12689

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**CAM/22UB/LSC/2018/0007**
Property	:	**3 Whitcroft, Basildon SS16 6LR** **62 The Hyde, Basildon SS16 6LS**
Applicant	:	**Susan Bloy (1)** **Bill Dowley and Linda Shipton (2)**
In attendance	:	**Mrs Gillian Blake**
Respondent	:	**Basildon Borough Council**
Represented by	:	**Mr Mark Baumohl**
Type of application	:	**For the determination of the reasonableness of and the liability to pay service charges**
Tribunal members	:	**Mrs E Flint DMS FRICS** **Judge Wilson** **Mr. C Gowman BSc MCIEH MCM**
Date and Venue of hearing	:	**2 May 2018** **Basildon Magistrates Court The Court House Great Oaks Basildon SS14 1EH**
Date of decision	:	**9 May 2018**

DECISION

Decisions of the tribunal

(1) The Tribunal determines that £2,156.14 is payable in respect of 62 The Hyde and £250 is payable is respect of 3 Whitcroft.

(2) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through the service charge account.

The application

1. The Applicants seek a determination under Section 27A of the Landlord and Tenant Act 1985 as to whether service charges for 2017 in respect of the water pipe replacement and duct lighting in the sums of £2156.14 per property are payable.

2. The Applicants seek a determination under section 20C of the Landlord and Tenant Act 1985 in respect of the landlord's costs in relation to these tribunal proceedings on behalf of all other leaseholders on the estate.

3. The relevant legal provisions are set out in the Appendix to this decision.

The background

4. The Langdon Hills Estate which was built in 1972 comprises 556 dwellings. A district heating system provides the dwellings with heating and hot water by means of ducts running beneath the dwellings and roads and at ceiling height in garage areas. The water main serving 414 of the dwellings is also located within the ductwork and consequently is classed as a private network by Essex and Suffolk Water Authority; maintenance is therefore the responsibility of the Respondent. The current water mains pipework was installed when the estate was built.

5. The 414 dwellings are a mixture of freehold, leasehold and tenanted properties owned by Basildon Borough Council.

The Leases

6. The lease for 3 Whitcroft which is dated 8 February 1989 is for a term of 125 years from the same date at a ground rent of £10 pa. By clause 2 (c) the Lessee covenants *"to pay a fair proportion of repairing the party structures as defined in clause 6(1) and the downpipes as*

defined in clause 6 (2)." The party structures being the dividing walls between the flat and any adjoining premises together with the concrete below the floor of the flat. The lessee further covenants by clause 2(4) *"To pay all rates taxes assessments charges impositions and outgoings which may at any time during the said term be assessed charged or imposed upon the flat or the owner or occupier in respect thereof ...."*

7. The lease for 62 The Hyde is dated 10 May 1999 and is for a term of 125 years from 10 October 1983 at a ground rent of £10pa. The lessee covenants to pay the specified proportion of the service charge which is defined as "*All those costs and expenses incurred or to be incurred by the landlord in connection with the management and maintenance of the Estate and the carrying out of the Landlord's obligations and duties and providing all such services as are required to be provided by the landlord under the terms of this Lease.*"

8. By paragraph 3 of the Seventh Schedule the Landlord covenants "*to maintain, repair, redecorate, renew and amend, clean, repoint .....the sewers, drains, channels, watercourses, gas and water pipes.....in under and upon the Reserved property ...*"

The Hearing

9. The Applicants were present and accompanied by Ms Gillian Blake, chairman of the Langdon Hills Residents Association and Ms Ross, the vice chairman of the association who addressed the Tribunal on behalf of the applicants. The Respondent authority was represented by Mr Mark Baumohl of counsel who was instructed by Ms Tope Ojikutu, a solicitor with the council, Mr James Henderson the Property Services Business Manager and Mr Clint Borley a surveyor and project manager were called as witnesses.

The Issues

10. The relevant issues set out for determination are as follows:

11. The payability of the service charge demands.

12. At the commencement of the hearing Mr Baumohl advised that the Respondent had previously treated the lessee of 3 Whitcroft as a freeholder; consequently, the section 20 consultation was not compliant with the statutory provisions. He confirmed that the Respondent did not intend to seek dispensation and that the sum due was therefore limited to £250.

13. Having heard the evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the issues as follows.

The Hearing

14. At the outset Mr Baumohl explained that the charges related to the replacement of the private water main within the estate and the replacement and renewal of the lighting system in the service ducts which house the water main and the district heating system pipework.

15. The water main had reached the end of its economic life. All 414 properties benefitting from the water main had been charged an equal share of the cost. The electrical work had been divided by 556 because all the properties on the estate benefitted from the district heating system whose pipes ran through the ducts.

16. The Council had obtained three reports regarding the condition of the water main. The 2012 final report in particular recommended that the main should be replaced. There was no suggestion that the fragile state of the main was due to a failure of the council to maintain the pipe work.

The Applicant's case

17. Ms Blake explained that the Association represents 192 households on the estate. She said that as the ducts belonged to the council it seemed unfair that the Respondent should charge for work to the ducts, pipes and lighting. There had been some replacement work to the northern end of the estate in 2002 although there was no paperwork available regarding this work and no resident had been charged for the work undertaken. The northern area was included in the present project, the 2002 work was not to a good standard.

18. This was once an award-winning estate, now it was run down, there was a lack of repair, the failure of the water main was in line with the rest of the infrastructure on the estate.

19. Ms Blake noted that the method of replacing the pipework in the ducts was not the same as the water authority had recommended in 1972. The council estimated the life of the pipework in the ducts to be half that of pipework under the ground. The residents had been sent a letter in 2012 stating that the pipes needed to be repaired urgently however work had not started for another four years. The costs were excessive as the pipes cost approximately £40 per run, the supporting brackets are about 1 metre apart.

20. The light bulbs in the ducts had failed. Lighting had subsequently been provided via a generator with portable lights plus those on the operatives' hats. She accepted that health and safety rules had changed however the lights were for the benefit of the contractors carrying out the repairs to the ducts which are owned by the council.

21. An administration fee of 5% had been added to the cost of the works but there had been no external oversight and therefore no additional cost to the authority.

The Respondent's case

22. Mr Baumohl referred to the schedule of works attached to the latest report which itemised the work according to its urgency together with a cause analysis for each item. The results were analysed in a series of pie charts. The majority of the problems were due to lack of insulation and bracket failure due to normal deterioration and the design of the system. There was no evidence of a failure to maintain leading to the need to replace the water main pipework.

23. Mr Henderson explained that various methods of apportioning the costs had been considered. Sharing the costs equally among the households benefitting seemed the fairest. A lot of the pipework is within the main infrastructure, there is a spur off to each property which is the same the size regardless of the type of property served.

24. The lifespan of pipework in the ground is about 100 years however the pipework in this case is not buried consequently the pipes are subject to different environmental factors which result in a shorter lifespan. He agreed that the method of fixing the pipework in the ducts was not as per the original specification. Methods change over time, this was recommended and in his professional opinion was the preferred method.

25. In cross examination he explained that once Essex and Suffolk Water had advised the council that the main was in a fragile state the council were concerned that the water company would take action against the council if there were leaks. The water company has a duty to ensure leaks are minimised.

26. He clarified the extent of the work which had been carried out in 2002 which involved only about 10 properties out of the whole estate. The cost of replacing the mains for these properties was insignificant in terms of the total contact and meant that the whole network was the same age and type which would make maintenance in the future less complex.

27. The administration charge covered the section 20 consultation process and employing a Clerk of Works for the project. He did not think the charge was excessive.

28. Mr Borley said that his involvement was concerned with the delivery of the project. He explained that several attempts were made to contact all households, including by hand delivering letters to arrange appointments to gain access for the installation of stopcocks within each property. The initial level of hostility to the works subsided once the contractors were on site. Approximately 30 stopcocks were outstanding, for a variety of reasons. He undertook to review the list of works not completed and ask the contractor to return to complete the work. He confirmed that payment was made on a completed work basis, following the signing off of the work by the Clerk of Works; each stopcock was itemised on a schedule.

29. In closing submissions Mr Baumohl said that there was no complaint regarding the section 20 process, no evidence that the work was being brought forward or that the cost was excessive.

The Tribunal's decision

30. The Tribunal finds that the costs relate to works which are chargeable under the service charge provisions of the leases.

31. Tribunal determines that the costs of the major works and the method of apportionment of those costs is reasonable and that the demand for £2,156.14 in respect of 62 The Hyde is payable. The amount due in respect of 3 Whitcroft is limited to £250 as the section 20 consultation was non-compliant. The Tribunal notes the concession made by the Respondent that no application for dispensation will be made in the future in respect of the non-compliance.

Reasons for the Tribunal's decision

32. The Tribunal is satisfied that the replacement of the water main and the installation of lighting in the ducts to allow contractors safe working conditions to complete not only this project but ongoing maintenance work was necessary. The cause analysis indicates that only 11% of the causes of failure were related in any way to either incorrect installation or repair.

Application under s.20C

33. The appellants sought an order under section 20c on behalf of all the lessees on the estate to prevent the council from adding its costs in connection with the substantive application to the service charge account.

34. Mr Baumohl said that it was not his client's intention to add the costs to the service charge account nor were the council continuing with their application for costs in relation to the alleged unreasonable behaviour of the applicants.

The decision of the Tribunal

35. Having considered the submissions from the parties, and for the avoidance of doubt in view of the concession made by the council the tribunal determines that it is just and equitable that an order is made under section 20C of the 1985 Act.

Name: E Flint **Date:** 9 May 2018

ANNEX - RIGHTS OF APPEAL

i. 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.

ii. 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.

iii. 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.

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 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,
   (d) the date at or by which it is payable, and
   (e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
   (a) the person by whom it would be payable,
   (b) the person to whom it would be payable,
   (c) the amount which would be payable,
   (d) the date at or by which it would be payable, and
   (e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
   (a) has been agreed or admitted by the tenant,
   (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
   (c) has been the subject of determination by a court, or
   (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

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.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
- (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
- (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

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