FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AN/LSC/2023/0022**
Property	**:**	**Flat 5 Charleville Court, Charleville Road London, W14 9JG**
Applicant	**:**	**Mr Alan Kilburn**
Representative	**:**	**N/A**
Respondent	**:**	**Cypher Residential (UK) Limited**
Representative	**:**	**Howard Kennedy LLP**
Type of application	**:**	**Application for orders under s.20C Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002.**
Date of Decision	**:**	**27 September 2023**

DECISION

Decision

1. I decline to make an order under s.20C Landlord and Tenant Act 1985

2. I make no order in respect of the application made under paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002 extinguishing the Applicant's liability to pay a particular administration charge in respect of litigation costs.

Background

3. At a case management hearing ("CMH") that took place on 17 August 2023, by remote video conferencing, I made a consent order under rule 35 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 disposing of Mr Kilburn's application for a determination of his liability to pay service charges (made under s.27A Landlord and Tenant Act 1985). The consent order required the Respondent to return to Mr Kilburn the sums of £9,484.80 to and £1,094.40 paid by him in respect of service charge.

4. The consent order also contained my directions regarding Mr Kilburn's applications for orders under s.20C Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002. Those directions required the parties to provide written representations on those applications, which they have duly done, following which I was to determine the applications on the basis of the representations received, without a hearing. My decision on the applications is summarised above, and my reasons follow below. I turn first to the factual and procedural background. References in bold and in square brackets below are to pages in the hearing bundle provided by the Respondent for the CMH.

5. Mr Kilburn is the joint registered proprietor of a leasehold interest in Flat 5 Charleville Court, Charleville Road, London, W14 9JG (the "Flat"). The Respondent has been the registered freehold proprietor of Charleville Court (the "Block") since 20 September 2017. The Block comprises 28 flats, 11 of which are retained by the Respondent.

6. It is common ground between the parties that the Block is in need of substantial major works, both internal and external, and that significant delay has occurred in those works being carried out. It is Mr Kilburn's position that the delay has been unreasonable, and that the Respondent's inaction has resulted in the costs of the required works rising substantially over the last four years. The Respondent's position is that the works were delayed for reasons outside of its control.

7. An initial notice of intention to carry out internal and external works was sent to lessees on behalf of the Respondent's predecessor in title, Moreland Majestic Limited SA by letter dated 15 July 2015 **[29]**. The costs of the works were specified as being in the region of £150,000, plus

VAT and fees. However, that consultation was not completed, and no works were carried out.

8. In 2018, after the Respondent had acquired its freehold interest in the Block, lessees approached it regarding the outstanding works required to the interior and exterior of the Block. This led, on, 18 December 2018, to the Respondent sending lessees a new initial consultation notice **[27]**, followed, on 14 November 2019, by a statement of estimates **[32]**. That statement referred to three quotes from contractors, ranging from £181,523 to £212,465.96, both plus VAT, to which would be added administration fees of 12.5%.

9. Works were delayed, and in 2021, the Respondent commissioned a new tender appraisal report from its managing agent, Mainstay Commercial ("Mainstay") who reported on 21 June 2021 **[34]**. In its report, Mainstay stated that the scope of the works had been revised because of the presence of asbestos and to allow for the inclusion of additional contingency and provisional sums. Two tenders had been received, a contractor was recommended and the total costs of the works (including VAT and fees) was estimated to now be £330,815.55.

10. Yet further delay occurred, and on 26 October 2022, a new notice of intention was served on lessees. That statutory consultation is ongoing, and the Respondent no longer relies upon its 2018 consultation. The Respondent now proposes to proceed with the internal works first, leaving the external works to a later date.

11. In Mr Kilburn's application form, received by the tribunal on 20 December 2022, he provides the following breakdown of sums he paid to the Respondent, by way of service charge, following its demands for payments towards the anticipated costs of the major works.

2018

Half-year Major Works contribution of £3,648.00, requested on 25.12.18 for the period covering 25.12.18 to 23.6.19.

2019

Half-year Major Works Contribution of £3,648.00, requested on 24.6.19 for period covering 24.6.19 to 24.12.19.

2020

Half year Major Works Reserve in Advance of £547.20, for 25.12.20 to 23.6.21.

2021

Half year Major Works Reserve in Advance of £547.20, for 24.6.21 to 24.12.21.

2022

Half year Major Works Reserve in Advance of £547.20, for 25.12.21 to 23.6.22, and another half year major works reserve in advance of £547.20 for 24.6.22 to end of year.

12. The total sum paid by Mr Kilburn towards the anticipated costs was £9,484.80. In his application he described the questions that he wanted the Tribunal to decide as follows:

> " (a) I would like the service charges listed above to be returned to me, because they were advance payments for major works which have not yet begun, even though the Section 20 Notice for these major works was served in December 2018."; and
>
> (b) As a result of the application to the Tribunal served by my fellow leaseholder, Mr Abbas Sabokbar of Flat 6 Charleville Court (Case Reference LON/00AN/LSC/2022/0251), the landlord - after four years of inaction - served a new Section 20 Notice for the major works on 26 October 2022. The costs of labour and materials have almost certainly increased in the last four years, and it is unfair for leaseholders to potentially have to pay more towards the major works, when leaseholders are not responsible for the delays to this project. The wrongs of four years of neglect and inaction by the landlord and their managing agent cannot simply be righted by serving a new Section 20 Notice. The condition of the building has, for example, been allowed to further deteriorate during this time. I believe that the landlord is in breach of the consultation requirements and should be limited to receiving no more than £250 per leaseholder as their contribution to the major works."

13. The tribunal issued directions on Mr Kilburn's application on 26 January 2023, and listed the matter for a final hearing to take place on 15 June 2023. On 31 January 2023, the Respondent's solicitors requested a stay of proceedings on grounds that Mr Kilburn's application concerned the same issues as those in Mr Sabokbar's application. I refused that request on 1 February because it appeared to me that following the agreement reached between the parties, the only issues that remained to be determined by the tribunal in Mr Sabokbar's application were the payability of legal costs, and the costs of the application. I did not consider determination of those issues would assist the tribunal in narrowing the issues in Mr Kilburn's application, which appeared to be wider than that of Mr Sabokbar's.

14. By letter dated 11 April 2023, Mr Kilburn requested that the hearing date be postponed because of his caring responsibilities. The Respondent consented to that request and considered that the additional time would allow the parties to attempt to resolve their differences. I issued amended directions on 20 April, which varied the date for provision of

the Respondent's statement of case to 30 June 2023, in order to allow the parties time to engage in settlement negotiations, which I strongly encouraged both sides to proactively engage in. The hearing was relisted for 4 September 2023.

15. In the Respondent's Statement of Case dated 29 June 2023, it accepted that in *Jastrzembski v Westminster City Council* [2013] UKUT 284 the Upper Tribunal (Lands Chamber) held that a delay of two years and a change in the nature of the works invalidated the initial consultation notice but argued that delay was not a relevant consideration as the Respondent was no longer relying upon the 2018 consultation. No works have been carried out pursuant to that consultation, and there were, therefore, no costs charged to Mr Kilburn, in respect of qualifying works, which could be capped at £250, as was requesting. As to Mr Kilburn's request for a refund of service charges paid by him, and held in the Respondent's reserve fund, "in the interest of restoring and maintaining a positive working relationship" it was willing to return those sums to him. It made clear, however, that once the 2022 Section 20 consultation was complete, it intended to demand service charges to cover the cost of the planned major works.

16. By letter dated 10 August 2023, Mr Kilburn informed the tribunal that he wished to withdraw his application. However, it appeared to me, from reading Mr Kilburn's letter, that his request to withdraw was equivocal, and that it may have been made because of the pressure he felt in complying with the tribunal's directions regarding preparation of the hearing bundle. Bearing in mind his status as a non-represented party and the difficulties he stated that he was experiencing as a result of his caring responsibilities, I converted the hearing listed for 17 August to a CMH at which I would consider: (a) the form of a proposed consent order provided by the Respondent's solicitors; and (b) Mr Kilburn's withdrawal request.

17. On 11 August 2023. Mr Kilburn wrote to the tribunal stating that his position was that whilst he was willing to accept the return of the sums paid by him to the Respondent, his position had always been that the Respondent could recover more than £250 from each contributing leaseholder towards the costs of the major works.

18. The £250 limit Mr Kilburn refers to concerns the provisions of s.20 of the 1985 Act and, the Service Charges (Consultation Requirements) (England) Regulations 2003), whereby failure by a landlord to comply with the statutory consultation requirements will limit the amount which a landlord can recover for the costs of qualifying works to £250 per lessee, unless this tribunal dispenses with the obligation to comply with those requirements.

19. At the CMH on 17 August 2023, I explained to Mr Kilburn that the sums that he had paid were demanded in respect of anticipated works. The £250 'cap' only limits costs that have already been incurred and it has no relevance to sums demanded by way of interim service charges towards

anticipated costs. I explained to Mr Kilburn that the tribunal had no jurisdiction to impose such a cap. In response, he said that he was not seeking that the tribunal limit the future costs to be paid by lessees to £250. That, he said was based on a misunderstanding. His concern was that the Respondent's unreasonable delay had led to substantially increased costs that lessees would now have to pay. In addition, he believed the Respondent's proposal to delay the external works was misconceived because carrying out the internal works first would not address the cause of the disrepair present. I pointed out to Mr Kilburn, that these were not issues that the tribunal could address in his current application. This is because:

(a) if he wished to contend that the costs of the works now proposed in the 2022 consultation were excessive because of the Respondent's historic neglect of the Block, he would have to argue that in a new application brought after the Respondent has demanded a contribution from him towards the costs of those works. No such demand has yet been issued, and I was informed by counsel for the Respondent at the CMH that notices of estimates have not yet been served. Mr Kilburn should note that establishing historic neglect as a defence to a claim for service charges is a complicated area of the law. He would be well advised to seek legal advice before pursuing a challenge, and he should consider the guidance given by the Upper Tribunal in the case of *Daejan Properties Ltd v Griffin & Anor* [2014] UKUT 206 (LC);

(b) he should raise his concerns about the scope of the planned works as part of the current consultation process. Once the anticipated costs of the proposed works are known, it is open to him to make a new application under s.27A of the 1985 Act, seeking a determination from the tribunal as to the amount that would be payable by him, as service charge, towards the costs of those works. Section 19(2) of the 1985 Act provides that where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable. However, any such application is currently premature because notices of estimates have not yet been issued and no service charge costs have been demanded. It is, of course, also possible for Mr Kilburn to challenge the actual costs of the works, once these are known, by way of a s.27A application, on grounds that the costs were not reasonably incurred, or works not caried out to a reasonable standard (see s.19 of the 1985 Act).

20. After I explained the tribunal's lack of jurisdiction (which, for his benefit, I have explained in greater detail above) Mr Kilburn agreed to enter into the form of consent order subsequently approved by me.

The s.20C Application

21. Section 20C of the Landlord and Tenant Act 1985 provides as follows:

> "(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" … the First-tier Tribunal… 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."

22. When faced with such an application the tribunal may make such order as it considers just and equitable in the circumstances.

23. Broadly speaking, the objective of the section is to avoid the injustice of lessees who have been successful in proceedings before the tribunal then having to contribute towards their landlord's costs of the proceedings through the service charge, under an obligation in their lease that obliges them to do so. However, a s.20C order will not automatically be made whenever a lessee is successful. The tribunal will bear in mind that the making of a s.20C order is an interference with the landlord's contractual right under the lease, to which the parties have entered into voluntarily. Careful thought will be given before preventing the landlord from exercising such rights, even where it has been unsuccessful in the proceedings.

24. In this case, it is Mr Kilburn's position that it would not be just and equitable for the Respondent to recover its legal costs relating to this Application, from him or any other leaseholder at Charleville Court, through the service charge. It is his contention that the Respondent has breached its covenants under his lease to maintain and repair the exterior of the Block as required by the Fifth Schedule of the lease, such neglect has led to a substantial increase in the costs of the works now required. In light of that, he submits that it would not be just or equitable for any leaseholder at Charleville Court to have to pay the Respondent's legal costs via the service charge.

25. The Respondent's position, as set out in para. 13 of its Statement of Case **[75]** is that works have been delayed for four reasons:

    (a) the discovery of asbestos in the boiler room following an asbestos site survey on 11 December 2020;

    (b) the need to arrange and provide an alternative hot water supply which led to the installation of a new boiler;

    (c) the COVID 19 pandemic; and

    (d) the presence of telecommunications masts on the roof of the Block.

26. It contends that in circumstances where a tenant brings an application and "the landlord's defence cannot be said to have been unsuccessful" it is generally not appropriate to make an order per s. 20C/para 5A (*Veena SA v Cheong* [2003] 1 E.G.L.R. 175 at [69]).

27. It also argues that Mr Kilburn's application was misconceived, and that making a s.20C order may encourage further similar unsound applications, prejudicing other lessees.

28. I have considerable sympathy with Mr Kilburn's position. It is not disputed that significant disrepair has affected the Block for several years, and there has been a lengthy delay in remedial works commencing to remedy that disrepair. As requested, he paid service charge demands sent to him asking him to contribute towards the costs of Major Works dating back to 2018, but no works took place. His frustration is understandable, as is that part of his application to the tribunal seeking to challenge the payability of the sums demanded from him, given the lack of progress in the works commencing. The four reasons advanced by the Respondent for such a lengthy delay do not, on first impression, appear to be compelling, but I have heard no evidence on the matter, and it is not for me, in this application, to decide the merits or otherwise of its explanation.

29. I agree with the Respondent that other part of Mr Kilburn's application, namely his contention that the Respondent should be limited to receiving no more than £250 per leaseholder in respect of their contribution to the major works, was based on Mr Kilburn's misunderstanding of the legal position. This is because, as stated above, the £250 'cap' only limits costs that have already been incurred, and is not relevant to sums demanded by way of interim service charges towards anticipated costs. His misunderstanding is understandable. Although he appears to have had a distinguished career as a property professional, this is a specialist and complex area of the law, and he is not legally represented in these proceedings.

30. When considering whether it is just and equitable to make a s.20C order, I first bear in mind that it to do so would be an interference with the landlord's contractual rights under the lease. I next consider whether Mr Kilburn has been successful in whole or part in respect of his application. In my view, the answer to that is that he has neither been successful, nor unsuccessful. Nor has the Respondent managed to successfully defend his application. Instead, the parties have reached a sensible compromise, the effect of which is that neither of them can be considered the successful party.

31. I accept that the Respondent has returned the sums paid by Mr Kilburn towards the costs of the anticipated major works. However, I do not consider this to be result from any success in this application. I accept the Respondent's argument that it is entitled, under the lease, to build up a reserve fund in order to fund major works. In this case, given the substantial delay in those works commencing, it has elected to return the contributions demanded from Mr Kilburn. This was a voluntary election which I accept was in the nature of a good will gesture intended to facilitate better landlord and tenant relations. If the application had proceeded to a final hearing, Mr Kilburn may have had

difficulties in persuading the tribunal that all the sums demanded from him were unreasonable given that the Respondent was entitled to build up a reserve to fund the works. Arguably, the tribunal may have taken the view that as time went on, the requests for further payments were unreasonably demanded as no works were carried out. But the matter did not proceed to a final hearing and that question was not determined by the tribunal.

32. As to that part of Mr Kilburn's application that concerned the £250 cap, this has not been the subject of any determination by the tribunal, and although it was based on a misunderstanding of the law, I do not regard the Respondent as having successfully defended the application. The matter was compromised by entry into the consent order.

33. Given my view that neither party has succeeded in the application, I do not consider it just and equitable to make a s.20C order and deprive the Respondent of its contractual ability to recover its costs of these proceedings from leaseholders. Under s.19 Landlord and Tenant Act, 1985, such costs must, of course have been reasonably incurred, and must be reasonable in amount.

34. Finally, I have regard to whether any conduct by the parties affects that conclusion. In my view there is not. The proceedings were compromised at a fairly early stage in the proceedings with minimal engagement with the tribunal. Both parties have conducted themselves entirely properly in the litigation and I am not aware of any other conduct issues relevant to my decision.

35. I therefore determine that it is not just and equity equitable in the circumstances of this case to make a s.20C order. I should point out that even if I were persuaded to do so, the only person who could have benefited from such an order would be Mr Kilburn. A s.20C order can only be made in respect of an Applicant, and he is the only Applicant in these proceedings. An order cannot be made in favour of non-Applicant lessees.

Paragraph 5A application

36. Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 provides that a tenant may apply to the tribunal for an order which reduces or extinguishes the tenant's liability to pay an "administration charge in respect of litigation costs". Despite my invitation to do so, neither party has made any written representations in respect of Mr Kilburn's application.

37. Having considered the provisions of his lease, I see nothing in its contents that would suggest that the Respondent has the ability to recover litigation costs from him personally, by way of an administration charge (this is distinct from its potential ability to recover its litigation costs of these proceedings from all lessees through the service charge).

38. In those circumstances, I make no order on Mr Kilburn's application. In the unlikely event that the Respondent attempts, in future, to demand payment from him of its litigation costs of these proceedings by way of an administration charge, he can make a further application under Paragraph 5A.

Judge Amran Vance **27 September 2023**

ANNEX - RIGHTS OF APPEAL

Appealing against the tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the date this decision is sent to the parties.

3. 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.

4. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking.