FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/33UG/LSC/2020/0048**
Property	**:**	**71 Vanguard Chase,** **New Costessey,** **Norwich,** **Norfolk** **NR5 0UG**
Applicant	**:**	**Joe Grant Burgess** **Unrepresented**
Respondent	**:**	**Adriatic Land 3 Limited** **Represented by** **Watson Property Group** **("managing agents")**
Date of Application	**:**	**22 October 2020**
Type of Application	**:**	**Section 27A Landlord and Tenant Act 1985 ("the 1985 Act")** **Determination of liability to pay and reasonableness of service charges**
Tribunal	**:**	**Judge J. Oxlade**
Date of Paper Hearing	**:**	**1st February 2021**

DECISION

For the following reasons, I find that:

(a) the service charges demanded as a contribution to the sinking fund for external decorations in years 2013 to 2020 were not reasonable and payable, nor that the sums expended on the external decorations in 2020 were wholly reasonable; I have reassessed the Applicant's contribution to the works done as £268.75;

(b) the Respondent shall be prohibited from adding to the service charge accounts any costs incurred in responding to these proceedings;
(c) the Respondent shall reimburse to the Applicant half of the sums expended by him in issuing this application.

REASONS

Background

1.The Applicant is the lessee ("the lessee") of a flat ("the property") located in a building; it is a two-storey coach house, with four garages on the ground floor, and a door leading to the Applicant's first floor flat over the garages.

2. The lessee's flat is defined in the lease, as including "doors and windows thereof including the glass in the windows *but not the external decorative surfaces*" [1]; the "building" is defined as the block of garages with flat or flats above [2].

3. The lease provides that the Lessor shall maintain, repair, and renew the main structure, exterior, and foundations of the Building, which obligation includes "*maintenance of the window frames and external doors of the building* [3] ".

4. Further, the lease provides that the Lessor shall paint and decorate the exterior of the building and common parts, at such intervals as the Lessor shall require, and "which work shall be carried out *for the whole building*"; the colour and type of materials used shall be chosen by the Lessor [4].

5. The Lessor's obligation to maintain and paint, is subject [5] to the Lessee's liability to contribute to the service charges and estimated service charges; namely, 62.5% of the buildings expenses [6] for the relevant period, not being more than a year [7] ("the service charge year"). The Lessee shall, within 10 days of a demand being made, pay on account a sum equal to half of the relevant percentage of the estimated total costs and expenses to be "incurred during the relevant service charge year" [8]. At the end of the service charge year, as soon as reasonably practical after that year end, the Lessor's accountants would determine and certify the amount spent [9], and any balance would either be credited against the following year or demanded if there was a shortfall [10].

6. The lease enables the Lessor (acting reasonably) to provide any other services to the lessees, which provision includes a sinking fund [11]; any sums collected by the Lessor as a reserve fund would be held on trust for the lessees [12].

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[1] Sch. 1, cl 1
[2] Clause 1.15
[3] Sch. 5. 2.1.5
[4] Sch. 5, cl. 2.4
[5] Sch. 5, cl. 2
[6] Sch. 6, cl.1
[7] Sch. 6, cl 2
[8] Sch. 6, cl 3
[9] Sch. 6, cl 5
[10] Sch. 6, cl 6
[11] Sch. 5, cl 2.7

Application

7. The lessee issued an application, pursuant to section 27A of the 1985 Act, because he considered that external painting which had been carried out in the Spring of 2019, was not only of poor quality but very expensive in light of the works actually done, which costs were paid from the reserve account. He had been making an annual contribution to the external decorating costs, every year from 2013 onwards at the rate of £250 per annum, so £2000. The invoice paid by the managing agents to the painter/decorator was £1176 for the exterior decoration, and £141.12 to the managing agents for project management fees (as permitted in the lease [13]); so the total cost for the works was £1317.

8. Further, he was unsure that the works were all permitted under the terms of the lease – because much related simply to his flat - nor that the consultation procedure had been clear as to the extent of the works.

Directions

9. The Directions made on 5th November 2020 identified at paragraph 4 the following issues for the Tribunal to determine: whether,

(a) the contribution to the reserve fund is reasonable;
(b) the costs of the works are reasonable, in particular in relation to the nature of the works, the contract price, and the supervision and management fee;
(c) the landlord had complied with the consultation requirement under section 20 of the 1985 Act;
(d) an order under section 20C of the 1985 Act and/or paragraph 5A of Schedule 11 to the 2002 Act should be made;
(e) whether an order for reimbursement of application/hearing fees should be made.

Evidence

10. The Applicant filed a bundle of documents, which includes the application, his statement [14], his reply to the Respondent's statement of case [15], photographs of the painting works (together with some annotations) [16], and an alternative quotation for works, dated 2nd February 2020 [17].

11. The Respondent filed a statement in reply made by their managing agent who project-managed the works [18], and filed in support a copy of the statutory notice of intention [19], two quotes for the works [20] and technical specification issued by Crown [21],

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[12] Sch. 6, cl 7
[13] Sch 5, cl. 2.5
[14] Page 32
[15] Page 38
[16] Pages 55 to 66
[17] Page 150
[18] Page 35
[19] Page 151
[20] Pages 85 to 87
[21] Page 67 to 84

a report made by the Respondent's managing agents to the Respondent on the works undertaken [22], photographs taken after redecoration [23], an invoice for the works done dated 30th April 2019 [24] and service charge accounts [25].

Hearing

12. In the application, the Applicant elected for a determination on the papers; neither party elected for an alternative disposal, as they could have done in accordance with the Directions.

13. Accordingly, the hearing proceeded on the papers alone, which – though there are issues of fact – is proportionate to the importance of the case and complexity of the issues, the resources of the parties and the Tribunal (and which are restricted during the COVID – 19 pandemic), the sums involved in the dispute being relatively small, and as there was some urgency (as he wishes to sell his flat in the near future). All factors suggest that a disposal on the papers is proportionate and in accordance with the overriding objective.

The Law

14. The 1985 Act provides that the Tribunal shall determine "whether a service charge is payable, and if so the amount payable" [26]; this is so whether or not payment has been made [27]. The cost of works can only be payable to the extent that they are reasonably incurred and to a reasonable standard [28].

15. Consultation is required under the Regulations [29] where any one lessees contribution is to be £250 or more; a failure of an effective consultation procedure is to limit the amount recoverable from that individual Applicant as a service charge in the sum of £250 (unless dispensation has been sought, and granted by the Tribunal).

16. A lessee can seek to limit or preclude the Lessor from adding to the service charge account the costs of engaging in the proceedings, where the Tribunal considers it just and equitable [30] to do so. Further, the Applicant can recover some or all of the costs incurred by him in bringing the application and paying the hearing fees [31].

Findings

17. I have carefully considered the terms of the lease, the documents filed by the parties, and their respective statements and shall in turn consider the questions identified as in issue in the Directions.

[22] Page 89
[23] Pages 90 to 97
[24] Page 41
[25] Page 43
[26] Section 27A(1) of the 1985 Act
[27] Section 27A(2) of the 1985 Act
[28] Section 29 of the 1985 Act
[29] Service Charges (Consultation Requirements) (England) Regulations 2003
[30] Section 20C of the 1985 Act
[31] Regulation 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) 2013

Is the Applicants contribution to the reserve fund reasonable ?

18. Paragraph 2 to 5 above set out the Lessor's obligations to maintain the building, which includes the exterior surface of the windows and front door relating to the property. So, whilst the Applicant questioned this (on the basis that as most of the work related to his flat, should it be treated as the Lessor's obligatio), the lease requires the Lessor to do so, and the Applicant to contribute to it.

19. The lease provides that the mechanism for setting the service charge payable in any given year, is that which is anticipated to be spent in the forthcoming year. However, the lease also allows for the Lessor to establish a sink fund ("reserve fund"), which is limited in the lease only by the Lessor being reasonable. In order to set an appropriate contribution, it would be acting reasonably to provide some basis for estimating what costs might be in respect of those items which the fund is intended to cover. The accounts refer to the sinking fund as "reserve funds" and specifically allocate funds to two items of repair/maintenance: external redecoration and surface to forecourt. The accounts seem to set an expectation of external redecorations every 4 years, although this is not explicit. The building was constructed in 2013, and so perhaps the expectation at that time was that the paintwork may need renewing every 4 years. That in itself is not unreasonable as such, although new wood work could reasonably be expected to last longer; more importantly, the managing agents should keep this under review, and bear this in mind when undertaking this annual/bi-annual inspections. It is not clear that any thought has been given to this nor that this has been kept under review. The Respondent has not addressed this aspect. Indeed it is not clear on the evidence adduced why painting works were undertaken in 2019, as opposed to 2018, 2017 or 2020; there is filed by the Respondent no pre-works inspection report nor photographs, nor evidence of condition to show what needed doing - despite the application referring to the shared areas "not being in need of regular redecoration", thereby putting the matter in issue – albeit that the Applicant's main issue is with what was in fact done.

20. It would be sensible for the managing agents/ Respondent in future, if such contributions to the sinking fund are to be requested, to undertake the task (as suggested above), in order to show that the demand for those sums is reasonable; factoring in inflation in costs and possible deterioration, and so to leave a margin for those.

21. In light of the above, I am not satisfied that the contribution made by the Applicant to the sinking fund in respect of external decoration, was reasonable.

Are the costs of the works reasonable, in particular in relation to the nature of the works, the contract price, and the supervision and management fee ?

22. The Applicant disputes what work the contractor did, to what standard, and what was included/ to be included ? Despite the clarity of the issues the Respondent has not adduced in evidence the specification given pre-tender to the contractors who were asked to quote, nor do their quotes detail what they are quoting for. The quote from the

Bell group refers to their undertaking work "as per the outlined specification"[32], but it is not attached and on page 86 they say "external redecorations to various locations". The quote from Novus [33] (who did the work) say that the specification was as per Crown paints specification, dated 9th February 2018; the Crown guide is a "how to", but does not detail what *items* were to be done on this building.

23. Further, the invoice of Novus dated 30th April 2019 speaks of having done "external decoration works to 71 Vanguard Chase", as per their quotation [34], but does not further detail it. So, it is hard to glean from any of that what they were required to do, nor what they did.

24. The managing agents have charged a fee of £141.60, seen in their invoice [35] but do not detail what work they did for this project management in respect of these external redecorations. They do not say if they inspected, and if so when; there is disclosed no site visit, whether before or after the works were done; whilst they refer in a report to the Lessor on 21st May 2019 [36] to "periodic inspections during the course of the redecoration", they do not detail when they took place. As the works were scheduled to take only a week to complete [37], it is hard to imagine a *series* of any visits to the works in that limited timeframe. There are pictures relied on, but it is not clear when these were taken nor by whom.

25. The statutory notice of intention [38], issued pursuant to section 20 procedure, said that the works to be carried out were "external redecorations to all previously painted surfaces including (if applicable) all wooden doors, windows, associated frames, eaves, render, soffits, fascias, bargeboards, metal garage doors". The "if applicable" was not a choice for the contractor to make as to what needed doing; rather, it was an instruction to paint <u>all that had been painted before</u>, but without detailing what was to be included, but gave examples of what this might have included. The inclusion of "if applicable" has the hallmarks of an instruction coming from someone who had not inspected to identify what needed doing. The lease[39] speaks in terms of the Lessor's obligation to paint and decorate the "whole building"; it does not import choice about what needs to be done, albeit that it would not be reasonable to paint some items just to slavishly follow that, when not needed. The Respondent says – relying on "if applicable" - that "on inspection with our contractors" the garage doors did not need doing, (page 36), but does not say when this inspection took place, and it is not clear whether the contractor reported that it did not need doing and adjusted the amount of work mid-performance of the contract, in which case the contract price should have altered to reflect less work to be done. The managing agents say that all four garage trims were done, and relies on the pictures, but it is not clear from the pictures that these are all different trims. The reference is to date stamped photographs from May 2019, but I do not see a date on those provided to me, and it is not clear who took them. The Applicant has provided pictures, though it is not clear when these were taken. However, even if taken 18 months later (as the Respondent supposes) the condition – if the decoration was

[32] Page 85
[33] Page 87
[34] Page 41
[35] Page 42
[36] Page 89
[37] Page 88
[38] Page 151
[39] Page 144

properly prepared – would reasonably be expected to look reasonably fresh, unless some intervening event had taken place. The photographs do show a deterioration (particularly pictures at pages 57, 60 to 63) and poor coverage (page 56, 65 and 66)

26. Having considered the totality of the evidence, I prefer the evidence of the Applicant to the Respondent as to what works were caried out, and I find that the works undertaken by the decorator were executed as described by the Applicant, and to the standard as alleged by the Applicant. The only items of reasonable quality appear to be the windows at first floor level and the front door, which are indeed part of the Lessors obligation[40]. Doing the best that I can, using the estimate that the Applicant has secured of full works at £860, I estimate that the works which were done to a satisfactory standard were half that which the Applicant has secured a quote for at £860 / 2 = £430; of which the Applicant's 62.5% share is £268.75.

27. In light of the Managing agents failure to define the works at the tendering stage, to secure detailed quotes, so that all were clear as to what works were being done and were to be paid for, together with the failure to supervise or check the work, I do not consider that payment of any project management fee is reasonable. Indeed, the Respondent has not detailed what was included. I do not consider that this is recoverable from the service charge fund.

Has the landlord has complied with the consultation requirement under section 20 of the 1985 Act ?

28. Whilst there is no issue but that there was a consultation procedure, the question is whether it was defective, for want of accurately specifying the works needed.

29. The Regulations [41] require that the landlord shall "describe in *general terms* the works proposed". I find that the Respondent's failure to be specific started at the consultation stage, and translated into a lack of clarity as to what the contractors were asked to do, and lead to the Applicant being unclear, and so the position the parties find themselves in. However, the statute sets a low threshold at the consultation stage and only requires a description in "general terms", which was done.

30. I therefore do not consider that there has been a failure to consult under the Regulations.

Whether an order under section 20C of the 1985 Act and/or paragraph 5A of Schedule 11 to the 2002 Act should be made ?

31. In light of my findings, which are in favour of the Applicant as to the sums recoverable as service charges (due to the works done and the quality of it), I do not consider that the Lessor should be permitted to add to the service charge account the costs incurred in respect of these proceedings; it would not be just and equitable to do so.

[40] Sch. 5 cl 2.1.5
[41] The Service Charges (Consultation etc.) (England) Regs 2003, Sch 4, Part 2, 8(2) (a)

Whether an order for reimbursement of application/hearing fees should be made ?

32. It is incumbent on all parties to attempt to resolve issues before resorting to the Tribunal. I do not have a complete copy of all the correspondence passing between the parties, and so whilst there is some correspondence, I cannot see at what point the Applicant first raised these issue with the Respondent, and how overall the Respondent responded. The Respondent makes a fair point that the Applicant did not dispute the works at the time that they were done, and that it was only some time afterwards; the Applicant has not addressed this. However, the Applicant has been substantially successful in these proceedings and should not have had to resort to making an application; the Respondent should have established the difficulties with their case much earlier on when the issues were raised by the Applicant .

33. Doing the best that I can on the evidence adduced, I find that the Respondent should reimburse the Applicant for half of the costs that he incurred in issuing the application.

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Judge J. Oxlade

1st February 2021