FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BK/LSC/2019/0017**
Property	**:**	**Flat 8, 72 Eaton Square, London SW1W 9AS**
Applicant	**:**	**Ms Sylvia Birrane**
Representative	**:**	**In person**
Respondent	**:**	**72 Eaton Square Limited**
Representative	**:**	**Mr Michael Walsh of Counsel**
Also present	**:**	**Mr Miles Baird (Respondent's managing agent) and Mr Zeev Ziv (a director of the Respondent company)**
Type of Application	**:**	**For the determination of the liability to pay a service charge**
Tribunal Members	**:**	**Judge P Korn** **Mr J Barlow FRICS** **Mr A Ring**
Date and venue of Hearing	**:**	**13th and 14th May 2019 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**5th June 2019**

DECISION

Decision of the Tribunal

(1) The Tribunal only has jurisdiction to make a determination in respect of (a) the items being challenged in the 2014 service charge year, (b) the special levy charged in 2017 and (c) the Applicant's challenges to the payability of legal costs.

(2) Those service charge items in respect of which the Tribunal has jurisdiction to make a determination are all payable in full.

Introduction

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("**the 1985 Act**") as to the payability of certain service charges.

2. The Applicant's challenge is to various service charge items in respect of the service charge years 2009 to 2017.

3. The relevant statutory provisions are set out in the Appendix to this decision. The Applicant's lease ("**the Lease**") is dated 5th June 1990 and was originally made between the Respondent (1) and The Right Honourable Margaret Eldrydd Viscountess De L'Isle (2).

Preliminary issue

4. At the start of the hearing Mr Walsh for the Respondent submitted that the Tribunal only had jurisdiction to make a determination in respect of the special levy charged in 2017.

5. Under section 27A(4) of the 1985 Act, no application for a determination as to whether a service charge is payable may be made *"in respect of a matter which – (a) has been agreed or admitted by the tenant …"*. Section 27A(5) then qualifies this as follows: *"But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment"*.

6. Mr Walsh drew the Tribunal's attention to the decision of the Upper Tribunal in *Cain v London Borough of Islington (2015) UKUT 0542 (LC)* where in his submission section 27A(5) was taken to mean that admission of liability could not arise from the making of a single payment. If, on the other hand, a tenant makes a series of payments then that person can be regarded as having tacitly agreed to the charges. In the present case, the Applicant has continuously paid the service charges now disputed by her, and her account shows payment of the relevant service charges to have been made soon after they were claimed. The charges were also paid without protest whatsoever. The only exception was the special levy charged in 2017, which Mr Walsh conceded had been disputed by the Applicant notwithstanding the contents of his written skeleton argument.

7. In response the Applicant said that her advisers had advised her to pay the service charge. When asked by the Tribunal if she could point to evidence that she had challenged the payability of any of the service charges or paid them under protest she pointed to some correspondence in which she had questioned aspects of the service charge. She said that she had not received substantive responses to her questions.

8. After the relevant correspondence had been discussed at the hearing Mr Walsh conceded that the Applicant had actually paid the 2014 service charge under protest and that therefore the Tribunal had jurisdiction to make a determination in respect of the charges challenged in that year.

Decision on preliminary issue

9. As notified to the parties orally at the hearing, the Tribunal's decision on this preliminary issue is that it has jurisdiction to make a determination in respect of (a) the items being challenged in respect of the 2014 service charge year, (b) the special levy charged in 2017 and (c) the Applicant's challenges to the payability of legal costs. The Tribunal has no jurisdiction to make a determination in respect of the other issues raised in the application.

10. In his decision in *Cain v London Borough of* Islington, His Honour Judge Gerald noted that under section 27A(5) of the 1985 Act *"the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment"*. In his view, the reference to the making of "any payment", and "only" such payment, indicated that whilst the making of a single payment on its own, or without more, will never be sufficient to found the finding of agreement or admission, the making of multiple payments over a period of time may suffice. He then went on to state that it would offend common sense for a tenant who without qualification or protest has been paying a series of demanded service charges over a period of time to be able to turn around and deny that he has ever agreed or admitted to that which he has previously paid without qualification or protest. Self-evidently, the longer the period over which payments have been made the more readily the court or tribunal will be to hold that the tenant has agreed or admitted that which has been demanded and paid. It is the absence of protest or qualification which provides the additional evidence from which agreement or admission can be implied or inferred.

11. In the present case, the Respondent accepts – and we agree – that there is sufficient evidence of challenge to and/or protest against the 2014 service charge and the special levy charged in 2017 that the Applicant should not be treated as having agreed or admitted that those sums are payable.

12. In addition, we are satisfied that the Applicant has challenged and/or protested against the various legal costs which she is now formally disputing such that the Tribunal has jurisdiction to make a determination as to their payability. For example, on 7th February 2013 the Applicant emailed the Respondent's managing agent stating as follows: *"I have also requested a detailed breakdown*

of the £14,000 legal fees. I would like to make it clear that I will not pay any legal costs or expenses that have been incurred by the Company that are against my interests". There is also a letter from the Applicant to the Respondent's solicitors dated 7th March 2014 requesting *"detailed breakdowns of the legal costs … together with an explanation of the relating issues"*. In addition, there is a letter dated 14th March 2018 to the managing agents in which the Applicant states *"I do not consent to payment of legal costs incurred by the directors in relation to flat 5-6"* and then goes on to connect this to her concerns about substantial legal costs of £159,000 going back to 2009.

13. As regards the other charges challenged in the application, we have not seen any evidence that these have been challenged or even that they have been paid under protest. We accept that the Applicant has raised various queries from time to time, but this is significantly different from actually raising objections to specific charges or making it clear that payment of one or more charges is being withheld or being made under protest. If, as has been the case here, payment is repeatedly and promptly made over a long period of time without the leaseholder making any specific challenge or protest then there comes a point where such a pattern of payment without protest constitutes acceptance that the relevant charges are properly payable or at the very least an acknowledgement that the leaseholder does not intend to challenge them.

The disputed items over which the Tribunal has jurisdiction

General observation

14. Whilst each issue needs to be considered on its merits, it is clearly the case that a large part of the backdrop to the dispute between the parties is the carrying out of works in and outside Flats 5 and 6, the Applicant's concerns about these works and her subsequent dealings with the leaseholder of Flats 5 and 6 and with the Respondent.

Legal costs

Applicant's case

15. The Applicant states that she has received no evidence or information explaining what the various legal costs relate to, despite her having made several requests for this information. She also considers the costs to be far too high and states that she should not have to fund the legal costs of dealing with disputes between other leaseholders.

16. Specifically in relation to the 2009 legal costs, the Applicant makes some comments about the accounts, the repayment of legal fees by the 'developer' of Flats 5 and 6 and a letter from Websters Accountants. In relation to 2010 and 2011, she refers to issues resulting from works to Flats 5 and 6 not being dealt with.

17. In relation to the 2012 legal costs, the Applicant comments that the accounts contain a note which state that *"significant legal fees have been incurred during the year in connection with the Licence for Alterations for flats 5 and 6. The company's solicitors are holding a deposit from which it is anticipated that these costs will be able to be recovered in due course"*. She questions why these costs have not been repaid.

18. In relation to 2013 the Applicant assumes that the legal fees relate to correspondence in respect of Flats 5 and 6. In relation to 2014 she makes further comments about Flats 5 and 6, and in relation to 2015 she states that the legal costs in her opinion relate to 'inappropriate action'. In relation to 2016 she submits that Forsters Solicitors had a conflict of interest and should not have been instructed. In relation to 2017 she refers to a £25,000 being used to pay legal costs.

Respondent's case

19. In his skeleton argument Mr Walsh states that the Applicant's solicitors wrote to the Respondent in September 2010 claiming that it was in breach of its obligations under the Lease by virtue of its alleged failings in connection with the works that had been carried out in Flats 5 and 6. In March 2011 her solicitors claimed that the Respondent was liable to her for damage to her premises, and in trying to resolve the dispute the Respondent incurred legal costs. The dispute continued through 2013 to 2015 and further legal and surveying costs were incurred. The Applicant herself admitted that she had repeatedly rejected offers which were put to her to try to resolve the dispute. The skeleton argument also states that during 2014 and 2015 there was – in addition to this dispute – a separate dispute regarding the liability for leaseholders to pay for repairs to the portico.

20. In cross-examination, Mr Walsh put it to the Applicant that she had no evidence that the amounts incurred each year by way of legal costs were unreasonable. He also put it to her that it was reasonable for the Respondent to take legal advice where appropriate and to rely on that advice, and she accepted this point. In addition, he put it to her that most of the Respondent's legal costs related to its dealings with her.

Mr Ziv's evidence

21. Mr Ziv has been a director of the Respondent company since January 2017 and is also the leaseholder of Flat 4. In his witness statement he states that he has attempted on numerous occasions to reason with the Applicant in relation to

her dispute with Flats 5 and 6 and to persuade her (a) that the dispute was a private one between the two flat-owners and (b) that the Respondent's only interest was in the restoration of the fire-barrier ceiling in the Applicant's flat. The Applicant had chosen to ignore his advice and, instead of trying to resolve the matter direct with the leaseholder of Flats 5 and 6 (Mr Troim), she had pressured the Respondent into incurring enormous legal and professional costs.

22. Mr Ziv goes on to state that Mr Troim had agreed either to restore the Applicant's flat to its original state or to contribute towards the reinstatement of the ceiling and to compensate her for allowing his installations to remain in his void space. However, the Applicant had ignored Mr Troim's proposals even after Mr Ziv had twice emailed her asking for her response.

23. At the hearing Mr Ziv said that he had originally been sympathetic to the Applicant's predicament regarding the trespass by Mr Troim, but at the same time he felt strongly that the dispute had nothing to do with the Respondent.

24. As regards the level of legal fees incurred, Mr Ziv accepted that the Respondent's solicitors' rates were slightly on the high side, but he felt that it was reasonable to use them as they were local and efficient. Mr Ziv also commented that he had spent a large amount of time on an unpaid basis trying to broker a compromise between the Applicant and Mr Troim even though it was not his responsibility to do so.

25. In cross-examination by the Applicant, Mr Ziv accepted that Mr Troim had not been co-operative initially, but Mr Troim later made generous offers of settlement to the Applicant which she either rejected or ignored.

Gas and heating for 2014

Aside from legal costs, the only items being challenged in relation to the 2014 service charge year are gas and heating charges.

Applicant's case on gas and heating for 2014

26. The Applicant states that the gas and heating costs have increased sharply since 2009 and that the increase appears to be as a result of the unauthorised works to Flats 5 and 6.

27. At the hearing the Applicant referred the Tribunal to a photograph of what she described as pumps together with some information regarding horizontal multi-stage close coupled pumps, a separate diagram and a list of amenities. In her submission, Flats 5 and 6 benefited from greatly enhanced services which fed off the central system, and this led to higher bills. The extra services became operational in 2009 and this is when utility costs started to increase.

Mr Ziv's evidence

28. The Tribunal was referred to an analysis of gas and heating costs carried out by Mr Ziv. 2014 was higher than some years but lower than others. At the hearing he said that the Respondent simply invoices the leaseholders for the amounts charged by the utility company, although the Respondent does review its supplier from time to time.

Cross-examination of Applicant

29. Mr Walsh put it to the Applicant that the Respondent considered her analysis to be mathematically flawed and felt that it did not take into account relevant variables. He also put it to the Applicant, and she duly accepted, that the Respondent had not been acting fraudulently in relation to gas and heating charges and that it periodically tendered the contract. The Applicant also accepted that the heating system was old and that the Respondent had fixed it when necessary. Furthermore, she accepted that there was no evidence in the hearing bundle to show that Flats 5 and 6 used a disproportionate amount of gas, and she accepted that Flats 5 and 6 were not using the communal supply for electricity.

Special levy

This levy relates to the proposed construction of a fire barrier ceiling between Flats 5 and 6 and Flat 8.

Applicant's case in relation to the special levy

30. The Applicant considers that the special levy is not payable because the Respondent's proposed works are not appropriate. At the hearing she referred the Tribunal to a copy of a letter from the City of Westminster dated 7th October 2013 stating that there were defects in the separation of her flat and Flats 5 and 6.

Cross-examination of Applicant

31. Mr Walsh put it to the Applicant that there were two entirely separate issues, the trespass by Mr Troim and the installation of a fire-proof barrier. In relation to the installation of a fire-proof barrier, he put it to her that she had no evidence to contradict the Respondent's evidence that the works are necessary and that the estimated cost is reasonable.

Further comments

32. Mr Walsh emphasised in oral submissions that the levy was just an estimate and that the works have not yet been carried out. The Respondent has been

through a section 20 consultation process and the schedule of works has been prepared by surveyors using their professional expertise.

Tribunal's analysis and determination

Legal costs

33. In the absence of a credible challenge to any of these costs, our determination is that they are all payable in full.

34. There is some evidence to indicate that a significant proportion of these costs has been caused by the Applicant herself by involving the Respondent in her dispute with Mr Troim and by resisting the Respondent's attempts to construct a fire-barrier between her flat and Mr Troim's flat. In addition, there is some evidence to indicate that the Applicant has herself behaved unreasonably, particularly in the latter stages of her dispute with Mr Troim, and that it is her behaviour which at least in part has caused the legal costs to reach the level that they have reached.

35. In any event, the Applicant has offered no evidence to demonstrate either (a) that these costs have been incurred on matters which are irrecoverable under the Lease or (b) that the Respondent has erred in some other way in seeking legal advice and in incurring these costs or (c) that the costs are unreasonably high. In addition, the Applicant has offered no analysis of any individual invoices, has offered no alternative figures and has not brought any expert evidence or comparable evidence.

36. The Applicant has made an assertion that the costs are too high, but such an assertion needs to be backed up by credible supporting evidence, and the Applicant has provided none. She has also made various comments in written submissions, but she has failed to demonstrate the relevance or logic of these comments. Specifically in relation to Forsters' alleged conflict of interest, the Tribunal asked the Applicant at the hearing to explain why she felt that there was a conflict but she failed to do so to the Tribunal's satisfaction.

37. Whilst we do have a concern that the Respondent and/or its managing agents may at times have failed to answer the Applicant's questions regarding the legal costs, it nevertheless remains the case that she has provided no credible evidence in support of her challenge to these costs. In addition, Mr Ziv came across as a credible witness on this and on the other issues.

Gas and heating

38. In the absence of a credible challenge to these costs, our determination is that they are payable in full.

39. The Applicant's mathematical calculations are not wholly convincing, but in any event she has not offered any proper analysis on this issue. Her assertion that costs have increased due to greater usage by Flats 5 and 6 is – in the absence of proper evidence – simply an assertion. The Applicant has not come up with alternative figures, comparable evidence or any forensic analysis, and nor does she seem to have considered other possible explanations for fluctuations in cost. The Respondent for its part states that it has carried out periodic market-testing, and there is no sensible basis for declaring these charges to be unreasonable in the absence of a stronger case on the part of the Applicant.

Special levy

40. This is not an actual charge for works already carried out, but instead it is an estimated charge for works proposed to be carried out. It can therefore only be challenged pursuant to clause 19(2) of the 1985 Act, the relevant part of which states that *"where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable"*.

41. The proposed works comprise the construction of a fire barrier ceiling between Flats 5 and 6 and Flat 8. The Respondent has carried out a section 20 consultation process, the validity of which has not been challenged by the Applicant. The Respondent has also used the expertise of a surveyor in drawing up the schedule of works.

42. The Applicant has offered no expert evidence as to why the proposed works should not be carried out or why alternative works should be carried out, she has merely made an assertion that the works are misconceived despite having no expertise in the matter. Her reference to a letter from the City of Westminster back in 2013 expressing concerns about defects in the separation of her flat and Flats 5 and 6 does not constitute evidence that the proposed construction of a fire barrier ceiling is misconceived. The Applicant has also offered no analysis of the proposed cost and therefore has done nothing to demonstrate that the proposed cost itself is unreasonable.

Cost Applications

43. The Applicant indicated at the hearing that she wanted to make cost applications under section 20C of the 1985 Act and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, but it was agreed at the end of the hearing that the parties would essentially reserve their position in relation to costs pending receipt of this decision.

44. Any cost applications must be submitted to the Tribunal within **14 days** after the date of this decision and any response that a party wishes to make to any cost application made by the other party must be submitted to the Tribunal within **28 days** after the date of this decision.

Name: Judge P Korn **Date:** 5th June 2019

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

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

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

APPENDIX

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.