



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

Case reference : **LON/00BJ/LSC/2022/0194**

HMCTS code : **Face-to-Face Hearing**

Property : **137 Upper Richmond Road, London,
SW15 2TX**

Applicant : **Tatiana Guseva (Flat 12) and the lessees
of Flats 1, 3, 4, 5, 6, 7, 8, 9 and 11
- see Appendix to Decision**

Representative : **Tatiana Guseve (lead tenant)**

Respondent : **Optivo**

Representative : **Joseph Meethan (Counsel)**

Type of application : **For the determination of the liability to
pay service charges under section 27A of
the Landlord and Tenant Act 1985**

Tribunal members : **Judge Robert Latham
Marina Krisko FRICS**

Venue : **10 Alfred Place, London WC1E 7LR**

**Date and Venue of
Hearing** : **17 October 2022 at 10 Alfred Place,
London, WC1E 7LR**

Date and Decision : **19 October 2022**

DECISION

Decisions of the tribunal

- (1) The name of the Respondent is amended to "Optivo" rather than "Optivo Home Limited". It is agreed that this is the correct title of the landlord.
- (2) Yana Lapitska is removed as an Applicant. She is not a party to the lease for Flat 12.
- (3) Shaline Teelock is removed as an Applicant. She is the lessee of Flat 2. She has "staircased" up to 100% of the equity and was not required to pay the service charge in dispute by the Respondent.
- (4) The Tribunal determines that demands for the payment of interim service charges on 17 February 2022 and 24 June 2022 are not payable as they were not demanded in accordance with the terms of the lease.
- (5) The Tribunal makes 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 Applicants through any service charge.
- (6) The Tribunal determines that the Respondent shall pay the Applicants £300 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees which they have paid.

Agreement between the Parties

- (7) The Respondent agreed to provide to the Applications, by no later than 14 November 2022, a statement explaining how the Respondent operates the service charge mechanism in their lease and how the service charges have been computed for the service charge years 2019/20, 2020/21 and 2021/2. This should include an explanation as to how any reserve fund is held (see section 42 of the Landlord and Tenant Act 1987).
- (8) Subject to this, the Applicants agreed that they would pay an interim service charge for the period 1 April 2022 to 31 March 2023 in the sum that they paid for 2021/22 + a 3% uplift for inflation. They recognise that at the end of the financial year there will be a reconciliation between the actual expenditure and the interim payments made and that an additional charge may become payable.

The Application

1. By an application dated 21 June 2022, the Applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985

("the Act") as to the amount of interim service charges payable to the service charge year 1 April 2022 to 31 March 2023 in respect of the flats which they occupy at 137 Upper Richmond Road ("the Building"). They also seek an order pursuant to section 20C of the Act.

2. On 17 February 2022, the Respondent demanded an interim service charge from Ms Guseva in the sum of £406.52. This was a 54% increase on the service charge of £263.99 which she had been required to pay for 2021/22. The letter explained that the charges represented (i) "managing agent charges": £387.16 and (ii) "management fee": £19.36. Although it was not apparent from the terms of the letter, the sum of £406.52 is a monthly charge.
3. On 22 March, Ms Guseva requested an explanation for the increase. She asked to see the accounts for 2021/2 and the budget for 2022/23 in accordance with the terms of her lease. On 29 March, a "Customer Experience Advisor" informed her that a response would be provided by 26 April. No response was received. Ms Guseva sent chaser letters. No response was received. The Customer Experience Officer escalated this as a formal complaint. A response was promised by 27 May. This was not received. On 21 June, the Applicants issued their application to this tribunal.
4. On 11 July 2022, a Procedural Judge gave Directions and set the matter down for hearing today. The Judge indicated that the case was "eminently appropriate for mediation". The Applicants indicated that they were willing to mediate. The Respondent failed to respond. The Tribunal is satisfied that this is a case which called out for mediation. The service charge mechanism specified in the tenant's leases, has not been the mechanism that has been operated in practice. Mediation would have offered the opportunity to explore the ways forward.
5. By 25 July, the Respondent was directed to disclose the service charge accounts and estimates for the three years up to and including 2021/22. The Respondent failed to comply with this Direction.
6. On 24 June 2022, the Respondent issued a revised demand for the interim service charge from Ms Guseva in the sum of £389.32 per month. This was a 47% increase on the service charge which she had been required to pay for 2021/22. The letter explained that the monthly charges represented (i) "managing agent charges": £370.78 and (ii) "management fee": £18.54. The Respondent stated that when it set the estimated service charge for 2022/2023, it didn't have the managing agent's budget for 2022. The Respondent rather based its estimate on what it paid to the managing agent in 2021 plus an allowance for inflation. The Respondent now had the budget for 2022 and the interim service charge had bene reduced.

7. On 15 August 2022, the Applicants filed their Scott Schedule and Statement of Case. The next step was for the Respondent to file their response to the Scott Schedule and their Statement of Case by 5 September. The Respondent failed to comply with this Direction.
8. On 20 September, the Respondent's Legal Services wrote to the tribunal and apologised for the failure to comply with the Directions and attributed this to staff absences. The Respondent stated that it would aim to forward its Statement of Case by 26 September. The Respondent enclosed a response to the Applicant's complaint, dated 21 July 2022.
9. On 23 September, the Tribunal issued revised Directions requiring the Respondent to file its material by 26 September. On 26 September, the Respondent filed a Scott Schedule and a witness statement from Michelle Emery, Head of Service Charges. She stated that Optivo had no direct involvement with Flat 2 Tileman House. It was suggested that the Applicants should rather have issued their application against Tileman House (Putney) Management Company Limited ("the Management Company") and/or their agent, HML Group. She stated that she would be unable to attend the hearing due to a "pre-existence annual leave arrangement".

The Hearing

10. The following appeared on behalf of the Applicants: (i) Ms Tatiana Guseva (Flat 12), (ii) David Peak (Flat 7) and (iii) his partner, Ms Jacqueline Burman and (iv) Mr Conor Gates, the husband of Rachel Sowerby (Flat 8).
11. It was agreed that the following should be removed as Applicants:
 - (i) Yana Lapitska as she is not a party to the lease for Flat 12. She is a merely the partner of the lessee.
 - (ii) Shaline Teelock who is the lessee of Flat 2, but has "staircased" up to 100% of the equity. Optivo no longer bill her for service charges. We were told that the Management Company now invoice Ms Teelock directly. The Tribunal is not clear as to why this occurs as the Management Company is not a party to her lease. Staircasing up to 100% of the equity should merely relieve her of her liability to pay "the specified rent".
12. Mr Joseph Meethan (Counsel) appeared for the Respondent. He was instructed by the Respondent's Legal Department. He was instructed at short notice and applied for an adjournment so that the Management Company could be joined as a party to the application. The Tribunal indicated to Mr Meethan that he faced an insuperable problem. There was no evidence before the Tribunal that either of the interim service

charge demands, namely those dated 17 February and 24 June 2022, had been demanded in accordance with the terms of the lease. Mr Meethan conceded that he could not establish that the demands have been lawfully made. The Tribunal therefore refused his application for an adjournment and indicated that we would be allowing the application.

13. Mr Meethan stated that the relevant landlord was "Optivo" rather than "Optivo Homes Limited" which was an associated vehicle used to acquire properties and interests in properties. The Tribunal therefore substitutes "Optivo" as Respondent.

14. It was only too apparent that there is considerable uncertainty as to how the Respondent should, and how it does, operate the service charge account for the Building. Looking to the future, the parties agreed to the following:

(i) The Respondent agreed to provide to the Applicants, by no later than 14 November 2022, a statement explaining how the Respondent operates the service charge mechanism in their lease and how the service charges have been computed for the service charge years 2019/20; 2020/21 and 2021/22. This should include an explanation as to how any reserve fund is held (see section 42 of the Landlord and Tenant Act 1987).

(ii) Subject to the above, the Applicants agreed that they would pay an interim service charge for the period 1 April 2022 to 31 March 2023 in the sum that they paid for 2021/22 + a 3% uplift for inflation.

15. The Applicants recognise that at the end of the financial year, there will be a reconciliation between the actual expenditure and the interim payments made and that an additional charge may become payable. This will provide them with the opportunity to analyse how the service charge account has been operated and to consider whether the service charge items for which they have been charged are payable under the terms of their lease and/or are reasonable.

16. The Tribunal records our gratitude to the help provided by Mr Meethan. He was instructed at a last stage, but assisted the Tribunal in exploring some of the complexities of this case. The Tribunal goes on to consider some of the issues that the parties will need to address for the future.

The Leases

17. The problems in this case arise from the fact that the sub-leases held by the Applicants do not mirror the headlease from which the Respondent derives its title. Tileman House is a substantial development at 131-177 Richmond Road which consists of three buildings of between 6 and 11 storeys. There are commercial premises on the ground and first floors

and a basement carpark shared by the three buildings. The Building at 137 Upper Richmond Road is the social housing element of the development and consists of 12 flats in a 6 storey building held under shared ownership leases.

18. The Tribunal has not been provided with a copy of the head lease for the Building. Mr Methan stated that the lease granted a term of 250 years from 1 January 2016. There are three parties to the lease:

(i) The Landlord: On 1 February 2019, Tileman House Freehold Limited acquired the freehold interest from Cress Nicholson Operations Limited.

(ii) The Tenant: The original tenant was Viridian Housing. In 2017, Viridian Housing and Amicus Horizon merged and now trade under the name of Optivo. Optivo is a charitable registered society which is also registered with the Regulator of Social Housing.

(iii) The Management Company: Tileman House (Putney) Management Company Limited. The accounting period for their service charges is the calendar year. The Management Company has appointed HML to manage the Building and the other parts of Tileman House.

19. The Tribunal understands that Optivo leaves the management of the Building to the Management Company. They merely pass on the service charges which they pay to the Management Company, to the Applicants. They also charge the Applicant's a 5% management fee for this service. This seems to include corresponding (or not corresponding) with their lessees.

20. On 10 June 2016, Viridian Housing ("the Landlord") granted a lease of Flat 12 to Ms Guseva ("the Tenant") for a term of 125 years. The Management Company is not a party to this lease. Optivo is now her landlord. This is a shared equity lease and Ms Guseva has a 30% interest in the equity. She is required to pay (i) a ground rent, currently £150 pa; (ii) a "specified rent", currently £507.73 per month reflecting the 70% interest in the equity that she does not own; and (iii) a service charge defined as "the Specified Proportion of the Service Provision".

21. The Landlord's covenants are set out in Clause 5. This includes covenants to insure the Building, to repair, redecorate and renew the structure of the Building and to provide specified services. Whilst it is always open to a landlord to appoint an agent to carry out its responsibilities under the lease, it is not open to a landlord to abrogate their responsibilities by leaving them to a third party. The Landlord has the ultimate responsibility for ensuring the Building is insured and determining what repairs are necessary and what services should be provided. It is unclear whether it is the Landlord or the Management Company who has

exercised this ultimate responsibility under the Applicant's leases in respect of the Building.

22. The service charge provisions are set out in Clause 7. The accounting year ends on 31 March. The lease makes provision for an interim service charge, namely "the Service Provision (which) shall consist of a sum comprising the expenditure estimated by the Authorised Person as likely to be incurred in the Accounting Year by the Landlord for the matters specified in Clause 7.4". The "Authorised Person" is defined as "the individual nominated by the Landlord to estimate expenditure in relation to the Service provision in accordance with Clause 7.3".
23. The Tribunal asked Mr Meethan to identify the authorised person who had approved the interim service charge. He was unable to do so. It also seemed apparent that this did not relate to the sums that would be expended on repairs and services in the "Accounting Year" but rather the calendar year for which the Management Company operates its accounts. In these circumstances, the Tribunal was satisfied that the interim service charges were not payable.
24. Clause 3.3.1 provides that the Landlord shall determine the "fair and proper proportion of the outgoings" to be paid by each Tenant. Ms Emery suggest that it is rather for the Management Company to determine this apportionment. This is not correct.
25. Clause 7.5 provides that as soon as practicable after the end of each Account Year, the Landlord shall determine and certify the amount by which the actual expenditure during the Account Year has exceeded or fallen short of the budgeted expenditure. The Tenant is required to meet any deficit and is entitled to be repaid any surplus.
26. The Directions provided for Optivo to disclose the service charge accounts for the years 2019/2020, 2020/21 and 2021/22. Optivo has failed to comply with this Direction. The most recent service charges provided for calendar year 2018. It seems that the Applicants may be paying three sets of management fees, namely to the Management Company, HML and Optivo. It would be difficult to justify this duplication as being reasonable.
27. Under the Applicant's lease, it is for Optivo to justify the that service charges are payable and that these charges are reasonable. It is also Optivo who is responsible for holding any service charge contributions (including any reserve fund) on trust for their service charge payers pursuant to section 42 of the Landlord and Tenant Act 1987.
28. Were there to be any further application to this tribunal in respect of the service charges which the Applicants have been required to pay, there

would be a further opportunity for the parties to utilise the mediation services offered by the tribunal.

Application under s.20C and refund of fees

29. In the light of our findings and the conduct of the Respondent in this matter, we are satisfied that it is appropriate to make an order under section 20C of the 1985 Act so that the Respondent may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge. We also order the Respondent to refund to the Applicants the tribunal fees of £300 which they have paid.

Judge Robert Latham
19 October 2022

Appendix

Parties to the Application

Mara Fernandes & Joao Magalhaes - Flat 1 (1 bedroom)

Matthew and Elizabeth Brooke - Flat 3 (2 bedrooms)

Jessica Hytten - Flat 4 (1 bedroom)

Serkan & Tuba Balakan - Flat 5 (1 bedroom)

David Allin - Flat 6 (2 bedrooms)

David Peak - Flat 7 (1 bedroom)

Rachel Sowerby - Flat 8 (1 bedroom)

Josep Oriol Brunet and Maria Vallivana Arnanz - Flat 9 (2 bedrooms)

Mindaugas Babonas & Irina Babone - Flat 11 (1 bedroom)

Tatiana Guseva - Flat 12 (2 bedrooms)

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).