



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

Case Reference : CHI/24UF/LSC/2016/0107

Property : 9-35 The Officers Quarters, Weevil Lane, Gosport, PO12 1AG

Applicant : The Leaseholders Association
Royal Clarence Yard (West)
Phase A

Representative : Cdr Peter Jeanneret, MA, RN (Flat 20)

Respondent : Royal Clarence Yard (Phase A) Ltd

Representative : Mr Chris Gilbert, Managing Director

Type of Application : Service Charges : Sections 27A and 20C of the Landlord and Tenant Act 1985 ("the 1985 Act")

Tribunal Members : Judge P R Boardman (Chairman) and Mr S D Barnden MRICS

Date and venue of Hearing : 3 May 2017
Havant Justice Centre, The Court House, Elmleigh Road, Havant, PO9 2AL

Date of Decision : 26 May 2017

DECISION

Introduction

1. This application, dated 14 November 2016, is for the Tribunal to decide whether :
 - a. exterior works carried out in 2011 were carried out to a reasonable standard
 - b. whether the budgeted sum for major works in 2017 is a reasonable amount, having regard particularly to whether the projected costs have been increased due to shortcomings in the 2011 works
 - c. there should be an order that all or any of the costs incurred, or to be incurred, by the Respondent in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the leaseholders
2. The application describes the Property as a Grade II military structure built in about 1857 to 1859, totally refurbished between about 1998 and 2002 by the Berkeley Group, and now divided into 26 flats
3. The application states that the Respondent, the landlord, is a subsidiary of the Berkeley Group
4. The Tribunal adopts in this decision the following expressions, and their respective definitions, used by the parties :
 - a. "Berkeley" : Berkeley Homes (Hampshire) Limited
 - b. "ISIS" : ISIS Restoration Limited, now trading as Bourne Construction & Refurbishment
 - c. "2011 works" : the external decoration and repair works to the Property performed by ISIS between September and November 2011
 - d. "2011 contract" : the JCT minor works contract dated 2 September 2011 between the Respondent and ISIS, forming Appendix 11 to the Respondent's statement of case
 - e. "HMLA" : HML Andertons Limited, the managing agent for the Respondent
 - f. "TFT" : Tuffin Ferraby Taylor LLP, the surveyor appointed by HMLA to supervise the 2011 works
 - g. "PJ List of overcharges" : the list headed "Appendix 2 – overcharges" at the end of document 3A attached to the Applicant's statement of case, and prepared by Cdr Jeanneret
 - h. "PJ letter 6 June 2012" : the letter from Cdr Jeanneret forming document 11 attached to the Applicant's statement of case

- i. "Berkeley's letter 30 October 2013" : the letter forming the first part of document 16 attached to the Applicant's statement of case
- j. "TFT schedule of defects" : the schedule dated 23 January 2013 and marked "updated 16 July 2013", forming the second part of document 16 attached to the Applicant's statement of case
- k. "PJ defects list" : the 2-page list dated 20 August 2013 and prepared by Cdr Jeanneret, headed, respectively, "Appendix 1" and "Appendix 2", forming the third part of document 16 attached to the Applicant's statement of case
- l. "Richardson" : Richardson Decorating Contractors Limited
- m. "TRC" : TRC Contracts Ltd
- n. "2017 works" : the proposed external redecoration and repair works to the Property to be undertaken in 2017
- o. "Richardson 2016 quote" : the quote provided on 1 March 2016 to undertake the 2017 works, forming document 25 attached to the Applicant's statement of case
- p. "PTL" : Parker Torrington Limited, surveyors appointed by the Respondent to oversee the 2017 works

Documents

- 5. The documents before the Tribunal are contained in a bundle, comprising six sections, and are summarised in a contents sheet at the beginning

The lease of Flat 23 dated 31 March 2003

- 6. The only lease copied for the Tribunal is the lease of Flat 23. For the purposes of this decision the Tribunal has assumed, as confirmed by the parties at the hearing, that all the leases are in materially the same terms
- 7. The material provisions of the lease of Flat 23 are as follows :

Particulars

Estate : the land at and known as Royal Clarence Yard shown edged with a thick black line on plan number 1

Phase : that part of the Estate known as The Officers Quarters Phase A shown edged in green on plan number 3

Building : the parts of the Phase comprising the block of private residential apartments shown edged in blue on plan number 3

Premises : Flat 23 shown edged red on plan number 2

Clause 1

Definitions and interpretation

"Rents" : means the Rent the Insurance Rent the Service Charge and the other sums reserved by or payable by the Tenant under this lease

"Lettable Premises" : accommodation within the Phase from time to time let to a tenant or tenants or occupied or intended to be occupied

or intended for separate or exclusive occupation by a tenant or tenants

"Retained Premises" : the Phase but excluding the Premises and any other Lettable Premises

Clause 3

[Covenants by the tenant]

.....to observe and perform the obligations of the Tenant contained in schedule 2.....and schedule 8.....

Clause 4

[Covenants by the landlord]

.....to observe and perform the obligations of the Landlord contained in schedule 4.....and schedule 8.....

Schedule 2

Tenant's covenants

1.1 To pay the Rents.....

Schedule 4

Landlord's covenants

6 That subject to payment by the Tenant of the Service Charge and to the provisions of schedule 8 the Landlord will use reasonable endeavours to carry out and provide or procure the carrying out and provision of the Services.....

Schedule 8

Part 1

Services and the Service Charge

1 Definitions

.....
"Building Services" : the services facilities amenities and items of expenditure specified in part 2 of this schedule

.....
2 Provision of the services

2.1 The Landlord shall not be liable to the Tenant in respect of :

.....
2.1.2 any act or omission or negligence of any person undertaking the.....Building Services.....on behalf of the Landlord

Part 2

The Building Services

1 Maintaining repairing preserving protecting decorating and (where beyond economic repair or obsolete) renewing replacing or

rebuilding the Retained Premises forming part of the Building and the Service media exclusively serving the Building.....

The Applicant's statement of case 1 March 2017

8. The Applicant stated that ISIS had carried out the external redecoration works during September to November 2011 and had done so very badly. Particularly bad was the use of a resin filler product, DryFlex. Examples of this were shown in the photographs comprising document 12. Misuse of that product now required expensive rectification work. There had been totally inadequate monitoring by TFT
9. The Applicant had promptly notified the workmanship and other failures to the Respondent, TFT and HMLA. The failures were summarised in :
 - a. the TFT schedule of defects
 - b. the PJ defects list
10. In Berkeley's letter 30 October 2013 Berkeley promised to repair all identified defects, at Berkeley's expense. However, this did not occur
11. The Respondent was now planning redecoration works this year, 2017
12. The Applicant proposed that Berkeley should cover the costs of making good all the previously recorded defective work from 2011, including full redecoration of the area affected, and that the leaseholder should pay for full redecoration of the unaffected areas
13. In addition there were various disputed payment items totalling £5247 arising from the 2011 work and which had been billed in the 2011/2012 service charge account, but should not have been. They were summarised in :
 - a. the PJ letter 6 June 2012
 - b. the PJ list of overcharges

The Respondent's statement of case 24 March 2017

14. The Respondent accepted that ISIS had not executed appropriately certain elements of the 2011 works
15. Berkeley, as a gesture of goodwill, offered, by the Berkeley letter 30 October 2013, to perform both the TFT schedule of defects and the PJ defect list, stating, at paragraph 4 of the letter, that any works outside the scope of completing the TFT schedule of defects and the PJ defect list would be chargeable to the leaseholders. Both parties agreed that Richardson should perform these works in 2014, but Richardson later withdrew. The Applicant insisted on a full external redecoration of all windows and doors, but the Respondent did not agree

16. The Respondent arranged for TRC to perform the TFT schedule of defects and the PJ defect list in 2015, but TRC withdrew
17. The Respondent did not accept liability for the sub-standard works undertaken by ISIS, but nevertheless, as a gesture of goodwill, proposed a financial contribution of £35000 to settle the matter. The Respondent withdrew that offer in 2016 following non-acceptance by the Applicant
18. If the Respondent were deemed liable for any financial contribution, then the cost should be only the extra cost incurred by the leaseholders over and above that which would have been incurred if the 2011 works had been properly executed in their entirety
19. The Respondent did not accept the Applicant's suggestion that the financial contribution by the Respondent should be based on a cash shortfall in the reserve fund
20. The Respondent had considered the quantum of the contribution using three methods, set out on pages 10 and 11 of the Respondent's statement of case
21. Method 1 resulted in a figure of £9265
22. Method 2 resulted in a figure of £18521, including a reduction of 20% "on the basis that 20% of the repairs required would have occurred subsequently to the 2011 works"
23. Method 3 resulted in a figure of £25313, as follows :
 - a. PTL had extracted the costs of making good the TFT schedule of defects and the PJ defect list and localised redecoration
 - b. PTL's costing, after revision to take account of comments by the Applicant, was £18876, as set out in appendix 10 to the Respondent's statement of case
 - c. that figure included additional repairs, inspection and painting costs, and also included all windows and doors rather than those identified in the TFT schedule of defects and the PJ defect list
 - d. the Respondent did not fully agree with the basis of that calculation
 - e. however, the application to the figure of £18876 of Richardson profit and overheads of 10%, section 20 administration fees of 1.75%, and VAT of 20%, resulted in the method 3 figure of £25313, as set out in the PTL defects cost summary analysis at appendix 8 to the Respondent's statement of case, and reproduced as Appendix 1 to this decision
24. The average amount of the three methods produced a figure of £17699. The Respondent's view was that the maximum goodwill gesture by the

Respondent should be £18521, in accordance with method 2, which was based on the fact that that level of contribution provided sufficient funding to cover all repairs being undertaken in the 2017 works, irrespective of whether they were on the TFT schedule of defects or the PJ defect list, or had arisen subsequently to the 2011 works

The Applicant's response 7 April 2017

25. The Applicant favoured a settlement where the exact scope of works which would be paid for by the Respondent and by the leaseholders through the service charge should be defined, and then the parties work out the cost split once the work was complete

26. However, in relation to the Respondent's proposed contribution to the 2017 works, the Applicant's position was that the Respondent should fund rectification of all issues raised in the PJ letter 6 June 2012, the TFT schedule of defects and the PJ defect list, including full redecoration of all locations where timber/paintwork repairs had been identified in those lists. In relation to the Respondent's calculations :
 - a. the Applicant did not agree that the retention balance should be deducted from any settlement; that sum had been retained because the 2011 works had been done badly; no amount of rectification during the 2017 works could alter the fact that the leaseholders had had to live in a building in a shoddy decorative state for five years, and this sum was small compensation for the resultant loss of amenity
 - b. in relation to method 2, the Applicant did not agree that "20% of the repairs would have occurred subsequently to the 2011 works"; the decay present in 2011 had been very old, much of it pre-dating even the refurbishment in 2002; if it had been properly repaired in 2011 there would have been no further decay in those areas for at least ten years, the length of time for which the product would have been guaranteed, if it had been properly applied; the well-seasoned wood, of which the windows and doors were made, decayed very slowly, and there was very little evidence now of further decay in locations not repaired in 2011; the 20% deduction should be removed from the calculation
 - c. in relation to method 3, the Respondent's calculations appeared to be based on only partial redecoration (scenario 1 of the PTL spreadsheet), where the Respondent would contribute to only 20% of the repainting of locations where remedying of defects in the 2011 works would be carried out
 - d. neither method 1 nor method 2 provided a sound basis for placing a value on the defects in the 2011 works
 - e. the Applicant's main concern was that Richardson had seriously underestimated the work involved in undoing the incorrect 2011 works repairs (eg removing every scrap of resin and inappropriately used filler) and redoing those repairs; a competing quote by Mitie Limited had valued the repair costs at more than

three times that quoted by Richardson, while the overall total was only 45% more

- f. the Applicant was also concerned about relying on the prices in Richardson's 2016 quote, as there was no evidence that they would hold their prices or even be able to do the work
- g. the Applicant's analysis of method 3, based on the PTL spreadsheet dated 7 March 2017, was as follows :
 - the Applicant had added costs for all locations included in the TFT schedule of defects and the PJ defects list for which there were no costs in the PTL spreadsheet, in accordance with paragraph 1 of appendix 9 to the Respondent's statement of case
 - the Applicant had added inspection costs for all locations, in accordance with appendix 9 paragraph 2
 - the Applicant had added costs for "poorly executed mortar fillets", in accordance with appendix 9 paragraph 3
 - the Applicant had added PTL's fee (approximately 5%) in accordance with appendix 9 paragraph 4
 - the Applicant had included 80% of the costs associated with the metal steps (appendix 9 paragraph 5); as identified in the PJ letter 6 June 2012, only the railings, not the steps or supporting structure, had primer applied, so that the bulk of this item was attributable to defects in the 2011 works
 - the Applicant had added repairs to damaged glass in accordance with appendix 9 paragraph 6
 - this resulted in total ISIS defect costs of £34624 (with only localised repainting) and £54540 (with full repainting of defect locations), in accordance with the calculation sheet at the end of the Applicant's response dated 7 April 2017, and reproduced as Appendix 2 to this decision

Inspection

27. The Tribunal inspected the Property on the morning of the hearing
28. Also present were Cdr Jeanneret, Mr Simon Arrol (Flat 11), Mr Gilbert, Mr Stuart Bainbridge, Finance Director of Berkeley, and Mr Ian Vetori, Head of Customer Services of Berkeley
29. The Tribunal found the Property to be a two-storey brick-built block, with timber sash windows, and a flat roof, and with the appearance of having been built in the 19th century. The lower floor was partially below ground level
30. There are helpful photographs comprising document 1 attached to the Applicant's statement of case, and plans at the end of the copy lease of Flat 23

31. The parties drew attention to :
- a. the timber door to the communal areas for Flats 12 to 18, with paint peeling, and resin evident about one third of the way up
 - b. the exterior of sash windows, such as Flats 24 and 26 with paint peeling, and such as Flat 23 with some of the sill missing
 - c. the timber door to the communal areas for Flats 19 and 20, with the sill peeling and rotting
 - d. the kitchen window sill of Flat 20, with original wood showing
 - e. a lounge window of Flat 20, with scratching on the glass
 - f. a window sill of Flat 19, with degradation and resin showing

The hearing

32. Attending the hearing were Cdr Jeanneret, Mr Arrol, Mr Gilbert, Mr Bainbridge, Mr Vetori, and Mr Adrian Parker, FRICS, of PTL
33. The parties confirmed that so far as they were aware, all the leases were in materially the same terms as the lease for Flat 23, and that the material provisions, so far as the issues in this application were concerned, were as set out earlier in this decision
34. In answer to questions from the Tribunal, the parties also agreed that :
- a. the substantive issue in this application was payability by the leaseholders of service charges in relation to the 2011 works and the 2017 works for the purposes of sections 18, 19 and 27A of the 1985 Act, and, in particular, whether the 2011 works had been carried out to a reasonable standard
 - b. the Respondent was responsible to the leaseholders under the leases for carrying out the 2011 works and the 2017 works
 - c. the leaseholders were responsible under the leases for paying for those works through the service charges, subject to sections 18, 19 and 27A of the 1985 Act
 - d. the question of the Respondent's "liability" to the leaseholders for breach of contract or negligence by ISIS, HMLA or TFT accordingly was not a question in issue before the Tribunal in this application, in that, although any breaches of contract or negligence by ISIS, HMLA or TFT might have been the reason, or part of the reason, for the 2011 works not having been carried out to a reasonable standard, the only question in issue before the Tribunal in these proceedings was whether, and not why, the 2011 works had, or had not, been carried out to a reasonable standard
 - e. paragraph 2.1, and in particular paragraph 2.1.2, of the eighth schedule to the leases was therefore not relevant to the Tribunal's decision in this application
35. In answer to further questions from the Tribunal, Mr Gilbert accepted that the 2011 works had not been carried out to a reasonable standard to the extent of the matters referred to in the TFT schedule of defects and

the PJ defect list

36. In relation to the additional matters set out under the heading "Outstanding work" on page 4 of the PJ letter 6 June 2012 :
- a. item 1 : spray paint on glass : Cdr Jeanneret accepted that Appendix 2 of the PJ defects list already included this item, so that this was not in fact an additional item
 - b. item 2 : scratched windows :
 - Mr Gilbert said that this item could not be linked with the 2011 works, and was not included in either the TFT schedule of defects or the PJ defect list, which had purported to be comprehensive
 - Cdr Jeanneret said that this item had been raised at the time in a snagging list, which was not before the Tribunal, and in the PJ letter 6 June 2012, soon after the 2011 works; no scratches had been noted before the 2011 works; at page 3.1/18 of the Richardson 2016 quote item 330 included a quote of £720 for this item, comprising £270 for polishing 25 panes, and £450 for replacing 15 panes
 - Mr Gilbert said that the Respondent accepted that some scratches had probably occurred during the 2011 works, but said that it was likely that some had predated the 2011 works; the Respondent offered to apportion 50% of the cost of the figure of £720 in assessing the extent to which the 2011 works had not been carried out to a reasonable standard
 - Crd Jeanneret said that the Applicant would not accept only 50%
 - c. item 3 : loose dirt and sanding dust : Cdr Jeanneret said that the Applicant could not be specific about this item, and would accordingly withdraw it
 - d. item 4 : painting of sashes carried out from the outside without looking properly at the inside : Cdr Jeanneret said that the frames would have to be redecorated anyway, so the Applicant would withdraw this item
 - e. window easing :
 - Cdr Jeanneret said that this was an unfulfilled contractual requirement during the 2011 works which would cause problems during the 2017 works; it was not noted in the TFT schedule of defects and the PJ defect list
 - Mr Gilbert accepted that there might have been issues in this respect when the PJ letter 6 June 2012 was written, but said that he believed that any such issues had been resolved in the meantime, with Berkeley paying the costs of so doing; he was not aware of recent complaints from leaseholders in this respect
 - Mr Parker said that he knew of one stuck window in 2016, which Berkeley had now addressed
 - Cdr Jeanneret confirmed that he was not aware of any service charge items for easing stuck windows; however, he said that he

was aware of some windows which were stuck now, including the upper window in the Flats 19/20 communal area, and one in his own flat which did not have full movement; more than half the Property was tenanted, and sub-tenants did not always complain; the full extent of the number of stuck windows would not be apparent until the 2017 works were undertaken

- Mr Parker said that there was no item for easing stuck windows in the Richardson 2016 quote
- Mr Gilbert said that the Respondent accepted that a small number of windows might need easing, but submitted that it was just as likely that the cause was painting on the inside as painting on the outside during the 2011 works
- Cdr Jeanneret accepted that that might have been possible in respect of lower sashes, but not in respect of upper sashes

37. The Tribunal asked the parties for submissions on how the Tribunal should assess the extent to which the 2011 works had not been carried out to a reasonable standard

38. Cdr Jeanneret said that the Applicant's preferred solution was for the Tribunal to decide which of the 2017 works were works needed to remedy the defects in the 2011 works, and then for the parties to apportion the cost of the 2017 works, between :

- a. the Applicant (through future service charges), in relation to such of the 2017 works as were not works to remedy defects in the 2011 works, and
- b. the Respondent, in relation to such of the 2017 works as were works to remedy defects in the 2011 works, including any defects not so far identified in the 2011 works

39. The Tribunal indicated that it would consider Cdr Jeanneret's preferred solution, but that it was more likely that the Tribunal would conclude that its assessment should be an assessment, in money terms, of the extent to which the 2011 works had not been carried out to a reasonable standard, as such an assessment would achieve a decision on payability of the service charges for the cost of the 2011 works in accordance with section 27A of the 1985 Act

40. The parties agreed that such an assessment should be on the basis of the items of work which should have been done at the time in order to bring the 2011 works up to a reasonable standard, but costed in accordance with the prices in the Richardson 2016 quote

41. PTL had prepared a spreadsheet showing the cost of remedying the defects in the TFT schedule of defects and the PJ defect list. The spreadsheet was at appendix 7 and PTL's analysis was at appendix 8 to the Respondent's statement of case, and reproduced as Appendix 1 to this decision. Cdr Jeanneret's e-mail response dated 14 March 2017 was at appendix 9. PTL's revised spreadsheet, to take account of Cdr Jeanneret's

comments, was at appendix 10. The Respondent had summarised three possible methods of calculating what it described on page 10 of its statement of case as “[The Respondent’s] proposed contribution to 2017 works”, and those three methods, namely method 1, method 2 and method 3, were at pages 10 and 11 of the Respondent’s statement of case

42. Cdr Jeanneret submitted that a pro-rata proportion of PTL’s fees should be payable by the Respondent, because a proportion of PTL’s time in dealing with the 2017 works would be spent sorting out the rectification of the defects in the 2011 works
43. In relation to the painting of the two metal staircases at the Property, Cdr Jeanneret said that this was the last item in the TFT defects list, and was costed at item F at page 3.1/2 of the Richardson 2016 quote as £6855. The paint on the treads had peeled off, and had been redone in 2016, apparently properly, although in the wet. The handrails had been done properly in 2011, but now needed repainting. The underlying structure was apparently alright, despite not being done in accordance with the specification, but now needed repainting
44. Mr Gilbert said that the treads had been redone in 2016 with a “gritty” paint to counter slipperiness, and so had been an enhancement. Mr Parker said that he had assumed that the 2011 contract would be for a non-slip finish, although the specification at page 3 of 11 did not expressly so state. Mr Gilbert said that the specification for paints near the end of the 2011 contract made no mention of non-slip. Cdr Jeanneret said that the difference was in any event only the cost of the “grit”
45. The parties agreed that that work to the treads in 2016 had cost £1248
46. Mr Gilbert said that the treads wore frequently, and the Respondent did not accept the Applicant’s suggestion that this item was not payable by way of service charge
47. Cdr Jeanneret commented on the Respondent’s three methods of calculating the cost of remedying the defects in the 2011 works. He said that the Respondent’s method 1 was based on 2011 prices, and did not cover consequential damage. Method 2 included a 20% reduction, on the basis that 20% of the repairs now required would have occurred subsequently to the 2011 works, which was not accepted. If the 2011 works had been done properly there would have been very little deterioration between 2011 and 2017. Cdr Jeanneret therefore submitted that the proper approach was the Respondent’s method 3, but with modifications
48. Cdr Jeanneret submitted that the cost of putting right the items in the TFT schedule of defects and the PJ defect list would be £34624 (with only localised repainting) to £54540 (with full repainting of defect locations), as set out on page 4 of the Applicant’s response to the Respondent’s

statement of case, and reproduced as Appendix 2 to this decision. £54540 of the service charge for the 2011 works was therefore not payable. The Respondent's figure of £17538 (Appendix 6 to the Respondent's statement of case) was insufficient. Another contractor, Mitie, had quoted £54000, although that quote was not before the Tribunal

49. Mr Parker said that Mitie was a large contractor, and would never price competitively for small jobs like this. Mr Parker said that he had had a huge problem obtaining quotes. Mr Parker said that the Property was a listed building, and that the local conservation officer's view was now firmer than when the 2011 works had been done. The Richardson 2016 quote therefore included costing for the new requirements, as it was unlikely that resin would now be allowed for sills and junctions

50. Cdr Jeanneret submitted that other matters to be taken into account were set out under the heading "ISIS costings" on pages 4 and 5 of the PJ letter 6 June 2012, namely :

a. power and water £280 :

- Cdr Jeanneret said that power and water had been made available, free of charge, but the contractor had never used power or water, and this sum should not have been paid to the contractor
- Mr Gilbert said that the sum included cables and transformers and transferring power and water from the supply to wherever they were needed on site

b. storage compound £1633 :

- Cdr Jeanneret said that :
 - the contractor had not provided a compound
 - the contractor had provided a portable office and toilet, but the specification had stated "no charge", and it had not been on site for the whole period
 - paint had been stored in a cupboard in a communal area
 - this sum should not have been paid to the contractor
- Mr Gilbert said that the contractor had provided what was necessary to do the 2011 works, and the choice of what was necessary was up to the contractor

c. towers (£1920) and cherry pickers (£3634) :

- Cdr Jeanneret said that there had been towers, but no cherry pickers, so the sum of £3634 should not have been paid to the contractor
- Mr Gilbert said that in an e-mail dated 24 April 2014 Cdr Jeanneret had accepted an extra cost of £759 because extra towers had been needed
- Cdr Jeanneret said that the Applicant accepted the extra £759
- Mr Gilbert said that the Respondent did not accept that there should be any deduction in respect of the figure of £3634, because the use of towers involved a greater labour cost

d. overcharge £122.48 :

- Cdr Jeanneret said that said that relevant ISIS works items had been charged at £59103.69, whereas the ISIS quote for those items had been £58981.21
- Mr Gilbert said that there had been a retention of £1472, which had never been paid to ISIS, and had not been included in any service charge payable by the leaseholders, and the £122.48 was therefore effectively included in that retention

51. Mr Gilbert submitted that the Tribunal's decision should not result in the leaseholders receiving a double benefit

52. He said that the cost of remedying the defects in the 2011 works was one thing, but the cost of decoration should not be added, because if the 2011 works had been carried out properly redecoration would now be required in any event

53. The amount charged to the service charge in 2011/2012 in was £61612, so it was illogical to suggest that £54540 was now not payable. The cost of remedying the defects in the 2011 works was now £23000 in accordance with the prices in the Richardson 2016 quote. The Respondent should not be asked to pay more than £18000 as a maximum. The Respondent had offered to contribute £35000 purely in order to settle the matter, but the Applicant had refused that offer, as shown in the exchange of e-mails forming document 21 attached to the Applicant's statement of case. The £35000 offer figure was very similar to Cdr Jeanneret's figure of £34624 (with only localised repainting)

54. The retention of £1472, less the £122.48, should be deducted from any award, as it had never been paid, either by the Respondent to ISIS, or by the leaseholders to the Respondent through the service charge

55. Cdr Jeanneret said that the Applicant wanted the Respondent to fund the rectification of the defects in the 2011 works by deduction from the cost of the 2017 works

56. In relation to the Applicant's claim under section 20C of the 1985 Act, Mr Gilbert said that the Respondent would not be claiming its costs in these proceedings from the leaseholders. The Tribunal indicated that it would make an order under section 20C accordingly

The Tribunal's findings

57. The Tribunal makes the following findings

58. The nature of this application

59. The Tribunal notes that in documents before the hearing the parties were using expressions such as "liability", "financial contribution [to the 2017

works]”, “award”, and “settlement”, and that the parties appear to have approached the issues in this application as if it were a court case involving claims for breach of contract or negligence

60. However, the Tribunal reminds itself that the substantive issue in this application is payability by the leaseholders of service charges in relation to the 2011 works and the 2017 works for the purposes of sections 18, 19 and 27A of the 1985 Act, and, in particular, whether the 2011 works were carried out to a reasonable standard

61. The standard of the 2011 works

62. The Tribunal finds that the parties have agreed that many items of the 2011 works were not carried out to a reasonable standard, and that those agreed items are set out in the TFT schedule of defects and the PJ defects list

63. The Applicant has also claimed that certain other items in the 2011 contract were not carried out to a reasonable standard, or were not carried out at all, and the Tribunal makes the following findings about those items

64. Damaged glass repair £720 :

- a. Cdr Jeanneret has given evidence that no scratches had been noticed before the 2011 works
- b. Mr Gilbert says that it is accepted that some scratches had probably occurred during the 2011 works, but that some had probably predated the 2011 works
- c. in the absence of more positive evidence, and doing the best it can, the Tribunal finds, on a balance of probabilities, that :
 - it is more likely than not :
 - that some scratches did indeed occur during the course of the 2011 works, in light of the fact that many of the items of the 2011 works were not carried out to a reasonable standard
 - but that some did occur before those works, in light of the age of the building
 - it would therefore be reasonable in all the circumstances to assess the proportion of scratches occurring the 2011 works as 50% of the total number of scratches

65. Window easing :

- a. the Tribunal finds that there is insufficient evidence before it at the moment to make an assessment in this respect
- b. this is therefore one of the items of possible further defects in the 2011 works referred to under the heading “Possible further defects” later in this decision

66. Power and water £280 :

- a. Cdr Jeanneret has given evidence that power and water had been made available to ISIS, free of charge
- b. although Mr Gilbert has said that the sum included cables and transformers and transferring power and water from the supply to wherever they were needed on site, there is no independent evidence before the Tribunal to that extent, such as contemporary correspondence between ISIS and the Respondent, or those acting for the Respondent, to explain why the figure of £280 has been inserted by this item in the 2011 contract
- c. having taken all the circumstances into account, the Tribunal is not persuaded, on a balance of probabilities, that this sum is payable by way of service charge

67. Storage compound £1633 :

- a. Cdr Jeanneret has given evidence that ISIS did not provide a compound, but provided a portable office and toilet, for which the specification had stated “no charge”, and that paint had been stored in a cupboard in a communal area
- b. Mr Gilbert has suggested that ISIS had provided what was necessary to do the works, and that the choice of what was necessary was up to the contractor
- c. However, the Tribunal finds that :
 - the Tribunal accepts Cdr Jeanneret’s unchallenged evidence that ISIS did not provide a storage compound
 - it is not reasonable for the service charge to include a charge for ISIS providing a compound when it did not do so
 - in the absence of contemporary evidence of an agreed variation of the 2011 contract in that respect, it is not reasonable to include in the service charge a charge for ISIS to “provide what was necessary to do the works” in some other way, let alone the same charge for doing so as the contracted sum for providing a compound
- d. having taken all the circumstances into account, the Tribunal is not persuaded, on a balance of probabilities, that this sum is payable by way of service charge

68. Cherry pickers £3634

- a. the Tribunal accepts Cdr Jeanneret’s unchallenged evidence that ISIS did not provide a cherry picker
- b. the Tribunal also accepts Mr Gilbert’s unchallenged evidence that ISIS had provided extra towers at an extra cost of £759, and the Tribunal notes Cdr Jeanneret’s acceptance of that extra cost
- c. Mr Gilbert has suggested that the whole of the cost of £3634 should be payable by way of service charge because the use of towers involved a greater labour cost
- d. however, the Tribunal finds that :
 - it is not reasonable for the service charge to include a charge for

ISIS providing cherry pickers when it did not do so

- in the absence of contemporary evidence of an agreed variation of the 2011 contract in that respect, it is not reasonable to include in the service charge a charge for unspecified and uncosted extra labour, let alone the same charge for doing so as the contracted sum for providing cherry pickers
- e. having taken all the circumstances into account, the Tribunal :
 - is not persuaded, on a balance of probabilities, that the sum of £3634 is payable by way of service charge
 - finds that, by agreement between the parties, the sum of £759 should be included in the service charge for extra towers

69. Assessing the extent to which the 2011 works were not carried out to a reasonable standard, or were not carried out at all, and the payability of service charges in each respect

70. The Tribunal finds, as indicated at the hearing, that its assessment should be an assessment, in money terms, of the extent to which the 2011 works had not been carried out to a reasonable standard, as such an assessment will achieve a decision on payability of the service charges for the cost of the 2011 works in accordance with section 27A of the 1985 Act
71. The parties have agreed that such an assessment should be on the basis of the items of work which should have been done at the time in order to bring the 2011 works up to a reasonable standard, but costed in accordance with the prices in the Richardson 2016 quote
72. The Tribunal has considered all the methods of calculation put forward by each party, but makes the following findings :
- a. none of the Respondent's methods 1, 2 or 3 adequately take into account all the defects in the 2011 works which the parties have agreed, or the Tribunal has found, nor do they adequately assess in money terms the extent to which the 2011 works had not been carried out to a reasonable standard; for example, none of them includes the addition of PTL fees, which the Tribunal finds to be a reasonable addition when making the assessment
 - b. the Applicant's scenario 2 includes repainting throughout, whereas, as the Tribunal finds, if the defects in the 2011 works had been rectified immediately at the time, it is more likely than not that only localised repainting would have been necessary
 - c. the Tribunal therefore adopts the Applicant's scenario 1, reproduced as Appendix 2 to this decision, as the Tribunal's starting point for the assessment
73. Two items in the Applicant's scenario 1 were the subject of evidence and submissions at the hearing, and it is convenient to deal with those two items now

74. Damaged glass repair £720

75. In accordance with the Tribunal's findings earlier in this decision, the Tribunal assesses the proportion of scratches occurring the 2011 works as 50% of the total number of scratches, and finds that only £360 of this sum is not payable by way of service charge

76. Metal steps £5484

77. Cdr Jeanneret explained at the hearing that this item in the Applicant's scenario 1 represented 80% of the price of £6855 in the Richardson 2016 quote, on the basis that the treads had not been done properly in 2011, and had been redone in 2016 at a cost of £1248, that the handrails had been done properly in 2011 but now needed repainting, and that the underlying structure appeared to be alright, despite not being done in accordance with the 2011 contract, but now needed repainting

78. Mr Gilbert said that the treads wore quickly, that the work done in 2016 had been an enhancement, and that the Respondent did not accept that this item was not payable by way of service charge

79. However, the Tribunal finds that :

- a. the 2011 works in respect of this item were not wholly carried out to a reasonable standard
- b. taking into account Cdr Jeanneret's concession that some of the work was carried out to a reasonable standard in 2011, and that work to the treads was carried out in 2016 at a cost of £1248, the proportion of 80% of the total figure of £6855 is a reasonable proportion in the assessment of the extent to which the 2011 works in respect of this item were not carried out to a reasonable standard
- c. the sum of £5484 is accordingly not payable by way of service charge in this respect, as set out in the Applicant's scenario 1

80. Summary of the Tribunal's assessment of the extent to which the 2011 works were not carried out to a reasonable standard

81. The Tribunal finds that the total sum of £40828 is not payable by way of service charge, made up as follows :

| | |
|--|--------|
| The net costs of the items in the Applicant's scenario 1 | £24714 |
| Less 50 % damaged glass repair | £360 |
| | £24354 |
| Add | |
| Power and water | £280 |
| Compound | £1633 |
| Cherry pickers | £3634 |

| | | |
|---------------------------------------|------|--------|
| Less extra towers | £759 | £2875 |
| | | £29142 |
| Profit and overheads @ 10% of £29142 | | £2914 |
| Administration fees @ 1.75% of £29142 | | £510 |
| PTL fees @ 5% of £29142 | | £1457 |
| | | £34023 |
| VAT @ 20 % of £34023 | | £6805 |
| Total | | £40828 |

82. Retention of £1472 and overcharge of £122.48

83. The Applicant has included these items in this application for determination by the Tribunal

84. The Tribunal finds that :

- a. this application, as already noted, relates to the payability of service charges
- b. by definition, the Respondent did not pay the retention to ISIS at the time of the payment for the 2011 works, and Mr Gilbert says that it has never been paid
- c. the retention sum should not therefore have been included in any past service charge, and should not be included in any future service charge unless, and until, the sum is paid by the Respondent to ISIS
- d. however, if it has in fact been included in a service charge, then it was not payable by way of service charge
- e. the overcharge of £122.48, being less than the retention, falls to be dealt with as part of, and in the same way as, the retention

85. The 2017 works

86. In the absence of any evidence or submissions to the contrary, the Tribunal finds that the 2017 works, and the budgeted cost as set out in the Richardson 2016 quote, are reasonable

87. Possible further defects

88. The Applicant has expressed concern about whether further, previously unknown, matters will be discovered during the course of the 2017 works, and which can be proved to be further defects in the 2011 works. The extent, if any, to which windows will need to be eased as a result of such defects, is an example, as noted earlier in this decision

89. If any further such defects are in fact discovered, then the Tribunal hopes that the parties, using the principles set out in this decision as a guide, will be able to agree the extent to which any further sums are not payable by way of service charge in relation to the 2011 works. However, in the

absence of agreement, it will be open to the Applicant to make a further application to the Tribunal in relation to the payability of service charges relating to those further such defects

Section 20C of the 1985 Act

90. In light of the concession made at the hearing on behalf of the Respondent, the Tribunal orders that none of the costs incurred, or to be incurred, by the Respondent in connection with these proceedings are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the leaseholders

Appeals

91. A person wishing to appeal against this decision 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

92. 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

93. 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 admit the application for permission to appeal

94. 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 which the person is seeking

Dated 26 May 2017

.....
Judge P R Boardman



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

Case Reference : CHI/24UF/LSC/2016/0107

Property : 9-35 The Officers Quarters, Weevil Lane, Gosport, PO12 1AG

Applicant : The Leaseholders Association
Royal Clarence Yard (West)
Phase A

Respondent : Royal Clarence Yard (Phase A) Ltd

Type of Application : Service Charges : Sections 27A and
20C of the Landlord and Tenant Act
1985 ("the 1985 Act")

Tribunal Members : Judge P R Boardman (Chairman) and
Mr S D Barnden MRICS

**Appendix 1
PTL defects cost analysis summary**

PTL cost analysis summary including overhead, profit and VAT

| | Issued 7 Mar 2017 Per Appx 7 | Issued 20 Mar 2017 Per Appx 10 | Variance |
|--|------------------------------------|--------------------------------------|-----------------|
| Repairs (excludes inspection costs) | £ 4,445 | £ 7,537 | £ 3,092 |
| Inspection costs | £ 1,456 | £ - | -£ 1,456 |
| Painting | £ 3,202 | £ 4,336 | £ 1,134 |
| Inspect each cill and round off edge (141 no.) | £ 282 | £ 282 | £ - |
| Remove and renew full length of defective glazing bars (10 no.) | £ 230 | £ 230 | £ - |
| Extra over for removing and renew 1000 mm lengths of defective staff bead (20 no.) | £ 730 | £ 730 | £ - |
| | | | |
| Making good cracking to upper face of ground floor window cill and cracking and flaking to front face of cill (10 no.) | £ 160 | £ 160 | £ - |
| Other Repairs | £ - | £ 5,601 | £ 5,601 |
| PTL Sub-Total | £ 10,505 | £ 18,876 | £ 8,371 |
| | | | |
| Profit & Overheads (@ 10%) | £ 1,051 | £ 1,888 | £ 837 |
| | £ 11,556 | £ 20,764 | £ 9,208 |
| S.20 Notice - Admin Fees (1.75% net tender price) | £ 184 | £ 330 | £ 146 |
| Sub-Total | £ 11,740 | £ 21,094 | £ 9,354 |
| VAT | £ 2,348 | £ 4,219 | £ 1,871 |
| Total Isis Defects Costs | £ 14,088 | £ 25,313 | £ 11,225 |

Note: repairs per TFT Defect List and PJ Defect List and localised painting only



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

Case Reference : CHI/24UF/LSC/2016/0107

Property : 9-35 The Officers Quarters, Weevil Lane, Gosport, PO12 1AG

Applicant : The Leaseholders Association
Royal Clarence Yard (West)
Phase A

Respondent : Royal Clarence Yard (Phase A) Ltd

Type of Application : Service Charges : Sections 27A and
20C of the Landlord and Tenant Act
1985 (“the 1985 Act”)

Tribunal Members : Judge P R Boardman (Chairman) and
Mr S D Barnden MRICS

Appendix 2
Applicant’s defects cost calculation sheet

Isis Defect costs - extracted from Richardson's 2016 tender by Adrian Parker
 Recalculation having included missing windows

| | <u>Column</u> | <u>Scenario 1</u> | <u>Scenario 2</u> |
|--|------------------|----------------------------|----------------------------|
| Repairs (excludes inspection costs) | D to L - E | £4,959 | £4,959 |
| Inspection: All 141 locations included here at £10 (140A) + £2 (140B) + £2 (140D) | E | £1,974 | £1,974 |
| Painting | P or N | £3,554 | £17,769 |
| Inspect each cill and round off edge (141 no.) | D179 | £282 | £282 |
| Remove and renew full length of defective glazing bars (10 no.) | D181 | £230 | £230 |
| Extra over for removing and renew 1000 mm lengths of defective staff bead (20 no.) | D182 | £730 | £730 |
| Making good cracking to upper face of ground floor window cill and cracking and flaking to front face of cill (10 no.) | D183 | £160 | £160 |
| Damaged Glass Repair - Tender 330 A & B | | £720 | £720 |
| Poorly executed mortar repairs - Tender 140C + 140E | | £1,020 | £1,020 |
| Metal Steps x 80% | | £5,484 | £5,484 |
| | PC less D179-183 | £5,601 | £5,601 |
| | | <hr/> | <hr/> |
| | | £24,714 | £38,929 |
| Profit & Overheads (@ 10%) | | £2,471 | £3,893 |
| | | <hr/> | <hr/> |
| | | £27,185 | £42,822 |
| S.20 Notice - Admin Fees (1.75% of net tender price) + PTL 5% | | £1,668 | £2,628 |
| Sub-Total | | £28,853 | £45,450 |
| VAT | | £5,771 | £9,090 |
| Total Isis Defects Costs | | <hr/> £34,624 <hr/> | <hr/> £54,540 <hr/> |