**FIRST-TIER TRIBUNAL**
**PROPERTY CHAMBER**
**RESIDENTIAL PROPERTY**

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| **Case reference** | **:** | **MAN/00EM/LSC/2020/0032** |
| **Property** | **:** | **31 Riverside Road, Tweedmouth, Berwick upon Tweed TD15 2HQ** |
| **Applicant** | **:** | **Lynda Cheetham** |
| **Respondent** | **:** | **Bernicia Group** |
| **Type of Application** | **:** | **Landlord and Tenant Act 1985 - s27A and 20C<br>Commonhold and Leasehold Reform Act 2002 Schedule 11 paragraph 5A** |
| **Tribunal Members** | **:** | **Tribunal Judge S Moorhouse LLB<br>Mr IR Harris BSc FRICS** |
| **Date of Decision** | **:** | **15 December 2023** |

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**DECISION**

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## DECISION

*Service Charge*

1. The service charge of £11,786.40 invoiced to the Applicant by the Respondent on 16 February 2021 relating to works to 29 Riverside Road is reduced by 15% to £10,018.44.

*Costs*

2. The tribunal makes no Order under section 20C of the Landlord and Tenant Act 1985 and makes no Order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

## REASONS

### The Application

3. The application is made under section 27A of the Landlord and Tenant Act 1985 ('the Act') by Lynda Cheetham ('the Applicant') in respect of a service charge invoiced to her by her landlord Bernicia Group ('the Respondent') in relation to her first floor maisonette at 31 Riverside Road, Tweedmouth, Berwick upon Tweed TD15 2HQ.

4. The application was received by HMCTS on 2 March 2020. The proceedings generally were delayed as a consequence of COVID-19 restrictions. Directions were issued initially on 22 October 2020, a case Management Conference was held and additional Directions issued to assist the parties in ensuring the relevant documentation was produced.

5. Whilst the Applicant had indicated that a paper determination would suffice, the case was listed for hearing. This took the form of a video-hearing and was held on 22 August 2023 before the present tribunal. It was attended by the Applicant and by Mr Boyd (Director of Development) and Lois Tarns (Home Ownership Manager) representing the Respondent.

6. Following the hearing further Directions were issued to obtain additional documentary evidence identified in the course of the hearing as being potentially of relevance. Neither party required a reconvene of the hearing therefore the tribunal went on to determine the application.

7. The tribunal considered it unnecessary to inspect the Property since the issues concerned internal works to a different flat and the tribunal had the benefit of some relevant photographs taken before and after these had been carried out.

### The Issues

8. The Property comprises a first floor two-bed maisonette in a purpose built block of four divided vertically into 2 pairs. Number 29 is situated directly below the Property and the other 'pair' are numbered 25 and 27.

9. The application relates to a service charge of £11,786.40 representing 50% of the cost of works to number 29. The service charge was invoiced to the Applicant on 16 February 2021, the amount being stated to be due on 1 March 2021.

10. The Property is held under a lease granted on 27 June 1997 under the Right to Buy for a term of 125 years from the same date ('the Lease'). The Lease includes an obligation on the leaseholder (at clause 1) to pay '*the yearly rent of £10 on the 1st March in each year together with a sum by way of further rent equal to (a) one half of the amount of costs which the Landlord shall have incurred since the preceding 1st March in keeping the demised premises and the building in which they are situated including drains gutters and external pipes in repair (which expression shall for the avoidance of doubt include external decorative repair) payable as service charge calculated in accordance with covenant 2(4) of this Lease and (b) the cost of insuring the premises ….'*.

11. Clause 2(4) reads: *'To pay to the Landlord from time to time one half of the costs which the Landlord may have incurred in keeping the demised premises and the building in which they are situated (including drains gutters and external pipes) in repair …'* It goes on to include provisions specific to the Right to Buy which were applicable only for the first 5 years of the term.

12. The Applicant purchased the Property on 26 February 2016 and became aware of the problems with number 29 in November 2018. Number 29 was sold under the Right to Buy in 1989, bought in 2016 and then sold in 2021 following the death of the leaseholder.

13. The works to number 29 were required owing to a failure of the damp-proof course. Initially it was estimated that the required works would cost £6,588. A section 20 consultation exercise was carried out in 2018 with the intention of carrying out bridging damp remedial works in the living room, hallway, cupboard and two bedrooms. Once the works were due to commence and floor coverings were fully removed to facilitate this the concrete floors throughout number 29 were found to be damp. It would be necessary therefore to excavate the concrete floor throughout number 29 and install a new concrete floor incorporating a damp proof membrane.

14. The contractor, K Dixon Building Services ('Dixons'), came off-site and number 29 was reinstated to allow the leaseholder to return temporarily. A specification for the works was prepared and a further section 20 consultation exercise initiated, the Notice of Intention being dated 22 October 2019. A further consultation notice dated 22 November 2019 included details of the costs submitted by 3 contractors in response to the invitation to tender. The cheapest was Dixons at £19,644.00 (plus VAT), the other tenders being in the sums of £24,471.28 (plus VAT) and £21,137.73 (plus VAT). Dixons were appointed, ultimately invoicing to Bernicia in respect of the works the precise amount they quoted.

15. A report dated March 2020 by Storm Tempest Property Consultancy was prepared for Bernicia with the purpose of substantiating the original survey and re-inspection findings in relation to number 29. It details the consultancy's observations of the defects identified and remedial action required, including the specification that had been used for the tender exercise and budget costs estimated at £24,000 plus VAT.

16. There was no evidence before the tribunal to suggest that the entrance-way to the Applicants maisonette, also at ground floor level and constructed at the same time and in a similar manner to the rest of the ground floor, had been investigated to determine whether the same issues at arisen in the concrete floor. Concerns as to damp issues in the entrance-way were raised by the Applicant in the course of the proceedings.

17. It was not in issue that the Respondent had consulted with the Applicant in relation to the works to number 29 under section 20 of the Act, although the Applicant had not taken the opportunity to inspect the relevant tender documents. At the hearing the Applicant explained that she had thought it was 'all wrapped up' by that point and referred to the considerable distance to the Respondent's offices. The Applicant had not asked whether it was practical to provide copies or for her to view the documents locally.

18. The works to number 29 were not carried out as per the specification. A handwritten letter dated 12 January 2020 from the leaseholder to the Respondent stated that she did not want Dixons to refit the kitchen with existing units as she was planning to put in a new kitchen, and that she also did not want the gas fire in the living room to be refitted (although she would like to keep the wooden fire surround).

19. It was also confirmed by the Respondent that a new wet-room had been installed by the leaseholder instead of the previous bathroom being reinstated, that a new boiler had been installed, that the flooring had been enhanced and that there had been rewiring work. The Applicant submitted photographs obtained through estate agents of the new kitchen and wet-room, and of the previous kitchen. The Respondent's understanding was that Dixons made an additional charge to the leaseholder of number 29 for work that was more in the nature of remedial work, such as electrics for the new boiler, but that the leaseholder had her own contractors for the new kitchen, bathroom and boiler installation.

20. The Applicant identified numerous questions and potential issues within her application form and statement of case. These included issues concerning the interpretation of the Lease and whether the Respondent has complied, issues of historic neglect and the Respondent's duties, and issues around the extent and scope of the work to number 29 and whether this was directly related to the Respondent's repairing obligation.

21. The application is made under section 27A of the Act. Extracts of this and of section 19 are set out in the Schedule. The tribunal identified the following specific issues arising from the application and the parties' representations that fall within the tribunal's remit under section 27A:-

- The interpretation of the service charge provisions of the Lease (set out earlier), specifically whether the 'building' comprised 2 or 4 maisonettes.
- Whether the type of work carried out to number 29 qualified as 'keeping the … building … in repair' under clause 2(4) of the Lease.
- Whether the cost of the work to number 29, of which 50% was recharged to the Applicant, was reasonable in amount. In particular, whether there should have been deductions in relation to specified works that became unnecessary, and whether there were additional costs that Dixons absorbed within the contract price that should be set-off against any such deductions.
- Whether there has been historic neglect by the Respondent that would give rise to a breach of the Respondent's repairing covenant within the Lease and, if so, whether there was an identifiable loss to the Applicant that should be set-off against the amount of the service charge.

## Determination

*Definition of 'building'*

22. Clause 2(4) of the Lease requires the Applicant to contribute by way of service charge, '*half of the costs which the landlord may have incurred in keeping the demised premises and the building in which they are situated … in repair*'.

23. The expressions 'demised premises' and 'building' are not defined in the Lease, and in fact there is no definition section at all. Whilst the words 'demised premises' are self-explanatory, naturally intended to refer to those premises demised by the Lease, the word 'building' is less so. However it was common ground between the Applicant and the Respondent that the word 'building' referred to half of the block of four maisonettes divided vertically, namely the half comprising the Property and number 29, and not the entire block of four maisonettes.

24. The intention of the original parties to the Lease was evidenced by the Lease obligation to contribute 50% of keeping the 'building' in repair. Had the word 'building' been intended to encompass the block of four maisonettes, a 25% contribution would have been logical.

25. For these reasons the tribunal interpreted the Lease as requiring the Applicant, amongst other things, to contribute 50% of keeping the building, being her half of the block of four maisonettes (divided vertically), in repair.

26. There was nothing in the Lease, nor was any argument advanced by either party in these proceedings, to suggest that the works of excavation of the concrete floor to number 29 and the installation of a new concrete floor incorporating a damp proof membrane were not works to 'the building' within the meaning of the Lease.

*Whether the works were 'repair'*

27. The wording at clause 2(4) of the Lease refers to keeping the building 'in repair'.

28. The repair was essentially the replacement of the concrete floor to number 29 with a new concrete floor and damp proof membrane. However it is implicit that the cost of works necessary to access the concrete floor, and to reinstate the maisonette, are included within the cost of repair.

29. In this case it appears that works were undertaken, not necessarily by Dixons, that are well in excess of 'repair', in particular the installation of a new kitchen and wet-room, and new boiler. There is no evidence before the tribunal that the cost of these additional items was included in the contract sum paid by Bernicia to Dixons. On the information before the tribunal the works undertaken for Bernicia by Dixons do appear to constitute repair. The tribunal did consider whether the replacement, rather than reinstatement of skirting boards was necessary, but in the absence of information on the condition of the skirting boards that were removed the tribunal made no adjustment in this respect.

*Reasonableness of costs*

30. The contract sum invoiced to the Respondent in two instalments by Dixons equated to the sum quoted in Dixons' tender which, on the evidence before the tribunal, was the lowest of three tenders. The Applicant obtained her own report, produced on 15 February 2021 by SWH Property Consultants. The SWH report contained significant caveats given the inability to inspect (the works were complete) and to clarify any

issues with the Respondent. The cost estimate for the remedial works came to £18,525 plus VAT. In view of the necessary caveats in the SWH report, the difference from Dixons' figure being less than a 6% reduction, and the fact that the Dixon's figure was the lowest of three tender sums, the tribunal did not accept that the Dixons tender sum was unreasonable in amount.

31. However the tribunal did identify two particular issues on quantum (in addition to the above issues around the definition of 'repair'):- whether there should have been any deductions in respect of specified works that became unnecessary, and whether there were additional costs that Dixons absorbed within the contract price that should be set-off against any such deductions.

32. The information before the tribunal that might assist on these issues was quite limited. The tribunal raised the question in the hearing of whether the cost incurred by Dixons was reduced since there was no need to reinstate the kitchen and bathroom, to which the Respondent replied that the cost of storage and disposal outweighed the reinstallation costs. In response to the present tribunal's further directions the Respondent stated that there were no notes held of any conversations between the Respondent's staff and Dixons as to the dates and pricing impact of the leaseholder of number 29 opting for the disposal of the fittings and appliances from the existing kitchen and bathroom.

33. The tribunal was able to identify that Dixon charged approximately one half of the contract sum to the Respondent by interim invoice on 17 March 2020 and invoiced the final amount on 13 July 2020. Since the leaseholder of number 29 notified the Respondent on 12 January 2020 that she would be installing a new kitchen it was reasonable to conclude that Dixons were aware of this fairly early in the course of undertaking the works.

34. In the installation of a wet-room, a basic shell only would be required, and connections made available for drainage and utilities. There would have been savings therefore to Dixons in labour and materials in the finishing of the bathroom and the cost of replacing or, if practical, reinstating the previous fittings. Whilst the cost borne by the leaseholder of number 29 for the new wet-room would have been much higher than the savings to Dixons arising from there being no need to reinstate the bathroom, the savings should nevertheless have merited a reduction in Dixon's price.

35. Similar considerations apply to the kitchen. It is clear from the photographs referred to earlier that the electrical points and appliances in the new kitchen are in different locations to some extent than their equivalents in the previous kitchen. Any alterations to drainage and utilities to accommodate the new kitchen layout should have been borne by the leaseholder of number 29 along with the costs of the new kitchen installation. Since the reinstatement of the previous kitchen had not been required there would have been significant savings to Dixons, particularly on labour.

36. Additionally significant savings should have accrued since it was unnecessary to replace or (if the gas fitters were prepared to do so) reinstate the gas fire to the living room.

37. The cost of storing and disposing of the various fittings and appliances which were no longer required would have been nominal in comparison to the savings from which Dixons benefitted, particularly in view of the letter to the Respondent of 12 January 2020 concerning the kitchen and gas fire.

38. Mention was made of the new boiler, that there were enhancements to flooring and rewiring work. There was insufficient information on these topics for the tribunal to ascertain whether any savings should have accrued, or additional costs been incurred.

39. The tribunal identified two examples in which it is contended that Dixons absorbed additional costs. One of these relates to additional plastering required, beyond that specified. No particulars of the precise areas or extent of this additional work were submitted. The second related to the removal of asbestos from a fireplace. The Respondent stated that Dixons had obtained an asbestos report however the Respondent was unable to produce this, stating that it was held by Dixons and had not been produced in time to comply with the further directions issued by the present tribunal.

40. The tribunal considered that the Applicant had raised a prima facie case that, since there were reinstatement works included in Dixon's tender that were not carried out, the costs taken into account in calculating her service charge were not all reasonably incurred within the meaning of section 19 of the Act. It was therefore for the Respondent to meet the allegation and prove its expenditure had indeed been reasonably incurred.

41. The Respondent had not succeeded in doing so in a comprehensive way. In particular there were no records available to evidence the cost of storing and disposing of the kitchen and bathroom units and appliances, nor the savings accruing to Dixons as a result of the leaseholder purchasing and installing a new kitchen and wet-room, and waiving the requirement to reinstall the gas fire in the living room.

42. There are some details of cost apportionments within the report by Storm Tempest Property Consultancy, however these are of limited assistance. Whilst there are cost estimates by room, there is no breakdown between the cost of accessing the concrete floor, the works to the floor and the reinstatement of the room.

43. With little information available from the Respondent the tribunal can only make approximate adjustments based on its own knowledge and experience in the housing sector and specifically of property maintenance and construction.

44. The tribunal makes a 15% deduction from the total cost for the works invoiced to the Respondent by Dixons, representing the same percentage reduction in the service charge. This takes into consideration a finding that Dixons were required to gain access to the concrete floor throughout the maisonette, remove this, replace this with a new concrete floor and membrane, reinstate floors as required, replace skirting boards, re-plaster to a greater extent than envisaged, carry out some unanticipated work to the fireplace and carry out other works of reinstatement. It also takes into consideration the savings the tribunal considers should have accrued as a consequence of the leaseholder opting to install a new kitchen and wet-room and waiving the requirement to replace or reinstate the gas fire to the living room.

*Historic neglect and set-off*

45. The tribunal was not satisfied that there had been a breach by the Respondent of the landlord's repairing covenant under the Lease since the Applicant purchased the property in 2016. The damp problem was reported by the leaseholder of number 29 in 2017 although there had been a history of damp issues in the estate as the bitumen damp proof layers in the flooring failed. Taking into consideration the tribunal's earlier findings as to the actions taken by the Respondent and the sequence of events,

there was no clear breach of the repairing covenant by the Respondent resulting in an identifiable loss that the tribunal should set-off against the repair cost.

*Overall determination*

46. Accordingly the tribunal determined that the contract costs giving rise to the service charge of £11,786.40 had not been reasonably incurred in their entirety, and that there should be a reduction of 15%, giving rise to a service charge payable of £10,018.44.

**Costs**

47. Within her application form the Applicant did not tick a box to indicate whether or not she wished to make a application under section 20C of the Act. She did tick a box to indicate that she wished to make an application under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

48. The Respondent confirmed at the hearing that they have no intention of charging any costs in these proceedings to the Applicant by way of service charge or administrative charge. In these circumstances, and taking into consideration the outcome of the section 27A application, no orders are made.

**S Moorhouse**

Tribunal Judge

# Schedule

## Extracts from legislation

### Landlord and Tenant Act 1985

Section 19

(1) 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 provision of services or the carrying out of works, only if the services or works are of a reasonable standard;
and the amount payable shall be limited accordingly.

(2) 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 adjustments shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(Subsections (1), (2), (3), (4)(a) and (5))

(1) An application may be made to a 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) the 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 [the 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) ...............

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