**First-tier Tribunal**
**Property Chamber**
**(Residential Property)**

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| **Case reference** | **:** | **CHI/00LC/LSC/2022/0026** |
| **Property** | **:** | **41A Arethusa Road,**<br>**Rochester,**<br>**Kent ME1 2UR** |
| **Applicant** | **:** | **Julie Morley** |
| **Respondent**<br>**Represented by** | **:** | **MHS Homes**<br>**Debi Sainsbury (lay)** |
| **Date of Application** | **:** | **7th March 2022** |
| **Type of Application** | **:** | **to determine reasonableness and payability of service charges and administration charges** |
| **The Tribunal** | **:** | **Judge Bruce Edgington**<br>**Bruce Bourne MRICS** |
| **Date & place of hearing:** | | **29th September 2022 as a video hearing from Havant Justice Centre** |

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# DECISION

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1. The Tribunal's decision is that the Respondent did not follow the consultation requirements of section 20 of the **Landlord and Tenant Act 1985** ("the 1985 Act") in respect of works to replace the roof and associated works of the property and the amount of service charges that can be recovered is £250.00.

2. The Tribunal makes orders under (a) Section 20C of the 1985 Act i.e. that any costs incurred by the Respondent in these proceedings are to be excluded from any service charge and (b) under paragraph 5A of Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") preventing the Respondent from recovering costs of this litigation from the Applicant.

## Reasons

### Introduction

3. The Applicant has been the long leaseholder of the property for over 15 years. It is let out to a sub-tenant, presumably on an assured shorthold tenancy. In September 2020 her sub-tenant telephoned her to say that scaffolding was being put up to enable a contractor to replace the roof. The Applicant says that she was unaware that this was to happen and asks the Tribunal to

consider whether she should have to pay for this as part of her service charges and, if so, how much.

4. Directions orders were made by the Tribunal on the 29th April and 19th July 2022 timetabling the case to a hearing and a bundle of documents was duly lodged. Both parties have helpfully provided statements of case and supporting documents together with skeleton arguments. Any references to page numbers in this decision are references to the page numbers in that bundle.

5. In the said bundle, the Respondent's case is that it complied with the consultancy provisions set out in section 20 the 1925 Act, that it chose the least expensive quotation/estimate for the work and, accordingly, it is entitled to the amount claimed which, the Tribunal was told at the hearing was now around £4,500.00.

**The Lease**

6. The Directions Orders required the Applicant to include a copy of the lease in the bundle. This is particularly important in this case because some of the issues depend on its precise wording. The original papers just included an undated draft lease. Helpfully the Applicant has now provided certified copies of the lease and other title documents.

7. The lease is dated 8th June 1987 for a term 125 years from the 30th March 1987 and the leaseholder has the right to sublet. As to service charges, the Respondent has to insure and maintain the building in which the property is situated and the Applicant has to pay 17.7 per cent of such costs. The landlord has the power to create what is sometimes referred to as a 'sinking fund' i.e. a fund to enable money to be collected from the leaseholder to cover major costs, such as replacing a roof, which will be incurred throughout the term.

**The Law**

8. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'. Under section 27A, this Tribunal has the jurisdiction to determine whether service charges are reasonable or payable including service charges claimed for services not yet provided. Schedule 11 of the 2002 Act" makes similar provisions with regard to administration charges.

9. Section 20C of the 1985 Act gives the Tribunal the power to order that any costs incurred by a landlord in a case before the Tribunal can be excluded from any service charge. Paragraph 5A of Schedule 11 of the 2002 Act allows a Tribunal to make orders preventing a landlord from recovering costs of litigation from a tenant.

10. Section 20 of the 1985 Act deals with the main point made by the Applicant. That section says that where a contribution by a tenant towards a particular service charge or prospective service charge exceeds "*an appropriate amount*" as defined by regulations, then a landlord must consult with all the tenants paying the service charge and a set procedure is explained. If a landlord wants to enter into a long term agreement with a contractor i.e. for more than a year,

when the cost to the tenant is to be more than £100, then there also has to be a consultation.

11. The consultation for doing works costing each tenant more than the appropriate amount will involve a preliminary notification of the intention to undertake such works and why they are 'necessary', and inviting suggestions for contractors and then sending copies of quotations to the tenants and taking account of their comments. The **Service Charges (Consultation Requirements) (England) Regulations 2003** ("the 2003 Regulations") say that "*the appropriate amount is an amount which results in the relevant contribution by any tenant being more than £250*". In other words, it is a particular tenant's contribution which triggers the requirement for consultations rather than the total service charge.

12. If the cost is likely to be more than £250 per tenant and a consultation is to be undertaken (which was going to be obvious on the facts of this case), then according to Schedule 4, Part 2 of the 2003 regulations, the initial notice to be sent to all tenants shall:

> *(a) Describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;*
> *(b) State the landlord's reasons for considering it necessary to carry out the proposed works;*
> *(c) Invite the making, in writing, of observations in relation to the proposed works; and*
> *(d) Specify-*
> *(i) The address to which such observations may be sent;*
> *(ii) That they must be delivered within the relevant period; and*
> *(iii) The date on which the relevant period ends*

13. The relevant period is 30 days beginning with the date of the notice.

14. As there may, in this case, have been some confusion between qualifying works and long terms agreements, Schedule 1 to the 2003 regulations sets out the requirements of the initial notice to be sent to all tenants when a long term agreement is to be entered into i.e.:

> *(a) Describe, in general terms, the relevant matters or specify the place and hours at which a description of the relevant matters may be inspected*
> *(b) State the landlord's reasons for considering it necessary to enter into the agreement;*
> *(c) Where the relevant matters consist of or include qualifying works, state the landlord's reasons for considering it necessary to carry out those works*
> *(d) Invite the making, in writing, of observations in relation to the proposed agreement; and*
> *(e) Specify-*
> *(i) The address to which such observations may be sent;*
> *(ii) That they must be delivered within the relevant period; and*
> *(iii) The date on which the relevant period ends*

15. Once again, the relevant period is 30 days beginning with the date of the notice. The 'relevant matters' "*means the goods or services to be provided or the works to be carried out (as the case may be) under the agreement*".

**The Inspection**

16. As the only issue in this case involves the legal consultation requirements prior to the replacement of the roof of the building in which the property is situated, it was not felt that an inspection would have really assisted the members in making this determination, particularly as the Tribunal members would not have been able to see the condition of the roof prior to the replacement.

**The Hearing**

17. Those attending the hearing were the Applicant together with Debi Sainsbury who was representing the Respondent and her witness Shaun Moys. The Respondent's witness, Stephen Morris, did not attend. The Tribunal chair introduced himself and the other Tribunal member. He said that the Tribunal members had looked at the case papers in the bundle and the skeleton arguments.

18. He then said that he had some questions to raise on the papers filed. He would do that and then ask the parties to put their cases. He and the other Tribunal member would ask any questions they had as and when necessary. That is in fact how the hearing was dealt with.

19. As a result of the questions raised by the chair, the following points were confirmed:

    (a) The Applicant had stated in her written evidence at page 28 that she had received notifications from the Respondent of their intention to instruct contractors. The chair read out to her part of the Notice attached to the letter of the 18th December 2019 starting at page 74 in the bundle and asked whether that was what she was referring to. She denied this although she accepted that in the Notice attached to that letter had similar wording to the Notices she had in fact received.
    (b) The Respondent confirmed that it had no evidence of the posting of the letter of the 18th December which had been dealt with by an outside agency.
    (c) The Respondent confirmed that the Notice attached to the letter of the 18th December 2019 was dated 23rd December 2019 and that was when the letter had actually been sent out.
    (d) The Respondent confirmed that they had no further evidence to produce to satisfy the Tribunal that the replacement of the roof was 'necessary'.

20. The Applicant and Mr. Moys gave their evidence and were cross examined. As far as the works in 2014 were concerned, Mr. Moys said that this was "*presumably work to effect a small repair and took less than one* day". He added that the photographs produced by the Applicant with her skeleton argument proved that not much had been done. He could not produce any report or record of when and how the works had been carried out and there had been no inspection of this roof before the replacement work had been planned.

21. The Applicant denied all of this. She said that the photographs had been taken before the work had been carried out and that such work took 3 days. The paper under the tiles had been replaced. The Respondent then added that in 2018 there had been a report of some leaks into the common parts of that building due to some slippage of one or more tiles. Again, no report could be produced.

22. There was then some discussion about a meeting in January 2022 which had been called by dissatisfied residents and was attended by them and some councillors. The Applicant said that she knew nothing of this. The Respondent said that it had not called the meeting and had therefore not sent a notice of the meeting to the Applicant.

23. The amount demanded from the Applicant had been reduced because certain aspects of the work were either not done or the cost had not been passed on. These included works to the soffits, facias and asbestos work. As far as the sinking fund was concerned, the local Council, which created the lease, had not been able to set this up because of restrictions on its ability to create separate bank accounts. The Respondent took over the estate in 2016 or thereabouts and set up the sinking fund.

24. The leaseholders complained that money was to be collected to cover future works and only a relatively nominal figure had been collected. On the 31st March 2021, it had only £1,251.17 (page 58).

**Discussion**

25. In **Schilling v Canary Riverside Development PTD Ltd** LRX/26/2005; LRX/31/2005 & LRX/47/2005 His Honour Judge Rich QC had to consider upon whom lay the burden of proof. At paragraph 15 he stated :

> *"If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the Yorkbrook4 case make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard."*

26. In this case, the Applicant challenges the payability of services charges rather than suggesting that the standard of a particular service was unreasonable.

27. On the 25th September 2020, the Respondent's Home Ownership Officer, Stephen Morris sent an e-mail (page 27 in the bundle) to the Applicant following her having contacted the Respondent to ask why the roof was being replaced. The e-mail said that a letter had been sent to the Applicant both at the property and to her known postal address which was different, sending details of the estimated costs That e-mail explains that the reason for the work is that "*overall, the roof itself is in need of renewal as it is the original roof added to the building when it was first constructed in 1957*".

28. The Applicant's reply at page 28 is that the roof was taken off and replaced about 5 years ago following an ingress of snow. She also says that she received a letter "*telling me about the contractor getting the job for works to carry out nothing about work being carried out and nothing about what would be involved*". Mr. Morris then replied saying that the initial letter was written on the 18th December 2019 informing her that the work involved replacing the roof.

29. The Applicant continued with her complaints and then Mr. Morris (on page 32) pointed out that "*for the sake of clarity, I can confirm that the work carried out in 2014 was repair work to the roof, rather than the more substantial work which we will now be doing. The 2014 work involved repairs to felt and battens, tiles and flashing. The work did not involve the removal and replacement of the whole roof*".

30. The Applicant continued to say that the letter allegedly sent by the Respondent was not received either by her or her tenant. She asked for proof of posting. She was sent copies of the letters dated the 18th December 2019 and 12th August 2020 but no proof of posting.

31. The letter allegedly sent on the 18th December is on page 66. It is an initial letter. It says "*we are planning to carry out works to the roof of your building during the financial year 2020/21*" and invites observations about the work and any nominations of a contractor by the 22nd January 2020.

32. It was accepted at the hearing that the letter had actually been sent on the 23rd December 2019 and the attached Notice said that the Respondent intended "*to enter into an agreement for work, and must consult you about this work*" which includes "*replacement of pitched roof coverings*" without saying that they are talking specifically about the roof to the property. Furthermore, the 'observation/nomination' form sent with the letter says that the property address is "*Rochester Kent ME1 2UR*" without mentioning the property specifically.

33. The letter goes on to say:

> "*We consider it necessary to enter into the agreement agreement (*sic*) because mhs homes as landlord is responsible for the repair, maintenance and renewal of the building and services. We consider it necessary to enter into a long term agreement because we want to provide the best service and value for our customers. The works are necessary to maintain the safety and condition of our communal blocks and residential units and to comply with health and safety regulations*"

34. Ms. Sainsbury said at the hearing that this wording was a mistake and that the consultation was specifically about the works to be carried out and not the creation of a long term agreement.

35. In the evidence of Mr. Morris starting at page 79 in the bundle, he says that "*the replacement of the roof to the block was deemed necessary. The roof at the time was over 60 years old, and although the repair history was minimal*

*to the block, our experience of other blocks built at the same time indicated that the roof covering was at a point of failure*". He then indicates (without any detail) that "*the block showed signs of weaknesses and had started to allow water ingress with small repairs required…*". Again, no detail is provided.

**Conclusions**

36. Taking all these matters into account and doing the best it can, the Tribunal's conclusion is that the consultation process was not carried out properly.

37. The Tribunal will accept the Respondent's admission that the letter of the 18th December, sent on the 23rd December, should have related to the works rather than a long term agreement. However, even if the Respondent could prove service of that Notice – which it can't – then the Notice itself does not contain the information demanded by the 2003 Regulations.

38. Having heard the Applicant in person, the Tribunal is satisfied, on the balance of probabilities, that if she had received the Notice in its correct form then she would have certainly made clear representations that replacing the roof of the building in which her flat was situated was not necessary in view of the work undertaken in 2014.

39. The letter attached to the Notice indicates that the Respondent wanted to carry out works to the roof, but the Notice itself is vague and contains no statement which could possibly be described as reasons for considering it 'necessary' for the roof to be replaced. This is reinforced by 4 significant points:-

    (a) The admission by the Respondent that it had not inspected the building in which the property is situated before the consultation or the work took place;
    (b) The evidence of the Applicant, which, on the balance of probabilities, the Tribunal accepts, that the repair work in 2014 took 3 days and involved the complete replacement of the water proofing material under the tiles in the roof above her flat;
    (c) The complete lack of any evidence that the 'nibs', which are in any tiled roof to keep the tiles secure, had in any way started to break and allow the tiles to slide in this particular roof; and
    (d) The evidence that the builders had said to the Applicant and/or her tenant that this was just a 'job lot' to replace all the roofs of the 6 blocks they had been told to replace

**Costs**

40. The Applicant, on the front cover for her skeleton argument states that costs order are to be considered i.e. orders preventing the Respondent from claiming its costs of representation either as service charges or administration charges. Both of these possibilities are set out in the lease. In view of the Tribunal's main decision, it considers that it would be just and equitable to make such orders.

**The Future**

41. Management of long leasehold properties is a particular skill as landlords have to comply with many Statutes and Regulations. The Respondent may well

have considered the Royal Institution of Chartered Surveyors code of practice which is a document recognised by law. It sets out what management tasks are appropriate.

42. The Tribunal was particularly concerned to see what had happened with the sinking fund which had been put into the long lease by the local authority some 35 years ago, presumably in the knowledge that they would be unable to operate it themselves. Clause 3(12) of the lease would appear to have enabled the Council to employ a managing agent who could have opened the separate bank account to hold the sinking fund.

43. Sinking funds are there to help long leaseholders and are generally recognised to be part of good management practice. They come with a programme setting out, over the years, what substantial works can be predicted and costed so that monies can be collected from the leaseholders gradually. Monies in the sinking fund will be there and available to cover costs such as roof replacement. The suggestion made in this case that long leaseholders can somehow prevent the build up of a sinking fund authorised in the lease is not something that this Tribunal finds reasonable or acceptable.

44. This Respondent obviously cannot be blamed for the behaviour of predecessors in title, but, with respect to them, they should now be giving serious consideration to setting up the programme referred to above so that this sort of problem is avoided in the future.

**.....**
**Judge Bruce Edgington**
**30th September 2022**

## ANNEX - RIGHTS OF APPEAL

i. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. 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.

iii. 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.

iv. 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.