FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AZ/LSC/2023/0355**
Property	**:**	**Kirkdale Corner, Westwood Hill, London, SE26 4NP**
Applicants	**:**	**(1) Gabriel William Salkie Moshenka and Maria Colette Phelan (2) Caroline Jane Elliott (3) Matthew Gisborne and Lourdes Gisborne (4) Danila Bodei (5) Beatrice Nota (6) Eliza Ann Lumley (7) Stuart John Cass**
Representative	**:**	**Derek Kerr of Counsel instructed by ODT Solicitors acting for all but the third and fifth Applicants (both of whom are litigants in person)**
Respondent	**:**	**Daejan Investments Limited**
Representative	**:**	**Katie Gray of Counsel instructed by RBG Legal Services Limited (t/a Memery Crystal)**
Type of Application	**:**	**For a service charge determination pursuant to Section 27A of the Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Judge P Korn** **Mr O Dowty MRICS**
Date of hearing	**:**	**6 June 2024**
Date of Decision	**:**	**10 July 2024**

DECISION

Description of hearing

The hearing was a face-to-face hearing.

Decisions of the tribunal

(1) The sums charged to the Applicants in respect of the 2020 Works (as defined in paragraph 5 below) are payable in full.

(2) The Applicants' cost applications are refused (see paragraphs 38-40).

Introduction

1. The Applicants seek a service charge determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("**the 1985 Act**"). The nature of the determination sought is dealt with below under the heading *"Clarification of extent of application at the hearing"*.

2. The Property is a large purpose-built mixed-use development set over three storeys comprising commercial premises at ground floor level and residential flats accessed by external walkways at first and second floor level.

3. Most of the Applicants were represented at the hearing by Derek Kerr of Counsel, who in turn had been instructed by ODT Solicitors. The exceptions were Matthew and Lourdes Gisborne and Beatrice Nota, who were each now unrepresented despite having originally been represented by ODT Solicitors. There was no separate statement of case on behalf of any of the unrepresented Applicants, although there were two witness statements from Matthew Gisborne in the hearing bundle and these will be referred to below under the heading *"Applicants' written submissions"*.

4. None of the unrepresented Applicants was present at the hearing and therefore the tribunal worked on the assumption, in the absence of any written statement of case or any other direct clarification from them, that the unrepresented Applicants were essentially adopting the position of the represented Applicants. Mr Kerr confirmed that he had no reason to suppose otherwise.

Applicants' written submissions

5. In their written statement of case in the section headed "The Issues", the Applicants state that one of the principal issues is the reasonableness of the sums incurred by the Respondent in 2019 in relation to the internal redecoration/repair of the common parts – works that were actually carried out (as we understand it) in 2020 and which we will hereafter refer to as "the 2020 Works". The Applicants

state that there is evidence that the cause of the internal disrepair at that time was external disrepair and that an email from the managing agents dated 5 June 2017 confirmed that the need to carry out the 2020 Works was because of "water ingress". The Applicants go on to state that despite the Respondent being aware that the internal disrepair was as a result of external disrepair the Respondent omitted to carry out the external works and proceeded instead with an entirely pointless project of internal redecorations. Such a decision-making process was in the Applicants' view clearly unreasonable because the Respondent had been expressly aware of the cause of the internal disrepair. The Applicants then go on to state that they seek the tribunal's determination as to the reasonableness of service charges levied in the years from 2016 to 2021. They also, separately, make certain legal submissions as to the test of reasonableness in the context of service charges.

6. In the background section of their statement of case the Applicants also mention certain other matters. They state that in 2016 the 'routine' service charge levied on each leaseholder was approximately £1,660.00 and that in 2021 it rose to £2,800.00. They also state that in 2021 the Respondent sought to collect a further sum of approximately £3,500.00 per year from each leaseholder towards a reserve fund. In addition, they state that over the past 5 years, there have been numerous projects of work and make various observations about these, and then they refer to some general concerns regarding what they describe as the poor, haphazard and insufficient repair and maintenance of the Property and the lack of professional building management.

7. For completeness, reference should be made to Mr Gisborne's two witness statements. In his first witness statement he states that *"the issue in dispute is that the Respondent carries out major works for the building without proper foresight or planning and at great expense to the leaseholders who must then pay further sums for issues to be corrected. In particular, the Respondent has carried out decorations to the internal communal areas without first resolving issues with water ingress. Since those internal decorations were carried out, the ingress has continued, causing further disrepair and rendering those decorations pointless"*. This statement appears to indicate that from Mr Gisborne's perspective the only issue as at the date of this witness statement was whether the 2020 Works should have been carried out before the carrying out of certain external works which (in his view) should have been carried out to prevent water ingress.

8. In his second witness statement Mr Gisborne adds that the managing agents have *"consistently failed to provide a satisfactory explanation or justification for several concerning charges. These include fees for a malfunctioning/redundant CCTV system, insurance premiums skyrocketing by 3-4 times, expenses related to terrorism cover, an inexplicable charge of £1200.00 for a defibrillator allocated to another property in Croydon, and the burden placed on Kirkdale*

Corner leaseholders for maintaining and funding the upkeep of four garages that Freshwater rents out and retains the profits from". However, first of all there is no mention of these points in his first witness statement made two weeks earlier in which he stated what "the issue in dispute was". Secondly, the Applicants' written statement of case does not indicate that any of these issues forms part of his or the other Applicants' case. Thirdly, even if his second witness statement could somehow be construed as a statement of case (despite not purporting to be one) it is so light on detail that there is no 'prima facie' (i.e. basic) case to which the Respondent can be expected to respond.

Clarification of extent of application at the hearing

9. At the hearing Mr Kerr for the represented Applicants was asked to clarify what the represented Applicants' case was, and he said that the quality of the Respondent's decision-making was the main issue. The Applicants' position was that the Respondent knew that there were external defects and that it was not reasonable for them to have proceeded with the 2020 Works before addressing the external defects.

10. After some discussion Mr Kerr appeared to accept and – in any event – the tribunal concluded that the only challenge to the service charge which was actually before the tribunal was the reasonableness of the cost of the 2020 Works, as this was the only issue that had been pleaded. Whilst the Applicants have also stated that they seek the tribunal's determination as to the reasonableness of service charges levied in the years from 2016 to 2021, there is no explanation of this statement in the section of their statement of case headed "The Issues" and there is no particularisation of the charges challenged, no statement as to what would be a reasonable charge and no analysis as to why any of these charges should not be payable (or should be payable only in part). And whilst there are some brief comments in the background section of the Applicants' statement of case, these amount to no more than a vague general reference to increased costs and to poor maintenance of the Property by way of backdrop to the Applicants' general dissatisfaction and do not in our view constitute a meaningful pleading of specific issues.

11. As regards the precise basis for challenging the reasonableness of the cost of the 2020 Works, Ms Gray for the Respondent noted that there had been a reference in the Applicants' written submissions to the consultation process, but she maintained that the Applicants had not actually raised any failure to comply with the statutory consultation requirements as part of their pleaded case. Furthermore, not all of the consultation documents were before the tribunal and the Respondent had been given no opportunity – because alleged failure to consult had not been pleaded – to apply in the alternative for dispensation. There had also been no application from the Applicants to amend their pleadings. Ms Gray also submitted that the Applicants' case was that

the cost of the 2020 Works was unreasonable because the Respondent actually knew that the internal disrepair was as a result of external disrepair (i.e. not merely that the Respondent ought to have known).

12. After an adjournment the tribunal made a determination as to the extent of the Applicants' pleadings and therefore as to what issues were before the tribunal on which to make a final determination. The tribunal noted that various matters aside from the 2020 Works charges had been referred to in the Applicants' statement of case but that they had merely been mentioned in the background section apparently as a backdrop to the Applicants' general dissatisfaction and/or in a very vague manner. Accordingly, the tribunal was satisfied that on any reasonable interpretation of the Applicants' written case the only charges being actively challenged were the 2020 Works charges.

13. As regards the **basis** on which the 2020 Works charges were being challenged, there is no clear statement in the Applicants' pleaded case that they are relying on any alleged breach of the statutory consultation requirements. Furthermore, the language of the Applicants' pleaded case is very narrow when challenging the reasonableness of the relevant costs. In particular, they state as follows: *"Despite the Respondent being aware that the internal disrepair was as a result of external disrepair, the Respondent omitted to carry out the external works and proceeded instead with an entirely pointless project of internal redecorations. Such a decision-making process was clearly unreasonable, the Respondent having been expressly aware of the cause of the internal disrepair and having carried out works the 24 previous year to the external parts of the Building which the Respondent was aware had been ineffective. It would have been apparent to any landlord acting reasonably that incurring significant costs to redecorate without addressing the cause of the ongoing damage was pointless and therefore, entirely unreasonable"*.

14. In the circumstances we agree with the Respondent that on any realistic interpretation of their pleaded case the Applicants are solely relying on the argument that the cost of the 2020 Works was unreasonable because the Respondent actually knew that the damage to the interior had been caused by external disrepair and actually knew that it was entirely pointless to carry out the internal works before addressing the external problems and yet chose to go ahead with the 2020 Works regardless. Therefore, the Applicants' case is limited to a challenge to the reasonableness of the cost of the 2020 Works on the sole ground that the Respondent actually knew that it was pointless to carry out the 2020 Works without first dealing with the external disrepair but nevertheless chose to go ahead anyway.

15. To put the above conclusion in context, it is important to emphasise that in the tribunal's view this is not a case in which it is at all obvious what wider case (if any) the Applicants are trying to make and therefore

not a case in which the Applicants are being prevented from running that case for purely technical reasons. On the contrary, the Applicants are legally represented and have had ample opportunity to set out their statement of case clearly or alternatively to apply for permission to amend their statement of case. Where a legally represented party's statement of case does not refer to a particular issue or does not do so coherently the other party is placed in a position in which it cannot prepare a meaningful response, and in those circumstances it would not be fair on that other party for the tribunal nevertheless to treat that issue as having been raised and as having been articulated in a manner which enables the other party to take professional advice and to assemble a detailed defence.

Stuart Cass's evidence

16. Mr Cass is the leaseholder of Flat 9 and has given two witness statements. In his first statement he endorses all of the matters set out in the background section of the Applicants' statement of case. Although he does not live in the Property he states that he visited the Property on 2 March 2024 and he has provided some copy photographs which he says show water ingress, moss growth, broken tiles and damage to ceilings, a stairway and other areas. In his second statement the emphasis is much more on questioning the reasonableness of the decision to carry out the 2020 Works before addressing any water ingress issues.

17. In cross-examination Ms Gray noted that he had referred to a Notice of Intention to Carry Out Works in the hearing bundle as constituting evidence of a leaking roof, but she put it to him that in fact the Notice made no reference to any leaking roof. She also suggested that there were certain inconsistencies between his concerns and those of Mr Gisborne. Ms Gray also put it to him that was informed that the 2020 Works would be carried out before any external works but that he did not object at the time, to which he replied that he was not an expert and so relied on the expertise of the Respondent's professional team. It was also put to him that he did not even object that water was coming in, to which he responded that he was overwhelmed at the time and there were financial implications with starting the process again.

Matthew Gisborne's evidence

18. Mr Gisborne's evidence has already been referred to above. Mr Gisborne was not available to be cross-examined on his evidence.

Paul Chapell's report

19. Mr Chapell has produced an expert report on behalf of the Respondent setting out his expert opinion on whether the Property suffers and has

historically suffered from water ingress to the common parts and if so what the cause is and when it began, whether the 2020 Works were damaged or rendered pointless by the water ingress, and certain related matters.

20. In his report he concludes that external repair and decoration works are required in the near future to repair and remedy defects within the external elevations and roof covering and that improvement works to the opening between the north staircase and walkway to prevent water entering the staircase are urgently required. However, he also concludes that leakage that has occurred to the internal common areas to the front staircase has not rendered the 2020 Works pointless and that only minor repairs to the ceiling and some blistering to the flank wall will be required.

21. Mr Chapell was asked various questions in cross-examination. He accepted that some water ingress may have predated the carrying out of the 2020 Works, although rising damp issues were dealt with as part of the 2020 Works. As regards the cause of any damp identified, Mr Chapell said that some of it could have been caused by condensation. He accepted that there was now a problem with water damage to the exposed staircase but said that it was already in a poor condition and the problems may have been exacerbated by more severe weather.

Kelly Seal's evidence

22. Ms Seal is a solicitor at Memery Crystal and has given a witness statement regarding her conversation with Dennis Fitzgibbon who had been involved in the decision-making process regarding the 2020 Works but was currently too ill to give witness evidence. She states that Mr Fitzgibbon told her that he had attended a site meeting with two leaseholders and that they had asked for the external works to be deferred (and for the internal works to go ahead first) because they could not afford at that time to pay for both sets of works. Mr Fitzgibbon also told her that at the relevant time there was no water ingress saved in relation to the exposed rear staircase.

Raymond Phelps' evidence

23. Mr Phelps is the property manager at Highdorn (the Respondent's managing agents) with responsibility for managing the Property and he has given a witness statement, although he has only been in the role for 2 years and therefore has no direct knowledge of the decision-making process leading to the carrying out of the 2020 Works.

24. In cross-examination he accepted that there were problems with the relationship between the Respondent and the leaseholders, but he was unable to answer any questions about the 2020 Works.

Paul Duncan's report

25. Mr Duncan has produced an expert report on behalf of the Applicant. In his opinion, the building and its grounds have been subject to poor, haphazard and negligent repair and maintenance practice, displaying no sign of professional building management for at least 20 years. What little works have been carried out, such as internal communal area decorations and provision of pigeon proofing, have been done with no sign of any joined-up management planning and forethought, which in his view will lead to unnecessary undoing and re-doing of works already executed.

26. Mr Duncan was not available to be cross-examined on his report, although this seems to be as a result of the Applicants (possibly jointly with the Respondent) considering this to be unnecessary.

Respondent's closing submissions

27. Ms Gray contended that little weight should be placed on Mr Gisborne's evidence as he was not available to be cross-examined. As for Mr Cass, he did not live at the Property and in her submission his witness statements did not deal with the key issues; in particular they did not deal with the reasonableness of the decision to carry out the 2020 Works without first carrying out external works to deal with alleged water ingress, as by his own admission (paragraph 4a of his second witness statement) he had no direct knowledge of the extent of any water ingress. His statements about leaks in his own flat were not relevant to the issue of whether there was water ingress in the parts of the building where the 2020 Works were carried out.

28. The Respondent did not dispute that there was water damage. What it disputed was that the water damage was ongoing such that it was unreasonable to proceed with the (internal) 2020 Works. Ms Gray also said that it was not disputed by the Applicants that the meeting took place at which two leaseholders told the Respondent's managing agent that they wanted the external works to be deferred and for the Respondent to proceed initially with the internal works alone.

29. On the basic question of whether the Respondent proceeded with the 2020 Works whilst aware that to do so would be pointless, it is a matter of fact whether the Respondent was actually aware (even if, which was not accepted, it was indeed pointless).

30. In relation to Mr Duncan's report, in Ms Gray's submission it only concluded that there was limited water ingress, and in any event Mr Chappel's report concluded that such water penetration as there had been had not rendered the 2020 Works pointless and only minor

repairs to the ceiling and some blistering to the flank wall were required.

Applicants' closing submissions

31. Mr Kerr submitted that the 2020 Works were wasted because of management failings. He also submitted that the Respondent knew about the historic problems and that it was clear that the roof was coming to the end of its useful life. Prior to the carrying out of the 2020 Works issues arose such as rising damp in the rear stairwell. He also suggested that Mr Gisborne's evidence was compelling because it included photographs.

32. Mr Kerr also said that the state of the building was appalling and that the leaseholders should have been formally consulted regarding the decision to split out the external works from the internal works. Furthermore, the Applicants were not experts and therefore the decision cannot be blamed on what two of them may have suggested or requested.

Tribunal's analysis

33. For the reasons set out above in the sections headed *"Applicants' written submissions"* and *"Clarification of extent of application at hearing"*, the question before the tribunal is merely the very narrow one of whether the Respondent actually knew that it was pointless to carry out the 2020 Works without first dealing with the external disrepair but nevertheless chose to go ahead anyway. Framing the question in this way is not to concede that it was in fact pointless to proceed in this manner; it is merely to identify what the question is.

34. The answer to that narrow question is that the Applicants have clearly failed to demonstrate that this is the case. There is no admission from anyone in the Respondent's team that it went ahead with the 2020 Works knowing this to be pointless and there is no credible basis for inferring from any other evidence that the Respondent knowingly went ahead with pointless work.

35. The Respondent's own expert, Mr Chappel, concluded that any leakage that had occurred to the internal common areas had not rendered the 2020 Works pointless and that only minor repairs to the ceiling and some blistering to the flank wall were required. The Applicant's expert, Mr Duncan, took the view that a lack of joined-up management planning and forethought had led or would lead to unnecessary undoing and re-doing of works already executed, but even this is very far from suggesting that the Respondent carried out works that it knew to be pointless. At most, Mr Duncan's evidence and conclusion provides some degree of support for the proposition that there were

some management failings, but as Mr Duncan was not made available for cross-examination and as his evidence was contradicted by that of Mr Chappel it would not be safe for the tribunal even to conclude that the Respondent was culpable to that, lesser, extent.

36. As regards the remainder of the evidence, there is some material such as witness evidence and photographs which offers some support to the narrative that the Property has been neglected at certain stages and currently needs attention. However, these are not the issues before the tribunal whether or not the Applicants themselves originally intended them to be. Furthermore, even where there has been neglect, leaseholders need to build a much better and clearer case in order to demonstrate – in the context of a service charge application – what consequences that has for the reasonableness of the sums that they have actually been charged.

37. Accordingly, the Applicants' challenge to the cost of the 2020 Works fails and the amount charged is payable in full.

Cost applications made at hearing

38. The Applicants have applied for a cost order under section 20C of the 1985 Act ("**Section 20C**") and for a cost order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("**Paragraph 5A**").

The relevant parts of Section 20C read 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 …".*

and the relevant parts of Paragraph 5A read 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".

39. The Section 20C application is therefore an application for an order that the whole or part of the costs incurred by the landlord in connection with these proceedings cannot be added to the service charge. The Paragraph 5A application is an application for an order that the whole or part of the costs incurred by the landlord in connection with these proceedings cannot be charged direct to the Applicant as an administration charge under his lease.

40. The Applicants have been wholly unsuccessful in their main application and there is therefore no proper basis for making a Section 20C or Paragraph 5A cost order in their favour. Both applications are therefore refused, although it should be noted that this does not mean that these costs are recoverable by the landlord as a matter of interpretation of the Applicants' leases.

Any further cost applications

41. If either party has any other cost applications that it wishes to make it must make them by email to the tribunal, with a copy by email to the other party, by no later than 5pm on **24 July 2024**. Any such cost applications must identify the legal basis for the application in question and must include suitable supporting evidence.

42. If a party makes a cost application within the time limit set out above the other party may respond to that application by email to the tribunal, with a copy to the other party, but it must do so by no later than 5pm on **7 August 2024**.

Name: Judge P Korn **Date:** 10 July 2024

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

APPENDIX

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

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 provisions 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 adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate 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) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

(6) An agreement by the tenant of a dwelling … is void in so far as it purports to provide for a determination – (a) in a particular manner, or (b) on particular evidence.