



**FIRST - TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case Reference** : **CAM/00MC/LSC/2019/0056**

**Property** : **Southcote Lodge, Burghfield Road,  
Southcote, Reading, Berkshire, RG30  
3NE**

**Applicant** : **Housing 21**

**Respondent** : **Leaseholders of Southcote Lodge**

**Type of Application** : **Application for the determination of  
the reasonableness and payability of  
service charges**

**Tribunal Members** : **Tribunal Judge S Evans**

**Date and venue of  
Hearing** : **Paper determination**

**Date of Decision** : **18 December 2019**

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**DECISION**

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**The Tribunal determines that:**

- (1) If costs were incurred of the kind detailed in the application, a service charge would not be payable under the terms of the leases;**
- (2) Those costs would not be costs reasonably incurred.**

## **DECISION**

### **Introduction**

1. The Tribunal is asked to determine the payability and reasonableness of costs to be incurred by way of service charges pursuant to an application made under s.27A of the Landlord and Tenant Act 1985.
2. Such an application may be made 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: s.27A(3) of the Act.

### **Parties**

3. The Applicant is stated to be the Leasehold Manager and Landlord of Southcote Lodge, a retirement scheme containing 26 residents' flats and 1 court manager's flat.
4. The scheme consists of an original grade II listed building containing 9 flats adjacent to newer 18 purpose-built flats within the grounds of the original building.
5. The Respondents are the leaseholders of Southcote Lodge.

### **The Application**

6. By its application the Applicant seeks determination for a single year, 2019/2020.
7. On p.10 of the application it is stated that uPVC windows were fitted to the newer buildings in 2017, but the uPVC programme could not extend to the grade II listed building with timber box sash windows sympathetic to the heritage of the building.
8. In June 2017 the Applicant Landlord undertook s.20 consultation for a programme of refurbishment of the windows in the grade II listed building. This was based on its surveyor's advice that the windows did not need replacing and could be refurbished and painted.
9. A local councillor became involved with the residents and has suggested it might be possible to get planning consent to change the uPVC windows in the grade II listed building. Some residents wanted

uVPC windows on the grounds of improved thermal and sound efficiency.

10. The local councillor's suggestion was contrary to all the advice the Applicant Landlord had received about the likelihood of planning permission being granted for uPVC windows. It is said that Reading BC planning officers have advised that they have no knowledge of such permission ever being granted in the Borough.

11. The Applicant then joined a national listed property owners club to obtain more advice and experience. Their advice was that the Applicant would not be successful in gaining planning permission for such windows.

12. The Applicant then made some inroads into having an application considered. The planners have advised that the Applicant needs to provide a sample heritage uPVC window of the type proposed, a conservation architect's report, and detailed drawings.

13. The estimated cost of the same will be:

£1500: for the report;  
£1450 plus VAT: for a supplement to the report, detailed drawings etc;  
£900: for a window sample.

14. At section 12 of the application, it is stated that the windows in the grade II listed building are at risk and their condition will deteriorate to a point where they cannot be refurbished.

15. The determination sought from the Tribunal is:

(1) Are the proposed costs reasonable?

(2) Can the proposed costs be recovered through the service charge mechanism of the leases?

### **The Leases**

16. There are 2 types of Lease before the Tribunal. The first (Lease type 1) is a sample dated 17<sup>th</sup> December 1999, and the second (Lease type 2) is a sample dated 25<sup>th</sup> September 2014.

*Lease type 1*

17. The Tenant covenants by clause 1 to pay a service charge to the Landlord being a fair proportion attributable to the Tenant of the cost of the matters referred to in the Second Schedule.
18. The Applicant by clause 5(1) covenants "...to keep in good and substantial repair (except the internal repair of the individual dwellings comprised in the Property) the structure and exterior of the Property" [i.e. Southcote Lodge].
19. By the Second Schedule, paragraph 2 to the Lease, the service charge shall make provision for the following expenditure:

"The costs and expenses of the Landlord in complying with its obligations herein and without prejudice to the generality of the foregoing:-

....

(ii) The costs and expenses of periodic or cyclical maintenance decoration and repair of the structure exterior common parts (which shall include all parts of the Property not on a long lease herein)...Save it shall be in the Landlord's absolute discretion what works fall within the definition periodic or cyclical maintenance and repair

...

(vi) The costs of management which shall not exceed the sheltered management allowance permitted from time to time"

#### *Lease type 2*

20. The Lessee covenants by clause 3.1 and 4.1 to pay the service charge as a contribution towards the costs and expenses of running and maintaining the Estate and other matters set out in Appendix III.
21. The Applicant covenants by clause 5.1 to "maintain, repair, decorate and renew... the main structure of any building on the Estate (including the Property)..."
22. The Estate is defined as the land and buildings at Southcote Lodge, and the Property as the individual flat.
23. By clause 5.5 the Applicant covenants to "maintain, repair, decorate, keep in good order and renew... the external windows and external doors of the Property..."
24. By clause 3.2 the Applicant may recover a proportion of its costs and expenses of providing the "Services", which by Appendix III include:

- (1) The Applicant's obligations under clause 5 (para.1);
- (2) "The fees and expenses paid to any managing agents appointed by the Landlord in respect of the Estate, or a reasonable allowance to the Landlord in respect of the costs and expenses of management and administration. When applicable such fees or costs will not exceed the level (if any) from time to time permitted by or agreed by the Housing Corporation..." (para. 4);
- (3) All other expenses (if any) incurred by the [Applicant] in and about the maintenance, repair, renewal and replacement and proper and convenient management and running of the Estate..." (para. 6);
- (4) "Such sum as shall be estimated by the [Applicant] by way of provision for future costs expenses and liabilities in respect of decoration and maintenance which are normally done at regular intervals, and repairs, renewals and replacements generally."

### **Relevant law**

25. The relevant statutory provisions are set out in Appendix 1 to this decision.

### **Can the proposed costs be recovered through the service charge mechanism of the lease?**

26. The Applicant states this question revolves around whether the cost of meeting the planners' pre-requisites for supporting information can be recovered through the service charges.
27. The Applicant states that the closest it can see for recovery through the express terms of the lease is Appendix III (6) of the 2009 Lease (see paragraph 24(3) above), but it is of the view that the costs being proposed are not "in and about" the general repair or renewal of the windows.
28. In *Chiswick Village Residents Ltd v Southey* [2019] UKUT 148 (LC), the lease terms enabled the lessor to recover a service charge contribution in respect of "all costs incurred by the Lessor...relating or incidental to the general administration and management of the Lessor's Property..." The First-tier Tribunal was satisfied that professional fees incurred by the lessor in defending 2 applications for

planning permission made by a third party lessee of the roof space above the residents' flats did fall within the terms of the lease quoted above. The Upper Tribunal decision concerned an issue of procedural irregularity, but it is recorded that the Respondent leaseholder did not challenge the FTT's conclusion that professional fees spent in understanding the potential consequences for other leaseholders were legitimate items of expenditure under the above clause.

29. The starting point for any Tribunal is the terms of the leases themselves, giving primacy to the actual words used: *Arnold v Britton* [2015] AC 1619. The focus should be on the meaning of the relevant words in their documentary, factual and commercial context.
30. In my judgment, the wording of Lease type 1 in its overall context does not encompass pre-planning expenditure of the type envisaged in this case. In particular, the ordinary and natural meaning of the Second Schedule is that only the costs and expenses in complying directly with the obligation to repair the structure and exterior, and of periodic/cyclical maintenance are to be recoverable.
31. Similarly, as regards Lease type 2. The "Services" include the obligation to maintain, repair, decorate, and renew the main structure and the external windows, with the addition of keeping those windows in good order. I agree with the Applicant that the pre-planning costs in this case do not fall to be considered as expenses "in and about" maintenance, repair, renewal and replacement.
32. That leaves only the question as to whether these costs, or part of them, might be "costs of management" under Schedule 2, paragraph 2(vi) of Lease type 1, or Appendix III paragraphs 4 and 6 of Lease type 2.
33. It is right to acknowledge that "management" may sometimes include obtaining professional advice: *Geyfords ltd v O'Sullivan and others* [2015] UKUT 683 (LC) at [37]; *Chiswick Village Residents Ltd v Southey* [2019] UKUT 148 (LC).
34. However, in my judgment, the *Southey* case is distinguishable from the instant case. The clause in that case was much wider, concerning costs which might not only relate to, but be *incidental* to, the *general administration and management* of the lessor's property. It is significant that the costs of management in both Lease type 1 and Lease type 2 are capped, in so far as they shall not exceed the sheltered management allowance/ Housing Corporation level. This indicates in

my view that the parties to the leases objectively considered a much narrower definition of management costs.

35. I recognise that para. 6 of Appendix III of Lease type 2 includes expenses in and about the proper and convenient management and running of the Estate, but in my judgment it would taking those words outside of their documentary and factual context to find them applicable to the costs of a specialist report and sample window as in this case.

### **Are the proposed costs reasonable?**

36. By section 19(1)(a) of the Act relevant costs shall be taken into account in determining the amount of a service charge payable only to the extent that they are reasonably incurred.
37. The Applicant states the question is simply whether it is a reasonable use of service charge monies to pursue a planning application for which there is a pre-requisite for supporting information before the application can be considered.
38. The Applicant places reliance on the fact that all the advice received hitherto is that planning permission would not be granted. In addition, the Applicant contends that the present condition of the timber windows has, on advice from a surveyor, been determined to be serviceable with pre-decoration repairs plus fresh paint.
39. On 11<sup>th</sup> October 2019 a Deputy appointed by the Court of Protection for Mr Martin Bradford (the leaseholder of Flat 26 Southcote Lodge) informed the Applicant that he considered that it would be inappropriate to spend funds on this exercise.
40. On the same day, Shirley Everett of 27 Southcote Lodge made representations through her son that she objects to the costs of the specialist works.
41. On 21<sup>st</sup> October 2019, Vivien Higgs of 18 Southcote Lodge made a statement to the effect that the windows had not been painted for at least 15 years, that there had been historic poor management and lack of maintenance, and that she did not want to pay any further monies out.
42. Aside from the above, no other leaseholders' representations are placed before the Tribunal.

43. In my judgment, on the evidence before me, the estimated costs set out in paragraph 13 above would not be costs reasonably incurred, for the following reasons:

44. First and foremost, whilst a repair may in certain circumstances require a renewal or improvement, the Applicant states on professional advice (and I have no evidence to the contrary) that the stage has not been reached where the windows require replacement.

45. Secondly, even if that stage had been reached, the choice/method of repair is for the Applicant. The leaseholders do not have a right to uVPC windows.

46. Thirdly, on the material before me, any planning application would look to be speculative. I am conscious that the leaseholders might be expected to pay in the region of £159 per head in respect of pre-permission costs of an application which might well be unsuccessful.

47. Lastly, whilst I appreciate there would not appear to have been any formal consultation in respect of these costs, such material as I have from the leaseholders indicates opposition to the expenditure envisaged.

48. The Tribunal therefore determines that:

- (1) If costs were incurred of the kind detailed in the application, a service charge would not be payable under the terms of the leases;
- (2) Those costs would not be costs reasonably incurred.

49. No application is made under s.20C of the Landlord and Tenant Act 1985, nor under Schedule 11 paragraph 5A of the Commonhold and Leasehold Reform Act 2002.

Judge: \_\_\_\_\_  
S J Evans

Date:  
18/12/19

## **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 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 to 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 1**

### **Landlord and Tenant Act 1985**

#### **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.

**Schedule 11 para 5A of the Commonhold and Leasehold Reform Act 2002**

- (1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.
- (2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.
- (3) In this paragraph-
  - (a) "litigation costs" means costs incurred or to be incurred by the landlord in connection with proceedings of a kind mentioned in the table [First-tier Tribunal proceedings.