12289

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AH/LSC/2016/0372**
Property	:	**111 Whytecliffe Road North Purley, Surrey CR8 2AE**
Applicant	:	**Mr Xavier Leeder**
Representative **Also in attendance**	:	**In person** **Joanna Jayrajan**
Respondents	:	**Miss Aurore Moineau** **Mr Leo Fletcher-Evans**
Representative **Also in attendance**	:	**Mr Robert Wood -Solicitor**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Judge Daley** **Mr I Thompson FRICS**
Date and venue of Hearing	:	**20 February 2017 at 10 am 10 Alfred Place, London WC1E 7LR**
Date of Amended Decision	:	**21 July 2017**

AMENDED DECISION

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Decisions of the tribunal

In accordance with The Tribunal Procedure (first-tier Tribunal) (Property Tribunal) Rules 2013 which states-:

The Tribunal may at any time correct any clerical mistake or other accidental slip or omission in a decision, direction or any document produced by it, by— (a) sending notification of the amended decision or direction, or a copy of the amended document, to each party; and (b) making any necessary amendment to any information published in relation to the decision, direction or document. The Tribunal may at any time correct any clerical mistake or other accidental slip or omission in a decision, direction or any document produced by it, by— (a) sending notification of the amended decision or direction, or a copy of the amended document, to each party; and (b) making any necessary amendment to any information published in relation to the decision, direction or document.

Upon the request set out in the letter dated 29 May 2017 the Tribunal makes the following corrections set out in red and in bold.

The tribunal makes the following determination-:

(1) That the costs of the fence and all associated works commissioned in connection with the fence are reasonable and payable by the Applicant. (Including the costs of the structural survey).

(2) That the costs of the provision of the additional two gates is not reasonable and payable by the Applicant.

(3) That the costs occasioned by the solicitor's letter dated 3 August 2015 is not reasonable or payable by the Applicant. That the payment of the costs occasioned by the writing of this letter did not amount to an agreement to pay in accordance with Section 27 A (4) of the Landlord and Tenant Act 1985.

(4) The costs of the insurance, (for all of the periods in issue), is reasonable and payable.

(5) The cost of the paving is reasonable and payable.

(6) The cost of the pressure washer charged under the heading "general maintenance" is reasonable and payable.

(7) The costs of replacing the upstairs windows are reasonable and payable.

(8) Upon the concession of the Applicant, the costs associated with the loose roof tiles are reasonable and payable.

(9) That management charges (save as set out in (10) below) are recoverable.

(10) That no management fee is payable on the costs of the fence or on the insurance premiums.

(11) The Tribunal makes an order under section 20C in respect of the landlord's costs.

(12) The Tribunal makes no order for the reimbursement of the Applicant's cost of the application.

The application

1. The Applicants sought a determination pursuant to s.27A (3) of the Landlord and Tenant Act 1985 ("the 1985 Act") as to whether service charges are payable for the periods 2013-14, 2014-15 and 2015-16. The Applicant also sought a determination in respect of the estimated charges for 2016-17.

2. The Applicant also sought an order under section 20C of the Landlord and Tenant Act 1985 (so that the costs of the tribunal hearing would not be recoverable as a service charge).

- Directions were given at a case management conference, on 8 November 2016, where it was stated that the service charges in dispute were in the total sum of £14,624.92, both parties were directed to provide a Scott Schedule setting out the issues in dispute, and their response. In addition the Tribunal determined that the following matters would also be adjudicated on

- *The disputed service charge years end 28 September 2014, 2015, 2016 and 2017.*

- *With respect to the service charge year ending 28 September 2014 with respect to the fence, whether it was reasonable to incur costs by instructing a surveyor, an architect and to have an appointment with a local authority planning officer?*

- *With respect to the service charge year ending 28 September 2015, with respect to the cost of erecting the fence, whether it was reasonable to replace the fence rather than carrying out repairs at a*

lower cost and whether the total cost in any event is a reasonable amount?

- *With respect to the lawyers letter, in the sum of £378, is the cost recoverable under the lease, was it reasonably incurred, and is it reasonable in amount.*

- *For each item of expenditure, where the respondents have charged a 10% management fee, whether it is recoverable under the lease and if so, whether the percentage charged is reasonable in amount?*

- The Directions also provided for the reasonableness of the following items: insurance premium, the maintenance charges for £100, for roof tiles and for the costs of the window replacement for the upstairs flat.

The background

3. The Applicant is the leaseholder of the premises known as 111 **Whytecliffe** Road **North** CR8 2AE.

4. The Leaseholder's flat is situated in a purpose built block, comprising two flats located at the corner of two roads **Whytecliffe** Road **North** and Christchurch Road. The Applicant's flat (which is occupied by his mother) is situated on **Whytecliffe** Road **North**. The other flat in the premises is occupied by the respondents. The respondents as well as being leaseholders own the freehold for the building, they occupy the upper flat, the entrance to which is situated on Christchurch Road, Purley

5. The premises are subject to a lease agreement dated 2 August **1988**, which provides that the respondents will provide services, the costs of which are payable by the applicant as a service charge.

6. Where specific clauses of the lease are referred to, they are set out in the determination.

The Hearing

7. At the hearing the Applicant represented himself, (he was accompanied by his wife). The Respondents were accompanied by Mr Robert Wood, a dual qualified solicitor/ surveyor. He explained that he was there to guide the respondents and give them advice. He stated that as they knew their case, they would be responsible for presenting the factual matters to the Tribunal.

8. The Tribunal decided that procedurally, Mr Wood could either present the case on their behalf, in which case he would be entitled to ask

questions of the Applicant and make submissions, or should the parties choose to present the case themselves, then Mr Wood's participation would be limited to making a final legal submission on their behalf, whilst the respondents presented their case. The Tribunal was not able to have both the Respondents and Mr Wood presenting the case.

9. At the start of the hearing, Mr Leeder provided the Tribunal with two additional documents; an extract of the Town and County Planning Order 1995 and an email entitled "*Windows in Purley*". Both were produced by the Applicant and were admitted by agreement with the Respondents.

10. Mr Leeder informed the Tribunal that the premises comprise a two bedroom maisonette on the ground floor, he stated that the maisonette was in good condition when he purchased it, and that in the past the service charges had been fairly low, and this was one of the factors that he had taken into account when deciding to purchasing leasehold of the property. The premises had been purchased by him as a residence for his mother, rather than as a buy to let property, with the aim that she could live near his family home. The costs, including the service charges was accordingly very important to Mr Leeder.

11. However, in the past three years, the total demand for service charges had been almost £15,000. The Applicant stated that in his view this was too much, for the size of the flat, and the purpose built nature of the building. Additionally, in his opinion the service charges were totally disproportionate for a property situated in the London borough of Croydon.

The Architect's fees for the fence

12. The first issue was the costs of the Architect's fee, in the sum of £209.92. Mr Leeder contended that as it was not been necessary replace the fence, the cost of an architect and any associated expenses were therefore unnecessary.

13. Mr Leeder referred the Tribunal to a quotation from Mr Steven Munns dated 16 November 2014 for repairing the fence. This quotation was in the sum of £310.00.

14. The quotation included the costs of -: "*Taking down the two close board sections as shown, clear away and clear fence line. To supply two close board sections, patch two bays up with new feather edge, put 9 stumps in to old gravel boards etc. ...*"

15. Mr Munns had also quoted for the costs of replacing the fence in the sum of £3200.00 in total. In answer to a question from the Tribunal about whether this quotation had been provided to the respondents, Mr

Leeder stated that before he could provide this quote, Mr Munn had suffered a back injury and as a result he was unable to carry out the work. As a result Mr Leeder had not provided the quotation to the respondent.

16. In reply, the respondents stated that when they purchased the property they had noticed that the fence was in disrepair. They had checked the plans and had noted that according to the plans, there had been no fencing at the front, and the only boundary was a dwarf wall. The respondents provided the Tribunal with a copy of the original plans for the building. The respondents were also concerned that the erection of the fence on the dwarf wall had occurred without planning permission, which they contended was necessary given that the fence abutted a highway, and as such raised safety concerns.

17. Ms **Moineau** (one of the respondents), stated that they had considered both options, that of repairing or replacing the fence. They had considered that it would work out more cost effective in the long term, if they replaced the fencing with new concrete posts and slotting board fencing. Mr Fletcher–Evans (The joint respondent) stated that it was their intention in the future, should a fence panel need replacing, to do it themselves. Ms **Moineau** stated that an additional concern was that as the property abutted the highway, any changes would require planning permission.

18. They had made enquiries with the local authority, and as a result it was confirmed that the existing fencing had been erected without planning permission. As a result, in order to regularise the position, the respondents needed to apply for planning permission. Such an application needed to be supported with drawings from an architect.

19. The Applicant noted that the fencing had been at the property for some time and as a result, the local authority was out of time to enforce planning regulations. Given this he queried why the respondents had not simply repaired rather than replaced the fencing as this had been the cheaper option? He referred to *The Town and Country Planning (General Permitted Development) Order 1995,* which referred to a development not being permitted if it exceeded its former height. In his view this did not include a repair, as it would not have exceeded the fences former height.

20. The respondents stated that the contractors who quoted for the work had informed them that it would not be cost effective, or indeed possible to repair the fence as there was extensive decay of the old fence. Given this, the decision had been made to replace it. As a result, the elevation drawings from the Architect were required for the planning application. The respondents had wanted to ensure that they had complied with all

of the necessary building and legal requirements before erecting the wall.

Council's planning appointment re fence

21. Mr Leeder's primary submission was that the fence should have been repaired; accordingly he did not consider the cost of the planning appointment in the sum of £36.00 to be reasonable or payable.

22. The respondent stated that the charge, related to standard charges made by the local authority for consultation in relation planning matters, the actual sum charged by the local authority was £72.00 (the applicant's share was £36.00).

23. As a result of the consultation, the respondents established that planning permission was needed, as there were elements of the fence which were more than 1.5 metres high. No planning permission was needed for fences of less than 1 metre height, however the height of the fence was not uniform.

24. The Respondent enclosed a copy of the grant of planning permission in the bundle dated 26 June 2014. The permission stated that it was conditional upon the applicant (to the planning permission) using the materials specified in the application.

Structural Surveyor's fee-: re fence

25. Mr Leeder referred to the costs of instructing a structural surveyor, he stated that the Respondents had engaged a structural engineer in relation to the previous fence. However the structural engineer had only made one recommendation; that was to add a timber fence post behind the existing fence. This recommendation had not been adopted by the respondents.

26. Mr Leeder in his Scott Schedule stated that "*... adding an extra post behind the fence was an obvious solution and did not require the services of a structural engineer*". He queried why the respondents had engaged a structural surveyor, when they had already made the decision to replace the fence.

27. Given this, he queried why he should be responsible for the structural engineer's charges.

28. The respondents stated that they had taken advice, because the existing fence had been bolted to the dwarf wall, they had wanted to confirm whether it had needed to be replaced or could be repaired as requested by the applicant. As they had ultimately decided to replace the wall they

had not taken the engineer's advice. The respondents considered the solution offered by the structural engineer to be a temporary solution, to take the load off the brick pier, however the damage to the brick pier by the erection of the fence was structural and not just cosmetic and they considered it required a permanent solution.

The cost of replacing the fence

29. The Applicant contended that it had been unnecessary to replace the fence as it could have been repaired, given this, he considered the costs of the work in the sum of £5150.00 to be not reasonable or payable, for the reasons he had previously stated. In support of this, he relied upon the estimate received from Mr Munns.

30. He contended that even if it had been necessary to replace the fence, the cost had been excessive, and that the respondents had obtained inadequate quotations, as no details had been given of the measurement of the fence, and the number of posts to be supplied.

31. The Tribunal asked for details of how the Respondents had chosen the contractors who had tendered for the work. The Respondents' stated that they had consulted "check a trade" reviews, and had then carried out site checks and finally had checked to see whether the short-listed builders had appropriate insurance.

32. In respect of the architect they had obtained several similar quotations, and had simply chosen the architect who was able to carry out the work at the earliest start date. The Respondents referred to an email sent on 14 March 2014 requesting access to the Applicant's garden for the purpose of the architect's inspection. Ms Moineau stated that Mr Leeder had responded by confirming his agreement to provide access and had not at that stage raised any objection to the inspection or the work being undertaken.

33. The respondents provided a copy of the Section 20 notice. They had engaged **Alcourt Landscapes**, the contractor who had provided the lowest tender.

34. In relation to the section 20 notice, Mr Leeder stated that the notice which was dated 28 June 2014, had provided for the replacement of two gates, whereas the final work had included 4 gates with additional gate posts, this had not been provided for in the section 20 notice.

35. The respondents acknowledged this; however, they stated that the Applicant had only paid 50% of the total costs, as the respondents were also required to meet the additional costs of this work, given this they did not consider this to be unreasonable.

The Tribunal's decision on the costs of the fence and associated work

36. The Tribunal determined that the cost of the work of replacing the fence, and the associated expenses was reasonable and payable. In the section 20 notice dated 28 June 2014, the respondents had stated that the reason for the work was that-: "*We consider it necessary to carry out the works because the fences are now degrading really fast. Most of the panels are rotten and heavily bowed. The wooden boards at the bottom of the fences are also bowing outwards onto pavement due to raised flower beds.*"

37. The Tribunal also heard that the respondents had sought the opinion of the fencing contractor, who had stated that they were unable to provide a guarantee should the fence be repaired.

38. The Tribunal also noted that the respondents had provided a copy of the response from the planning department concerning the need for planning permission in which Pete Smith Head of the Development department stated-: "*From the information and description provided by the customer, it appeared that the proposal would require planning permission as the fence would be in different form to the existing fence and over 1m in height fronting a highway.*"

39. The Tribunal noted that Applicant in his submissions stated that had a repair to the fence been carried out then it would not have been necessary for planning permission, however the Tribunal are satisfied that although repairing the fence was one of the options, the respondents had made a good economic case for the replacement of the fence as being more cost effective in the long term.

40. The Tribunal noted the estimate obtained by the Applicant from Mr Munns. The Tribunal was informed that this had not been provided to the Respondents. The Tribunal noted that Mr Munns had not been available to carry out the work; given this, his estimate could not be relied upon. Accordingly in the absence of other estimates, supplied by the applicant, the Tribunal is satisfied, on a balance of probabilities, that the costs of carried out the work, was reasonable, and payable.

41. The Tribunal noted that the respondents had sought advice from the local authority, and that in so doing, a cost was incurred. The Tribunal was informed that this is the normal practice of the local authority. The cost was a direct consequence of the work carried out work to the fence, in the same way, as was the costs of engaging an architect. Accordingly the Tribunal finds the costs of the architect and the costs of the fees for the local authority planning officer reasonable and payable.

42. The Tribunal noted that a structural surveyor was also engaged, and his advice was not taken. Given that the Applicant had raised the issue of repair rather than replacing the fence, it was not unreasonable for the respondents to seek such advice before reaching their decision, there was no obligation on the respondents to take such advice upon deciding that replacement of the fence was a more viable solution. The Tribunal noted that the Applicant had not suggested that the cost associated with the survey was excessive. Accordingly the Tribunal finds that the cost of the survey was reasonable and payable.

43. The Tribunal has noted that the section 20 notice did not provide for two additional fence posts or gates, no reason has been given as to why it was necessary for the two additional gates, accordingly any costs associated with this work are not reasonable and payable.

Lawyer's letter in the sum of £378.00

44. The Applicant's next service charge item in dispute was a lawyer's letter dated 3 August 2015, from Wainwright & Cummins LLP.

45. In the letter, the solicitor set out his interpretation of clauses, 1(C) (ii) and clauses 3 of the sixth schedule of the lease. The solicitor stated that the sums were due in advance of expenditure. The penultimate paragraph of the letter stated -: *"... Our clients now expect you to forward the balance of the sums demanded by them for the service charges for 2014-2015 as soon as you receive this letter. Furthermore, our clients' costs are to be paid by you in the sum of £378.00 (£315.00 plus £63.00 (1.5 hours work at our hourly rate of £210.00 plus VAT) in accordance with Clause (f) of the Ninth Schedule. Further correspondence will be charged at the same rate..."*

46. Mr Leeder queried why the service charge monies needed to be paid in advance, when payment was not due until 29 September of each year. He also argued that the work had not been undertaken at that stage, and the contractor was due to be paid on completion. Mr Leeder said that the letter also indicated that the insurance was due even though it was not payable until the end of August.

47. Ms **Moineau** referred to a letter sent by the Applicant in which he stated that he had sought legal advice on an invoice received in relation to the major works, in which he said that it was his opinion following receipt of advice that the lease did not require him to pay in advance of the work being undertaken.

48. Ms **Moineau** stated that the Applicant had only been charged for 50% of the costs of the solicitor's involvement which included taking instructions as well as drafting the letter. The respondents stated that they had been surprised that the applicant had paid the legal costs as

they had not demanded the cost of the letter by sending a service charge demand.

49. Mr Leeder explained that this was because of the threat contained in the letter, to increasing costs payable by him if further letters were sent. As a result he had paid the solicitors costs along with the outstanding service charges.

50. He submitted that he should not have to bear the costs of solicitors letters as a result of the Applicant having chosen to engage solicitors, as in his opinion, this had not been necessary

51. The Tribunal were referred to the eighth and ninth schedule of the lease.

The decision of the Tribunal on the costs of the letter

52. The Tribunal having considered the lease finds that the sums demanded were due on 29 September of each service charge year; accordingly the Applicant was correct in his interpretation. Clause 3 of the sixth schedule states-: "At all times during the said term to pay and contribute promptly upon written demand by the Lessor one half of the costs and expenses reasonably and properly incurred by the Lessor in carrying out its obligations in accordance with the Eighth Schedule hereto...

53. Clause 2 (C) (ii) of the lease states-: the contributions under Paragraph (i) of this Clause for each year shall be estimated by the Lessor or his Managing Agents (whose decision shall be final save in the case of manifest error) as soon as practicable after the beginning of the year and the lessee shall pay the estimated contribution on 29th day of September in that year..."

54. Mr Wood on behalf of the Respondent's sought to argue that the demand related to the sum due in September of the previous year. The Tribunal did not accept this. If the Respondent had sought payment for the sums due in 2014, then the demand should have been served on 29 September 2014. Accordingly the sums demanded were not for the previous year, but were effectively a demand levied in advance for the period ending 29 September 2015. Given this, it was not reasonable to engage a solicitor at that stage to pursue the service charges that had been demanded.

55. The Tribunal finds that the sum of £378.00 was not reasonable or payable.

56. The Tribunal is satisfied that the sum was paid under the mistaken belief that the Applicant needed to pay the solicitors' costs to avoid the threat

of further legal costs being incurred. Accordingly there was no agreement to pay the sum.

57. Accordingly the Tribunal determines that this sum ought to be reimbursed to the Applicant or set off against future service charges.

The costs of the window replacement for the upstairs flat

58. Mr Leeder accepted that his windows had been replaced and that the respondents as leaseholders had been required to contribute to the costs of replacement, however he raised two issues in relation to the respondents' windows, firstly he did not consider the first floor flat windows to be in need of replacement, and secondly under the terms of the lease, the glazing was demised to the leaseholder, accordingly, he did not accept that he should be required to contribute to the costs of the glass.

59. Mr Leeder stated that the respondents' windows had been replaced, in 1999. He stated that there was nothing obviously wrong with the upstairs windows, although he accepted that the ground floor windows had been in a poor state of repair with water stains and rotting frames.

60. The applicant also stated that the costs of replacing rather than repairing had meant that scaffolding had been necessary. He stated that he understood that a repair would not have resulted in the need for scaffolding.

61. Mr Leeder had also obtained an estimate in November 2016 for repairing the seals in the sum of £1980.00

62. The total costs of the windows had been as follows-: £3396.00 for his flat and £7862.80 for the upstairs flat. Mr Leeder stated that the windows could have been repaired rather than replaced and replacement had included an item to the respondents' Velux window; a blind in the sum of £100.80 which in his submission should not have formed part of the service charges.

63. The respondents accepted that the windows could have been repaired, however, in their reply in the Scott Schedule; they stated that the work would not have been covered by a guarantee. The Tribunal were referred to an email from Steve Davis of *PS Home Improvements* dated 15 August 2016, in which he stated-: -: "...we *have done this type of work in the past and we have always had problems. If we were prepared to do it there would certainly be no guarantee. I am really sorry but I think you will struggle to find anyone who is prepared to carry out the repair work you require...*"

64. The applicant stated that he had been informed that there was a Thermographic survey, upon which the respondents had placed reliance. Mr Leeder had asked to have sight of this prior to the work being undertaken and his request had been refused. The respondents had provided a copy of the Thermographic report to the Tribunal which was included in the bundle, (accordingly the applicant had now had sight of the document) The Report dated February 2016, had been prepared by Nick Murphy an Energy and Safety Services Manager of Incentive FM Group. The purpose of the report was to consider whether there was *"...any thermal bridging leading to any inefficiency within the thermal elements".*

65. In the conclusion of his report, he noted that there was evidence of condensation within the external seals which was indicative that the seals had failed. He recommended that the window frames be removed and re foamed and re sealed to the building fabric, he also recommended that the seals and panes be replaced. In his report he cautioned that there was a risk that the windows would be damaged in the exercise of replacing them.

66. The applicant had provided an alternative quotation, for a repair in an email dated 28.12.16. In the email from Nick Karpata of *"Cloudy 2 Clearwindows".* Mr Karpeta stated-: *"We can and do replace rubber seals/gaskets when we carry out repairs; they normally cost £8 per metre (plus VAT). The seals we replace regularly are internal gaskets where they have perished/worn or have shrunk back significantly. External gaskets/rubber seals are not always replaceable it will depend on the type of window system...Regardless, we may be able to replace these also, and I would be able to advise you on this once I have seen the windows in person..."*

67. The respondents did not accept that the quotation referred to by the applicant was a "like for like" quotation, in that they stated that it failed to take into account the fact that two of the upstairs windows were in need of replacement. In respect of the Velux blind, they stated that this feature had existed in the original window, and as such they had replaced like with like.

The decision of the Tribunal on the costs of replacing the first floor flat windows

68. The Tribunal having considered the Third Schedule of the lease, accept that the glazing is demised to each of the leaseholders, however, in practicable terms, the Tribunal accepts that the wording of this clause enables repairs to the glazing to be carried out by the leaseholders should the need arise. Where as in this case the frame is in need of replacing it would be wholly impractical for the leaseholder to be separately responsible for the glazing.

69. The Tribunal having considered all of the documentary and oral evidence finds that it was reasonable to replace the windows. The Tribunal noted that no issue had been raised as to the standard of workmanship, or that the cost of replacement was unreasonable.

70. The Tribunal in considering the survey and its conclusion accepted that although in theory, repair of the window seals was possible, the report sounded a word of warning in that it stated that -: *"repair should be used with caution as the manufacture of the windows is not known and any damage to the frame would mean that it is required to be replaced..".* It was also noted that it was unlikely that the panes would be under warrant.

71. Accordingly the Tribunal is satisfied that the cost of replacing the windows was reasonable and payable. The Tribunal noted that the blind within the Velux window cannot be considered part of the window frame, given this, the Applicant's contribution to the sum of £100.80, is not payable.

The cost of replacing the paving

72. In the Scott Schedule, the applicant stated that the paving located in front of the garages and outside the front door was replaced at a cost of £2125.00. Mr Leeder had obtained a quotation for repairing the paving in front of the garage in the sum of £468.00. Mr Leeder also stated that he had obtained a quotation for replacement of the area near the garage for £1980.00. In his view, given this, it ought to have been possible to obtain a quotation for the work for less than the sum claimed. The applicant also relied on the respondents' quotation for costs of repair as the contractor had quoted the sum of £600.00 for the cost of repairing the area outside the front door. Mr Leeder stated that given this, had the respondents opted for a repair rather than a replacement, then the total costs would have been £1068.00.

73. He also complained that the respondents had only obtained two quotations rather than 3 and had not included the measurements in section 20 notice.

74. In reply, the respondents stated that the applicant had been consulted through the section 20 procedure and that he had not made any observations or provided an alternative quotation at the time.

75. The respondents stated, in their reply that repairs were not a long term solution-: *"...Repairs would only be temporary with no warranty on works and the landlord was advised by contractors to replace entire paving area. Replacing just some blocks would look odd and blocks would need to be mixed between old and new to create a seamless fit*

as per manufacturers' recommendations and best practice. There were a lot of cracked, broken and sunken blocks."

76. In their oral evidence, the respondents stated that they had been advised that they had problems with uneven corners. It was clear that work needed to be undertaken to the paving, however, the difference in costs of repair involved lifting blocks, with the risks of a large percentage of blocks breaking on lifting, the costs of these replacements would have added to the total costs of repairing the paving. The respondent referred to a photograph of the paving, prior to the work being carried out. In the photograph there was some evidence of weeds growing through the path.

77. In an exchange of email correspondence between Aurore and D Plumridge Professional driveway Mr Plumridge stated £890.00 plus VAT. Ms Moineau asked for Mr Plumridge's opinion of the better option.

78. In reply he stated-: *"...New work comes with 5 yrs. labour and 10 years product repairs come with nothing. Best option is new work as repairs are temporary..."*

79. The Respondents used Alcourt Landscapes to undertake the work. The total price for the paving and ancillary work was £4250.00. This cost included items of work which also included works to the respondents' demised premises, including laying standard blocks, laying drainage channels and building soak.

80. Mr Leeder asserted having the contractor on site had meant that some of the work had been carried out solely for the benefit of the respondents. Although Mr Leeder was not querying the costs of the work, he stated that the equipment which had been on site had been used for the respondents work, which resulted in a saving, as such they should have apportioned and shared this saving.

The General Maintenance

81. The next item in dispute was a pressure washer; this charge was incurred under the heading of general maintenance. Mr Leeder stated that this was for the sole benefit of the respondents, according he did not accept that the costs of this should be payable as a service charge item.

82. The respondents explained that they had brought the pressure washer to maintain the footpaths and forecourt rather than engaging someone to carry out this work, they intended to do the work themselves which in the long- term would result in a savings.

The Tribunal's decision on the cost of the paving work and the pressure washer

The cost of the paving work

83. The Tribunal having carefully considered the documentary evidence and having heard from both parties; finds that the charges for replacing the paving tiles were reasonable and payable.

84. The Tribunal noted that there was no challenge from the applicant regarding the necessity of the work, it was accepted that the paving was broken and in poor condition, (which was confirmed by the photographs.) The applicant challenged the service charges on the basis that the respondent ought to have repaired rather than replaced the paving tiles; the Tribunal noted that there has been no complaint about the overall standard of the work.

85. The Tribunal determined that whilst there was agreement that it was possible to repair the paving, there was a concern that on lifting the tiles up, that tiles would be broken which would add to the costs, there was also concern that this option would be a short term fix, and that the respondents would not have the benefit of a guarantee for the costs of labour and materials. The Tribunal considers that this was a legitimate concern.

86. The respondents in making a decision about the cost effectiveness of the work took the opinion of the contractor into account and accordingly decided that it would be better to go for a long- term solution. The Tribunal considers that the approach adopted by the respondents was reasonable.

87. Although it might have been possible to find contractors who were willing to carry out the work at a lower sum, the Applicant did not respond to the section 20 consultation process by finding a contractor who was prepared to carry out this work at less than the contracted price, accordingly the Tribunal finds that the cost incurred was reasonable and payable.

88. The applicant has produced no evidence that there was an increase in the costs associated with the respondents using a contractor who also carried out work on their behalf, or that the elements paid for as part of the service charge was more expensive as a result of work being undertaken for the respondents or indeed that there was a saving.

89. Any saving which may have resulted from the work being undertaken with the respondents work was incidental. Accordingly the tribunal finds no reason to interfere with the charges for the paving.

The pressure washer

90. The tribunal finds that the costs of purchasing the pressure washer was reasonable and payable, the Tribunal accepts that the respondents intention in purchasing the pressure washer was to carry out the maintenance of the tiles without the need to engage contractors to do this work. The Tribunal considers that this was a reasonable approach to adopt and accordingly finds the cost of the pressure washer reasonable and payable.

91. The next charge related to roof tiles, which had slipped. The Applicant indicated that he now accepted this charge as reasonable and was accordingly prepared to concede that the cost of this item was reasonable and payable.

The Management Charges

92. The Applicant stated that the lease provided for management charges to be paid at 10%, his challenge was on two grounds firstly, that this sum was not reasonable and secondly, management should be performed for a fixed fee.

93. The second issue related to the wording of the lease, (which is referred to below) which appeared to exempt two of the service charge items, that is the insurance, and the work in relation to the fence, from attracting a management fee of 10% as an up lift on these items.

94. In relation to the first issue, the Applicant argued that the normal method of applying management charges was by having a fixed fee, in his view, as the respondents were managing the premises themselves and had not engaged managing agents. He stated that they were not professional managing agents. He asserted that a reasonable fee, for the premises, should be no more than £150.00 per annum.

95. In relation to the second issue, the charge of 10% related solely to charges in the 9th schedule, whereas the cost of the insurance, and the replacement of the fence, was not covered by the provisions in the 9th schedule of the lease. The insurance was payable by reference to the 8th schedule, and the work to the fence by reference to the 2nd schedule of the lease.

96. Accordingly, if the Tribunal did not accept that a flat fee was payable for the management of the building, then the Applicant argued that these two charges did not attract the 10% management fee.

97. The respondents asserted that the 10% management fee was included in the lease and as such they were entitled to charge this sum on all the heads of charges.

98. Mr Wood sought to deal with this matter in submissions on the respondents' behalf. He asserted that there was a mistake in the wording of the lease and that in any event the wording related to the performance of all of the covenants in the lease. Mr Wood also asserted that the management costs were reasonable for the work undertaken by the respondents.

The Tribunal's decision on the management fees

99. The Tribunal carefully considered the wording of the lease as set out in the ninth schedule, in relation to the management fees.

100. The lease stated- at clause e) of the ninth schedule -: " *The cost to the Lessor of performing the Lessors covenants in this lease so far as the same are not set out in detail in the Eighth Schedule (f) The management and collection expenses incurred by the Lessor and its agents in respect of management of the building and the collection of rent and provided that so long as the Lessor does not employ Managing Agents the Lessor shall be entitled to add the sum of ten per centum to any of the above items for administration."*

101. The eighth clause referred in clause 1 -: *To keep the Reserved Property in good and substantial repair and condition and whenever necessary rebuild and reinstate..."*

102. The definition of 'reserved property' is set out in the second schedule which stated that the following are included-: *" All those parts of the Building not comprising Flats and including for the avoidance of doubt ... the front gateway and front wall or fences as well as the pathways..."*

103. The Tribunal finds that the lease is worded precisely to exempt the landlord from claiming the costs of management on placing the insurance, and also where it involves the management of the reserved property which is separate to the demised premises, and which, arguably is for the benefit of the landlord, (whose long term interest is in the fabric of the building) that the reserved property be maintained.

104. The Tribunal finds that the provisions of the lease provide for the management of the property to be chargeable at 10 percent on all the service charge items save in relation to the work to the fence (and all the associated charges) and the placement of insurance.

105. The management charges on the placement of the insurance and the costs of the work to the fence are not payable in accordance with the terms of the lease.

The insurance

106. The applicant stated that it was possible to obtain cheaper insurance, in support of this, he referred to steps taken by himself in 2014 (supported by documentation), which lead to a reduction in the costs of the insurance.

107. In reply the respondents stated that they were concerned that the applicant represented to the insurance company that he was one of the freeholders. Although this had resulted in a reduction in the premium which had benefitted the applicant and the respondents, the respondents were not happy with this. They also disputed whether the quotations obtained by the applicant was "like for like" in that the declared values used by the applicant was lower than the respondents declared value.

108. The respondents asserted that they used an established broker and that the insurance cover was provided by AXA an established insurance company.

109. The landlord's obligations in accordance with the wording of the lease state-: "*Building (including the demised premises) against loss or damage ... covered by a Comprehensive Building Insurance Policy to the full up to date rebuilding cost thereof and to any extent in excess of such amount and against such other risks as the Lessor may from time to time deem necessary or prudent...*"

The Tribunal's decision on the costs of the insurance

110. The Tribunal determined that there was in accordance with established law no obligation on the respondent to go for the cheapest insurance cover, and that the obligation to obtain insurance is satisfied where the costs of the insurance is reasonable incurred notwithstanding that cheaper insurance cover could be obtained.

111. The wording of the lease is also sufficiently wide to provide the respondents with considerable discretion as to what to include within the policy. The applicant in the Scott Schedule stated that the sum he deemed reasonable, based on the estimates obtained by him was £139.00. The landlord's charge for insurance ranged from £197.50 to £247.08.

112. The Tribunal finds that the difference between the two figures is not so significant, as to be deemed unreasonable. As such it is satisfied that even though the insurance premium is higher than otherwise might have been obtained, the provisions of the lease give the landlord discretion as to what to include in the cover. Given this, the Tribunal finds that the cost of insurance was reasonable incurred and that the sums demanded for all of the years in issue is reasonable and payable.

Application under s.20C and refund of fees

113. Mr Leeder applied for an order under section 20 C in respect of his application. This was resisted by Mr Wood on behalf of the respondents. He stated that it had taken considerable time and money to respond to the Scott Schedule, and that Mr Leeder had acted unreasonably in rejecting every proposal made by the respondents and by threating the respondents with these proceedings.

114. He had also failed to request information from the respondents prior to issuing these proceedings.

115. Mr Leeder did not accept this submission. In reply he stated that he had taken these proceedings as a last resort. He stated that he had queried the change in the charging basis for the service charges (that is why he was required to pay charges before they were due). He stated that as a result of his query he had been threatened with forfeiture.

116. He had also been deterred from raising queries to charges as a result of the solicitor's letter.. Accordingly he considered that it had been necessary to come to the tribunal. This paragraph is amended by deleting the following sentence *"He noted that even after he had paid the charges there was a follow up letter from Mr Wood."*

117. Having heard the submissions from the parties and taking into account the determinations above, the tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the **Respondents** may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

118. The Tribunal considers that there was a characteristic lack of communication between the parties, and to a degree both must accept some responsibility for this, however as landlord there was an obligation to act transparently, and it was a legitimate concern that work was being undertaken such as the work to the windows without the respondents providing the justification such as the thermographic survey.

119. The Tribunal also noted that the applicant although not substantially successful, did raise issues concerning the construction of the lease which given the respondents interpretation needed to be determined as his interpretation was not accepted by the respondents. As a result he sought a determination from the Tribunal. Accordingly it is appropriate that an order by made under Section 20C

120. The Tribunal makes no orders for the leaseholder applicant's fees to be refunded by the landlord.

Rule 13 Costs application

121. At the hearing on 20 February 2017, the respondents through their solicitor indicated an intention to apply for costs under The Tribunal Procedure Rules 2013 rule 13 Costs.

122. On 25 February a written application was sent to the Tribunal by the respondents. The applicant's reply dated 9 March 2017 was also considered by the Tribunal, the respondents submitted that the applicant's claim was vexatious, trivial, frivolous and without merit.

123. In the application under rule 13, the respondents also refer to the applicant's conduct in relation to the work undertaken to his windows and his refusal to provide a copy of the home buyers report.

124. The respondents also rely upon this application as further grounds for resisting the application under section 20 C. The respondents also provide a copy of their schedule of costs provided by their solicitor whose costs are in the sum of £10,281.60.

125. The Tribunal has considered their application in detail and the applicants reply, (although the Tribunal has not found it necessary to rehearse every issue raised by the respondents in their application, or the applicant in his reply) in this decision.

126. In reply the applicant as well as responding to the allegations concerning his behaviour referred the Tribunal to the case of Willow Court Management Ltd-v- Alexander 2016, in his submission he stated-: "I do not see how the landlord can say I met the threshold for unreasonable behaviour in bringing my application. The ambiguous wording of the lease and the opportunity for its meaning to be clarified by the Tribunal is reason enough and benefits the landlord."

127. The Tribunal in considering the application under section 20 C for an order in the applicant's favour accepted that it was just and equitable for an order to be made, and accordingly it would be entirely inconsistent if the Tribunal determined that an order for costs under rule 13 be made.

128. The Tribunal has noted that substantial costs were incurred by the respondents, this is of some concern to the Tribunal, as the respondents ably presented their own case and accordingly it was difficult to see the justification for the legal costs that have been incurred, and whilst this is a matter for the respondents, the Tribunal is not persuaded that it was wholly necessary for such a substantial sum to be incurred. In any event, the Tribunal has determined that the conduct of the applicant was not so egregious as to justify an order under rule 13 being made.

Name: Judge Daley

Amended in accordance with regulation 50 of the Tribunal Regulations 2013
21 July 2017

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.

Appendix of relevant legislation

Landlord and Tenant Act 1985

(1) Section 27A

(1) An application may be made to a leasehold valuation 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 a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -

(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -

(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to that tribunal;
(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
(c) in the case of proceedings before the Upper Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

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

<u>Leasehold Valuation Tribunals (Fees) (England) Regulations 2003</u>

<u>Regulation 9</u>

(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

of any question which may be the subject matter of an application under sub-paragraph (1).

<u>Schedule 12, paragraph 10</u>

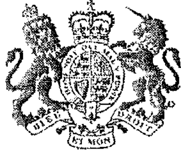
(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where—
(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or

(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—
  (a) £500, or
  (b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.



FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AH/LSC/2016/0372**
Property	:	**111 Whytecliffe Road North, Purley, Surrey, CR8 2AE ("the property")**
Applicant	:	**Mr Xavier Leeder**
Representative	:	**In Person**
Respondents	:	**Miss Aurore Moineau** **Mr Leo Fletcher-Evans**
Representative **Also in attendance**	:	**Mr Robert Wood-Solicitor**
Type of Application	:	**Correction certificate**
Tribunal Member(s)	:	**Judge Daley** **Mr I Thompson FRICS**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**21 July 2017**

DECISION

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As Tribunal Judge, which decided the above-mentioned case, I hereby correct the errors and clarify the decision dated 27 April 2017, as set out in the amended decision which is hereby attached.

Name: Judge Daley **Date:** 21 July 2017