FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) and
IN THE COUNTY COURT AT WANDSWORTH, sitting at 10 Alfred Place, London WC1E 7LR

Tribunal Reference	**:**	**LON/00AC/LSC/2019/0082**
Court claim number	**:**	**E46YX842**
Property	**:**	**Flat 77, Riverside Court, 20 Nine Elms Lane, London SW8 5BZ**
Applicant/Claimant	**:**	**Riverside Maintenance Ltd**
Representative	**:**	**PDC Law**
Respondents/ Defendants	**:**	**Raymond Hampshire** **Jane Hampshire**
Type of Application	**:**	**Reasonableness of and liability to pay service and administration charges**
Tribunal Members	**:**	**Judge Nicol** **Mr L Jarero BSc FRICS**
In the county court	**:**	**Judge Nicol (sitting as a Judge of the County Court [District Judge]), with Mr L Jarero as assessor**
Date and venue of Hearing	**:**	**22nd May 2019** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**26th June 2019**

ORDERS AND REASONS

Order of Judge Nicol:

(1) Judge Nicol shall sit on this matter as a judge of the county court as well as the chair of the Tribunal.

(2) Mr Jarero is appointed to sit as an assessor of the county court to assist Judge Nicol, as well as a member of the Tribunal, but, in respect of matters exclusive the jurisdiction of the county court, any decision is that of Judge Nicol alone.

Determination of the Tribunal:

(3) All service and administration charges sought by the Applicant are reasonable and payable by the Respondents, save that the charge for legal costs is reduced from £840 to £600.

(4) The Respondents shall reimburse the Applicant the Tribunal hearing fee of £200.

Order of the county court:

(5) The Defendants shall pay the Claimant's costs of the court proceedings, summarily assessed in the sum of £1,200.

Relevant legal provisions are set out in the Appendix to this decision.

Judgment/Reasons

1. The parties are hereafter referred to by their Tribunal designation, namely Applicant and Respondents.

2. The Applicant is a lessee-owned company which was originally a party to the lease as a management company but has since also purchased the freehold of the building containing the subject property. Their agents are HML PM Ltd.

3. The Respondents are the lessees of the subject property, a second-floor flat in a large purpose-built block on the banks of the River Thames.

4. The Applicant issued a claim in the county court (claim no: E46YX842) for the following sums:

(a) Reserve Fund & Service Charge	£7,426.12
(b) Administration fees	£532
(c) Legal costs	£840
Total:	£8,798.12

5. The Respondents filed a Defence and Counterclaim, and then an Amended Defence and Counterclaim. They admitted £7,104.12 of the service charges but denied the rest, a balance of £1,694. The

Counterclaim alleged the Applicant had breached the lease in the following ways:

(a) The drain to the kitchen sink was often blocked due to problems in the communal waste pipe. The Applicant failed to clear the pipe, causing the acid which the Respondents used as an unblocker to come back up, damaging the sink.
(b) Further, the Applicant charged exclusively to the Respondents the cost of one visit from a contractor to unblock the drain from within their property, despite the problem being in the communal pipe.
(c) The exterior wall has Virginia creeper growing on it. The Applicant failed to cut it back and so the Respondents had to do it themselves.
(d) The Virginia creeper damaged window cills and seals.

6. The Respondents claimed the following losses:

(a) Cost of stainless steel sink	£196
(b) Cost of fitting and fittings	£200
(c) Cost of removing Virginia Creeper for eight years One day per year at £150 per day	£1,200
(d) Cost of repairing windows and internal damage	£2,900
Total	£4,496

7. A judgment had been entered in default of the Respondents' Defence. On 20th February 2019, Deputy DJ Martynski, sitting at the County Court at Wandsworth, ordered,

1. The Defendants' counterclaim is reinstated.
2. Transfer to First Tier Tribunal (Property Chamber) London Region under flexible deployment of judges pilot scheme.
3. Upon being notified by the tribunal that the case has been transferred the Claimant may file and serve a reply and defence to counterclaim with the tribunal.

8. The Tribunal issued directions on 28th February 2019:

(a) The Respondents were directed in paragraph 7 to produce a statement of case. They did not provide a separate statement for the Tribunal until just before the hearing, which was too late, but rely on their Amended Defence and Counterclaim filed with the court.
(b) The Tribunal has taken no action in relation to paragraph 2 of DDJ Martynski's order other than to receive the transfer. The directions should have dealt with the Tribunal members also being appointed as county court judge and assessor and notified the parties that the hearing would be held as a joint Tribunal/court sitting.

9. At the hearing on 22nd May 2019, Mr Jonathan Wragg of counsel represented the Applicant, accompanied by Mr Simon Daws, the Head of Property Management for their agents, and the Respondents attended in person. The Tribunal explained the issue referred to in paragraph 7(b) above. All parties wanted all issues to be dealt with at the hearing and had no objection to Judge Nicol sitting as a judge of the county court with Mr Jarero as an assessor.

The lease terms

10. The Respondents' lease contains terms to the following effect:

- Clause 3(15) requires the Respondents to pay all costs, including legal costs, incurred by the Applicant in or in contemplation of any proceedings under sections 146 and 147 of the Law of Property Act 1925 – in broad terms, for steps taken preliminary to the exercise of the lessor's right of forfeiture.
- Clause 4(i) and (ii) require the Respondents to pay the "Annual Maintenance Cost" by contributions in advance and by a balancing charge after the production of the "Annual Maintenance Accounts".
- Clause 4(v)(a) defines the "Annual Maintenance Cost" as the total of all sums expended by the Applicant in connection with the management and maintenance of the building.

Service charges

11. The Respondents had withheld payment of their service charges because they felt that the Applicant and their agents had failed to respond to their complaints over the years, not because they had any challenge as such to their reasonableness or payability. They explained to the Tribunal that the balance of £322 which they had yet to admit by the time of the hearing was made up of three elements as shown on their statement of account:

- 8 December 2015 Service charge £27.17
- 8 December 2015 Reserve fund £9.67
- 9 December 2015 Reserve fund £285.16

12. The Respondents' bank statement showed a payment in the sum of £2,941.27 on 24th February 2016. This payment was made in response to a Final Reminder dated 16th February 2016 from the Applicant's agents demanding payment of a total of £3,226.43. To reach the figure they paid, the Respondents made the following adjustments to this figure:

(a) The agents had included a debt management fee of £72 (£60 plus VAT). The Respondents objected to this and so took it off. Liability for this sum is dealt with separately below.
(b) They added back in the sum of £36.84. They had intended this to be payment of the first two sums referred to in the above paragraph. The Applicant's agents run separate accounts for service charges relating to the building and for those relating to the garage – the two sums related only to the garage. However, the Respondents made their payment solely under the reference number for the building and the Applicant allocated it to that account, leaving the garage account with a shortfall.
(c) As discussed further below, the Applicant's agents charged the Respondents with the sum of £250.08, being for an invoice from Hammond Drainage Services for an attendance at the Respondents' property to clear blockages in the kitchen. The Respondents had only

paid it because payment was a condition to the provision of a loan. They sought to recover it by deducting £250 from this payment.

13. It is clear that the balance of £322 for the service charges is payable subject to the Tribunal's determination below in relation to the debt management fee and the cost of the plumber's attendance.

Administration charges

14. The Applicant claims the following administration charges:

(a) An arrears management fee of £72 to cover the agents' additional work required in monitoring the account when it is in arrears and issuing reminder letters.
(b) The agents charge a referral fee of £150 to review the account and collate the necessary documents before referring a file to the debt collection agents, PDC Ltd.
(c) The Applicant has an agreement with PDC Ltd under which the latter charges a fixed fee of £250 on each referral. This covers reviewing the documents, opening a new file, carrying out Land Registry checks, sending pre-action correspondence and preparing the case for legal action.
(d) The agents charge a fee of £60 when a claim is issued at court. It covers confirmation of the Applicant's instructions, reviewing the account to check for recent payments and providing any additional documents.

15. The Respondents argue that all this is unnecessary. They point out that the board members of the Applicant company are their neighbours within the same block. They had only withheld their service charges due to a lack of communication or effort on the part of the Applicant and their agents to resolve their long-standing and justified complaints. They assert that they could have easily been disposed of in amicable, neighbourly chats rather than by involving agents, debt collection agencies and court proceedings.

16. The problem is that failures by the Applicant or their agents, whether of the type referred to by the Respondents or arising from other breaches of the lease, do not release the Respondents from their liability to pay service charges. When they complain of blocked drains and overgrown creeper, the Applicant is entitled to ask what they are supposed to do if the Respondents deprive them of the funds to tackle these issues.

17. The Tribunal pointed out to the Respondents that, while it is common for tenants to withhold rent or service charges for a landlord's perceived defaults, it is rarely effective in resolving those defaults. The more usual outcome is proceedings for unpaid liabilities. If the alleged defaults have caused the tenant loss, they may have a set-off arising from a counterclaim for those defaults. The Respondents have pursued such a counterclaim and that is considered below but their liability for the service charges must first be established before any set-off is considered.

18. The Respondents point out that they admitted most of the service charges but they did so only after receiving the letter before claim. They assert that the Applicant's lawyers refused to accept part-payment and failed to consider the proportionality of issuing legal proceedings when such a small balance remained in dispute. However, the lawyers' actions are explained by the Applicant's desire to retain the option of forfeiture – accepting part-payment might have been taken as waiving that option.

19. In the circumstances, the Applicant was entitled to employ professionals to chase the Respondents' significant debt. The charges are within the bounds of what can be considered reasonable for this kind of work. The Tribunal is satisfied that the administration charges are reasonable and payable.

Legal costs

20. The Applicant's lawyers charged their fixed fee of £840 for their pre-action work. The Applicant failed to include in their bundle before the Tribunal any evidence of this, such as the agreement for fixed fees or an invoice. The Respondents' objections were the same as those in relation to the administration charges.

21. The Tribunal is not satisfied that the charge is reasonable for the work which would have been required in this case. The circumstances were routine and there was no lengthy list of challenges to individual charges as there is in some cases. Allowances should be made for the advantages of using fixed fees but that does not mean one lessee's simple case should be used to provide a significant subsidy for a more complex and expensive case. While the Applicant is entitled to incur a fee of this type, in the Tribunal's opinion, it should be no more than £600.

Counterclaim

22. The biggest problem with the Respondents' Counterclaim is that they did not take legal advice before formulating it. The Tribunal pointed out that there are sources of free legal advice, such as the Leasehold Advisory Service (LEASE) and CABs, but even a short consultation with a solicitor is not expensive and they would be well-advised to seek professional help in future. The results of the lack of specialist advice included:

    (a) There was no claim for general damages because the Respondents thought they could not claim for something that was "not quantifiable".
    (b) The cause of the blocked pipes, the existence of any damage to the windows and the properties of and the best way to manage the Virginia creeper would all have been more likely identified with the assistance of an expert but it did not occur to the Respondents to rely on any expert evidence.
    (c) The Respondents are only able to claim for actual losses but none of their particulars of loss involved any actual expenditure. The costs of repairs to the kitchen sink and the windows were all putative while the cost of removing the Virginia creeper was the value the Respondents put on their time for dealing with it themselves.

(d) The Respondents' own experiences are, of course, relevant evidence for these purposes but, in quantifying loss which is said to arise from putative repairs, some form of guide to the cost of those repairs, such as may be obtained from sample quotations, would be essential in most cases. The Respondents did not have any such evidence.

23. Under clause 3(3) of the lease, the Respondents are responsible for maintaining and cleansing pipes and drains within their property. Under clause 6(i)(d), the Applicant is responsible for maintaining and cleansing communal pipes and drains.

24. The kitchen sink in the Respondents' property suffers from a lack of a proper fall so that it does not drain as efficiently as it should. The Respondents say the Applicant recommended using a sink unblocker on a regular basis – the Respondents refer to the sink unblocker as "acid" although the Tribunal was not informed what it actually consists of. In November 2014, the Respondents found their kitchen sink was blocked and sought to unblock it using the acid. Instead, the acid was unable to drain away and bubbled up back into the sink. It only drained away again when the Respondents rodded the pipes all the way to the communal pipe into which their pipe drains.

25. In December 2014 the Respondents found their washing machine and dishwasher were affected by a further blockage. They rodded all their pipes but the blockage remained. The Applicant's agents arranged for Mr Hammond of Hammond Drainage Services to attend. The Respondents say he rodded the communal pipe through the rodding eye accessible in their property and that this resolved the issue.

26. On both occasions, the rodding brought up a black particulate residue. The Respondents say that Mr Hammond identified it as powdered soap which they do not use. The Applicant subsequently sent a notice to residents asking them to use liquid soap. From this evidence, the Respondents surmise that the blockage must have been in the communal pipe.

27. However, by email dated 3rd December 2014, just two days after he had attended, Mr Daws asked Mr Hammond whether the blockage was "on the flats branches or the main stack". Mr Hammond replied later the same day, "It was the flats branches, the main stack was clear …"

28. The Respondents point out that Mr Hammond's invoice referred to clearing the kitchen sink as well as the washing machine and dishwasher waste pipes whereas they are adamant the kitchen sink was unaffected at the time of his visit. They assert that this shows his written comments should not be relied on. However, in the Tribunal's opinion, that is an insufficient basis to reject evidence which, although it is hearsay, is contemporaneous and from a source with no reason for bias or to lie.

29. In the Tribunal's view, the Respondents have not been able to make good their assertion that the communal pipe was blocked. The Tribunal is not saying that the evidence suggests it was not blocked, rather that the

Respondents' evidence is insufficient to establish that it was blocked. Based on the information from Mr Hammond, the Applicant was entitled to seek the cost of his attendance, the sum of £250.08, from the Respondent.

30. Even if the Tribunal were wrong about the blockage, the Respondents have also failed to provide evidence of loss. They showed photographs but none of them indicated any damage to the sink. Further, as already mentioned, they had no quotes for the repair or replacement of the sink.

31. When the Respondents bought the property, there was no creeper growing on the building. The Applicant apparently grew Virginia creeper deliberately on the basis that they and some of the lessees liked the way it "softened" the edges of the building. It reached the point where, as the Respondents' photos showed, the creeper wrapped the building like a giant overcoat.

32. The Respondents were not the only lessees who were concerned that the creeper might damage the building. They believe that it has damaged their window seals, cills and frames, allowing the ingress of rainwater which has in turn damaged the internal cills.

33. The Respondents showed the Tribunal photos which they asserted showed deteriorated window seals. Unfortunately, the copies available to the Tribunal were insufficiently clear to show this. Further, the windows are those originally installed when the property was built over 30 years ago. It is not obvious that any deterioration in the seals would have been caused by the creeper rather than by the passage of time and, perhaps, proximity to the river. This is one of the issues on which it would have been beneficial to see expert evidence but none was available.

34. Some of the photos showed the state of the window cills after the removal of the creeper. The photos clearly showed that the creeper had left behind marks and other bits but not that this constituted material damage.

35. The service charges have included each year a charge for pruning the creeper once. The Respondents say that this was normally done in April whereas the Royal Horticultural Society, as well as recommending that this non-native species should not be used, suggested that Virginia creeper would best be pruned in late winter and/or summer. The Respondents say that, each year, the creeper had a growth spurt after the April pruning, resulting in its growing around and over their windows, blocking their light and their views. They asked the Applicant to deal with this but, in the absence of any response, they used to prune the creeper themselves each July. This involved leaning out of the window to carry out the pruning and incurring scrapes and bruises.

36. Under clause 6(ii) of the lease, the Applicant is required to keep the grounds in good order and condition. The Applicant concedes that this covers a reasonable level of pruning of the creeper but it obviously does not extend to removing it altogether (although this has now been done, at least on the river side).

37. Even if the Applicant should have done more pruning or done it at a more propitious time of year, the Respondents' problem again is the lack of evidence of loss. The Tribunal is not satisfied that the creeper has damaged the windows or caused any water ingress. The photos clearly show the creeper interfered with the view out of the windows but the Respondents fixed that themselves by carrying out their own pruning. They are not entitled to carry out work which is the Respondents' responsibility and then charge them for it after the event, in particular not by putting a nominal value on their own wasted time. There was no evidence of actual cost to the Respondents, such as loss of earnings or the cost of any equipment and, as already mentioned, no claim for general damages.

38. In the circumstances, the Counterclaim must be dismissed so that there is no set-off against the Applicant's claim.

The Respondents' liability

39. For the above reasons, the Respondents are liable to pay the Applicant the total sum of £8,558.12, including the admitted sum but taking into account the reduction referred to in paragraph 21 above.

Costs

40. The Applicant sought their costs of the court proceedings in accordance with the terms of the lease and the general principle under rule 44.2(2)(a) of the Civil Procedure Rules that the unsuccessful party should be ordered to pay the costs of the successful party. They provided a Statement of Costs for summary assessment in county court form N260. The form showed profit costs of £1,559, incurred principally by a Grade D fee earner charging £135 per hour, counsel's brief fee of £950 and the Tribunal hearing fee of £200. VAT was added to solicitors' and counsel's fees.

41. Unfortunately, the reference to the whole of counsel's brief fee and the Tribunal hearing fee shows that these costs were in respect of the Applicant's costs incurred in both the court and the Tribunal whereas the Tribunal has no power to award costs under the court rules.

42. The Tribunal has the power to order the Respondents to reimburse the Applicant the hearing fee of £200 under rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and exercises its discretion to do so in the light of their success in establishing most of their claim.

43. The Applicant did not apply for costs under rule 13(1), presumably due to the difficulty of establishing that the Respondents could be said to have acted unreasonably. Also, the Applicant only gave notice of these costs by handing over the Statement of Costs at the hearing so they cannot be said to constitute an administration charge in respect of which the Respondents could have made an application under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

Therefore, there is no power to award the Applicant any more of any costs relating exclusively to proceedings before the Tribunal.

44. In relation to the costs claimed, the hourly rate is reasonable and the total costs are modest. However, there is some force in the Respondents' argument that the Applicant has an alternative to litigation. Legal action should always be a last resort. As mentioned in the hearing, the Applicant is not a company located abroad which has no choice but to act through agents. Members of the board live right next to the Respondents and have the option of engaging in dialogue, not just up to a time when they feel they need to involve a debt collection agency but right up to the time of judgment. The court is not satisfied that the Applicant did all it could and should to have avoided litigation.

45. This is a summary process. There is no breakdown of costs between the court and Tribunal and no exact method of quantifying the missed opportunity to avoid legal action. Doing the best it can in the circumstances, the court assesses the Applicant's costs of the court proceedings in the sum of £1,200.

Name: NK Nicol **Date:** 26th June 2019

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

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

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

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

Section 19

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

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

Section 27A

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

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

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -

  (a) the person by whom it would be payable,
  (b) the person to whom it would be payable,
  (c) the amount which would be payable,
  (d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

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

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

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).

Schedule 11, paragraph 5A

(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph—

(a) "litigation costs" means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and
(b) "the relevant court or tribunal" means the court or tribunal mentioned in the table in relation to those proceedings.