FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BE/LSC/2018/0281**
Property	**:**	**12 Bellamys Court, Abbotshade Road, London SE16 5RF**
Applicant	**:**	**Kris Seo Bee Tay**
Representative	**:**	**Self**
Respondent	**:**	**Holding & Management (Solitaire) Limited**
Representative	**:**	**Paul Sweeney instructed by J.B. Leitch**
Type of application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	**:**	**Judge Hargreaves** **Mel Cairns MCIEH**
Date and venue of hearing	**:**	**10 Alfred Place, London WC1E 7LR** **27th February 2019**
Date of decision	**:**	**7th March 2019**
Re-issued		**27th March 2019**

DECISION
Corrected under Tribunal Rule 50

Decisions of the Tribunal

(1) The decisions on the Applicant's contributions to reserves for Flat 12 Bellamys Court for the service charge years ending 30th June 2014 and 30th June 2015 (as per the s27A application at pages 10 and 12 of the trial bundle) stand **adjourned pending the outcome of the Applicant's application for permission to appeal/and or the substantive appeal of the Tribunal's decision dated 4th December 2018 between the same parties and in relation to the same property in case LON/00BE/LSC/2017/0178 (which deals with service charges for the period 1st January 2016 to 30th June 2018).**

(2) **The decisions are to be reserved to this Tribunal.**

(3) The Tribunal makes the **other** determinations relating to electricity charges and the 2019 reserve fund contribution as set out under the various headings in this Decision below.

(4) The Tribunal makes an order (if required and for the avoidance of doubt) under section 20C of the Landlord and Tenant Act 1985 so that no more than ~~50%~~ 20% of the Landlord's costs of the Tribunal proceedings may be passed to the lessees through any service charge.

REASONS

1. All references except where otherwise stated are to page numbers in the trial bundle.

2. A considerable amount of time was spent initially in deciding what exactly we were supposed to be determining. This was due, essentially, to two reasons. The first is the extent and potential overlap with a recent decision made by a different panel in LON/00BE/LSC/2017/0178 ("the 0178 decision"), and the second relates to some arguably confusing Tribunal correspondence amending the directions previously given about the scope of this application which appear to confuse the two applications. The 0178 decision was a referral from the county court. This application was issued in June 2018 but not ordered to be heard at the same time. We do not intend to add to the confusion further by explaining any more than we consider necessary to reflect our conclusions about what it is we are dealing with. Suffice it to say that our decision to proceed as we did was explained to the parties after some debate, and they both agreed with it.

3. The first and main difficulty procedurally is the Applicant's contention that this application includes a challenge to the reserve contributions for the years ending June 2014 and June 2015 because they were

excluded from the county court proceedings as referred, and should have been included in any dispute resolution hearing before this Tribunal. So, naturally, as she is clearly (we note) an extremely careful, thoughtful and methodical person, despite having no litigation experience whatsoever, she thought it would be sensible to provide a means of determining these disputed years in this Tribunal: see pages 10 and 12 for the relevant pages of her application. Without carefully dissecting the 2018/0178 decision we cannot decide whether that Tribunal's decision includes these disputed reserve contributions. After some discussion as to whether it did or not (the positions of the parties naturally differ), the parties both agreed that the outcome of the challenge to the reserve fund contributions for the years ending 2014 and 2015 will stand or fall with the success of the Applicant's application for permission to appeal, sent in time to the Upper Tribunal but not so far copied to the Respondent. If the Applicant succeeds, those reserve contributions are not payable. The appeal is not a matter for us, except we will deal with the outstanding years by consent or otherwise after 2018/0178 is finalised in terms of the Applicant's challenge to the decision. We should make it clear: we do not expect to deal with these outstanding issues on any other than a peremptory basis.

4. Stripping away other potential issues which might have been wrongly included because of the overlap with 0178 (see eg paragraph 4 of the Applicant's reply at p543, agreed by Mr Sweeney), the other matters we have to decide are (i) the reasonableness and payability of the electricity charges for the service charge periods ending 2015, 2016, 2017, 2018 and estimated for 2019; (ii) the reasonableness of the contribution to reserves in the sum of £968.75 (p17, year ending 30th June 2019) and (iii) the s20C application.

5. We therefore limit our decision to these issues, and for that reason do not deal with the entirety of the evidence and documents submitted by both parties, creating a bundle which exceeds 600 pages. The Applicant is well-acquainted with the development and what she wanted to say, which is set out clearly in her pleadings and evidence. Mr McGovern of Maunder Taylor, who has managed the development only since July 2017 made a witness statement in January (p541) adopting the Respondent's statement of case as his evidence, which turned out (as it often does), not to have been the most careful tactic to adopt. Let us emphasise however that, this mistake apart, Mr McGovern was a helpful, careful and straightforward witness when it came to actually answering both the Applicant's and the Tribunal's questions and we accept his oral evidence, excluding those aspects which relied on matters remarked to him by other witnesses who did not provide direct evidence themselves (such as various electricians).

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

7. The property which is the subject of this application is a third floor flat in a Thames-side development in Rotherhithe, built since the mid-90s (the lease is dated 1996: see tab 3, p51; plan at p54). We saw photographs and plans which were very useful. Neither party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute. By way of background, although not identified as such on p54, the path running along the River frontage is part of the Thames Path and as such open to the public as well as the Applicant (Part III, First Schedule, paragraph 1(b) p65).

8. The dispute about common parts electricity charges for the years 2015-2019 is based on the following facts, explained by the Applicant from p90. In simple terms the leaseholders discovered in around 2017 that some of the lights on the Thames Path (18 out of 53) and an electrically operated gate were connected to the Bellamys Court electricity meters. This was historic in dating from the development's inception. It means in simple terms that the leaseholders of Bellamys Court have been paying for electricity under one scheme of charging under the lease, rather than another. (The Thames Path is part of the "Amenity Areas": see 1.11 at p57.)

9. This is because of the charging regime set out in the lease (from p51 of the bundle) as follows. For the purposes of definition, "The Block" is the building incorporating the Applicant's flat, Bellamys Court. The Block is outlined green on the plan in the lease at p54. The "Estate" is the land edged blue on the plan and includes the other blocks and the Thames Path as well as other access and Amenity Areas. The "Service Charge" and "Estate Charge" are defined by clause 1.7 and 1.8 respectively.

10. Part I of the Fourth Schedule provides that the Applicant's share of the Service Charge is 1/32. Part III of the Fourth Schedule (p75) explains how it is computed, and for the purposes of this decisions that is based on clauses (i) and (ii) of Part III. That takes us to the Fifth Schedule (p78) and in particular to Part I paragraph 13 (p81) which allocates electricity as a Block Service Charge.

11. Running parallel with the Block/Service Charge scheme, is the Estate Charge scheme. The Estate Charge is concerned with the expenses particularised by Part II Fifth Schedule (p82), and paragraph 7 of the Sixth Schedule, paragraph (iv) of which includes an obligation by the landlord to keep the Amenity Areas lighted (p85). The Applicant's share of the Estate Charge is 1/141 (clause 1.8 as varied), see also Part IV, Fourth Schedule, p76.

12. At paragraph 7 of her statement of case (p90), the Applicant set out the electricity charges allocated to Bellamys Court Service Charge for the years in question and states, correctly, that the allocation of Thames Path lighting to the Service Charge is a breach of the terms of the lease.

It should have been charged to the Estate Charge and her share apportioned at 1/141.

13. It might have been thought that the Respondent would concede that allegation in plain terms because it was clear at the hearing that all parties before us agreed with the Applicant's analysis of the facts.[1] Instead, having set out at length the provisions of the lease in its statement of case, it contends at paragraph 12 (p99) that "The Electricity Charges have been properly budgeted for, demanded and accounted for, which does not appear to be disputed by the Applicant", which looks like and is a misreading of her pleading. Paragraph 18 of the Respondent's statement of case repeats the same point then at paragraph 19 finally appears to accept she is challenging the inclusion of Thames Path electricity costs in the Service Charge. The pleading then continues, in effect (but not expressly), at paragraphs 24-29, (from p101), to confirm the Applicant's case on the facts. The Respondent seems to argue that that the Applicant is being unreasonable and the financial effect of getting the costs allocated correctly would be minimal and therefore the electricity charges are reasonable however allocated. The Respondent had no credible evidence to support this assertion despite being encourages by the Tribunal to explain this position by reference to some hard facts.

14. At paragraph 29 the Respondent pleads to the installation of new sub-meters which will split the costs correctly and indeed Mr McGovern explained the changes to us by reference to a useful diagram representing the situation from January-July 2018: see p639. He argued that the electricity supplier said to him that it would take a year's worth of readings from the new meters to gain some idea of how far the Applicant (and her co-leaseholders) had been overcharged, and that therefore the claim was premature. The Tribunal notes that the Respondent made no application to adjourn the hearing until after a year's worth of readings had been taken, or made any clear offers to the Applicant on those lines. The Respondent's pleading was unhelpful as in reality, as far as the electricity charges are concerned, the Applicant has not only made out her case, but the Respondent has now decided to take practical steps to remedy the situation. That is a clear recognition of the fact that the historic situation was producing a result not in line with the provisions of the lease.

15. Whilst Mr McGovern stressed that he thought it would make little difference in the end, he had no credible evidence to bring to the Tribunal in support as we have indicated. For example, he thinks that the block lighting is expensive in comparison to the Thames Path lighting, but could not explain why with reference to any hard evidence. He finally conceded, when pressed, that he had no hard evidence to support his allegations, though we consider that it would have been

[1] Mr Sweeney did not prepare the Respondent's statement of case

possible to take some meter readings since last year and make a start on some analysis.

16. When charges are allocated incorrectly, the starting point is that this is not in accordance with the lease and is therefore not payable and unreasonable. We conclude that the Applicant has made her case out in relation to the electricity charges for the years in question. But what to do in response?

17. She has itemised those charges (which are not themselves in dispute) in a table at p641 and compared them to the figures for Quayside Court (no charges for Amenity Areas exterior lighting or a lift) in a brave attempt to assist the Tribunal by providing some methodology for calculating how much Bellamys Court leaseholders have been overcharged. But we cannot accept that Quayside Court provides an ideal comparator, as a careful review of the evidence reveals discrepancies between the two blocks (leaving out 2017 as something of a rogue year for reasons which do not assist us). Although we pressed Mr McGovern to see if he could provide a competing methodology using the figures available, he could not. It is wholly inappropriate to waste further time waiting for a year's worth of readings to see if something better can be calculated.

18. Taking an extremely broad brush approach we have decided that the charges for Bellamys Court should be reduced by 50% to reflect the deduction of the costs which have been wrongly allocated to the Service Charge. This approach includes the fact that there is a difference between paying 1/32 and 1/141.

19. It follows that the figures which we substitute as reasonable for the electricity charges are as follows (which highlights the point made by various parties throughout the hearing, that the amount in dispute, in comparison to the pages of argument produced in response and about the point, was disproportionately small):-

    2015 £21.75

    2016 £42.20

    2017 £4.41

    2018 £23.44

20. That leaves us to decide the next question whether the contribution for 2019 to the reserve fund in the sum of £968.75 is reasonable or not. We listened to what both parties had to say about this, and prefer the evidence of Mr McGovern. The Applicant argues that the Respondent has around £70,000 in reserve but seemed unable to appreciate how

this can be reduced if not "topped up" at regular intervals. We suspect that her approach might be tainted by the outcome of the 0178 case, but on the basis of Mr McGovern's evidence and long term planned maintenance schedule, which we found to be sensible, the Respondent succeeds on this point and the sum is reasonable and payable. There is no reason to reduce it by 50% as suggested by the Applicant, whose calculations are based on the expected rather than covering the risk of the unexpected, as Mr McGovern explained.

21. The Applicant had applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal determines, for the avoidance of doubt, that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act. However, that decision is qualified. We consider that the Applicant's opposition to the reserve fund was unfounded, as was the Respondent's opposition to the dispute about the electricity charges, which was a strong case for the Applicant. In the circumstances it is appropriate to limit the s20C order to 80% of the Respondent's costs. On any view the amount at stake in relation to the electricity charges would be minimal, but there was an important principle at stake.

Judge Hargreaves

Mel Cairns MCIEH

7th March 2019

Re-issued 27th March 2019

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

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

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

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

Section 19

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

   and the amount payable shall be limited accordingly.

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

Section 27A

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

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

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

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

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

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

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

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

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

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

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

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

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

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

Schedule 11, paragraph 2

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

Schedule 11, paragraph 5

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

(2) Sub-paragraph (1) applies whether or not any payment has been made.

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

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

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

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

(b) on particular evidence,

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