FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BG/LSC/2020/0095**
Property	**:**	**Various Properties on the Avebury Estate, Turin Street, London E2**
Applicants	**:**	**Various Leaseholders on the Avebury Estate**
Representative	**:**	**Dr Kenneth Smith, Secretary to the Avebury Estate (Turin Street) Leaseholders Association**
Respondent	**:**	**The Mayor & Burgesses of the London Borough of Tower Hamlets**
Type of application	**:**	**Payability of service charges**
Tribunal	**:**	**Judge Nicol** **Mr T Sennett FCIEH** **Mr C S Piarroux JP CQSW**
Date and venue of hearing	**:**	**16th and 17th June 2022;** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**7th July 2022**

DECISION

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1) The service charges challenged in these proceedings arising from the lift replacement and fire stopping works are payable by the Applicant to the Respondent.

2) The Tribunal refuses to make an order under section 20C of the Landlord and Tenant Act 1985.

Relevant legislation is set out in an Appendix to this decision.

The Tribunal's reasons

1. The Avebury Estate consists of 27 4-storey blocks of between 8 and 24 flats which range in size from bedsit to 3 bedrooms. There are about 120 leaseholders on the Estate, of whom 40 are Applicants in this case. The

Respondent owns the freehold. The Estate is managed by Tower Hamlets Homes, an arms-length management organisation.

2. The Applicants applied to the Tribunal in accordance with section 27A of the Landlord and Tenant Act 1985 for a determination as to the payability of service charges arising from 5 sets of major works. The Tribunal decided on 18th January 2022 to strike out the application in relation to 3 items, leaving:

   a. Replacement of lifts in some of the blocks, spread over number of years; and
   b. Fire stopping works 2018-19.

3. The application was heard in person on 16th and 17th June 2022. The attendees were:

   - Dr Smith for the Applicants, accompanied by Prof Kevin Hiom (8 Crewe House);
   - Mr Jeff Hardman, counsel for the Respondent;
   - Mr Karl Schooling, solicitor for the Respondent; and
   - The Respondent's witnesses – Mr Nick Neal (in relation to the fire stopping works), Mr Ian Ford (in relation to lift replacement) and Mr Mohamed Ali (in relation to administration and charging).

4. The documents available to the Tribunal consisted of:

   - A primary bundle of 721 pages;
   - A supplementary bundle of 38 pages;
   - A further supplementary bundle of 29 pages; and
   - A skeleton argument from Mr Hardman.

Fire stopping works

5. On 24th June 2017 there was a fire in Dickinson House, one of the blocks on the estate. It originated on the top floor but spread to adjacent flats due to the lack of compartmentalisation in the roof space. Just 5 days later, the London Fire Brigade served a Fire Safety Order in relation to a neighbouring block, McKinnonwood House, which is physically identical to Dickinson House. The Order set out recommended actions to be taken by 28th December 2017.

6. The Respondent decided to carry out fire safety works to all similar buildings on the estate. It was considered that the scheme was relatively simple, not having any complicated structural arrangements, and so an internal design team was used, with input from Building Control. Mr Neal explained that using external consultants would have considerably extended the process while the surveyors on the team were felt to have sufficient knowledge, ability and expertise.

7. In October 2017 the Respondent's contractors, Chigwell Construction, started work to a scheme brief prepared by the design team at an

estimated cost of £761,171.02. Due to the urgency of the works, the Respondent did not conduct the usual consultation required under section 20 of the Landlord and Tenant Act 1985. By a decision dated 14th November 2018, the Tribunal granted dispensation from the consultation requirements (case ref: LON/00BG/2018/0143).

8. As part of the works, the Respondent's design team had decided to use a fire-proofing system called Promat. On completion of the works, they decided to invite Promat to inspect what had been done, which they did on 3rd November 2019. Promat made several recommendations, including encasing some areas further in order to provide the intended 60-minute fire proofing. Unfortunately, this resulted in a significant increase in the cost of the works. The Respondent sought to offset the increase by fitting louvre infill windows rather than installing new dormer windows as originally planned.

Previous Tribunal decision

9. Dr Smith and a fellow lessee in McKinnonwood House sought to challenge the reasonableness of the resulting service charges and the Tribunal issued a decision on 18th October 2019 (case ref: LON/00BG/LSC/2019/0158). The Tribunal determined that the works were not reasonable to the extent that more partitions were installed than required and permanent doors and lighting were not needed. Further, Promat's additional works were unreasonable. Surveyor's fees and administration charges were reduced to 25%. However, the basis for these findings was summarised in paragraph 22 of the decision:

> Despite the absence of alternative reports or costings from the applicants acting in person, the tribunal finds that the oral and documentary evidence to support the respondent's case was significantly lacking in detail or clarity, not only in respect of the documentary evidence provided but also in the absence of significant and relevant witnesses who had been central to the decision making process behind these works and their costs. The tribunal finds that the process adopted by the respondent of ascertaining the nature and extent of the works required as well as their specifying and tendering process to be unsatisfactory and unsound, which had resulted in excessive, unnecessary and overly expensive costs. The tribunal found the lack of any independent expert report to explain and justify these Works to the tribunal to be a significant omission and contributed to the uncertain decision making of the respondent as to precisely what works were required in order to comply with the Fire Safety Notice.

10. In the experience of the members of this Tribunal, it is an unfortunately common feature of local authorities' responses to adverse court or Tribunal decisions to regard them as wrong and to be ignored. This is itself wrong and short-sighted. As well as constituting part of the essential fabric of the rule of law, court and Tribunal decisions can provide learning points which, if used effectively, can help to avoid

litigation or provide a degree of insulation against challenges to local authority decisions. It is distressing to judges and Tribunal members if and when local authorities repeat avoidable errors in more than one case.

11. Fortunately, the present case provides an example of a local authority reacting more appropriately (apart from a silly allegation about a supposed bias of the Tribunal in favour of lessees). A report was compiled in response to the Tribunal's decision recommending that any further challenge be met with better evidence. While Dr Smith argued that the evidence provided to this Tribunal was still inadequate, it is indisputable that it was a significant step-up from that before the previous Tribunal. Instead of one witness with few of the answers to the Tribunal's questions, the Respondent provided 3 witnesses who were able to address the Tribunal's concerns and more documentation, thereby providing a much more comprehensive picture of the Respondent's actions and the justification for them. Tribunal decisions are not binding on later Tribunals and whether they are persuasive often depends on the evidence available to them and what findings follow from that evidence. On that basis, the current Tribunal's findings differ significantly from those in the previous decision.

12. Having said that, there was one glaring omission from the Respondent's evidence. The previous Tribunal specifically mentioned the absence of an independent expert's report. The Applicants provided a copy of a report compiled for the Respondent which considered the use of such an expert. They also pointed to correspondence in which the Respondent promised to obtain such a report. Mr Hardman confirmed that such a report had been obtained but, for reasons which they were not prepared to disclose, the Respondent decided not to use it.

13. The absence of the report is unsatisfactory for both the Tribunal and the Applicants. It could have been expected to provide assistance as to the correct outcome in this matter. Someone who is cynically-minded might speculate that the report has not been used because the expert reached conclusions with which the Respondent was unhappy but the fact is that the Tribunal has no idea why the Respondent has acted in this way and has no power to enquire into the circumstances. It would be pure speculation to consider what the reasons might be.

14. Having said that, the Applicants knew that the Respondent's report would not appear. The previous Tribunal mentioned the absence of alternative reports or costings from the Applicants, which criticism they have made no effort to correct in relation to the fire proofing works. If they had felt that they had insufficient time to obtain their own report, they could have sought more time, praying in support the fact that they had expected to see the Respondent's report. Dr Smith suggested that the cost of such a report would be off-putting but there is no evidence that the Applicants considered something more limited, the cost of which would be affordable when split between 40 or so people.

15. It is not uncommon for the Tribunal to have to work from evidence which is less extensive than it would wish. However, findings still have to be made from that evidence. The Tribunal is satisfied that the evidence which it did have sufficiently supports the conclusions set out below.

Surveyors' fees

16. The Applicants had complained that some of the works seemed unnecessary while they did not understand some of the costings. Their understanding was improved in relation to some items by the Respondent's evidence produced during these proceedings. In preparing for this hearing, the parties have sensibly sought to narrow the issues and the Applicants have limited their challenges to a number of points set out in a Scott Schedule in which the Respondent has also inserted their comments.

17. The Respondent's design team charged 9.32% of the cost of the work for their contribution under the heading "Surveyor Fees". The Applicants were concerned that this was a duplication of costs charged in a category listed in their annual service charges. In fact, this is a separate charge which is a normal additional charge in major works programmes for the design and supervision element. The percentage used by the Respondent is within the range of such charges found in the market and even a little below the average.

Compartmentalisation

18. A key part of the fire stopping works was the installation of fire walls to separate roofs into compartments which would retard the spread of fire. The Applicants accepted that one fire wall was needed for blocks of 8 flats which have two top floor flats, three fire walls for blocks of 16 flats and five fire walls for blocks of 24 flats. However, they were concerned that prices differed between otherwise identical blocks. They were similarly concerned as to the differences in prices in otherwise identical blocks for safe working platforms used when the fire walls were installed. The Tribunal accepted the Respondent's evidence that the cost difference was down to slightly different sizes in each block. For example, Karslake and Snell Houses appear identical but the layout in Snell House had to be adjusted relative to that in Karslake House to take account of a drainage pipe.

19. The Respondent chose to insert fire doors in the fire walls to allow movement around the roof space for maintenance purposes such as leaks, electrical failures and access to soil and vent pipes. The previous Tribunal accepted the argument that cheaper removable panels would be sufficient. However, the current Tribunal accepted the Respondent's evidence that the installation of large heavy 60-minute fire resistant panels, instead of doors, would be unsuitable. An operative carrying their tools is likely to have their movement significantly restricted by having to remove and find a place for such panels rather than moving through a door. The Respondent asserted that using doors accords better with the

Construction (Design and Management) Regulations 2015 requirements for suitable routes and exits and the Tribunal agrees.

20. The Applicants objected for similar reasons to the installation of permanent lighting. The previous Tribunal accepted that this had nothing to do with fire safety. However, the aforementioned Regulations specifically require lighting which may be used at any time (reg.31(4)). The Tribunal accepts that such lighting is a necessary part of providing a safe space for operatives to access the roof area rather than having to carry or set up temporary lighting each time.

Additional Promat work

21. The Applicants objected to the additional work Promat recommended which the previous Tribunal accepted was unreasonable. In cross-examination it was revealed that the Promat representative, Mr Dave Oram, who inspected and recommended the additional work was an Area Sales Manager. The Applicants sought to impugn him as a mere salesman with financial motives and inadequate expertise.

22. Mr Neal explained that the Promat representative was not a mere salesman but expert in the use of his company's product. Both he and his company had a professional reputation to maintain – in fire safety, that reputation is essential to ongoing success in the market. Further, with the increase in fire safety work following the Grenfell disaster, he had no need to generate additional sales. In fact, at one point the Respondent had to deal with a shortage of available product from Promat.

23. The Respondent pointed out that, having used Promat's system, they had to ensure that they complied with Promat's guidance as to how to use it, without which Promat would not certify the finished work. It is arguable that the Respondent erred in not understanding what work was required from the outset – as a result of that error, the lessees were landed with a bill which was significantly higher than expected.

24. However, if there were a fire and the fire safety work were not certified, the Respondent would be open to claims of negligence and possible repudiation by the insurers of their liability under the buildings insurance policy. This is quite apart from the danger to occupants' health and safety from a faulty installation.

25. Promat know how their product is to be used and failing to follow their instructions as to use seems to the Tribunal likely to be negligent in most circumstances. No-one would suggest that it is unreasonable to follow a supplier's instructions in how to assemble or use, for example, a piece of furniture, which reasoning would apply even more strongly for a fire safety system. The fact that it would have been better if the Respondent had understood the extent of the required work from the outset does not make it unreasonable to charge for the additional work when they finally realised that it was necessary. Mr Neal explained that a fire safety inspector would judge the adequacy of the fire safety work by Promat's own standards.

Windows

26. When the Respondent changed the specification for the windows from dormers to new infills, they didn't change the name they gave to this item – it was still listed as "Create new opening in the roof and install dormer windows", even though this was no longer an accurate description. The Applicants objected to paying for something which was no longer happening. The Tribunal accepted the Respondent's evidence that the Applicants had misunderstood the situation due to the failure to re-name this item of expenditure.

Insulation

27. The Applicants objected to the price of the installation of loft insulation on the basis that they found they could get insulation much cheaper at local DIY stores. The Respondent replied that the rates were agreed at the tender stage when a long-term agreement was reached with the contractor. DIY store rates are not comparable. This is an unfortunately common misunderstanding by lessees who are not involved in the award of large-scale contracts. The Tribunal accepts the Respondent's reasoning.

28. The Applicants pointed out that insulation had recently been installed as part of Decent Homes works for which they had already paid. Mr Neal explained that, while some blocks had adequate insulation, the majority did not. Insulation was only installed in those blocks.

29. The Applicants also objected that some otherwise identical blocks paid more for the insulation works. The Respondent replied that there were differences in actual measured areas and in the amount of insulation previously installed. While it is entirely understandable that lessees may question differences in price when ignorant of what has caused the differences, the Tribunal has no reason to consider any particular costing as unreasonable.

Administration fee

30. The Respondent charged a fee for administering the major works programme calculated as 10% of the cost but capped at a maximum of £500 per lessee. The Applicants challenged the cost and whether it duplicated charges in their annual service charges. Mr Ali explained the services delivered by the Respondent's administration and estimated that the amount in question in this case was almost certainly an under-charge. From the Tribunal's experience, the Respondent's evidence that the amount was within the range charged in the market is correct. The charges included in the annual service charges were for other work.

31. The Applicants argued that, if the major works programme had never happened, all of the Respondent's staff would still have been paid. On that basis, they questioned why lessees should have to pay as well. In the Tribunal's opinion, this argument has no merit. When work benefitting lessees is carried out and is recoverable under the terms of their leases,

the Respondent is obliged to ensure they pay their share of the cost incurred. Someone has to bear the cost and the fact that this cost would still be covered by someone else in any event is no reason why lessees should not make their fair contribution when appropriate and within the terms of their leases.

Lift works

32. Many of the blocks on the estate date from times when lifts were not normally installed. Therefore, they lack lifts while other more recently built blocks have them. The Respondent sought to replace the lifts in 3 blocks, Dence, Snell and Karslake Houses, using Liftec as their contractor following a tendering process. The Applicants argued that the Respondent could simply decommission the lifts and leave these blocks in the same situation as the older blocks.

33. The Applicants' approach is not remotely realistic. First and foremost, each lease in the relevant blocks requires the Respondent to continue to repair and maintain the lifts. When the lifts reach a certain stage, it becomes less expensive to replace them rather to continue to try to maintain them. At that point, repair includes replacement. In this particular case, the lifts had an expected life of 25 years but had been running for 32. If the Respondent were simply to decommission the lifts, they would be in breach of the leases.

34. In one block(Karslake House), the Respondent had to make temporary provision of an 'evac' chair while the lift was out of commission to allow one occupant to continue to access their flat. The cost included training for the resident and their family in the safe and proper to use of the 'evac' chair. The Applicants reluctantly accepted that this was a necessary expense. However, it also highlighted a further issue. Removing the lifts would mean that many existing and potential occupants of the Respondent's housing would be unable to access the upper floors due to disability. This would arguably be contrary to the Respondent's duties under the Equality Act 2010.

35. The Applicants obtained a quote from an anonymous lift contractor suggesting that the work could be carried out for a significantly lower price. However, the specification was unhelpfully brief and did not appear like-for-like. The Tribunal could not accept that it constituted evidence that the Respondent's charges for lift replacement were in any way unreasonable.

36. The Respondent had trialled cheaper lift installations from the likes of Kone and Otis in some new build developments but found them unreliable and more expensive to repair and maintain. Moreover, Liftec had been appointed as contractor after a full tendering and consultation process in accordance with section 20 of the Landlord and Tenant Act 1985. Liftec had a further advantage in that they were willing to work to the Respondent's specification, designed to be more robust to take

account of its location in a council block, rather than working only from their own products or a single source of components.

Costs

37. The Applicants sought an order under section 20C of the Landlord and Tenant Act 1985 that the Respondent should not be permitted to regard their costs in these proceedings as relevant costs when calculating the Applicants' service charges. It is rare that local authorities pass on litigation costs in this way but the Tribunal must consider this application on the basis that the Respondent will do so.

38. The Respondent has succeeded in this case. It would not be just or equitable in the circumstances to deny them what is otherwise their right of recovery. Therefore, the Tribunal refuses to make such an order.

Name: Judge Nicol **Date:** 7th July 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).

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 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 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 tribunal or the Upper Tribunal, 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 a county court;
   (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
   (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the

application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, 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 a 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.

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.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 5A

(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph—

(a) "litigation costs" means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and
(b) "the relevant court or tribunal" means the court or tribunal mentioned in the table in relation to those proceedings.

Proceedings to which costs relate	***"The relevant court or tribunal"***
Court proceedings	The court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, the county court
First-tier Tribunal proceedings	The First-tier Tribunal
Upper Tribunal proceedings	The Upper Tribunal
Arbitration proceedings	The arbitral tribunal or, if the application is made after the proceedings are concluded, the county court.