FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BH/LSC/2019/0166**
Property	**:**	**42 Burrell Towers, Albany Road, London E10 7EH**
Applicant	**:**	**Mrs G Wright**
Representative	**:**	**No representation**
Respondent	**:**	**London Borough of Waltham Forest**
Representative	**:**	**Mr Andrew Key**
Type of Application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival** **Professional Member H Geddes**
Date and venue of Hearing	**:**	**22 November 2019** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**16 December 2019**

DECISION

The application

1. The Applicant in the application sought a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of the service charge years 2008, 2010 to 2012 and 2014. In the event, it became apparent that the contested service charges were those relating to major works demanded in 2013 and 2014

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

The property

3. The property is a two bedroomed flat in a ten storey block, containing in total 44 flats. Of those, five are held on long leaseholds.

The lease

4. The lease was granted in 1988 to the current leaseholder for a term of 125 years under the Right to Buy provisions of the 1985 Act.

5. The lessee covenants to pay service charges, representing a "due proportion" of various expenditures required of, or at the discretion of, the lessor, payable quarterly in advance, and including provision for improvements (clauses 1 and 3).

6. By clause 9, the lease states that section 196 of the Law of Property Act 1925 "shall apply to any notice under this lease".

The issue and the hearing

7. The Respondent landlord was represented by Mr Key, who is the Respondent's leasehold project manager. Ms Fatima Choudhury, a home ownership officer with the Respondent, gave evidence. We were told that sadly Mrs Wright had died after the application was submitted. She had been represented in the application by her son, Mr Terence Wright, who is resident in the United States of America.

8. The application initially came before the Tribunal on 1 September 2019 for determination on the papers. We concluded that it was inappropriate for paper determination in the light of the factual questions raised, and it was set down for hearing on 22 November.

9. The only issue was whether the contested service charges had been properly demanded and/or an effective notice under section 20B(2) of the 1985 Act had been served.

10. Section 20B, which is reproduced in the appendix, places a limit of 18 months on the period during which a landlord can claim service charges, from the time that a relevant expense is incurred. Such an expense is incurred, usually, when a contractor invoices the landlord. Under section 20B(2), however, a landlord can serve a notice stating that the expenditure had been incurred and that the leaseholder would subsequently be required to contribute. Once such a notice is served, the 18 months' period ceases to be effective to prevent recovery.

11. The charges and the relevant demands and notices were helpfully set out in a table produced by Mr Key in the Respondent's statement of case, which we reproduce here (excluding two small items that the Respondent was unable to document and accordingly was no longer seeking to cover).

Works	**Amount (£)**	**First payment to contractor**	**Section 20B deadline**	**Date of s 20B(2) notice**
Lift upgrade	5,559.97	25.1.2013	25.7.2014	5.11.2013
Electrics	861.52	25.1.2013	25.7.2014	5.11.203
TV aerial decoration	823.34 1,390	30.11.2012	31.5.2014	21.5.2014
Fire risk assessment	871.44	21.2.2012	21.8.2013	5.7.2013
Bird netting	211.88	16.11.11	16.5.2013	4.4.2013

12. Annexed to Mr Key's witness statement were copies of the section 20B(2) notices and of letters with invoices attached, with stood as the service charge demands for the major works.

13. The Respondent runs separate service charge accounts for major works and for the remainder of normal service charges. Before 2015, the Respondent managed the properties through an arms length management organisation called Ascham Homes. This was wound up in

2015 and housing management was taken back in house by the Respondent.

14. Mr Wright argued, in the initial application and his brief statement of case, that the first time that he or his mother were fully aware of the charges was in November 2018, when a letter was received setting out arrears of £9,406.30. He added that they had also received a letter in 2015 relating to an invoice (which he described as having the number 92015581). He had at that time contacted Ascham, asking for further details. Ascham had said they would get back to him about the matter, but had failed to do so.

15. Mrs Wright had, Mr Wright said, always paid first rent and then rent and service charge since she had first moved to the flat in 1964. To the extent this was contested on the papers by the Respondent, it became apparent that there had been one occasion when a dispute had arisen, as a result of which there had been a judgment in the county court. The Respondent accepted, however, that this was a case of a genuine dispute rather than a failure on Mrs Wright's part to pay a charge when demanded.

16. Mr Wright argued that, had these sums been owed, or at least properly managed, the Respondent would have followed up failure to pay, but they had not done so.

17. Mr Wright did not argue that the service charge demands would not have been valid if they had been sent and received, and he took no point as to the reasonableness of the sums demanded.

18. Although it was not mentioned in Mr Wrights' written material, it became clear at the hearing that, throughout the period under consideration, Mrs Wright had paid her non-major works service charge on time and in full.

19. For the Respondent, Mr Key argued that the systems used by the Respondent to issue both the major works service charge demands and the section 20B(2) notices meant that they must have been sent to Mrs Wright.

20. To the extent that Mr Wright argued that the service charge demands may have been paid, Mr Key said that there was no evidence of any such payments having been received. Mr Key noted that Mr Wright had not produced any evidence of the relevant sums having been debited to an account of Mrs Wright.

21. We heard considerable evidence as to the system used to generate mail-merged letters to demand service charges. The Respondent currently used, and Ascham had previously used, a computer system called

Northgate, which the Tribunal is aware is in wide use by large local authority landlords. The Northgate system is operated by an IT team, rather than the team directly responsible for leaseholders, the Home Ownership Team.

22. We do not consider that it is necessary to relate the evidence in detail. The broad outline is that once a payment on a major works project is approved by a quantity surveyor or the contract administrator, the information is passed to the Home Ownership Team, who then provide a list of relevant properties to the IT Team. That team then generates invoice numbers and creates a list of letters with invoices to be sent out. That is then returned to the Home Ownership Team, who create letters and invoices as a mail merge and send the letters by post.

23. Mr Key fairly agreed that here was room for human error in such a system.

24. We pressed the Respondent on the letters that Mr Wright agreed had been received, in 2015 and in 2018. Mr Wright did not provide the Tribunal with copies of either letter.

25. At this point we should refer to Ms Choudhury's witness statement, which was signed on 25 September 2019. In it, she relates that, while working as an income assistant in the Collections Team of Ascham, she had a meeting with Mr Wright in May 2015, and as a result emailed another member of staff who was responsible for specialist welfare and financial advice. She produced notes kept on the Northgate system which supported this evidence. She further produced a note from another income assistant who had spoken to Mr Wright at the same time.

26. The Northgate note of Ms Choudhury's meeting with Mr Wrights states "[Leasholder] son came in to discuss major works bill – LH is an elderly and extremely stressed out with this bill …".

27. It is evident that there was a letter received by Mrs Wright in about May 2015, and according to both parties it related to arrears in relation to major works. The letter, however, presents something of a mystery. First, Mr Key told us that extensive searches had been undertaken to locate the letter on Northgate. He explained that searches were necessary over a range of different ways of organising information on Northgate – it was not, he said, a simple matter to "tease out" the necessary information from the system. But no search had been positive.

28. Secondly, Mr Wright relates that the letter included a reference to what he described as an invoice number, 92015581. However, the evidence from Mr Key was that this number was not an invoice number at all,

but rather a payment reference number. Payment reference numbers are numbers used in relation to the payment of service charges, and are linked to specific properties. The property to which this particular number is linked is not Mrs Wright's flat, but an address in Rayner Towers, the second block on the same estate, referred to by Mr Key as the sister block to Burrell Towers.

29. It was not, however, possible that all communications with regard to major works that should have been sent to Mrs Wright had, in fact, been erroneously sent to the other address. The letters and section 20B(2) notices supplied by the Respondent clearly indicate that the right address had been used for Mrs Wright. The Tribunal is aware of instances where supposedly copy letters had been produced from an IT system for the purposes of a hearing before the Tribunal, where the name and address on the letter is not a reliable indication of the name and address used when the letter was sent out, because the IT system has incorporated a more recently added name and address.

30. That is not the position here. It is the Respondent's practice to keep digital copies of all letters sent out in PDF format, and it was from such PDF documents that the letters and notices exhibited had been produced. The use of PDF documents in this case indicates that they are true copies of the letters actually sent.

31. How Mr Wright came by the payment reference number is, therefore, wholly unclear. But it does not, as far as we can determine, create any additional doubt as to the dispatch of the letters and notices in 2013 and 2014.

32. The position in respect of the 2018 letter is clearer. We were told that the Respondent put a hold on enforcement and the chasing of arrears in relation to major works as a result of a large scale application to the Tribunal originating on 10 March 2016. The application was heard in November 2016 and a decision issued on 25 January 2017 (LON/0 0BH/LSC/2016/0134). The decision in an associated application under section 20ZA of the 1985 Act for dispensation from the requirements of section 20 was issued on 17 October 2017 (LON/00BH /LSC/2016/0064). Some considerable time thereafter, in November 2018, the Respondent sent a letter to every leaseholder in the borough. This letter included the leaseholder's balance on both the ordinary service charge account, and their major works account. It seems clear that this letter (a copy of which the Respondent secured during the course of the morning of the hearing) was that to which Mr Wright was referring.

33. Part of Mr Wright's case was the absence of appropriate chasing of arrears. A partial explanation of this feature of the case (which had also caused us concern when we considered the application on the papers) is

provided by the Applicant's stop on chasing during the period from (it appears) early 2016 to November 2018.

34. In the light of all the evidence, our conclusion on the facts is that the contested letters covering the service charge demands, and the section 20B(2) notices, were in all probability sent in the post in the form exhibited in the evidence before us.

35. This conclusion necessarily relies on probabilities. We consider that a systemic reason for the Respondent not receiving all of the relevant communications is wholly implausible. As we indicate above, the fact that the copy letters/notices were kept in PDF format argues powerfully that they were originally generated in the same form as the copies exhibited in the bundle; that is, with the correct name and postal address.

36. While human error in posting the letters after they were generated by the mail merge is certainly possible, it is highly unlikely that such an error would have been made on each of the occasions on which these communications were sent (and not on any of the occasions on which the normal service charge demands, which were paid, were sent). Our view is, therefore, that it is highly unlikely that *all* of the communications were not sent. We cannot say with the same high degree of likelihood that *each* of the communications were sent. But Mr Wright has not provided any evidence that one or more, rather than all, of the communications were not sent. Considered individually in turn, therefore, we cannot conclude that, on the balance of probabilities, any of the communications were not sent.

37. Mr Wright's point about the lack of chasing up of the arrears initially appeared to be a strong one, but an explanation for that, at least in large measure, is to be found in the stop put on enforcement and following up before November 2018. Ms Choudhury's evidence points to one chasing letter in 2015, before the stop. It also indicates that the Applicant was aware of the arrears at that time, perhaps more clearly aware than is indicated in Mr Wright's statement of case, although that may have been related to the confusion in relation to the invoice number/payment reference number.

38. Ms Choudhury's evidence also speaks to Mr Wright's argument that Mrs Wright's record of always paying her bills (in the absence of a genuine dispute) makes it more likely that they were not received (or paid). Mrs Wright was aware, and concerned, about the arrears in 2015.

39. As a matter of law, a section 20B(2) notice is a notice "under" a lease for the purposes of a provision applying section 196 of the Law of Property Act 1925 to a lease: *London Borough of Southwark v Akhtar*[2017] UKUT 0150, [2017] L & TR 36. The same authority is binding on us for the proposition that wherever section 196 applies,

section 7 of the Interpretation Act 1978 also applies. This means that once a letter is properly posted, it is deemed to be served at the time it would be received in the ordinary course of the post, unless the contrary is shown. There is no evidence, apart from that discussed above in relation to the prior issue of the generation of the communications, that would allow us to conclude that the presumption had been negatived.

40. We therefore conclude that the communications were served on the Applicant at the time that they would have been delivered in the ordinary course of the post, which is conventionally assumed to be two days after posting.

41. *Decision*: The contested service charge demands and section 20B(2) notices were in all probability sent by the Respondent to the Applicant, and are therefore deemed to have been received by her. In consequence, the sums claimed by the Respondent are payable by the Applicant.

Application under section 20 of the 1985 Act

42. In the application form, the Applicant applied for an order under section 20C of the 1985 Act that the costs incurred by the landlord in connection with the proceedings should not be passed on in the service charge. Mr Key, for the Respondent, said that it would not seek to pass on its costs through the service charge. In order to secure that assurance, it is just and equitable in the circumstances to make the order.

43. *Decision*: The application for an order under section 20C of the 1985 Act is allowed.

Rights of appeal

44. 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.

45. 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.

46. 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.

47. The application for permission to appeal must identify the decision of the Tribunal to which it relates, 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.

Name: Tribunal Judge Richard Percival **Date:** 16 December 2019

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

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

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

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

Section 19

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

   and the amount payable shall be limited accordingly.

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

Section 27A

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

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

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

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

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

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

Section 20

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

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

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

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

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

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

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

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

Section 20B

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

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

Section 20C

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

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

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

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

Law of Property Act 1925

Section 196

(1) Any notice required or authorised to be served or given by this Act shall be in writing.

(2) Any notice required or authorised by this Act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

(3) Any notice required or authorised by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorised to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

(4) Any notice required or authorised by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned [by the postal operator (within the meaning of [Part 3 of the Postal Services Act 2011]2) concerned]1 undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

(5) The provisions of this section shall extend to notices required to be served by any instrument affecting property executed or coming into operation after the commencement of this Act unless a contrary intention appears.

(6) This section does not apply to notices served in proceedings in the court.

Interpretation Act 1978

Section 7

Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.