FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BE/LSC/2019/0298**
Property	**:**	**199 Rodney Road London SE17 1RG**
Applicant	**:**	**London Borough of Southwark**
Representative	**:**	**Mr Loveday of Counsel**
Respondent	**:**	**Mr Giancarlo Niccoli**
Representative	**:**	**N/A**
Type of application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	**:**	**Judge Carr** **Mr Sennett** **Mr Ring**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**29th January 2020**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the sum of £771.76 is payable by the Respondent in respect of the balancing charge demanded for the service charge year 2016 -17

(2) The tribunal determines that the sum of £1382.98 is payable by the Respondent in respect of the balancing charge demanded for the service charge year 2017 -18

(3) The tribunal makes the determinations as set out under the various headings in this Decision

(4) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

(5) Since the tribunal has no jurisdiction over county court costs and fees, and the counterclaim is outstanding, this matter should now be referred back to the County Court.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Respondent in respect of the service charge years 2016 – 17 and 2017 - 2018.

2. There are two items in dispute; the first is a balancing service charge of £771.76 due on 16th February 2017; the second is a sum of £1882.98 due on 16th February 2018.

3. Proceedings were originally issued in the County Court Business Centre under claim no. F8QZ6Y53. The claim was transferred to the County Court at Clerkenwell & Shoreditch and then in turn transferred to this tribunal, by order of District Judge Manners on 2nd August 2019.

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

The hearing

5. The Applicant was represented by Mr Mark Loveday of Counsel at the hearing. Mr Loveday was accompanied by Ms McColl, enforcement officer with the Applicant and Mr Khan, senior enforcement officer with the Applicant. In addition the Applicant had four witnesses: Ms Diana

Lupulesc, Mr John Marenghi, Mr Peter Lucas and Ms Jo Taylor, all employees of the Applicant. The Respondent appeared in person, assisted by Ms Moore from BPP. The tribunal is grateful for the assistance of all those in attendance.

6. Immediately prior to the hearing Mr Niccoli made an application that the tribunal consider the counterclaim that he made in response to the Applicant's county court claim. He argued that the counterclaim had been transferred by the District Judge as it was implicitly included in the phrase, 'the case be transferred'. He argued that it would be appropriate and economical for the counterclaim to be determined by the tribunal.

7. He argued that first tier tribunal judges are also judges of the County Court and that therefore the tribunal is capable of exercising the jurisdiction of the County Court. He requested that the 'double hatting' pilot be used.

8. Mr Loveday argued that the counterclaim had not been transferred. This was evidenced by the lack of directions made in relation to it by the tribunal. He also argued that the tribunal could not determine the matter as it fell out of the tribunal's jurisdiction. Whilst there was a pilot under which tribunal judges could determine matters of costs and disrepair the proper procedure was that tribunal judges had to be allocated to that pilot to decided particular cases. It was not open to the tribunal to appoint itself to that pilot.

9. The tribunal determined that it could not hear the counter-claim; it agreed with the arguments of Mr Loveday and it could not appoint itself to determine the counter-claim.

The background

10. The property which is the subject of this application is a leasehold ex-council flat in a low rise block on the Salisbury Estate in Walworth. The estate is served by a district heating scheme which provides hot and hot water from a central boiler via a network of pipes laid within the estate and branching into the blocks and thence to the the individual flats. Access to the block is via a newly installed security door with entry phone and magnetic locking device.

11. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

12. The Respondent holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their

costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

The issues

13. At the start of the hearing the parties identified the relevant issues for determination as follows:

    (i) The payability and/or reasonableness of balancing service charges of £771.76 for the 2016 -17 service charge year

    (ii) The payability and/or reasonableness of balancing service charges of £1882.98 for the 2017 -18 service charge year

14. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

Balancing service charges of £771.76

15. The Applicant explains that the sum of £771.76 relates to a 'balancing charge' and represents the balance of Mr Niccoli's service charges of £2,541.19 giving credit for interim charges. It is payable by Mr Niccoli under para 4(1) of Sch.3 to the Lease.

16. Mr Niccoli argues that the sum covers works carried out in his property to repair a leaking pipe. He has asked for, and argues that he has not received a complete or accurate breakdown of the costs and therefore cannot assess whether the invoice has been fairly or reasonably calculated.

17. The Applicant accepts that works were carried out during the period in question to repair a burst or leaking pipe. Costs of £1718.23 were incurred in carrying out those works. Mr Niccoli's share of those costs were £143.18.

18. There was correspondence between Mr Niccoli and the Applicant. The Applicant maintains that it answered Mr Niccoli's questions as fully as it was able.

19. The tribunal accepted that Mr Niccoli would find it difficult to understand exactly what he was being charged for because the paperwork provided did not disclose addresses where work was carried out. The applicant said that it could not disclose individual addresses because of data protection requirements.

20. Mr Niccoli also argues that the sum, or at least some of it should have been claimed on insurance rather than invoiced to him.

21. The Applicant stated that these works were not covered by insurance and produced documentation in support.

22. Mr Niccoli also argues that the landlord took more than 6 months from the time of the leak to the completion of repairs. For much of this time the defendant was without heating and hot water. He argued that this was unacceptable and impacted upon the reasonableness of the charges.

23. Mr Marenghi, for the Applicant, gave evidence that in his opinion the works in respect of Mr Niccoli's heating system were carried out in a timely manner and to a good standard.

24. Cross examination by Mr Niccoli established that the heating and been cut off on the 3rd January 2018 following a leak being found underneath the floor of the property. Various tests were required and because the hot water cylinder was old it had to be replaced. New heating distribution pipe work also had to be installed. This all caused delays in carrying out effective repairs.

25. Whilst the replacement hot water cylinder was installed on 6th February 2018 it was not until 27th February 2018 that it was working effectively to provide the family with hot water.

26. Mr Marenghi gave evidence that a particular cause of delay was the result of Mr Niccoli requesting that the new heating distribution pipe work be buried under the floor in the concrete screed, which was where the previous heating distribution pipe work had been located. The Applicant agreed to carry out this work on condition that Mr Niccoli arranged for his own contractors to channel out the concrete ducts.

27. Mr Niccoli accepted that it took a little time to organise the work, but only a very small proportion of the delay was due to this. He also said it was a reasonable request that he had made as he had a very young child in the property and did not want them touching hot pipe work.

28. Mr Marenghi replied that the external pipes were no more of a hazard than radiators and that 40% of the properties on the estate have surface pipe work.

29. The hot water cylinder was not working until 27th February 2018 and the new pipes were not laid until 23rd April 2018.

30. Following this work Mr Niccoli could not turn his radiators off. This surprised Mr Marenghi as he believed that the valves should be functional and that all the relevant tests should have been carried out on the completion of the works. Mr Niccoli informed the tribunal that the applicant turned the heating off until the issue with the radiators was solved. This was not until August 2018.

The tribunal's decision

31. The tribunal determines that the amount payable in respect of the balancing charge is £771.76 .

Reasons for the tribunal's decision

32. The tribunal has a great deal of sympathy with Mr Niccoli. The works to the heating system appear to have taken a disproportionate amount of time. It accepts his evidence that he was without hot water until 27th February 2018 and without heating for nearly 8 months.

33. It considers that the reasons the works took so long was in part because of the out of date heating and hot water system in the property. Mr Niccoli's request that the pipe work be buried in the concrete floor also caused some delay. However the tribunal determine that his request to have the pipe work buried was a reasonable request as the previous pipework had been buried and he had a legitimate concern about the safety of his child and the risk of scalding from exposed heating pipework.

34. However the tribunal also accepts that the costs that related to the heating and hot water works were limited to £143.18 and there is no argument that this amount was unreasonable. The works were carried out and the heating now works. It also accepts that the works were not covered by insurance.

35. Mr Niccoli appears to have suffered loss, distress and inconvenience as a result of delays in carrying out the works. He needs to pursue this in the County Court.

The balancing charge of £1,882.98

36. The applicant explains that the sum relates to the first instalment of major works charges of £2301.63 which represent Mr Niccoli's contribution to the installation of a door entry system to his block. It argues that the sum is payable under the lease.

37. Mr Niccoli argues that the charge is not reasonable. He accepts that he voted in the ballot in support of the decisions to install an entry phone door system. He did this on the basis that it was designed to increase the security of the block and to cut down on anti-social behaviour.

38. However subsequent to the installation of the entry phone door system the Applicant removed the locks on the internal parts of the block because of a perceived fire risk. The locking mechanism to this door was such that it could be opened from the inside, to facilitate egress, without the need for a key.. The Applicant did not consult with the occupiers or inform them that it would be removing the internal door locks. Mr Niccoli argues that if he had known that the internal locks would be removed he would not have voted in the ballot in support of the entry phone system, and he does not believe that his neighbours would have done either.

39. The Applicant agrees that its Fire Safety Team removed the locks to the internal communal doors to ensure that there was appropriate and safe access to areas of the communal parts for which the Applicant is responsible. However it argues that the removal of the internal locks was unrelated to any costs incurred by the Applicant in respect of the major works charges in dispute.

40. In addition Mr Niccoli considers that the entry phone door system has not been installed to a reasonable standard as it often does not close and/or lock. Mr Niccoli believes that the system is of poor quality and that the Applicant should not have used magnetic door locks as they are less secure than alternative systems.

41. As a consequence of removing the internal door locks and the poor installation of the door entry system Mr Niccoli states that there has been a reduction in the security of the block. The problem that the works were designed to resolve, unauthorised people gaining access to the block continues. For that reason he considers the charges unreasonable.

42. The applicant argues that the installation was to a reasonable standard. Ms Taylor, a contract manager with the Applicant, gave evidence that neither she, nor her major works team had received any complaints about the installation of the door entry system. She also stated that the system was working correctly at the time of the hearing.

43. Mr Niccoli said that numerous complaints had been made by the residents of his block. He produced a witness statement from Ms Tabacchi who lives at 201 Rodney Road in the same block as the Respondent with whom she shares the entry phone system. This indicates that complaints were made on at least five occasions, between 7th February 2018 and 21st October 2019. Ms Tabacchi's statement included emails between herself and the Applicant. In particular an

email from the Repairs team indicated that her complain was incorrectly logged to the repairs team instead of the major works team. It assures Ms Tabacchi that the complaint is not with the major works team who would be able to proved a full response in due course. The email, which apologises for the delay, was dated 24th March 2018.

44. Although Ms Tabacchi did not attend the hearing and could not be cross examined, the tribunal found the evidence that complaints had been made persuasive. The tribunal asked Ms Taylor what research she had done into the matter. She said that she had asked the former team manager and another colleague who had told her there were no complaints. She was unable to explain why she had not checked the repairs log.

45. Mr Lucas, a senior Building Surveyor with Pottter Raper Ltd, the consultants who provided the feasibility study for the entry phone door system, explained that the decision to install magnetic locks was a reasonable one in accordance with standard practice in the industry.

The tribunal's decision

46. The tribunal determines that the amount payable in respect of the balancing charge is £1382.98. .

Reasons for the tribunal's decision

47. The tribunal has reduced the charge for the installation of the entry door system by £500 for the following reasons:

(i) The tribunal accepts the evidence of the Respondent that the work has not been carried out to a satisfactory standard. The evidence of the Applicant that it was to a satisfactory standard was not robust; proper checks of complaints logs etc had not been carried out.

(ii) The works were designed to increase the security of the block. In the event the security of the block has not been increased. The tribunal accepts that the works to remove internal locks were carried out independently of the entry phone door system. However the Applicant should have been more rigorous in checking the impact of those works on the security of the block.

(iii) The tribunal determines that the decision to install a magnetic lock system was a reasonable one.

(iv) The tribunal has not reduced the charge by more than £500 as it accepts that there is still some utility in the door entry system.

Application under s.20C and refund of fees

48. At the hearing the Respondent applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, and the difficulties faced by the Respondent in getting evidence about the basis of charges, the tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Applicant may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

The next steps

49. The tribunal has no jurisdiction over the counterclaim or county court costs. This matter should now be returned to the County Court.

Name: Judge Carr **Date:** 29th January 2020

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).

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.

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).