FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BJ/LSC/2021/0158**
HMCTS code (paper, video, audio)	**:**	**P: PAPERREMOTE**
Property	**:**	**63-84 Elmwood Court, 38 Battersea Park Road, London SW11 4JE.**
Applicant	**:**	**Peabody Housing Trust**
Representative	**:**	**Mr Robert Shaw (Senior Homeownership Manager)**
Respondents	**:**	**The leaseholders of 75, 76, 77, 78, 79, 80, 81, 83 and 84 Elmwood Court**
Representative	**:**	**Mr Peter Donnelly (leaseholder of flat 78)**
Type of application	**:**	**Reasonableness and payability of service charges**
Tribunal	**:**	**Judge N Carr**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**6 October 2021**

DECISION

DECISION

1. The Applicant's apportionment of the service charge cost is in accordance with the lease and reasonable.

REASONS

Background

(1) By application form dated 21 April 2021, the Applicant applies for a determination under section 27A of the Landlord and Tenant Act 1985 ('the Act') that its method of apportioning service charges at Elmwood Court is in accordance with the lease and the service charges are therefore payable. This turns on the issue of the definition of the 'Building' in the lease.

(2) It appears that 9 of the 10 leaseholders are in arrears of service charge, in the total sum of £30,281.44, for the service charge years 2017/18 and 2018/19. This is separate to the Estate Charge. It is unclear whether those sums have been paid. The application seeks determination that the methodology applied by the Applicant, to determine what a fair proportion of the service charge is for each leaseholder, is fair and in accordance with the lease.

(3) Judge Hamilton-Farey issued directions on 17 June 2021 for the determination of this application and stated: "The applicants seek a determination under section 27A of the Landlord and Tenant Act 1985 of the respondent leaseholders' liability to pay service charges for the years 2017/18 and 2018/19. It is understood that the total claim is for £30,281.44." It appears that this caused the leaseholders some confusion, despite the clear terms of the application, and what appears to be a considerable background history to the application. However, at a case management hearing before Judge Nicol on 10 August, it was clarified that the **only** matter for the tribunal to determine is the apportionment issue, which was recorded thus:

    (a) The Applicant apportions the service charge by first splitting the total charges for the building between the two core staircases 45-55. The Respondents dispute whether this is an appropriate apportionment.
    (b) The first issue may turn on the second issue which is how to define the term "building" in each lease.

(4) Further Directions were given by Judge Nicol on 10 August 2021, in particular to address the dispute relating to the apportionment issue identified. This has been a decision on the papers with the consent of the parties. The documents that the tribunal was referred to are in a bundle of 89 pages, the contents of which have been noted. References to the bundle appear in bold and square bracket below, e.g. **[1]**.

(5) Each party has provided their statements of case. The parties were given the opportunity to provide to the tribunal skeleton arguments in advance of this determination, but none have been received. The tribunal's attention has not been drawn to any caselaw in the statements of case.

(6) No application has been received from the respondents seeking a determination of any particular items in dispute when it comes to the quantum of the dispute, which the Applicant indicated that it had understood to have been resolved at mediation in any event.

The dispute

(7) In short, Elmwood Court is a development in which a single building 'envelope' houses two stair 'cores' – flats 75 – 84 (ten flats) are on one side and are occupied by shared-ownership lessees ('core 1'), and flats 63-74 (twelve flats) are on the other and occupied by affordable rent or assured tenants ('core 2'). Each core has its own separate street access onto Battersea Park Road.

(8) On the ground floor, a commercial tenant occupies the space between the two entrances, spanning across both cores within the envelope, as demonstrated in the pictures at **[14]**.

(9) The service charge demanded by the Applicant is on the basis that the cores 1 and 2 are within a defined single "Building". It therefore divides the repair and maintenance costs by the total number of units in the Building (of which there are 22). This results in a 55-45% split of the overall costs, with the shared ownership core taking 45%. The Applicant makes service charge demands to each leaseholder calculated by reference to the size of the flat concerned. Calculated out, this adds up to 100% across the Building **[16]**.

(10) The Applicant relies on the definition of "the Building" in the lease to support its case that this is a reasonable apportionment of the service charges in accordance with the lease.

(11) It also relies on the factual situation at the Building, that common services, like the fire alarm, AOV and smoke ventilation systems serve the Building overall, not the cores separately **[27]**.

(12) The Applicant states that as there is no percentage or other split methodology prescribed by the lease, the apportionment they have adopted to ascertain the sum due from each leaseholder is fair and reasonable. Charges, even if accrued separately for core 1 and core 2, would likely be essentially the same. Reactive works in core 2 that might cause the leaseholders of core 1 to pay a higher charge in one set of circumstances, would in effect even out (or indeed work to the leaseholders of core 1's advantage) if the reverse situation were true **[30]**.

(13) The leaseholders' argument is that the service charge demanded from them and for which they are liable should only consist of those costs incurred in relation to core 1, and it is only those sums of which they should pay a fair proportion in accordance with the lease. Fundamentally, they say, the service charge clause at 5.1 in the lease make no reference to 'the building', only to 'common parts', 'common areas' and 'the estate'. Those areas for which they should pay are confined to the definition of "the Common Parts".

(14) They do not have access to the common parts in core 2, and therefore they say they are not common parts for the purposes of *their* leases. They

should only have to pay for areas they can access. They cannot take responsibility for the way in which core 2 is looked after, for example by reporting issues in respect of it to the Applicant, which may result in them incurring more costs if the Applicant's apportionment method is adopted. The Applicant's apportionment is therefore not a fair and proportionate one consistent with the lease **[24-25]**.

(15) They rely on a scheme plan that was provided to leaseholders when completing their property purchases, in which a blue line on the drawing designates the two cores as separate blocks **[25]**, and reference to blocks EL5 and EL6 in the Applicant's own invoice pack **[embedded document on page 25]**. This, they say, only strengthens their argument that "the Building" definition is nothing to do with the services they should pay for.

(16) Unfortunately, the tribunal is unable to open the embedded document, but the Applicant admits in any event that it does adopt the original development data in its asset management system showing the two stair cores as designated by EL5 and EL6 **[28]**. Its position is that its acknowledgement of that physical layout does not detract from the provisions of the lease.

The lease

(17) A single lease for flat 76 appears in the bundle **[33-88]**. I understand that all of the leases are identical.

(18) The material definitions at page **[40]** are as follows:

> **Flat**: means [property address] situated on the first floor of the Building…
>
> **Specified Proportion**: A fair and reasonable proportion…

(19) An extended definition of the Flat is to be found in the First Schedule **[63]**. It excludes:

1. the Common Parts

2. any part of the Building lying above the surface of the ceilings or below the floor surfaces save as otherwise provided in this lease;

3. any of the main timbers and joists of the Building not referred to as specifically included in the Flat and any of the walls or partitions (whether internal or external) except such of the internal walls and partitions and the plastered surfaces windows window frames doors and door frames as are expressly included in the Flat;

4. any Conduits that are now laid or may be laid under or through the Building or the Estate that do not exclusively serve the Flat…

(20) The Ninth Schedule **[75 – 79]** contains further defined terms as follows:

"**Building**" means the building of which the Flat forms part and each and every part of the Building and the car park, service or loading area, service road and any other areas the use and enjoyment of which is appurtenant to the Building, whether or not within the common structure of the Building

"**Common Parts**" means those parts of the Building which are not let to tenants or designed to be let to tenants including (without prejudice to the generality of the foregoing) the entrance and door entry system the porch corridors and hallways landings passages fire escapes and staircases on each floor of the Building and all other means of pedestrian access and circulation within the Building the structure loadbearing walls beams and columns ceiling and floor slabs joists and beams and the roof of the Building the refuse disposal facilities and bicycle stores within the Building the lift and lift plant rooms (if any) and all associated equipment and apparatus within the Building and all other areas within the Building which may be designated from time to time by the Landlord for the common use and enjoyment by the Tenant and occupiers of the Building

"**Communal Areas**" means the means of vehicular and pedestrian access and circulation within the Estate the security gates and entry system (if any) the refuse disposal areas bicycle stores common garden areas and facilities within the Estate designated or provided by the Landlord for the common use and enjoyment by the tenants of the Other Flats and other occupiers of and visitors to the Building and the Estate and the boundary walls fences hard standing and landscaped areas and other facilities shared by the Tenant with others.

"**Conduits**" means all channels pipes rainwater pipes gutters conduits gas and electricity mains spouts drains sewers watercourses gullies gutters ducts wires risers cables flues attenuation tanks and all other conducting media (including the communal television aerial and satellite dish (if any)) and all pumping facilities and the like which are now constructed or which may be constructed within the Exercise Period in on under or over or connected to the Premises and the Building

…

"**the Estate**" which expression shall in this lease means all the land in respect of which the Landlord is or was registered as proprietor under title number SGL344312 together with the buildings constructed thereon…

"**Estate Charge**" means that part of the Service Charge Proportion as relates to maintenance and upkeep of the Estate

…

"**Service Charge**" means the Specified Proportion of the Service Provision

"**Service Charge Provision**" means the sum calculated in accordance with Clause 6 (Service Charge Proportion)

"**Services**" means the Services referred to in clause 5

"**Service Charge Proportion**" means such reasonable sum as shall be determined by the Landlord from time to time of the Service Costs in so far as they relate to the Estate Charge and such reasonable sum as shall be determined by the Landlord from time to time of the Service Costs in so far as they relate to the Utility Charge and such reasonable sum as shall be determined by the Landlord from time to time of the Service Costs in so far as they relate to the Estate Charge

...

"**Service Costs**" the proper and reasonable expenditure incurred by the Landlord in providing the Services

(21) The leaseholder covenants by clause 3.2.2.2 to pay the Service Charge Proportion to the Landlord in accordance with clause 6, which provides as follows **[55]**:

6.1 In each Service Charge Year the Tenant is to pay the Service Charge Proportion of the Service Costs...

(22) By Clause 5 **[53-55]**, the Landlord's Services "in relation to the Estate... and for the benefit of the Estate and each and every part thereof" include (but are not limited to) covenants to:

5.1 "pay and discharge all rates taxes assessments charges (including all standing charges and meter rents) imposition and outgoings which may during the Term be assessed charged or imposed upon or payable in respect of or by the owner or occupier of the Communal Areas and/or Common Parts and/or Estate as a whole;

5.2 "keep in good and substantial repair,... reinstate,... rebuild,... replace improve ... and ... renew the Common Parts and the Communal Areas (including tending any landscaping (if any) forming part of the Flat) and any equipment apparatus and facilities installed from time to time in the Building or on the Estate for the provision of services to the tenants of the Other Flats in the Building and the occupiers of the Estate and where reasonably necessary to alter the Common Parts and/or the Communal Areas;

5.3 "keep the Common Parts and Communal Areas cleaned heated maintained repainted and lighted to a standard which the

Landlord (acting reasonably) considers from time to time to be adequate and to maintain and keep the intercom system smoke detections systems and communal television aerials (if any) serving the Building in good and tenantable condition;

5.4 To decorate as often as reasonably necessary the exterior parts of the Building and the Common Parts previously decorated…

5.5 To keep the exterior and interior surfaces of the windows in the Common Parts cleaned to a standard which the Landlord (acting reasonably) considers from time to time to be adequate

…

5.8 to provide security for the Building and/or the Estate [including alarm systems and fire detection and prevention]

5.9 to provide for disposal of refuse from the Building and/or the Estate…

…

5.11 to effect and maintain… contracts for the repair and maintenance of the Landlord's fixtures … in the Building or on the Estate…

Decision

(23) Guidance on the interpretation of leases was given by the Supreme Court in *Arnold v Britton* [2015] UKSC 36; [2015] 2 WLR 1593. In particular, I should consider the intention of the parties when drawing up the lease, the overall purpose of clause 3.22.2.2 and 6.1 and commercial common sense (per Lord Neuberger in paragraph 15 of that decision).

(24) The leaseholders have made no argument regarding the percentage charges applied by the Applicant in respect of each flat, in calculating the service charge proportion. They argue only that their obligation at clause 6 is to pay for those items set out in clause 5.1, which makes no reference to "the Building". I should therefore ignore the definition of "the Building" and determine that it is only the service costs <u>of core 1</u> of which the lease obliges them to pay a reasonable proportion.

(25) That position is in my view unsustainable. The Service Cost is defined as the sum properly and reasonably incurred by the Landlord in meeting its obligations to carry out the Services provided for in the entirety of Clause 5. Though it is true that clause 5.1 refers to rates, taxes, assessments, charges impositions and outgoings of the Communal Areas and/or Common Parts and/or the Estate as a whole, that is to be expected – it would be unusual for a landlord to covenant to pay for services outside of those definitions. The limitation of the leaseholders' covenant in clause 3.2.2.2 and 6.1 by reference to that sole landlord obligation amongst the long list of eighteen further obligations found in clause 5,

many of which refer specifically to the Building as well as the Estate, is impermissibly narrow.

(26) Even were that not the case, by definition in the ninth schedule (as well as natural implication), the "Estate" is that registered under "title number SGL344312 together with the buildings constructed thereon…" The Building is unquestionably one of those buildings. The very preamble of clause 5 makes clear that the obligations apply to the whole Estate and to each and every tenant of every part of the Estate, of which again the Building must logically form part.

(27) The only term that the lease does not in fact make any reference to is the 'core' argued for by the leaseholders. There is nothing in the lease which determines that the services will be divided on a core-by-core basis or that the tenants of a particular core will be responsible for service charges associated only with that particular core. That would go against the specific wording of clause 5, of the definitions, and against commercial sense. It would be impossible for a potential leaseholder to determine from the lease alone that the service charges would be divided to different parts of the Building.

(28) The leaseholders' sole argument to support that reading of the lease is that they only have access to core 1 and no control over what is happening in core 2. It is not therefore a "common area" in accordance with the lease, and the service charge itself should, in effect, be half of that demanded.

(29) The argument proceeds on the false assumption that the leaseholders would have to pay less for the Services. However, even were only half of the costs incurred for the Building to be charged to core 1, each of their fair proportions of that half would more than double. In the end, the sum they would have to pay would be virtually the same, if not slightly more. Of course, there may be items of expenditure to core 2 for which the leaseholders may have to pay a proportion. The same will occur in reverse. In the end, the situation is one of swings and roundabouts.

(30) To stretch the leaseholders' argument to its furthest reach, to interpret the lease as if the two cores were each to be separately maintained though under one roof and within the same envelope (both of which are by definition Common Parts) would result in a situation, for example, in which the Applicant has to apply an intolerable subdivision for external repainting where an external brick stretches one inch more than halfway across the exterior of one 'core' and less than halfway across the other; or for roof repairs where one roof slate stretches across cores 1 and 2 in uneven proportions. Indeed, subdivision of this nature is likely to result in higher costs for both cores, due to the administrative burden it would create.

(31) Most importantly, the leaseholders' position is founded in an incorrect limitation on the meaning of "Common Parts". 'Use' is not defined by the leaseholders' unhindered access to those areas maintained. The roof is

clearly a location to which the leaseholders would not have unhindered access, as are the foundations, beams, and other structural elements. They are all nevertheless "Common Parts" by definition. The words "*and all other areas within the Building which may be designated from time to time by the Landlord for the common use and enjoyment by the Tenant and occupiers of the Building*" are not to be read as somehow limiting their liability to contribute to the cost of repairing and maintaining only core 1. They are clearly intended to encompass the whole building as defined, and to ensure that the leaseholders do indeed contribute to common costs. The words are not capable of the limitation contended for. Nor am I persuaded that the leaseholders do not have 'use' of the common parts in core 2: as soon as one of them visits their friend in core 2, they are making use of those common parts.

(32) In my view, the original parties' intention is abundantly clear from the lease provisions, namely that the leaseholders were each taking a lease of a flat within "the Building" as defined, and would each be bound by cross-covenants so that that building would be managed and maintained in a simple, straightforward and cost- effective way, with all leaseholders participating and contributing to this common end. That interpretation also makes commercial common sense.

(33) Though the leaseholders suggest that the Applicant's recognition in its breakdown of invoices into EL5 and EL6 recognises that the charges should be levied on a core-by-core basis, I reject that analysis. Indeed, the fact is that some costs might no doubt be possible to break down in this way – and that may lead a leaseholder to challenge the reasonableness of particular charges when looking comparatively across the two cores – is an answer to the leaseholders' complaint that they have no control over what is being done in core 2.

(34) There will be many charges, however, that the Applicant will not be able to break down in that way, the fire detections and smoke alarms serving the whole Building being but one example. The set-up of accounting software does not speak to the lease. The leaseholders are not freeholder owners and must recognise that leasehold ownership carries with it a contractual responsibility to contribute to works that they may feel are no of direct benefit to them.

Conclusion

(35) I therefore find that the Service Costs are those for the Building in accordance with the lease, and not for core 1 as contended by the leaseholders. There being no other argument made regarding the apportionment of that Service Cost, and in view of the Applicant's methodology at **[16]**, I find that the apportionment is reasonable.

Name: Judge N Carr **Date:** 6 October 2021

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).