FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case references	**:**	**LON/00BJ/LSC/2022/0074** **LON/00BJ/LDC/2022/0166**
Property	**:**	**Flat B, 159 Wandsworth High St, SW18 4JB**
Applicant	**:**	**Greenline Housing Ltd**
Representative	**:**	**Mr Simon Stern, Director, Fountayne Managing Ltd**
Respondent	**:**	**Mr Jeremy Neal**
Representative	**:**	**In person**
Type of application	**:**	**For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985; Section 20ZA application**
Tribunal members	**:**	**Mr Charles Norman FRICS Valuer Chairman** **Mr John Naylor MRICS**
Date and Venue	**:**	**30 August 2022, 10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**3 March 2023**

DECISION

Decisions of the Tribunal

(1) The Tribunal makes the determinations as set out under the various headings in this Decision and the appended Scott Schedule.

(2) 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 lessees through any service charge.

(3) The application for dispensation under section 20ZA is REFUSED.

The application

1. The Applicant seeks a determination pursuant to s.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 service charge years:

   2016/17
   2017/18
   2018/19
   2019/20
   2020/21 (on account)

2. Directions were issued on 23 March 2022 setting down the matter for a face to face hearing. The section 27A directions required preparation of Scott Schedule. Subsequently, a section 20ZA application was made. Directions for the section 20ZA application were given on 8 September 2022 together with further directions for the section 27A case, as important documents were missing from the Applicant's bundle which was raised at the hearing.

The hearing

3. The Applicant was represented at the hearing by Mr Simon Stern of Fountayne Managing Ltd and the Respondent appeared in person. The Tribunal received an electronic bundle of 368 pages from the applicant. The respondent provided a separate bundle of 66 pages and two-page skeleton argument. Further documents were provided subsequent to further directions and in relation to the section 20ZA case.

Procedural Matters Post Hearing

4. Following the hearing, the Tribunal decided that the other residential long leaseholders in the building as it currently exists ought to have been notified of the application, as they were "interested persons" under rule

29(3)[1]. This states "on being notified of the name and address of an interested person the Tribunal must provide that person with a copy of the application and any accompanying documents." Accordingly, the Tribunal caused an email to be sent to the applicant on 4 January 2023 directing that those relevant names and addresses be provided. On 6 January 2023, the applicant responded stating "there are only two leaseholders in the building and both have been served". On 23 January 2023 the Tribunal caused a further email to be sent to the applicant as follows: "The request for addresses related to all long lessees in the building which now comprises 8 flats and a double commercial unit, based on the landlord's evidence. In particular this issue refers to the landlord's apportionment of building insurance. The landlord has described these flats as forming part of Simrose Court. Therefore, the Tribunal needs to write to all those residential long lessees and requires their names and addresses. These should be provided by 27 January 2023." No substantive reply was received. The Tribunal does not accept that the building only contains two flats.

5. However, on 8 February 2023, the Supreme Court promulgated its judgment in *Aviva Investors Ground Rent GP Ltd v Williams and Others* [2023] UKSC 6. Put briefly, the Supreme Court held that the previous cases on the interpretation of section 27A(6), in which any decision reserved to a landlord in a lease (such as apportionment) was held to be void, were wrongly decided. The correct test was one of the reasonableness including rationality of such landlords' decisions. Consequently, the Tribunal no longer considered it essential for interested parties to be notified of these proceedings. In any event, the relevant contact information has never been provided, upon which the r. 29(3) duty is conditional. The Tribunal has therefore decided to issue its decision.

The background

6. The property which is the subject of this application is a converted flat on the second floor of a Georgian building on Wandsworth High Street. There is another converted flat on the first floor in this part of the building. As constructed, the building was three storeys. Prior to extension works (see below) it was (and remains) in mixed use with a double sized former bank unit on the ground floor. There is also another maisonette within the original building, which is understood to have been occupied by the bank. The Applicant stated that to the rear of the building is a new development of 6 flats, known as Simrose Court owned by the same freeholder. This was constructed in 2017/18 and extends over the existing High Street building within a mansard roof forming the fourth storey. Simrose Court is in fact a street rather than building name.

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

1 The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

issues in dispute. However, the Tribunal viewed images of the building at the hearing.

8. The Respondent holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

The issues

9. The Tribunal identified the relevant issues for determination as follows:

   (i) The reasonableness payability and apportionment of service charges for years 2016/17, 2017/18, 2018/19, 2019/20, 2020/21 relating to day to day service charges;
   (ii) The effect of section 20B on the payability of charges for 2016/17;
   (iii) The reasonableness, payability and apportionment of insurance costs;
   (iv) Whether dispensation under s 20ZA should be granted for fire prevention works of £1900;
   (v) Whether the Tribunal should make a section 20C order in favour of the tenant.

10. The Tribunal has no jurisdiction to make service charge determinations in relation to the non-residential parts of the building.

The Applicants' Case

11. Mr Stern, Director of Fountayne Property Manager provided a witness statement and gave evidence. This may be summarised as follows. The respondent holds the lease dated 26 April 2013 from Greenline Housing Ltd. Service charge provisions in the lease allow the freeholder to demand service charges on account for the costs of maintaining and managing the property. The accounting period is 25th December to 24th of December. Interim demands are issued on a biannual basis. The service charge budget is fair and reasonable based on the size of the building and based on similar properties. The aggregate amount contended for was £10,230.15. Accountants' expenditure certificates for 2018/19 and 2019/20 were supplied [290,291][2].

12. Owing to the nature of the property the service charge had been set into three separate schedules[3]. In schedule one, the commercial unit contributed 50% and the two flats each contributed 25%. In the second

[2] Square brackets denote references to the hearing bundle.
[3] As a management practice and not pursuant to the lease

schedule, which related to services applied only to the residential element [Flats A and B] the expenditure was apportioned 50% to each flat. The third schedule dealt with building insurance which was split between 157 Wandsworth High Street and Simrose Court, and in which each of eight flats in the combined property contributed 10% and the commercial ground floor 20%.

13. Mr Stern also gave evidence in relation to communal cleaning, emergency lighting certificates, window cleaning, general maintenance, fire prevention system service, repairs, maintenance, management fees and other items of expenditure. The applicant's case in relation to these matters is set out fully in the appended Scott Schedule.

14. In relation to section 20B, the applicants case was that relevant notification of charges had been sent to the respondent at another address at Balham, which was shown as the respondent's address at in the lease. [Prescribed clause LR3[4]].

The respondent's case

15. The respondent provided responses in the Scott Schedule, provided a skeleton argument, and made oral submissions at the hearing. His case may be summarised as follows. In relation to the 2017 service charge he was not informed of these costs until 9 January 2019. Therefore, the applicants are only allowed to charge for half the year in question, as a result of section 20B.

16. As to cleaning, he had requested cancellation of the service because the cleaners do not clean. Between 2017 and 2020 they used a wet dirty mop to clean the carpet. He provided photographs. There was no plug socket in the communal area and therefore a vacuum cleaner could not be used. When a socket was fitted the vacuum only reached halfway up the stairs. Furthermore, the cleaners had made sexual and lewd comments to the respondent's girlfriend in the past. The respondent can keep the area clean and has previously painted the area, fitted movement sensitive lights, and replaced the letterbox.

17. The respondent had overpaid for insurance; the landlord's charges are muddled and inconsistent and range between 10% and 25% of the premium. The respondent has been paying 25% for each year in question. His submission was that as per the applicants last correspondence, Simrose Court should be liable for 60%, and 159 should be split as to 25% for the two flats and 50% for the commercial unit. Therefore, his insurance apportionment should be 12.5%. Further, the insurance invoice shows that the building is over-insured as the insured sum was £5.4 million in 2020/21 but the full reinstatement produced by Barrett [Surveyors] is for £2.214 million [30 November 2020][215].

4 [62]

There is unnecessary communal area contents insurance and cover for loss of rent, which is not applicable.

18. The fire prevention work of 2020 [£1900] was unexpected and unacceptable. His 50% share of this cost is £950. The process and how this was dealt with was contrary to section 20. There was no consultation. The works amounted to a basic MDF wooden box fitted to cover the electric box which took two men two days to complete, which was staggering. The cost is unreasonable, inflated and no competitive tendering process occurred.

19. Management fees were excessive. These were £522 in 2019, an increase of £312 from 2018. There was a lack of provision of invoices for many costs.

20. Mr Neal also submitted that Fountayne are unfit to manage the building. Builders have been in the commercial building on the ground floor who act in an antisocial manner, smoking and taking drugs. A current flat owner is planning to take the managing agents to court. The front door is insecure and the managing agents unprofessional. The respondent also referred to his making a future right to manage application and seeking assurances of the reasonableness of future cost estimates.

The Lease

21. The salient features of the lease are as follows. The lease was made on 26 April 2013, prior to construction of the Simrose Court additions to the property. The building was defined as 157-159 Wandsworth High St. The common parts were defined as "the front door entrance hall passages stairways and landings of the building which are not part of the property or the commercial premises." The property was defined as "second floor flat known as Flat B."

22. The "Retained Parts" included the main structure and common parts. "Service charge" was defined as "a fair and reasonable amount of the Service Costs determined by the landlord." "Service costs" include all costs properly and reasonably incurred in providing the Services, complying with all laws relating to the Retained Parts and fees and disbursements reasonably and properly incurred of the managing agents and accountants.

23. "Services" are defined as cleaning maintaining decorating repairing and replacing the retained parts, heating, and lighting the common parts, cleaning outside windows excluding the commercial premises, maintaining and replacing signage for the common parts, cleaning maintaining repairing and replacing the floor coverings in the internal areas of the common parts, providing cleaning and maintenance staff the building, and keeping the retained parts insured.

24. The Insured Risks include "fire explosion lightning storm flood overflowing of water tanks apparatus or pipes and any other risks which the landlord decides to insure against from time to time."

25. By clause 2.3, the tenant covenanted to pay inter alia the service charge and by paragraph 2 of schedule 4 this was amplified with reference to paragraph 4 of schedule 6. By paragraph 3 of schedule 4 the tenant covenanted to pay the insurance rent demanded by the landlord.

The Tribunal's decision

26. The Tribunal sets out its determinations on the appended Scott Schedule, supplemented below.

Section 20B

27. The Tribunal caused a post hearing letter to be sent to the applicant seeking specific evidence that notification of the 2017-18 service charges had been sent to the respondent. The applicant provided a copy letter to the applicant and his partner dated 11 December 2017 enclosing estimated costs, at an address in Balham shown in LR3 on the lease (see above). There was no evidence that the respondent had asked for that address to be used. There was no certificate of posting.

28. The lease incorporates section 196 of the Law of Property Act 1925. This enables documents to be served by leaving them at the demised premises or by leaving them at the last-known place of abode.

29. In *London Borough of Southwark and Runa Akhtar and Stell LLC* [2017] UKUT 0150 (LC), it was held that a s 20B notice was "a notice served under the lease" because it enabled the landlord to do something prescribed by the lease i.e. recover a service charge. It also held that because section 196 of the Law of Property Act 1925 permitted the service of certain documents by post, section 7 of the Interpretation Act 1978 also applied to the posting. The significance of this is that unlike section 196, which requires use of registered or recorded delivery post, section 7 of the interpretation act 1978 states

> where an act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be affected by properly addressing, prepaying and posting a letter containing the document and, unless the contrary is proved, to have been affected at the time at which the letter would be delivered in the ordinary course of post.

30. However, the Tribunal has been provided with no evidence that the Balham address was the last then known place of abode of the respondent. The lease itself was dated 13 April 2013. There is nothing in the lease permitting service of notices at the Balham address as opposed to at the subject property. The Tribunal therefore finds that the respondent was not served with the 2017 demands until 9 January 2019.

31. For these reasons, the Tribunal finds that the section 20B defence is made out. The Tribunal finds for the purposes of s.20B, a cost is "incurred" not when the relevant service is provided but when the landlord providing the service receives an invoice from its contractor. The Tribunal therefore disallows any invoice received by the landlord earlier than 18 months prior to 9 January 2019 , i.e. 9 July 2017.

32. The Tribunal requested, post hearing, a full bundle of the 2017-18 invoices from the applicant, to enable it to easily identify and disallow those invoices. However, it appears that as provided, this is incomplete. The applicant will therefore need to identify relevant disallowed invoices and agree the position with the respondent.

33. Any decision given by the Tribunal in the Scott Schedule must be read subject to this decision in relation to s 20B, which takes precedence.

Apportionments

Costs relating to 157/159 Wandsworth High Street

34. The Tribunal has jurisdiction to determine whether the landlord's apportionments are rational as part of the Tribunal's assessment of reasonableness and payability of service charges under section 27A(1): see *Aviva Investors Ground Rent GP Ltd v Williams and Others* [2023] UKSC 6. (see above).

35. Mr Stern's submissions were that 157/159 Wandsworth High Street, prior to construction of Simrose Court, should be apportioned on the basis of 50% to the bank and 25% to each of flats A and B.

36. However, it emerged during Mr Stern's evidence following questions from the Tribunal that the 157/159 Wandsworth High Street, prior to construction of Simrose Court, included a further area of accommodation in addition to Flats A and B and the double ground floor commercial unit. Mr Stern's evidence about this was unclear, but the Tribunal notes that the building description on the Aviva Insurance Certificate 2016/17 [210] describes the building as "Lloyds Bank with 2 Upper Flats & 1 Upper Maisonette[5]". This additional accommodation is a mirror of Flats A and B which occupy the upper parts of only one of the

[5] Emphasis added

two shops. The Tribunal infers that the upper maisonette was incorporated into the bank as ancillary space. Irrespective of its actual use, it follows that the existing building comprised three floors, each of which was formed of two sections, being situated in 157 and 159 respectively. Therefore the building comprised six and not four units for service charge purposes.

37. Accordingly, the Tribunal finds that a reasonable, rational and proper apportionment to the respondent, for building insurance and other costs to be relating to the building (prior to construction of Simrose Court) was one-sixth.

Apportionment of the Block Insurance Policy between Simrose Court and 157/159 Wandsworth High Street

38. Following completion of the Simrose Court, the Tribunal accepts the landlord's position set out in the Scott Schedule for 2018, as follows:

> "The property is a multiple occupancy property which has a commercial unit on the ground floor two flats on the side entrance which are directly on top of the commercial unit, at the rear of the property there is a separate entrance referred to as simrose court for which has 6x flats. The building insurance policy covers 157 – 159 Wandsworth as well as Simrose court, the insurance is split into ten units in which each will be liable for 10%. The commercial unit is liable for 20%. [so] that the appropriate apportionment of the block insurance cost in relation to the respondent is one-tenth".

39. The Tribunal has also relied the descriptions of the building on the insurance certificates to assess the number of units and the period from which the Simrose Court additions were completed.

40. The Tribunal has also considered the effect of the Respondent's apparent acceptance of the landlord's latest proposed apportionment at Para 3 of his skeleton argument (12.5% of the whole premium). However, the Tribunal does not consider that this amounts to an agreement because (i) the landlords position implying 12.5% is inconsistent with the 10% position in the Scott Schedule (ii) the amount payable remains disputed owing to the alleged over-insurance (see below) and (iii) it is no more than the respondent's opinion.

Costs relating to Flats A and B only

41. The Tribunal agrees that a 50/50 apportionment is correct.

Buildings Insurance

1. A reinstatement cost assessment was carried out as at 30 November 2020 by Barrett Corp Harrington, chartered surveyors. This covered the whole development 157 Wandsworth High Street together with Simrose Court. The reinstatement assessment was £2.214m. The Tribunal finds (as admitted by Mr Stern) that the property was over insured in 2019/20 and 2020/21. It therefore finds that a pro-rata reduction in recoverable premium is appropriate.

2. The evidence relating to insured sums and insurance premia may be summarised as follows:

Year	Insured sum	Premium	% based on reinstatement valuation of £2.214m	Pro-rata reduced premium	No of units
2016/17	£1.567m	£2168.33			6
2017/18	£1.610m	£2684.94			6
2018/19	£2.185m	£3049.95			10
2019/20*	£2.9925m	£3200.87	73.99%	£2368	10
2019/20	£5.40m	£10738.58	41.00%	£4403	10
2020/21	£5.40m	£5985.03	41.00%	£2454	10
2020/21	Not stated	£2523.61			Not stated

* Not shown in the accounts or Scott Schedule

3. It is unclear why there are two insurance certificates for 2019/20 and two premia for 2020/21. However the Tribunal relies on the Scott Schedule entries. The Tribunal's findings are set out in the Scott Schedule .

Section 20ZA Application

4. The basis of the application was as follows. It was described as a retrospective audit dispensation of the section 20 consultation in relation to works relating to fire and safety compliance to the communal areas. These required a contractor to build a cupboard within the communal area and carry out some fire stopping works at and around the area of the main electricity inlet. The landlord stated, "due to the complexity of the area and nature of the job the cost has been £1900, this has come at a major surprise to us as we have not expected the works would exceed £250 and we would have had to formally consult, understandably if we would have been aware of the cost beforehand we would have consulted"(sic).

5. The bundle contains the relevant invoice [279] which described the work as follows "remove old electric cupboard, supply and install frame with

fire door lining, install fire rated doors, fire rated plasterboard, intumescent strips and smoke seals, plaster and paint hallway. Enclose power supply with fire rated material and adequate trunking. Make safe wire produce protruding onto stairs as was causing a trip hazard. All rubbish removed from site. Materials and labour included."

6. Directions were issued on 8 September 2022 requiring the applicant to give publicity to the application to other leaseholders and inviting opposing leaseholders to complete a pro forma response.

7. The respondent Mr Neal made a submission which may be summarised as follows. The application was made far too late, no notice of intention was submitted, no notice of estimates, no notice of award of contract and no tendering process. Only one quote was obtained, and no consultation took place. The quote was from an affiliated company to the managing agents. In the grounds of the application questions two and three had been left blank with insufficient explanation given.

Decision of the Tribunal in respect of the section 20ZA Application

8. The Tribunal finds that the cost of the works appears very high. No satisfactory explanation of the great urgency has been provided. The Tribunal is also concerned by the landlords' remarks relating to the high and unexpected cost. Therefore, absent of any form of consultation or competitive quotation the Tribunal finds that the respondent has suffered significant prejudice. The Tribunal has considered the effect of *Daejan Investments Limited v Benson* [2013] UKSC 14, which allows the grant of dispensation subject to conditions, but concluded that a conditional grant of dispensation would not remedy the prejudice to the tenant. For these reasons, the grant of dispensation is refused.

Application under s.20C

9. At the hearing, the Respondent applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above and the conduct of the parties, the Tribunal determines that it is just and equitable for an order to be made under section 20C of the 1985 Act, so that the Applicant may not pass any of its costs incurred in connection with the proceedings before the Tribunal through the service charge

Name: Mr Charles Norman FRICS **Date:** 3 March 2023

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).