FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AU/LSC/2020/0236**
HMCTS code (paper, video, audio)	**:**	**P: PAPER**
Property	**:**	**2nd Floor Flat, 308 Caledonian Road, London N1 1BB**
Applicant	**:**	**Mr A Oberg**
Representative	**:**	**In person**
Respondent	**:**	**Mr C Frangos**
Representative	**:**	**In person**
Type of Application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Member	**:**	**Tribunal Judge Prof R Percival**
Date and venue of Hearing	**:**	**10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**17 June 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a determination on the papers, P:PAPERREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined on paper. The documents that I was referred to are in a bundle of 60 pages, the contents of which I have noted.

The application

1. The Applicant seeks 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 from 2016-17 to 2020-21.

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

The property

3. The property is a flat in a building comprising (now) four flats. The Applicant states that originally the building comprised two flats above a shop/office, with a basement beneath, and that the shop and basement were at some time converted to flats.

The lease

4. The lease is dated 1991, for a term of 99 years. The lease refers to "the property" as comprising two flats, a ground floor office and a lower ground floor storeroom.

5. By clause 5(d), the landlord covenants to insure "the property".

6. The rent clause (clause 1(v)) specifies the tenant pay "by way of additional rent the rateable proportion of the sums expended by the landlord insuring the property". Clause 6 3) states that "In the event of rateable values being abolished without at that stage rateable proportions having been determined proportions of contributions hereunder payable will be assess by reference to floor areas and the proportion of which the floor area of the flat bears to the aggregate floor area of the building as a whole".

The issues

7. The bundle, prepared by the Applicant, consists of his statement of case dated 18 March 2021 with appendices. These include the contested invoices for building insurance, some email correspondence, the Tribunal's directions and amended directions (dated 6 October 2020 and 8 January 2021), the application form and the lease. Amongst the correspondence is an email from the Respondent dated 11 February 2021 in which he indicates that he does not wish to produce any further materials, other than what I take to be a bundle of invoices which are presented in the bundle. The Respondent has not provided a narrative statement of case of any kind.

8. The Applicant raises two issues, which I consider in turn.

Are the demands in respect of insurance payable under the lease?

9. The Applicant has produced a photograph of a handwritten invoice from the Respondent dated 12 March 2020, expressed as a demand for ground rent and insurance contribution for each of the four years from 2016 to 2020. The total is £2,484. The invoice was accompanied by invoices from the broker for the insurance for each of those years (the insurance running from 3 February every year to the 2 February in that following). There are references in the papers to a dispute about how much ground rent has been paid by the Applicant, but it is evident from the invoices that the sum charged for ground rent in each of the years concerned was £100. As the parties are aware, the Tribunal has no jurisdiction in relation to ground rent.

10. The brokers invoices and the invoice figure presented to the Applicant (which includes the sum for ground rent) are shown in the table.

Year	Respondent's invoice	Brokers invoice (date)
2016	£458	£1074.46 (03.02.2016)
2017	£474	£1122.55 (03.02.2017)
2018	£502	£1207.81 (03.02.2018)
2019	£528	£1274.86 (20.02.2019)
2020	£522	

11. After the Applicant's application to the Tribunal, the Respondent sent a further invoice, dated 9 February 2021. That only charged the insurance from 3 February 2019 and the 3 February 2020. The sums were £321 and £317.

12. The 12 March 2020 invoice divides the total premium by three to arrive at the sum demanded (see below for the proportion issue).

13. The 9 February 2021 invoices appears to divide the overall premium by four (although the total premium for 2019 implied by the invoice is £1,284, not £1274.86, an apparent minor calculation error).

14. The Applicant does not object to the sums demanded in the 9 February 2021 invoice, and has paid them.

15. The Applicant argues, however, that the demands for the years 2016 to 2018 are not payable, on the basis that they were demanded more than 18 months after they were incurred.

16. Section 20B of the 1985 Act is reproduced in the appendix to this Decision. That provision requires that a demand for a service charge be made no later than 18 months after it is incurred.

17. In general, a cost is "incurred" for the purposes of a service charge when an invoice is proffered (*OM Properties Ltd v Burr* [2013] EWCA Civ 479, [2013] 1 W.L.R. 3071). Section 20B(2) provides for a notice of costs to be given within the 18 month period to preserve liability to pay beyond the 18 month period. There is no suggestion that such a notice was served in this case

18. *Decision*: The service charge demanded in respect of building insurance which relates to the premiums demanded in the brokers invoices dated 2016, 2017 and 2018 are not payable.

The proportion

19. The Applicant notes that the 12 March 2020 invoice divides the premium invoices by three. He argues that the division should be by four, now that there are four residential flats in the building.

20. The Applicant interprets the invoice of 9 February 2021, which represents a division by four (see above) amounts to an agreement by the Respondent that four is the correct divisor. There has been nothing from the Respondent to gainsay this assumption.

21. The Applicant's argument is that "the lease … does not specify what proportion of the building insurance or other costs should be paid by the leaseholder". That is not correct. As noted above, the lease

stipulates that the insurance rent should be divided according to rateable proportion, or, if rates were abolished before a rateable proportion was ascertained, by means of floor area. It is clear that, although slightly different terms are used ("property" and "the building as a whole"), it was intended that all the occupants of the building – the occupants of the office/storeroom as well as residential occupiers, initially – were to pay appropriate proportions. That now clearly applies to all four flats.

22. Domestic rates ceased to be leviable in England and Wales in 1990. I do not know whether the rateable value of the flats was ever ascertained. No calculation according to proportionate floor area appears to have been made. Pragmatically, it may well make good sense for the parties to agree a straightforward fourfold division as a stand-in for rateable proportion or an exact calculation of floor space. In the circumstances, I conclude that such an agreement appears to be in place, and accordingly a fourfold division of the insurance premium is a reasonable one.

23. *Decision*: In the absence of a calculation according to the lease of the relative proportions of the insurance rent payable in respect of each of the four flats, a simple division by four as agreed between these parties is reasonable.

Application for orders under Section 20C of the 1985 Act/Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A

24. Given his level of engagement, any costs incurred by the Respondent must be negligible. Nonetheless, the Applicant makes the applications under section 20C of the 1985 Act and paragraph 5A of schedule 11 to the 2002 Act.

25. An application under section 20C is to be determined on the basis of what is just and equitable in all the circumstances (*Tenants of Langford Court v Doren Ltd* (LRX/37/2000). The same applies to paragraph 5A, a provision enacted to ensure that a parallel jurisdiction existed in relation to administration charges to that conferred by section 20C.

26. The success or failure of a party to the proceedings is not determinative. Comparative success is, however, a significant matter in weighing up what is just and equitable in the circumstances. The Applicant has been wholly successful in this application.

27. I conclude that it is just and equitable to make both orders.

28. *Decisions*: The Tribunal orders:

(1) under section 20C of the 1985 Act that the costs incurred by the Respondent in proceedings before the Tribunal are not to be taken into account in determining the amount of any service charge payable by the Applicant; and

(2) under the Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A that any liability of the Applicant to pay litigation costs as defined in that paragraph be extinguished.

Rights of appeal

29. 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 London regional office.

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

31. If the application is not made within the 28 day time limit, the 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 these reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

32. 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 Professor Richard Percival **Date:** 17 June 2021

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 provision 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.

(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 of an application under subsection (1) or (3).

(7) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

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 20ZA

(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

(2) In section 20 and this section—

"qualifying works" means works on a building or any other premises, and

"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

(a) if it is an agreement of a description prescribed by the regulations, or

(b) in any circumstances so prescribed.

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—

(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,

(b) to obtain estimates for proposed works or agreements,

(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) Regulations under section 20 or this section—

(a) may make provision generally or only in relation to specific cases, and

(b) may make different provision for different purposes.

(7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

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 tribunal2 or leasehold valuation tribunal or the First-tier Tribunal3 , or the Upper Tribunal4 , 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 the county court ;

(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal;

(c) in the case of proceedings before the Upper Tribunal4 , 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 the 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]1 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).