FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00ML/LIS/2019/0069
Property	**:**	Ground Floor, 36 Temple Street, Brighton, BN1 3BH
Applicant	**:**	Rebecca Stanley
Representative	**:**	Simon Masters
Respondent	**:**	Julie Yeoman
Representative	**:**	Dan Skip, Senior Property Manager, Harper Stone
Type of Application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge- section 27 of the Landlord and Tenant Act 1985**
Tribunal Member(s)	**:**	Judge J Dobson
Date of Decision	**:**	20th April 2020
		On the papers

DECISION

Summary of the Decisions of the Tribunal

1. The Tribunal determines that management fees ("the Management Charges") are not recoverable in any event for either 2018/2019 or 2019/2020 in any sum, the Lease providing no entitlement to recover any such fees.

2. The Tribunal determines that the Respondent is not entitled under the terms of the Lease to demand service charges, other than the Insurance Charges, in advance of the costs and expenses being incurred. The service charges demanded excluding the contribution to insurance and the management fees are referred to below as "the Other Service Charges". As the only demands served have been for charges on account, the Tribunal therefore determines that all the Other Service Charges demanded on behalf of the Respondent, have not been demanded in accordance with the Lease and are not currently payable.

3. The Tribunal, determines that the Applicant will not be liable to pay the 2018/2019 Other Service Charges until the issue of any lawful demands made now that the expenditure has been incurred. The Tribunal determines that a service charge of £637.74 would be recoverable and reasonable for the year 2018/ 2019 as and when, save regarding insurance, properly demanded. The £637.74 comprises:

    a) £279.41 in respect of the Insurance Charges;
    b) £358.33 in respect of the following elements of the Other Service Charges, namely the fire alarm and emergency lights, asbestos survey, fire risk assessment, common way electricity and work to a hopper. That is on the basis that those sums have been accepted by the Applicant as reasonable in the Applicant's Statement of Case and no determination is sought in relation to them.

4. The Tribunal determines that aside from the Insurance Charges of £287.50 for the year end 2019/ 2020, which are recoverable as set out above, the Applicant is not liable to pay any 2019/2020 service charge ahead of any expenditure being incurred and then the later issue of any lawful demand. Such 2019/2020 Other Service Charges may be reasonable and recoverable, dependent upon the amount of and the reason for any expenditure which has now been, or yet will be if relevant, actually incurred and then upon subsequent lawful demand.

5. The Tribunal determines that the Respondent shall pay the Applicant £100 within 28 days of this Decision, in respect of the reimbursement of the Tribunal fees paid by the Applicant.

Application

6. The Applicant made an application to the Tribunal, received 11th September 2019, for a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of the service charge years 2018/2019 and 2019/2020.

Directions made/ history of the case

7. On 4th October 2019, a Directions Order was made identifying 3 particular issues to be determined in the course of considering the reasonableness and recoverability of the service charges, namely:

   - Does the Lease allow the recovery of management fees?
   - Does the Lease allow the freeholder to recover payments in advance of expenditure and if so can these be based on an estimate?
   - What if any electrical works have been undertaken?

8. The Directions Order thereafter listed the steps to be taken by the parties in preparation for the determination of the dispute, including the preparation of a bundle by the Applicant. The Applicant's representative provided a bundle, received 4th December, containing no statement of case or evidence on behalf of the Respondent, no such statement of case or evidence having been served.

9. Subsequently, on 29th January 2020, a Notice to Bar the Respondent was issued, advising that the Tribunal was minded to preclude the Respondent from defending. However, by further Directions dated 6th February 2020, the Tribunal advised that it accepted the Respondent's reasons, as provided by the Respondent's representative, for non-compliance and that the Respondent would not be so barred. The Respondent was permitted to rely on its Statement of Case sent in under cover of a letter dated 5th February 2020.

10. The Respondent's Statement of Case comprises two pages without attachments and did not indicate there to be any relevant evidence further to that provided by the Applicant on which the Respondent wished to rely.

11. The Applicant has not challenged the further Directions Order and has not sought to file any reply to the Respondent's Statement of Case.

12. The further Directions additionally advised that a Tribunal Judge would decide the application by way of paper determination and without a hearing. Neither party has subsequently requested an oral hearing.

13. The Tribunal has accordingly proceeded by way of a paper determination on the papers provided by the parties. The Tribunal considered the question of the recoverability and reasonableness of the

service charges for each of the years 2018/2019 and 2019/2020, including but not limited to the 3 specifically identified elements. For the avoidance of doubt, any ground rent payable by the Applicant to the Respondent forms no part of this Decision.

14. This is the decision made following that paper determination.

The background

15. The property which is the subject of this application is a two-storey maisonette ("the Property"), comprising the ground and basement floors of a five-storey mid-terraced building ("the Building") together with the rear patio area and rear garden. The first, second and third floors comprise the other maisonette ("the Upper Maisonette") within the Building. There is a communal front door and entrance hall.

16. The Respondent's title is registered at HM Land Registry under title number ESX28466. The Respondent acquired the freehold of the Building on 24th November 1994.

17. The Applicant holds a long lease of the Property. The Applicant's title is registered at HM Land Registry under title number ESX393522.

18. The Lease requires the Respondent freeholder (described in the Lease as the "landlord") to provide services and the Applicant leaseholder to contribute towards the costs by way of a variable service charge. The specific provisions of the Lease are referred to below, where appropriate.

19. The Lease was originally granted by the then freeholder to the then leaseholder (described in the Lease as the "tenant") on 24th August 1984. A Deed of Surrender and Re-Grant of Lease was entered into by the Respondent and the Applicant's predecessor in title dated 17th September 2018. The relevant obligations of the parties remained unchanged, save where explicitly varied.

20. The Applicant accepts the entitlement of the Respondent to recover from the Applicant half of the cost incurred in insuring the Building, the Insurance Charges, in each of 2018/2019 and 2019/2020, being therefore half of £558.82 (£279.41) and £575.59 (£287.79) respectively. The Applicant further accepts the reasonableness of the Respondent recovering from the Applicant half of the cost of the following further items of the Other Service Charges in 2018/2019, namely fire alarm and emergency lights, asbestos survey, fire risk assessment, common way electricity and general repair (to a hopper), being therefore half of £717.03 (£358.01). The Tribunal makes no determination in respect of reasonableness where that has already been accepted by the Applicant.

21. The essential issues raised by the Applicant pursuant to the 1985 Act are whether the service charges are payable in advance of being

incurred by the Respondent and whether certain of the service charges are recoverable in any event as a matter of contract under the terms of the Lease, on the proper construction of the Lease.

22. Neither party requested an inspection of the Property or the Building more generally and the Tribunal did not consider that one was necessary, or that it would have been proportionate to the issues in dispute. Only a few photographs of the building were provided in the Determination Bundle. However, the Tribunal did not consider that the absence of any additional photographs prevented it being able to determine the issues in dispute in this case based on the evidence that the parties did provide.

The Law

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

The Lease

24. The recital to the Lease states:

"WHEREAS :-

(1) The Landlord is seised for an estate in fee simple of the premises known as 36 Temple Street Brighton in the said County of East Sussex comprising two Flats Together with the land appurtenant thereto ("hereinafter referred to as "the Building")
(2) The Landlord intends to grant a Lease of each Flat and has agreed to grant a Lease of the Ground Floor Flat and Garden to the Tenant in manner hereinafter appearing"

25. The demise to the Applicant and her predecessors in title is described in the First Schedule as follows:

> "ALL THOSE pieces or parcels of land at Brighton in the County of East Sussex for the purpose of identification delineated on the plan marked "A" and more particularly described on Plan "B" annexed hereto known as Ground Floor Flat and Garden 36 Temple Street Brighton aforesaid consisting of that part of the Building as lies below the centre line of the joists of the First Floor thereof."

26. Clause 2(n) of the 1984 Lease provides that the Applicant is required:

> "to pay to the Landlord on demand one- half of the costs incurred from time to time in repairing wherever necessary the main structure of the Building including the roof and foundations and sewers boundary walls thereof and all gutters drains and drain pipes and pipes and cables serving the building jointly and all common pathways access ways porches and halls

and the cost of insuring the building in accordance with clause 3(iii) hereof".

27. By clause 3(iv), the Respondent covenants:

> "Subject to the payment of the contribution in clause 2(n) hereof to maintain repair and keep in good order and condition the roof chimney stacks and main structure the gutters drains and drain pipes serving the Building jointly and all common pathways access ways porches and halls"

28. There is a difference in the wording of the above two clauses. The landlord's obligation is stated to be to maintain and to repair and to keep in good order and condition. In contrast, the tenant is required to contribute to the cost of repairing but is not required to contribute to the cost of maintaining or of keeping in good order and condition.

29. The tenant covenants by clause 2(c) to:

> "repair maintain uphold keep paint and decorate the demised premises (but not the main structure and foundations or….. serving the Building jointly) and all walls….. and appurtenances thereto belonging solely serving the demised premises in good and substantial repair and condition and in particular to paint and decorate the exterior of the demised premises……"

30. The Tribunal notes that, notwithstanding the originally expressed intention at the time of the Lease, the freeholder, occupies the Upper Maisonette. There is nothing before the Tribunal to clearly indicate that whether or not a lease of the Upper Maisonette has ever been granted by the Respondent or any earlier freeholder.

Consideration of the service charges

31. The main question raised by the Applicant for determination is whether or not service charges are recoverable where demanded prior to the expenditure referred to being paid out, save in relation to insurance, and therefore whether or not the Respondent is lawfully able to make such demands.

32. For the avoidance of doubt, as the contribution to the insurance has not been challenged by the Applicant, either as to its reasonableness or as to its recoverability, no determination by the Tribunal is sought or made. However, it is worthy of note that the provision in relation to service charges at clause 2(4) of the Lease provides that the leaseholder must pay "on demand one half of …… cost of insuring".

33. In contrast to the Other Service Charges, the clause does not specifically refer to the Insurance Charges having been "incurred" prior to being demanded. The clause simply refers to a demand in

relation to the insurance cost. Once that cost has been ascertained, it may be demanded.

34. The Applicant otherwise challenges the recoverability and reasonableness of some items. The Respondent has, in addition to service charges accepted as reasonable by the Applicant, demanded other sums for Management Charges, and, within the Other Service Charges, electrical compliance upgrades and other general repairs. The Tribunal considers those below taking each issue in turn.

i) Management fees 2018/2019 and 2019/2020

35. The Applicant asserts that the Lease makes no provision for the Respondent to recover management or similar fees from the Applicant in relation to management of the Building.

36. The Respondent's representative in his Statement of Case, argues that the amount of the management fees is reasonable and, more fundamentally, that "just because the lease does not advise on this directly; that the engaging of a managing agents (sic) for managing the is property is in fact a reasonable item of expenditure to be allowed".

37. The Respondent's representative accepts by his comments that the Lease does not contain any provision which refers to recoverability of managing agent fees. He does not provide any legal authority or other basis for his assertion that the costs of managing agents being a reasonable item of expenditure, if such were found, is such that the cost is thereby recoverable irrespective of any express agreement between the parties to the Lease that such costs are recoverable.

38. Decision

39. The Tribunal determines that there is no amount payable in respect of management fees for 2018/2019 or for 2019/2020.

Reasons for Decision

40. There is no provision in the Lease allowing the Respondent to recover any management fees which the Respondent may choose to incur in respect of the management of the Building from the Applicant. Any such fees are not recoverable pursuant to the Lease.

41. Neither is there any other basis in law identified by the Respondent for recovery of such fees.

42. Whilst outside of this application and the scope of this decision, it necessarily follows that were there to be any demand for management fees in any subsequent year, the same reasoning would be applicable, applying the terms of the Lease.

ii) Other Service Charge items for 2018/2019 and 2019/2020 demanded on account

43. The Applicant disputes the claim by the Respondent for estimated expenditure set out in the budget prepared by the Respondent's representative, save where that expenditure has in fact subsequently been incurred.

44. The Applicant's representative denies that the Applicant is obliged to pay sums in advance of actual expenditure by the Respondent, in reliance on clause 2(n) of the Lease. The Applicant asserts that the word "incurred" indicates that the Respondent must expend the sum or sums first and then claim the Applicant's contribution after that. The Applicant's representative contends that the lack of provision for accounting for service charges and the lack of provision for balancing payments supports that interpretation.

45. The Respondent's representative points to clause 3(iv), arguing that the meaning of the clause is that the freeholder's obligations are subject to the payment of the contribution by the leaseholder and further that the payment of that contribution is a condition precedent to the freeholder's maintenance and repairing obligations.

46. The Respondent's representative therefore asserts that the payment must be made prior to the expenditure being incurred.

Decision

47. The Tribunal determines that, save in relation to the contribution to insurance, the Applicant is not liable for sums demanded in advance of the Respondent paying them out.

Reasons for Decision

48. The Lease provides at clause 2(n) that the leaseholder shall pay to the freeholder "on demand one half of the costs incurred".

49. The interpretation of the Lease must be carried out applying the principles identified in *Arnold v Britton and Others* [2015] UKSC 36. At paragraph 15, Lord Neuberger said as follows:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all of the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", ... And it does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant

> provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions".

50. There are other authorities which deal with the interpretation of contracts. However, the Tribunal does not find any to add to the principles set out in *Arnold* in the context of the decision to be made in this case.

51. The wording of clause 2(n) is clear on its face. "Incurred" is the past tense of "incur". The natural meaning of "incurred" is that the expense is in the past, which is to say that the amount of the expense has already been paid out.

52. A contrast is apparent between costs "incurred" for the purposes listed in the clause on the one hand and the contribution to be made to "the cost of insuring". The latter does not indicate that the cost must have already been "incurred". The different wording used by the same draughtsman in the same clause indicates different intentions in respect of the Insurance Charges and other expenditure.

53. Whilst the Respondent's representative points to clause 3(iv), the Tribunal does not find that the payment of the contribution is a condition precedent to the freeholder's maintenance and repairing obligations. The law sets a high bar for there to be a condition precedent and unless that was clearly the intention of the parties a clause will not create that condition, even though it uses wording similar to this Lease, as so commonly leases do. *Yorkbrook Investments v Batten* (1985) 52 P & CR 51 is the relevant authority. The Tribunal finds that clause does not require the leaseholder to pay service charges ahead of the freeholder incurring the costs.

54. The Tribunal notes that clause 2(n) falls to be interpreted in light of other relevant provisions of the Lease and that clause 3(iv) is relevant for that purpose. However, clause 3(iv) does not demonstrate that the parties to the Lease intended the word "incurred" to have other than its natural meaning. The Tribunal considers that if the original parties had so intended, the clause or otherwise the Lease more generally would explicitly say so.

55. In support of the Tribunal's interpretation of the wording in dispute, the Tribunal notes that the Lease makes no provision for balancing payments to or from the leaseholder, which would be expected if the intention of the parties to the Lease had been for the leaseholder to make payments on account.

56. Additionally, the Lease is of one of the two maisonettes in a building with modest communal areas. There is nothing so unusual about the notion of the Lease requiring the freeholder to incur expenditure and

then claim it as service charges such as to indicate that the natural and ordinary meaning of "incurred" is inconsistent with the overall purpose of the clause and the Lease, the facts and circumstances known or assumed by the parties at the time that the document was executed, or commercial common sense.

57. Such of the demanded Other Service Charges as had not in fact been incurred at the time of each of the demands are not payable.

58. The effect of clause 2(n) is that the Applicant is not liable for the Other Service Charges until the time that the costs have been incurred by the Respondent and a lawful demand, including compliance with any statutory requirements, have been made thereafter, which has not occurred.

59. It follows from the above findings that there has not yet been a lawful demand for the Other Service Charges and so those are not yet due.

iii) Reasonableness of the 2018/2019 Other Service Charge items

60. There are various items of general repair costs challenged by the Applicant. Given that expenditure has been incurred by the Respondent in the 2018/ 2019 service charge year, albeit not lawfully demanded to date, the Tribunal addresses the question of the level of the Other Service Charges which are reasonable and which would be recoverable from the Applicant as and when they are lawfully demanded.

61. £1162.50 was demanded from the Applicant by the Respondent's managing agent in December 2018, approximately a quarter of the way through the 2018/2019 service charge year ending 28th September 2019, being half of estimated expenditure of £2325.

62. A breakdown of the expenditure was subsequently provided, together with evidence of the actual expenditure, during the 2018/2019 service charge year. The total of the actual expenditure evidenced is £3249.10, including insurance, in addition to which the Respondent is said to have incurred cost of £175 for a fire alarm and emergency lights and increasing the total to £3424.10, of which the Respondent asserted the Applicant to be liable to contribute £1712.05.

63. £1275.48 including insurance is accepted as reasonable by the Applicant, including the £175 for the fire alarm and emergency lights, irrespective of any lack of supportive evidence of the cost, and £60 of what the Applicant terms general repairs, in respect of clearing a blocked hopper. The Applicant has not sought any determination by the Tribunal in respect of those elements and accepts a contribution of £637.74 to be reasonable.

64. Consequently, £2148.62 of actual expenditure is disputed. Leaving aside the half of the £700.25 Management Charges demanded but not recoverable as dealt with above, the balance of the expenditure in dispute is £1448.37. The disputed liability of the Applicant to pay the Other Services Charges for the year is therefore £724.18.

65. The expenditure in dispute relates to three elements of cost, namely:

    a) repairs to the window cill (adopting the spelling more commonly used in the building industry and related) of the Upper Maisonette and related;
    b) repairs to the interior of the Property (the Applicant's lower maisonette); and
    c) repairing a skylight.

    The Tribunal deals with each in turn.

    a) Window cill to the Upper Maisonette

66. The Respondent has received an invoice dated 19th February 2019 from Grayland Construction Limited, which has been provided to the Applicant, in the sum of £888, inclusive of VAT, in respect of work to repair damaged cills to the bay window to the first floor of the Upper Maisonette, together with related sealing and redecoration and including the cost in relation to scaffolding.

67. The invoice from Grayland Construction does not identify the exact nature of the damage to the window cills to the bay window of the first floor or the impact of that. Neither is it clear from the invoice whether the cills repaired were stone, wood or made of another material.

68. The Applicant's representative does not dispute that the cost was incurred but does dispute any liability to pay, doing so on the basis that the window cill is not a common part but rather solely the responsibility of the Respondent. The Applicant's representative further refers to rot to the window cill as a consequence of lack of painting of it for many years.

69. The Respondent's representative does not specifically address that issue in his statement of case on behalf of the Respondent and indeed comments on the 2018/2019 budget figure, rather than the actual figure for the expenditure.

    Decision

70. The Tribunal determines that there is no amount payable as Other Service Charges in respect of the window cill to the Upper Maisonette.

    Reasons for decision

71. The Lease only refers to windows with regard to the leaseholder not obstructing access to air or light (Fourth Schedule clause 5.) and with regard to not putting any sign or similar in any window (Fourth Schedule clause 10). Window cills are not mentioned at all.

72. The Lease sets out covenants by both the freeholder and the leaseholder as to repair and maintenance, as set out above. The provisions must be meant to be exclusive.

73. The question which arises is as to whether any or all of the work to the window cill to the Upper Maisonette comprises work to part of the "main structure" of the Building and to part of the main structure which required repair, which the freeholder can recover the relevant contribution to as service charges so that the Applicant must contribute half of the repair cost pursuant to clause 2(n), or it does not. The Lease requires contribution if the cill is part of the main structure and if the work constituted repair. Both of those questions must be answered in the affirmative.

74. The phrase "main structure" is, regrettably, not defined in the Lease, although the term is a common one in leases and not ordinarily defined.

75. Leaving aside caselaw, the parties to a lease would be likely to perceive that the use of the word "main" must have been intended to convey some meaning and that its use indicates that there are other elements of the structure which it does not include. The "main" elements would not obviously be all elements: necessarily there must be elements of the structure as a whole which are not the "main structure".

76. Woodfall on Landlord and Tenant law at paragraph 13.060 has the following to say about structure and main structure (the numbering reflects caselaw cited in support of the content in the footnotes):

> "Structural alterations have been defined by the Court of Appeal as "permanent alterations which affect the structure of the premises"; those which "would affect the form and structure of the premises" and those which involve "any substantial alteration, extension or addition to the fabric of the house".[16] A house is a complex unity. "Structure" implies concern with the constituent or material parts of that unity. The constituent or material parts involve more than simply the load bearing elements, for example the four walls, the roof and the foundations. The constituent parts are more complex than that. "Structural" is that which appertains to the basic fabric of the house as distinguished from its decorations and fittings.[17] The installation of kitchen sinks and cookers with the necessary plumbing work does not amount to a structural alteration.[18] It is submitted, therefore, that the expression "structural repairs" is intended to distinguish those which involve interference with the basic fabric of the house—its walls, roof, foundations floors and so forth— from those which do not. The structure of a dwelling-house consists of those elements which give it its essential appearance, stability and shape.[19] Although this is a good

> working definition, it must not be applied slavishly; and the particular context may require a different meaning to be given.[20]
>
> In a particular lease, however, the word may be given a more restrictive meaning. In general, it seems, a more limited meaning will be given to the phrase "main structure" than to "structure".[21] Thus where the lease of a flat included the external walls of the flat, and the tenant covenanted to keep the flat (including all walls and party walls) in repair, but the landlord covenanted to keep in repair the "main structure", it was held that the main structure did not include the floor separating the ground floor from the basement flats.[22] Similarly, where part of a building consisted of a roof terrace which also served as the roof of a lower part of the building, it has been held that only the surface of the terrace fell within the scope of the tenant's liability, and that the remaining layers formed part of the structure and were maintainable by the landlord.[23] A covenant to keep the main structure in repair did not oblige the covenantor to repair any part of the woodwork or glass of sash windows.[24]

77. The last footnote, [24], refers to the authority of *Pattrick v Marley Estate Management* [2007] E.W.C.A. Civ 1166.

78. That passage in Woodfall supports main structure being more restrictive than structure generally, although it provides no definitive answer as to what will constitute one and not the other in any given instance. However, notably, there is specific reference to the woodwork of windows.

79. The Applicant is responsible for the decoration of the exterior of the Property ie the lower maisonette. That is not a cost in relation to a common part or otherwise covered by service charges, unless it forms part of the "main structure".

80. The painting and decoration of the exterior of the Upper Maisonette must properly be responsibility of any long leaseholder of the Upper Maisonette, if any, and otherwise of the freeholder, in either case as having title to that maisonette. That is also not a cost in relation to a common part otherwise covered by service charges, unless it forms part of the "main structure". Pursuant to the Lease, the leaseholder of the Property, the Applicant, is not otherwise responsible for contributing to that.

81. The Lease does not use the term "common part", which is used by the Applicant's representative, in the relevant clauses.

82. The Tribunal finds as a fact that the window cill is wooden. The Tribunal does so on the basis of the statement of case of the Applicant referring to rot and in the absence of any other evidence, hence the balance of evidence is in favour of the cill being made of wood.

83. The Tribunal finds decoration and sealant forms part of decoration of the exterior in the first instance and forms part of work to an item

which is not part of the main structure- the window, including its glass and frame- in the second instance. It does not form part of work to the main structure.

84. In terms of the actual damage to the cill itself, the question is whether that cill is part of the "main structure".

85. No submissions or case authorities have been provided by either party as to whether window cills of the nature of the cills to the first-floor bay window to the Upper Maisonette should or should not be regarded as part of the main structure of this particular building. Indeed, the Respondent has provided little comment at all. The Applicant has, as noted above, simply asserted more generally that the cills are not a common part.

86. The Tribunal considers that damage to window cills may or may not amount to damage of the "main structure" of a building, dependent upon the nature of the window cills and upon the nature of the damage. Window cills may be of an at least partially decorative nature.

87. However, given the finding that the cill in question is wood, the Tribunal additionally finds that they form part of the window itself and not part of the external wall, which is part of the main structure. As noted above, the window and frame do not form part of the main structure.

88. It necessarily follows from that finding that the window cill is not part of the main structure of the Building that the cost of the work undertaken to it is not recoverable as service charges.

89. Given that the cost of the items of work are not recoverable as service charges, inevitably the cost of the scaffolding to facilitate the work is not recoverable as service charges.

90. The part of the Other Service Charges as relates to the window cill to the first-floor bay window of the Upper Maisonette is accordingly not recoverable by the Respondent.

b) <u>Repairs to the interior of the lower maisonette (the Applicant's property)</u>

91. The Respondent has received an invoice dated 22nd March 2019 from Happy Handymen Limited, which has been provided to the Applicant, in the sum of £425 in respect of work to the plaster and plasterboard and for redecoration around a window to the Property.

92. The Applicant's representative does not in the Applicant's statement of case dispute that the cost was incurred but does dispute any liability to pay on the basis that the work was not undertaken to common parts, rather it was work to the Property itself, as opposed to the parts of the Building relevant to service charges.

93. The Applicant's representative also asserts that, in any event, the need for repairs arose from the breach by the Respondent of its own obligations, contending that rainwater leaked into the external walls via the rotten window cill to the bay window of the Upper Maisonette and then into the Property. He suggests that the cost of the work should be borne by the Respondent alone for that reason.

94. The Respondent's representative again does not specifically address that issue in his statement of case on behalf of the Respondent and indeed comments on the 2018/2019 budget figure, rather than the actual figure.

Decision

95. The Tribunal determines that there is no amount payable by the Applicant to the Respondent in respect of the repairs to the interior of the Property.

Reasons for the decision

96. The Tribunal agrees with the Applicant that the areas in relation to which work was undertaken were the inside of the Property and were the responsibility of the Applicant and not of the Respondent. There was no entitlement of the Respondent to undertake the work and charge the Applicant for a contribution to it as service charges.

97. In doing so, the Tribunal finds that the plasterboard and plaster to which work is referred to as having been undertaken and equally any decoration, do not form part of the main structure of the Building. The walls themselves are part of the main structure.

98. The plaster may very well be part of the structure more generally, which caselaw known to the Tribunal supports. The Tribunal has not been referred by either of the parties' representatives to any specific authorities in respect of the elements in relation to which work was undertaken and so must apply its knowledge of the relevant law generally. The Tribunal has concluded that to be sufficiently settled that no specific submissions need be requested.

99. However, as noted above, main structure has a more limited interpretation.

100. Importantly, there is no evidence as to whether the Applicant would have needed to incur the same cost or how the Applicant might have dealt with any necessary work. It has not been demonstrated that the Applicant would have incurred the same or similar cost and that the cost incurred by the Respondent was reasonable.

101. It is worthy of passing mention that the Tribunal is unclear why the Applicant agreed to the work by a contractor employed by the

Respondent and what was discussed between the parties at that time. It seems unlikely that the Applicant would have allowed someone instructed by the Respondent to have undertaken work without at least some communication. However, there is no evidence that the Applicant had agreed to the work being undertaken on the basis that the cost would be chargeable as service charges such that the Applicant would bear some of the cost.

102. In the absence of anything to indicate what occurred and in the absence of any aspect of this decision turning on the matter, it is unnecessary to say more.

103. In addition, if, for which the Tribunal has the Applicant's comments but no other evidence, the damage to the Applicant's premises was caused by a failure by the Respondent to comply with her own obligations to "repair maintain keep uphold paint and decorate" the window cill, it may very well not be reasonable for the Respondent to recover any of the cost of the work against the Applicant, whether as service charges or otherwise. The question does not fall to be determined in the event.

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104. The information and evidence available to the Tribunal in respect of this element is limited. However, the Tribunal accepts the Applicant's representative's argument in respect of the effect of the terms of the Lease.

105. The part of the Other Service Charges as relates to the work within the Property is accordingly not recoverable by the Respondent.

c) Repairing a skylight

106. The Respondent has received an invoice dated 19th June 2019 from S. B. Property Maintenance, which has been provided to the Applicant, in the sum of £135 in respect of inspecting the skylight and identifying upon doing so, firstly the condition of the skylight and secondly, accumulation of moss to the roof above the level of the skylight, of which some of the moss is washed into the lead gulley above the skylight in heavy rain, causing the gulley to be blocked and resulting in leaking to the skylight.

107. The Applicant's representative again does not dispute that the cost was incurred by the Respondent. However, it is denied that the Applicant is liable to pay on the basis that the skylight serves only the Upper Maisonette and is not a common part of the building falling instead within the landlord's obligations.

108. The Respondent's representative position is the same as in respect of the preceding items.

Decision

109. The Tribunal determines that there is no amount payable in respect of the work in relation to the leaking of the skylight.

Reasons for the decision

110. There is specific reference in clause 2(n) to the leaseholder contributing to repairing the roof. The roof is explicitly included in that clause as falling within the definition of the main structure.

111. Different relevant clauses do treat the roof differently. Clause 3(iv) refers to the roof and main structure separately, not including the former as part of the latter. Clause 2(c) in relation to the leaseholder's obligations excludes the main structure but makes no reference to the roof as being or not being part of that. However, any obligation to contribute arises from clause 2(n).

112. A question therefore arises as to whether the skylight forms part of the roof of the building.

113. Plainly, if the skylight was removed, there would be gap, almost certainly being referred to as a hole in the roof, because that is what there would be. The roof would not be complete. The glass skylight is part of the top of the building which protects the interior from the elements. It would have to be replaced, if not with another opening window, then with something else which maintained the purpose of the roof.

114. The passage from Woodfall quoted above explains that:

> "A covenant to keep the main structure in repair did not oblige the covenantor to repair any part of the woodwork or glass of sash windows.24"

115. The Tribunal finds that the skylight does not therefore form part of the main structure. However, the Tribunal does find that the skylight forms part of the roof. The tenant agreed to contribute one half of the cost of repairing the roof. The Tribunal does not accept the Applicant's representatives' contrary argument.

116. However, that is not the end of the matter in respect of this application because the work undertaken was to investigate the cause of leaks to the skylight and to resolve those, where the cause was the gully within the roof above the skylight. The work undertaken was in relation to the gully. The description of the work given by the Applicant as "repairing a skylight"- and adopted in the header to this section- is not correct.

117. The gully also appears on the limited available evidence to form part of the roof and the Tribunal so finds.

118. The Tribunal additionally finds that the gully forms part of the "gutter, drains", to which the Applicant is also required to contribute half of the cost of repair. As noted above, the Applicant is not required by the Lease to contribute to the cost of maintaining or keeping in good order and condition, despite the obligations on the Respondent to carry out such work. Whilst the different wording is a little odd at first blush, those are the terms entered into by the original parties to the Lease and on which the rights and obligations of the parties to this application are based.

119. Those findings lead on to the question of whether the cost incurred by the Respondent is for "repair".

120. A blocked gully is not a gully functioning as it ought. That said, there appears to have been nothing wrong with the gully itself. The gully being made larger, as proposed, would not be a repair but rather an improvement to combat an external issue.

121. That issue is with moss. The moss does not form part of the roof.

122. The Tribunal determines that clearing the moss from the gullies would form part of keeping the gullies in good order and otherwise fall within the Respondent's obligation pursuant to clause 3(iv). However, it does not form part of a repair of the gully itself.

123. That is significant in this case, where it is only repair to which the leaseholder covenanted to contribute.

124. Contributing to the clearing of moss which has fallen into the gully but where there is no defect to the gully itself, in order to address the problem causing the skylight to leak, does not fall within the Applicant's service charge obligations.

125. There is no evidence before the Tribunal that the skylight itself required any work. There is no evidence as to why it leaked. There is also no evidence as to whether, or not, it may continue to leak and, if so, why. Whilst a leak suggests a repair issue in respect of the skylight, the information provided in the invoice, makes no reference to work having been required and undertaken to the skylight.

126. In the event that there had been different evidence, the Tribunal may potentially have reached a different conclusion. However, there is no useful purpose to be served in speculating what a decision might be if the evidence before the Tribunal were other than that actually received.

127. The part of the 2018/2019 Other Service Charges as relates to the work with the Property is accordingly not recoverable by the Respondent.

iv) Reasonableness of the 2019/2020 service charge items other than insurance and management fees

128. The demand for 2020 related to expenditure anticipated within a budget prepared for the year commencing 29th September 2019 and ending 28th September 2020. 5 months of that year has yet to elapse. The budget year had not commenced at the time of the Applicant's application, received 11th September 2019. The service charges for 2020 being expressed as "on account" serves to emphasise, if such were needed, that at least some of the expenditure had not been incurred at the time. £1162.50 was demanded on account on 29th August 2019.

129. As previously noted, the Applicant has accepted the contribution to the cost of insurance to be reasonable and has not sought any determination to contrary. The position of the parties in respect of demands for money on account or otherwise ahead of money being expended and the determination of the Tribunal in respect of that is set out above.

130. The Tribunal deals briefly with whether any other determination can be made as to recoverability in principle and as to reasonableness.

Decision

131. The Tribunal determines that the Applicant is currently liable to pay half of the cost of the insurance premium, namely £287.50, but no more than that.

Reasons for decision

132. The Applicant would not be liable to pay any 2019/2020 service charges, save the Insurance Charges, ahead of any expenditure being incurred and then the issue of any lawful demand. There had been no such expenditure at the time of the demand. The nature of a budget is that it sets out anticipated expenditure for the future, rather than costs already paid out. Necessarily, there was no actual cost paid out, and so no actual expenditure being claimed for, for any specific item.

133. It is impossible in this instance for the Tribunal to reach any determination as to the reasonableness of any 2019/2020 Other Service Charges unless or until actual expenditure is incurred and clearly identifiable. As and when the Respondent demands money expended, it will be possible to identify what that expenditure was upon and in what sums. Only then can it be identified whether the expenditure was incurred on recoverable items and in reasonable sums. The Tribunal accepts that some expenditure may have been

incurred by this point in the service charge year which was not incurred back in August 2019 but the Tribunal has no information as to that.

134. The 2019/2020 Other Service Charges will then need to be lawfully demanded. The Applicant may then challenge the charges if she deems it appropriate to do so.

135. The Applicant has accepted the recoverability and reasonableness of the Insurance Charges for 2019/2020.

136. The rest of the 2019/2020 Other Service Charges are not, as at the date of the demand and this application, recoverable by the Respondent.

Applications in respect of costs and refund of fees

137. The Applicant stated in her application that she did not wish to make an application that any costs incurred in connection with proceedings before the Tribunal should not be included in the amount of any service charge payable by the tenant pursuant to section 20C of the Landlord and Tenant Act 1985. The Applicant further stated that she did not wish to make an application, pursuant to Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002. In addition, no application has been made by either the Applicant or the Respondent for an order for costs against a party who has conducted the proceedings in an unreasonable manner, pursuant to Rule 13 of the Tribunal Procedure Rules 2013.

138. Accordingly, the Tribunal has not considered those matters and makes no order in relation to them. If the Respondent seeks to claim such charges, the Applicant will then be able to argue whether the Lease allows their recovery and whether they are reasonable, should the Applicant wish to do so.

139. In contrast, the Applicant has requested that the Respondent reimburse the Applicant with the £100 Tribunal application fee and any hearing fee, although in the event no such hearing fee has been incurred in light of the paper determination.

140. As the Applicant has achieved success in challenging whether, or not, service charges are payable, the Tribunal orders the Respondent to pay the £100 to the Applicant within 28 days.

Judge J. Dobson

RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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

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.