FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**CHI/45UH/LSC/2022/0110**
Property	:	**Flat 3, 17 Winchester Road, Worthing, West Sussex, BN11 4DJ**
Applicant	:	**Kevin Leake**
Representative	:	**None**
Respondent	:	**Winchester 17 Freehold Limited**
Representative	:	**Dean Wilson LLP, Solicitors**
Type of application	:	**Determination of liability to pay and reasonableness of service charges under Section 27A of the Landlord and Tenant Act 1985**
Tribunal member(s)	:	**Judge David Clarke** **Michael Ayres FRICS**
Hearing Venue:	:	**Determination on the papers**
Date of decision	:	**23 March 2023**

DETERMINATION AND STATEMENT OF REASONS

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Determination

1. **The Tribunal determines that the service charge issued for the financial year 2022-23 in the total sum of £5,549.14, with a reserve fund and major works element of £3,333.32, was reasonable and properly issued under the terms of the Lease held by the Applicant.**
2. **To the extent that the service charge was payable before the relevant costs of £3,333.32 are incurred, the amount so charged is reasonable within section 19(2) of the Landlord and Tenant Act 1985.**

Statement of Reasons

The Application

1. This Application was made under the Landlord and Tenant Act 1985 ("the Act") on 5 September 2022 by the Applicant, Kevin Leake, for a determination of his liability to pay, and reasonableness of, service charges. The Respondent, Winchester 17 Freehold Limited, is the Lessor and Freeholder of the building known as 17 Winchester Road, Worthing, West Sussex, BN11 4DJ ("the Property"). The Respondent is a company, with members comprised of leaseholders of flats within the Property, who acquired the freehold, apparently by virtue of enfranchisement, on 28 September 2021. The paperwork does not specifically disclose whether the Applicant is one of those leaseholders who are members of the Respondent company but a remark in the copy correspondence in the bundle of papers suggests that the Applicant is not a member of the Respondent company.

2. The Applicant is the leaseholder of Flat 3 ("the Flat") within the Property. He holds the Flat under the terms of a Lease ("the Lease") dated 30 September 1988 as varied on 17 March 1993 and further supplemented by a Deed of Surrender and Lease agreed in 2017 (the copy supplied to the Tribunal is undated) whereby the term of the Lease was extended to a period of 99 years from 1 June 2017. The Applicant was the leaseholder of the Flat when this Deed of Surrender and Lease was signed.

3. Following the Application, Directions were issued on 20 December 2022 which included a provision for determination on the papers alone which was accepted by the parties. It was also decided that unless either party applied, there would be no inspection of the Property or the Flat. This determination proceeds on the evidence of the papers provided by the parties which include a Schedule of Works and photographs that accompanied the schedule of works. A case management application by the Applicant for extension of time for bundle of papers submission was refused on 6 February 2023.

4. The Application incorporates further additional applications under section 20C of the Act and under Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 in respect of costs incurred by the Respondent landlord.

Background

5. The Property is a former substantial town house converted into flats in about 1987 when, at the time of such conversion, a more modern extension was added to the rear of the Property to create additional accommodation. It is common ground between the parties that the Property fell into disrepair for some years prior to 2021 when the Respondent secured the freehold title. The Applicant's Flat is to the rear of the Property, and he indicates that the Flat is subject to damp caused variously by roof defects, including particularly inadequate roof verges which result in water running from the roof down the walls. The problems are set out in detail in the Schedule of Works referred to more fully below (see paragraph 10). The damp problems have particularly affected the flat numbered 4, also at the rear of the property. The papers include an email from a Michael Arscott, the leaseholder of flat 4, stating that his flat has suffered from persistent problems of water ingress which was so bad that he was unable to use the flat for a period of four years. Mr. Arscott is not otherwise a party to this Application.

6. Both parties aver that, prior to the acquisition of the freehold in September 2021, the previous landlord took no action to deal with the issues of disrepair despite requests to do so by leaseholders. The Tribunal was not given any further details, but it does appear that one of the main reasons for securing the freehold by a group of leaseholders was to enable the issues of disrepair to be addressed. But it did mean that, in the words of the Respondent, it inherited difficult issues from the outgoing freeholder. It also left a legacy of justified indignation, and perhaps financial loss to the Applicant (and no doubt to Michael Arscott as well), that the disrepair had not been dealt with as it should have been by the outgoing freeholder.

The Lease

7. As has been indicated, the Applicant holds the Flat under the terms of the Lease as varied and later further supplemented by the Deed of Surrender and Lease. The provisions of the Lease relevant to the Application are as follows:

(a) By clause 6(D)(i) of the Lease, the Lessor covenants to remedy all defects in and keep in good and substantial repair all parts of the Property not comprised in any of the flats and particularly (inter alia) the roofs and gutters and the main structure.

(b) Under clause 4(A), the Lessee covenants to keep the interior of the Flat in good repair; and then the clause states that, in particular, this includes the interior faces of all walls enclosing the Flat.

(c) Under clause 4(B)(ii), the Lessee is to pay the defined proportion of the service charge and pay in advance on the two payments days each year the proportion of what the Lessor considers in its absolute discretion appropriate, described as the 'estimated sums' of all monies to be expended by the Lessor in complying with its covenants. There is a specific proviso that any amount that exceeds or fall short of the estimated sums to be repaid to the Lessee or payable to the Lessor, as appropriate. However, by a further proviso, any sum repayable may at the option of the Lessor be retained as part of the reserve fund provided for by clause 6(d)(vi).

8. The proportion payable by the Applicant is one sixth, as provided for in the 1993 Variation of the Lease. There are six flats in the Property, and each pays the same

proportion namely 16.6666%. The payment days provided for under the Lease are 25 March and 29 September in each year (by recital 8) and the annual accounts are made up to 24 March in each year. The relevant financial year for the matters in dispute under this Application is 25 March 2022 to 24 March 2023.

The 2022-23 Service Charge

9. The Application seeks a determination on matters relating to this financial year only. The sum requested of the Applicant is £5,549.14 (in two equal payments on 25 March and 29 September) and the Applicant disputes a part of that sum of £3,333.32 which is stated in the budget to be 'Provision of Reserve/Works arising', the total for the Property under this heading being £20,000.

10. The Respondent has provided full evidence of the major works proposed. These are set out in a Schedule of Works drawn up by Ross Pocock BSc, MRICS from a firm known as Infinity Surveyors Ltd and dated March 2022. This is a professionally prepared list of the works required to effect roof repairs, including replacing verge detail, and covers much more including exterior works to lead flashings, gutters and downpipes, replacement of render and exterior redecorations. The Applicant does not dispute the works to be done except perhaps in relation to the rendering, as mentioned below, paragraph 13(b). The Applicant does not provide any evidence from a surveyor. The Tribunal has studied the Schedule of Works and the accompanying photographs and considers it fairly sets out the repair works to the Property, which appear to the Tribunal to be required.

11. Following the completion of the Schedule of Works, the Respondent sent to all leaseholders a notice under section 20 of the Act of its intention to carry out the works and included a copy of the works schedule. The notice accords with the requirements of the Act and the Applicant did not respond with any observations. Indeed, in his reply to the Respondent's statement of case, he says that he does not dispute that the section 20 process has been carried out correctly. He further states that he fully agrees with the Schedule of Works, saying all the work is necessary.

12. The Respondent plans to undertake the repair works required during the summer of 2023. It has deliberately delayed the second notice required under section 20 since contractors are reluctant to commit to a price for a long period of time so tenders will be sought shortly. The budgeted sum for the totality of the works is £40,000 plus VAT and fees and is subject to completion of the section 20 process. It was decided to raise the sum of £20,000 for the reserve fund in 2022-23 and thereby, together with existing reserves, to have to hand in advance a significant contribution to the expected costs of the works.

The Applicant's submissions

13. Even though the Applicant accepts that all the repair work set out is necessary, nevertheless he submits that the inclusion of the sum of £3,333.32 in his service charge is wrong and unreasonable. In summary, his arguments, which he says are essentially about what costs the Lease permits the Respondent to recover, and over what timeframe, are as follows.

(a) He submits that some of the work proposed, namely the planned work to roof verges, amounts to an improvement and so not recoverable under the terms of the Lease.
(b) Though at one point in his submissions the Applicant accepts the necessity of all the work contained in the Schedule of Works, in his statement of case, he contends that the rendering on the rear wall is in good condition and does not need replacing.
(c) He submits that some of the defects must have existed at the time the Lease was entered into and that the repairing covenant does not extend to such defects. Though he accepts that it is unlikely monies could now be recovered from the developer, he thinks that there should be a check to see if there are any insurance backed guarantees.
(d) He denies that any leaseholder should have any financial obligation for defects that existed before the Lease was signed. But at the same time, he considers that the Respondent is in breach of its repairing obligations.
(e) He questions whether the way the red-line edging of the plan of the Flat on the Lease is drawn means that the outside wall of his Flat is included in the demise enabling him to object to the removal of the rendering. However, he denies that that would mean that he has responsibility for the repair to that external wall.
(f) He complains that the historic neglect of the need for work under the previous freeholder amounts to historic neglect which is a defense to a claim for service charges. He cites *Daejan Properties Ltd v Griffin* [2014] UKUT 206.
(g) Finally, and principally, he submits that the terms of the lease do not permit the recovery of sums for major works in advance and certainly not when it is accepted, as here, that there will be no expenditure until the following year and in circumstances where no tenders have yet been received. He says that only reasonable amounts can be paid into a reserve fund.

Respondent's submissions

14. The Respondent submits that the terms of the Lease permit recovery of the sums demanded and that they can be payable in advance. It refers the Tribunal to *Knapper v Francis* [2017] UKUT 3 and to *OM Property Management Ltd v Burr* [2013] EWCA Civ 479 as authority that sums for estimated costs of planned work can be recovered independently of the section 20 consultation process. The sums requested are estimated sums and based on a reasonable assessment of costs to be incurred independently of actual costs.

15. On other issues:
(a) It is denied that the works proposed involve any element of improvement. Unless an overhang is introduced into the roof verge, the damp problem will continue.
(b) The rear wall is single skin, and the present rendering allows water penetration, and the bitumen underneath is likely to have failed.
(c) The Respondent says that it is is not aware of any guarantees.
(d) It submits that whatever the failings of previous freeholders, the Respondent is obliged under the covenant in the Lease to address the disrepair.

(e) The Respondent disagrees that the poor marking on the Lease plan results in the inclusion of part of the external wall of the Flat and refers to clauses 4(A)(ii) and 6(D) of the Lease.
(f) The Respondent submits that any claim for historic neglect must be pursued in a claim for damages in other proceedings against the previous freeholder.

Analysis of the submissions

16. Before examining the terms of the Lease and whether the sums claimed are lawful and reasonable, the Tribunal gives its ruling on the other matters raised by the Applicant.

(a) The Tribunal is entirely satisfied that there is no element of improvement in the works proposed. In respect of the roof verges, there is an inherent defect in the original construction, and this can only be remedied by increasing the overhang - without such work the water will continue to run down the walls and the damp problems will continue. It is always a question of degree in deciding if works to a building amount to repair or improvement, but in this case the Tribunal is clear that these are works of repair, it being necessary to remedy the faulty verge: *Ravenseft Properties Ltd v Davstone Holdings Ltd* [1980] QB 12.
(b) The Tribunal entirely accepts the surveyors report recommending replacement of the rendering. The Applicant provides no evidence to suggest that this is wrong.
(c) The Tribunal accepts that there is no evidence of insurance backed guarantees. It comments that it is not feasible that any such would still exist in force after a period of 35 years.
(d) It is basic to the law relating to repairing covenants that a duty, as in clause 6(D)(i) of the Lease, to keep a property in good and substantial repair requires that the property first to be put in good repair if it is in disrepair at the commencement of the term of the lease – it is a double requirement: *Proudfoot v Hart* (1890) 25 QBD 42. The suggestion that the Applicant puts forward, namely that there were defects in 1988 and thus the duty to repair does not apply, was rejected in *Lurcott v Wakely and Wheeler* [1911] 1KB 905 (CA) – a person who covenants to repair, or who takes on a covenant to repair by assignment (as here), can never say that 'the house was old so that it relieved me from my covenant to keep it in good condition'.
(e) A plan on a conveyancing document only takes precedence over wording if the property is to be 'more particularly delineated' on the plan. That is not the case here. The Flat is described only by reference to the plan. Consequently, the clear wording of the Lease in Clauses 4 and 6, that sets out the repairing obligations of each party and carefully sets out responsibilities, for example, in relation to windows and doors, prevail over the plan, which is only indicative of what has been demised. The exterior walls of the Flat are part of the retained property and subject to the Lessor's repairing obligations.
(f) The Respondent is correct that any claim for historic neglect must be pursued in a claim for damages against the previous freeholder. The Tribunal has no jurisdiction in such matters. The case of *Daejan Properties Ltd v Griffin* is one where the neglect had been by the landlord who was imposing the service charge and the remedy was by way of setting off the resultant damages against the service charge sum. In this case, however, the Respondent is not liable for any

such damages – it is seeking to remedy the lack of repair as soon as possible after securing the freehold. Moreover, there is no evidence to demonstrate that part of the costs now to be incurred in remedying the defect and lack of repair would have been avoided if completed sooner, nor any detail of the damages incurred.

17. Given that none of the Applicant's submissions above are upheld, the final and central issue is whether the terms of the Lease permit the Respondent to include in the 2022-23 service charge the sum of £20,000 ((£3,333.32 per flat) as an advance payment towards major works intended to be undertaken in the following financial year. The Tribunal has no doubt that the Lease permits this.

18. Under clause 4(B)(ii) of the Lease, the Lessee is to pay such service charge in advance, on the two payments days each year, the proportion (one sixth) of what the Lessor considers in its absolute discretion appropriate. Of course, by statute, namely section 19 of the Act, that discretion is limited. A service charge is payable only to the extent that sums are reasonably incurred (section 19(1)(a)) or if, as in this case, when the service charge is payable before the relevant costs are incurred, only to the extent that the amount is reasonable (section 19(2).

19. The Lease describes as the 'estimated sums' the monies to be expended by the Lessor in complying with its covenants. It is specifically stated that sums may include 'a reserve for future expenditure' – clause 6(D)(vi)(b)(I). There is certainly a specific proviso that any amount that exceeds or falls short of the estimated sums is to be repaid to the Lessee or payable to the Lessor, as appropriate. However, importantly, by a further proviso, any sum so repayable may at the option of the Lessor be retained as part of the reserve fund provided for under the Lease.

20. The Tribunal concludes that the Respondent's decision to raise by way of advance payment on account of planned major works in 2022-23 financial year is entirely reasonable and permitted by the terms of the Lease. It will be necessary, after the tenders are received and the contractor chosen, to have those reserve funds in hand to finance the works as they progress. Of course, the Respondent will need to further comply with section 20 of the Act, and, within that process, the Applicant will have an opportunity to examine the tenders received and propose a contractor from whom a tender should be sought.

21. The decisions cited by the Respondent in its statement of case, namely *Knapper v Francis* [2017] UKUT 3 and *OM Property Management Ltd v Burr* [2013] EWCA Civ are clear authoriies that support this conclusion. It is lawful to include in a service charge estimated sums on account of work to be done and to increase reserves for that purpose wherever, as here, the Lease permits that to be done.

Determination

22. The Tribunal therefore determines that the service charge issued to the Applicant for the financial year 2022-23 in the total sum of £5,549.14, with a reserve fund and major works element of £3,333.32, was reasonable and properly issued under the terms of the Lease held by the Applicant. To the extent that the service charge was payable before the

relevant costs of £3,333.32 are incurred, the amount so charged is reasonable within section 19(2) of the Landlord and Tenant Act 1985.

Other issues

23. The Applicant asks for details of the 'Landlord Loans' included in the Respondent's accounts; and for details of service charge arrears owing by other leaseholders. These matters do not in any way impact on the issue that the Tribunal is asked to determine – namely the reasonableness of the service charge - and it is not therefore appropriate for the Tribunal to make any comment on these issues.

24. The Tribunal noted that one page of the witness statement of Gary Pickard, a partner in the firm engaged by the Respondent to manage the Property after its purchase of the freehold, was omitted from the bundle (between pages 42 and 43). The Tribunal considered that it was able to determine this case notwithstanding this omission so did not adjourn to seek a copy of the missing page.

25. The bundle of papers included a considerable number of copies of email exchanges between the agent for the Respondent and the Applicant. The Tribunal considers it is unnecessary to refer to this documentation except to comment that it reveals that Gary Pickard patiently explained the Respondent's position carefully to the Applicant before these proceedings were commenced.

Costs

26. The Applicant seeks an order under section 20C of the Act, and under Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002, in respect of costs incurred by the Respondent. If these orders were made, it would mean that the Respondent could not include any costs that it has incurred in these proceedings in a future service charge and reduce or extinguish any administration charge that the Respondent might impose under the Lease in respect of litigation costs. The Applicant has not succeeded on any of his submissions. It would not be appropriate to make an order under either statutory provision.

27. The Tribunal did consider whether it was appropriate to make an order for costs against the Applicant, and in favour of the Respondent, under paragraph 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The Tribunal may only do so if it is satisfied that the Applicant has unreasonably brought these proceedings. A case could be made on the basis that the Applicant accepts the need for works to be done to repair the Property and provide a remedy for dampness in his flat but is unwilling to pay for such works. Nevertheless, the Tribunal concluded that it was satisfied that the Applicant, who apparently did not have the benefit of legal advice in making his submissions, did not act unreasonably. Moreover, the Respondent did not ask for a costs order under paragraph 13. The Tribunal does not consider such a costs order should be made.

Closing remarks

28. The Tribunal has a degree of sympathy for the Applicant – and Mr. Arscott – who appear to be the Leaseholders within the Property who have suffered the most from the

failure of a previous freeholder to fulfil its covenant obligations to repair the Property. But the Respondent is now undertaking the works that are required to put the Property in repair and cannot be blamed for the shortcomings of the past. It is to be hoped that the parties can work together better in the future and thereby protect the investments that they have made in their flats within the Property.

Right of Appeal

1. 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 (RPSouthern@justice.gov.uk). 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.

2. If the person wishing to appeal does not comply with the 28-day time limit, the 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.

3. 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 that the party who is making the application for permission to appeal is seeking.

4. Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.