FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BK/LSC/2017/0447**
Property	**:**	**Flat 1, 229 Sussex Gardens, London W2 2RL**
Applicant	**:**	**231 Sussex Gardens RTM Ltd**
Representative	**:**	**JB Leitch Solicitors** **Ms K Mather of Counsel**
Respondent	**:**	**Ms S R Sinclair**
Representative	**:**	**Ms Rai of Counsel**
Type of Application	**:**	**S27A Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Judge F J Silverman Dip Fr LLM** **Mrs S Redmond BSc (Econ) Hons MRICS**
Date and venue of Hearing	**:**	**10 Alfred Place, London WC1E 7LR** **6 September 2018**
Date of Decision	**:**	**13 September 2018**

DECISION

The Tribunal determines that the Respondent is liable to pay the sum of £5,871.3 to the Applicant under the service charge provisions contained in her lease.

REASONS

1 The Applicant is the RTM company responsible for performing the landlord's covenants under a lease dated 12 June 2010 of the property known as Flat 1, 229 Sussex Gardens London W2 2RL (the property) of which the Respondent is the tenant and leaseholder.

2 This matter, relating to the recovery of a sum under the service charge provisions contained in the lease was transferred to the Tribunal from the County Court.

3 Directions were issued by the Tribunal on 9 January and 17 May 2018.

4 Three bundle of documents were presented for the Tribunal's consideration. Additional documents presented on the day of the hearing were declined by the Tribunal as being too late for inclusion in the bundles.

5 The service charge issue before the Tribunal related to the recovery of the balance of costs from previous Tribunal proceedings where the Respondent had been held liable to pay arrears of service charge for the years 2010-2014.

6 At the Directions hearing on 17 May 2018 the Tribunal identified three issues which were to be considered at the full hearing.

7 However, since the matter had been transferred to the Tribunal from the County Court the Tribunal only had jurisdiction to deal with the item(s) which had been so transferred. In this case the only matter transferred was item 6(i) in the Directions which related to the Respondent's liability for her percentage of the recovery of legal and professional fees. No separate application had been made by the Respondent relating to the other issues.

8 Item 6(ii) of the Directions was not within the Tribunal's jurisdiction at the present hearing and had already been determined (res judicata) by the Tribunal in a previous case (LON/00BK/LSC/2014/0592). It appeared that the nature of the Respondent's dispute in this area related to an action for an account which is in any event a matter within the exclusive jurisdiction of the County Court.

9 Similarly, item 6(iii) was not within the Tribunal's remit at the present hearing. This item however, related to a purely factual matter as to whether or not the Respondent had been issued with a service charge demand for the year ending March 2016. The Applicant showed the Respondent the demands on pages 315-318 of the bundle and the Respondent agreed that these were the relevant service charge demands for that year. That matter therefore seems to have been resolved.

10 Counsel for the Respondent asked the Tribunal to extend its jurisdiction to deal with item 6(ii). The Tribunal said that it had no power to do so.

11 The amount claimed by the Applicant in the present proceedings under paragraph 6(i) of the Directions is £5,871.43. This represents a deduction of £336 from the original £6,307.43 claimed, owing to a payment on account of £336 by the Respondent.

12 The Respondent's main argument was that there was no clause in the lease which allowed for the recovery of legal and professional fees. It is noted that this issue was not part of the Respondent's case when it was discussed at the Directions hearing.

13 Clause 7 of Schedule 7 part C of the lease states as follows*: 'MANAGEMENT FEES. Make such arrangements for the collection of the tenants' contributions in respect of the outgoings and for the general management of the Building and of the Management Company as they shall decide and such costs and fees as may be incurred therein shall be included as part of the outgoings'*.

14 The Respondent relied on 'Embassy Court' [1984] WL 281637 to support her contention that the clause cited above was inadequate to impose a liability on the tenants to pay legal and professional fees. She said that any clause which imposed a financial obligation on the tenant must be clear and specific and the tripartite lease under discussion made no reference to the management company taking legal action to recover unpaid service charges.

15 The Applicant however relied on the same case and on 'Plantation Wharf' [2011] UKUT 488 (LC) to support her contention that the lease clause should be construed to include the recovery of litigation costs. She argued that the wording of the clause referred specifically to 'such arrangements for the collection of the tenants' contributions' and that the words 'such costs and fees as may be incurred therein' included any decision by the management company to pursue the recovery of service charges from a tenant by way of legal action together with the costs of such action. If the clause were construed otherwise the management company would be unable to recover service charges from defaulting tenants which could result in the insolvency of the management company itself.

16 Although the Tribunal accepts that the wording of the clause in question does not expressly include legal fees as a sum recoverable under the service charge provisions, the clause does give the management company the right to make 'such arrangements … as they shall decide' in order to recover 'the collection of the tenants' contributions'. It is inconceivable that such a clause would not authorise the management company to recover such service charges, through litigation if necessary. Even the legendary 'man on the Clapham omnibus' would understand this construction of the clause. To construe the clause in the manner proposed by the Respondent would produce a ridiculous result of a management company which was unable to recover service charges from defaulting tenants. This lease was drawn up with the cooperation of the tenants and it simply cannot have been intended by any of those participating in the procedure that the appointed management company should be devoid of power to fulfil its obligations.

17 For these reasons the Tribunal finds that clause 7 can be construed to allow the management company to recover service charges from defaulting tenants through litigation.

18 The Respondent then argued that the costs claimed were not reasonable but produced no evidence to support her contention. She averred that it was the Applicant's responsibility to produce evidence that the costs had been reasonably incurred and were of a reasonable rate. She said that the Applicant had not produced schedules to show the fee earner's rates or details of what work had been undertaken. In response to a question from the Tribunal she conceded that she had not asked for this information from the Applicant.

19 The Respondent's counsel said that she had only been instructed two days before the hearing and had not had time to ask for the relevant documents. The Tribunal suggested that had the Respondent's counsel deemed it necessary to examine such documents she could have made an application to the Tribunal to adjourn the hearing in order to enable disclosure to be made. At this point the Respondent's counsel made an application to adjourn which, after having adjourned briefly to consider the application, the Tribunal refused. It was clear to the Tribunal that the Respondent had not contemplated an adjournment until the Tribunal had mentioned it itself. Further, the application had been ongoing for a considerable period of time including in excess of three hours of oral case management and the Tribunal considered that the Respondent had had already sufficient time in which to refine her case and to ask the Applicant for disclosure of relevant materials. As it is, the hearing bundles extend to over 1000 pages, very few of which were referred to during the course of the hearing.

20 The Respondent stated that it was unreasonable for the Applicant to have pursued a claim where the costs of the claim exceeded the amount claimed. Although this is in principle a valid point it is countered by the argument that if a management company chose not to pursue a debt owed by a tenant on the grounds that the costs of the action would exceed the sum recovered, many tenants would take advantage of such policy by refusing to pay any service charge at all, as a consequence of which the management company would become insolvent and the maintenance of the property would suffer. However, this argument is not relevant to the issue under discussion which concerns reasonableness not proportionality.

21 The Applicant accepted that the costs of the litigation had been high but stressed that when analysed, those costs were justified because they involved firstly, a county court action, then a transfer to the Tribunal, followed by an appeal to the Upper Tribunal and further proceedings before the County Court. The Applicant had been represented by solicitors and at the hearings, by counsel. The invoices submitted by the Applicant's solicitors included a discount because they had not charged for all the time recorded as having been spent on the case. The Respondent made no challenge to these statements and produced no evidence of alternative fee rates or to suggest that the Applicant's legal representatives had overcharged or had charged for work which had not been done.

22 In the absence of such evidence the Tribunal finds that the sums claimed by the Applicant are reasonable.

23 No application was made under s20C Landlord and Tenant Act 1985 and there was no application for costs.

24 The case is remitted to the Central London County Court.

25 **The Law**

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).

Judge F J Silverman as Chairman
Date 13 September 2018

Note:
Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking