FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/21UC/LSC/2018/0071**
Property	**:**	**Flat 61, Riverbourne House, Eastbourne, East Sussex BN22 8AZ**
Applicant	**:**	**Mrs Jean Garner**
Representative	**:**	**Mr Graham Dale**
Respondent	**:**	**Eastbourne Borough Council**
Representative	**:**	**Mr David Lewis-Hall of Counsel**
Type of Application	**:**	**Determination of service charges**
Tribunal Members	**:**	**Judge E Morrison** **Judge A Lock** **Mr R A Wilkey FRICS**
Date and venue of hearing	**:**	**Best Western Lansdowne Hotel, Eastbourne on 20 March 2019**
Date of decision	**:**	**11 April 2019**

DECISION

The applications

1. By an application dated 25 June 2018 the Applicant lessee applied under section 27A of the Landlord and Tenant Act 1985 (the Act") for a determination of her liability to pay a proposed service charge in 2018 and subsequent years towards a new block reserve fund. The Respondent Council is the freeholder of the block.

2. The Tribunal also had before it applications under section 20C of the Act and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 for orders that the Respondent's costs of these proceedings should not be recoverable through future service or administration charges.

Summary of Decision

3. The block reserve fund contribution recoverable by the Respondent from the Applicant in each of the first two years of operation of the new block reserve fund is £585.00 per annum.

4. An order is made under section 20C of the Act.

The Lease

5. The Tribunal had before it a copy of the lease for Flat 61 Riverbourne House dated 22 September 1989. The lease was granted by Eastbourne Borough Council for a term of 125 years from 1 July 1989, at a rent payable monthly on the first day of each month. It is a shared ownership lease made pursuant to the Right to Buy provisions of the Housing Act 1985, with the lessee acquiring a 62.5%, share, and paying rent on the remaining 37.5% share.

6. The relevant service charge provisions in the lease may be summarised as follows:

   (a) The lessee is liable to pay a specified proportion towards the lessor's costs incurred in carrying out its obligations and functions under clauses 6, 8, 9B and the Ninth Schedule ("the Management Charges");
   (b) Pursuant to clause 6(A) the lessee must pay "such annual sum as may be notified to the Lessee from time to time as representing the due proportion of the reasonably estimated amount required to cover [those costs] .... such estimated amount to be payable monthly in advance on the day for payment of the rent...";
   (c) Flat 61's due proportion is 1.52% of the costs incurred under Part I of the Ninth Schedule (principally repairing and insurance costs) and 3.63% of the costs incurred under Part II of the Ninth Schedule ((supply of hot water and central heating);
   (d) The Management Charges may include such amounts "as the Lessor may from time to time consider necessary to put to

reserve to meet the future liability of carrying out major works to the Property, the Reserved Property or the demised premises"

(e) Any service charges paid by the Lessee are carried forward by the Lessor, and there is no provision for repayment to the Lessee.

The Inspection

7. The Tribunal inspected the subject property on the morning of the hearing, accompanied by Mrs Garner, Mr Dale, the Council's legal representatives, and two employees of Eastbourne Homes Limited. Riverbourne House is a three-storey development of some 69 small flats, built in 1969. Twenty five of the flats are sold on long lease but the majority are occupied on Council tenancies. The block is constructed on level ground as an infilling development and is part of an established, predominantly residential area within easy reach of local amenities.

8. The main roof pitches are covered with re-constituted slates. The elevations are mainly part brick, part tile hung. Windows are uPVC double glazed casements. There is a passenger lift serving all floors. The block is occupied by residents over the age of 55 years and has been specifically designed for retired people. There are communal facilities including a café/food preparation area and lounge on the ground floor, and an attractive inner courtyard. Limited on-site parking is provided but it is not clear how the spaces are allocated.

9. The Tribunal walked round the outside of the building and the internal common parts. No inspection was made in respect of the interior of any of the flats. In general terms, Riverbourne House is of traditional modern construction and is being adequately maintained. The Tribunal noted outstanding maintenance items including (a) paint is deteriorating to several exterior doors to dustbin stores/plant rooms (b) decorations to the internal public ways were generally fair but soiled in parts (c) the condition of carpets in the common parts varies but is generally serviceable (d) there is a missing/defective flashing beneath a ground floor front window (e) some sections of suspended ceiling in the common ways were missing or unmatched (f) There was staining to some fascias and soffits and minor staining and defects to some roof slates (g) a rear gutter is blocked. This is not intended to be an exhaustive list of defects but will give an indication of the general state of repair.

Representation and evidence at the hearing

10. The Applicant was represented by Mr Graham Dale, who is a non-resident lessee of a flat at Riverbourne House. Mr Dale had also assisted Mrs Garner with the preparation of her case. This had caused some difficulty, and numerous sets of directions were given by the Tribunal in the run up to the hearing to clarify what was required and which issues the Tribunal would/would not be dealing with. Although

the Tribunal had, on 4 December 2018, listed the relevant issues, Mr Dale attempted to introduce a further statement of case, for which no permission had been given, shortly before the hearing. This was not allowed but he was permitted to rely on a small number of new documents, the Council not objecting to these. At the hearing, Mrs Garner gave only brief oral evidence, her case largely resting on submissions put by Mr Dale.

11. The Council was represented at the hearing by Mr Lewis-Hall. Its written evidence had been submitted through a witness statement made by Anthony Sayers, a chartered surveyor and the Asset and Capital Works Manager at Eastbourne Homes Limited ("EBH"), a Council–owned company that provides the Council with housing management services. However the Tribunal was told that Mr Sayers was unable to attend the hearing, and instead a further witness statement was proffered from Michael O'Brien, Mr Sayers' line manager, who confirmed and adopted the matters set out in Mr Sayers' statement as his own evidence. Mr O'Brien attended the hearing to give oral evidence, and was permitted to do so in place of Mr Sayers, despite objection from Mr Dale, as there was clearly no prejudice to the Applicant.

The law and jurisdiction

12. The tribunal has power under section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when a service charge is payable.

13. By section 19 of the Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard. Under section 19(2) where a service charge is payable before the relevant costs are incurred, "no greater amount than is reasonable" is so payable.

14. Under section 20C of the Act a tenant may apply for an order that all or any of the costs incurred by a landlord in connection with proceedings before a tribunal 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.

15. Under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 a tenant may apply to the Tribunal for an order which reduces or extinguishes the tenant's liability to pay an administration charge in respect of litigation costs.

Preliminary point – identity of Respondent

16. The application named EBH as the Respondent. However upon the Tribunal pointing out at the start of the hearing that the lessor is the Council, it was agreed by both sides that the Respondent should be amended to be Eastbourne Borough Council. This did not affect the preparation or presentation of the Respondent's case.

Background to the application

17. Until the service charge year ending 31 March 2018 the lessees at Riverbourne House have been required to contribute an annual sum of up to £125.00 towards a "major works fund". When major works have been carried out the cost of which was not covered by this fund, the lessees have been required to pay though the annual service charge. Notably, over the past two years, new boilers and a replacement lift have been installed.

18. In February 2018 the lessees were informed by EBH that a new "block reserve fund" would be created as from 1 April 2018, with contributions calculated by reference to the "estimated anticipated costs" of maintaining the building. The calculations would be based on a "30 year asset management plan", the idea being that the anticipated cost of any item would be recovered through the service charge, not in the year the cost is to be incurred, but spread over a period of years, the maximum being 30 years, in advance.

19. The asset management plan ("Plan") figures in evidence only covers works anticipated in the period 2019-2044 (26 years inclusive), and calculates contributions from the service charge year commencing 1 April 2018. By way of example, the Plan provides that in each of 2018 and 2019 a lessee will be required to pay not only 1/2 of their estimated contribution to the cost of external decoration works to be carried out in 2019, but also 1/7th of their estimated contribution to those works to be repeated in 2024, and 1/12th of their estimated contribution to those works when repeated again in 2029, and so on. By way of further example, it is anticipated that a new roof will be needed in 2039, and so the lessee will be required to pay 1/22nd of the anticipated cost every year from 2018 – 2039 inclusive, calculated at £267.84 per annum per lessee. The programme is a rolling one, so that in service year commencing 1 April 2019, new works/ costs anticipated for Year 31 (2049) will be added to the contribution calculation.

20. Mrs Garner has not yet received a formal demand for her first year's contribution although this was envisaged as a contribution for service charge year 2018/19, which has just ended. The Tribunal was told that the demand will actually be made in October 2019 as a "reconciliation" for 2018/19, and that the sum demanded for the first year will be £2311.42.

21. Mrs Garner, with the support of other lessees, objects to the new regime on a number of grounds which will now be considered.

Issues

(i) Does the lease allow for the establishment of a "reserve" fund?

22. It was submitted on behalf of Mrs Garner that there is a distinction between a reserve fund and a sinking fund, and that the lease provides only for a reserve fund. Thus monies cannot be collected in advance for major repairs or renewals that might be required only once or twice, or maybe not at all, during the lease. Insofar as the Plan requires contributions to these works it cannot be upheld.

23. The Council submitted that the clear wording of the lease granted it the right to demand sums to build up an advance reserve fund for major works. Reference was also made to the Glossary to the RICS Service charge residential management Code 3rd ed. 2016 which describes a "Reserve/sinking fund" as "A provision for future expenditure. These terms have become interchangeable over recent years".

24. The Tribunal must interpret the lease based on its intended meaning at the date it was granted. There is no evidence that in 1989 the terms reserve fund and sinking fund were interchangeable. However the wording of the clause 6 (A) of the lease refers only to "the future liability of carrying out major works". There is no restricting or other definition of "major works", and the Tribunal concludes this wording is wide enough to cover works that might be carried out either periodically or only once during the lease. Therefore the lease allows for the establishment of a fund of the type proposed by the Council.

(ii) Is Mrs Garner liable to pay 100% of service charges attributable to Flat 61 or only 62.5% of those costs?

25. It was submitted that as Mrs Garner's flat is held on a shared ownership basis (see para. 5 above) and she is paying rent for the 37.5% interest retained by the Council, she should only have to pay 62% proportion of the service charge attributable to her flat. .

26. This issue has to be determined by reference to the terms of the lease. This clearly states, at clause 6(B), that the Lessee must pay 1.52% of the Lessor's costs.. There is no basis for departing from this percentage. Having said that we note that the Plan apportions 1/67th of costs to each flat, which amounts to slightly less than the lease apportionment for Flat 61, a discrepancy not explained by the Council.

(iii) Is the amount demanded no greater than is reasonable?

27. This was the main issue between the parties. It is convenient to set out the Council's position first.

The Council's case

28. In or shortly after 2014 EBH decided to introduced a revised reserve fund for all properties it manages for the Council and also for Lewes District Council. The stated purpose was to ensure that funds were built up over time, and on a measured basis, for future works, spreading the cost fairly between current and future owners of leasehold properties. The Council states that its scheme mirrors the RICS Code which, in its 3rd ed at Chapter 7.5, states that "The usual method of working out how much money is to go into the fund each year, assuming the lease/tenancy agreement does not make any other provision, is to take the expected cost of future works, including an allowance for VAT and fees, and divide it by the number of years which may be expected to pass until it is incurred…".

29. The Council has a computerised asset management system using Keystone software. A stock condition survey was carried out by external surveyors, Rand & Associates ("Rand"), in 2013, the data from which was uploaded onto the Keystone system. The Tribunal was told that any subsequent information obtained from later surveys or works carried out has also been uploaded. Anticipated life-spans for building components have been gauged using the Department for Communities and Local Government's 'A Decent Home' Guidance, published in 2006, but modified as thought appropriate for Riverbourne House.

30. The result is the Plan, setting out the works anticipated to be required at Riverbourne House. The estimated costs are said to have been derived from actual costs incurred by the Council in carrying out similar works on other blocks, tendered costs for similar works, standard pricing books, and expert advice from quantity surveyors.

31. Based on the above, the Council submits that it has adopted a reasonable methodology to calculate the lessees' proposed contributions to the block reserve fund and that the sums requested are and will be reasonable. Furthermore, the lessees were consulted in advance, and although it is accepted that the new charge is very much higher than the previous charge, the Council has offered lessees a number of options for payment which are much more flexible than the payment requirements of the lease. One option, set out in a letter to the lessees dated 28 March 2018, is expressed as follows: "*Do not pay into the Reserve Fund and pay for the major works when they are completed. Using this option means that your unpaid Reserve Fund contributions will show as arrears on your service charge account until it is paid or you sell your flat*". Mr Lewis-Hall for the Counsel told the Tribunal that if the Council attempted to renege on this

promise it would effectively be prevented by doing so on the ground of estoppel.

32. The Tribunal posed a number of questions to Mr O'Brien:

- In response to a query as to why 30 years had been chosen as the appropriate period for calculating costs, he said that the Council had a statutory obligation under the Housing Revenue Accounts Business Plan to assess the value of future repairing obligations over this period;
- In response to a query as to why works which were scheduled to be repeated every 5 years could not be paid for on a rolling 5 year basis, instead of a rolling 30 year basis, he was unable to give a reason, other than to say that the "forecasts are designed around informing our business plan";
- In response to what would happen if lessees paid every year towards a lift replacement that turned out not to be needed, Mr O'Brien said that contributions for future years would be adjusted downwards, but there would be no refund; if subsequent surveys carried out prior to the anticipated replacement date showed that the date was wrong, again adjustments to the Plan would be made; all major plant is assessed every 5 years;
- Mr O'Brien was unable to state whether the Plan-anticipated expenditure for a new lift in 2037 had taken into account the cost and manufacturer's suggested life expectancy of the new lift installed recently; he accepted that a new survey had not been done since the new lift was installed;
- The "Test and report" item which the Plan called for every 5 years related to an electrical test in the communal areas.

33. In response to questions from Mr Dale, Mr O'Brien said:

- When asked what the Council's statutory requirement for a 30 year business plan had to do with the lessees, Mr O'Brien said that the business plan factored in the lessees' contributions to the block costs;
- The Decent Homes guidance on life-spans had been adjusted based on the professional view of Rand, bringing local knowledge into play;
- The estimated costs were primarily based on local costs experienced by EBH;
- Referring to an extract from the Rand survey introduced by Mr Dale, which in costing assumed external redecoration on a 7 year cycle, and internal communal decoration on a 15 year cycle, Mr O'Brien was asked why the Plan called for decoration every 5 years; his answer was confined to internal work and he suggested that as this was a retirement block with more communal areas the standard redecoration cycle should be 5 years; he accepted that the Decent Homes guidance gave no guidance on this aspect; the last redecoration of internal communal areas at Riverbourne House

was 7 years ago; he did not know when the exterior was last redecorated;

- Mr O'Brien reiterated that the estimated costs were based on local rates.

34. In closing, Mr Lewis-Hall submitted on behalf of the Council that the Council had taken a reasonable approach all round. There was no expert evidence suggesting the Council's costings were wrong. Although the Council could have adopted a 5 year rolling plan instead of a 30 year plan, that would result in higher service charge bills later on. The Council's approach spread payment fairly over a longer period. A person selling a flat could point to the amount in the reserve fund, which would impact on the attractiveness of the flat. All monies would be held on trust for the lessees, including accrued interest.

Mrs Garner's case

35. On her behalf, Mr Dale disputed both the life-spans and costings in the Plan. The principal points made were as follows:

- Interior redecoration did not need to be done in 2019; some localised repairs would be sufficient; the Council tenants, who did not have to pay anything other than their rent, might want the work done, but the lessees were more pragmatic; the Rand 15 year life-span estimate should be adopted;
- Exterior redecoration was needed but Mr Dale had obtained a competitive quote for £4,500.00 + VAT; the work required was limited to softwood doors, which should last 10-12 years if done properly, and metalwork, which should also last many years;
- The Plan called for all flooring (carpets) to be replaced in 2019, but there were three different types of carpet in the communal areas, some carpet was worn, some was fairly new; replacement should be phased as it became necessary; the carpets had never been regularly cleaned; Mr Dale had obtained a quote for replacing all the carpets for £20,985.00 + VAT;
- It was unclear what work was covered by the 5 yearly external repairs item in the Plan;
- The re-roofing costs in the Plan were excessive and the roof would not need to be replaced in the next 30 years;
- Each flat only has 2 windows and the estimated cost of replacement in 2039 is excessive; not all windows/doors will need to be replaced at the same time;
- There was no evidence to support the need for replacement of the heating distribution system in 2029.

36. Although the Council did not put the 2013 Rand survey into evidence and indeed said that it was no longer available, Mr Dale produced what appeared to be selective pages from this survey. These stated that the survey covered 319 flat blocks, and covered all external and communal

areas. Of the 319 blocks only one contained more than 50 flats, (presumably Riverbourne House). In Mr Dale's statement of case he said the survey was carried out in 2 weeks and did not include any internal, roof, drain or structural surveys. The Council did not challenge this evidence.

37. Mrs Garner said that the internal common parts were last redecorated in 2011/12. She had lived in the flat for 8 years; no external redecoration had been carried out in that period.

38. Generally it was submitted that the amounts to be requested towards the block reserve funds were unreasonably high, particularly when compared with previous demands of no more than £125.00 per annum. The new scheme was presented as a fait accompli. The Council's suggestion that the existence of the fund would result in the flats fetching a higher price on sale meant little to residents who had bought them for their retirement, especially when the lease did not provide any mechanism for refund of overpayments.

Discussion and determination

39. The Tribunal must reach a decision based only on the evidence before it. The Council has explained the methodology behind its Plan, but neither Rand survey of 2013, nor any subsequent surveys or inspection reports are in evidence. There is no evidence that any detailed information particular to Riverbourne House, the only block of its size managed by EBH, has been fed into EBH's computerised asset management system. Our conclusion is that the Plan is the product of information of a highly generic nature with little or no reference to the particular characteristics and condition of the building or building components at Riverbourne House.

40. We are also of the view, based on Mr O'Brien's evidence, that the principal reason for the Plan is statutory financial management requirements imposed on the Council as a local housing authority. While the Council may be subject to strict financial discipline in relation to its forward planning, it does not follow that it is necessarily reasonable to impose the same financial discipline on a lessee of a small retirement flat. Indeed, the disconnect between the Council's statutory obligations and the need to collect funds from the lessees is evidenced by the payment options (see para. 31 above).

41. In the recent case of *Avon Ground Rents v Cowley* [2018] UKUT 92 (LC), cited by the Council, the Upper Tribunal applied and approved guidance on the application of section 19(2) of the Act given by the Lands Tribunal in *Parker v Parham* (2003) EWLands LRX/35/2002. At para. 49 the Upper Tribunal stated:

'…Considerations which a tribunal either ought, or may properly, have regard to in determining the question of the reasonableness of an advance payment included the time at which the landlord would, or

would be likely, to become liable for the costs, how certain the amount of those costs was, and whether there was certainty that the works would in fact be carried out and paid for during the period covered by the advance payment…'

And at para. 51:
' It is clear from both *Parker* and *Knapper* that whether an amount is reasonable as a payment in advance is not generally to be determined by the application of rigid rules, but must be assessed in the light of *the specific facts of the particular case* [emphasis added] …. In *Parker* the Tribunal mentioned at several points that the certainty that works would be carried out, and thus the certainty of the anticipated costs, were matters which it was permissible to take into account in considering the reasonableness of the advance payment: "if the cost of the works is uncertain, so that there is a wide range of possible outcomes around the amount that the LVT has found to be reasonable, that could well be something that could affect the reasonableness of an advance payment" (Parker , paragraph 23).'

42. The difficulty with accepting the Council's case on reasonableness is that it has adduced virtually no evidence on the "specific facts of the particular case". While the Tribunal agrees that it is reasonable to spread cost and to plan ahead, and that the RICS model of spreading cost over the anticipated period of time before the costs are incurred is unobjectionable, we do not have sufficient evidence to be persuaded of the reasonableness of the need for and scheduling of many of the works said to be needed at Riverbourne House. As to the cost of the works, with one exception mentioned below, we accept the projections set out in the Plan. Although Mr Dale obtained some quotes, the Tribunal cannot be sure they are on a like-for-like basis, and the Council's figures are not obviously outside a reasonable range. In any event, where works require a lessee to contribute more than £250.00, section 20 consultation will be applicable and the lessees will have the opportunity to obtain competitive tenders at that time.

43. It is clear that the Plan will be revised and extended on a regular basis. Although Mrs Garner's application asks the Tribunal to determine reserve fund contributions for 2018 and subsequent years, the Tribunal does not consider it is in a position to make a judicial determination beyond the first two years of the new scheme's operation.

44. The projected works set out in the Plan may conveniently be placed into two categories. The first comprises those works projected in the Plan to be carried out in 2019 and thereafter repeated every 5 years. These works are external decoration, external repairs, internal decoration, and test and report. The Plan provides for all these works to be carried out by 2019.

    (i) External decoration. There is limited periodic external decoration work at Riverbourne House as the elevations are brick/tile hung and there are uPVC windows. Only a number of

ancillary wooden doors and some metalwork need to be painted. There is no evidence that decoration has been done as frequently every 5 years in the past; the Tribunal was not told when it was last carried out, but it was not later than 2011. Nor is there any evidence to support the view that it would be reasonably required every 5 years. The standard required by the lease is "to keep in good and substantial repair and condition". Rand assumed a 7 year cycle.

The Tribunal accepts that external redecoration is due and that, as proposed by the Council, the anticipated cost of £20,100.00 should be spread over two service charge years, at a cost of £150.00 per annum per flat. However, the Tribunal does not approve a 5 year cycle and finds, based on the Rand survey and our general knowledge and experience, that a 7 year cycle would be reasonable.

Nor does the Tribunal find that it is reasonable to ask lessees to pay towards the cost of future external redecoration until such time as the previous cycle of work has been completed. The Council's approach in requiring lessees to pay now and in each ensuing year towards redecoration costs in 2024, 2029, 2034, 2039 and 2044 is not required either by the RICS approach or to meet the rationale of spreading cost between present and future lessees.

(ii) External repairs. According to Mr Sayers' witness statement, the allowance for external redecoration includes repairs to decorated surfaces. The Tribunal was not told what other external repairs might be required, let alone why such work would be required every 5 years. The need for major external repair works was not apparent from our inspection. In the absence of any evidence about what work is anticipated, the Tribunal disallows any demand under this head for the first two years.

(iii) Internal redecoration. Although it is arguable that simply making good damaged areas of paintwork and replacing missing/damaged ceiling tiles would suffice for a few more years, the Tribunal finds it would not be unreasonable to undertake complete redecoration within the next two years. The anticipated cost of £20,100.00 should be spread over two service charge years, as proposed by the Council, at a cost of £150.00 per annum per flat. However, again the Tribunal does not find that a 5 year cycle is reasonable. Rand assumed a 15 year cycle; Mr Sayers that 5 years is reasonable for the retirement sector. However it has been 7 years since the last redecoration and most of the decoration is still in an acceptable condition. There is no evidence that the work has ever been carried out as frequently as every 5 years, and the lease does not require this. In our view a 10 year cycle would be a reasonable basis to adopt for the

collection of costs in advance. Nor should lessees be asked to contribute towards the cost of anything other than the next anticipated cycle of work, for the reasons set out at (i) above.

(iv) Test and report. The Tribunal was told only that this related to electrical testing in the communal areas. We cannot be expected to guess the extent and nature of this. We accept that electrics must be tested regularly, perhaps at least every 5 years, but are not satisfied on the sparse evidence that this testing will constitute "major works", as opposed to expenditure that can be dealt with as part of the annual service charge. Accordingly the Tribunal disallows any demand under this head for the first two years.

45. The second category comprises all other projected works.

(i) Renew CCTV camera. This is projected for 2023 and 2038 at a cost of £100.00 on each occasion. This is not a major works item and any demand under this head is therefore disallowed.

(ii) Flooring. This is projected for 2019 and 2034 at a cost of £53,600.00 on each occasion. The projection assumes that all flooring (carpets) will be replaced at the same time. However it was obvious from the Tribunal's inspection that not all the carpets require replacing now. Some carpet was worn and somewhat soiled; it would be reasonable to replace this in 2019. Carpet in other areas was in reasonable condition; some looked almost new. The Tribunal estimates that it would be reasonable to replace approximately 1/3rd of the carpet in the next two years, and demands should be based on that projection. So far as cost is concerned, we note that the quote obtained by Mr Dale was detailed and was in sum of less than half of the Council's projected cost which, using our general knowledge and experience, looks very high. Doing the best we can on the evidence, the Tribunal finds that it would be reasonable for the Council to recover £15,000.00 towards the cost of carpet replacement over the first two years of the new reserve fund, i.e. £112.00 per annum per flat. An overall 15 year life-span cycle appears reasonable but replacement should be phased according to the age/condition of the carpet in different areas. Without better evidence from the Council about the likely dates for replacing the carpet which is currently still in good or reasonable condition, the Tribunal does not approve any demand made in the first two years of the new scheme towards the cost of this.

(iii) Communal entrance door renewal. This is projected for 2029 at a cost of £14,000.00. However there is no evidence to support the need for this work. The main entrance door appeared to be in good condition. The age of the entrance doors was not made known to us. Although the Decent Homes guidance suggests that external doors may be classified as "old" after 30 years, the

guidance also emphasises (at page 15) that a building component does not cease to be in a reasonable state of repair based on age alone. Its condition must also require that it be replaced or subject to major repair. Moreover the guidance does not attempt to distinguish between different building or component materials; it cannot be regarded as anything other than a rough guide. The Tribunal notes also that the combined projected cost for all these doors would work out at less than £250.00 per flat, so it is arguable that it is not a major works item in any event. In light of the foregoing, the Tribunal does not approve any demand made in the first two years of the new scheme towards this projected cost.

(iv) Heating distribution. This is projected for 2029 at a cost of £100,500.00. Mr Sayers' witness statement refers to "the latest report … identified that corrosion was appearing within joints and distribution pipework and that replacement within the medium term was advised". However, the report was not in evidence. The Decent Homes guidance suggests that pipework is "old" after 40 years, but the comments regarding condition apply again. The Tribunal does not know the extent of any problems. It is not clear that any corroding pipes or joints cannot be replaced as and when needed, with the cost recovered through the general service charge. Without better evidence the Tribunal does not approve any demand made in the first two years of the new scheme towards this projected cost.

(v) Renew lift. This is projected for 2037 at a cost of £70,000.00. Mr O'Brien was unable to tell the Tribunal anything about the cost of the new lift installed recently or the manufacturer's projected lifespan, although this evidence could easily have been provided. Many lifts last much longer than 20 years if properly maintained. If the recently replaced lift was the original one, it lasted much longer than 20 years. Once again the Council has failed to adduce evidence sufficient to persuade us that this is a future expense to which lessees should be required to start contributing now. We disallow any demand made in the first two years towards this cost.

(vi) Heating plant. This also projected for 2037 at a cost of £207,700.00. The comments made above with respect to the lift also apply to this item, new boilers having been recently installed. The Tribunal was not told the type of boiler so cannot even apply the Decent Homes guidance on when it will be regarded as "old". Given the lack of evidence, we disallow any demand made in the first two years towards this cost

(vii) Renew double-glazed windows. This is projected for 2039 at a cost of £180,900.00. The Decent Homes guidance suggests windows are "old" after 30 years. The Tribunal was not told when they were installed but Mr Sayers states that "the repairs

history for the building evidence that the windows are beginning to fail … it is also necessary to include for fairly imminent replacement as part of a sensible preventative and maintenance system". There is an obvious contradiction between imminent replacement and planning for the works in 20 years time, which has not been explained by the Council. However, our inspection satisfies us that at least some of the windows will need replacement prior to 2039. We therefore approve the demand for the lessees to start paying £123.00 per annum per flat towards this work.

(viii) Renew pitched roof. This is also projected for 2039 at a cost of £394,800.00 The Council wants each lessee to contribute £267.84 every year for 22 years towards this cost, which is a very substantial amount. There is no evidence that there are any concerns whatsoever with the roof covering; from street level it appears robust and in good condition. Although the Decent Homes guidance suggests that a roof is "old" after 30 years, this takes no account of the type of roof or roofing material. Riverbourne House has a pitched roof with reconstituted slate tiles. In 2039 the roof will be approximately 50 years old. There is simply no evidence before us that this type of roof will require renewal or major repair after 50 years. We bear in mind that service charge contributions are non-refundable. It is little comfort to a lessee of a very modest retirement flat to be told that, if they contribute almost £6000.00 over the next 22 years towards roof renewal which turns out to be unnecessary, the service charges will then be reduced. Given the lack of evidence, we disallow any demand made in the first two years towards this cost

46. Accordingly the lessees' contribution towards the new block reserve fund in the first two years of its operation is determined at £585.00 per annum per flat:

External decorations: £150.00
Flooring: £112.00
Internal redecoration: £150.00
Window renewal: £123.00
Total: £585.00

We are not allocating these contributions to specific service charge years because we do not understand the Council's assertion that the new block reserve fund will operate from 1 April 2018 and yet the first demand will not be made until October 2019.

47. Any monies standing to Mrs Garner's credit in the previous major works fund should be set against her liability.

Applications under Section 20C of the Act and Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002

48. The Council confirmed that it would not seek to recover any of its litigation costs from Mrs Garner. There is therefore no need to consider making an order under paragraph 5A.

49. In deciding whether to make an order under section 20C a Tribunal must consider what is just and equitable in the circumstances. The circumstances include the conduct of the parties and the outcome of the proceedings. The Tribunal finds not only that it was reasonable for Mrs Garner to bring her application but also that she has been, to a large extent, successful and, for this reason, determines that it is just and equitable for an order to be made that to such extent as they may otherwise be recoverable, the Respondent's costs, if any, 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 Mrs Garner or those other lessees whose letters accompanied the application authorising it to be made on their behalf.

Concluding Remarks

50. Our determination is limited to the first two years of the operation of the new block reserve fund. Many of our findings have been attributable to lack of evidence to support the projected scheduling and certainty of occurrence of the anticipated expenditure. These are relevant considerations for the Tribunal per *Avon Ground Rents v Cowley*. However, our decision relates only to reserve fund contributions. If major works are reasonably required and carried out within that two year period which cost more than those contributions there is of course nothing to prevent the Council seeking to recover the surplus cost through the normal service charge. Nor does our decision dictate what contributions should be made after the first two years; the reasonableness of future contributions will be dependent on the evidence at that time.

Dated: 11 April 2019

Judge E Morrison

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) 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.

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.