FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AM/LSC/2021/0440**
HMCTS Code (paper, video, audio)	**:**	**V - Video**
Property	**:**	**38, Montefiore Court, Stamford Hill, London. N16 5TY**
Applicant	**:**	**Majascules Ltd.**
Representative	**:**	**Mr. S. Stern of Fountayne Managing Ltd.**
Respondent	**:**	**Mint-Print Properties Ltd.**
Representative	**:**	**Mr. D. Silver**
Type of Applications	**:**	**For the determination of the reasonableness of and the liability to pay service charges and/or administration charges**
Tribunal Members	**:**	**Tribunal Judge S. J.Walker** **Tribunal Member Mr. M. Taylor MRICS**
Date and venue of Hearing	**:**	**21 June 2022 – video hearing**
Date of Decision	**:**	**24 June 2022**

DECISION

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: Video Remote. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The Tribunal’s determination is set out below.

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Decisions of the Tribunal

(1) The Tribunal determines that no sums are payable by the Respondent by way of service charges for the period from 25 June 2021 to 24 December 2021. This is because no charges have been demanded in a manner which is in accordance with the terms of the lease between the Applicant and the Respondent.

(2) The Tribunal further determines that should a demand for payment be made in accordance with the terms of the lease and on the basis of the budget provided for the 2021/2022 service charge year then the sum reasonably payable by the Respondent for the period from 25 June 2021 to 24 December 2021 would be £581.86.

(3) The application for an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the Tribunal proceedings may be passed to the lessees through any service charge is refused because no such order is necessary.

(4) The application for an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, so that none of the landlord's litigation costs can be recovered as an administration fee is refused because no such order is necessary.

Reasons

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 Respondent in respect of the period from 25 June 2021 to 24 December 2021.

2. The application was made on 24 November 2021. Directions were initially issued on 22 January 2022. Among other things these directions required the parties to complete a Scott Schedule and to produce bundles of documents for the hearing. Although the directions were varied on a couple of occasions in order to amend the timetable for the production of documents, they were complied with. The Applicant produced a bundle of documents comprising 201 pages and the Respondent produced a bundle of documents comprising 336 pages. In what follows page numbers prefaced by "A" refer to the former and by "R" to the latter.

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

The Hearing

4. The Applicant's representative Fountayne Managing Ltd. was represented at the hearing by Mr. S. Stern. The Respondent was represented by Mr. D. Silver.

5. Neither party requested an inspection, and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

6. In addition to the bundles already referred to the Tribunal had before it a skeleton argument produced by Mr. Silver.

The Background

7. The property is a flat situated within a block of 44 purpose-built flats. The block also includes a number of garages and a garden area at the rear.

8. The application states that the freehold is owned by a company called Dometown Ltd. (see page A4) though no evidence of title was produced. However, there was no dispute about this, and the ownership of the freehold was not relevant to the issues between the parties.

The Lease

9. By a tri-partite lease dated 31 May 1974 originally made between Fairview Estates (Barnet) Ltd. as the landlord (described in the lease as "the Vendor"), Majascule Ltd. (the Respondent – described in the lease as "the Company") and Mrs. Esther Freedman (described in the lease as "the Purchaser") the Respondent holds the property for a term of 99 years from 24 June 1973 (pages A14 to A44).

10. There was no evidence of the Respondent's title to the lease, but this again was not in issue between the parties.

11. The relevant clauses in the lease are as follows;

    (a) In the recitals at the beginning of the lease clause (3) states as follows; "*The Company has been incorporated with the object (inter alia) of providing certain services to and for the lessees of the said parts of the Block and otherwise managing the property as hereinafter appears*" (page A15)

    (b) By clause 2(5) of the lease the Respondent covenants as follows; "*To pay all costs charges and expenses (including Solicitors' costs and Surveyors' fees) incurred by the Vendor for the purpose of or incidental to the preparation and service of a notice under sections 136 and 147 of the Law of Property Act 1925 (including any such fees payable in respect of the preparation and service of any schedule of dilapidations) notwithstanding that forfeiture may be avoided otherwise than by relief granted by the Court.*" (page A17)

    (c) By clause 3(5) of the lease the Respondent covenants with the Vendor, the Company and the lessees of other parts of the block as follows;
    (a) Deposit with the Company on the execution hereof the sum set out in Part V (j) of the Schedule hereto (the receipt whereof the Company hereby acknowledges) and to permit the Company to

retain the same during the term hereby granted as a reserve towards making good and default by the Purchaser in the payments referred to in the next following sub-clause hereof which shall be payable in full notwithstanding such deposit which or the unexpired part of which shall be payable without interest to the Purchaser at the end or sooner determination of the said term

(b) *Contribute and pay on demand the proportionate part set out in Part V (i) of the Schedule hereto of all costs charges and expenses from time to time incurred or to be incurred by the Company in performing and carrying out the obligations and each of them under Part IV of the Schedule hereto as set out in the notice mentioned in paragraph 9 of Part IV of the Schedule hereto PROVIDED ALWAYS that if the Vendor shall under the provisions of Clause 6(3) hereof perform or carry out all or any other obligations of the Company hereunder the Purchaser shall contribute and pay to the Vendor on demand the due proportion of all costs charges and expenses as more particularly hereinbefore mentioned.*" (pages A20 to A21)

Note that the sum specified in paragraph (j) of Part V of the Schedule is £25 and the lease share specified in paragraph (i) is 2/116 or 1.74% (page A42). By clause 6(3) of the lease the Vendor may undertake the Company's obligations if it has either failed to perform its obligations for 21 days or has gone into liquidation.

(d) By clause 3(6) of the lease the Respondent covenants with the Vendor, the Company and the other lessees as follows;

"*Comply with and observe any reasonable regulations which the Company may consistently with the provisions of this Deed make to govern the use of the Property and any part thereof. Such regulations may be restrictive of acts done on the property detrimental to its character or amenities. Any costs charges or expenses incurred by the Company in preparing or supplying copies of such regulations or in doing works for the improvement of the Property providing services or employing gardeners shall be deemed to have been properly incurred by the Company in pursuance of its obligations under Part IV of the Schedule hereto.*" (pages A21 to A22)

(e) The Company's obligations under Part IV of the Schedule can be summarised as follows. Those provisions which need closer scrutiny are set out in full;

1. To repair, redecorate and renew the structure and common parts.
2. To pay water rates not assessed on individual parts of the property.
3. To keep the common parts clean and lighted, to maintain the garage driveways and paths, and to maintain the garden, roadways and pavements.
4. To decorate the exterior of the property

5. “*The Company will at all times during the said term (unless such insurance shall be vitiated by any act or default of the Purchaser) insure and keep insured the Property with an insurance company of repute to be nominated by the Vendor and through the Vendor’s Agency in the names of the Vendor the Purchaser his Mortgagees (according to their respective estates and interests) and the Company against comprehensive risks ....”*
6. To do works required by statute.
7. “*The Company shall keep proper books of account of all costs charges and expenses incurred by it in carrying out its obligations under this Part of the Schedule and an account shall be taken on the 24th day of June in each year during the continuance of the demise of the amount of the said costs charges and expenses incurred since the date of the commencement of the term hereby created or of the last preceding account as the case may be.*”
8. “*The account taken in pursuance of the last preceding Clause shall be prepared and audited by a qualified accountant who shall certify the total amount of the said costs charges and expenses (including the audit fee for the said account) for the period to which the account relates and in respect of all subsequent periods during this demise there shall be certified the proportionate amount due from the Purchaser to the Company under this Lease credit being given for any amount which shall already have been paid under Clause 3 (5)(b) hereof.”*
9. “*The Company shall within two months of the date to which the said account is taken serve on the Purchaser a notice in writing stating the said total and proportionate amount certified in accordance with the last preceding paragraph together with details if known and an estimate of the amount required for the following year.*”
10. Provide for refuse collection
11. “*The Company may employ such staff or agents for the performance of its obligations hereunder as it shall think fit.*”
12. Maintain the television aerial.

THE APPLICANT’S CASE

12. The Applicant’s case is set out in Mr. Stern’s witness statement at pages A84 to A97. A letter dated 1 July 2021 from the Applicant shows that they appointed Fountayne Managing Ltd. to manage the property on their behalf (page A191). There was no dispute that the Applicant was permitted to do this.

13. In their application the Applicant has set out details of the service charges which it is claimed are payable by the Respondent (page A10). These are stated to be for the 6-month period from 25 June 2021 to 24 December 2021. Figures are given for a total of 15 different budget heads, with the total amounting to £598.30. However, the application also stated that the total value of the dispute was £2,381.54 (see page A5). In addition, the Applicant’s

statement of case at paragraph 11 appeared to show that in fact the Applicant was seeking service charges for the whole of the service charge year (page A86).

14. The Tribunal sought to clarify with the Applicant what exactly was being claimed. Mr. Stern accepted that the application only referred to a 6-month period and that no application had been made to amend this. He stated that he was happy to proceed with the case on the basis of that period alone. He referred the Tribunal to a statement of account at page A200. This showed that a demand for payment was made on 29 June 2021 for £586.99 in service charges together with a demand for additional drainage clearance costs of £194.55 on 14 September 2021, making a total of £781.54. This was, he said, the sum sought.

15. The Tribunal noted that a charge had been made for a contribution towards a reserve fund but that this had been credited back to the Respondent. Mr. Stern accepted that the lease made no provision for making charges for contributions towards a reserve fund of this kind and made it clear that the Applicant's claim did not include any such contribution.

16. At para 1.12 of the summary contained in the Applicant's statement of case (page A96) it was also stated that the landlord sought to recover fees of approximately £2,500 said to be incurred pursuant to the service of notices under section 146 of the Law of Property Act 1925. Mr. Stern told the Tribunal that this was not part of the current application but that such fees may be sought in due course. The Tribunal considered this aspect of the case when considering an application for an order under section 20C of the Act below.

17. The Applicant's case was that the lease allowed the Applicant to demand service charges in advance, that the accounting period was from 24 June to 23 June each year, and that interim demands were made on a biannual basis (para 6 at page A85). The charges sought were all budget items for the 2021/2022 service charge year and so the figures were all estimates and that adjustments would be made once the actual expenditure was identified and certified (para 7). The Applicant's case was that, based on the size and nature of the building, the proposed budgets under each head were both fair and reasonable and that each budget item was a recoverable item under the terms of the lease. Details in respect of each budget head are set out at pages A87 to A94.

18. The Applicant's bundle showed that an application for payment was made on 29 June 2021 (page A182) together with a further application for payment in respect of additional drainage costs on 14 September 2021 (page A186).

THE RESPONDENT'S CASE

19. The Respondent raised a number of issues in relation to the Applicant's claim which the Tribunal considered in turn as set out below.

Have the Charges Been Demanded In Accordance With the Terms of the Lease?

20. The Respondent's first argument was that the service charges had not been demanded in the manner specified in the lease and so it was under no liability to pay. In his skeleton argument at para 5 Mr. Silver argued that no notice had been provided as required by paragraph 9 of Part IV of the Schedule and so the demand for payment was defective. He argued that the provision of the necessary notice was a condition precedent to the Respondent's liability to pay. Although he accepted that the terms of the lease allowed for the recovery of items in advance, he argued that, nevertheless, the lease made a paragraph 9 notice essential before advance payments could be sought. Such a notice required a reference to the accounts as certified under paragraph 8 of Part IV of the Schedule and this had not been produced.

21. In response to this, Mr. Stern argued that if the lease were properly construed, the failure to provide such a notice did not preclude the making of demands for service charges on account. It was accepted that the demands that had been made did not include such a notice and there were no certified accounts. He relied on the fact that clause 3(5)(b) of the lease referred to an obligation to pay the service charge "*on demand*". He also sought to rely on the second part of this clause which enables the Vendor to recover costs.

22. Mr. Stern also suggested that the making of bi-annual demands in advance was something which had been requested by leaseholders and had become established as custom and practice. However, there was insufficient evidence before the Tribunal to show that either the Respondent or other leaseholders had made such a request, nor that this was what had, in fact, happened historically. In addition, even if a practice of making half-yearly demands had developed, it does not follow that this was in the context of a failure to provide the required paragraph 9 notice in the past.

23. The resolution of this issue depends solely on the correct interpretation of the lease. Normally a provision to make payments on demand would mean that applications for payment could be made at any time. It is also clear to the Tribunal that clause 3(5)(b) allows for the recovery of costs in advance – as it refers to costs charges and expenses "*from time to time incurred or to be incurred*".

24. However, in the Tribunal's view the crucial words in this clause are "***as set out in the notice mentioned in paragraph 9 of Part IV***". The clear ordinary meaning of the clause is that the lessee must pay their share of those costs which are set out in the paragraph 9 notice. If no such notice is provided no costs are payable.

25. The wording of paragraphs 7 to 9 of Part IV of the Schedule is also instructive. Under paragraph 7 the Company is required to take an account as at 24 June and under paragraph 8 that account is to be audited and certified. However, it is not this certificate which must be provided under paragraph 9. What is particular about this lease is that paragraph 9 requires not the provision of the certificate but a notice which contains two things. Firstly, the amount certified under paragraph 8 and secondly "*details if known and an estimate of the amount required for the following year*". The notice served on the

Respondent contains the latter but not the former. In the view of the Tribunal, the failure to include the first part means that no proper notice as required by paragraph 9 has been served on the Respondent. That being the case no obligation to pay arises.

26. In the Tribunal's view the Applicant can derive no assistance from the second part of clause 3(5)(b) as this is a power which is exercisable by the Vendor, not the Company, and is only exercisable in circumstances where the Vendor has taken over the Company's responsibilities under clause 6(3) of the lease. That is not the case here.

27. It follows that the Tribunal is not satisfied that any sums have been properly demanded from the Respondent and so no service charges are payable by them. It also follows that the lease does not permit the making of ad hoc charges such as the additional charge sought in respect of the drains in September 2021 as only charges which are specified in a valid paragraph 9 notice are recoverable.

28. Although that conclusion effectively disposes of the application, the Tribunal considered it appropriate to consider and make findings in respect of the other arguments put forward by the Respondent in this case.

<u>Are the Budget Heads Recoverable Under the Lease?</u>

29. The Respondent argued that some of the items in respect of which a payment was sought were not items for which the lease allowed the Company to charge. The Tribunal identified those items as the following;
    (a) Directors' and Officers' Insurance
    (b) Management Fee
    (c) Bank Charges

30. Clause 3(5)(b) makes it clear that the Company is only entitled to recover its costs incurred or to be incurred "*in performing and carrying out the obligations … under Part IV of the Schedule*". Therefore, unless an item for which a charge is made falls within the scope of those obligations, a service charge may not be levied.

31. The contents of Part IV of the Schedule are set out above. On the face of it this makes no provision for the management of the property. It covers standard items for repairs, maintenance and insurance, but says nothing about management.

32. On behalf of the Applicant, Mr. Stern sought to rely on Clause 3(6) of the lease. Although this commences as a clause requiring the Purchaser to comply with the Company's regulations, it goes on to provide that;

> "*Any costs charges or expenses incurred by the Company in preparing or supplying copies of such regulations or in doing works for the improvement of the Property providing services or employing gardeners porters or other employees shall be deemed to have been properly incurred by the Company in pursuance of its obligations under Part IV*"

33. The Applicant's argument was that this allowed the Company to provide services and that such provision was deemed to fall within the Part IV obligations.

34. This is certainly a poorly drafted provision. Not least because it is not clear what is meant by "*providing services*". The Applicant's case is that this term is sufficient to include the provision of everything that one would normally expect to be included within the usual clause permitting the recovery of management costs. However, the clause makes no mention of management at all nor, indeed, is what amounts to a service explained further in any way. In addition, this provision is found in the context of a clause dealing with the power of the Applicant to make regulations and to pass on the costs of preparing and making those regulations. The clause is also odd in that it repeats the power in paragraph 11 of Part IV to employ staff.

35. However, clause 3(6) does go beyond the scope of what is expressly set out in Part IV by including "*works of improvement*". Such works, though not included within Part IV would, by this clause, be deemed to be so included.

36. The clause must also be considered within the context of the overall structure of the lease. The Applicant is a company limited by guarantee with no share capital whose membership is limited to leaseholders of the properties managed by the company (see pages R116 to R130). The lease recites that the Company has been incorporated to provide services to and for the lessees and to otherwise manage the block – although this is qualified by the phrase "*as hereinafter appears*".

37. In the view of the Tribunal it would be extremely odd for a lease of this kind not to make provision for the management company to recover the costs of that management, as there would be no other way in which those costs could be met other than through the service charge.

38. Taking those arguments together the Tribunal accepted that the clause encompassed the provision of services to and for the lessees. It concluded that the performance of normal management functions falls within the scope of the term "*providing services*" within clause 3(6) and that, therefore, these functions are deemed to fall within the scope of the Part IV obligations.

39. Applying that reasoning to the disputed heads, the Tribunal concluded as follows;

Directors' and Officers' Insurance

40. In their statement of case the Applicant states that this charge is to provide indemnity insurance for those leaseholders who take on the responsibility of being directors of the Company and that, without that insurance they were not prepared to act, though no evidence of such a refusal was provided (page A92).

41. The Tribunal concluded that despite the broad scope of "*providing services*" as set out in clause 3(6) the provision of such insurance could not be regarded

as the provision of a service to or for the lessees. Rather, it is a benefit provided for the directors of the Company.

42. That being the case, the Tribunal concluded that this charge would not be recoverable even if a valid paragraph 9 notice were served as it is not a charge which the terms of the lease permit to be made.

Management Fee

43. The scope of the management fee which the Applicant seeks to recover is set out at page A93. It includes raising demands, collecting and processing payments, compiling accounts, dealing with insurers, communicating with lessees, conducting inspections and overseeing maintenance and repairs. In the view of the Tribunal these are all matters which can be regarded as normal management functions and so, as explained above, they fall within the scope of the Applicant's obligations under Part IV. Charges for such activities are, therefore, recoverable under the terms of the lease.

Bank Charges

44. As a matter of principle the Tribunal concluded that the making of a charge for bank charges would fall within the scope of the Applicant's Part IV functions as part of its overall management of the property and so such a charge is also recoverable under the terms of the lease.

Are the Proposed Charges Reasonable?

45. The Respondent's main argument in relation to the reasonableness of the service charges sought was that the Applicant could not show that the amounts sought were reasonable as there had been no certified accounts since 2017. Mr. Silver argued that without evidence of previous actual expenditure no proper assessment could be made of what was a reasonable budget going forward.

46. The Respondent also argued that in the last published accounts there was reported to be a reserve fund of £39,828 and that before the budget could be regarded as reasonable the current reserve figure should be ascertained and a view taken as to how much of this should be met from the reserve.

47. The Tribunal rejected those arguments. Firstly, whilst accounts for previous years are certainly very helpful in assessing the reasonableness of a budget going forward, they are certainly not essential. Otherwise, how else could a reasonable budget be set in the first year of operation? In addition, whilst there were no previous year's accounts, the evidence included a number of invoices for services provided in the previous financial year – about which there was no challenge from the Respondent. Also, the Tribunal is a specialist one which is experienced in determining questions of whether or not a budget is a reasonable one by reference to the size and nature of the premises in question.

48. As far as the reserve fund was concerned, there are certainly questions to be answered by the Applicant in respect of the whereabouts of money which appears to have been obtained from leaseholders as a contribution to a reserve

fund for which no provision was made in the lease. However, that does not prevent the Applicant from moving forward and setting a budget to enable it to continue to meet its obligations under the lease.

49. The Tribunal's consideration of whether or not the budget is reasonable is, in any event, predicated on an assumption that certified accounts have been prepared, thereby enabling a valid paragraph 9 notice to be served. Once that happens the true picture will become clear.

50. The Respondent provided no alternative figures for what it would regard as a reasonable budget and in the main raised no specific challenges to the proposed amounts. Apart from the general arguments considered above the Respondent raised no challenges to the budget sums in respect of communal cleaning, communal electricity and lighting, fire prevention services, general maintenance, gutter and roof maintenance, bin rentals, rubbish removal, estate gardening, window cleaning, drains maintenance, accounts, and the out-of-hours service.

51. The Applicant's statement of case at pages A87 to A94 sets out what is charged for under each head. The Tribunal considered this and the other documents provided in the bundle in relation to previous years. It bore in mind that the property is part of a block of 44 flats with garages and gardens. Using its knowledge and expertise the Tribunal was satisfied that the proposed budget for each of these items was reasonable and that, provided the formalities of the lease were complied with, the Respondent's share of them would be recoverable from it.

52. With regard to the out-of-hours service the Tribunal ascertained from Mr. Stern that this covered only a call-out fee. However, if divided equally between the 44 units the charge would amount to no more than £35 per year which, given a history of repeated drain blockages, the Tribunal considered to be reasonable.

53. In the case of the management fee, Mr. Silver also sought to argue that the sum sought should be capped at £100 as the management contract is a qualifying long-term agreement about which there has been no consultation – see para 6 of the skeleton argument. The agreement itself was not before the Tribunal and it makes no findings about its terms. However, it reminded itself that the demand, if properly made, is for a budget item only. This budget of £13,200 for the management fee amounts to £300 per flat if spread equally between the 44 flats. The Tribunal considered this to be a reasonable figure. The Applicant will, of course, have to produce year end accounts and reconcile these to the budget in due course. If the actual sum charged is in fact in respect of a qualifying long-term agreement, then the Respondent may have a case at that stage. However, in the context of a budget item only, the Tribunal is satisfied that the sum sought is reasonable provided a proper demand is submitted.

54. The Tribunal was concerned that a separate budget was included for bank charges whereas it would expect this to be included as part of the general

management fee. Also, the explanation provided, namely that a separate service charge account was needed at the bank for each individual property, lacked weight. It is not necessary for there to be 44 different bank accounts, one for each flat, in order to provide a proper service charge account. The Tribunal therefore concluded that this budget item was not reasonable and therefore not payable in any event.

55. The only other charge about which the Respondent raised an issue was the cost of insurance. Mr. Silver's case was that the insurance that had been provided was not in accordance with the terms of the lease as paragraph 5 of Part IV of the Schedule required the insurance to be in the names of both the Vendor and the Purchaser – ie the freeholder and the Respondent - whereas, as was accepted by Mr. Stern – the Respondent's interest was merely noted on the policy. In doing so he relied on the case of Green -v- 180 Archway Road Management Co. Ltd [2012] UKUT 245 (LC). No issue was taken with the actual sum charged for the insurance.

56. Whilst the Tribunal understood and accepted Mr. Silver's argument, it also bore in mind that what was being sought was a contribution towards a budget for insurance, not a contribution towards an actual charge. The Applicant could in theory provide insurance which met the requirements of the lease. The Tribunal also considered the proposed budget sum was a reasonable one. That being the case the Tribunal considered that, at least as a budget item, the sum was recoverable provided a paragraph 9 notice was served.

57. However, the Applicant will in due course have to provide end of year accounts for this service charge year and make necessary adjustments to the sums charged to reflect actual expenditure. If the end-of-year accounts include an actual sum for insurance which was provided but which was not compliant with the terms of the lease it may well be that the Respondent will then have a good case for challenging that service charge item at that stage.

58. In summary, therefore, the Tribunal considered that, if properly demanded, the following sums would be reasonable and payable by the Respondent for the period from 25 June 2021 to 24 December 2021

Item	Sum
Communal Cleaning	£ 93.96
Communal Electricity/Lighting	£ 11.31
Fire Prevention System Service	£ 26.10
General Maintenance	£ 43.50
Gutter and Roof Maintenance	£ 21.75
Bin Rentals	£ 30.45
Rubbish Removal	£ 14.79
Estate Gardening	£ 47.85
Window Cleaning	£ 8.70
Drains Maintenance	£ 21.75
Insurance	£126.15
Accounts	£ 7.31
Management Fee	£114.84
Out-of-Hours Service	£ 13.40
Total	£581.86

59. The Tribunal bore in mind the Applicant's claim for additional money in respect of drain maintenance. If included in a proper demand then the additional sum would be recoverable, though it would not be so recoverable as an ad hoc charge.

Is There an Equitable Set-Off?

60. The final part of the Respondent's case was an argument that it could rely on an equitable set-off to defeat the Applicant's claim. The basis of this argument was that in May 2020 the Respondent's flat was flooded with sewage following a blockage to the main drain, forcing the tenant to leave. As a result, the Respondent had suffered a loss of rental income together with a number of costs in relation to works to the flat, not all of which had been covered on the insurance.

61. In the Respondent's statement of case it was argued that repairs to the flat were not carried out to a reasonable standard and that the failure to name the Respondent on the insurance policy had resulted in a shortfall in the amount paid by the insurers. This argument is also set out in the skeleton argument at paras 12 to 27.

62. There is no doubt that the Tribunal has jurisdiction to determine claims for damages for breach of covenant but this is only in circumstances where those claims raise a defence to a service charge in respect of which the Tribunal's jurisdiction has been invoked. The most frequent instance of this is where a demand for payment in respect of maintenance or repair is met by the argument that historic failure to repair as required by the lease has resulted in the costs of that maintenance or repair being higher than would otherwise have been the case.

63. However, that is very far from the case presented by the Respondent. Firstly, and most importantly, the amount of the claimed set-off far exceeds the amount of the Applicant's claim, to the extent that the Respondent invited the Tribunal to order the Applicant to pay a sum of £9,479.09. That is something which the Tribunal simply has no jurisdiction to do. At best an equitable set-off may extinguish a claim entirely. It cannot, though, form the basis of a counter claim, certainly not in the Tribunal. The jurisdiction of the Tribunal is simply to determine what service charges are payable. If there is an equitable set off the amount payable may be less, but that is as far as the Tribunal can go.

64. Secondly, equitable set-off may only be used as a defence to a claim for a service charge which is before the Tribunal. At the hearing Mr. Silver made it clear that it was not the Respondent's case that there had been any failure to maintain the drains properly – and in any event there was no evidence to support such a claim. The substance of the Respondent's claim was the failure to insure in accordance with the terms of the lease. As the drains were blocked in May 2020 the relevant charge would be the charge for insurance for the service charge year June 2019 to June 2020. That was not a charge

which was before the Tribunal, so there was nothing before the Tribunal against which the claim for an equitable set-off could bite.

65. In any event it was clear to the Tribunal given the nature of the Respondent's complaint, that this issue was something which was clearly more suited to an action in the County Court. This was not an issue which it was appropriate for the Tribunal to adjudicate on.

Applications under s.20C of the 1985 Act and Para 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 and Fees

66. Mr. Silver made it clear that the Respondent wished to make an application for an order under section 20C of the 1985 Act ("section 20C") to the effect that none of the Applicant's costs of the Tribunal proceedings may be passed to the lessees through any service charge, and an order to reduce or extinguish its liability to pay an administration charge in respect of litigation costs under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ("paragraph 5A").

67. Before making an order under either provision it is necessary to consider whether or not the lease allows for the recovery of costs of proceedings or administration costs as, if not, no order is necessary.

68. When asked to identify any relevant provisions in the lease allowing for the recovery of such costs Mr. Stern sought to rely on clause 2(5) of the lease in respect of the Applicant's costs in these proceedings. He accepted that there was nothing in the lease which allowed for the recovery of administration charges.

69. Mr. Silver on behalf of the Respondent argued that clause 2(5) here was irrelevant as it clearly states that the obligation is to pay the costs incurred by the Vendor – ie the freeholder.

70. The Tribunal accepted this argument. The Vendor was not a party to the application and there was nothing to show that any of the costs incurred in these proceedings had been incurred by them. This clause cannot be used as a means of recovering the Applicant's costs in bringing this application.

71. The Tribunal also considered that whilst the provision in clause 3(6) in relation to the provision of services and the employment of employees was broad, it certainly is not broad enough to enable the Applicant to pass on the costs of these proceedings as a service charge.

72. The Tribunal agreed with Mr. Stern's assessment that the lease makes no provision for administration charges.

73. It follows that orders under section 20C and paragraph 5A are not necessary and so the Tribunal makes no such orders.

74. There were no other applications before the Tribunal. Had there been an application by the Applicant under rule 13(2) of the Tribunal procedure (First-

tier Tribunal) (Property Chamber) Rules 2013 for the payment by the Respondent of the Applicant's fees the Tribunal would have refused it, given the failure of the Applicant to show that the charges sought are payable.

Name:	Tribunal Judge S.J. Walker	**Date:**	27 June 2021

ANNEX - RIGHTS OF APPEAL

- The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.

- If a party wishes to appeal against 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.

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 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.

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 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 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 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 subject to annulment in pursuance of a resolution of either House of Parliament.

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 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).

Schedule 11, paragraph 5A

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.