FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AN/LSC/2019/0296**
Property	**:**	**5 Mustow Place, London SW6 4EL**
Applicants	**:**	**Timothy Bush** **Marie-Therese Bush**
Respondent	**:**	**Mustow Place Residents Association Ltd**
Representative	**:**	**JCF Property Management**
Type of Application	**:**	**Liability to pay service charges**
Tribunal	**:**	**Judge Nicol** **Mr P Roberts DipArch RIBA** **Mr ON Miller**
Date & Venue of Hearing	**:**	**17th December 2019** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**13th January 2020**

DECISION

Decisions of the Tribunal

(1) The Tribunal has concluded that the service charges to which the Applicant objects are reasonable and payable.

(2) There shall be no order under section 20C of the Landlord and Tenant Act 1985 or paragraph 5A of the Commonhold and Leasehold Reform Act 2002.

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

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The Tribunal's Reasons

1. The Applicants are the lessees of the subject property, a 3-storey townhouse and garage in a mews development consisting of 23 properties, mostly houses. There are also 7 garages and 16 designated parking spaces.

2. The Respondent is the freeholder of the mews and the Management Company referred to in each lease. All the lessees are shareholders of the Respondent company. The First Applicant is a former director.

3. The Applicants seek to challenge a number of service charges pursuant to section 27A of the Landlord and Tenant Act 1985. The application was heard on 17th December 2019. Both Applicants attended, representing themselves, and the First Applicant spoke for them. The Respondent was represented by Mr Michael Levenstein of counsel, accompanied by Mr Steve Oates of his instructing solicitors and 3 of the current 5 directors of the Respondent company, Mr Peter Morrison, Mr Mark Powell and Mr John Hall. The Respondent had compiled a bundle of relevant documents for use at the hearing.

4. In his skeleton argument prepared for the hearing, Mr Levenstein asserted that the matters in dispute between the parties had now been resolved. In particular, he conceded that the service charge accounts had not been certified timeously but all of them had now been certified. However, the First Applicant asserted that a number of issues remained and, at the Tribunal's request, he enumerated them. Each issue is dealt with in turn below.

Graffiti

5. The mews sits within an elongated triangle of land leading away from the main entrance on Munster Road. On its longest side, to the north, it is bounded by land belonging to Transport for London on which sits a railway line. The end of the southern wall is bounded by the grounds of a primary school. The rest of the southern boundary is next to other residential developments.

6. Unfortunately, this long boundary has been regarded since about 2010 by some unknown vandals as an opportunity to spray unsightly graffiti. The Respondent was concerned that any graffiti would attract more graffiti artists to further areas of the estate. The Respondent's agents at the time, GH Property Management, arranged for CountyClean Environmental Services Ltd to remove the graffiti. They followed this up by instructing further contractors, Insight Security, to place anti-climb paint and warning signs on the relevant areas of wall. The contractors invoiced the Respondent on 31st January 2018 for £3,451.68 and £775.92 respectively.

7. In accordance with their lease, the Applicants' share of any costs incurred by the Respondent in maintaining the common parts of the mews is 1/23rd. However, the Applicants asserted that the walls in

question were either not part of the common parts or, in relation to the boundary with the school, the school's responsibility.

8. The First Applicant relied on the following clauses of the lease which had been included in the hearing bundle (any differences in the clauses of other leases were not material to his argument):

1. IN this Deed unless the context otherwise requires the following expressions shall have the meanings respectively ascribed to them:-

(6) "Demised Premises" means ALL THOSE the premises specified in paragraph 6 of the Particulars and more particularly referred to in the Fifth Schedule hereto and any alterations or additions thereto together with all Landlord's fixtures and fittings in or about the same and all conduits exclusively serving the same

(12) "Common Parts" means all those services facilities conduits and parts of the Estate not demised for the exclusive use of the Lessee or any other Estate Owner including in particular but without prejudice to the generality of the foregoing the clock and clock tower on the roof of plot 20 the structure and surface of the two archways respectively under plot 20 at the entrance to the Estate and under plots 1 and 2 at the rear of the Estate the Estate Road all paths all landscaped areas boundary walls and fences and all lamps and other lighting effects relating to the Estate

4. THE Lessee HEREBY COVENANTS with the Lessor and with the Management Company and with and for the benefit of the other Estate Owners that throughout the term the Lessee will:-

(1) Repair maintain renew uphold and keep the Demised Premises and all sanitary water gas and electrical apparatus therein and all fixtures and additions thereto and all fences and walls thereof (if any) marked with a "T" inside the boundary on the said plan in good clean and substantial repair and condition

5. THE Management Company HEREBY COVENANTS with the Lessor and with the Lessee that the Management Company will throughout the term:-

(1) Maintain and keep in good and substantial repair and condition the Common Parts

THE FIFTH SCHEDULE

The Demised Premises

ALL THOSE residential premises on the ground and first floor and the garage premises on the ground floor as the same are shown edged red on the said plan BUT EXCLUDING the loadbearing structure above the said garage which supports the residential accommodation thereabove and ALSO EXCLUDING any part which constitutes or comprises any part of the Common Parts.

9. The First Applicant showed the Tribunal a photo of a wall which was both a boundary to the estate and one of the walls to parts of the properties numbered 17 and 20. The wall being part of those properties

would appear to bring it within the demise of each of them. Therefore, he argued, under clause 4(1), it was the lessee's responsibility to maintain it and work to that wall could not be the subject of any service charge.

10. Moreover, he pointed to another photo showing the wall of the house numbered 7. The demise extended beyond the wall to include a narrow strip of land up to the neighbouring fence belonging to TfL. The wall in question was not even part of the boundary of the estate and, therefore, could not constitute part of the Common Parts on any possible interpretation of the lease.

11. The Respondent replied that the most obvious objection to the Applicants' denial of their liability to pay their share of the graffiti removal work was that the service charge did not include the cost of the work to numbers 7 or 17. The owner of number 7 refunded the Respondent for the work in the sum of £1,587 and the owner of number 17 £255, in accordance with arrangements made and notified to all lessees prior to the work being done. Further, the Respondent obtained a contribution from the insurers of £740 (£990 less the excess of £250) so that the total charge to the service charge was £1,645.60, rather than £2,385.60 as the Applicants had claimed.

12. To the extent that the Applicants did contribute to the removal of graffiti on the walls of numbers 17 and 20, the Tribunal pointed out during the hearing that they appeared to have misunderstood the terms of the lease:

(a) The Respondent is obliged to maintain the "Common Parts".

(b) The "Common Parts" include those parts of the Estate not demised for the exclusive use of the Lessee or any other Estate Owner.

(c) A boundary wall is not for the exclusive use of the Lessee – other lessees and third parties use such a wall to delineate the whole of the estate, not just the demised premises.

(d) Therefore, a wall of a property which is also a boundary wall comes within the definition of "Common Parts".

(e) Therefore, it is the Respondent's obligation to maintain that wall and the lessees' obligation to pay their share of the costs arising from that maintenance.

13. As to the boundary with the primary school, there appears to be no law or written rule as to whose responsibility it is. The school has accepted responsibility and paid for maintenance in the past but, on this occasion, the Respondent decided to pay for the work as a goodwill gesture to the school. Even if the Respondent could have sued the school for the cost, such a dispute would have its own costs in money, time and good neighbourly relations. It is entirely reasonable for the Respondent to take the approach they did on this occasion.

14. Therefore, the Tribunal is satisfied that the element of the service charge for the graffiti removal work which was actually levied on the Applicants is both payable and reasonable.

Insurance

15. The Respondent used to insure the common parts of the estate with Allianz. In 2014-15 the premium was £977.42 and in 2015-16 it was £1,040.55. The service charge account for 2016-17 showed the buildings insurance as £721. At some point the Respondent switched to Covea whose premium in 2017-18 was £694.84.

16. The Respondent had noted cracks in the wall which they thought might be evidence of subsidence. They asked Covea to look into it. By letter dated 10th May 2018, relying on photos volunteered to them by the First Applicant, Covea rejected the claim on the basis that cracks to the wall had existed since 2013. This both pre-dated their becoming insurers and indicated a lack of movement since that time.

17. In the meantime, the policy with Covea was due to expire. On 11th May 2018 they quoted £1,389.69 to renew the policy. Instead, the Respondent switched to Aviva at a premium of £1,170.01.

18. The Applicants alleged that the insurance premium was unreasonably high. They pointed to the fact that Covea's policy nominally covered subsidence whereas Aviva's expressly excluded it but their main point was that the increase was solely down to the Respondent having made a subsidence claim which was rejected. The First Applicant was particularly aggrieved that he had previously raised concerns that the cracks had existed before but the Respondent did not change course in the light of those concerns.

19. The main problem with the Applicants' claim that the Respondent's actions had caused the increase in the premium is a total lack of evidence. The allegation rests on the assumptions that Covea would otherwise have been willing to re-quote at around the previous year's price and that there were no other factors influencing the amount of the premium. Both assumptions were entirely unsupported.

20. The evidence of all the other premiums obtained by the Respondent is that it was Covea's which was out of line with the market. When Covea re-quoted at a high level, the Respondent went to the market. There is no evidence that they could have got a better policy, either in terms of price or coverage, than the one they did.

21. Therefore, the Tribunal is satisfied that the element of the service charge derived from the insurance premium is reasonable and payable.

Parking

22. Each of the lessees has a garage or parking space. The Respondent has regulations governing when additional permits may be granted. The

Applicants alleged that the service charge for parking enforcement, carried out by an outside contractor, was unreasonable because the Respondent had issued too many permits. When pressed by the Tribunal, the First Applicant conceded that the issue of a lower number of permits would make no difference to his service charge and so he dropped this challenge.

Clock Tower

23. As referred to in clause 1(12) (quoted above), the estate includes a clock and clock tower at the entrance. Maintenance had previously required either access through the roof of the flat below or scaffolding rising to the top of the roof. When the flat-owner decided to renew or refurbish her roof, the Respondent decided to take advantage by building better access, saving money in the long-term, and carrying out some maintenance, including re-painting, at the same time. Top-Roofing provided a quote on 15th November 2017 for the work at a cost of £3,920. The better access was to be provided by some steps from the roof's edge to the tower and a platform attached around the tower itself.

24. While the contractors were working on the clock tower, they identified some electrical cabling which required renewal. The Respondent instructed them to carry it out, which they invoiced for £440.

25. Unfortunately, a number of lessees, including the Applicants, objected to the platform. There appears to have been a misunderstanding as to what it would consist of and whether it would attach to the roof or the tower. This dispute delayed some of the works. Rather than allow the delay or the dispute to continue, the Respondent decided to abandon the building of the platform. Top-Roofing agreed to keep their price the same, despite the delays, but re-quoted on 23rd July 2019 with the platform removed.

26. The Applicants had a number of objections to the service charge arising from this work:

(a) The clock tower work was listed as part of the estimated charges sought in advance as an interim service charge in both 2018 and 2019. The Applicants alleged that this meant they were double-charged. However, this represents a fundamental misunderstanding of how service charges work. The actual service charge, based on actual costs incurred, is determined after the end of each year. Any sums paid as interim charges are fully credited against the actual service charge. If an item is put into the estimate but not actually spent, the lessee gets the full credit at the end of the year when the actual service charges are calculated. Its reappearance in the following year cannot be a double-charge because credit will have already been given for the previous year.

(b) The Applicants added together all the costs quoted for and invoiced by the contractors and claimed that the total triggered the statutory consultation requirements under section 20 of the Landlord and

Tenant Act 1985 and the Service Charges (Consultation Requirements) (England) Regulations 2003. Since no consultation had been carried out, they claimed that the service charge had to be limited to £250. However, the works in this instance should not be grouped together in the way claimed. They were separate works serendipitously and coincidentally addressed at around the same time.

(c) The Applicants claimed that the steps were useless due to the fact that the platform was not built. However, the steps have value in their own right, providing access from the edge of the roof to the tower.

(d) The Applicants claim that they were charged for the unbuilt platform but they are simply mistaken, having been confused by its inclusion in Top-Roofing's first quote and its exclusion from the second.

Manager's fees

27. The Respondent estimated their expenditure on their new agents, JCF, would be £6,000. JCF's basic contractual charge was £4,200. The Applicants claimed that there was an over-estimate. While, again, misunderstanding how interim charges work, the estimate took into account possible additional costs arising from JCF having to look at historic disputes over and above what is included in their basic charge. When the Tribunal pointed this out, the Applicants decided not to pursue this issue.

Company Secretary

28. JCF currently carry out the tasks of the Respondent's company secretary. When calling an AGM in July, they wrongly mentioned that directors would be elected. Also, it was noted in minutes of a meeting of the Respondent's board of directors that two of the directors had obtained their own advice on how directors should be appointed, from which the Applicants surmised that the Respondent had followed this advice. The Applicants branded these matters as a poor service by JCF as the company secretary so that their charges were unreasonable and should be substantially lowered.

29. The Tribunal looked at JCF's contract and the services listed. It appears that they have carried out the tasks listed. The mistake as to how directors are to be elected does not appear to have had any consequences and it is difficult to see why it should affect the reasonableness of the price. As to the advice received by the directors, the Tribunal has not seen any evidence that it was followed or, if it was, that this had any adverse consequences so the Tribunal cannot see how it should affect the reasonableness of JCF's fee.

Costs

30. The Applicant also applied for orders under section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 that the Respondent should not be permitted to recover their costs of these proceedings

through the service charge or as an administration charge under the lease. The main factors which the Tribunal must take into account are as follows:

(a) If the lease permits a landlord to recover legal costs, then that is a contractual commitment by both parties which the Tribunal must respect.

(b) The Tribunal does not follow the rule in court that the loser should pay the winner's costs but who has succeeded on the main issues is relevant. In that context, the Applicant has failed on all issues.

(c) The costs of these proceedings have been incurred because the parties took their dispute to litigation. Parties should always try to avoid litigation where possible by taking steps to narrow the issues between them. A party which does not do so makes it more likely that there will be litigation and higher costs than would otherwise be the case. The Applicants refused to enter into mediation when the Respondent offered it but also made a cross-allegation that the Respondent failed to respond to their correspondence.

31. In the circumstances, the Tribunal sees no reason to make either order. The First Applicant conceded during the hearing that, if he were successful in reducing any service charges, any resulting shortfall in the service charge fund would have to be met by the members of the Respondent, including himself. The Applicants are entitled to pursue their rights through the Tribunal but, if they wish to do so when there is no financial benefit to anyone, they must be prepared to risk having to bear the costs of doing so.

32. Therefore, the Tribunal refuses to make any order under section 20C or paragraph 5A, although the Applicants retain the right to challenge the reasonableness of any charges made at a later date.

Name: Judge Nicol **Date:** 13th January 2020

Appendix 1 – 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 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.

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.