FIRST-TIER TRIBUNAL

PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	:	**CAM/00KF/LBC/2022/0008**
Property	:	**Flat 14, Napier Court West, Gordon Road, Southend on Sea, Essex SS1 1NH**
Applicant	:	**Gordon Place Management Company Ltd**
Representative	:	**Ms C Zanelli, solicitor**
Respondent	:	**Mr A Fernandes**
Representative	:	**In person**
Type of application	:	**Determination as to reasonableness and recoverability of service charges**
Tribunal member(s)	:	**Judge S Brilliant** **Mr R Thomas MRICS**
Date and venue of hearing	:	**28 October 2022** **Cambridge County Court,197 East Road, Cambridge CB1 1BA**
Date of decision	:	**02 November 2022**

DECISION

Corrected pursuant to rule 50 on 30 January 2023

Introduction

1. The development with which we are concerned consists of two modern purpose-built blocks of flats, Napier Court West ("Napier Court") and Sunningdale Court, Gordon Road, Southend on Sea, Essex SS1 1NH. The landlord is owned and controlled by the long lessees. The tenant holds a long lease of Flat 14, Napier Court ("the flat").

2. The development includes an above surface car park and roadway under which is situated an underground car park belonging to South Essex College ("SEC"). The above surface car park and roadway constitute a flying freehold. The above surface car park and roadway had a large number of heavy and substantial planters resting on it. The roadway deteriorated to such an extent that serious water penetration occurred in the underground car park. There were holes and splits in the asphalt layer of the roadway.

3. SEC threatened legal proceedings against the landlord which prompted the

major works which are the subject of these proceedings.

4. The lease is dated 19 August 1992, and the tenant took an assignment of the residue of the term in 2021. The lease requires the landlord to carry out certain services, the cost of which is recoverable through a variable service charge.

5. The landlord has carried out major works to the roadway, the cost of which it seeks to recover through the service charge. It is not suggested that in itself it is a cost falling outside what is permitted to be recovered through the service charge.

The proceedings

6. The landlord commenced proceedings in the County Court against the tenant on 05 November 2021. It claimed (a) £2,810.12 in respect of the costs of the major works, (b) administration fees of £250.00 and costs of £1,080.00.

7. The Defendant ~~In his Defence the tenant said that he had already~~ has not paid the £250 administration fee, ~~but that~~ and he disputed~~ds~~ the whole amount of the claim against him.

8. On 18 May 2022, the District Judge ordered the case to be transferred to the tribunal for further directions and for the claim in the County Court to be stayed.

9. At a directions hearing of the tribunal on 04 July 2022, the Judge said that given the terms of the transfer order, the tribunal will only determine payability of the service charges under s.27A of the 1985 Act. The tribunal would also consider any applications (if made) under s.20C of the 1985 Act or under paragraph 5A of schedule 11 to the 2002 Act. There were copies of such applications unissued in the bundle but we were not addressed on them. Should the tenant want to pursue these matters then he will have to have these applications issued.

The hearing

11. The landlord was represented by Ms C Zanelli. She called Ms A Brealey, a director of the current managing agents, Metta Property Management Ltd ("Metta").

12. The tenant represented himself, gave evidence and asked questions. He firstly put in a witness statement from Mr Boyce. It was taken virtually word for word from the tenant's witness statement. Mr Boyce was not available to be cross-examined and we therefore do not rely upon it. He secondly put in a witness statement from Ms Ball. She was unable to be available through no fault of her own, but as she could not be cross-examined on it we do not rely upon it. He thirdly put in a very short witness statement from Ms Hamilton. She was available to be cross-examined, but her witness statement did not really address any of the issues with which we are concerned and Ms Zanelli did not seek to cross-examine her. The tenant sought to put in some further evidence by email, consisting of photographs, but this was not served in time or drawn to our attention at the hearing, so we do not take it into consideration.

The major works

13. On 09 April 2021, Metta sent out notices of intention to all the tenants in accordance with s.20 of the 1985 Act and the 2003 Regulations. The notice of intention said that it was the intention of the landlord to undertake the following works:

I. To ensure the drainage of the surface car park is functioning correctly.

II. To carry out necessary alterations to the detailing of the car park construction to prevent water ingress into South Essex College car park.

III. To carry out necessary repairs to the asphalt layer by a number of planters and vents that have been poorly detailed and maintained.[1]

IV. To repair all holes and splits in the asphalt.

14. The notice of intention explained that it was necessary to carry out the major works to prevent water ingress into the underground car park.

15. The notice of intention invited observations and nominations by 12 May 2021.

16. On 24 May 2021, Metta sent out notices of estimates for the major works. There were separate quotations for removing the planters or repairing them. The ~~cheapest~~ quotation received which followed the specification and which was subsequently voted for by the majority of the tenants was from Weatherproofing Advisers Ltd ("WAL"). It estimated £446,046.00 for removing the planters and £438,066.00 for retaining the planters.

17. The notice also explained that the project surveyors would be charging 6% to oversee the project, and that Metta would be charging £1,818.00 per ~~tenant~~ flat to oversee the administration of the project and for communication with the tenants.

18. The notice said that the estimates might be inspected with prior appointment at Metta's offices. The tenants were invited to make written observations in relation to any of the estimates within 30 days, the consultation period ending on 24 June 2021.

19. Metta also sent a letter dated 24 May 2021 asking for a vote on whether the planters should be repaired or retained (this went above and beyond the statutory requirements).

20. Following the consultation process, the contract was awarded to WAL.

21. In the tribunal's directions the tenant was directed to fill in a Scott schedule in accordance with the template attached to the directions. He did not do so, but set out 10 points in his summary of his statement of case dated 31 August 2022. Metta then helpfully set them out in tabular form with the landlord's response. With the agreement of the tenant the tribunal conducted the proceedings by dealing with each of the 10 points in turn.

Item I

22 . The first point taken by the tenant was that the directors of the landlord were themselves in breach of covenants in their leases. The covenants alleged to have been breached related to restrictions on alienation.

23. Ms Zanelli pointed out this is not a matter which falls within s.27A Landlord and Tenant Act 1985[2] , so is not within our jurisdiction to deal with.

Item II

24. The second point taken by the tenant was that he requires compensation

[1] This was intended to refer to the repairing of the very large planters, but at the request of a majority of the tenants who replied to a questionnaire, the planters were removed altogether at a lower cost.
[2] Set out below in the appendix.

because the previous managing agent, Rylands Associates Ltd ("RAL"), had gone into liquidation owing the landlord £173,261.66.

25. Again, this is not a matter which falls within s.27A, so is not within our jurisdiction to deal with.

Item III

26. The third point taken by the tenant was that Ms Brealey, who is a founding director of Metta, was formerly an employee of RAL. Ms Brealey explained that she had never been a director of RAL and that she had ceased being an employee eight months before it went into liquidation. Again, this is not a matter which falls within s.27A, so is not within our jurisdiction to deal with.

27. We would add that if was intended as an attack on the integrity of Ms Brealey, it was wholly unjustified. We found Ms Brealey to be a helpful, measured and truthful witness.

Item IV

28. The fourth point taken by the tenant was that the wrong fractions, as laid down in the lease, were used to calculate the amount of service charge demanded of him.

29. The total cost of the major works was £446,046.00. This was split between the two blocks, so that the figure for Napier Court was halved to £223,023.00. From this figure was deducted a reserve of £93,887.86. The total payable was therefore reduced to £129,135.14.

30. The appropriate fraction for the tenant to pay depends on whether the major works fall within Part A or Part B as defined in the definition of "Fraction" in the lease. In respect of Part A works for a two-bedroom flat, the fraction is 5/397. In respect of Part B works for a two-bedroom flat, the fraction is 5/211.

31. Part A works relate to works common to all flats. Part B works relate to works common only to the flat and other flats in Napier Court.

32. The repairing of the roadway constituted works common to all the flats so the appropriate fraction was 5/211. The tenant was charged £3,060.12 which is virtually 5/211 x £129,135.14.

33. In the circumstances, we find that the tenant was correctly charged.

Item V

34. The fifth point taken by the tenant was that the breakdown of votes to the options provided in the s.20 consultation was not provided.

35. This is not correct. On 24 May 2021, the tenants were invited to express a preference for either retaining and repairing the planters or having them removed. On 29 June 2021, the tenants were informed that 33 tenants had voted to remove the planters and 14 had voted to retain them.

36. 03 May 2021, the tenants were also asked to choose between the options of (a) having the planters removed and the costs met just by Sunningdale Court, (b) having the planters removed and the costs met by both blocks and (c) the planters remaining. This was an extra-statutory consultation and there was no requirement for the breakdown of the votes to be provided. In any event, this exercise was overtaken by

the one asked for on 24 May 2021 referred to above.

Item VI

37. The sixth point taken by the tenant was that separate specifications should have been provided to the contractors who were tendering based on whether the planters were to be (a) removed or (b) repaired.

38. The major works were overseen by Mr Livemore of Project Chartered Surveyors. We have been shown the tender analysis dated 22 April 2021 provided by him to the landlord, and we have seen no evidence to conclude that he lacked the necessary skills and expertise effectively to tender for the project.

39. In paragraph 4.6 of the tender analysis, it is explained that the project manager awaits confirmation from the landlord as to whether the planters are to be removed, retained or part retained. He would then seek to arrange a site meeting with the successful contractor and recommend a further provisional sum with which to include within the contract.

40. The tenants were informed in a letter dated 03 May 2021 from Metta that the project managers would be obtaining prices from contractors on both bases. We find no fault with Mr Livermore's tendering.

Item VII

41. The seventh point taken by the tenant was that the total cost of the major works to be undertaken in accordance with the s.20 consultation was never provided.

42. This is not correct. The notice of estimates dated 24 May 2021 gave the cost of the major works to be carried out by those contractors which had tendered, on the basis of both the removal and the retention of the planters.

43. The matter of the costs of the project managers and Metta was raised by the tenant. Those costs are not part of the s.20 requirements. However, the notice of estimates explained that the project managers would be charging 6% of the total project cost, and that Metta would charge each ~~tenant~~ flat £1,818.00.

Item VIII

44. The eight point taken by the tenant was that the quotations of the contractors which the landlord asked the tenants to pay for was not provided.

45. This is not correct. On 12 July 2021, the tenant requested quotes that made up the tender report. Metta responded on 14 July 2021 that if the tenant would like to inspect the documents, an appointment could be arranged.

46. The tenant did not arrange an appointment to inspect.

Item IX

47. The ninth point taken by the tenant was that the consultation period in respect of the notice of proposals ended on 24 June 2021. The landlord gave notice that it had placed the contract with WAL on 29 June 2021. The tenant asserts that this five day gap was too short and that the landlord should have waited 21 days before awarding the contract.

48. But the notice of reasons set out all the observations received and we accept the

evidence of the landlord that it had regard to those observations and communicated them to the project managers. The landlord was under pressure to start the major works because of legal threats from SEC, and is not open to criticism for having placed the contract when it did.

Item X

49. The tenth point taken by the tenant was that because the specification changed, it was necessary for the landlord to observe a fresh s.20 notice. This specification changed was for removing the planters rather than repairing them.

50. We do not consider that a change of this nature requires a fresh s.20 notice to be served.

51. In the course of oral argument, and from some of the witness statements, it appeared that the tenant was suggesting that the works had not been carried out to a reasonable standard and that the landlord was therefore unable to recover the whole or part of the cost.

52. It was pointed out that if the tenant wished to make a challenge of this nature he would need independent expert evidence from a building surveyor and also possibly a structural engineer. He had never supplied proper particulars of the alleged defects, he had no admissible evidence about any defects and he had never asked for permission to adduce expert evidence.

53. Accordingly, it is not open to us to rule on whether the major works were of a reasonable standard.

Conclusion

54. For the reasons given above we find that the cost of the service charges claimed by the landlord against the tenant in the County Court proceedings are recoverable by the landlord.

Name: Simon Brilliant **Date:** 02 November 2022

Appendix

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

(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.

(4) No application under subsection (1) or (3) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to

allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).