribunal did not have the benefit of direct evidence on compliance with the Consultation Regulations, doing the best we can with the limited evidence before us, we find that it is much more likely than not that the Consultation Regulations were complied with in respect of the roof works in 2021.

34. In our view, it was far too late for the Applicants to raise compliance with the Consultation Regulations with regard to the water tanks in their 9 March 2022 submission, and we decline to deal with the point. It should have been raised in the initial statement of case, and/or the 28 January 2022 statement.

Can payment in advance be required to service charges?

35. Despite appearing to raise this issue, at the hearing the First Applicant informed the Tribunal she did not wish to dispute the way the leases were being operated in relation to service charge demands. She was adamant about this.

Discussion on advance payments

36. The tribunal's clear view is that the leases do not allow the Respondent to demand payment of service charges in advance. The Respondent submitted that the lessees were estopped from objecting to the practice that had arisen of making demands in advance.

37. In the light of the First Applicants position, this is an issue that is agreed between the parties, and we therefore decline to make a determination. The parties should understand that we are expressly not ruling that the estoppel argument works. We are simply not determining it. We do not need to.

Sinking fund

38. At one point it appeared the Tribunal might be asked to ascertain the amount in the sinking fund. That would have been impossible on the

material provided to the Tribunal and the witnesses (or rather lack of them) who offered evidence.

39. Fortunately, the First Applicant did not ask us to do so at the hearing. Draft accounts for 2020 were provided to us which showed a sinking fund of £85,069.59. Both parties appeared to accept this figure.

40. The issue was therefore whether some or all of that sinking fund should have been applied to the 2021 roof bill. Mr Nathan said a decision had been taken in 2020 not to apply any sinking fund monies to that expenditure. It was not clear to the Tribunal why that decision had been taken at that time. Looking forward, Mr Nathan said that it was the preference of the newly established resident's association to use the sinking fund for future expenditure. Common parts decoration and lift renewals were needed soon, and these would require substantial service charge contributions.

41. Mr Nathan's own position was that he would be happy to refund the sinking fund reserves to the lessees if they wished. He accepted there was no provision in the lease allowing collection of sums from service charge payers towards an ongoing sinking fund. He also confirmed that the Respondent did not have a cyclical maintenance programme against which required contributions towards reserves could be more accurately calculated.

Discussion on sinking fund

42. We were informed that the 2021 roof works had been carried out, funded by advance payments from lessees. We believe that we could have made a determination that the 2021 service charge demand should not have sought to claim the whole cost of those roof works, but that some part of the sinking fund should have been applied to those costs, leaving only the balance payable. However, from a practical point of view, this outcome appears to have limited real value, and would be a complicated accounting procedure. We decline to make such a determination.

43. What we will do however, is make a determination that under the leases, the sinking fund should not exist. It is held in trust for the lessees, and it is for the individual lessees to decide where they wish to keep their own money, rather than that decision being for the resident's association or its chair. Accordingly, each lessee has a credit of their share of the sinking fund, and they are fully at liberty to decline to pay more future service charges until that credit is exhausted. The Respondent ought to be able to provide each lessee with individualised statements showing the status of their service charge accounts, which should include a credit for their share of the sinking fund.

44. The Tribunal fully understands that The Albany would be much easier to manage if demands for service charges in advance were allowed, and

reserves could be built up for future expenditure, but it is for them to regularise the situation through mutual consent of all the lessees, rather than impose the solution they prefer.

Administration charges

45. Although this issue had been raised, at the hearing Mr Nathan confirmed that all solicitor's costs for seeking payment of the roof payment service charge demand had been cancelled and lessees should find their accounts credited accordingly. The First Applicant confirmed this had happened on her account. It is therefore unnecessary for any determination on this point to be made.

Determination

46. Exercising our jurisdiction under section 27A of the Act, we determine:

    a. There is no basis for reducing or extinguishing any part of the service charge demands for the year in which the 2021 roof work are charged because some or all of those charges should have been collected under the 2009 guarantee from Phoenix Roofing;

    b. A full statutory consultation was carried out in 2020/21 on the 2021 roof works and so there is no basis for limiting any service charges for that works because of failure to consult;

    c. We were not asked to make any determination of the legality of demanding payment of service charges in advance;

    d. The existing sinking fund belongs to the individual lessees according to the state of their running service charge accounts. No additional service charge payments will be collectable from lessees until their credit balances are exhausted, unless a subsequent arrangement is agreed with each lessee.

Section 20C and paragraph 5A applications

47. Neither party made submissions regarding these applications. That is not objectionable as the correct decisions on these applications can often be affected by the outcome of the case, which is only now known.

48. The Tribunal will need to know whether any costs have been incurred in relation to these proceedings by the Respondent, and if so whether in the Respondent's view these costs are recoverable from a lessee, by reference to the terms of the leases.

49. The parties should seek to resolve these applications by consent if possible. If not, each party should provide a written submission to the Tribunal within 14 days of the date of this decision, copying their

submissions to each other. The Tribunal will then make a determination on the applications on the basis of the written submissions and without reconvening a hearing.

Appeal

50. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)