FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CHI/43UH/LSC/2023/0030**
Property	**:**	**7 Elmcroft Drive Ashford Surrey TW15 2PQ**
Applicant	**:**	**Jessica Turner**
Representative	**:**	**None**
Respondent	**:**	**Cyntra Properties Limited**
Representative	**:**	**Wildheart Residential Management**
Type of application	**:**	**Liability to pay and reasonableness of service charges, and limitation of landlord's costs. Section 27A and 20C Landlord and Tenant Act 1985 and Paragraph 5A Schedule 11 Commonhold and Leasehold Reform Act 2002**
Tribunal member	**:**	**Judge H. Lumby**
Venue	**:**	**Paper determination**
Date of decision	**:**	**18 September 2023**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the amount of £3,461.51 payable by the applicant in respect of major repairs in the 2023 service charge budget is reasonable.

(2) The tribunal dismisses the applicant's application for an order under section 20C of the Landlord and Tenant Act 1985.

(3) The tribunal dismisses the applicant's application for an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

The application

1. The applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of the 2023 service charge year.

2. The applicant challenges expenditure of £3,461.51, being her share of the total estimated cost of major works of £69,230.16. Her challenge is based on a claim for breach of contract caused by a failure of the property manager and/or the landlord to carry out regular maintenance and repair, to manage the budget sufficiently or to maintain a sinking fund. She also questions the consultation process.

3. By directions issued by the tribunal on 7 June 2023 following a case management hearing on 7 June 2023, the issues for which the applicant seeks determination were identified as:

    (i) Historic neglect of the building resulting in damage and deterioration; lack of sinking fund; mismanagement of service charge budget;

    (ii) Have any necessary statutory consultations been undertaken correctly;

    (iii) Mismanagement of the property;

    (iv) Affordability of the proposed major works.

4. The applicant also seeks a determination under section 20C of the Landlord and Tenant Act 1985 seeking an order preventing the landlord recovering the costs of these proceedings through the service charge and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 for an order reducing or extinguishing the tenant's liability to pay an administration charge in respect of litigation costs.

The background

5. The property is a 1950s purpose-built two bedroom, ground floor maisonette with private garden with a right to use an external storage building together with one car parking space. It is part of a development comprising twenty units across five blocks.

6. The applicant is a long leaseholder, holding her interest pursuant to a lease dated 26 July 2013 for a term of 999 years from 25 June 2012. The freehold reversion to the lease is vested in the respondent.

7. The property is managed by Wildheart Residential Management Limited on behalf of the respondent.

The lease

8. The lease provides that the tenant is to pay by way of service charge a fair and reasonable proportion of the costs and expenses that the landlord incurs pursuant to its covenants in the second schedule to the lease. In practice costs have been split equally between the twenty units and so each pay 5% of costs.

9. The services set out in the second schedule include:

    1. Maintaining and keeping in good and substantial repair and condition:

        (i) the main structure of the Property including the foundations and the roof thereof with its gutters and rain water pipes and the balconies but excluding the window frames thereof and including the structure of any sheds or storage cupboards

        (ii) all such gas and water pipes drains and electric cables and wires serving the Property as are enjoyed or used by the Lessee in common with the owners or lessees of the other flats comprised in the Property

        (iii) the common entrances passages landings and staircases of the Property including the structure and surfaces of the external staircase leading to the Property

        (iv) the common television and/or radio aerial system or other similar apparatus in the Property other than serving only one of the flats comprised in the Property

    2. Maintaining a sinking fund for future expenditure in accordance with advice tendered by the Lessor's Managing Agents or Surveyor
    3. Redecorating the exterior of the Property (including window frames) and the internal common parts thereof in every third year of the Term in the manner in which the same is at the time of this demise decorated or as near thereto as circumstances permit

4. Paying all outgoings in respect of the Property including Water Rate not separately assessed on each individual flat in the Property
5. Keeping the common parts of the Property in a clean condition and properly swept and lighted
6. Keeping in a tidy and cultivated condition any communal gardens (including the front garden) within the Property
7. Maintaining an entry phone system for the Property and entrance gates together with maintenance and insurance thereof (at the Lessors total discretion)
8. Maintaining and repairing all external boundaries of the Property

10. The lease provides for an on account maintenance payment to be made and for the total cost to be ascertained and certified following the year end, with any shortfall to be paid within one month of issue of the annual certificate.

Tribunal determination

11. This has been a determination on the papers. The documents that the tribunal was referred to are in a bundle of 440 pages, the contents of which the tribunal have noted. The decisions reached and the reasons for them are set out below.

12. Having considered all of the documents provided, the tribunal has made determinations on the various outstanding issues as follows.

Applicant's case

13. The applicant has provided a statement setting out her case together with a response to the respondent's statement of case.

14. The applicant accepts that repairs are needed to the building. Her case is that the property has been allowed to decay, causing the required works to be more extensive than required If carried out earlier they would have been cheaper as the cost of works has increased. She blames this on mismanagement by the landlord's managing agents, despite being told about the need for repairs, in not carrying out works or setting service charges at an appropriate level. She argues that there should have been a sinking fund to help cover the cost of works but this was only introduced in 2022. She questions the quality of the section 20 consultation, saying that a zoom call to discuss the proposed works was cut short after 40 minutes and a survey was not provided. Finally, she questions the affordability of the proposed works and service charge, even with a payment plan.

15. The applicant also refers to damage to her property caused by a failure to repair by the respondent. The respondent has confirmed that it will be responsible for the cost of this and it will not be charged to the service charge.

Respondent's case

16. A statement has been provided by Paul Chatter on behalf of the managing agents, considering each of the issues in turn.

17. Historic neglect - he argues that since their appointment, they put in place a planned preventative maintenance programme to address the necessary repairs. Doing the works in one go will be cheaper than having done them over time, due to increased costs of repeat contractor visits. He claims that the neglect has been exaggerated by the applicant and that other costs have been routinely incurred such as regular maintenance of the garden area in front of the maisonettes in Elmcroft Drive and expenditure on pest control, aerial repairs, gutter clearance, entrance gate and waste management.

18. Sinking fund – he argues that this is a matter within the managing agent's discretion.

19. Service charge management – he argues that these were set at appropriate levels historically, with the managing agent's deciding not to carry out works earlier or charge tenants for such work.

20. Consultation – a notice of intention of works was served on 8 December 2021 and a statement of estimates was served on 22 May 2022. The demand for payment of the sum of £3,461.51 being the service charge contribution towards the cost of the works, was sent to the Applicant on 12 September 2022 by email. That sum has been calculated by applying a percentage of 5% to the total contract cost of £69,230.16, there being 20 maisonettes in Elmcroft Drive, with leaseholders paying an equal share of the expenditure. The scope of works and tender documents have been made available to leaseholders to inspect on request. He therefore argues that the requirements of the consultation with leaseholders under section 20 of the Landlord and Tenant Act 1985 has been fulfilled.

21. Mismanagement – he argues that management has been properly considered and appropriate.

22. Affordability – he claims that this issue was addressed during and as a consequence of the consultation process. The leaseholders were given advanced notice of the works in September 2021, to give sufficient time to financially plan for the cost of the works. The specification of works was reduced significantly as there was concern about the affordability of the cost of the works. 75% of leaseholders have paid for the cost of the works, as at 30 June 2022.

Law

23. The service charge provisions contained in a residential lease must be read subject to the effect of the Landlord and Tenant Act 1985. Section 18 of the 1985 Act defines "relevant costs" as including payments for services and management, and under section 19 of the 1985 Act:

"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 provisions of services or the carrying out of works, only if the services or works are of a reasonable standard".

Where sums are payable in advance of the relevant works being carried out, section 19(2) of the 1985 Act provides:

"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."

The tribunal's decision

24. The issue to be determined by the tribunal is whether the sums claimed towards repair in the 2023 service charge are payable and reasonable. The specific questions raised by the applicant are not within the tribunal's jurisdiction to determine (other than the question is relation to statutory consultations) but have been considered by it in making its determination.

25. The applicant accepts that the works need to be carried out. The tribunal determines that a fair and reasonable proportion of the costs of the works are recoverable by the respondent under the applicant's lease, subject to the requirements of the Landlord and Tenant Act 1985.

26. The proportion payable by the applicant has been assessed by the respondent as 5% and this has not been challenged by the applicant. The tribunal therefore determines that the proportion payable is 5% of the amount due.

27. The tribunal next considered whether there was a requirement for a consultation in relation to the works in accordance with section 20 of the Landlord and Tenant Act 1985 and whether this was properly carried out. It is accepted by the respondent that a consultation was required for these works and the tribunal agrees with that conclusion, as the amounts being charged to each leaseholder exceeded £250.

28. The applicant argues that the consultation was not carried out properly and that the lack of a proper consultation limits the amount payable by each leaseholder to £250. She cites as an example the failure to provide a copy of the planned preventative maintenance survey to the leaseholders.

29. The tribunal has considered the documentation relating to the consultation for these works within the bundle and finds that each stage of the consultation was carried out in accordance with section 20 of the Landlord and Tenant Act 1985. It is not relevant whether the applicant was not supplied with a copy of survey referred to by her or that a consultation call was cut short. The tribunal therefore finds that a proper consultation has

been agreed out for the purposes of section 20 of the Landlord and Tenant Act 1985 and the amount payable should be not limited as a consequence.

30. The tribunal next considered the reasonableness of the amounts payable for the works. The respondent carried out a full tender for the works and received two estimates, both at broadly the same level (£52,210 plus VAT and £54,330 + VAT). There has been no challenge to the reasonableness of these figures or evidence provided as to why they are not reasonable. (The applicant's arguments on cost are that they would have been cheaper if carried out earlier although no evidence for this has been provided. This is not the same as the reasonableness of the costs at today's prices which is the criterion here). The tribunal therefore determines that the amounts claimed are reasonable.

31. The tribunal next considered the applicant's other arguments in relation to these costs to see whether this made any difference to the position.

32. The applicant argues that the cost of the works now would have been lower if they had been carried out earlier, as the costs of works have risen, citing historic neglect. The respondent argues that they are being carried out at an appropriate time and it is for the managing agents to decide upon the appropriate time for works to be done.

33. The tribunal has not been provided with evidence that the costs of doing the works earlier would have led to a reduced cost. Conversely, if they had been done earlier, the leaseholders would have incurred greater cost at that time which they have not incurred. It finds that it is for the landlord via its managing agents to determine when works should be done.

34. The essence of the applicant's argument is that the respondent has breached its repair and service charge obligations historically, causing a loss to the applicant. The tribunal does not have the power in this case to determine whether the landlord was in breach of its historic repair or service charge obligations. If the applicant considers this to be the case, she is able to make a claim in the county court. The tribunal could consider setting off any liability of the respondent to the applicant for increased costs arising from any failure by the respondent to repair but no increased costs have been evidenced or set off claimed. It cannot therefore consider set off. This therefore has no impact on the amount payable in respect of the 2023 major repairs.

35. The applicant argues that a failure to provide for a sinking fund historically is another reason why the amount payable towards repair should be reduced. The provision of a sinking fund is within the discretion of the landlord or its managing agents and is not something which has to be provided. It is also essentially a circular argument – if there had been a sinking fund before, the leaseholders would have had to pay these sums to be landlord earlier. It would not have reduced the total amount payable, just

the timing of payment. Finally, the existence or otherwise of a sinking fund does not impact on the payability or reasonableness of the sums demanded.

36. The applicant also argues that historic mismanagement of the service charge budget means that the amount payable towards repair should be reduced. However, this is not a relevant consideration in relation to the payability and reasonableness of the repair costs in the 2023 service charge budget.

37. Finally, the applicant argues that the amount claimed should not be paid on grounds of affordability. It is accepted that if there had been a sinking fund, this could have been applied towards the cost of the works but this would have needed to have been paid by leaseholders in prior years. The respondent has taken account of the leaseholders' comments in relation to the initial cost of £5,000 per unit and reduced the scope and so the cost to reflect this. There have been discussions about phasing payments. The tribunal has already determined that the amounts claimed are reasonable. As a result, the tribunal does not accept the applicant's affordability argument.

38. Accordingly, the tribunal does not accept the claimant's arguments as to why the proposed share of the major repair works is not payable or reasonable. Her share (at 5%) amounts to £3,461.51. It therefore determines that this amount as her share of the costs of major repairs in the 2023 service charge budget is reasonable.

Applications under s.20C and paragraph 5A

39. The applicant has applied for cost orders under section 20C of the Landlord and Tenant Act 1985 ("Section 20C") and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("Paragraph 5A").

40. The relevant part of Section 20C reads 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…".

41. The relevant part of Paragraph 5A reads as follows:-

> "A tenant of a dwelling in England may apply to the relevant … tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs".

42. A Section 20C application is therefore an application for an order that the whole or part of the costs incurred by the respondent in connection with these proceedings cannot be added to the service charge of the applicant. A

Paragraph 5A application is an application for an order that the whole or part of the costs incurred by the respondent in connection with these proceedings cannot be charged direct to the applicant as an administration charge under the Lease.

43. In this case, the respondent has been successful on the issue before the tribunal. Having read the submissions from the parties and taking into account the determinations above, the tribunal determines that it would not be just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act. The tribunal therefore dismisses the applicant's application for it to make a Section 20C order.

44. For the same reasons as stated above in relation to the Section 20C cost application, the tribunal does not consider it just and equitable for it to make a Paragraph 5A order against the respondent. The tribunal therefore dismisses the applicant's application for it to make a Paragraph 5A order.

Rights 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 by email to rpsouthern@justice.gov.uk

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.