FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AZ/LSC/2020/0276**
HMCTS code	**:**	**V: VIDEO**
Property	**:**	**27B Brockley Grove, London, SE4 1QX**
Applicant	**:**	**Mr F Henry**
Representative	**:**	**In person**
Respondent	**:**	**Beitov Property Limited**
Representative	**:**	**Mr Galliers, BLR Property management Ltd**
Type of Application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival** **Mr R Waterhouse MA LLM FRICS**
Date and venue of Hearing	**:**	**13 September 2021** **Remote**
Date of Decision	**:**	**22 November 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was CVP. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The contents of the electronic bundle have been 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 ending on 24 March 2019 and 2020.

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

The property

3. The property is a two bedroom flat in a converted house. There is one other flat.

The lease

4. The Applicant acquired the leasehold interest in 2003. The lease is dated 1985, for a term of 99 years (running from 1984).

5. By clause 1, the tenant covenants to pay 50% of the cost of the lessor's insurance obligation, which is contained in clause 5(2). The tenant covenants to pay the interim charge and the service charge (as defined in the seventh schedule) in clause 4(2). The Lessor's repairing etc covenant is set out in clause 5(4) and (5).

6. The fifth schedule defines the costs relevant to the service charge as those relating to the lessor's repairing etc covenant and the management costs, which expressly include the employment of managing agents (the relevant definitions being provided in the seventh schedule). The seventh schedule also defines the "interim charge" as a sum paid on account of the service charge, payable twice yearly on 25 March and 29 September. Provision is made for reconciliation of interim and final charges (paragraph 5 of the seventh schedule), and for the service by auditors of a service charge certificate setting out the interim and final charges (paragraphs 6 and 7).

7. There is a section 146, Law of Property Act 1925 notice clause (clause 3(j)).

The issues and the hearing

8. The Applicant represented himself, and Mr Galliers of BLR Property Management, the managing agent, represented the Respondent.

9. Initially, in his application the Applicant had stated that he contested service charge demands from 2015 to 2020. We note at this point that service charges relating to the property had been adjudicated in two previous Tribunal applications (LON/00AZ/LSC/2017/0137, 15 September 2017; and LON/00AZ/LSC/2019/0443, 17 February 2020, when the Tribunal had also been sitting as the County Court).

10. At the start of the hearing, the Tribunal and parties spent some time isolating the issues that remained in issue. The documentation available to the Tribunal was somewhat limited, and we adjourned twice for short periods to allow the parties to send us additional material and/or clarify their positions.

11. We concluded, and the parties agreed, that the issues remaining related to the final service charge accounts for the years ending 24 March 2019 and 24 March 2020.

12. We set out the charges for each year below. The totals are for the house as a whole, the Applicant's share being 50%.

Year ending March 2019	
Insurance	£848.01
Management fee	£640

Year ending March 2020	
Accountancy fees	£180
Insurance	£1,007.55
Legal fees	£4,200
Management fees	£657.41

13. During the course of making submissions in respect of each year, the Applicant said that he now accepted the sums for insurance and accountancy fees. At issue, therefore, were the management fees for both years and the legal fees for the second year.

14. As a general point, Mr Galliers objected that the original application related only to interim fees, and that it had been insufficiently particularised. We agree that there was a lack of specificity in the application, and that this had not been sufficiently clarified before the

hearing. However, since the scope of the service charges was so restricted, we did not consider that the Respondent was in fact prejudiced in relation to the management fees. For our position in relation to the legal fees, see paragraph [23] below.

Management fees

15. The Applicant's argument came down to the assertion that the management fees were just too high, given the limited nature of the management actually carried out. The Applicant initially asserted that the lease was, at least, ambiguous as to who was responsible for maintaining the building, but accepted that the clause he identified related only to maintenance of the demised premises, not the parts of the building the freeholder was responsible for.

16. Nonetheless, there was, he said, an informal agreement that the leaseholders would look after the building, and the freeholder did not do so. He said that he and the other leaseholder had replaced the roof some years ago, as evidence of this agreement.

17. Mr Galliers defended the management fees. The fee per unit was, he said, in accordance with the market average. His firm managed the property as part of the freeholder's portfolio. If it had been a freestanding proposition, however, his company had a general policy of requiring a fee of not less than £1,500 per building. It was true that they had not undertaken any maintenance or redecoration, but that was simply that it had yet to become necessary.

18. His account in relation to the informal agreement was that there had been such a general agreement before the last Tribunal hearing. After that, the freeholder had initially asked BLR to undertake the full range of management tasks, but had then agreed that they should not do so in respect of everyday tasks such as cleaning the common parts, but that they would be responsible for the structure of the building.

19. We asked Mr Galliers about whether they inspected the property. Initially, he took it as a query in relation to fire inspections, and said they contracted such inspections to a specialist company, and had yet to do so at 27 Brockley Grove. As to normal property inspections by a managing agent, they did not do so as a result of a lack of co-operation from the leaseholders. In reply, the Applicant rejected this charge. He had never been approached to provide access to BLR.

20. We put it to Mr Galliers that it was the general experience of the Tribunal that per unit costs for the management of properties of this sort were in a range from about £250 to perhaps £375, but that this was for a management service providing the full range of services, not merely procuring insurance and billing. He responded that BLR were still responsible for the internal communal areas, external decoration

and the structure, and would still arrange services if necessary. He mentioned that the leaseholders had now served a right to manage application, in what we took to be an explanation that it was unlikely that such services would be required in the immediate future.

21. We prefer the Applicant's submissions. It is clear that, whatever the position in relation to responsibilities under the lease, the only matters actually dealt with by the managing agents on behalf of the Respondent were insurance and arranging charging and collection of ground rent and service charges. This had been so for at least a considerable time before BLR took on the management, and, as a matter of fact, still persists. We do not think that in the circumstances, a per unit management fee of £320 (2018-19) or £329 (2019-20) is warranted.

22. *Decision*: The management fees charged are unreasonable in amount. A fee of £270 and £279 should be substituted for the years ending March 2019 and March 2020 respectively.

Legal fees

23. While it was clear in advance of the hearing that the cost of the insurance and of the management fees would be in issue, it was not so clear to us that Mr Galliers was in a position to deal with the issue of legal fees in the year ending March 2020, despite the fact that they constituted by far the largest item in either year. The Applicant had been required to pay £3,000 in costs following the last combined Tribunal/County Court hearing, and before us he said that he had paid that, so, he contended, this fee was in addition to that. Mr Galliers was, however, unable to provide us with any details as to what the fees consisted of.

24. Mr Galliers argued that the fifth schedule to the lease was sufficiently broad to allow legal fees to be charged through the service charge.

25. We concluded that it would be fair to Mr Galliers to allow the Respondent to make written submissions as to both whether the lease allowed the charging of legal fees to the service charge, and the reasonableness of those fees, and made directions accordingly.

26. Mr Galliers submitted his further response. As to whether the lease allowed for the collection of legal fees through the service charge, he argued that as paragraph 3 of the fifth schedule allowed the collection of "the costs of management of the building which shall include the costs of the Managing Agents", that implied that there were management costs other than those of the managing agent, and that legal fees were costs of managing the building. He also relied on the definition of "the total service cost", as including "costs of administration professional and management fees".

27. In relation to the reasonableness of the costs, Mr Galliers states that reasonableness has not been challenged, as the Applicant only asked for further particulars. Mr Galliers notes that the Applicant had been sent "copies of the accounts showing details of the expenditure".

28. The Applicant, in a further response, only addresses the issue of his challenge to the reasonableness of the charge, and repeats various points about the provision of information.

29. We reject the Respondent's contention that legal fees must be recoverable under the heading of "management costs" in the lease. Of course, in every case, the individual lease falls to be construed in its own terms. But nonetheless, it is difficult to find a case in which litigation legal costs have been found to be recoverable under the heading of "management" without more. There is an illuminating treatment of the issue by the Deputy President in *Geyfords Limited v O'Sullivan and Others* [2015] UKUT 683 (LC), for example, in which the Upper Tribunal upheld a decision of the Tribunal that a clause that allowed "all other expenses … incurred by the lessors … in and about the … management and running" of a property did not include litigation costs.

30. In the recent case of *No. 1 West India Quay (Residential) Ltd v East Tower Apartments Ltd* [2021] EWCA Civ 1119, the Court of Appeal quoted with approval the dictum of Taylor LJ (as he then was) in *Sella House Ltd v Mears* (1988) 21 H. L. R. 147:

> "I add only a few words on the issue whether legal fees can be included in the service charge under this lease. Nowhere in Clause 5(4)(j) is there any specific mention of lawyers, proceedings or legal costs. The scope of (j)(i) is concerned with management. In (j)(ii) it is with maintenance, safety and administration. On the respondent's argument a tenant, paying his rent and service charge regularly, would be liable via the service charge to subsidise the landlord's legal costs of suing his co-tenants, if they were all defaulters. For my part, I should require to see a clause in clear and unambiguous terms before being persuaded that that result was intended by the parties."

31. While the use of this dictum to require "magic words" has been deprecated in some recent cases, particularly following *Assethold Ltd v Watts* [2014] UKUT 537 (LC); [2015] L. & T.R. 15, the current case seems to us to present a clear example of when "clear and unambiguous terms" would be necessary to justify collection of such legal fees through the service charge.

32. Having found that the legal fees are not chargeable to the service charge, we are not required to consider whether they are reasonable in amount.

33. We had anticipated that the Respondent might seek to justify collection of the legal fees not through the service charge, but as an administration charge under clause 3(j). We considered that such collection would not be possible in the current context, there being no evidence that the Respondent had forfeiture of the lease in actual contemplation in relation to the relevant proceedings. We note that the Court of Appeal in *No. 1 West India Quay* has upheld that approach to such clauses in *Barrett v Robinson* [2014] UKUT 322 (LC), [2015] L. & T. R. 1. The issue is, however, not technically before us.

34. *Decision*: The service charge referable to the legal fees are not payable.

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

35. The Applicant applied for orders under section 20C of the 1985 Act that the costs of these proceedings may not be considered relevant costs for the purposes of determining a service charge; and an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 extinguishing any liability to pay an administration charge in respect of litigation cost in relation to the proceedings.

36. We have found that legal costs may not be charged to the service charge under the lease. However, we will nonetheless consider the section 20C application on its merits as if the lease did provide for the recovery of such costs, in the event that it may become relevant if we are reversed on appeal on that issue. We have made no formal determination in relation to the administration charge, and consider the paragraph 11 application on that basis.

37. 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 approach must be the same under paragraph 5A, which was enacted to ensure that a parallel jurisdiction existed in relation to administration charges to that conferred by section 20C.

38. Such orders are an interference with the landlord's contractual rights, and must never be made as a matter of course.

39. We should take into account the effect of the order on others affected, including the landlord: *Re SCMLLA (Freehold) Ltd* [2014] UKUT 58 (LC); *Conway v Jam Factory Freehold Ltd* [2013] UKUT 592 (LC); [2014] 1 EGLR 111.

40. 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.

41. There are no evident financial implications for the landlord (or any other party), as there would be, for instance, in the case of a tenant-owned freehold company. The Respondent did not make such an argument before us.

42. As for success, the Applicant has been wholly successful before us.

43. We conclude that it would be just and equitable to make the orders.

44. *Decision*: We order (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 Applicants; and (2) under Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A that any liability of the Applicants to pay litigation costs as defined in that paragraph be extinguished.

Rights of appeal

45. 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.

46. 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.

47. 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.

48. 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:** 22 November 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).