**FIRST-TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case reference** | **:** | **LON/00BK/LSC/2021/0264.** |
| **HMCTS code (paper, video, audio)** | **:** | **V: CVPREMOTE** |
| **Property** | **:** | **Basement Flat, 64 Marylands Road, London, W9 2DR.** |
| **Applicant** | **:** | **Ms. C. Bradshaw.** |
| **Representative** | **:** | **In person.** |
| **Respondent** | **:** | **Fairdale Property Trading Limited.** |
| **Representative** | **:** | **Greenwoods Solicitors.** |
| **Present at the hearing** | **:** | **Ms. Bradshaw (Applicant)**<br>**Mr. James Castle of Counsel (on behalf of Respondent). Instructed by Greenwoods.**<br>**Ms. Holly Marsh (Property Manager for the Respondent)** |
| **Type of application** | **:** | **For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985.**<br>**For an Order under S.20C Landlord and Tenant Act 1985, and for a determination under Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.** |
| **Tribunal members** | **:** | **Tribunal Judge Aileen Hamilton-Farey.**<br>**Mrs. Louise Crane.**<br>**Ms. J. Gittus (Observer)** |
| **Venue** | **:** | **Remote.** |
| **Date of decision** | **:** | **30 March 2022.** |

## DECISION

**Covid-19 pandemic: description of hearing.**

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V:CVPREMOTE . A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that the tribunal was referred to are contained in three bundles labelled 1 part A, 1part B, 1 part 2, together with a completed Scott Schedule, all of which have been considered by the tribunal. The order made is described at the end of these reasons.

**The application**

1. The Applicant, Ms. Bradshaw seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of service charges and administration charges payable by her in respect of the service charge years 2013 to 2021 inclusive.

2. Directions were issued by the tribunal on 3 September 2021 which required, amongst other things, for the parties to compile a Scott Schedule of the items in dispute. Ms. Bradshaw prepared the Schedule, which was passed to the respondents for comment and then further comments added by Ms. Bradshaw.

**The Property:**

3. The property is a basement flat in a converted house comprising a total of four flats. Two flats, including the subject, are let on long leases, two have been retained by the freeholder and are let. The first-floor unit is let as non-self-contained accommodation to regulated tenants. The subject property has a separate entrance, and the common parts of the building are accessed through a main front door accessed via entrance steps, under which part of subject property lies.

4. The entire property is classified as a House in Multiple Occupation (HMO) because of the lack of self-containment to the first floor flat and is licensed accordingly.

**The lease:**

5. The applicant occupies the property under a lease originally granted for 99 years from 29 September 1980. On 17 May 2012, by a Deed of Variation, following surrender and re-grant the lease was extended to

189 years with a rising ground rent of £250.00 per annum payable half-yearly on 25 March and 29 September.

6. The applicant is also required to pay a maintenance charge, calculated on the basis of the rateable value of the property compared with the rateable value of the building. In this case the percentage liability is 29.904%. It is not clear whether this is an accurate calculation because the tribunal was not provided with details of the rateable value of the other units in the building, however the sum has been accepted by the parties and is therefore the percentage used by this tribunal.

7. Relevant extracts of the lease are reproduced within the body of this decision.

## The hearing

8. The Applicant appeared in person at the hearing and the Respondent was represented by Mr. James Castle of Counsel. Ms. Holly Marsh the managing agent appeared as a witness for the respondents.

9. The respondent raised two procedural matters in their statement of case. These were: What was the impact on the sums claimed following the transfer of the freehold, given that there had been no express transfer from the landlord of the right to collect sums due, and secondly whether the claim made by the applicant in relation to the garden wall repair was a service charge in any event. Mr. Castle also drew our attention to the fact that although there was only one issue to be determined in the year 2021 (the garden wall), the Scott Schedule had been expanded to include other expenditure such as electricity and works to the common parts. He said that the inclusion of these items was an abuse of process and should not be admitted.

10. The tribunal has taken into consideration the fact that the applicant is a litigant in person, and the items on the Scott Schedule are repetitions of previous years. We consider that by admitting these items, there will be no prejudice to the respondent, and will prevent further applications.

11. In relation to the freehold transfer, Mr. Castle said that the transfer had taken place on 28 October 2018 and that the previous freeholder was now a dormant company. His client (the respondents) did not have any interest in the service charges claimed before this time (and these represented items 1 – 33 on the Scott Schedule, with his clients only interest in items 34 onwards.

12. The tribunal decided that it would consider the items numbered 1-33 because they are repeated throughout the Schedule, and then determine whether these amounts would be payable because of the terms of transfer.

13. With respect to the wall repair, Mr. Castle said that the wall was within the demise of the applicant, and the repair was therefore her responsibility. It appeared in any event that the applicant sought to be reimbursed by the respondent for the amount she had paid to have the wall repaired with the adjoining owner. The applicant had made no application in relation to 'set-off', and it is the tribunal's view that this matter is outside our jurisdiction and should more properly be dealt with in the County Court.

## Decisions of the tribunal

### Historic Maintenance Charges:

A. The tribunal determines that none of the historic and current service charges are payable until the managing agent complies with the lease terms and produces a reconciliation of the maintenance fund for each of the years in dispute. The tribunal considers it is a condition precedent to recovery to produce these reconciliations, the sums may not be recoverable by virtue of S.20B of the Landlord and Tenant Act 1985, but the parties should seek advice on this matter.

B. In relation to the expenditure identified below, a decision is made in principle of liability/reasonableness, however until the manager complies with the lease nothing is payable.

### Electricity Charges and Common Parts Repairs/Maintenance:

C. the applicant is not liable for the cost of providing electricity and repairs to the internal common parts of the building, including the main front door.

### Reasons for the decision:

- The applicant relies on Schedule 8 Clause 3 of the lease, that includes the words 'enjoyed or used by the lessee in common'. She says that she neither uses nor enjoys the common parts, has no access and has never been given a key.
    - Mr. Castle drew our attention to Part 1 of Clause 1 of the sixth schedule – *subject to the payment by the lessee of the rents the Maintenance Charge and the Interim Maintenance charge herein mentioned and provided that the Lessee has complied with all the covenants agreements and obligations on his part to be performed and observed to keep in good*
    - *repair and decoration and to renew and improve as and when the Lessor may from time to time in its absolute discretion consider necessary :……*

- *(c) the Common Parts*
- *BUT EXCLUDING any part of the Property included in this demise by virtue of the Second Schedule or in the demise of any other flat or part of the Property.*

D. The tribunal is satisfied that the landlord is obliged to maintain the common parts, and the definition of those common parts is identified in the lease. However, we have also had regard to the 3rd Schedule –

- *The included rights. The right for the lessee and all persons authorised by him in common with others enjoying the like right at all times for all purposes incidental to the occupation and enjoyment of the demised premises to use on foot only (except in the case of drives or forecourts adapted for vehicular use) the common entrance hall staircases passages and lifts (if any) in the property giving access to the demised premises and any of the common external paths driveways staircases or forecourts leading from the public highway or footpath to the main entrance of the property the demised premises or the refuse area used in connection therewith*

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E. The tribunal considers that the included rights have a direct bearing on the use and enjoyment of the common parts by the applicant. We find that the rights are only effective where they give access to the subject flat or may be incidental to the occupation of the flat. In this case, neither applies. The internal common parts do not give access to the basement flat, nor are they incidental to the occupation of the basement flat. In our view therefore the cost of repairs, maintenance, cleaning etc of the areas behind the main front door of the house are not chargeable to the basement leaseholder. The tribunal accepts that the accessways, steps, refuse area etc are all incidental to the occupation of the basement flat and repairs/maintenance charges for these areas should be apportioned to the basement flat.

**Insurance charges:**

F. The tribunal considers that the amounts claimed in relation to insurance are reasonable payable by the applicant for the years in question.

**Reasons for the decision:**

- We find that the amounts claimed in relation to the 'loss of rent premiums' are recoverable under the lease, and form part of a typical insurance policy of this type. It appears that the applicant has misunderstood the purpose of the loss of rent provision, which could have been explained by the managing agents, to clarify the situation, and preventing this matter coming before the tribunal.

**Works to install fire doors to ground and first floor flats:**

G. The tribunal disallows all costs claimed in relation to the supply and fitting of fire doors to the ground and first floor flats (both internally and the entrance door to the flat).

**Reasons for the decision:**

- The definition of the demise within the lease is as follows: Demise includes – (1) the internal plaster tiles or other coverings of the external and internal load-barding walls of the Flat and the integral garage or cupboard (if any) and the doors door frames windows and window frames fitted in such walls and the glass fitted in such window frames.
- Any of the walls or partitions lying within the flat and the integral garage or cupboard (if any) which are not load-bearing or do not form part of the main structure of the property including the plaster tiles or other coverings of such walls or partitions and the doors and door frames and any glass and locks fitted in such doors walls partitions and door frames.

- From this definition the tribunal is satisfied that the doors/door frames are within the demise of the individual units and any works required to them are not a communal charge and therefore do not form part of the maintenance charge.

- The landlord should therefore credit the maintenance charges demanded of the applicant accordingly.

**Surveyor's project management fees:**

H. The tribunal finds these are reasonable and payable for the works undertaken by the surveyor in preparing the specification of works, consulting with leaseholders.

**Reasons for the decision:**

- The expenditure falls within the Eighth Schedule of the lease, and it is reasonable for the landlord to employ a surveyor to prepare the specification of works. Unfortunately, the works did not proceed, but that does not invalidate the process, or the specification itself, which could be updated and used in the future.

**Management fee – for major works/liaising with local authority:**

I. The tribunal disallows 50% of this charge on the basis that it is unreasonable.

**Reasons for the decision:**

- The tribunal considers that it is unreasonable for the managing agent to charge a supervision fee/fee for liaising with the local authority in relation to the requirements for fire doors/fire alarm and HMO licence, especially given the decision in relation to the fire doors above. Although Ms. Marsh said that the major works project had to be retendered due to a nomination being received from one of the leaseholders, the surveyors have also produced an invoice for altering the specification and re-tendering the works, and there is, in the tribunal's view, a duplication of costs. Any additional supervision fees relation to liaising with the local authority for the improvement and hazard awareness notices for the ground and first floor units should be met by the freeholder, because the works required were not to the common parts.

**General Management Fee:**

J. The tribunal considers that the management of this property, and in particular the tenancy relating to the applicant, has been poor, with the result that the tribunal considers £125.00 per annum to be a reasonable sum.

**Reason for the decision:**

- It was unreasonable for the manager to take eight years to rectify their mistake in charging the incorrect percentage of the maintenance fund. Even though the applicant provided copies of previous demands showing the correct percentage, this was not actioned by the manager. In addition, the manager instructed solicitors to recover unpaid sums, some of which were not properly due.

- In addition, during the hearing Ms. Marsh said that one of the problems with the maintenance fund was that it could only be collected in arrears, and this had meant the freeholder had had to fund works and then recover from the leaseholders. She confirmed that no accounts had been produced because of this and said that they were not necessary they be prepared. This is not the case. The collection mechanism in any event in the lease is clear. The manager should calculate an interim charge, make a demand from the leaseholders, and then provide a reconciliation at the end of the year, making a further demand. The previous managing agent had operated on this basis, and it

should not have been difficult for the manager to read the lease (or take advice) and see what had gone on before.

**Repair to hopper and downpipe:**

K. The tribunal finds that the repair to the hopper is a maintenance fund item, but the work to the ground floor flat waste pipe is not (until it reaches the downpipe). The manager should apportion the costs between the common parts and the landlord's repairs.

**Reasons for the decision:**

- The lease demises all pipework that exclusively serves one property to be the responsibility of that property. In the case of the hopper and downpipe, these are communal repairs, but the connection to the waste in the landlord's flat is not a communal pipe and therefore does not come within the maintenance fund.

**HMO Licence:**

L. The applicant disputes liability for the works carried out as part of the HMO Licensing procedure. She says that, contrary to the respondent's claim, the properties on either side of the subject, have been converted so as to self-contain the first floor rooms, and that the respondent should have done this to avoid the property being registered as an HMO.

M. No evidence was supplied to show that this was the case and the tribunal is satisfied that the respondents complied with the requirements of the local authority. However, given our decisions above, the costs of works to the common parts are not chargeable to the basement flat.

**Legal Fees:**

N. The applicant disputes liability for a proportion of the legal fees that were not recovered from Mr. Ahuja of the first floor flat. She says that the respondent should have factored in the legal fees when reaching an agreement with Mr. Ahuja and not recovered any shortfall from the service charge.

O. Mr. Castle confirmed that the costs could be recovered under Clause 11 of the Eighth Schedule, and that the leaseholders would have taken into consideration when they purchased their flats, that the landlord could recover costs from them in relation to other leaseholder's defaults. The tribunal disagrees. We do not consider that this is part of the 'bargain' that a potential leaseholder would take into consideration. We find that, if the landlord wished to agree a settlement with a defaulting tenant, then they

should take into consideration any legal costs, and not rely on any clause in the lease that would enable them to recover shortfalls from other tenants.

P. In addition, we find that these charges are not recoverable by the current landlord in any event, because they relate to a period prior to the transfer of the freehold. As we were informed at the start of the hearing, there was no agreement on transfer that the new landlord would take on responsibility for the recovery of debts prior to that transfer.

Q. We also find that the sums claimed from the applicant in relation to chasing her maintenance charges are unreasonable. As already noted, the respondent instructed solicitors to recover debts that were inaccurate, and where the lease had not been complied with. It is not reasonable therefore for the applicant to be penalised for the respondents/manager's errors. We find these costs irrecoverable.

**Ground Rent:**

**R.** Although the tribunal does not have jurisdiction to determine disputes regarding ground rent, we find that this complaint also highlights the poor management of the manager. As they should be aware, if a tenant expressly states that a payment should be allocated to a specific item (such as ground rent), then the manager must allocate the payment in that way.

**Application under s.20C, Paragraph 5 of Schedule 11 and refund of fees**

14. At the end of the hearing, the Applicant made an application under S.20C to prevent the landlord from recovering legal fees from the service charge. She also made an application under Paragraph 5A to Schedule 11 to the Commonhold and Leasehold Reform Act 2002 to limit/extinguish administration charges.

15. Mr. Castle said that the legal fees claimed related to the period before the transfer of the freehold and that his client was attempting to recover these on behalf of the previous freeholder. We find in principal that these fees are not recoverable. We were informed at the start of the hearing that there had been no agreement between the original freeholder and the current one that any liability would be transferred. It is our view that the freeholders cannot have it both ways. If it is necessary for the dormant freehold company to be resurrected to recover any outstanding maintenance charges, the same must be said for the legal fees.

16. Following the hearing, the tribunal received a schedule of costs totalling £11,416.00 plus VAT The instructing solicitors made comment that the matter had spanned eight years with in excess of 50 service charges being disputed.

17. The tribunal considers that the applicant has been mainly successful in her application. The respondent's managing agent has not complied with the terms of the lease and has taken steps to recover sums that were not properly due. The cost of works to fire doors and the common parts are not payable by the applicant, and in the circumstances, we find the costs of this and previous legal action to be irrecoverable from the applicant directly, or through the maintenance fund. Although Mr. Castle said that a decision on this basis would stifle the landlord's ability to recover. He said that it did not make sense for the landlord to settle a dispute, if it could not fall back on the lease to recover any shortfall, this was a disincentive for the landlord. We disagree. Although it might be a disincentive for the landlord to settle where it cannot recover its costs, we would expect a landlord to attempt to agree matters, which in this case it has not done. This lack of action on the part of the landlord/managing agent is reflected in this decision.

18. The tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Applicant/ Respondent may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

19. The tribunal also determines that the landlord may not recover any of its costs as administration charges under the lease.

**Name:** Tribunal Judge Aileen Hamilton-Farey **Date:** 30 March 2022.

## 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).