10088

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/00ML/LSC/2014/0038**
Property	:	**55 St Aubyns, Hove, BN3 2TJ**
Applicant	:	**55 St Aubyns Limited**
Representative	:	**Miss A Gourlay, Counsel**
Respondents	:	**Various Lessees (see list on page 2)**
Representative	:	**Mr P Barnes, Solicitor**
Type of Application	:	**Determination of service charges under section 27A Landlord and Tenant Act 1985 ("the Act")**
Tribunal Members	:	**Judge E Morrison (Chairman)** **Mr N I Robinson FRICS (Surveyor Member)**
Date and venue of Hearing	:	**31 July 2014 at Brighton County Court**
Date of decision	:	**7 August 2014**

DECISION

List of Respondents

Lyn Tracey Fowler (Personal Representative of Rose Calladine decd.) (Flat 1)
John Robert Wilson (Flat 2)
Ciprian Ionescu (Flat4)
Zbigniew Wincenty Kobialka and Ewa Josefa Cuminsky (Flat 5)
Stuart Durand and Anna Bryman (Flat 6)
Andrea Johanna Baxter (Flat 7)
Linda Vera Marcroft (Flat 8)
Paul Michael Archer and Martin Richard Godsmark (Flat 9)

The Applications

1. By an application dated 14 April 2014 the Applicant freeholder applied for a determination of the Respondent lessees' liability to pay an interim service charge demand covering the period 25 December 2013 – 24 June 2014. The Respondents are 8 of the 11 lessees at 55 St Aubyns.

2. The Tribunal also had before it an application under section 20C of the Act that the Applicant's costs of these proceedings should not be recoverable through future service charges.

Summary of Decision

3. The interim service charge payable by each lessee for the half year period commencing 25 December 2013 (or 25 March 2014 in the case of Flat 5) is £3947.72.

4. No order is made under section 20C of the Act.

The Leases

5. The Tribunal was told that there are two different forms of lease, described here as Type A or Type B. All the Respondents have a Type A lease, save for Flat 5 which has a Type B lease. Both forms of lease grant 99 year terms, which in the two sample leases provided ran from 9 January 1990 in one case and from 25 December 1989 in the other. Both leases require the lessee to contribute 1/11th towards the total service charge, and provide for twice-yearly interim payments towards that service charge in an amount which may be determined by the lessor.

6. The Type A lease requires the lessee to pay on 24 June and 24 December each year such sum in advance as the lessor shall deem

appropriate "on account of the lessee's liability for the next half year". Any amount collected in excess of actual liability at the end of the service charge year may be repaid to the lessee or retained by the lessor towards future expenditure (clause 4(B)(ii)). Clause 6 (D)(vi)(c)(1) provides for a Reserve fund.

7. The lessor's obligations, the cost of which may be recovered through the service charge, are set out in clause 6(B) and (D). The lessor is (amongst other things) responsible for keeping in good and substantial repair those parts of the building that are not demised, which include the main structure, roof, pipes, conduits and common parts, and for external redecoration. The lessor may employ such persons "as shall be reasonably necessary for due performance of the covenants... and for the property management of the Block" including "chartered surveyors or other professional managers of property to handle the management of the Block".

8. The Type B lease requires the lessee to pay on 25 March and 29 September in each year such sum on account of the Service Charge as the lessor shall specify to be a reasonable interim payment. The Service Charge is defined as "the total of all sums spent or reserved by the Lessor or for which the Lessor has incurred a liability during the accounting period to which the service charge relates..." (Fifth Schedule). There is also provision for a Reserve fund.

9. The lessor's covenants are set out at clause 3 and include the obligation to "when and as necessary maintain repair cleanse repaint redecorate and renew" essentially the same items as under the Type A lease. The Fifth Schedule provides that the cost of so doing is recoverable through the service charge along with various other costs, including fees of managing agents or if no such agent is employed "a reasonable charge payable to the lessor for managing and maintaining the Building".

The Inspection

10. The Tribunal inspected the subject property immediately before the hearing, accompanied by Mr J Porter, Mr Barnes, Mr J Wilson and Ms A Bryman. 55 St Aubyns is a mid terrace four storey house built around 1880 which has subsequently been converted into 11 self-contained flats. St Aubyns itself runs approximately north - south, down towards the sea, and No 55 is on the east side of the road. The front elevations of No 55 are rendered under a slate roof with bay windows serving the basement, ground and first floor levels. From the Tribunal's brief ground level inspection, it was difficult to examine the building in detail but it could be seen that the rendering to the firewalls and chimneys generally looked weathered, the guttering and downpipes needed overhaul or replacement and defective render was noted, particularly at entrance level. Some of the downpipes were probably the originals with signs of rusting and cracking together with overflowing from hoppers where vegetation growth was visible. The decorations were, at best, fair

with flaking paint etc. particularly visible to windows. Attention was drawn to the poor condition of the front steps to the property where repair of the tiling, if not replacement, was clearly necessary.

11. The front lower ground floor flat 9 has its own entrance from the front area. Flats 1-8 are accessed from the ground floor main entrance and the common parts serving these flats were inspected. The Tribunal's attention was drawn to a very small area of discolouration/efflorescence below a section of modern cornice at top floor level suggesting a problem with the north side firewall. The tribunal was also shown damp staining below the top floor mezzanine window on the rear wall of the main property together with water staining to the ceiling of the common parts on the floor below. Further damp staining was visible on the ceiling just inside the main front entrance door. The decorations were in fair condition only with the carpets also fair only. It was noted that rubber nosings had been stapled over a couple of treads apparently where the carpet had been considered dangerous. Attention was also drawn to the door closer on the front door which protrudes internally, clashing with the electrical cupboard, stopping the door from opening fully.

12. There being no direct access through the house, the Tribunal walked round into Seafield Road to view the rear. As with the front, the back has rendered elevations under a slate roof but also has a three storey rear addition with hipped and pitched slate roof. The rear lower ground floor flats 10 and 11, together with communal garden, are accessed from Seafield Road through a gate alongside a pair of garages. Whilst these garages are built on land that is likely to have been part of the garden of No 55, it was understood that they are now in separate ownership. The rear of the property was in a similar condition to the front, with poor paintwork to the windows in particular, a section of badly delaminated paint to the addition render at low level and vegetation growth in gutters. The tribunal noted a small upvc "conservatory" at the rear of the main house which apparently had been erected by one of the lessees and does not therefore form part of the landlord's obligations. It was indicated to the Tribunal that the yard way along the side of the rear addition is not considered part of the landlord's responsibility either although this was not confirmed. The garden area is mostly concreted, in fairly poor condition, with earth borders for shrubs, bushes and an apple tree. The tribunal's attention was particularly drawn to the poor condition of the coping to the north boundary wall of the garden.

13. The Tribunal had read the various building reports prior to the inspection. Whilst the report from Porter Holden in particular painted a very grim picture of the property which was not wholly borne out by the inspection, it was clear that substantial maintenance including redecoration was necessary to protect the building. The Tribunal considered that further issues, although hopefully not individually too major, could be anticipated once a detailed inspection could be made from scaffold.

Representation and Evidence at the Hearing

14. Directions were issued on 17 April 2014 which provided for each side to provide statements of case, accompanied by copies of relevant documents. Subsequently permission was given for each side to adduce expert evidence.

15. The Applicant's statement of case was accompanied by a report on condition prepared by Mr J Porter of Porter Holden in September 2013, and a further report prepared in November 2013 by Mr R Blake of Clifford Dann, a chartered surveyor. It was further supported by a witness statement of Nichola Bainbridge, a director of the Applicant, who gave oral evidence at the hearing. The Applicant was represented at the hearing by Miss A Gourlay, counsel.

16. The Respondents' statement of case was accompanied by a report prepared in May 2014 by Mr P Goacher, a civil/structural engineer, and supported by a witness statement of Anna Bryman, a joint lessee of Flat 6, which the other Respondents had indicated should also be taken as their evidence. Ms Bryman gave oral evidence at the hearing. The Respondent was represented at the hearing by Mr P Barnes, solicitor.

17. The parties had agreed that it was unnecessary for the experts to give oral evidence, and they did not attend.

The Law and Jurisdiction

18. The tribunal has power under section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when a service charge is payable.

19. By section 19(1) of the Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard. Section 19(2) provides that 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 of subsequent charges or otherwise.

20. By section 20 and regulations made thereunder, where there are qualifying works or the landlord enters into a qualifying long term agreement, there are limits on the amount recoverable from each lessee by way of service charge unless the consultation requirements have been either complied with, or dispensed with by the Tribunal.

21. Under section 20C a tenant may apply for an order that all or any of the costs incurred by a landlord in connection with proceedings before a 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.

Background

22. The following matters are relevant to the matters in dispute but are not themselves disputed. In early August 2013 the Applicant company purchased the freehold of 55 St Aubyns, the company having been formed for this purpose. There are 11 shares, all currently held jointly by Acornrent Ltd (the lessee of Flat 10) and Dean Golding (the lessee of Flat 11). The directors are Nichola Bainbridge and Dean Golding. Since the Applicant acquired the freehold Acornrent Ltd has acted as managing agent. Acornrent was incorporated in 1991 and the majority of the shares are held in the names of Ms Bainbridge and Mr John Porter, who are also the directors.

23. Very shortly after acquiring the freehold, Mr Porter, through his firm Porter Holden, prepared a report on the condition of 55 St Aubyns. He concluded that there were serious defects, mostly affecting the exterior but also within the common parts, some of which required emergency remedial work, and he provided a rough costing for the works totalling £41,107.20 including professional fees and VAT.

24. On 30 October 2013 a first stage Section 20 notice was sent to all lessees with regard to proposed major works. The notice stated that the estimated cost of the works was £42,000.00

25. On 14 November 2013 the Applicant issued service charge demands to all lessees requiring payment of an interim service charge of £4913.64 each for the period 25 December 2013- 24 June 2014. The demands were accompanied by a Proposed Budget for the 12 month period 25 December 2013 – 24 December 2014 which listed various heads of anticipated expenditure, excluding the major works. The budget items were said to total £16,100.00. It is now accepted that the correct total was £15,901.00.

26. The Applicant then obtained a further detailed report on condition from Mr Blake of Clifford Dann. This recommended extensive repair work but did not include any estimated costings. Before Mr Blake's report was sent to the lessees, the lessees of Flat 6 responded to the section 20 notice querying the amount demanded, the need for all the works to be carried out at the same time, and Mr Porter's qualifications.

27. A copy of Mr Blake's report, and of a separate Specification prepared by Mr Porter to be sent to the potential contractors (one of whom had been nominated by a lessee), was then provided to each of the lessees. The works covered by the Specification were more limited than those

suggested in Mr Porter's first report, and did not incorporate all the matters recommended by Mr Blake. In particular, it excluded general external redecoration, work in the rear garden and to the front garden/boundary walls, and all interior work. The Specification was put out to tender and two estimates were obtained, one for £33,292.80 and the other for £38,780.00, both including VAT but exclusive of any professional fees. A second stage section 20 notice was issued to the lessees on 14 March 2014.

28. In May 2014 the Respondents commissioned their own expert, Mr Goacher, to provide a report as to whether the proposed works were required and whether they could be phased over a number of years.

29. The works have not been carried out because the Respondents have not paid their requested share of the cost.

The Issues

30. The Respondents' case is that the amount of the interim service charge is not reasonable as required by section 19(2).

31. This objection can be broken down into two principal parts:

- The budget for general expenditure totalling £15,901.00 includes heads of expenditure which are either not permitted by the lease or are excessive or otherwise unreasonable;

- The amount requested on account of major works is excessive and otherwise unreasonable as the works should be phased over more than one service charge period. Furthermore, as the works have not been carried out in the service charge period for which they were demanded, nothing is payable.

The Budget for General Expenditure

32. The budget items disputed by the Respondents are:

- Buildings Insurance £1900.00
- Deacon & Co invoices £1051.00
- Management fees £1925.00
- Legal fees £4000.00
- Repairs/renewals £3000.00
- Gardening £300.00

33. Prior to the hearing the Applicant conceded that the provision for legal fees should be removed, reducing the overall figure to £11,901.00

Buildings Insurance

34. The Respondents stated that £1900.00 was too high. The actual premium paid in October 2013 for the next 12 months was £1771.74. A refund for the previous year's premium should also have been obtained as the new policy took effect before the end of the previous policy year. Furthermore, a quotation had been obtained from another insurer with a premium of £1202.00.

35. The Applicant said the figure of £1900.00 was based on the anticipated renewal premium in October 2014, as the accounts are run on a cash basis. Clifford Dann had been asked to provide an updated rebuild valuation and the premium might well increase. An insurance refund of £217.00 had been received in January 2014 from the previous insurers but this did not affect the anticipated expenditure.

36. Given that the budget sum is simply an estimate, the Tribunal finds that £1900.00 is reasonable. The single quotation obtained by the Respondents is not does not come close to establishing that the premium budgeted for is too high as it is based on a representation that 55 St Aubyns was built in 1930, which is clearly wrong, and is for a lower sum insured. The Tribunal also notes that the premium paid by the former freeholder for 2013 was £1956.00, more than the budgeted amount.

Deacon & Co Invoices

37. Ms Bainbridge explained this item related to third party invoices received by Deacon & Co, the managing agents for the previous freeholder, relating to the period prior to the sale to the Applicant but which were unpaid at the point of passing over service charge funds to Acornrent Ltd as the new managing agents. The Respondents contended that the money to pay these invoices could not be collected by way of interim service charge after the costs had been incurred.

38. It is clear from the service charge accounts produced that Deacon & Co passed over service charge funds which were sufficient to pay these invoices, and on this ground alone the Tribunal finds it was unreasonable to include them in the budget for the six months commencing 25 December 2013. The sum of £1051.00 should therefore be removed from the budget.

Management Fees

39. The budgeted management fee of Acornrent Ltd in the sum of £1925.00 equates to £180.00 per flat. In its statement of case the Respondents suggested that any management fee was unreasonable on the grounds that there was a conflict of interest due to the close relationship between the Applicant, Acornrent Ltd and its directors. At the hearing,

by which time a copy of management agreement between the Applicant and Acornrent (albeit unsigned and undated) had been produced, Mr Barnes did not press this point, and quite properly accepted that in principle, providing the arrangement is not a sham, there is no objection to a landlord appointing an associated company which is a separate legal entity, as managing agent: *Skilleter v Charles* (1991) 24 HLR 421. Ms Bainbridge told the Tribunal that the management agreement had been signed in August 2013, and the Tribunal noted that the service charge accounts for the period 5 August 2013 – 24 March 2014 include expenditure of £1251.00, an amount in line with the agreement.

40. In Ms Bryman's witness statement she also suggested that the service had been "so lamentably poor" that the proposed fee was unreasonable. The only evidence offered in support of this assertion was reference to a demand for payment made on 26 August 2013, the validity of which was challenged. Ms Bryman also contended that the Applicant's behaviour had been intimidating, and she referred to emails received (not in evidence).

41. The Tribunal does not find there is any cogent evidence of either misconduct or poor service by Acornrent Ltd, and in any event such matters would be relevant to challenge costs once they had been incurred, not at the budget stage.

42. The Respondent's main challenge to the management fee was that, under the Type A leases, the Applicant could only recover a management fee if it was "reasonably necessary" to employ managing agents. The argument made was that as Ms Bainbridge is a director of both companies, the appointment of Acornrent did not "unlock any additional expertise"; Ms Bainbridge could have done the same work as director of the Applicant and in those circumstances the lease would not permit any charge to be made. Furthermore under the general law, service charges are only reasonably incurred if the landlord's actions are appropriate: *Forcelux v Sweetman* [2001] 2 EGLR 173 (Lands Tribunal). It was unreasonable to appoint Acornrent and this had been done simply to recover fees. It was also queried whether Acornrent were "professional managers".

43. Ms Bainbridge said she had 22- 24 years experience of managing properties. Acornrent was accredited with the National Landlords Association and she was personally affiliated with the Institute of Residential Property Management. Acornrent manages 10 freeholds and nearly 100 flats. The Applicant was a company set up specifically to acquire the freehold of 55 St Aubyns, did not trade, and she was not an employee of that company. Ms Bainbridge said it was normal for enfranchisement companies to engage managing agents, and she would expect to be paid for her work. She explained that a fee of £180.00 per flat was Acornrent's standard charge for properties where there were problems collecting service charges, and that this fee was lower than

the average management fee in the area, which she put at £200.00 + VAT.

44. The Tribunal accepts that it was reasonably necessary for the Applicant to appoint managing agents. There is no reason why the director of a non-trading freehold company should provide management services free of charge. The Tribunal is also satisfied that Acornrent is a professional property manager and that the proposed fee is reasonable.

Repairs/Renewals

45. This item was put at £3000.00 in the budget, with the note "just in case". The Respondents said this item was unnecessary given that the service charge accounts to 4 August 2013 showed a Reserve of £9091.00 and given that major works were planned. Furthermore only the Type B lease permitted "renewal" as opposed to "repair".

46. In her witness statement Ms Bainbridge gave details of possible repairs which were indeed included within the proposed major works, but at the hearing she gave further examples of a number of repairs that had already been carried out and were not so included. She said the building has ongoing repair issues and that £3000.00 was reasonable. She referred to the RICS Service Charge Residential Management Code as recommending prudence so there is sufficient money to cover contingencies. She also explained that there was no Reserve fund handed over by Deacon & Co; the sum described as such on their final accounts was just the total service charge fund handed over, all of which had since been spent on ongoing expenditure, as shown in the accounts made up to 24 March 2014.

47. The RICS Code (Part 8) notes that "there will be considerable difficulties if there is a deficit at year end. It is better to estimate prudently and to include a contingency sum". In this case the managing agents are new to the property, and there is a considerable amount of work to be done. The major works do not include any work to the interior common parts. The Tribunal notes that in the year to 24 June 2013 the sum of £2545.00 was spent on repairs. All in all it cannot be said that a budget sum of £3000.00 is unreasonable.

Gardening

48. The Respondents said that a budget of £300.00 for the rear yard was excessive. The Applicant said it was not, and referred to pruning and tidying needed on a regular basis. This is a modest budget figure and the Tribunal sees no need to interfere with it. The amount can of course be reconsidered next year once the actual annual cost is ascertained.

Conclusion re Budget

49. The revised annual budget figure of £11,901.00 should be reduced by £1051.00 to £10,850.00. As Ms Bainbridge accepted at the hearing that the Applicant was only seeking to recover 50% of the budget via the interim service charge in issue, the amount recoverable is £5,425.00, which equates to £493.18 per lessee.

The Major Works

50. The total demanded by way of interim service charge was £4,913.64 per lessee (total £54,050.00). Ms Bainbridge gave two different accounts of how this figure was arrived at. In her witness statement she said it reflected the budget originally calculated at £16,100.00, plus the estimated costs of the major works as reduced by the Specification to £38,000.00. In her oral evidence she suggested it reflected 50% of the budget costs less £4000.00 legal costs, plus 100% of the legal costs, plus £44,000.00 estimated cost of the major works based on Mr Porter's first report. The Respondents' position was that whether the amount demanded was £38,000.00 or £44,000.00, it was too high.

51. Given that Mr Porter's first report may be open to criticism for a possible lack of objectivity, the Tribunal gains most assistance from the reports of Mr Blake (Clifford Dann) and Mr Goacher, both qualified independent experts. Mr Blake undertook a detailed inspection of the property and provided a very detailed report on condition, running to 28 pages. In his Summary and Recommendations he noted that although the property was in reasonable structural condition having regard to its age and location, external repair and redecoration was overdue. At page 27 he concluded:

"Having regard to the nature of the various external defects and repairs identified, it is recommended that a comprehensive scheme of external repair and redecoration is carried out. If funds dictate, this may need to be phased between the front and rear elevations. Timely implementation of repairs is recommended to minimise the escalating cost of repair or increased risk of water penetration... Where water penetration occurs, I recommend this be dealt with by way of emergency temporary repair".

52. Mr Goacher, instructed by the Respondents, provided a much shorter 5 page report, having seen the previous reports. At paragraphs 3.2 - 3.3 he stated:

"From my brief inspection of the property, I am generally in agreement with the proposals mentioned in [Mr Blake's] report ... Some of the items of maintenance will only be required at this time if evidence of ongoing water ingress into the property is occurring".

He went on to state that the bulk of the work to the external elevations were not urgent and can be phased, and that the contractors' estimated prices based on the Specification were "fair". At para. 6.8 he suggested an extension to the scope of the works, to include redecoration of all rendered areas. In his Conclusion and Recommendations he stated:

"*The priced tenders generally appear adequate. The prices appear to be realistic for the works proposed. However, some of the items, particularly to the roof, may not be required if there is no evidence of water ingress at this time. The front steps tile replacement could be delayed at this time while funds are being obtained, but in the long term I suggest this would be beneficial...I understand that the leaseholders would like to split the works into several phases over a period of years. This will be a prudent measure if the funds for the whole project cannot be obtained in one go*".

53. The Respondents' case was that only emergency works needed to be carried out this year, and the rest should be phased in some manner over a number of years. The amount reasonably required for emergency works was not quantified. Both Mr Blake and Mr Goacher said the works could be phased. Ms Bryman said she was unsure there was water penetration to the extent mentioned by Mr Blake, and that the damp stain in the common parts near Flat 6 had been there since she had purchased that flat. She was also concerned that the Applicant would make opportunistic use of the scaffolding required for the major works to undertake the proposed development of a new flat in the roof space (although planning permission was refused in May 2014).

54. The Tribunal's attention was also directed to a pending contested application for collective enfranchisement in the county court, and to a Claim Notice seeking the right to manage, both matters being pursued by the Respondents. Although accepting that they did not prevent the major works proceeding, it was submitted that they were relevant considerations in assessing reasonableness.

55. It was further argued that as the major works had not in fact been carried out within the period covered by the interim service charge in issue, the Respondents could not now be required to contribute to them through that service charge. (Ms Bryman's statement went further in suggesting that alleged defects in the section 20 consultation procedure meant that the works couldn't be done within the entire service charge year commencing 25 December 2013. However this argument was not pursued at the hearing.)

56. The Applicant's case was that the works covered by the Specification were reasonably required and it was reasonable for those works to be done at one time. The works had been restricted to those needed to protect the fabric of the building and make it water-tight. Ms Bainbridge said that the water penetration inside the front entrance door had become worse since August 2013 and she produced two photographs taken in August 2013 and June 2014 to support this. She

referred to the appearance of other damp spots and said that when it rains, the rainwater runs down the external walls. If only one elevation was repaired, the other would continue to deteriorate and let water in. If the works were delayed, the cost would increase. The lowest contractor's' price would be held until October 2014. Summer or Autumn was the best time of year to do the work.

57. Ms Bainbridge stated that £44,000.00 was a reasonable sum to demand on account as although this was higher than Mr Porter's original estimate, provision should be made for any extra work found to be necessary once the contractors started on site. She denied that any of the works were being proposed simply to facilitate the re-development of the roof space.

58. Ms Gourlay submitted that the Respondents could not evade the interim service charge by delaying payment and then arguing that it was too late for the service charge to be collected. This was not a proper construction of the lease provisions. Both leases allowed monies collected but unused by the end of the service charge period to be retained for future use. Futher, the pending enfranchisement/RTM applications were irrelevant unless it was said the Applicant was deliberately trying to cream off money from the Respondents before the applications succeeded, and there was no evidence of this.

Discussion and determination

59. Section 19(2) simply provides that any service charge payable in advance of costs being incurred be of a reasonable amount. The Upper Tribunal has held that the test of reasonableness under section 19(2) is no different from that under section 19(1). This means that a landlord has a wide discretion as to the programme of works to be adopted. A decision to carry out works in a certain way is not unreasonable just because other reasonable decisions could have been made. *City of Westminster v Fleury* [2010] UKUT 136 (LC); *Southall Court (Residents) Ltd v Tiwari* [2011] UKUT 218 (LC).

60. There is no principle that a repair must be urgent or that disrepair must create an emergency before it is reasonable to remedy it, and in general it is for the party with the obligation to decide upon the appropriate method of repair. Even where a temporary repair might alleviate an immediate problem, it may be reasonable to elect a more costly permanent repair. The question is whether the lessor's actions in incurring the costs and the amount of the costs is reasonable: *Forcelux v Sweetman*. The lessor is not obliged to adopt a minimum standard of repair: provided that the works carried out are such as an owner who had to bear the cost himself might reasonably accept, and so long as they are within the scope of repairing covenant, the lessee is not entitled to insist on a more limited or cheaper option: *Plough Investments Ltd v Manchester City Council* [1989] 1 EGLR 244 (Ch).

61. In *Garside & Anson v RFYC Ltd* [2011] UKUT 367 (LC) the Upper Tribunal held that the financial impact of major works on lessees through service charges and whether as a consequence works should be phased is capable of being a material consideration when considering whether the costs are reasonably incurred for the purpose of section 19(1)(a). There is no obvious reason why this principle should not also apply to section 19(2) demands.

62. In applying the above principles to this case, the Tribunal rejects the Respondents' suggestion that works should initially be limited to those required due to emergency or urgency. There is no significant disagreement between the experts as to the scope of the proposed repairs to the exterior, and Mr Goacher takes no issue with the prices quoted by the contractors. To the extent that there is a difference of emphasis, this relates to when, as opposed to whether, the works should be carried out. It is fair to say that both experts accept that it would be possible to phase any non-urgent repairs. Mr Blake contemplates this possibility "if funds dictate" but suggests "timely implementation" to minimise escalating costs and the risk of ongoing water penetration. Mr Goacher says the bulk of the works are not urgent and can be phased, but he recommends phasing "as a prudent measure if funds for the whole project cannot be obtained in one go". He does not refer to any disadvantages of delay, but given that Mr Blake carried out a detailed inspection, whereas Mr Goacher's inspection was "brief", the Tribunal prefers Mr Blake's view, which also accords with common-sense, the Tribunal's own inspection, and is supported by Ms Bainbridge's evidence about ongoing water ingress. Even if there is no current water ingress, the defective and insufficient gutters and downpipes mean there is an ongoing risk.

63. In any event it is clear that both experts regard phasing as the preferable option only if funding is a problem. There was no evidence whatsoever before the Tribunal that any of the lessees have, at any time since these works were first canvassed, mentioned any difficulty in raising funds to meet the service charge. Most if not all of the Respondents are non-resident; they own their flats as an investment and let them out. While the major works will not be inexpensive, neither are they very costly. There is therefore no evidential basis for a finding that the works should be phased due to financial considerations. Moreover, phasing is likely to increase both the overall cost due to rising prices and the risk of further deterioration of the areas awaiting repair in the meantime. Indeed it could be argued that the Applicant has gone too far in reducing the scope of the works, and that it would have been beneficial to include full external redecoration now, in order to obtain better weather-sealing, and to maximise value out of the building's appearance. Taking everything into consideration, the Tribunal concludes that it is reasonable to undertake all the proposed works as one project.

64. Nor was there any cogent evidence that any of the proposed works were being suggested in order to facilitate any development of the roof space.

65. It is also noted that the three individuals associated with the Applicant and Acornrent (Ms Bainbridge, Mr Golding and Mr Porter) have paid or will be, directly or indirectly, paying the share of the costs attributable to their flats. This is some evidence that, in accordance with *Plough Investments*, the lessor would reasonably accept these costs if having to pay for them itself.

66. The pending enfranchisement and RTM applications are not relevant to the issue and it cannot be right to hold up the works until these applications (both initiated after the service charge was demanded) are determined. Nor can the Tribunal accept the Respondents' argument that the demands for the cost of the works have effectively lapsed simply because the cost was not incurred during the six months to which the demands related. If that were right a lessee could endlessly frustrate the works by withholding payment of any demand. Both leases permit the lessor to retain surplus monies demanded but not yet spent, and this must mean that valid demands for monies are not rendered invalid simply because those monies are not immediately expended.

67. The remaining issue is how much should be paid on account of the works. The figure suggested by Ms Bainbridge in her oral evidence of £44,000.00 is not supported by any estimates. The cheapest contractor has quoted £33,292.80 inc. VAT. To this figure must added professional fees and the cost of party wall agreements for the work to the fire-walls and chimney stacks. The costs of flat window repairs within the major works will need to be re-charged to the relevant lessees as these are the lessees' responsibility. Taking all these matters into account, the Tribunal concludes that a figure of £38,000.00 for the proposed works, being the sum referred to by Ms Bainbridge in her witness statement, is reasonable and is payable by the lessees. [1]

68. The sum of £38,000.00 amounts to £3454.55 per lessee. When added to the amount payable for general expenditure, the Tribunal determines the interim service charge at £43,425.00 or £3947.73 per lessee.

Section 20C Application

69. In deciding whether to make an order under section 20C the Tribunal must consider what is just and equitable in the circumstances. The circumstances include the conduct of the parties and the outcome of the proceedings. There are no relevant conduct considerations in this case but the Applicant has been substantially successful. Given that the major works could not proceed until this dispute was determined, it was entirely reasonable for the Applicant to have made the application.

[1] In the case of Flat 5, which has a Type B lease, the interim demand was premature as the next payment date was 25 March 2014 rather than 24 December 2013. Due to passage of time, this is no longer relevant.

For these reasons, it would not be just and equitable to make an order under section 20C limiting recovery of the Applicant's costs through future service charges. In so deciding we are not making any determination as to the reasonableness of such charges, nor is the Tribunal making any finding as to whether the lease permits recovery.

Concluding Remarks

70. This decision simply approves an interim service charge. It does not make any determination as to the reasonableness or payability of the final service charge that will be based on expenditure actually incurred during the service charge year. Any dispute that cannot be resolved as to the recoverability of service charges based on actual expenditure remains within the power of the Tribunal to determine under sections 19(1) and 27A of the Act.

71. It is noted that Acornrent is preparing accounts on a cash basis, whereas the previous managing agents appear to have used a receivable basis, and also that the accounts produced for the period to 24 March 2014 did not appear to include a balance sheet. The RICS Code states that accounts should be transparent and accounts should be presented so they indicate all income received or receivable. It is the Tribunal's view that a receivable basis would better enable the lessees to understand the financial position of the block, particularly when large amounts are being collected and/or are due to be spent.

Dated: 7 August 2014

E Morrison

Judge E Morrison (Chairman)

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.