FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00ML/LSC/2023/0036
Property	**:**	20B Upper Market Street, Hove, BN3 1AS
Applicant	**:**	Simon Maginn
Representative	**:**	In person
Respondent	**:**	Park Avenue Estates Ltd
Representative	**:**	Dean Wilson LLP, solicitors
Type of Application	**:**	Landlord and Tenant Act 1985 s.27A (service charges)
Tribunal Members	**:**	Judge Mark Loveday Mr Colin Davies FRICS
Date and venue of hearing	**:**	Determination without a hearing
Date of Decision	**:**	8 August 2023

DETERMINATION

Introduction

1. This is an application relating to liability to pay service charges for a flat in Hove. Only one issue of substance remains, namely whether the costs of works to the basement and ground floor of the premises can be recovered as service charges under the terms of the relevant lease.

2. For the reasons given below, the Tribunal determines that the works do not fall within the covenant and that the sum of £3,949 is not payable. It also makes consequential orders under s.20C of the Landlord and Tenant Act 1985 ("the 1985 Act") and para 5A of Sch.11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act").

Background

3. By an application dated 8 March 2023, the applicant lessee sought a determination of liability to pay service charges under s.27A of the 1985 Act in relation to 20B Upper Market Street, Hove, BN3 1AS. The respondent is the landlord.

4. Directions were given on 22 May 2023. The Tribunal decided the application was suitable for a paper determination and met to determine the matter on 2 August 2023. The applicant made written submissions personally. The respondent made submissions through Ms Claire Whiteman, a partner at Dean Wilson LLP.

Facts

5. 20 Upper Market Street is a mid-terrace property c.1830 in the fashionable Brunswick Town area of Hove. Photographs suggest it was originally built as a single family home on basement and three upper stories under a pitched slate roof. Again, as originally built, there appears to have been a prominent bay at ground to second floors and a lightwell to the front basement protected by iron railings. The main street access at ground floor level was up some steps through the street door at the right-hand side of the property. There would also have been secondary access down a staircase from the street to the lightwell.

6. At a later stage, the house was converted into a mixed-use property. The applicant suggested that this occurred in the 1960s. He suggested that the freeholder chose to remodel the house by removing the steps and the lower part of the bay and covering the lightwell with a concrete slab. The slab was supported by two steel beams and it ran from the pavement back to the building front wall. A second door was formed at ground floor level on the left-hand side to give access to a new commercial unit on ground and basement levels. This unit was provided with a timber shopfront (which rested on the floor slab), full width signage and a retail window. The three upper floors were converted into a flat, which became known as 20B Upper Market Street. The applicant's statement was supported by photographs in the bundle (c.2016) and the lease plans referred to below. In effect, the layout as evidenced in the photographs and plans was that there was a shopfrontage and separate entrances at ground

floor level to both the shop and maisonette. The timber shopfront and doorway were supported by the concrete slab and steel beams.

7. By 2016, the beams and slab were apparently found to be unsafe. There is a letter from Reactive Surveys dated 24 June 2015 which describes the corrosion of the beams that recommended replacement of the slab and beams. Acrow supports were installed. The applicant suggests the extent of the damage was limited to the slab and that it was not a structural problem.

8. The respondent then put work in hand. According to a specification of works by Overill Associates dated October 2015, the original project mainly comprised the bricking up of the front basement window, removal of parts of the wall beneath the ground floor shopfront window and the removal and replacement of the defective floor slab. Works were commenced by Smart Construction at an estimated cost of £11,260 plus VAT. However, only some of the works were completed before the project was put on hold towards the end of 2016. The reason for this was that the respondent had decided to apply for consent to remodel the front elevation, returning it to its original residential appearance. The planning application, dated 20 July 2016, was described as

> "conversion of storage at basement level and office at ground floor level into 1no one bedroom maisonette (C3) including replacement of existing shopfront with bay windows, creation of light well and installation of railings".

   Planning approval was notified on 19 January 2017. The works then re-started. The recently installed floor slab was removed, together with the shopfront and doorway. The bricks which had been inserted in the basement window were also removed and the original basement was exposed. Railings were installed along the street matching the neighbouring properties, the steps to the main entrance were re-tiled to match the original and the steps down to the basement improved. At ground floor level the lower part of the bay was reinstated, so that the exterior of the house returned to something close to its original appearance. The ultimate cost of this refurbishment was approximately £121,745.35 and the premises are now configured as three flats.

9. In 2016, the managing agents, Austin Rees, sent a demand for £8,619.77, being the applicant's contribution to the cost of the works. There was a reference to the Property Ombudsman and various issues about consultation under s.20 of the 1985 Act. Eventually, under threat of forfeiture and under protest, the applicant paid the sum of £3,949 plus £360 costs to the managing agents. The respondent has produced details of this payment, which it says is the element of the 2021 balancing service charges that related to the major works.

10. The application itself sought a determination of liability to pay this sum, but also

challenged other elements of the service charges raised over the years. Those objections were pursued until a fairly late stage. On 27 July 2023, the applicant made a late application to withdraw the other objections, leaving the sole issue of the cost of the major works. The respondent consented to this application, albeit reserving its position on costs.

The lease

11. The lease of the flat is dated 25 June 1990 and was granted for a term of 99 years from 25 March 1990. Clause 1 defined "the Building" as "the building of which the Premises shall form part". The "Common parts" were defined as "the entranceway and stairway of the Building as is shown coloured green on the attached floor plans". These plans showed rough sketches of each floor, including the ground floor and basement. It is clear enough from the ground floor plan that at the date of the lease the premises were configured as above on the date of the lease.

12. The service charge obligations are set out in clause 4. By clause 4(1) the tenant covenants to pay 65% of the landlord's Annual Maintenance Costs. These are defined at clause 4(5) and include at clause 4(5)(b):

    > "the costs of and incidental to the performance and observance of each and every covenant on the Landlord's part contained in sub-clauses (1) (2) (3) and (4) of Clause 5 of this Lease."

    The landlord's main repairing obligation is at clause 5(1):

    > "(1) That the Landlord will when and as necessary maintain repair decorate and renew or procure the maintenance repair decoration and renewal of:-
    > (a) The common parts.
    > (b) The main structure of the Building including in particular (but not by way of limitation) the foundations and exterior walls thereof
    > (c) The gas and water pipes …"

Submissions

13. Despite a lengthy bundle and long statements of case, the point before the tribunal was a very narrow one. Did the works which completed in 2017, and which formed part of the 2021 balancing charges, fall within clause 5(1) of the Lease? The applicant said they did. The respondent said they did not. On this one point turned the applicant's liability to pay the disputed service charges of £3,949.

14. In para 1.9 of his statement of case dated 27 June 2023, the applicant said:

    > "… [clause] 5(1)(b) stipulates the matters I am required to contribute to,

ie those matters referred to in the landlord's covenants contained in sub-clauses (1)(2)(3) and (4) of clause 5 of the lease. The landlord's covenants under the lease regarding maintenance, repair etc are set out in Lease 5(1). This provides for 'maintenance, repair, decoration and renewal'. It excludes any costs arising from improvements or remodelling of the ground floor and basement of the building the freeholder may have undertaken in the past or may wish to undertake in the future to further their commercial interests, or from any work which is not 'structural' in nature … and thus I as long leaseholder of the upper three floors have no liability for any costs arising from such works.

The freeholder installed the slab and steel beam for their own commercial purposes some time in the 1960s, the steel beam became unsafe over time, and it is thus the freeholder's sole responsibility to make it safe or remove it. Nothing to do with the steel beam or the slab has anything to do with me as long leaseholder of the upper three floors of the building."

In support of the assertion that the floor slab is non-structural, the applicant refers to an (undated) report of Gary Edwards MRICS, who stated that "the shop window itself does not appear to be structural as the window framing, which is timber, is far too slender to provide adequate support".

15. Para 11 of the respondent's statement of case dated 15 June 2023 states:
"The Respondent asserts that the costs that have been charged the leaseholder for the structural works to the RSJ and concrete slab whereas a result of the identified disrepair to the building as defined under the lease. They were solely carried out for the benefit of the building as a whole and have not been overcharged to the Applicant. The Respondent therefore asserts that the sums were both reasonable and payable."

16. The applicant's response in his statement of case dated 11 July 2023 was that:
"1. This is not the condition of the property shown in the lease which I signed in 1990.
2. The diagram of the building included in the lease I signed in 1990 does not show the exterior slab as part of the building. The lease makes no mention of a slab, because it isn't part of the structure of the building."
…
5. The corrosion of the steel beam … is solely the Respondent's responsibility, since they installed it for their own commercial purposes in the first place. There is no mention of it anywhere in the lease".

17. Somewhat unusually, the respondent submitted a reply to the applicant's further statement of case on 14 July 2023. It suggested the argument about the structural slab was contrary to the submitted reports from the surveyors who investigated the building over recent years. In any event, at the time of the

grant of the Lease to the applicant in 1990, that conversion had already taken place. In relation to the distinction between improvements and repairs, the respondent had already dealt with this in its Statement of Case and explained the limited costs charged to the service charge account related to necessary repairs of the building.

Discussion

18. The tribunal starts with the issue of whether the relevant cost of the works fell within the scope of the clause 5(1) repairing obligation. Were the works to the "common parts" or the "the main structure of the Building including in particular (but not by way of limitation) the foundations and exterior walls thereof"? It should be noted the definition of "the Building" in clause 1(e) does not exclude any of the parts let to the commercial occupiers (or even the applicant). Moreover, the repairing obligation is not limited to "structural works", it covers works to the "main structure" In other words, even minor works to parts of the structure are covered by this obligation.

19. Applying these tests, there is little doubt the 2016-17 remodelling was work to "the main structure of the Building". Removing the lintel over the shopfront, remodelling the masonry supporting it and rebuilding the wall and bay were all works to the Building structure, even if the shopfront itself was not load bearing. Forming new steps, removing a doorway and installing railings can also be described as works to the main Building structure. Finally, the Tribunal is satisfied the concrete slab and beams supporting are also work to the structure. These were substantial concrete and steel elements of the Building, that provided the external footway and main pedestrian access to the Building, and supported the timber shopfront and left hand side doorway. Although the applicant asserts Mr Edwards's report supported the suggestion the floor slab was not structural, the surveyor's report dealt with the question whether the shopfront was part of the structure, not whether the floor slab was structural.

20. The other issue is whether the works went beyond mere repairs and amounted to improvements. There is a lot of caselaw relating to whether a repair covenant includes improvements. *Dilapidations: The Modern Law and Practice* 7th Ed at 11-04 to 11-05 explains the distinction between repairs and improvements is no more than part of the well-known fact and degree test. It is always a question of degree whether works go beyond the repairing obligation: *Ravenseft Ltd v Davstone Ltd* [1980] 1 QB at 21C. *Woodfall* at 13.055 says:

> "a covenant to repair does not involve a duty to improve the property by the introduction of something different in kind from that which was demised, however beneficial or even necessary that improvement may be by modern standards."

There is no 'bright line' division between repairs and improvements. But a useful pointer is if works result in something different to what was there before. In *Lurcott v Wakley* [1911] 2 K.B. 905, Cozens-Hardy MR said:

> "That being so, it seems to me that we are driven to ask in this particular case, and in every case of this kind, is what has happened of such a nature that it can fairly be said that the character of the subject-matter of the demise, or part of the demise, in question has been changed? Is it something which goes to the whole, or substantially the whole, or is it simply an injury to a portion, a subsidiary portion, to use Buckley LJ's phrase, of the demised property?

21. Here, the Tribunal agrees with the applicant that one needs to take into account the configuration of the property at the date of the grant of the lease and before the major works began. At that stage, the premises were configured as a shop on ground floor and basement and residential on the upper floors.

22. The Tribunal has no hesitation in finding that the works carried out in 2016/17 provided something very different to what was there before. Compared to the 1990 configuration, the main front elevation of the Building was dramatically different, and quite deliberately so. The intention was to return the premises to an interpretation of what the house may have appeared nearly 200 years before. The Building was no longer a shop with a flat above, but rather a house solely in residential use. The most obvious features at street level, namely the shopfront and signage, were complete removed. Pedestrians could no longer walk up to the shopfront, because the lightwell had been opened up for the first time in many decades. The handsome bay was reinstated at ground floor level. It is hard to see how this was not giving back something which was very different to what was there before. Factually, the appearance and front elevation were very different. The degree of change was dramatic, as is obvious from the photographs submitted to the Tribunal. The structure of the premises was different, both in fact and degree, and in the ordinary sense of the word, the works were therefore "improvements", not "repairs". Indeed, this conclusion is supported by the point that the major areas which required repair, namely the steel beam and the concreate slab, were in fact removed completely in the second phase of the works. The remedying of pre-existing defects to the structure did not therefore form any part of the costs which were included in the service charges. Although there is no 'bright line' test to distinguish a repair form an improvement, the Tribunal is satisfied that the works went far beyond the respondent's obligation to "maintain repair decorate and renew or procure the maintenance repair decoration and renewal of … the main structure of the Building" in clause 5(1) of the lease.

23. The charge of £3,949 relating to the major works is therefore not payable.

Other matters

24. The applicant ticked the box on the application form for making an application under s.20C of the 1985 Act. Section 20C provides:

> "20C.— **Limitation of service charges: costs of proceedings**.
> (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

25. The Tribunal is conscious this is not a conventional costs jurisdiction, in that it is assumed the respondent has a contractual right to its costs of the proceedings under the terms of the Lease. But it is nevertheless just and equitable to make an order under s.20C. The applicant has succeeded in his application and there is nothing in his conduct of the proceedings which can reasonably be criticised. It would not be just and equitable for him to incur any of the respondent's costs of the application.

26. The applicant also ticked the box on the application form for making an application under para 5A of Sch.11 to the 2002 Act. The charges of £360 in costs were administration charges under para (1)(d) of Sch.11. Again, the tribunal found the service charges demanded were not payable. It therefore makes an order under para 5A of Sch.11 to the 2002 Act extinguishing the applicant's liability to pay this.

Conclusions

27. The Tribunal determines that the respondent cannot recover the cost of the 2016-17 works through the 2022 balancing service charges. The respondent is not liable to pay the balancing service charge of £3,949.

28. Under s.20C of the 1985 Act, none of the costs incurred by the respondent in connection with proceedings before the tribunal are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the applicant. The tribunal makes an order under para 5A of Sch.11 to the 2002 Act extinguishing the applicant's liability to pay the costs of £360.

Judge Mark Loveday

8 August 2023

Appeals

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.

2 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.

3 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.

4 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.