FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BG/LSC/2021/0039**
Property	**:**	**The Switch House, 4 Blackwall Way, London E14 9QS**
Applicant	**:**	**Various leaseholders of The Switch House**
Representatives	**:**	**In Person; Nicholas Hodder**
Respondent	**:**	**Fairhold Freeholds No 2 Limited (1)** **Firstport Property Services Limited (2)**
Representative	**:**	**Mr Tom Morris of Counsel**
Type of Application	**:**	**For the determination of the liability to pay and reasonableness of service charges (s.27A Landlord and Tenant Act 1985)**
Tribunal Members	**:**	**Judge Professor Robert Abbey** **Mr Richard Waterhouse FRICS**
Date and venue of Hearing	**:**	**27 October 2022 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**2nd November 2022**

DECISION

Decisions of the tribunal

(1) The tribunal determines that: -

(2) The cost of £5,520 for RopeTech (London) Limited should be reduced by 50% down to £2760, on the basis that it was unreasonably incurred.

(3) The cost of £803.65 for Infallible Systems is reasonable and payable but not at £1205.50

(4) Otherwise, if service charge items are not specifically mentioned under this heading, then the Tribunal has found them to be reasonable.

(5) With regard to the S.20c application, the tribunal further determines that it is just and equitable in the circumstances for an order to be made under section 20C of the Landlord and Tenant Act 1985

The applications and background

1. The applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charge payable by the applicants in respect of service charges payable for services provided for **The Switch House, 4 Blackwall Way, London E14 9QS** (the property) and the liability to pay such service charge.

2. Switch House, 4 Blackwall Way, London E14 9QS is a purpose-built block of 60 flats across nine floors and each of which is held on a long residential lease. The Applicants are some of the leaseholders of the 60 flats. The second respondent is defined in the applicants' leases under its former name Peverel OM Limited, as the manager of the building and is a party to the lease. The first respondent is the registered proprietor of the property and the applicants' landlord. By a decision made by Judge Dutton and dated 12 May 2022 it was decided that it was right to remove Fairhold Freeholds No.2 Limited from these proceedings, which thereafter continued against the second respondent only. So, hereinafter I shall only refer to the respondent with this meaning Firstport Property Services Limited.

3. The applicants in this case have applied for a determination of the reasonableness and payability of service charges from 2018-2020 largely relating to major works for roof repairs which are in the sum of £69,136.85 incurred by the respondent in relation to the repair of roof

terraces. The applicants say these are costs which are excessive and unreasonably incurred.

4. Four of the flats in this block have roof terraces. The development was completed by Barratts. All the lessees had the benefit of a ten-year building guarantee scheme or insurance cover that ended in December 2013. In 2006 problems arose with the terraces. Barratts carried out remedial works. In 2011 problems were again identified with the terraces. In 2014 a report was prepared which identified significant issues with the terraces. In 2015 Barratts declined to do anything about the problems with the terraces. In August 2017 the respondent told the tenants that it would complete works to the terraces that would be covered by the service charges. Works commenced in January 2019. On commencing the works, it soon became apparent that there were further problems and defects that would need to be remedied. All the terraces were then subject to the roof repairs being the subject of this application.

5. The applicants object to the reasonableness of the cost of the roof repairs on two grounds. First, they contend that the cost of the roof repairs was not reasonably incurred by reason of delay on the part of the Respondent (the "delay issue"). Secondly, they object to two specific items within the roof repairs on the basis that they were not reasonably incurred (the "specific issues"). The applicants also make some complaints about the respondent's compliance with the reserve fund provisions in the tenant's leases.

6. On or around 23rd December 2020, the respondent applied for dispensation from the consultation requirements pursuant to section 20ZA of the 1985 Act for major works of repair. The Tribunal granted dispensation under section 20ZA of the 1985 Act in a decision dated 9th September 2021. It is the cost of those works which are in issue in this dispute before this Tribunal under section 27A of the 1985 Act.

7. The relevant legal provisions are set out in the Appendix to this decision. Additionally, rights of appeal are set out below in an annex to this decision

The hearing

8. The face-to-face hearing took place on 27 October 2022, when the applicants were represented by one of themselves, Mr Hodder, the lead applicant and the respondent was represented by Mr Morris of Counsel.

9. The tribunal did not inspect the property as it considered the documentation and information before it in the trial bundle enabled the

tribunal to proceed with this determination and also because of the restrictions arising out of the Covid-19 pandemic.

10. The Tribunal had before it an electronic/digital trial bundle and a paper-based version of it and it was a bundle of documents prepared by the parties, in accordance with previous directions. The documents that were referred to are in a bundle of many pages, the contents of which we have recorded and which were accessible by all the parties.

Decision

11. The Tribunal is required to consider whether the roof repair works are reasonable and payable in the sum of £69,136.85. The Tribunal will first consider the delay issue.

12. Of the delay issue the applicant contends that the costs were unreasonably incurred because of the respondent's negligent building management service and had the problem been ascertained earlier then a claim against Barratt or the NHBC would have covered the roof repair costs. The respondent countered this by citing to the Tribunal the provision of the case of *Daejan Properties v Griffin* [2014] UKUT 0206 (LC) in which it was held that

> *As the Lands Tribunal (HH Judge Rich QC) explained in Continental Ventures v White [2006] 1 EGLR 85 an allegation of historic neglect does not touch on the question posed by s. 19(1)(a), Landlord and Tenant Act 1985, namely, whether the costs of remedial work have been reasonably incurred and so are capable of forming part of the relevant costs to be included in a service charge. The question of what the cost of repair is does not depend on whether the repairs ought to have been allowed to accrue. The reasonableness of incurring the cost of remedial work cannot depend on how the need for a remedy arose.*

This decision is good authority for the respondent to refute the case made by the applicant with regard to the delay issue. As Counsel for the respondent observed, "In light of these authorities, the Applicants' case on the Delay Issue is unarguable. It is irrelevant to the reasonableness of the cost of the Roof Repair Works that they might have cost less had they been carried out sooner. Likewise, it is irrelevant to the reasonableness of the cost of the Roof Repair Works that they might have been covered by the NHBC Policies had they been carried out sooner."

13. The roof repairs in themselves are to be considered in the context of their own reasonableness and not on an historical basis. Accordingly, in this context this Tribunal must find for the respondent with regard to the delay issue.

14. Turning now to the two disputed specific issues, the applicants object to the following specific costs: -

(i) The cost of £5,520 for RopeTech (London) Limited on the basis that it was unreasonably incurred.

(ii) The cost of £1,205.50 for Infallible Systems

Each specific issue will now be considered in turn starting with the charge of £5520.

15. The cost of £5520. The applicants said that to carry out the removal and later replacement of the window copings, the respondent hired RopeTech at a total cost of £5,520.00. The applicant further asserted that RopeTech primarily supplies abseiling services, for example for the building's quarterly window cleaning, and therefore its workers are considerably more costly than the reasonable labour cost of removing and replacing window copings. The applicant maintained that because the window copings are accessible from the safety of the walled roof terraces without abseiling, the applicants submit that this simple work could have been carried out by an alternative supplier for a small amount of this cost without incurring a large abseiling premium. The applicant confirms that it is agreed that RopeTech accessed the roof terraces on a very small number of occasions by abseiling, but the Applicants submit that this was unnecessary, not least given that Infallible Systems accessed the same roof terraces through the flats without abseiling. Therefore, the Applicants submit that this £5,520.00 cost was incurred unreasonably by the Respondent.

16. On the other hand the respondent says that RopeTech were contracted to remove glazing from the top floor flats. It was, on any view, a sophisticated job. It involved using specialised casing tools to remove bolts, then removing the glazing itself, before accessing the caping screws which were not accessible without the removal of the glazing. It required the skills of the employees of a glazing or façade repair contractor like RopeTech. RopeTech had an advantage, in that it had previously worked on the glazing and façade of Switch House. Its costs were competitive. There is no reason to suppose that any other contractor of similar skill could have carried out the work any more cheaply, and was reasonable for the Respondent to reach the view that

RopeTech would be able carry out the work in less time and at a more competitive cost than other contractors.

17. The Tribunal does not agree with the respondent and favours the argument made by the applicants in this regard. It was apparent that the use of abseiling contractors was more for the convenience of the respondent when considering access to the flats as work could be carried out without the need to involve flat owners affording access through their flats. Accordingly, an excess charge has been incurred unreasonably. Access could have been arranged through the flats affected and it could have meant that no abseiling premium was incurred. Therefore, the Tribunal determines that this specific amount is unreasonable and that it should be reduced by 50% to £2760.

18. The second specific issue related to the charge of £1205.50. In this regard the applicants say that an e-mail from Dave Williams of Infallible Systems to Tony Ulasi for the respondent on 7th March 2019 states

> *"On Wednesday 27/02/19 our charge hand Clifford Evans requested removal of a section of aluminium cill to enable fixing of insulation and upstand details, The cill has still not been removed as of today 07/03/19 at 09.30 am, due to this, out of sequence works have resulted in costs of £1'205.50 Please ensure the cill is removed today otherwise further costs may apply."*

19. Therefore, the applicants assert that it is evident from this e-mail that the respondent had neglected for eight days to arrange for RopeTech to remove the sill of flat 59 before instructing Infallible Systems to repair the roof terrace on 7th March 2019, and that that this failure by the respondent incurred an additional cost of £1,205.50 that would otherwise have been avoided.

20. The respondent says that as to the additional cost of Infallible Systems, that was not occasioned by anything done by the respondent. The need to remove the sill in question was not initially appreciated. It was only once the investigations commenced that it became clear what rotten boards would need to be removed and therefore that the additional sill would need to be removed. In any event, following discussions between the Respondent and Infallible, the cost was reduced to the sum of £803.65.

21. In this regard, this Tribunal prefers the evidence from the respondent regarding the second issue and accepts that the work was done and that

the reasonable charge for the work was indeed £803.65 and this sum is properly payable.

Reserve fund

22. In the Tenth Schedule at paragraph 3 of the applicants' leases it states quite clearly that: -

> "*The Manager shall ensure that the reserve fund or funds referred to in the Sixth Schedule shall be kept in a separate trust fund account and any interest on or income of the said fund shall be held by the Manager in trust for the lessees of the Dwellings and shall only be applied in connection with the matters detailed in the Sixth Schedule*"

23. Accordingly, the lease makes it very clear that the respondent is under a simple obligation to ensure that reserve fund monies are kept in a separate trust fund. Upon questioning from the Tribunal, Counsel for the respondent admitted at the hearing that this had not been done and that reserve funds were wrongly mixed up with all other funds paid as service charges. This is a breach of the lease and is in the view of the Tribunal an obvious example of bad management. The Tribunal would strongly urge the respondent to forthwith correct this error and create the trust account as required by the lease terms.

Application for a S.20C order

24. It is the tribunal's view that it is both just and equitable to make an order pursuant to S. 20C of the Landlord and Tenant Act 1985. Having considered the conduct of the parties, their written submissions and taking into account the determination set out in the decision above, the tribunal determines that it is just and equitable in the circumstances that there be an order made under section 20C of the 1985 Act. As such these costs may not be included as a service charge expense

25. With regard to the decision relating to s.20C, the Tribunal relied upon the guidance made by HHJ Rich in *Tenants of Langford Court v Doren Limited* (LRX/37/2000) in that it was decided that the decision to be taken was to be just and equitable in all the circumstances. The tribunal thought it would be just not to allow the right to claim all the costs as part of the service charge. The s.20C decision in this dispute gave the tribunal an opportunity to ensure fair treatment as between landlord and tenant in circumstances where costs have been incurred by the landlord and that it would be just that the tenant should not have to pay them.

26. As was clarified in *The Church Commissioners v Derdabi* LRX/29/2011 the tribunal took a robust, broad-brush approach based upon the material before it. The tribunal took into account all relevant factors and circumstances including the complexity of the matters in issue and all the evidence presented. The Tribunal also took into account all oral and written submissions before it at the time of the hearing.

27. It was apparent to the tribunal that the failure by the respondent to honour the lease terms by not creating a separate reserve fund with its own accounts was a cause for suspicion on the part of the applicant with regard to the conduct of the respondent. It is understandable that the applicants would be concerned about what the respondent was doing when it failed to comply with its lease obligations and consequently failed to provide reserve fund trust accounts. When supplying accounts every year, the respondent repeatedly failed to include any accounts for a reserve fund, from which it says the repairs were mostly funded. This failure alone would be enough to persuade the Tribunal that this s20c order should be made.

Name:	Judge Professor Robert Abbey	**Date:**	2nd November 2022

Appendix of relevant legislation and rules

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.

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

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

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 identify the decision of the Tribunal to which it relates (i.e., give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.