FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00EC/LSC/2021/0078**
Premises	**:**	**Flat 54, Maddren Way, Middlesbrough, TS5 5BD**
Applicant	**:**	**Roderick Fraser McIntosh**
Respondent	**:**	**Sinclair Garden Investments (Kensington) Limited**
Representative	**:**	**Mr Richard Bottomley**
Type of Application	**:**	**under s.27A of the Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Judge P Forster** **Mr C R Snowball MRICS**
Date of Decision	**:**	**2 November 2022**

DECISION

Decision

(1) The replacement of the cladding was reasonably required and the reasonable cost to replace the cladding was £46,035.00 of which 50%, that is £23,018.00, is the sum to be included in the calculation of the Applicant's contribution to the reserve fund in the demand dated 1 April 2021.

(2) The administration charge of £1,162.50 made in respect of the management of the redecoration of the communal hallway is reasonable.

Introduction

1. This is an application under s.27A of the Landlord and Tenant Act 1985 ("the Act") to determine the reasonableness of the charges that have been made, in respect of Flat 54, Maddren Way, Middlesbrough, TS5 5BD ("the Premises") for the 2020/21 service charge year.

2. The Applicant, Roderick Fraser McIntosh, is the leasehold owner of the Premises under a lease dated 22 June 2006, registered at HM Land Registry under title no. CE190324, made between (1) Barratt Homes Ltd. and (2) Darren Neil Conley for a term of 155 years from 1 April 2003. The Applicant purchased the Premises on 10 June 2010.

3. The Respondent, Sinclair Garden Investments (Kensington) Limited, is the landlord of the Premises having purchased the reversionary interest on 11 December 2009. Its interest is registered at HM Land Registry under title no. CE205971. All property management functions are delegated to First Management Ltd. trading as Hurst Managements.

4. The Premises is one of thirty flats in a purpose-built three-storey residential block which was built in about 2008. The block is located within a residential estate of both houses and flats which share the use of communal areas. The leases for each flat are in substantially the same terms. The Applicant is liable to pay 3.3% of the service charge. This has historically been charged at 1/30th, or 3.333334%.

5. The Applicant indicted in his application form that he wished to apply for orders under s.20C of the Act and paragraph 5A Schedule 11 of the Commonhold and Leasehold Reform Act 2002. These matters were raised with the Applicant at the hearing and he did not proceed with the applications. The Applicant expressed the view that he simply did not wish to pay the costs of the proceedings. The Tribunal has a very limited jurisdiction to deal with costs and in the present case it does not make any costs orders in favour or against either of the parties.

6. The Tribunal issued directions on 18 January 2022 that required the parties to exchange statements of case, copies of all documents on which they intend to rely and any witness statements. The parties have complied with the directions and the Tribunal has an agreed bundle of documents that runs to 271 pages. The hearing was held by video on 4 October 2022. The Tribunal did not inspect the Premises. The Applicant represented himself and the Respondent was represented by Mr Bottomley. The Tribunal heard evidence from Mr Mark Kelly who is a director of First Management Ltd. t/a Hurst Managements.

The Issues

7. The Applicant initially disputed six of the items included in the service charge demand. Before the hearing, he accepted the "service charge" item and withdrew his objection to it. At the hearing, the issues were further reduced to two issues: (1) the reserve fund, and (2) administration fees and costs.

The Law

8. The law relevant to the case is set out in the annex to this decision.

Reasons for the decision

9. The Tribunal will address the two issues in dispute in turn, setting out the parties' respective arguments and giving reasons for its decision.

The reserve fund

10. The lease provides that the lessor "shall as far as it considers practicable equalise the amount from year to year of its costs and expenses by creating reserve funds and in subsequent years levy such sums as it considers reasonable by way of a provision for depreciation future expenses liabilities and payments whether certain or contingent and whether obligatory or discretionary" – para 2(c) of the Eighth Schedule to the lease. The Applicant accepts that the Respondent is able to ask leaseholders to contribute to reserve funds. The issue is the reasonableness of the amount charged in 2020/21.

11. On 5 March 2021, the Respondent wrote to the Applicant, as one of the leaseholders, informing him of its intention to replace the timber cladding and timber decking on parts of the block because it is 'combustible and could assist a fire should it get started across the elevations of the building'.

12. The Respondent also issued a formal notice in respect of the proposed works pursuant to the consultation requirements in s.20 of the Landlord and Tenant Act 1985. The notice invited the leaseholders to make written observations and to nominate a contractor to carry out the described works by 8 April 2021.

13. On 3 April 2021, the Applicant received a payment notice from the Respondent dated 1 April 2021 showing the amount due as £1,186.57 payable within 21 days for the service charge year ended 31 March 2021. This included £660.27 in respect of the reserve fund. The payment notice was accompanied by a statement of service charges for 2020/21 certified by Matthews Hanton Ltd., Chartered Accountants. The statement refers to 'other major building works' estimated at £76,600.00 as part of the reserve fund which totalled £95,100.00. The Applicant, who is himself a Chartered Accountant, took exception to this and wrote to the Respondent asking for an explanation.

14. In response, the Applicant was informed that the £76,600.00 related to the replacement of the timber cladding and timber decking. The Applicant was not satisfied by the 'vagueness and brevity' of the Respondent's reply, but nevertheless he paid the service charge demand excepting an amount for the reserve fund. Following further correspondence between the parties, the Applicant instructed solicitors to act for him to ask questions of the Respondent.

The need for the works

15. The Applicant's position is that the replacement of the timber cladding and timber decking is not necessary. He challenges the professional advice obtained by the Respondent that specifies 'the removal of the wooden panels as soon as practicality allows'. The Applicant relies on a statement from Barratt Homes who built the block, that the cladding was compliant with Building Regulations at the time of construction, that the cladding is acceptable on buildings under 18 metres and that the building does not include metal composite material (MCM), aluminium composite material (ACM) or high pressure laminate (HPL) panels.

16. The Respondent denies that the proposed works are unnecessary and relies on a report prepared by Ohms Fire & Security Ltd. that recommends that during any future major external renovation works the wooden materials on the front and rear elevations of the block used in the exterior cladding be replaced with non-combustible materials. The Respondent maintains that the replacement of such materials is required to reduce the risk of the spread of fire.

17. Hurst Managements properly commissioned Ohms to assess the block for fire risk in accordance with its statutory duty as the "responsible person". The advice received was to replace the wooden materials to reduce the spread of fire. The block is below 18m, but this does not negate the need, or render unreasonable, the recommended works. The Respondent is obliged under the terms of the lease – Part 1 of the Sixth Schedule – to keep the property "in good and substantial state of repair and condition". This goes beyond simple repair, and the block cannot be said to be in good and substantial repair when the cladding represents a fire risk. The need to manage the risk of external fire applies to buildings of any height. Guidance that applied at the time was only advisory but it was nevertheless necessary for the Respondent to ensure the safety of the block by identifying potential risks.

18. The Applicant criticises Ohms' report for lacking technical detail, but he has not provided any expert evidence of his own to call into question the recommendations made by Ohms. The Tribunal does not accept the Applicant's submission that there are no underlying issues with the building and therefore no reason for accruing money in a reserve fund.

19. The recommendation from Ohms was to undertake the removal of the wooden panels as soon as practicality allows. The timing of the proposed works is a matter for the Respondent alone and not for the leaseholders. It is for the Respondent to decide how to proceed in order to comply with its maintenance and repairing obligations under the lease. The Applicant had the opportunity to engage with the Respondent about the proposed works under the statutory consultation process but did not do so.

20. The Applicant's reliance on what he was told by Barratt Homes confuses the requirements on the developer at the time of construction of the block with the ongoing responsibility to keep the building in good and substantial repair in accordance with current legislation. It was reasonable to make financial provision for the works and to ask for a contribution to the reserve fund.

21. The Tribunal is satisfied that the proposed works are necessary and that the Respondent is under an obligation to carry them out under the terms of the lease.

The cost of the works

22. Under s.19(2) of the Act, where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable. This applies to demands for contributions to a reserve fund.

23. The cost of the replacement works was previously estimated at £76,600.00 of which a little over a half, together with redecoration costs was included in the demand for £39,616.00, for the reserve fund for the year ending 31 March 2021. The estimated sum was based on similar work required to a similar building in the Respondent's portfolio and managed on its behalf by Hurst Managements. The major works were to include the replacement of both the timber cladding and the timber decking to the individual balconies for each flat. The Respondent now accepts, on examination of the leases, that the decking is the responsibility of each individual leaseholder and consequently that the scope of the works has to be narrowed to the replacement of the timber cladding.

24. In January 2022, the Respondent obtained a quote for the works, now excluding the timber decking, from Alexandra Builders Ltd. of £46,035.60 inclusive of VAT.

25. The basis on which the service charge demand was made was wrong because it provided for works that are the responsibility of the individual leaseholders and for which the Respondent has no liability.

26. The Applicant submits that he should only be charged based on the 2022 quote and not on the original estimated costs. The Respondent argues that the costs estimated in 2021 should be considered in the light of what was known at the time the service charge demand was issued on 1 April 2021.

27. The Respondent through its managing agent, Hurst Managements, could, and indeed should have known at the relevant time that the balconies were the responsibility of the individual leaseholders and therefore should not have featured in the works to be covered in the reserve fund. The cost of replacing the balconies should not have formed part of the estimated costs on which the demand was based. Hurst Managements has been managing agents for the Respondent since the freehold was acquired in 2009 and should have been familiar with the provisions in the lease.

28. The Respondent relies on the decision in Knapper & Others v Francis & Francis [2017] UKUT 3 (LC). This is authority for the proposition that the line is drawn at the date on which the payment became due and excludes from consideration matters which could not have been known at that date. The present case can be distinguished from Knapper which excluded facts that could only have been known after the liability arose and were therefore to be disregarded. Here, it was, or should have been known that the balconies were not the Respondent's responsibility.

29. Mr Kelly was unable to provide the Tribunal with a detailed calculation showing how the estimate of £76,600 was arrived at. He was unable to break the figure down between the balconies and the cladding. The best evidence the Tribunal has is the quote from Alexandra Builders Ltd. for £46,035.60 inclusive of VAT for the replacement of the cladding. It is reasonable to conclude that the balconies accounted for approximately £30,600.00 of the estimate.

30. The Tribunal was asked to compare the quote of £46,035.60 to the sum included in the service charge demand of £39,616.00. These two sums are not so very different. This is mere coincidence. The Tribunal is invited to confirm the estimated costs on which the demand is based. This would be wrong on three counts. First, £39,616.00 represents 50% of the total estimated sum of £76,600.00 which incorrectly included the costs of replacing the balconies and secondly, includes an amount for the costs of external decorations of £1,316.00. The figure for the major works is in fact £38,300.00. Third, the statement of service charges does two things, it gives notice of the amount but it also states the intention to split the amount over the course of the year, in two tranches, in April and October 2021, with £38,300.00 being collected over the year.

31. The Tribunal concludes that the reasonable costs to replace the cladding, based on the 2022 quote, are £46,035.00. Of this sum, 50% is the reasonable figure to have been claimed in the service charge demand dated 1 April 2021. That is, £23,018.00.

32. The Applicant originally argued that he is not liable to pay any VAT on the cost of the works because the managing agents, Hurst Managements, is registered for VAT. He now accepts that VAT is properly charged because it is the Respondent's VAT status that is relevant, and the Respondent is not registered for VAT.
33. Mr Kelly confirmed that the estimated costs of £76,600.00 included in the demand did not include the managing agent's fees which are charged at 12.5%.

34. The Applicant maintains that any expenditure to replace the timber cladding should be treated as a matter of accounting practice as a capital improvement for the benefit of the landlord. This is not the correct approach in the context of the lease to which the Applicant and the other leaseholders are bound. The Respondent is under an obligation to carry out works to repair and maintain the building under the terms of the lease.

35. The service charge demand dated 1 April 2021 included £39,616.00 in respect of the reserve fund. The sum of £23,018.00 needs to be substituted for the original figure of £38,300.00. To this must be added £1,316.00 in respect of the cost of external redecoration. The reasonable sum to be charged in respect of the contribution to the reserve fund is therefore £24,334.

Administration fees and costs

36. Paragraphs 2 and 9 of the Seventh Schedule to the lease enables the Respondent to recover from leaseholders "all costs expenses and outgoings incurred by the Lessor in or about the discharge of the obligations on its part" and specifically "all fees charges expenses or commissions payable to any managing agent solicitor accountant architect surveyor or other professional person whom the Lessor may from time to time employ or engage in connexion with the management and or maintenance of the development…".

37. Hurst Management invoiced the Respondent on 24 February 2021 for £1,162.50 in respect of services provided administering the redecoration of the communal hallway. This was charged at 12.5% of the gross contract price for the works. The Applicant argued that this was not an "actual" cost, but rather a management fee with the VAT charged thereon being recoverable by the Respondent and by implication, that it should not have been charged to him. The Respondent submits that it was reasonable to engage the services of the managing agent to administer the works on its behalf.

38. Mr Kelly confirmed that Hurst Managements' fees and charges are set out in its terms of engagement agreed with the Respondent and are based on the RICS's Service Charge Residential Management Code of Practice. Mr Kelly stated in his first witness statement that additional charges for administration and management of qualifying works are allowed under section 3.5 of the Code. This includes works such as preparing statutory notices, consultations, preparing specifications, obtaining tenders and supervising works.

39. The Code does not provide guidance on how supplementary charges are to be calculated. It says that the charges should be proportionate to the time and amount of work involved. On the face of it, 12.5% is perhaps generous but it should not be viewed in isolation without considering the level of the basic annual management fee of £184.00 per leaseholder. The evidence was that the charging regime was changed in 2018 when the fixed annual fee was reduced, and supplementary fees were introduced for additional services.

40. In summing up his case, the Applicant simply said that he now understands how the fees are charged – that 12.5% is charged on the contract price exclusive of VAT, but he really does not accept it and the cost should be based on actual time taken. However, the Applicant did not present any evidence to the Tribunal to demonstrate that the charge made, £1,162.50 inclusive of VAT, was unreasonable. On the evidence presented, the Tribunal finds that the charge is reasonable and that it is recoverable by the Respondent from the Applicant.

Dated 2 November 2022

Judge P Forster

ANNEX

S.18 of the Landlord and Tenant Act 1985 defines “service charges” and “relevant costs”:

(1) In the following provisions of this Act “service charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent—

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord’s costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose—

(a) “costs” includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

S.19 of the 1985 Act deals with limitation of service charges:

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.

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

S.27A of the 1985 Act deals with the liability to pay service charges:

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the 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.

RIGHT OF APPEAL

A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional Office, which has been dealing with the case.

The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

If the person wishing to appeal does not comply with the 28-day time limit, that person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.