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

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| **Case Reference** | : | BIR/47UE/LIS/2018/0006 |
| **Property** | : | 23 Ullswater Close, Worcester, WR4 9HN |
| **Applicant** | : | Ksenia Trifonova |
| **Representative** | : | None |
| **Respondent** | : | Fortis Living Limited |
| **Representative** | : | Anthony Collins Solicitors LLP |
| **Type of Application** | : | Application for determination of liability to pay and reasonableness of service charges under s.27A of the Landlord & Tenant Act 1985 |
| **Tribunal Members** | : | I.D. Humphries B.Sc.(Est.Man.) FRICS<br>Judge M. Gandham |
| **Decision Type** | : | Paper Determination |
| **Date of Decision** | : | 16 January 2019 |

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**DECISION**

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## Introduction

1 The Applicant holds the long leasehold interest in a flat. The application relates to the Applicant's liability to pay service charges of £3,565.07 to the Respondent for building works to a balcony.

2 The Applicant applied to the First-tier Tribunal on 30th January 2018. The case was referred to mediation which was unsuccessful and remitted to the Tribunal for determination. Directions were issued, the parties made submissions and the property was inspected on 23rd October 2018. The Tribunal then requested further information and invited the parties to comment on the Upper Tribunal decision in *Jastrzembski v Westminster City Council* [2013] UKUT 284 (LC). Following receipt of further submissions the Tribunal has considered the evidence and finds as follows.

## Items in Dispute

3 The Applicant initially asked the Tribunal to determine service charges for four years; 2014-15, 2015-16, 2016-17 all of which were for £500 per annum and 2017-18 for which there was a budget sum of £3,565.07 but in fact, the dispute related only to the final year's charge and submissions were made on that basis.

4 The disputed sum of £3,565.07 related to works to a balcony undertaken by the Respondent landlord.

5 The Applicant contests whether it was reasonable to carry out the works, not whether they were completed to a reasonable standard.

6 The Applicant raises the following issues:

1 The Applicant questions whether the works were a repair or improvement.
2 The Applicant states that she could not afford the cost of the works;
3 The Applicant states that no survey had been undertaken prior to the works being undertaken;
4 The Applicant questions whether the correct consultation process had been followed;
5 The Applicant states that no new works should have been completed within five years of other previous major cyclical works;
6 The Applicant questions whether fees incurred by the Respondent for professional services were reasonable.

## Facts Found

7 The Tribunal inspected the property with representatives of the parties on 23rd October 2018. It is a second floor self contained flat in a four storey block containing eight flats, one of eleven such blocks built by Worcester City Council in 1968. It is within a large Council estate in Warndon to the north east side of Worcester.

8 The accommodation comprises a living room, kitchen, two bedrooms and bathroom. The living room has a glazed screen and door to an external balcony enclosed by steel railing. The landlord recently undertook work to the balcony comprising removal of the previous asphalt surface and screed substrate and replacement with new materials which included work to the adjacent glazed screen to the living room. When the Tribunal inspected the flat the work had been completed.

**Relevant Law**

9 The Tribunal's powers derive from statute.

10 Section 27A(1) of the Landlord & Tenant Act 1985 provides that an application may be made to a Leasehold Valuation Tribunal (LVT), now the First-tier Tribunal in the Property Chamber (Residential Property), for determination of whether a service charge is payable and if so, the person by whom it is payable, to whom, the amount, the date payable and manner of payment. The subsection applies whether or not payment has been made.

11 Section 18 of the Act defines a 'service charge' as an amount payable by a tenant of a dwelling as part of or in addition to rent which is payable directly or indirectly for services, repairs, maintenance, improvements, insurance or the landlord's cost of management, the whole or part of which varies according to the relevant cost.

12 Section 19 of the Act provides that relevant costs shall be taken into account in determining the 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 carrying out of works, only if the works are of a reasonable standard and in either case the amount payable is limited accordingly.

13 These are the statutory criteria for the Tribunal's jurisdiction but it is also bound to take account of precedents set by the Courts for interpretation of the standards to be applied.

**Lease**

14 The Applicant holds a lease for term of 125 years from 20th November 1989 at a fixed ground rent of £10 per annum together with a service charge. Miss Trifonova acquired the lease by assignment in 2014.

15 Under clause 3.(ii), the previous landlord, Worcester City Council, undertook to maintain, repair, decorate and renew the main structure and exterior of the demised premises. The cost was recoverable from the tenant by means of the Fifth Schedule, clause 12, and the Seventh Schedule, clause 4, where the costs included in the service charge were defined to include repairs and maintenance to the main structure.

**Submissions**

16 Applicant

Miss Trifonova raises the following points regarding the points in issue:

*1 The Applicant questions whether the work was a repair or improvement.*

In Miss Trifonova's view, work to the balcony was an improvement for the landlord's benefit, it was not a repair where she should be liable for the cost.

*2 The Applicant states that she could not afford the cost of the work.*

Miss Trifonova advises that she is a student and unable to afford the cost of the work.

*3 The Applicant states that no survey had been undertaken prior to the work being undertaken.*

Miss Trifonova states that the Respondent only inspected two flats in the whole development before instructing contractors to carry out the work. This in her view is unreasonable because there was no evidence that this particular balcony was faulty and other properties in the scheme may have been subject to different environmental conditions, for example greater exposure to prevailing winds where driving rain may have

been more likely to cause problems of water ingress. Furthermore, she had spoken to other lessees in the building and no-one as far as she was aware had reported any damp problems with their flats caused by defects in her balcony. She had asked the Respondent to provide copies of their Experts' reports on the problem but none had been provided.

*4 The Applicant questions whether the correct consultation process had been followed.*
This is the main point made by Miss Trifonova. She bought the flat in 2014 but said she had been unaware of any alleged problem with the balcony until the Respondent wrote to her on 30th August 2017 proposing to carry out works. She said she had not received any prior Notice under the Service Charges (Consultation Requirements) (England) Regulations 2003/1987 and had not even owned the flat in 2010 and 2011 when the Respondent said Notices had been issued, and without compliance with the Regulations she should not be liable for the cost.

She also said her Solicitor has asked the Respondent whether they had any plans for major expenditure when she bought the flat and had been advised that they did not, but this was unsubstantiated in the documents submitted to the Tribunal.

*5 The Applicant states that no new work should have been carried out within five years of previous major cyclical works for other items.*
This point was made in the initial application to the Tribunal but unsubstantiated in the subsequent Statement.

*6 The Applicant questions whether fees incurred by the Respondent for professional services were reasonable.*
Again, this was a point made in the initial application but not pursued in the Applicant's statement.

17 Respondent
In reply, Anthony Collins Solicitors for the Respondent made submissions that can be summarised as follows:

*1 The Applicant questions whether the work was a repair or improvement.*
The Respondent submits that the work to the balcony was a repair. The balconies needed repair because their design and construction allowed water ingress to the asphalt surface and concrete screed beneath that was damaging the fabric of the building and leading to defects in the timber screen between the balcony and living room. The work did not lead to the balcony being substantially different after the work than before, it was no larger and the concrete base had not been altered. It was in their submission entirely repair work in line with the decision in *Postel Properties Ltd. v Boots the Chemist Ltd.* (1996) 2 EGLR 60.

*2 The Applicant states that she could not afford the cost of the work.*
The Respondent claims this is irrelevant and affordability is not a test of reasonableness. Furthermore, the Respondent had offered to spread the cost over a year.

*3 The Applicant states that no survey had been undertaken prior to the work being undertaken.*
The Respondent provides a Witness Statement by Philip Barnfield, Tenancy Services Officer, advising that problems with the balconies in this development only came to light in 2015. Residents in the blocks were complaining about water ingress to their flats and an initial appraisal was undertaken by the Respondent's in-house surveyor at the time, Charles Slade, highlighting the balconies as a possible cause. After further investigation the Respondent took independent advise from DJD Architects and Patrick Parsons, Chartered Structural Engineers specialising in balconies, and it was decided that the

balconies needed repair. Pilot works were undertaken, asphalt and timber opened up for inspection and it was decided that remedial work was necessary to protect the long term strength of the balconies from corrosion of steel reinforcing bars in the concrete. All the flats in the scheme were of similar age and construction and it was reasonable to assume that they needed similar repair.

*4 The Applicant questions whether the correct consultation process had been followed.*
The Respondent provided copies of:

1 Statutory Notice of Intention to enter into a Qualifying Long Term Agreement dated 6th July 2010;
2 Statutory Notice of Landlord's Proposal dated 18th January 2011 and
3 Statutory Notice of Landlord's Consultation (Notice of Reasons to carry out Works) dated 30th August 2017 addressed to the Applicant.

All the statutory requirements had been complied with.

Furthermore, in response to the Tribunal request for observations on *Jastrzembski v Westminster City Council*, the Respondent submitted that the case related to qualifying works rather than work pursuant to a Qualifying Long Term Agreement and there had been no unreasonable delay between the issue of the Notice in 2017 and work being undertaken.

*5 The Applicant states that no new work should have been carried out within five years of previous major cyclical works for other items.*
There was no reference to this in the lease or statutory provisions and it was irrelevant.

*6 The Applicant questions whether fees incurred by the Respondent for professional services were reasonable.*
The Respondent said it had not included the fees of its Architect or Structural Engineer in the cost of the works it claimed from the Applicant.

18 Tribunal Decision

*1 The Applicant questions whether the work was a repair or improvement.*
The work to the balcony did not increase its size, it was essentially the same specification before as after the work was carried out. Having reviewed the photographs and descriptions of balconies opened for inspection, they clearly needed repair as the asphalt was degrading and allowing water ingress to the screed below. We find as a matter of fact that the works were repairs but in any case, the distinction is largely academic because the tenant is liable to contribute to the cost whether it comprised repair, maintenance or renewal of the structure of the building under clause 4 of the Seventh Schedule to the lease.

*2 The Applicant states that she could not afford the cost of the works.*
We disagree with the Respondent's assertion that affordability has no effect on the reasonableness of carrying out works, see for example in *Garside v B R Maunder Taylor* [2011] UKUT 367 (LC). However, in this instance, where the Respondent had offered to spread the cost over a year and the work was essential for the long term maintenance of the building, coupled with the fact that no evidence had been provided to show hardship by the Applicant, we find the claim of inability to pay insufficient to determine that it would have been unreasonable to carry out the works.

*3 The Applicant states that no survey had been undertaken prior to the work being undertaken.*

The Applicant may have been unaware of all the research carried out by the Respondent prior to instructing contractors when she made the original Tribunal application. However, it is apparent that surveys had been carried out by suitably qualified experts and it would have been reasonable to assume that defects affecting some of the flats were likely to have affected all the flats in the development built at the same time. Accordingly we find this is not a ground to determine that the repairs were not reasonable.

*4 The Applicant questions whether the correct consultation process had been followed.*

Evidence provided by the Respondent shows that the correct Notices were sent in 2010 and 2011 to give effect to a Qualifying Long Term Agreement. They were sent to the Lessee at the time and while it may be unfortunate if they had not been passed to the Applicant on purchase, this does not affect their validity. Furthermore, the Applicant was served with the correct Notice of Intent to undertake the Works in 2017 and having taken account of *Jastrzembski v Westminster City Council*, we do not consider there was any unreasonable delay between service of the Notice and the repairs being carried out.

The statutory conditions were complied with and the correct consultation process followed.

*5 The Applicant states that no new work should have been carried out within five years of previous major cyclical works for other items.*

This was not pursued by the Applicant beyond the initial application form and as there is no reference to such limitation in either the lease or statute, we find it is not relevant to the question of reasonableness.

*6 The Applicant questions whether fees incurred by the Respondent for professional services were reasonable.*

The Applicant may have been unaware of the Respondent's position but it has been clarified that Miss Trifonova is not liable for the professional fees incurred by the Respondent within this application.

19 In summary, the Respondent entered into a Qualifying Long Term Agreement in 2011 and the correct Notices were issued at the time. When defects in the building were reported to them they made proper enquiries, instructed independent experts to report to them and accepted their recommendations to repair the balconies. They issued the correct Notice of Intention to undertake works in 2017 and subsequently carried them out. We find this course of action reasonable to protect the long term condition of the building and prevent further damage to the balconies.

20 The Applicant is liable to pay the cost which is specifically covered by the service charge provisions of the lease. The works are covered by the definition of service charges in section 18 of the Landlord & Tenant Act 1985 ('the Act') and reasonably incurred for the purposes of section 19. The Applicant has not questioned whether the works were of a reasonable standard and we have no reason to assume otherwise.

21 Accordingly, the Tribunal finds the budget cost of repair of £3,565.07 for 2017-18 to be reasonable and recoverable under the terms of the lease and section 27A of the Act.

I.D. Humphries B.Sc.(Est.Man.) FRICS

Date: 16 January 2019

If either party is dissatisfied with this decision an application may be made to this Tribunal for permission to appeal to the Upper Tribunal, Property Chamber (Residential Property). Any such application must be received within 28 days after the decision and accompanying reasons have been sent to the parties (Rule 52 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).