FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LSC/2019/0078**
Property	**:**	**First Floor 22 Three Kings Yard, London W1K 4JT**
Applicant	**:**	**Ms Samantha Hill**
Representative	**:**	**In person**
Respondent	**:**	**Three Kings Yard Residents Limited**
Representative	**:**	**Mr Harniman (Director of Respondent's managing agent)**
Type of application	**:**	**For the determination of the liability to pay a service charge**
Tribunal member(s)	**:**	**Judge Hansen, Mr Barlow FRICS and Mrs Dalal**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of hearing	**:**	**15 & 16 July 2019**

DECISION

<u>The Tribunal's Determinations</u>

(1) <u>2015</u>: The Applicant is not liable to pay a service charge in respect of the following: (i) £3,450 invoice for surveying services; (ii) £1,740 for purchase of a mansafe; (iii) £876 accountancy charges and (iv) £195.24 for bank charges and interest. Save as aforesaid, all other service charge items for 2015 are payable and reasonable.

(2) <u>2016</u>: The Applicant is not liable to pay a service charge in respect of the following: (i) £6,180 for managing agents' fees; (ii) £873.40 for accountancy fees; (iii) £1,197 for legal, professional and company secretarial fees; (iv) £200 for bank charges and (v) £246 for directors and officers insurance. Save as aforesaid, all other service charge items for 2016 are payable and reasonable.

(3) <u>2017</u>: The Applicant is not liable to pay a service charge in respect of the following: (i) £6,000 for managing agents' fees; (ii) £1,437 for accountancy fees; (iii) £200 for bank charges; (iv) £261 for directors and officers insurance and (v) general repairs whether in the sum of £3,199 or £1,227 or any sum. Save as aforesaid, all other service charge items for 2017 are payable and reasonable.

(4) <u>2018</u>: The Applicant is not liable to pay a service charge in respect of the following: (i) £6,000 for managing agents' fees; (ii) £1,450 for accountancy fees; (iii) £200 for bank charges; (iv) £236.42 for damp works; (v) £300 for fall arrest equipment testing; (vi) £750 for window cleaning, (vii) £250 for public liability insurance, (viii) £250 for directors' and officers' insurance and (ix) £105 administration charges Save as aforesaid, all other service charge items for 2018 are payable and reasonable.

(5) The Tribunal makes an Order under section 20C of the Landlord and Tenant Act 1985 that the Respondent shall not be entitled to add the costs incurred in connection with these proceedings to the Applicant's service charge.

<u>Decision</u>

1. By application dated 8.2.19 the Applicant seeks (i) a determination of her liability to pay and the reasonableness of various service charge items covering the period from 2015 to 2018 inclusive and (ii) an order under section 20C of the Landlord and Tenant Act 1985 ("LTA 1985"). There was a further application of the same date seeking an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("CLRA") but the Grounds under Box 12 of that form appear to be grounds that would be relevant to an application for the appointment of a manager. The Applicant has indeed made such an application (LON/00BK/LAM/2019/0004) which was heard at the same time as this application and is the subject of a separate decision.

2. The focus of this claim is concerned with the Applicant's liability to pay and the reasonableness of various service charge items covering the period from 2015 to 2018. Although the application, on its face, sought to challenge prospective costs relating to 2019, the parties agreed that any issues in relation to 2019 would be best left until the position in terms of actually incurred costs were known. On that basis we did not consider 2019 but we make it clear, for the avoidance of doubt, that the Applicant is not precluded in any way from bringing a challenge to the charges for 2019 if so advised.

3. Before we set out the background, and the terms of the relevant underlease with which we are concerned, which are very important in the context of this application, we must express our regret at the way that this case has been prepared and presented to the Tribunal. Making all due allowance for the fact that the Applicant was acting in person and the Respondent was acting by its managing agent, Mr Harniman, the level of acrimony and accusation on both sides was totally unacceptable. Whilst we understand the Applicant's frustration at what was undoubtedly late disclosure by the Respondent, this is not an excuse for either side to talk across the Tribunal and argue with each other. The bundles with which we were presented were voluminous, totalling over 750 pages, in no particularly logical order, the Scott Schedules were overburdened with commentary and argument, and it was obvious that there had been no attempt whatever by the parties to cooperate with each other or the Tribunal. Under paragraph 1(4) of the 2013 Procedure Rules the parties must (a) help the Tribunal to further the overriding objective; and (b) co-operate with the Tribunal generally. We did not feel that either party complied with this important obligation. This made our task of trying this case much more burdensome than it should have been.

4. The relevant background is as follows. We are concerned with a two storey, converted, period mews property comprising 3 garages on the ground floor, 2 flats on the first floor and 2 flats on the second floor although we were told that these have now been knocked into one flat ("the Building"). The constituent elements of the Building are somewhat eccentrically numbered 5, 6, 7, 8 and 22. The Applicant is the tenant of the first floor flat 22 Three Kings Yard. There are three separate entrances, 5, 8 and 22. The entrance to 22 serves the first and second floor flats at 22 but the second floor flat at 22 has been knocked together with flat 5 and is therefore now accessible using the entrance to flat 5. The practical result is that the common parts to 22 are now only used by the Applicant.

5. There is a headlease dated 28.11.83, the parties to which are the Grosvenor (Mayfair) Estate and Three Kings Yard Limited. Three Kings Yard Ltd, not to be confused with the Respondent, then granted separate underleases of the flats. In particular, by an underlease dated 16.1.86 ("the Underlease") Three King's Yard Limited demised to the Applicant's predecessor in title the first floor flat, 22 Three King's Yard for a term of 75 years less 3 days from 24.6.83. The garages were separately underlet pursuant to an underlease dated 7.3.97 to MDDT Nominees SA and Wolfe Nominees Limited.

6. The Underlease is very badly drafted. Materially, it provides as follows. By clause 2 the tenant covenants to perform all the covenants and conditions in the Second Schedule. The landlord covenants to perform the covenants in the Third Schedule. By paragraph (1)(b) of the Second Schedule the tenant covenants to pay to the landlord on demand 14.04% of such amount as shall be paid by the landlord to the superior landlord by way of annual premium for insuring the Building. By paragraph 6 of the Second Schedule the tenant covenants to pay on demand 14.04% of the expenses incurred by the landlord or the superior landlord in carrying out the works in paragraph 4 of the Third Schedule. Paragraph 4 of the Third Schedule is a landlord's covenant to carry out a variety of works to the Building including painting the external parts of the Building, repairing the roof and foundations and repointing the external brickwork. Returning to Schedule 2, paragraph 7 obliges the tenant to pay its usual 14.04% share of a variety of costs relating to party walls, sewers, gutters and the like, maintaining the roadway of Three King's Yard and preserving the amenities of the Building and adjacent and neighbouring premises by keeping Three King's Yard free from obstruction. Paragraph 10 of the Second Schedule obliges the tenant to pay all costs charges and expenses (including solicitors' costs and surveyors' fees) incurred by the landlord for the purpose of or incidental to the preparation and service of a s.146 notice. Paragraph 17 of the Second Schedule obliges the tenant to contribute 14.04% of the expenses incurred in maintaining the aerial. Finally, paragraph 19 obliges the tenant to pay on demand 50% of the expenses incurred by the landlord in maintaining repairing decorating carpeting and keeping in good order and condition the front entrance passageway and staircase leading from the way of Three Kings Yard on the ground floor to the first and second floor flats at 22 Three Kings Yard, including the cost of keeping the same well-lit ad regularly cleaned. Paragraph 9 of the Third Schedule contains a parallel obligation on the landlord to maintain these common parts "*(subject to the tenant making payment as aforesaid)*".

7. It is to be noted that there is no express provision that entitles the landlord to pay out and recover through the service charge any management fees, accountancy fees or indeed any other professional fees save in the limited circumstances referred to in paragraph 10 of the Second Schedule which is not relied on by the landlord in this case. In the course of deliberating, the Tribunal became concerned that the parties had not fully addressed this central issue in their submissions to us. Immediately following the hearing, the Tribunal therefore wrote to the parties inviting short further submissions, limited to 4 pages, as to "*the payability of the accountancy charges, management fees and other professional fees (e.g. Murray Birrell) claimed as part of the service charge* [and] *whether these items are recoverable as service charge items under the terms of the Underlease and if so on what basis*". In response we received submissions from the Applicant dated 30 July 2019 limited, as per our directions, to 4 pages and addressing the points we had raised. We shall revert to the substance of these submissions shortly. However, we also received from the Applicant a further 5-page document entitled "Clarification of the Errors in the Service Charge Accounts" which appears to cover a myriad of disparate points. We decline to consider this later document as it is an attempt to re-open the argument generally and is not in accordance with our directions. However, insofar as it sought to resist any suggestion by Mr Harniman that we should vary the Underlease, the Applicant can be reassured that we have no intention of varying the Underlease in the context of this application which was an application for a determination in relation to service charges under s.27A, LTA 1985. If either party seeks to invite the Tribunal to vary the Underlease, they should make a proper application under s.35 of the Landlord and Tenant Act 1987 or otherwise as advised. Mr Harniman, for the Respondent, wrote a letter to the Applicant dated 31 July 2019, which he copied to the Tribunal and invited us to treat as his further submissions and we shall proceed on that basis.

8. In her further submissions, the Applicant made the point that there was no provision in the Underlease permitting the landlord to recover through the service charge sums expended on professional fees, management fees or accountancy fees. She then went on to concede, on the face of it, that certain fees within each of these categories were payable if reasonably incurred. In his further submissions, Mr Harniman appeared to concede that "*all professional fees have no provision to be met within the leases*" and made the point that "*the costs entailed, including those related back to the 2014-15 year, would need to be met by the RMC [the Respondent], which will require to be funded by the shareholders*". He then in effect invited the Applicant to agree to vary the Underlease on the basis that "*the tribunal would seek to impose on all leaseholders*

the requirement to vary lease conditions such that service charges would be collectible in advance together with a reserve fund".

9. Mr Harniman appears to be labouring under a misunderstanding of the Tribunal's comments at the hearing and its jurisdiction generally. At the hearing the Tribunal certainly expressed the view that the Underlease was badly drafted generally and did not, as might be expected, make provision for the collection of service charge in advance and the accrual of a reserve fund. However, there is no question of this Tribunal imposing on the parties a variation of the Underlease. If either party wishes to vary the lease, they can make a proper, formal application under s.35 of the Landlord and Tenant 1987 to this tribunal. That would be an entirely separate application to be considered on its merits in due course in the normal way. This Tribunal cannot vary the Underlease in the course of considering an application under s.27A, LTA 1985. That said, there is nothing to stop the parties agreeing to vary the Underlease, if that is their wish. That is a matter for them and their advisers, although any such variation would need to be by deed and properly documented in a formal deed of variation. Whilst the Tribunal has made no secret of its views on the difficulties that this Underlease gives rise to, we have to make our determination on the terms of the Underlease as it now is, even if our determination gives rise to real problems, relating to funding or otherwise, of the type to which Mr Harniman refers.

10. Against that background we turn to consider the various challenges for each of the years in question. We will deal only with the items that were the subject of a specific challenge and which were not conceded by one side or the other at the hearing. Accordingly, if our decision is silent on any particular item, it is because it was the subject of a concession at the hearing and/or essentially an accounting issue which did not bear on the subject of payability or reasonableness. Finally, we would mention the fact that there were a series of "challenges" to the insurance costs, not as a matter of principle nor based on any suggestion that the costs were unreasonable, but on the basis that the sums claimed had not been exactly the same as that set out in the renewal documents. The differences in each case were very modest and invariably accounted for by the fact that the insurance year is not the same as the service charge year so some adjustment was necessary. It is disproportionate to condescend to the detail in relation to these items. We consider all that all the sums claimed in respect of insurance are payable and reasonable.

11. *2015*. The Applicant challenged 4 items as follows, being her 14.04% share of: (i) £3,450 invoice for surveying services; (ii) £1,740 for purchase of a mansafe; (iii) £876 accountancy charges and (iv) £195.24 for bank charges and interest.

12. (i). The invoice in the sum of £3,450 was rendered by Murray Birrell, chartered surveyors, for inspecting and preparing a specification of works for the external redecoration of the Property. The Applicant challenged it on a variety of grounds but the short point is that there is no provision in Schedule 2 of the Underlease which permits a service charge to be demanded in respect of such professional fees. We invited the parties, and the Respondent in particular, to file supplemental written submissions to identify the provisions in the Underlease which permitted such a charge and Mr Harniman was unable to do so. There is no express provision and no sweeping up clause which might allow the landlord to include within the scope of the chargeable items matters which are not specifically or expressly mentioned. It might be said that this charge is recoverable as incidental to and/or a necessary pre-requisite to carrying out the works referred to in paragraph 6 of the Second Schedule and paragraph 4 of the Third Schedule. However, the case was not put in this way by Mr Harniman and in the context of residential service charge provisions such as this, we consider that we should approach the task of construction restrictively and not allow recovery for items which are not clearly included: see e.g. *Gilje v. Charlgrove Securities Ltd* [2001] EWCA Civ 1777. Neither party invited us to imply any terms into the Underlease and we would have declined to do so because there is no basis for doing so or at least no basis that has been identified by the parties. For that reason this charge is not payable as a matter of construction of the Underlease and there is no need to give detailed consideration to the other grounds of challenge relied on by the Applicant, although we would have concluded in any event that this charge was not reasonably incurred given that no work then proceeded and we were not persuaded that there was any good reason for this. Mr Harniman suggested that works at some nearby premises had delayed the proposed works but there was a lack of evidence to explain what had happened and why. Our conclusion on payability gives us no particular satisfaction but our hands are tied if, as we have concluded, this charge is not recoverable as a matter of construction of the Underlease. The result is, in our judgment, thoroughly unsatisfactory and appears to leave the way open for endless disputes whilst the Building is allowed to fall into a state of disrepair. What is required is, in reality, wholesale re-writing of the Underlease and this we cannot do, at least not in the context of this application. This could only be achieved by means of an application under section 35 of the Landlord and Tenant Act 1987, as previously mentioned.

13. (ii). The landlord accepted that the charge for the mansafe of £1,740 was not recoverable.

14. (iii), (iv). We repeat our observations under paragraph 12 above, mutatis mutandis. We can see nothing in the Underlease which entitles the landlord to recover these charges through the service charge.

15. The result is that the Applicant is not liable to pay a service charge in respect of any of the four items referred to above.

16. 2016. The live challenges that remained at the hearing related to: (i) £6,180 for managing agents' fees; (ii) £873.40 for accountancy fees; (iii) £1,197 for legal, professional and company secretarial fees and (iv) £200 for bank charges. The Applicant did not pursue her challenge to the item for general repairs (£1,580) and the landlord conceded that the sum of £246 for directors and officers insurance was not recoverable.

17. (i), (ii), (iii), (iv). We repeat our observations under paragraph 12 above, mutatis mutandis. We can see nothing in the Underlease which entitles the landlord to recover these charges through the service charge.

18. The result is that the Applicant is not liable to pay a service charge in respect of any of the four items referred to above.

19. 2017. The live challenges that remained at the hearing related to: (i) £6,000 for managing agents' fees; (ii) £1,437 for accountancy fees; and (iii) £200 for bank charges. The landlord conceded that there would be no charge for general repairs for 2017 and conceded that the sum of £261 for directors and officers insurance was not recoverable.

20. (i), (ii), (iii). We repeat our observations under paragraph 12 above, mutatis mutandis. We can see nothing in the Underlease which entitles the landlord to recover these charges through the service charge.

21. 2018. For this year the accounts have not yet been finalised, only draft accounts are available, but we dealt with it nonetheless as we were told that any final adjustments would not be material to our determination.

22. The Scott Schedule revealed a myriad of challenges to virtually every item but thankfully there were a series of concessions on both sides during the course of the hearing which narrowed the issues. The live challenges that remained at the hearing related to: (i) £1,750 (in fact the correct figure was £436.80) for roof repairs; (ii) £414 for fire risk assessment; (iii) £6,000 for managing agents' fees; (iv) £1,450 for accountancy fees; (v) £200 for bank charges; (vi) £244.80 and £343.20 for anchor door repairs and (vii) £236.42 for damp works. The Applicant did not pursue her challenges to the electrical safety certificate (£432), the electricity charges (£150), the Ascent invoice for £96, the Pinewood invoice for carpet cleaning (£144) and the Bramah invoices for £440.52 & £286.20 and the landlord conceded that the following charges were not payable: £300 for fall arrest equipment testing, £750 for window cleaning, £250 for public liability insurance, £250 for directors' and officers' insurance and £105 administration charges.

23. We consider item (i) above, £436.90 for roof repairs, to be payable and reasonable The Applicant said this was unreasonably incurred as the need only arose as a result of historic neglect but this was based on her assertion rather than any clear supporting evidence. The challenge to (ii), £414 for fire risk assessment, was to the cost, not the principle, yet the Applicant's rival costings were as high as £275+ VAT. The difference is relatively modest and the landlord's figure is not unreasonable. We allow this item. We disallow the claims for (iii) [managing agents' fees], (iv) [accountancy fees] and (v) [bank charges] for the reasons previously given. They are not payable under the terms of the Underlease. We allow the landlord's claims for £244.80 and £343.20 for the anchor door repairs. The Applicant suggested that the contractor had agreed to cancel these invoices and she referred to us to emails from Vanessa and Ana at Anchor Group. Regrettably the version of the email from Ana which she included in the bundle had been edited by her and the material part deleted. That read as follows: *"... I found that we did not overcharge you and the job was done as requested in both visits. [...]. I believe that Vanessa shouldn't cancel any invoice as we carried out the works and there is almost a year apart*". Having considered all the evidence in relation to this challenge, we reject the Applicant's challenge and find these sums (£244.90 & £343.20) to be payable and reasonable. That leaves the question of damp repairs and the invoice for £236.42. Both sides presented photographs showing the condition of these common parts in varying states of repair. Mr Harniman told us that he had been

advised of the need for a damp proof course by one contractor but had tried a less expensive solution to the damp problem, on the advice of a different contractor, on the basis that it might be due to condensation. The Applicant complains that the landlord was simply repeating a treatment that had been tried before and failed. She suggested that the work quoted for by a specialist damp-proofing contractor, Kenwood plc, should be undertaken at a cost of £1,480 + VAT. This involved the insertion of a chemical damp proof course and associated tanking works. We have some sympathy for the landlord. Normally it is the tenant complaining that the landlord has resorted to a Rolls Royce solution when a patch repair is more appropriate. However, having considered the most recent photographic evidence, we consider that the limited damp work commissioned by the landlord was inadequate and was not based on proper advice from a specialist damp-proofing contractor. On that basis we have concluded that this cost was not reasonably incurred.

24. These conclusions should enable the parties to agree the consequences for the liability of the Applicant in the relevant years. The sums already paid by the Applicant by way of service charge should be a matter of record. Equally, the sums demanded by way of service charge for the relevant years should be a matter of record. Our decisions above set out what is payable and what is not payable. We expect the parties to cooperate and agree the position. If they are unable to do so within one month we will deal with any outstanding matters, but only on the basis of the parties' short written submissions (limited to 2 pages). We hope that will not be necessary and we would reiterate what we have already said: we expect the parties to cooperate in working out the consequences of our judgment. The Applicant may be entitled to a credit or set-off against current or future service charges and/or entitled to restitution of sums overpaid. We say no more because enforcement is not a matter for this Tribunal (*Warrior Quay Management Co Ltd v. Joachim* LRX/42/2006) and nothing we say can prejudice any defence which the landlord may have in the event of a restitutionary claim.

25. Section 20C. The Applicant applied for an order under section 20C of the LTA that the Respondent should not be entitled to add the costs incurred in connection with these proceedings (if any) to her service charge. The Tribunal has a discretion in the matter which must be exercised having regard to what is just and equitable in all the circumstances: *Tenants of Langford Court v. Doren Ltd* (LRX/37/2000). Having regard to our conclusions above and the large measure of success that the Applicant has enjoyed, we consider that a section 20C order is justified.

26. We cannot leave this case without expressing our regret at the situation facing the freeholder and all the lessees at Three Kings Yard, not just the Applicant. Matters cannot continue as they have done over recent years. We would urge the parties to do what they have hitherto apparently been incapable of doing, namely cooperating with one another in an effort to find a satisfactory solution to what appears to have been a long-standing problem arising out of defects in the drafting of the Underlease.

Name: Judge W Hansen **Date:** 19 August 2019

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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

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.

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

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).