FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/29UN/LIS/2018/0058**
Premises	**:**	**Northumberland Court, Northumberland Avenue, Margate, Kent CT9 3BS**
Applicant	**:**	**Northumberland Court Residents (Cliftonville) Limited**
Representative	**:**	**Mr W Barker, Bamptons – Managing Agents**
Respondent	**:**	**The Lessees**
Representative	**:**	**Mrs McChesney & Miss McChesney**
Type of Application	**:**	**Service Charges - Sections 27A and 20C of the Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Mr R Athow FRICS MIRPM – Chair** **Mr N Robinson FRICS - surveyor member** **Mr P A Gammon MBE BA (Lay Member)**
Date of Hearing	**:**	**10th April 2019**
Date of Decision	**:**	**25th April 2019**
Date of Publication	**:**	**8th May 2019**

DECISION

Decision

1. The Budget to set the Interim Service Charge for the Financial year ending 30th June 2019 is £192,230.

2. No order is made under Section 20C of the Landlord and Tenant Act 1985.

3. A brief decision was published on 25th April 2019 (a copy is attached at Annexe A) and this is the fully reasoned decision of the Tribunal.

Background

4. The Applicant is the Head Leaseholder and Resident Management Company of Northumberland Court (the premises). The Respondents are the lessees of the flats within the premises.

5. On 11 October 2018 the Applicant applied for a determination as to the liability to pay an interim service charge for the period 1 July 2018 to 30 June 2019 totalling £192,230.

6. The application was made by Bamptons, managing agent on behalf of the Applicant, and was opposed by various leaseholders.

7. The application was listed for hearing on 10 April 2019.

8. On 13 February 2019 Mr Porter informed Judge Tildesley that the Directors of the Company, Mr Jim Dobbe and Ms Grace Neal had been relieved of their duties and replaced by Mr Phillip Porter and Mr Albert Berritt. Further Mr Porter advised Judge Tildesley the new board had dismissed Bamptons as managing agent with effect from 13 March 2019.

9. Mr Porter applied for the hearing to be adjourned on 10 April 2019 on the grounds that the proposed works could not be carried out seamlessly and in efficient order due to the restrictive covenants contained in the old outdated lease. The new Directors also indicated that the methodology and costs of the proposed works were disputed.

10. Based on the information provided by Mr Porter on 21 March 2019 Judge Tildesley granted the adjournment and vacated the hearing on 10 April 2019.

11. On 22 and 25 March 2019 the Tribunal received applications from Mr Jim Dobbe and Ms Grace Neal and from Mr Smith for reinstatement of the hearing on 10 April 2019 on the ground that Judge Tildesley had been misled. Mr Porter and Mr Berritt had not been appointed as Directors of the Company.

12. Judge Tildesley decided to call a case management hearing by telephone on 4 April 2019 at 10.00 a.m. to determine whether the case should proceed on 10 April 2019.

13. On 4 April 2019 Judge Tildesley heard from Mr Brown of Gullands solicitors and Mr Yates of Karslakes solicitors who were instructed by the two sets of directors in respect of the Corporate dispute, Mr Barker of Bamptons, Mr Dobbe, Ms Neal, Mr Berritt, Mr Smith, Mr Coad, Ms Benton, Ms Forde, Mr Abbott, Mr Kelleher, and Ms Chesney.

14. Judge Tildesley concluded that the dispute about the directors is still unresolved and it is not a matter that falls within the Tribunal's jurisdiction. Judge Tildesley noted that the demand for the estimated service charge is still in force and the directors who were in place at the time the demand was issued are still recorded as directors of the Applicant at Companies House.

15. Judge Tildesley formed the view from the leaseholders' representations that there remains a substantial dispute regarding the way forward in respect of the property, and that dispute remains when and if there is a change in the directors of the Applicant company. Further it appeared that some of the issues with the property are urgent. In those circumstances Judge Tildesley decided that the hearing should go ahead on 10 April 2019 at 11.00 a.m. at Margate Law Courts with an inspection of the property at 10.00 a.m. in the hope that that at least aspects of the dispute can be resolved.

16. In this Decision [x] refers to pages within the bundle.

Inspection

17. The Tribunal inspected the premises before the Hearing commenced. The weather on the day was fine and sunny, although cold and windy.

18. All of the communal areas were inspected as well as Flats 7, 19 and 20 where the Tribunal were shown the areas of damp penetration, rusting balcony handrails and areas of plasterwork and rendering that had fallen away. Various areas of damp in the common areas were noted as well as a faulty alarm panel close to Flat 7. Generally, internal condition is worn. Externally the condition is also worn and in particular the Tribunal noted the advanced state of decay to the steel RSJ structural support adjacent to the underpass from Beresford Gardens to the car park area which had safety hoarding around it.

19. The premises are sited on a corner plot just back from the seafront, overlooking Palm Bay. The main frontage is to Northumberland Avenue (East elevation), the North elevation fronts Palm Bay Avenue, and the South elevation fronts onto Beresford Gardens.

20. The main part of the building is 4 storey plus one flat in the basement. It is rendered and colour-washed and was built about 90 years ago with a steel frame construction, the steelwork being encased in either concrete or brickwork. At some later date an annexe was added which is over 3 floors with a central vehicular access underpass. It is understood that originally the premises were constructed as an hotel. Many features of the main communal areas incorporate parts of a liner (at the inspection we were told it was from SS Mauritania) including the revolving entrance doors, wood panelling and ornamental plastered ceiling to the foyer, and the original lift

from the ship. Most of the remaining common parts were of traditional construction and style.

Hearing

21. The hearing took place at the Margate Law Courts where Mr W Barker of Bamptons represented the Applicant. Mrs McChesney (Flat 3) represented Mr Porter (2), Miss McChesney represented herself and 12 other lessees. In total 19 lessees or family members were present.

22. The Tribunal explained the only purpose of the hearing was to consider the application from the landlord under Section 27A(3) of the Landlord and Tenant Act 1985 to consider whether the budget set by the directors of £192,230 for the year ending 30th June 2019 was fair and reasonable.

23. There was also an application by the lessees under Section 20C of that Act seeking an Order that any costs incurred by the landlord in connection with these proceedings are not to be included in any of the service charges payable by the tenants.

24. The Tribunal were grateful for the production by the Respondents of a schedule showing the items in dispute in the budget [159] and, after clarification and correction of some points, it was agreed the only items to be decided by the Tribunal were:

Description	Budget	Respondents
Buildings Insurance	£ 18,000	£ 15,000
Entryphone Locks &Keys	£ 5,000	£ -
Fire Equip/Alarm/Emerg Lighting Tests	£ 1,000	£ 500
General Repairs	£ 40,000	£ 25,000
Lift Telephone	£ 230	£ -
Management Fees	£ 16,200	£ 8,100
Programmed Works	£ 100,000	£ 27,500

25. It was agreed that each of these items would be considered individually in turn. The remaining items were agreed.

Applicant's Case

26. Mr Barker, for the Applicant, gave a detailed history of the building and its management over the past 20 years or so. He explained the building had needed substantial investment to prevent further deterioration to the fabric of the building, caused by its construction and exposed position overlooking the Thames Estuary and North Sea. In 1988 a report had been published by B W Dartnell [309] upon the instructions of the then directors which highlighted the defects in the building. It listed 20 items which required action of varying degrees of priority, 6 of these being high priority. Little of these works were dealt with.

27. There have been nine subsequent reports [308 – 474], but again little had been done to deal with the defects found.

28. Budgets had been prepared over the past years in accordance with the terms of the lease but there had been an ongoing arrears problem meaning there was never enough funding to carry out all the works intended.

29. A further problem exists in that the lease does not allow for a reserve. Had there been such a clause, funds could have been built up over a period of time to enable major works to be carried out and the costs spread.

30. Over the past few years directors of the day had considered the situation and instructed Crowther Overton-Hart to prepare a 10 year Planned Maintenance Schedule, which was published in July 2017 [385]. This highlighted the defects needing attention. The budgeted figure for 2018 was £84,406.29.

31. In setting the Budget for the year from 1st July 2018 to 30th June 2019 the previous years expenditure was taken as a starting point and adjusted making appropriate adjustments where required.

32. In addition to these sums, the directors were conscious of the need to commence some of the work as set out in the 10-year Planned Maintenance Schedule, together with urgent steel repairs which would cost in the region of £16,000, roof repair works which would cost in the region of £10,000, and other urgent works. It was felt that an appropriate sum to fund these works was £100,000. With this amount of money in the service charge account the company could start the process of bringing the building back into a good state of repair.

33. The directors were conscious of the financial situation that some of the lessees found themselves in, but their duty as directors of Northumberland Court Residents (Cliftonville) Ltd was to keep the building in good repair in accordance with the Company's liabilities under the terms of the lease.

34. Because of the concerns raised by some of the lessees about affordability, the directors decided to make the application to the Tribunal in order that this issue can be finalised.

Respondents' Case

35. The respondents' main concern was affordability. Whilst it was acknowledged that the repairs were required, some lessees were financially unable to afford what was, in effect, the doubling of the interim service charge for the foreseeable future. Several are on state pensions or low incomes. If the budget is adopted at its proposed level it will cause hardship for some lessees.

The challenged items

Buildings Insurance

36. The Respondents felt the building was over-insured. Mr Abbott had approached a broker and sent them a copy of the insurance details which were included in the bundle. The broker spoke to some insurers who gave guide prices in the region of £15,000 for the premium. The broker felt the cover was excessive and need only be £8-10 million cover. They were aware there had been a series of previous claims made. There was nothing in writing from the broker.

37. Mr Barker stated the sum insured was correct as there had been a professional assessment made in June 2017 (which he produced to the Tribunal and lessees later in the day). It had previously been under-insured by £4 million. The building was subsequently insured in accordance with that valuation.

38. He confirmed that Bamptons placed the insurance through a broker who sought competitive quotes from insurers, but some had refused to quote because of the claims history of the block and its structural condition. The additional risks for the insurer resulted in the premium being somewhat higher than would be the case if there had been no claims and the building was in good order.

39. Mr Abbott believed the building was over-insured because, if there were a total loss, the building would be rebuilt differently. Mr Barker explained how building insurance operates, and that cover is given for full reinstatement in its existing form subject to it being fully insured. Additionally, if it were under-insured, there would be a proportional discount in the sums paid out in the event of a claim.

40. Mr Smith (1) reminded the hearing that every lessee had received a copy of the appraisal in 2017.

41. Mr Barker confirmed that Bamptons received no commission from the broker.

Entryphone Locks & Keys

42. The Respondents felt this was not a high priority this year; there were more important issues. This could be left until the next financial year.

43. Mr Porter had reported the entrance was to have a coded lock and signage.

44. Mrs Benton stated her door entryphone had stopped working 2 weeks ago.

45. Mr Barker said he was aware there were ongoing problems with the system; some do not have a working entryphone, some are noisy and "buzzy". It had been decided at the AGM held on 13th May 2017 a new system should be installed, but arrears had meant there was insufficient funds to do this. There are doors in the basement ready to be fitted, but this cannot happen until they are fitted with fire safety glass. Kent Fire & Rescue had reported in 2016 that there were no outstanding works.

Fire Equipment/Alarm/Emergency Lighting Tests

46. Mr Abbott referred to Bamptons e-mail at page 1057 which discussed the replacement of the fire alarm system. In 2008 he had arranged for a new system to be installed and, although there have been problems with it recently, he arranged for the original installer to replace some new panels and the battery at the beginning of last week at a cost of £385.20.

47. Mrs Bonotto-Campbell (30) said the last report was carried out by her brother-in-law, but in future she felt it would not be prudent for him to undertake a future report as it needed to be carried out by a totally independent company with no connections to any lessee.

48. Mr Barker explained the budget figure is for testing the Fire Alarm and Emergency lighting in accordance with legal requirements. This ensures that the block has an effective and operational system in the event of a fire.

49. Regarding the proposed works to the system, he referred to his e-mail dated 22nd March 2019 [1073]. The specification [1075] shows the items to be dealt with.

50. Mr Abbot enquired about the Fire Risk Assessment. Mr Barker confirmed it was in the bundle [423].

51. Mr Smith (1) was of the opinion that any works undertaken to the block needed to be carried out by appropriately qualified contractors. "Beware the gifted amateur" was, in his opinion, a valuable adage.

52. Mrs Benson (19) said the fire alarm had gone off in the past few days. It was then turned off, but nobody knocked on her door to check if anyone was in her flat.

53. Mrs Bonotto-Campbell stated she thought the system was frugal but operational, but accepted she was in favour of the works being undertaken.

General Repairs

54. The Tribunal asked Mr Barker if there was a breakdown of this costing.

55. He responded that the previous year's budget was £20,000 but £25,772 had been spent. This proved the budget set for that year was too low. Had there been more funds available, the expenditure would have been even greater as there was a considerable number of general repairs that needed to be undertaken.

56. Miss McChesney said the Respondents' budget figure of £25,000 was based on past expenditure.

57. Mr Abbott said the sum needed further explanation. Miss McChesney said she had asked for this at previous residents' meetings.

58. Mr Barker said that £10,000 was for roof repairs, £2,000 for lighting repairs, Water supplies to Flat A between £500 and £1,000, Drains £5,000, and the steel works under the annexe £25,000. These alone came to more than £40,000.

Lift Telephone

59. Mr Abbott said there was no telephone in the lift.

60. Mr Barker acknowledged there was no telephone, but it was appropriate that one should be provided so it could be used to call for assistance in the event of the lift becoming stuck. This had been discussed at an EGM where it was agreed this should be provided. It had not been installed as there had been insufficient funds available.

61. Miss McChesney queried whether this was a priority.

Managing Agents Fees.

62. Mrs McChesney (for Mr Porter) said they could employ consultants whom they could call upon whenever the need arose. This would give a cost saving. The residents could manage the funds and day to day running of the block.

63. Mr Abbott said he felt the cost seemed high compared with other blocks. He felt that £250 + VAT per flat was the going rate.

Programmed Works

64. Mr Barker stated the Report and Planned Maintenance Schedule had been the main item of discussion at the EGM held on 23rd September 2017 [487]. The Schedule had been commissioned by a previous board of Directors in order to comply with the company's obligations under the lease to keep the building in good repair and condition. It set out a 10-year programme spreading the costs of the recommended works over a suitable period of time.

65. The budget for the financial year 1st July 2018 to 30th June 2019 was due to be considered and set at the AGM held on 21st July 2018. However, the issue of potential development of part of the site was considered at that meeting also, when various options were open for consideration. In the light of ongoing investigations on this it was agreed to defer setting the budget at that time [505].

66. The Board meeting held on 20th August 2018[525] took place solely to set the budget. At that meeting the directors noted the minutes of EGM held on 23rd September 2017 clearly stated the 10-year plan would form the basis of future service charge demands.

67. The sum of £84,000 was taken from the 2018 year allocation of the Planned Maintenance Schedule [287] and referred to in paragraph 24 above.

68. £18,000 was allocated towards obtaining a report on the steel fabric of the building.

69. This made up the total of £100,000 under the budget heading "Programmed Works".

70. Mrs McChesney for Mr Porter said that several reports had been commissioned over the years, some when he was a director, but many of the intended works had not been carried out.

71. There was in his opinion no need for further reports too be commissioned as the Holliday and CGI reports were on file and should be relied on.

72. Mr Smith referred to Mr Porter's letter [979 onwards]. At page 981 he does not dispute the need for the overall expenditure but felt it should wait until the potential for the sale of part of the site had been resolved. Mr Smith said the sale of part of the site would take several years to achieve due to planning and legal issues needing to be completed before anyone would pass over money to buy the site. Time was not on their side and the works need to be carried out now. It has been put off for too long.

73. Mrs Bonotto-Campbell (13) said that when she bought her flat, she was made aware of the 10-year plan, having met Mr Porter in the foyer and discussed the matter. At that meeting she was told it could be £1.5 million.

74. Mr Benton (19) referred to Mr Porter's "The Way Forward" [211]. The first part sets out the way the building has fallen into disrepair. He agrees with that.

75. Mr Coad (34) was concerned the element amounting to £16,000 was not explained to the lessees when the budget was published. He had looked through the Planned Maintenance Schedule analysis and found that only £26,835 was for urgent works and asked where the rest of the money would be spent.

76. Mrs Bonotto-Campbell (13) said the budget only showed what was known, and any hidden damage would not be known about until the survey was undertaken, when a fuller costing would be able to be made.

77. Mr Barker explained the 10-year Schedule was priced on costings made by the professional company who carried out the assessment. The first costing was adjusted on the instructions of Mr Porter when he was a director.

78. Mr Coad asked why 10 years had been chosen as opposed to 15 or 20 years. He felt it would be more palatable if the cost could be spread over a longer term, and his service charge paid monthly.

79. Mrs Bonotto-Campbell said this had been discussed at the EGM in November. Bamptons had said the steel survey needed to be undertaken to

assess the severity of the situation. She was aware these works were reported many years ago and needed to be dealt with. “We need a safe building to live in.”

80. Mr Barker stated the 10-year Schedule was recommended by the author of the report, taking into account the current condition of the building.

81. Mr Abbott said he had discussed the issues with a barrister. Some of the costs had been incurred during the first part of the year and therefore the first half year demand could be adjusted.

82. Mr Barker said the first interim service charge had been issued on 31st August and fell due on 29th September under the terms of the lease.[805]. Once the past year’s accounts had been finalised, any credit balance from that year would be given against the second half’s demand when issued, in accordance with the terms of the lease.

83. In summing up, Miss McChesney thanked Mr Barker for that explanation, and the issues were clearer now he had done so.

84. Mr Smith said the building had been through similar times before. They had tried to self-manage but was unsuccessful because of the legal and financial complexities of managing a building with these difficulties.

85. Several of the lessees commented upon the large volume of paperwork issued and as such they had become confused on the issues.

86. Mr Barker explained there were legal requirements for such paperwork, for example the S20 consultation processes.

Hardship

87. The Tribunal invited lessees to address them on the matter of hardship as there had been several comments noted within the main bundle. A supplementary bundle had been submitted to the Tribunal on 7th April by Bamptons. This comprised statements from 17 lessees. It was not intended to be a fully published bundle as some statements contained personal financial information.

88. Miss McChesney made a statement on behalf of several lessees explaining the financial impact that the budget would have on their financial circumstances. She commenced by acknowledging that Health and Safety of the building is of paramount importance.

89. The doubling of the interim service charge would, however, mean that some lessees would be put into a very difficult financial position in that they simply could not afford to pay the sums due.

90. She believed the directors of the Company should represent all leaseholders.

91. She thanked the lessees she was representing for putting their trust in her as they had felt unable to put their points across as eloquently as she had been able to do.

92. When questioned by the Tribunal how she would reduce the service charge she said she felt it would be more manageable if the works could be spread over 15 years rather than 10.

93. Mr Abbot confirmed that was his view too.

94. Mrs Bonotto-Campbell said the option of spreading the works over 15 years had been considered at an EGM but much of the work is urgent and would not reduce the immediate need for substantial funding. She accepted the decision of the directors.

95. Mr Barker was aware of the need to firstly make the building wind and water-tight and that was the first year's priority as far as funds would permit.

96. Mr Barker had offered to meet with anybody who had financial difficulties and had also trialled attending site on a monthly basis to have an "open surgery" but very few people took the opportunity to meet with him. He has stopped the monthly site surgeries due to lack of interest from the lessees. In particular, none of the respondents had asked to meet with him.

97. Mrs Grace was concerned about the future of her home. She felt that she had the right to live in a building that is fit to live in. She was frightened that the building would fall into disrepair.

98. Mr Abbott accepted at the EGM that many lessees could afford to fund the increase, but there were some who could not.

99. Mr Coad had asked if it would be possible to pay monthly, but Bamptons had said this was not possible as the lease required the interim charges to be paid in two instalments.

100. Mr Smith said he was one of the fortunate ones and could afford to pay. He had suggested that a "Hardship Fund" might be set up and had offered to research how this could be created. However, his offer was not taken up, primarily because of the reluctance of some people to give their personal financial situation. Mr Smith said all he needed to know was a total sum for those unable to pay, not individual amounts.

101. Miss McChesney did not dispute the works were needed; it was just the methodology of funding it she was not in agreement with.

102. Mrs Drummond stated she was now finding it difficult to let her flat after her last tenant vacated due to excessive damp in the flat. None of the necessary work had been undertaken and her flat was now unlettable. The damp was coming through from the flat above; had the work been done when the problem first came to light, the cost would have been lower and

her flat would not be in such a damp state. She has paid reluctantly. She has tried to sell the flat but cannot do so because of the high service charge.

103. Miss Mc Chesney said she had asked at the 6th October EGM for a working party to be set up, but this had not happened.

104. Miss McChesney had contacted Thanet Safeguarding Scheme and Bamptons had received a letter from them expressing their concerns about the affordability of the works by some of the lessees.

105. Mr Barker has replied to TSS explaining the circumstances which the directors find themselves in, especially as they are also lessees living in the block.

Section 20C Application

106. The lessees had made an application under Section 20C of the Act.

107. The Tribunal explained it had powers to make an Order which prevented the Company from charging any of the costs related to the preparation and attendance of this case. There would need to be specific reasons why this should be done and there was nothing before the Tribunal setting out the case for the lessees.

108. Mr Barker said there had been the Application fee and hearing fee which totalled £300. Additionally, there had been costs in the region of £500 incurred in the preparation of the bundle and distribution of this to the Tribunal and parties. (N.B. Subsequent to the hearing Bamptons have stated that the cost was £649.24.)

109. Mr Smith said if the Tribunal made the Order the costs will become a Company expenditure under Article 12 of its Memorandum & Articles of Association which would make each leaseholder liable for their share, and in recovering the money in such a way the money collected would be liable to taxation, thus making it even more expensive. As a result, he suggested the Tribunal should not make the Order.

110. With that in mind the general consensus of lessees present felt that his proposal was sound and this application for the Section 20C Order should not proceed.

111. The tribunal thanked everyone for attending and especially those who had made representations in a clear and concise way.

The Tribunal's consideration

112. The Tribunal reconvened on 25th April to consider the case.

113. Firstly, it considered the budget items that were challenged as follows:

Insurance Premium

114. The Tribunal considered that, having had an independent insurance appraisal carried out, insuring the premises at the recommended sum was good professional practice. The lease requires the premises must be insured in its full reinstatement value.

115. Bamptons had employed an insurance broker who took the block to the market. They were unable to get all the invited insurance companies to quote due to the claims history but had secured cover with a reputable insurer.

116. The respondents had not had the benefit of the full claims history when they spoke to a broker and no written quotes were put before the Tribunal. Without such evidence, the Tribunal cannot agree that the building was

i. Over-insured and
ii. The premium agreed was too high.

117. Accordingly, the Tribunal finds both the sum insured, and the insurance premium are reasonable under the terms of the lease and Act.

Entryphone Locks & Keys

118. At the hearing the Tribunal heard there were still ongoing problems with the entryphone system and as a result there must be an allocation within the budget for this.

119. It had been agreed at the AGM held on 13th May 2017 a new system would be installed, but this had not happened due to lack of funds.

120. Because of the AGM agreement this item should be included as a budgeted expenditure in the current financial year. Consequently the Tribunal finds the sum of £5,000 is reasonable.

Fire Equipment/Alarm/Emergency Lighting Tests

121. The Tribunal finds this is an essential part of the budget because the expenditure is for tests that are required by Law.

General Repairs

122. Having had the details of the £40,000 budget figure explained by Mr Barker (para 58), the Tribunal are satisfied that, although these costs exceeded the budget amount, it was reasonable.

Lift Telephone

123. This item had been agreed to be installed at a previous EGM.

124. Consequently, the installation is deemed by the Tribunal to be an appropriate item to be included in the budget for the current year. The cost is minimal under the overall scheme of the budget.

Management Fees

125. The Respondents state that they can manage the premises themselves, calling in consultants whenever the need arises.

126. They also feel the fees charged are excessive.

127. Dealing with the self-management issue first, the Tribunal strongly disagree with this viewpoint. The residents have tried to manage the block before on occasions, but they have failed to comprehend the significance of the legal obligations.

128. Firstly, the directors have an absolute duty to ensure that Northumberland Court Residents (Cliftonville) Limited comply with its obligations under the Seventh Schedule, Paragraph 4 which states:

> "*The Lessor shall keep the reserved property all party walls of the premises and all fixtures and fittings therein and additions thereto in a good and tenable state of repair decoration and condition including the renewal and replacement of all worn or damaged parts .....*"

129. There have been many reports commissioned by the Company over the past years, but very few of the recommendations contained in those reports have been acted upon. The failure to do so by the directors is a serious omission of their duties. Consequently, the premises have deteriorated to the point in which it is found.

130. To ensure proper management of the building the directors will need to be firm and sometimes make unpalatable decisions. By employing a professional managing agent, the directors could be seen to have taken proper advice. Up until recently it would appear the directors have not been prepared to take these steps, and the building has fallen into disrepair.

131. Such is the difficulty of holding the post of director in a block where directors live next to their neighbours who may be placed into financial difficulties when having to raise funds to keep the building in a good state of repair. The fact remains that, a director's primary duty is to the Company to ensure it does not breach its obligations.

132. By employing professional managing agents they will be able to explain to the lessees the need to have these works undertaken and possibly give guidance on how to fund their share of the cost of the works.

133. A firm of repute would need to comply with the RICS Service Charge Residential Management Code of Practice. This was approved by the Secretary of State under The Leasehold Reform, Housing and Urban Development Act 1993, as amended. The aims of the code are to improve standards and promote best practice, uniformity reasonableness and transparency in the management and administration of long leasehold residential property. A copy of this guide is available from RICS.

134. One aspect that makes the management of these premises more difficult is the poorly drafted lease. There is no provision for the creation of a reserve, and any surplus at the year-end must be credited back to the individual lessees. Consequently, there are no ongoing surplus funds to enable the block to be managed efficiently. This will be addressed later in this decision. There has already been one variation to the lease in 2014, but this only dealt with the apportionment of the service charge contribution and the preparation of the year end accounts. Mr Kelleher had brought this to the attention of the Tribunal at the time the variation was considered but, as the Tribunal noted at paragraph 12 of its decision, these had not been included in the application, and therefore could not be considered.

135. The Tribunal accepts that in a normal situation the fees seem to be above what the Tribunal consider to be an acceptable range of management fees of £250-300 per flat + VAT, but taking all of the foregoing into account there will be a considerable extra workload for the managing agent, the Tribunal acknowledges that these premises are difficult to manage and an enhanced fee will justifiably be incurred whilst all of these works are in progress. It is also unclear whether this fee includes their work as Company Secretary, or whether this is billed direct to the Company.

Programmed Works

136. Section 9 of the above mentioned RICS Code contains guidance on how to plan the ongoing management of a block. It recommends that it should cover a period of at least three years.

137. In 2017 the directors employed a firm of Chartered Surveyors who specialise in this type of work to undertake the creation of a rolling programme of works (planned maintenance schedule) for the premises and they have costed it in accordance with standard practice. It would be foolhardy for the directors not to take note of the recommendations.

138. Most of these works are overdue by many years and the budgeted sum under this heading fits well within the framework of the planned maintenance schedule, together with the other works set to be undertaken as per the directors' intentions.

139. These intentions had been discussed at previous EGM and AGM's.

140. The Tribunal notes that the work is essential, long overdue, there is no reserve fund, and the cost must be incurred within the 2018/9 financial year. Accordingly, the Tribunal finds that the sum of £100,000 is a reasonable sum to budget for these works in the current financial year.

Hardship

141. This element of the hearing brought out the concerns of some of the lessees. It was agreed there is a large volume of works needing to be undertaken to bring the building back into a good state of repair.

142. The Tribunal had received an Ancillary bundle "A" which comprised statements sent in by the objecting respondents when they completed their forms. The Tribunal took time to read each of the statements. Of the 17 lessees who had submitted written statements, 10 specifically stated they could not afford to pay the sums required. Most of these were elderly on low pension incomes.

143. From these 17 statements the Tribunal noted that six of these were from former directors, and a further 2 had received the surveys before they purchased the flats. Therefore, these people were aware of the need for substantial expenditure, and the need to pay their share.

144. From the information provided at least 7 have owned their flat in Northumberland Court for more than 10 years. 7 did not give a date of when they bought their flat.

145. With these facts before them the Tribunal notes that the major works have been known to be required by a majority of those opposing the budget for a considerable period of time.

146. The initial report from Dartnell was dated September 1988 and in the conclusions to that report it was noted:

> "It *is likely that the exposed area of corner "E" is typical, and that the steel frame as a whole is in a very corroded condition and will get progressively worse."* [312]

147. This point "E" is shown on the plan [314] and is the area that is currently boarded up for safety reasons. From this it would appear that little or no action has been taken to rectify this defect.

148. Further reports have been published to lessees or discussed at AGM's or EGM's and so all lessees must have been aware of the need to have these works undertaken and the seriousness of the repairs required.

149. Because of the urgency of some of the works, the Tribunal does not agree that the Schedule could be extended to 15 or 20 years. The condition of the building will only get worse.

150. If these works had been undertaken at the time they were first noted, they could have been phased over a period of years at that time and would have been completed many years ago. The extent of deterioration would have been less and therefore the cost lower. This would have left the other works to have been dealt with over a period of time in conjunction with a much less extensive Planned Maintenance Schedule.

151. Mr Barker stated at the hearing that, other than receiving the statements from the lessees, he had not been approached by anyone to inform him of their financial situation and seek advice on how to fund their share of the cost of the works. Without any approaches he is unable to give advice.

152. Mr Smith had offered to investigate the setting up of a "Hardship Fund", but this had not been taken up.

153. It would appear to the Tribunal that many lessees have been frightened by the high cost and have hidden from the reality that exists. This is not a unique situation for people to find themselves in as the cost is considerably above their normal financial experience; it is difficult for them to comprehend spending sums of this amount.

154. The conclusion reached by the Tribunal is that, whilst there may be some lessees who are in a financial situation where they do not have the necessary funds to pay, the majority will be able to pay their interim service charge.

155. Without the funds to carry out the work, the Company cannot maintain the building in accordance with its liabilities under the terms of the lease. Until all funds are in place, there will continue to be an ongoing problem of lack of finance and only part of the works will be undertaken as far as the available funds will permit.

156. The possible sale of the land has been considered, but it is a very complex matter that will require planning consents, etc. to enable the site's value to be maximised. This option is speculative and something that requires time to process. The timescale for this is likely to be years rather than months, and time is something the Company does not have on its side. It must consider the repairs to be its prime priority and nothing in the ease allows for delays in maintenance for reasons such as anticipating funds from a sale of part of the property.

157. Failure to carry out the necessary works in the past has now led to the situation where some of the outstanding works have become safety issues. The outcome is that insurers have threatened to withdraw/limit cover if some works are not done.

158. The test the Tribunal are required to make is one of reasonableness.

159. The Tribunal is assisted by the case law of *Garside v RFYC Ltd & Maunder-Taylor [2011]UKUT367(LC)*. In her decision HH Judge Robinson, allowing the appeal, comments:

> 16. …. If a lessee wishes to put forward a case of particular hardship by reference to their personal circumstances they may do so, though the weight to be attached to such an argument would depend on the cogency of the evidence to support it.
> 17. However, other considerations will no doubt be relevant and will need to be weighed in the balance when deciding whether major works should be phased, and the cost spread over a longer period of time. Where, as here, the lessees do not all agree and some wish the works to be carried out in one contract as soon as possible that should be taken into account. It is inevitable that where not all lessees agree the final decision is likely to please some and not others. That does not mean one lessee or some lessees' views have been unfairly preferred over others, rather they all have been

taken into account with all other relevant considerations when reaching a decision.

18. **The degree of disrepair and the urgency of the work or the extent to which it can wait are likely to be relevant. These considerations may be important in the context of the present case where there has been a history of neglect, some work at least is urgently required, the local housing authority has served notices requiring work to be carried out and insurance cover has been reduced because of the poor condition of the Estate. Another relevant consideration may be the extent of any increase in the total cost of the works if carried out in phases as opposed to in one contract**.

19. These are only examples of factors that may or may not be relevant and there may be others to take into account. All are factual issues and matters of judgment for the LVT to weigh up against the hardship of substantial increased costs when deciding on the evidence before it whether the service charge costs are reasonably incurred…….

20. It is important to make clear that liability to pay service charges cannot be avoided simply on the grounds of hardship, even if extreme. If repair work is reasonably required at a particular time, carried out at a reasonable cost and to a reasonable standard and the cost of it is recoverable pursuant to the relevant lease then the lessee cannot escape liability to pay by pleading poverty…….

160. This case involved a block of flats 15, 20 & 36 Frognal Court, Finchley Road, London NW3 5HG. It had been a block which, similar to Northumberland Court, had fallen into disrepair. There were two groups of residents and a situation developed where neither were willing to accept the other's proposed scheme of management. An application was made to the Leasehold Valuation Tribunal in 2011 for the appointment of a manager. This is a role distinctly different from that of a managing agent. When a manager is appointed by the LVT that person has a direct liability to the tribunal, and often appoints an independent managing agent. The role is to stand in the shoes of the freeholder (or management company), to ensure the terms of the lease are complied with.

161. Mr Maunder Taylor had been appointed Manager in 2011. After the case heard in the Upper Tribunal as discussed above, Mr Maunder-Taylor wrote an article in "Flat Living", a magazine published with specific emphasis on living in, maintaining and managing blocks of flats. In his article he noted that:

> *What we can all learn from this decision is that if landlords and RMC/ RTMCo's want to protect themselves from the tactics of non-payers, they are now going to have to draw up a long term maintenance term plan, setting out a reasonable estimate of the life expectation of the various parts of the building fabric and services, predicting the anticipated cost of renewal and, from that information, deciding on a reasonable annual contribution to reserves.*
>
> *If the lease does not contain reserve fund provisions, flat owners need to be forewarned about what they should be saving. Maybe an application to the FTT should be considered*

to vary the leases to include a reserve fund provision in future (S.35 or S.37 of the Landlord and Tenant Act 1987). Failure to take these steps will expose the landlord or RMC/RTMcCo to the risks of flat owners relying on the Garside decision to support their refusal to pay a major works bill in one particular service charge year. They will ultimately be obliged to pay but now have the option to spread payment over months or even years. This leaves the landlord or RMC/RTMco exposed to claims for damage if the necessary works are delayed. Rocks and hard places come to mind!

162. This is exactly the situation that the directors of Northumberland Court Residents (Cliftonville) find themselves in. In the past year or so, there have been steps taken by the directors to address the decaying condition of the building, starting with the commissioning of the report and Planned Maintenance Schedule. The steps taken by the directors and Bamptons have been correct and in line with the RICS Code and the terms of the lease. The main problem is that the lease makes no allowance for the setting up of a reserve fund. This and the lease terms requiring any surplus funds at the year-end to be credited back to the lessees creates a toxic situation.

163. It is only by producing a budget which includes a sum to allow for repairs as per the Planned Maintenance Schedule that the block can move towards being brought back into a state of repair.

164. The lessees who have stated they have financial difficulties have, in the main, been flat owners for a considerable number of years and, having the knowledge that the works were required to be undertaken at some stage in the future should have taken steps to start saving for the day when the works were ordered. Any failure to do this cannot be said to be the fault of the directors or the managing agents.

165. Indeed, if the work is not commenced immediately, the directors would soon find themselves defending a claim against Northumberland Court Residents (Cliftonville) Ltd and themselves for breach of lease and negligence in their directorship. This could also impact back onto the previous directors.

166. Some of the flats are currently uninhabitable, mainly due to water ingress from defective roofs. There is a risk that claims for loss of income or cost of alternative accommodation might be made.

167. Consequently, the Tribunal finds that because the directors have a prime responsibility to the company to comply with the repairing and maintenance of the premises, they have not caused any lessee hardship.

168. The Tribunal has sympathy with those lessees who find themselves in a genuine state of hardship as a result of this decision, but there are options discussed above which they should consider.

169. The Tribunal is aware there may be a change of directors before this full decision is published. If new directors are appointed they will be bound by the budget set, and the programme of works upon which it was set.

Section 20C

170. The Tribunal heard the views of those present and accepts Mr Smith's views. The Tribunal does not make an Order under Section 20C of the Landlord and Tenant Act 1985.

Richard Athow FRICS MIRPM

Chairman

Appeals

A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

ANNEXE A

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/29UN/LIS/2018/0058**
Premises	**:**	**Northumberland Court, Northumberland Avenue, Margate, Kent CT9 3BS**
Applicant	**:**	**Northumberland Court Residents (Cliftonville Limited**
Representative	**:**	**Bamptons – Managing Agents**
Respondent	**:**	**The Lessees**
Representative	**:**	**None**
Type of Application	**:**	**Service Charges - Sections 27A and 20C of the Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Mr R Athow FRICS MIRPM – Chair** **Mr N Robinson FRICS - surveyor member** **Mr P A Gammon MBE BA (Lay Member)**
Date of Hearing	**:**	**10th April 2019**
Date of Decision	**:**	**25th April 2019**

BRIEF DECISION

Decision

171. The Budget to set the Interim Service Charge for the Financial year ending 30th June 2019 is £192,230 as set out below.

Description	**Budget amount**
Accountancy Fees	£ 720.00
Buildings Insurance	£ 18,000.00
Cleaning	£ 3,500.00
Drain Cleaning	£ 400.00
Electricity Common Areas	£ 2,100.00
Entryphone Locks and Keys	£ 5,000.00
Fire Equip/Alarm/Emerg Lighting tests	£ 1,000.00
Gardening	£ 3,000.00
General Repairs	£ 40,000.00
Health & Safety Risk Assessment	£ 390.00
Lift Insurance	£ 615.00
Lift Maintenance	£ 1,000.00
Lift Telephone	£ 230.00
Management Fees	£ 16,200.00
Programmed Works	£ 100,000.00
Sundries	£ 75.00
TOTAL	**£ 192,230.00**

172. No order is made under Section 20C of the Landlord and Tenant Act 1985.

173. A fully reasoned decision will be published in due course.

174. No party may make an application to appeal the decision until the full Decision is published.

Richard Athow FRICS MIRPM

Chairman

Dated 25th April 2019