FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) &

IN THE COUNTY COURT at GUILDFORD

Case Reference	**:**	**CHI/43UM/LIS/2021/0042**
County Court claim	**:**	**210MC916**
Property	**:**	**2 Holly Lodge, Beechwood Road, Knaphill, Woking, GU21 2BT**
Applicant	**:**	**Holly Lodge Freehold Management Company Limited**
Representative	**:**	**Dr Matt Easton (Director)**
Respondent	**:**	**Mr Richard McNee**
Representative	**:**	**(self)**
Type of Application	**:**	**Transferred proceedings from the County Court**
Tribunal Members	**:**	**Judge J Dobson**
Date and venue of Hearing	**:**	**Havant Justice Centre, Elmleigh Road, Havant PO9 2AL** **16th December 2021**
Date of Decision	**:**	**12th January 2022**

DECISION

Those parts of this decision that relate to County Court matters will take effect from the 'Hand Down Date' which will be the date this decision is sent to you.

Summary of Decision of the Tribunal

1. **The Applicant has failed to demonstrate that any service charges are recoverable by the Applicant lessor from the Respondent lessee.**

2. **The Tribunal has insufficient information on which to determine the reasonableness of any service charges insofar as they may subsequently be recoverable.**

3. **No costs of the proceedings may be recovered by the Applicant as service charges or administration charges.**

Summary of the Decision of the County Court

4. **The Applicant's claim is dismissed.**

5. **The Respondent's counterclaim is dismissed.**

6. **No order as to costs.**

Procedural Background

7. On 3rd May 2021, the Applicant lessor filed a money claim in the County Court under Claim No. 210MC916. The substantive claim was for the sum of £1710.40, comprising sums claimed as service charges in relation to 2 Holly Lodge, Beechwood Road, Knaphill, Woking, GU21 2BT ("the Property"), together with court fees of £105.00. No claim was made for interest or any legal fees. A detailed chronology was included, and particular reliance was placed on a document headed "Maintenance Agreement" ("the Maintenance Agreement" or "the Agreement").

8. The Respondent filed a Defence by completing the Defence and Counterclaim form, supplemented by a document headed "Statement of Facts" referring to various "Evidence Items". The Counterclaim was expressed to be for £4490.00, comprising costs said to have incurred by the Respondent in relation to maintenance of Holly Lodge ("the Building") and its garden and other grounds ("the Grounds"), together with court fees of £205.00.

9. On 28th July 2021 the whole claim was transferred to the Tribunal by Order of District Judge Wilson, dated 13th September 2021. As a result of amendments to the County Courts Act 1984, the issues falling outside of the Tribunal's jurisdiction can be determined by a Tribunal Judge sitting as a Judge of the County Court and such issues were allocated to a Tribunal Judge accordingly.

10. The Tribunal gave Directions dated 14th September 2021 allocated the County Court elements to the Small Claims Track of the County Court. The Directions required each side to serve witness statements and documents relied on and permitted the Applicant to serve a Reply. The Directions provided for a bundle ("the Bundle") to be prepared and listed the case for final hearing/ Small Claim Track trial on 16th December 2021

The factual background to the dispute and the Property/ Building

11. The Applicant is a company set up to acquire the freehold of the Building and Grounds. The Applicant acquired the freehold of the Building and the Grounds in February 2007. There are four shares in the Applicant company, one held by each of the lessees of flats within the Building, including the Applicant's representative and the Respondent. The Respondent became the lessee of the Property in June 2014.

12. There are two officers of the Applicant, the Applicant's representative and Ms Barbara Sullivan.

13. It was apparently perceived that there was not a mechanism to deal with the undertaking of work to the Building and the Grounds and payment for that and that in any event there had been a difficulty in obtaining contributions to the costs incurred from one of the lessees. The Respondent was, it is said, anxious for that to be attended to.

14. The Maintenance Agreement was entered into between themselves by the then four lessees. It is dated August 2019 towards the top of the document but was signed by the Respondent on 19th September 2019. That was not signed by a subsequent lessee- Mr Vincenzo Scannella- and re-signed by the continuing lessees on Mr Scannella's acquisition of that flat. His signature to a version of the agreement was obtained and there is a document in the Bundle which shows that in place of the earlier lessee together with the signatures of the remaining lessees. However, it is apparent that the new signature was superimposed and that there was no mutual signed agreement between the current four lessees. Nothing turns on that new purported signature in this application, although the Maintenance Agreement itself is relevant and referred to below.

15. The Respondent refused to pay the amounts demanded by the Applicant on the basis of sums asserted to be owed to him by the Applicant.

16. Thus, the remit of the Tribunal was to determine whether the service charges demanded were payable and reasonable.

17. The Tribunal Judge would then decide, sitting as a Judge of the County Court, whether any service charge sums were owed to the Applicant, and would further decide whether the Respondent succeeded in respect of his counterclaim.

The Lease

18. The Tribunal was provided with a copy of the lease for Flat 2 ("the Lease"). The Lease, dated 9th February 1976, is for a term of ninety-nine years.

19. The relevant parts of the Lease provide the following various matters (my emphasis added):

    Clause 1 includes a requirement for the lessee to pay rent, now of £60 per year, by two half- yearly instalments on 24th June and 25th December.

    There is also a requirement on the lessee to pay by way of further or additional rent sums equal to one quarter of the amount which the lessor may expend on appropriate insurance, which must be paid on the half yearly rent payment date after the expenditure on taking out the insurance has been incurred.

    Clause 4(2) requires the lessee to pay annually one quarter towards the costs, expenses and outgoings and matters in the fourth schedule to the Lease.

    The fourth schedule essentially includes all costs of complying with the lessor's obligations in respect of the Property and Grounds plus certain other matters.

    Those obligations, set out in clauses 4, 5 and 6 appear to include the usual requirements for maintenance, insurance and enforcement, although the particular page of the Lease which appears to have set out much of the contents of clause 5 has been obscured by a plan which was presumably attached to that page in the original Lease. In the event, nothing turns on that.

20. It can fairly be said that the style of the Lease differs to an extent from that of somewhat more recent drafting of most leases.

21. It is not immediately obvious on what date or dates the annual payment towards costs, expenses and similar should be made. Whilst

one or more of the rent payment days may be the most obvious such date from the perspective of how the Lease is drafted generally, such date(s) is(are) not stated- and there is no need in the event for the Tribunal to determine the point.

The Hearing

22. The Applicant was represented by Dr Easton and the Respondent represented himself. The hearing was conducted as video proceedings. Judge Dobson sat as the sole member of the Tribunal as well as the County Court Judge, the approach take to Tribunal composition being particularly a reflection of the fact that approximately three- quarters of the amounts claimed were claimed by the Respondent as his counterclaim and determinable by the County Court.

23. It was of help that both representatives were realistic as to the difficulties arising with their respective cases- as explained below.

The Case before the Tribunal

The Tribunal's jurisdiction

24. The Tribunal has power under section 27A of the Landlord and Tenant Act 1985 ("the Act") to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a lessee to a lessor for the costs of services, repairs, maintenance or insurance and the lessor's costs of management, under the terms of the Lease and which vary according to such costs- section 18 of the Act.

25. The Tribunal can decide by whom, to whom, how much and when a service charge is payable. By section 19 of the Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges. Where service charges are payable in advance, no greater amount than is reasonable is payable (section 19(2)).

26. The Tribunal takes into account the Third Edition of the RICS Service Charge Residential Management Code ("the Code") approved by the Secretary for State under section 87 of the Leasehold Reform Housing and Urban Development Act 1993 and effective from 1 June 2016. The Code contains a number of provisions relating to variable service charges and their collection. It gives advice and directions to all

landlords and their managing agents of residential leasehold property as to their duties.

27. The Approval of Code of Management Practice (Residential Management) (Service Charges) (England) Order 2009 states: Failure to comply with any provision of an approved code does not of itself render any person liable to any proceedings, but in any proceedings, the codes of practice shall be admissible as evidence and any provision that appears to be relevant to any question arising in the proceedings is taken into account.

28. It is well established that a lessee's challenge to the reasonableness of a service charge must be based on some evidence that the charge is unreasonable. The burden is on the landlord to prove reasonableness, but the tenant cannot simply put the landlord to proof of its case. Rather the lessee must produce some evidence of unreasonableness before the lessor can be required to prove reasonableness (see for example *Schilling v Canary Riverside Development Ptd Limited* [2005] EW Lands LRX 26 2005).

Payability of the Service charge

29. The Tribunal was mindful that the Respondent had not specifically raised an issue as to the Applicant's compliance with the Lease in relation to the service charges demanded. However, it is fundamental that service charges are actually payable and that the provisions of the Lease and statute in relation to the charges becoming payable have been complied with. The Tribunal must consider the question of whether service charges are contractually and otherwise legally due and to what extent before addressing questions as to reasonableness of the charges.

30. The Tribunal considered it to be quite proper to therefore determine whether service charges were payable and indeed considered that it would not be appropriate to ignore that fundamental question. The Tribunal is an expert one and must apply its expertise to relevant questions in the case. The Tribunal determined it to be inappropriate to ignore the question of the requirements of the Lease and the wider law.

31. The Applicant is correct to say that the Respondent is nevertheless required by the Lease to pay service charges to the Applicant. However, the Lease is quite vague as to the requirements in respect of service charge demands and payments, explained above. As touched on in paragraph 21 above, the Lease does not in terms say that the annual payment of service charges is to made in one single sum, whether on the anniversary of the signing of the Lease, or a rent date. At first blush, neither does it say any other clearly identifiable date. It should be emphasised that the Tribunal has not considered the matter

with full care because the outcome of the case is determined by other matters. However, the Lease most certainly does not say the payment is to be made in, for example, monthly instalments.

32. The Applicant's case is that the Respondent was required to pay £50 per month and to pay a quarter of the other costs arising to the Applicant. The sums sought by the Applicant at the monthly rate stated were sought pursuant to the provisions of the Maintenance Agreement and explicit reference is made to that. The requirement on the part of the Respondent to pay £50 per month contributions (plus one quarter of other costs incurred or to be incurred by the Applicant, for these purposes the insurance and the tree removal) is a requirement of the Agreement.

33. The Applicant stated in correspondence to the Respondent that maintenance contributions and service charges are "the same thing". The Tribunal does not agree.

34. Reference is made in the Maintenance Agreement to the "management company". However, that is plainly in error. There is no such thing. The only company relevant is the Applicant, which is the freeholder/ lessor. It does not employ any separate company to manage the Building and the Grounds. The Maintenance Agreement appears to perceive the "management company", albeit plainly meaning the Applicant, to be something different to the freeholder/ lessor, whereas it is not.

35. In any event, the Applicant is not a party to the Maintenance Agreement and no provision of the document states that it is able to enforce the terms. The Agreement is, as noted above, an agreement between the then lessees themselves.

36. The Agreement is not said to be, and is not, a variation of the Lease. The Applicant's representative stated in the hearing that it was never intended to do so. He presented the Agreement as practical attempt to avoid previous difficulties with obtaining payments. It may well be that appeared a sensible approach to take, and the Tribunal notes for example, correspondence relied on making reference to somewhat unequal contributions at earlier times. The Tribunal does not, notwithstanding the other matters addressed in this Decision, criticise that approach in itself.

37. However, any provisions applicable as between the parties to the Agreement do not alter the position between these parties to this set of proceedings, which must be considered pursuant to the provisions of the Lease and the requirements applicable to service charge demands.

38. As identified above, a different provision applied in respect of insurance to that applicable to other sums claimed. That is in this instance applicable to an unpaid sum of £10.40 payable for the Respondent's contribution to an adjustment to the insurance premium.

39. That payment would have been due pursuant to the Lease on 24th June 2021- the next rent payment date after it the extra cost was incurred. It necessarily follows that it was not due as the date of issue of the claim in May 2021 and could not be claimed as owing at that time irrespective of any other relevant matters.

40. The sums demanded have not, in respect of any of them, identifiably been demanded in accordance with the provisions in the Lease or indeed pursuant to the Lease.

41. It was abundantly clear that the service charge demands, such as they were and applicable to the insurance adjustment the same as the remainder of the sums claimed, did not demonstrably comply with the wider statutory requirements for such demands.

42. The Claim Form refers to emails requiring payments, although only one such was provided. That attached a short statement of sums said to be due in respect of maintenance contributions, being the total of the "monthly payments" for seventeen months, plus other specific costs. It is, as the Applicant describes it, a statement and not a service charge demand for service charges for a given period pursuant to the Lease.

43. The email and statement do not, and do not demonstrably attempt to, comply with statutory requirements for service charge demands. Most obviously, there was no identifiable Summary of Rights and Obligations attached as required by section 21B of the Landlord and Tenant Act 1985.

44. Consequently, even if the Applicant had been able to rely on the terms of the Maintenance Agreement, the lack of demands complying with statutory requirements would have prevented the sums being payable until such time as those requirements were met and subject to any other defences available at that time.

45. Accordingly, there has, on the evidence presented, been no valid demand for service charges such that at this time no service charges are payable and due. The Tribunal found that no service charges were payable.

46. In any event, there are no service charge accounts produced, nor other financial documents and so if matters had got as far as the Tribunal considering the reasonableness of service charges demanded, there

was, amongst other potential issues, nothing to demonstrate the level of expenditure incurred by the Applicant and how the sums sought from the Respondent related to those on the basis of which the Tribunal could have found the charges to be reasonable. In respect of one particular matter, not that a determination was required in the event, it was unclear why the claimed sum for the cost of removal of trees was £750.00, an email of December 2020 from the Applicant's representative to the lessees indicating that a quote of £3000.00 had been received but then a lower one of £2160.00. At first blush, in the event that a service charge were payable, the reasonable sum would appear to be no more than a quarter of that lower sum. There may be an explanation which the hearing did not need to reach.

Set- off and defence as to reasonableness

47. The argument by the Respondent in respect of sums said to be owed to him by the Applicant may have been relevant in relation to service charges otherwise being payable, in the event that the Applicant had been able to demonstrate that any were payable in the first instance. However, as no service charges were demonstrated to be payable, there is no sum against which to set- off. Consequently, the Tribunal did not consider whether the Respondent's assertions may amount to breaches of covenant on the part of the Applicant, those having no impact on the level of service charges (none) found payable. Therefore, no such findings have been made by the Tribunal.

48. Neither did the Tribunal need, for example, to consider the argument raised by the Respondent, amongst others, as to the tree removal work not being reasonable as relating to trees not within the Grounds and the responsibility of the Applicant. The Applicant is said in email correspondence to have assumed the trees to be its responsibility. Nevertheless, in the event that it may subsequently be relevant, the Applicant may be well advised to consider the point and whether the Lease would permit the recovery of that cost.

The Tribunal's concluding remarks

49. The cases presented were unsatisfactory at best. There was a failure to understand the primacy of the Lease and the requirements imposed by it or to understand the relationship between that and the separate Maintenance Agreement.

50. Whilst the Respondent was critical of the Lease, the Lease is adequately clear in identifying the obligations of the Applicant and it has provisions for charging service charges to the and Respondent and the other lessees and enabling action to be taken to recover those if not paid, albeit that the short clause referring to paying one quarter of the Applicant's costs and expenses and similar annually is unclear as to the payment date and potentially problematic.

51. Nevertheless, if the Applicant had followed the requirements of statute and so made otherwise valid demands and its approach had fallen within the provisions of the Lease, there could be little question that service charges would have been payable to the Applicant by the Defendant insofar as reasonable in light of expenditure reasonably incurred.

52. It may be that the Lease, with for example no provision permitting the claiming of payments on account, is not in a form obviously desirable where the lessor is a lessee- owned company such as the Applicant with no assets save for the freehold of the Building and Grounds and no income save for the sums paid by the lessees. As noted above, the date(s) for payment of service charges other than insurance by the lessees could helpfully be clearer. As to whether there may be ways of making the situation work without variation of the Lease is a matter beyond the remit of the Tribunal, the job of which is neither to advise nor to speculate, at this time.

53. Any cause of action under the Agreement entered into between the four lessees at that time is a separate matter to recovery by the Applicant of sums payable under the Lease. So too are any matters arising from the company and membership of it and any related company governance matters. Equally, there may be other matters to be addressed in terms of the maintenance payments that have been made and their application. together with related accounting. Those will all be matters for the parties to consider and seek advice about should they choose to do so.

54. What can be said without much fear of being proved wrong is that the lessees need to seek to resolve any past differences and issues arising from these proceedings and to co-operate in effective management of the Building and the Grounds. There are only four lessees, all of whom are members of the company and all of whom have an obvious interest in maintaining the Building and the Grounds and in attending to necessary expenses, whether insurance or otherwise, not only in their collective interest but also in their own individual interests. In contrast, continued lack of co-operation and, worse, any disputes will only cause ongoing difficulties, time and expense, and will be detrimental to all the parties involved in the Building and the Grounds, including their individual financial interests. The Tribunal trusts that these remarks will be given careful thought.

55. No application was made by the Respondent to prevent costs of the litigation, if any, being recoverable as service charges and/or administration charges, in the event that such recovery would otherwise be permitted pursuant to the Lease and applying section 20C of the Act and paragraph 5 of Schedule 11 of the Commonhold and Leasehold Reform Act 2002. The Tribunal did not therefore address that potential matter.

The County Court issues

56. The effect of the Tribunal determination that none of the sums demanded are payable on the evidence presented necessarily causes the claim to fail - there is no indication that any sum was properly due prior to the amounts set out by the Applicant.

57. In relation to the Counterclaim, the Respondent asserted that he had incurred expenditure maintaining as no-one else would do so, which maintenance is the responsibility of the Applicant. He stated that the cost had been considerable.

58. The Applicant filed a document described a witness statement, made by Dr Easton and dated 11th October 2021. Whilst it does not explicitly state that it is the reply provided for in the Directions, it is adequately clear that is its purpose, being filed the day before the last date for such a reply and, having reiterated the Applicant's case, addressing the Counterclaim. The statement said that a detailed response to the issues raised in the Counterclaim had been set out in a Defence to the Counterclaim. That document was not contained in the court file and nor was it included in the bundle for the final hearing. Neither was it produced at the hearing. Consequently, the contents have not been considered, although it appears unlikely the document would have added anything in the event. The Applicant's essential position, namely that the Applicant had not agreed with the Respondent for the Respondent to undertake work, or indeed been provided with a quote for such work or invoice for sums said to be payable, was explained in the witness statement.

59. The Respondent was candid in accepting that no legal agreement had been reached with the Applicant that work would be charged to it and paid for by it. He did not seek to advance any other basis on which the Applicant might be liable to the Respondent for any sum expended. He described the matter as a moral one, not a legal one.

60. It is apparent that the Respondent sent emails referring to expenditure and proposing to charge for maintenance undertaken by or for him. It is not immediately apparent that any of those constituted a demand for payment which was not met giving rise to a cause of action even had there been such a legal agreement. It is also apparent that the Applicant and/ or others of the lessees were aware of cost incurred by the Respondent or at least of work being undertaken, of which at least some work they appear to have been happy about. It is less that more recent work found favour.

61. No other consideration of or comment on the immediately above matters is required in the circumstances.

62. It necessarily follows from there being no agreement on the part of the Applicant to pay sums expended by the Respondent and no other basis for liability set out in the Counterclaim that the Respondent's counterclaim also fails.

63. Both parties incurred court fees in issuing their respective claims and sought recovery of those from the other party when doing so. As noted above, no other claim for costs was brought.

64. The court has a wide discretion in respect of fees and costs pursuant to Part 44 of the Civil Procedure Rules. Those include whether to make a costs order, in whose favour that should be made and any general limits on that other than as to the specific sums and thereafter as to how much of such costs as might be payable are awarded, including consideration of work undertaken where applicable and proportionality. To that relates to legal costs of professional lawyers or the costs claimed by parties for their time, those aspects are not directly relevant given that the claims were limited to court fees.

65. Taking account of the circumstances and lack of success of the claim or the counterclaim, I conclude that the court's powers should be exercised to disallow recovery of the fee paid by both parties.

ANNEX - RIGHTS OF APPEAL

Appealing against the Tribunal's decision

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 date this decision is sent to the parties.

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 state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers

Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.

Appealing against a reserved judgment made by the Judge in his/her capacity as a Judge of the County Court

A written application for permission must be made to the court at the Regional Tribunal office which has been dealing with the case.

The date that the judgment is sent to the parties is the hand-down date.

From the date when the judgment is sent to the parties (the hand-down date), the consideration of any application for permission to appeal is hereby adjourned for 28 days.

The application for permission to appeal must arrive at the Regional office within 28 days after the date this decision is sent to the parties;

1. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers

2. If an application is made for permission to appeal and that application is refused, and a party wants to pursue an appeal, then the time to do so will be
extended and that party must file an Appellant's Notice at the Regional Tribunal office within 21 days after the date the refusal of permission decision is sent to the parties.

3. Any application to stay the effect of the order must be made at the same time as the application for permission to appeal.

Appealing against the decisions of the tribunal and the decisions of the Judge in his/her capacity as a Judge of the County Court

4. In this case, both the above routes should be followed.

Appendix of legislation relevant to the Tribunal decision

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.