FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	LON/00AY/LSC/2021/0171
Property	:	FLAT 3, 47 CLAPHAM COMMON NORTHSIDE, LONDON, SW4 0AA
Applicant	:	47 NORTHSIDE LIMITED
Representative	:	Ms Muir
Respondent	:	MARGARET GILLIAN PHILIPPA O'NEILL AND DAVID CHRISTOPHER WYATT
Representative	:	Ms Ziya
Type of Application	:	Determination as to reasonableness and payability of service charges
Tribunal Members	:	Judge Jim Shepherd Rachael Kershaw MCIEH
Date of Determination	**:**	14th March 2022

1. In this case the Applicants are seeking a determination pursuant to s 27 A Landlord and Tenant Act 1985 as to the reasonableness and payability of the service charges they seek from the Respondents for the period 2017-2021.

Background

2. The Applicants are the freehold owners of 47 Clapham Common Northside ("the premises") and the shareholders are the leaseholders. The premises contains 8 flats, is Grade II listed and in a conservation area. The Respondents are the leasehold owners of Flat 3. They like the other leaseholders have a 999 year lease.

3. The Respondents have accrued substantial service charge arrears (£64000 at the date of the hearing). They have not paid service charges since December 2019.

4. For their part the Respondents allege that the Applicants have failed to comply with their maintenance obligations. In particular their arguments were focussed on the allegation that a beam called a Bressumer beam is unsafe and that works carried out at the premises were unlawful because listed building consent had not been obtained when it should have been. For these reasons and others, they have chosen to withhold their service charge which the Applicants say has hampered their ability to carry out works at the premises. The circularity of these arguments cannot be ignored. In many contexts withholding of rent or service charges can be used as a means of forcing a landlord to carry out works which they are obliged to do under the lease. In the present case the leaseholders themselves perform the role of landlord. The premises are effectively self - funded. There is no ability to fund works for which funding has not been raised from the leaseholders. In this context the Respondents' complaints about the alleged failure to carry out works are difficult to justify where they are complicit by failing to pay their service charge. In truth however the Respondents don't really complain about a failure to carry out works which are essential. They complain about a failure to carry out works which they regard as essential. The distinction is marked particularly in the context of a self -funded service charge.

The Lease Terms

5. Under the terms of the Lease the Respondents are required to pay 1/7th of the Total Expenditure as defined in the Fifth Schedule of the Lease [23]. Under Clause 4 (4) of the Lease the Respondents covenanted to

   Pay the Interim Charge and the Service Charge at the times and in the manner provided in the Fifth Schedule with both such charges being recoverable in default as rent in arrear

6. The "Interim Charge" is defined at paragraph 1(3) of the Fifth Schedule as:

   "such reasonable sum to be paid on account of the Service Charge in respect of each Accounting Period as the Lessor or is Managing Agents shall specify at their discretion to be a fair and reasonable interim payment in accordance with the provisions of the Housing Act 1980 so long as the same may be in force".

7. The "Service Charge" means "*such fraction of the Total Expenditure as is specified in Paragraph 7 of the Particulars*" – Para 1(2) of the Fifth Schedule.

8. The "Total Expenditure" means:
   "*the total expenditure incurred by the Lessor in any Accounting Period in carrying out their obligations under Clause 5(5) of this Lease and any other costs and expenses reasonably and properly incurred in connection with the Building including without prejudice to the generality of the foregoing (a) the reasonable cost of employing Managing Agents (b) the proper cost of any Accountant or Surveyor employed to determine the Total Expenditure and the amount payable by the Lessee hereunder".*
9. The Landlords' obligations are contained in Clause 5 of the Lease and include the usual duties to repair, maintain and insure the Building. Clause 5(5)(l) [44] provides that the Landlord is:

   "(l) To set aside (which setting aside shall for the purposes of the Fifth Schedule hereto be deemed to be an item of expenditure of the Lessor) in a bank or building society trust account earning interest such sums of money

as the Lessor shall reasonably expect to incur of replacing maintaining and renewing those items which the Lessor has hereby covenanted to replace maintain or renew and which are not normal annual expenditure".

The Relevant Law

10. Under s. 19 of the Landlord and Tenant Act 1985:

"(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 provision 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. . . ."

The Issues

11. The Scott Schedule in this case ran to 110 pages because the Respondents challenge was wide and scattergun. In reality the main challenges were based on the alleged need for the Bressummer beam and the alleged unlawful works. These items dominated the majority of the time in the hearing which lasted 2 days.

The hearing

12. The hearing took place over two separate days. The parties had failed to notify the court that a second day would be required. Their respective solicitors would be advised to ensure that the Tribunal is kept up to date with changes in a case time estimate in the future. Cases frequently develop over time. It is

not for the Tribunal to anticipate changes to the time estimate. It was plain at the start of this hearing that one day was not going to be sufficient.

13. Ms Muir represented the Applicants and Ms Ziya the Respondents. Both are experienced Counsel and the Tribunal records its gratitude for their contribution in making the hearing structured and well organised. Ms Muir rightly took issue with the fact that the Respondents' case had changed somewhat with Ms Ziya's appointment. This is not unusual. The Respondents are not legally trained and their responses prior to Ms Ziya's appointment reflected this. Ms Ziya made some sense out of the case and submitted a detailed skeleton argument. It was clear the Respondents' case had expanded. At the commencement of the hearing the Tribunal spent time clarifying which issues it would deal with and which it would not. These were recorded in Ms Muir's skeleton argument together with challenges to the reserve fund and remedial works to the basement of the premises.

The Bressummer Beam

14. The Bressumer is a large timber or two adjacent timbers that brickwork is built up off of. These timbers sit in the external wall either side of the bay and often have very little covering to the external elements. The Respondents alleged that the Bressumer is unsafe. They relied on a report by a structural surveyor in April 2015 Mr Vashee who was appointed by them. He recommended an investigation of the timbers to determine if there was any decay or rot. In response to this the Applicants arranged for the beam to be surveyed on various occasions. In March 2016, a survey from Baker & Joiner Ltd reported that the bressummer appeared to be in good condition and free of decay. A further survey by AEC on 17th April 2016 found that the bressummer was sound and did not require replacement. Mr Vashee then provided an addendum Report after he was supplied with the reports commissioned by the Applicants. He didn't comment specifically on the beam but stated the following:

It is clear from my various inspections and review of the specialist reports, that the bay roof needs re-roofing with a new structure and new replacement roof covering, with appropriate lead flashing and details agreed with the Local Authority. 4.2 The Structural Cracks to the brick façade and below the bay roof needs remedial works. We recommend that proper details and methodology agreed with a specification and scope of works. 4.3 The 3 x reports prepared by the specialists are not conclusive as they have not inspected the internal parts of the flat. They will need to revisit and undertake appropriate and invasive investigations and explorations and provide their findings and recommendations to be progressed with a holistic and strategic approach.

15. The Applicants then arranged a further inspection as part of major works in 2019 by James Halldron Associates. The Applicants invited the Respondents to instruct their expert to attend a joint inspection. Mr Vashee did not attend. This is frankly remarkable. This was surely the opportunity to arrive at a consensus opinion. Such a consensus would have broken the deadlock that exists and the Respondents would then possibly have paid the withheld service charges. The opportunity was spurned.

16. The Halldron report started by stating the following:

I can confirm that I inspected the property on Tuesday 7th July 2020, gaining access to the roof of the bay window structure via the pre-erected scaffold and was accompanied by Mr Lea Spearmen and the building contractor who exposed the roof covering to permit observations of the concealed structures. I also confirm having been supplied with historical photographs by Mr Spearman taken during previous inspections which included internal images of the bay window.

17. Further:

Access to the said structures was provided via a scaffold to the left half of the front elevation to enable direct access to the structures via removal of part of the bay window roof structure. Plates 1 to 5 Illustrate the upper bay external features and noticeable existing defects and the access created through the roof covering permitting observation of the concealed support arrangements to the main external wall over the internal opening.

18. The report concluded:

The external wall elevation above the internal bay window ceiling level which includes historic style traditional support features in the form of composite arch and timber beam structures. Earlier photographs taken during the bay window strip out, indicate an additional timber beam structure supported by the projecting walls of the bay window which in turn provides support only to the bay roof structure. Cracks observed adjacent to the end bearings of both the internal beam and the arch (as observed beneath the bay roof structure) indicate some historically based inadequacy of these structures, but with the cracks being of limited form, it is considered that such evidence of movement is largely non-progressive. It is, however, recommended that the opportunity to further examine the timber beam portion of the composite structure at some point in the future, both first by non-destructive means, checking the deflection in the beam, and later during the next decoration cycle Future monitoring has also been recommended.

19. Ms Ziya said that Mr Vashee was the only surveyor who had been provided with full access to view the Bresumer. Her clients said that they were willing to pay for all of the works if the beam was attended to. They said repeatedly that the works carried out by the Applicants were illegal because Listed Building Consent had not been obtained. Ms Muir said that the beam had been inspected on several occasions and the conclusion was that it was stable. No charges had been made in relation to the beam aside of professional fees the sole issue being that the Respondents considered it unsafe and were withholding service charges for this reason. Ms Zia said that the Bressumer issue went to the incorrect prioritisation of works. She said the beam had been

concealed when all of the inspections save for Mr Vashee's had been done. Ms Muir countered this by stating that Baker and Joiner had lifted the tarpaulin covering to inspect the beam.

20. The Bressumer issue was something of a red herring in terms of the Tribunal's function. It did not affect the Respondent's service charge and they had not brought a counterclaim in relation to it, neither it seems had they sought an injunction in the County Court requiring the Applicants to attend to the urgent works which they considered were necessary. The Applicants had commissioned surveyors who carried out surveys some of which were detailed. The surveys concluded that the beam was not unsafe. Despite this the Respondent's remain unhappy and have withheld service charges. This conduct was unjustified. It is for the Applicants as landlords to decide what works are necessary. They had decided as they were entitled to that the beam was safe. As far as the Tribunal is concerned that is the end of the matter.

Cleaning and gardening

21. The Respondents challenged the increase in cleaning and gardening costs over the years in question. The Applicants said that this was as result of a change of suppliers in 2018 with respect to the cleaning. Also the cleaning was carried out more thoroughly. The gardening was previously done by a resident but now a contractor was employed. The Respondents failed to provide any comparables and the quoted figures appeared entirely reasonable. The sums are allowed in full.

Receipts and invoices

22. The Respondents were refusing to pay unless they received relevant invoices and receipts. Even if the Tribunal accepted that the Respondents had made requests for particular invoices and receipts and they had not been provided the Tribunal adopts the approach endorsed by the Upper Tribunal in

Enterprise Home Developments LLP v Adam [2020] UKUT 151 (LC) and find that the overall sums claimed are reasonable.

Change of door lock

23. The Respondents allege that the door lock replaced on the main door in August 2017 was not required. The works actually involved replacement with a temporary lock and then a new Banham lock being fitted. These works are entirely reasonable and necessary. The sums are payable in full.

Lift works

24. The Respondents alleged that maintenance works to the lift were unnecessary and it was uneconomic to have a lift. The lift is to be refurbished and S.20 notices had been served. The suggestion that a building with 90 steps can function without a lift is rejected. Ms Ziya said that the lift had been out of service for four years and costs were still being incurred including electricity costs. The lift works had been deprioritised below the major works she said. The Respondents' arguments in relation to the lift were confused and contradictory. The lift needs to be refurbished and the projected costs of this are reasonable.

Insurance

25. The Respondents again failed to substantiate the challenge to the increase in insurance costs by supplying comparables. They said that they should not have to pay towards insurance because there has been a lack of maintenance and the cost of works to the bay window were not recoverable under the insurance policy in 2015/2016. The Bressumer beam issue is dealt with above. The Tribunal does not accept that the Respondents were entitled to withhold sums including sums for the insurance premium for a building which needs to be insured based on unsubstantiated concern about the safety of a beam. The Applicants did not claim on the insurance in relation to a leak into flat 3 because the works had to be carried out urgently. This was entirely

reasonable. The Respondents allegations about the alleged illegal roof terrace in one of the other flats having an effect on the insurance was unsubstantiated. The Respondents challenged the Directors and Officers' insurance but this is an accepted charge and is recoverable under the lease. All insurance costs are recoverable in full.

Management fees

26. The Respondents made an unsubstantiated allegation that Mr England one of the Applicants' directors was too closely associated with the agents, Mainstay. They also made a number of serious allegations of criminal conduct by Mr England who was not at the hearing to defend himself. In any event Mainstay were replaced by Wilmotts who are a well-known managing agent. The Respondents had provided an alternative quote from Warwick Estates but their fees were broadly comparable to Mainstay's. The charges are payable in full.

Professional fees

27. The Respondents object to the payment of various professional fees including £600 in relation to the lift that they think should be decomissioned; £480 for an aerial survey that they haven't seen; fees in relation to the beam issue and an inspection of a leak into flat 3. None of the objections are justified. The professional fees incurred were all reasonable and the sums are payable in full.

Asbestos survey

28. The Respondents said that a second asbestos survey was not necessary. It was entirely reasonable for Wilmotts to conduct a further asbestos survey when they took over the management of the building. The sums are payable in full.

Reserve fund

29. The Applicants had claimed various sums for the reserve fund including £28700 in 2017 for the general reserve, £50000 for major works and £55000 for the lift reserve in 2018. In lights of the cost of the major works and lift refurbishment these sums were reasonable.

Works to the basement

30. It was argued by Ms Ziya that these works should have required a further consultation as they were separate from the major works being carried out. Ms Muir said that the works were covered by contingencies in the main contract and any reasonable landlord would have done them on discovery. On balance the Tribunal considers that this is correct. Were we to decide that the basement works were not covered by the original consultation the Applicants would make an application for dispensation which would likely succeed. It is disproportionate to require such an application be made. The sums are payable in full.

Lack of Listed Building consent

31. The Respondents repeatedly alleged that the major works carried out by the Applicants were illegal because Listed Building consent was not sought and that this excused them form contributing to the those works.

32. Section 7 of the Planning (Listed Buildings and Conservation Areas) Act 1990 states the following:

(1) Subject to the following provisions of this Act, no person shall execute or cause to be executed any works for the demolition of a listed building or for its alteration or extension in any manner which would affect its character as a building of special architectural or historic interest, unless the works are authorised under section 8.

33. The Respondents appear to have adopted the view that any works to the building require consent. This is not what section 7 says. It is only works which affect the character on the building. Its not the function of the Tribunal to determine whether Listed Building consent was required as we do not have expertise in this area. In any event there was no expert evidence submitted by the Respondents confirming that the works carried out needed consent. Suffice to say that it is difficult to envisage the council allowing the works if consent was required. In any event the Tribunal finds the Respondents were liable to pay for their contribution to the major works in full.

Summary

34. The sums claimed by the Applicants are allowed in full and any claim by the Respondents for relief pursuant to s 20C Landlord and Tenant Act 1985 is dismissed.

Judge Shepherd

14th March 2022

ANNEX - RIGHTS OF APPEAL Appealing against the tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal at the Regional tribunal office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.

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

4. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers

5. Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.