FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00CA/LSC/2019/0085**
Property	**:**	**Flat 4, 59-61 Queens Road, Southport PR9 9HB**
Applicant	**:**	**Marcin Lukasz Gowron**
Respondents	**:**	**Michael Jackson and Louise O'Connor** **Represented by Mr H Derbyshire of Counsel**
Type of Application	**:**	**Application to determine reasonableness and payability of service charges (Landlord and Tenant Act 1985, Section 27A, Commonhold and Leasehold Reform Act 2002, Section 158 and Schedule 11)**
Tribunal Members	**:**	**Mr J R Rimmer** **Mr J Faulkner**
Date of order	**:**	**29th December 2020**
Date of Decision	**:**	**4th January 2021**

DECISION

Determination: **1: the roofing works charges are reasonable and the Applicant should pay his appropriate proportion thereof.**

2: The cost of fire safety works and postage costs to which contribution should be made is limited to £1,800, including VAT and £276.97 respectively

3: The solicitors' costs are not reasonably incurred

4: In accordance with paragraph 49, below, orders are made in favour of the Applicant in respect of Section 20C Landlord and Tenant Act 1985 and Schedule 11, paragraph 5 Commonhold and Leasehold Reform Act 2002

A. Application and background

1 The Applicant is the long leaseholder of Flat 4 at 59-61 Queens Road, Southport, Merseyside. The Respondents are the freeholders who also provide the services to the building under the terms of the leaseholders' leases.

2 The Applicant has raised a number of issues as to the reasonableness and payability of 4 aspects of the service charges he has been asked to pay:

(1) He is not satisfied that the full cost of extensive roofing works to the building has been paid, or paid to the correct payees.

(2) Fire safety works have been carried out to a suggested value of £3,000.00 by a contractor connected to the landlords and this may not have been at a reasonable cost

(3) A charge has been made for postage that exceeds the amount justified by invoices in the service charge accounts.

(4) Charges in excess of £2,600.00 have been levied against the Applicant in 2 invoices raised by the landlords' solicitors for costs the Respondents have incurred in pursuing the Applicant for outstanding service charges.

The first three items arise in the 2018 accounting year and the solicitors' charges in 2019.

3 The lease under which the Applicant hold Flat 4 is one dating from 12th December 2017 and made between Neil Desmond Carnall, Robert Malone, Christopher MacKay and Terence Bromley (1) and Terence Bromley (2). It is for a term of 999 years from 1st July 2007.

4 Clause 5(17) and Schedule 7 of the lease provide for the provision of relevant services to the building and the covenant by the leaseholder to pay for them. There appears to be no dispute that the matters raised by the Applicant are service charges that fall within those provisions. The liability of the Applicant is for payment of 20% of the total charges.

5 It became clear during the course of the hearing of this matter on 21st October 2020 that whilst the Applicant had raised the issue of the solicitors costs within an application to the Tribunal in respect of service charges those costs could also be recovered as an administration charge under clause 5;10:3 of the lease. This was how the Respondents apparently would wish to recover them as the Applicant would be liable there for the full costs rather than 20% of them if they were recovered as a service charge.

6 After consideration of that matter by the Tribunal with the parties at some length it determined that it should treat the application as relating also to an administration charge as it was considered inevitable by all parties that the costs would always be brought to the Tribunal for consideration of their reasonableness and they could properly be considered now, rather than within a later application.

The Law

7 The law relating to jurisdiction in relation to service charges, falling within Section 18 Landlord and Tenant Act 1985, is found in Section 19 of the Act which provides:

(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 the are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard

8 Further section 27A landlord and Tenant Act 1985 provides:

(1) An application may be made to a leasehold valuation 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

and the application may cover the costs incurred in providing the services etc and may be made irrespective of whether or not the Applicant has yet made any full or partial payment for those services (subsections 2 and 3)

Subsection 4 provides for certain situations in which an application may not be made but none of them apply to the situation in this case.

8 Section 20C landlord and tenant Act 1985 provides that:

(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… the First-tier tribunal… 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…

(ba) in the case of proceedings before the First-tier Tribunal, to the Tribunal

(3) The…tribunal to which the application is made may make such an order on the application as it considers just in the circumstances.

9 Section 158 and Schedule 11 paragraph 5 Commonhold and Leasehold Reform Act 2002 provide almost identical provisions to those set out in section 27A in relation to administration charges, those being charges identified in paragraphs 1 and 2 of the Schedule:

(1) …"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) …

(b) …

(c) In respect of a failure by the tenant to make a payment by the due date to the landlord…or

(d) In connection with a breach (or alleged breach) of a covenant or condition in his lease

(2) A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

10 Paragraph 5A was inserted into Schedule 11 by the Housing and Planning Act 2016 to further provide for consideration by the Tribunal of litigation costs:

(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order educing 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 I 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 the 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

Inspection

11 In view of the current situation in relation to the Covid-19 virus the Tribunal determined that no inspection of the property was required to be undertaken. Where the cost of work was in issue it was the accounting in respect of the work that was in issue and not the quality, or extent, thereof and other matters related purely to the accounting procedures, or costs of the Respondent. The Tribunal did not feel that an inspection would be of any significant assistance.

Language Assistance

12 English is not the first language of the Applicant and for the hearing that was eventually scheduled to take place by way of a Full Video Hearing link on 21st October 2020 an interpreter was engaged to assist him. Unfortunately, that link was unable, for technical reasons, to provide a suitable connection between Mr Gowron and the interpreter to the extent that no meaningful contact could be made between them.

13 Mr Gowron was kind enough to indicate that he was happy for the hearing to continue without the assistance being available. It was clear to the Tribunal from the submissions that he had provided that he had quite adequately identified the service charge issues he wished to raise and the concerns that he had about them. The Tribunal therefore made a decision that it could proceed in the absence of the interpreter and, indeed, perceived that there was no difficulty created for the Applicant.

14 Out of an abundance of caution, however, it proved necessary to adjourn the proceedings to allow all parties to give further consideration to the legal costs being sought as an administration charge and to give the Applicant the opportunity time to give further submissions appropriate consideration and for the Tribunal not to consider it appropriate to try to proceed with purely verbal submissions on the day. The tribunal felt it prudent at that point to seek further clarification of the fire safety works and obtain a copy of the fire risk assessment upon which the Respondent suggested the works were based.

15 It was also appropriate to seek further submissions in relation to section 20C of the Act.

16 Following further directions from the Tribunal and the receipt of relevant submissions from the parties it was possible to conclude the case by giving consideration to them without a further hearing as neither party reconsidered its position at the conclusion of the original hearing that a determination of the papers alone would be sufficient.

Submissions and hearing

17 The original written submissions made by the parties dealt clearly with the distinct issues that have been raised within the Application and the provision of statements from both parties that complied with the directions previously given by Deputy Regional Judge Holbrook clearly identified the areas of disagreement between the parties.

Roofing works.

18 In 2017 the Respondents had commissioned a condition report upon the building. This was produced by a Chartered Surveyor, Martin Butterworth in July of that year and identified considerable work as being necessary for the roof of the building. This work was subsequently made the subject of an appropriate consultation procedure under Section 20 of the landlord and Tenant Act 1985.

19 The Applicant took no issue with the consultation process carried out, nor with the standard to which the work was carried out. His concern was that payment appeared to have been made to a person who was not a contractor connected with the work that had been undertaken.

20 The Respondents, in their submissions, and Mrs O'Connor at the hearing accepted that this might appear to be the case. She had made payments to one contractor, and to a separate account at his direction in favour of a colleague. She had not been assisted by the accounting system of the Nationwide Building Society which failed to identify payees where payment was made from one Society account into another.

21 The matter was important to the Applicant. The eventual cost of the works, after additional work had been required and an allowance made by the contractor, D K C Roofing, for some making good, was £18950.00. The Applicant was responsible for 20% under the terms of his lease. It could be seen that payments to one Douggie Carren represented payments to DKC Roofing but some £10,000 had been paid to a numbered account, apparently in the name of Mark Davies.

22 Mrs O'Connor suggested that through what paperwork she had produced by way of bank statements and emails, together with the invoice from DKC Roofing she had shown that she had paid what had been requested for roof works, broadly in line with the original estimate. She was at the mercy of her contractor for any further confirmation by way of receipts, or other written confirmation of her payment in full.

23 The Applicant had clearly identified his concerns. Payment had been made to a third party at the direction of Mr Carren and who was not clearly identified. This was confounded by the banking processes of nationwide Building Society in the manner in which it made payments between accounts within the Society, rather than externally. No final receipt had been issued and it was not clear that the works had been paid for, although it was accepted that the amounts identified by the Respondents equated to the total provided on the invoice.

24 Fire safety works

These further works had also been undertaken following a consultation process under Section 20 of the Act. Mr Gowron had 2 concerns

(1) Fire safety works had been identified in the general condition survey mentioned in paragraph 17, above. The costing in that report suggested a cost of £1,200.00 should be allowed for them to be carried out. This was considerably below the eventual cost of £3,000.00

(2) This final cost came from the lower of two estimates received by the Respondents, one from a contractor in Southport of £3,040.00 and one from the second named Respondent, Michael Jackson.

The combined effect, to Mr Gowron's mind, suggested an unreasonable inflation of the cost, benefitting the Respondents directly.

25 Mrs O'Connor explained that the external estimate was the only one received by the Respondents, apart from that from Mr Jackson, and although the consultation process had been undertaken there had been no further contractor suggested by the leaseholders to provide an alternative external estimate.

26 The Tribunal supported the Applicant's concerns about the difference between the cost suggested in the general condition survey and that finally incurred from Mr Jackson. Mrs O'Connor advised that a more thorough fire safety survey had

been carried out and identified much more extensive work as being required. This had been provided neither to the Tribunal nor the Applicant and although attempts were made for it to be sent electronically on the day the Tribunal subsequently requested it to be forwarded by post and further consideration could take place at a later date alongside the costs issues raised by the Applicant. This would give him time to give the report appropriate consideration.

27 Mrs O'Connor accepted that whilst it was unfortunate that there were no further external estimates proffered this was often the case when works were advertised and it was in those circumstances that Mr Jackson had offered his own assessment. Provide the process had been gone through, it was not unreasonable to accept his lower tender to the specification.

28 Following the hearing, and in compliance with the directions given, a copy of the fire risk assessment, provided by a Mr Lenaghan in 2017. Mr Gowron, in his subsequent correspondence, pointed out that he felt its recommendations differed little from those in the initial general condition survey, apart from a 250% increase in costs by the time of Mr Jackson's invoice.

29 Postal Charges

The Charges incurred for banking were further examples, from the Applicant's point of view, of the amounts shown in the accounts not matching those identifiable and documented in the Respondents' accounts. Whilst it was appreciated that the variation was not a large amount, there being £276.97 shown on the Respondents' building society statement, as against £404.47 shown in the service charge accounts, this was seen by the applicant as further evidence of accounting discrepancies. Mrs O'Connor sought to rely upon the addition to those entries on the bank statement of further amounts recorded in a different manner, principally a cash withdrawal of £127.50 exhibited to her 3rd statement. She also suggested that the total amount of £404.47 related only to direct postal costs and no additional charge was made for such items as paper, printing or time in raising the relevant correspondence.

Legal costs

30 After the hearing the Tribunal received narratives expanding upon the summary of costs originally submitted by the Respondents' solicitors which detailed the work carried out in order to justify the amounts being sought.

31 The Respondents had already made the observations that under clause 5.10. of the lease (see paragraph 5, above) there was an obligation upon the lessee as follows:

"The lessee must pay to the landlord the full amount of all costs, fees, charges, disbursements, and expenses including… those payable to counsel, solicitors, surveyors and bailiffs properly and reasonably incurred by the landlord in relation to and incidental to

5.10.3 The recovery or attempted recovery of arrears of rent or other sums due under this lease."

32 The two bills came to a total of £2634.30, including VAT, split almost equally between initial work seeking to recover the amounts due and then in relation to court proceedings for the recovery of those amounts.

33 Mr Gowron considered the work done to be unnecessary and unreasonable. He expressed concerns about the necessity for the work to be done and whether it was reasonable to expect him to make any contribution given that those queries he had raised had not, to his mind, been resolved satisfactorily.

Section 20C application

34 Both parties addressed this matter in submissions following the hearing. It is appropriate to note that whilst both parties make reference in those submissions to matters that are not directly relevant to the purpose of section 20C, they do address issues that might be seen as influencing the Tribunal as to what might be a just decision in the circumstances of this case. Mr Gowron re-lists his concerns as evidencing the appropriateness of his application to determine those matters about which he has expressed apprehension and pointing out that in his view it took until the hearing to obtain adequate answers. The Respondent considers that adequate responses had been provided and that Mr Gowron continued with his case beyond the point of reasonableness and within it had impugned the honesty and integrity of the Respondents without any justification.

Determination

35 The Tribunal reconvened on 16th December to consider all that it had read in the submissions received and what had been said at the hearing on 21st October. It is able to deal with the matters raised in the manner set out below.

<u>Roof works</u>

36 The Tribunal will say from the outset that these are reasonably incurred at reasonable cost (including the very small excess over the contract price, as explained by the additional rubbish disposal). The Applicant admits as much and has done so from the outset. His concern has been to ensure that the right payments have been made to the right people. In this regard the Tribunal is satisfied that Mrs O'Connor has contributed greatly to the Applicant's concerns. Record- keeping and Book-keeping appear to such that what amounted to a reasonable enquiry begins to uncover the unusual paper trail involving two contractors, a lack of invoices matching how they wished to be paid and a

peculiar manner in which Nationwide Building Society deal with internal transactions.

37 The Tribunal is of the view that the situation could have been explained very easily in a few sentences as to how the pay the payments were requested and made, together with how the Applicant was clearly indemnified against any further claim upon his resources.

The fire safety works

38 The Tribunal recalls Mrs O'Connor as acknowledging that there was a considerable difference between the suggested costing of fire safety works in the general condition survey carried out by Mr Butterworth and the costs of the works eventually carried out by Mr Jackson. They were undertaken after a further fire risk assessment was carried out. That is presumably the report from Mr Lenaghan.

39 That is undoubtedly correct. An analysis of the two reports suggest a very similar view as to what should be done. Mr Butterwoth makes three recommendations. They are at page 23 of his report, page 161 of the hearing bundle. Mr Lenaghan's action plan makes the same three recommendations and adds two more, neither of those suggesting any significant further cost, so far as the Tribunal can see.

40 No explanation is offered as to why those limited recommendations made in common by both experts transmute into the more extensive works tendered for by Mr Jackson and Jeff Wall Electrical Services. The issue, so far as the Tribunal is concerned is not why were they carried out by one of the Respondents, but rather why do they go beyond the strikingly similar recommendations of two unrelated experts?

41 In so far as it is able to do so, the Tribunal has exercised its expertise to attribute a reasonable cost to what was required to be done, according to the concurring elements of the two experts, and come to a conclusion that an amount of £1,800.00, including VAT, is reasonable. This is based upon Mr Butterworth's costings (Mr Lenaghan does not provide any) with a reasonable amount for overruns and contingencies. If this is generous to the Respondents, then they may count themselves fortunate.

Postage

42 Mr Gowron rightly points out that clearly identified postal expenditure amounts to £267.97. The difference between that and the amount charged of £404.47 being a cash withdrawal from a cash machine on 1st October 2018. Mrs O'Connor suggests in her witness statement of 6th February 2020 that this was for further postage. The tribunal notes, however, at page 326 of the bundle an exhibit marked "LOC3" which lists the same withdrawal as relating to "courts". It cannot be both. It may indeed be neither as there is elsewhere a separate entry for

"HMCTS" on page 333 amounting to £105.00. The Tribunal also notes that after £127.50 is supposedly withdrawn in cash for postage there is a conventional entry the following day for £6.50 transaction at Farnborough Post Office attributed to postage in the otherwise usual manner.

43 In the circumstances the Tribunal is not satisfied on balance that the £127.50 in question is properly attributable to services reasonably incurred at reasonable cost.

Solicitors costs

44 The Tribunal clearly recognises the right of a party in a situation such as that in which the Respondent's found themselves here. Similarly, it is easy to recognise that solicitor's and other professional costs are recoverable under Clause 5.10.3 of the lease as an administration charge, subject to the oversight of the Tribunal under those provisions referred to at paragraph 9, above.

45 It is also clear that it is a not insignificant sum that was in dispute, bearing in mind the extent of the contribution required from the Applicant to the overall value of the roof works. Instructing a solicitor may well be justified in relation to assist with recovery, as against seeking to act in person.

46 Nevertheless, the Tribunal has found that the Respondents have contributed considerably to their own difficulties. Communication with Mr Gowron could have avoided much of the difficulty with the roofing costs and his objections in relation to the fire safety works and the postage costs have been vindicated. In relation to the roof works dispute, the Tribunal has considered the copy correspondence that has been supplied to it prior to both the court proceedings and the application to the Tribunal, as against further information apparently supplied later. Are the solicitor's costs in those circumstances to be considered reasonable in the light of the positions adopted by the parties up to that point in relation to how the roofing works were paid for?

47 The Tribunal is of the belief that against the background that has been set out they were not reasonable. To take the steps they did at the time they did, was not appropriate.

Section 20C (and Paragraph 5A of Schedule 11 of the 2002 Act)

48 The Tribunal considered this matter in the light of the submissions made and after giving consideration to the relevant provisions of the lease.

Clause 5.10 of the lease does not appear to relate to tribunal proceedings relating to the consideration of service charges, or administration charges. It relates to professional fees for:

a) Consent to licences

b) Work directly, or indirectly relating to notices for forfeiture,

c) Recovery of rent or other outstanding sums,

d) Preparation of a schedule of dilapidations.

49 It also appears to be the case that professional work and associated costs in relation to a tribunal dispute is not within any of the elements of a service or administration charge contemplated by Clause 7. To confirm that position the Tribunal makes an order in favour of the Applicant.

JR RIMMER
Tribunal Judge
4th January 2021