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

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| **Case Reference** | **:** | **CHI/00HP/LSC/2022/0002** |
| **Property** | **:** | **12 Ribbonwood Heights, Blair Avenue, Poole, Dorset BH14 0DE** |
| **Applicant** | **:** | **Mr J Conway** |
| **Representative** | **:** | |
| **Respondent** | **:** | **Ribbonwood Heights Management Co Ltd** |
| **Representative** | **:** | **Burns Hamilton** |
| **Type of Application** | **:** | **s27A and s20C Landlord and Tenant Act 1985; Schedule 11 paras 1 and 5 Commonhold and Leasehold Reform Act 2002** |
| **Tribunal** | **:** | **Judge F J Silverman MA LLM**<br>**Mr R Brown FRICS** |
| **Date of paper Consideration** | **:** | **12 July 2022.** |
| **Date of Decision** | **:** | **12 July 2022.** |

**DECISION AND ORDER**

1. **Since no challenge was made by the Applicant to the reasonableness of the service charges forming part of this application, the Tribunal was unable to consider those items and makes no determination in respect of them.**
2. **The Tribunal determines that the obligation to repair the balconies to the individual flats falls within the landlord's remit as part of the structure and exterior and that reimbursement for the reasonable costs of those repairs lies collectively with the tenants under their respective service charge obligations contained in the lease.**
3. **The Tribunal makes no order under s20C Landlord and Tenant Act 1985 or Schedule 11 para 5 Commonhold and Leasehold Reform Act 2002.**

**This has been a remote consideration on the papers which has been consented to by the parties. The form of remote hearing was P:REMOTE. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents to which the Tribunal was referred are contained in an electronic bundle the contents of which are referred to below. The orders made in these proceedings are described above.**

**REASONS**

1 The Applicant is the leaseholder of 12 Ribbonwood Heights Blair Road Poole Dorset BH14 0DE (the property) which is a two bedroom flat forming part of a modern block of twenty similar apartments in a residential area of Poole. The Respondent is the managing agent of the property.

2 The hearing took place as a paper consideration to which the parties had previously consented.

3 In accordance with current Practice Directions relating to Covid 19 the Tribunal did not make a physical inspection of the property but was able to obtain an overview of its exterior and location via GPS software. Photographs and diagrams of the property were also included in the electronic hearing bundle.

4 The Applicant holds the property under an extended lease dated 22 June 2018 which incorporates the description of the property and all the covenants from the original lease dated 28 September 2001 which was made between Gregory Rodney Taylor and Nadine Marie Marchant (1) Ribbonwood Heights Management Company Limited (2) John Douglas Conway, Helen Louise Burtenshaw, David Edward Conway

and Michael John Conway (3) for a term of years 99 year (less 10 days) from 25 March 2000 and registered at HM Land Registry under title number DT290661.

5 Directions in this case were issued on 11 March 2022.

6 The Applicant's application asked the Tribunal to make a determination relating to service charges for the years 2010-2020/21 . A request for orders under s20C Landlord and Tenant Act 1985 and Sched 11 Commonhold and Leasehold Reform Act 2002 was added later.

7 The Applicant did not challenge any individual items in any of the service charge years listed, no accounts, invoices or demands were exhibited and no witness statement addressed any issue which would give rise to a s27A determination on reasonableness. For that reason the Tribunal has been unable to make such a determination in this case.

8 No submissions were made relating to the associated claims under s20C Landlord and Tenant Act 1985 and Sched 11 Commonhold and Leasehold Reform Act 2002 and the Tribunal sees no justification for making orders under either of those provisions.

9 The main issue in this case centres round the liability to pay for the repairs to a small number of balconies which had been affected by water ingress. As an associated but subsidiary argument it was suggested that in some cases the Respondent's method of curing the damp had amounted to an improvement rather than a repair and thus the cost would not be recoverable under the terms of the landlord's repairing covenant contained in the lease.

10 The wording of the lease and lease plans as incorporated without amendment into the extended lease is potentially ambiguous in the way in which the demised property and the reserved property are described. The plans of the property (pages 140-146) show the balcony as being included in the demise (shown in a two dimensional diagram) whereas the wording of the lease states that the structure and exterior are 'reserved property' within the ownership of the landlord and included within the scope of the tenants' liability to pay service charges.

11 The Applicant argues that the ambiguity should be construed in the tenants' favour and thus, as a tenant he should not be required to make a contribution to the cost of repair to balconies belonging to other flats. He also wanted a variation of the lease to clarify the situation but has not brought an application to that effect and therefore the Tribunal is not able to consider making such a determination.

12 Neither party cited any legal arguments to support their views. Advice from a surveyor and an unnamed solicitor were included but were not supported by witness statements.

13 Having read the lease and the statements made by each party the Tribunal understands that the balconies are made of concrete slabs and are attached to the main structure of the building. The top surface of each balcony is tiled. Some but not all balconies were constructed with a water repellent membrane inserted in the substrate of the balcony structure.

14 The Tribunal's previous experience is that it is usual in cases similar to this one for the structure of the balcony to be considered to be part of the structure and exterior of the property and thus the responsibility

for its upkeep and repair would fall to the landlord. The top surface of the balcony would be considered to be part of the demised premises belonging to the tenant who could change or replace the tiled top surface at will and would bear the responsibility of repairing the same. It is very likely that the balconies in the present case would match this scenario.

15 That distinction between the top surface and substrate would appear to be particularly relevant in the instant case where the cause of the water ingress is said to have stemmed from a waterproof membrane (or in some cases the lack of a membrane) which lies between the tiled top surface and the concrete slab underneath.

16 Repair or renewal of the membrane on the under-surface of the balcony would not be possible without disturbing the top surface therefore whoever repairs the sub-strate would be required to remedy any damage to the top surface caused in the course of the repairs being made to the lower surfaces.

17 The alternative solution i.e. whereby each tenant owns the entirety of their balcony including the concrete slab, with consequent repairing liability would create a wholly unsatisfactory situation where a tenant's neglect to repair their own balcony could result in major structural damage to the entire building and a physical danger of falling masonry to other tenants and visitors. The Tribunal rejects this solution as unrealistic and unworkable in practice. The only plausible answer to the question of ownership must be as set out in paragraph 14 above.

18 The secondary issue relating to the balconies was raised in connection with the repairing covenant in the lease (clause1.4 page 157) which requires the landlord to keep the property 'in good and tenantable repair *including* renewal and replacement' (italics added). The Applicant argued that the installation of a waterproof membrane where none had existed before (as opposed to replacing an existing but damaged membrane) was not permitted by the wording of this covenant. No legal arguments were put forward by either party in relation to this submission. The Applicant may have misconstrued the wording of the covenant which allows renewal and replacement to be included i.e. as part of the repair process, but is not limited to those methods. In the Tribunal's experience there are many examples (such as the installation of double glazing in place of single glazed windows) where a repair incidentally brings about an improvement but on the facts of the case still constitutes a repair within the scope of the particular lease covenant. It is likely that the same result would ensue in the present case.

19 In summary, the Tribunal considers on balance, and applying a conventional construction of the wording of the lease in conjunction with the factual matrix, that the landlord in drafting the lease, would have intended the 'structure and exterior' to include the structure of the balconies to each flat. These would then lie within the responsibility of the landlord for repair save as to the top surface of each balcony which belongs to and is part of each individual demise. Further, the Tribunal considers that the repair of a balcony by the insertion of a waterproof membrane, even where such was not originally present, would

constitute a repair and not an improvement within the scope of the landlord's covenant in the lease.

20 **The Law**

**Landlord and Tenant Act 1985 (as amended)**

**Section 18**

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

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

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

**Section 19**

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

**Section 27A**

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,
   (d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

**Section 20**

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
(a) if relevant costs incurred under the agreement exceed an appropriate amount, or

(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

**Section 20B**

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

**Section 20C**

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration 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 tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Judge F J Silverman as Chairman
**Date 12 July 2022**

**RIGHTS OF APPEAL**

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk.
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.