In the FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Tribunal Case Reference	:	**LON/00AC/LSC/2021/0185**
Property	:	**St Joseph's Gate, Holborn Close, London NW7 4JX**
Applicants	:	**Some of the leaseholders of St Joseph's Gate, set out in the First Schedule to the application**
Representative	:	**Spencer West LLP**
First Respondent	:	**St Joseph's Gate Management Co Ltd**
Representative	:	**Fladgate LLP**
Other Respondents	:	**The remaining leaseholders of St Joseph's Gate, set out in the Second Schedule to the application**
Type of Application	:	**Payability of service charges**
Tribunal	:	**Judge Nicol** **Mr SF Mason BSc FRICS** **Mr J E Francis**
Date and venue of Hearing	:	**3rd May 2023** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**5th May 2023**

DECISION

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(1) The Applicants' application to amend their statement of case is refused.

(2) The Respondents' application to admit a second witness statement from Mr Paul Fecher is refused.

(3) The service charges for the year 2020-2021 challenged by the Applicants in these proceedings are reasonable and payable. In particular:

(a) The Sector 1 Proportion of the service charges was correctly calculated in accordance with the lease.

(b) The allocation of expenses for electricity, staff salaries, pension contributions, and managing agents' fees between Estate and Building charges was reasonable.

(4) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 that the First Respondent may recover no more than 90% of their costs of these proceedings through the service charges levied on the Applicants.

Relevant legal provisions are set out in the Appendix to this decision.

Reasons

1. St Joseph's Gate is a development of the former St Joseph's College, with 49 flats in a building sub-divided into 7 wings or courts. The freeholder is Berkeley Homes (Three Valleys) Ltd who are not active in these proceedings. The development is managed by the First Respondent, St Joseph's Gate Management Ltd, a company owned jointly by the lessees of the various flats.

2. The flats were marketed by Berkeley on the basis that service charges would be calculated using each of the sub-divisions as a separate block – the lessees in that block would pay, in addition to charges arising from estate expenses paid by everyone equally, service charges based on costs incurred in relation to their block only, calculated as a proportion of floor area. Until 2020, the charges were calculated on this basis. However, following the election of new board members for the First Respondent, the calculation was changed so that the entire building was counted as one rather than 7 parts. Some of the expenses were also re-allocated from the estate to the building. This resulted in increases in service charges for some lessees. The Applicants objected and applied to the Tribunal for a determination under section 27A of the Landlord and Tenant Act 1985.

3. The Tribunal was scheduled to hear the case over 3 days, 3rd-5th May 2023, including an inspection of the property. In the event, the hearing took only one day and it was not necessary to inspect. The attendees were:

- Mr Mark Warwick KC, counsel for the Applicants
- Mr David Rose, solicitor for the Applicants
- Witnesses for the Applicants:
    - Mr Raymond Pollock
    - Mr Roger Burston
    - Mr Hilton Lewis
    - Mr Richard Romain
    - Mr Emanuel Woolf
- Ms Caroline Shea KC, counsel for the Respondents
- Mr Adam Gross, solicitor for the Respondents

- Witnesses for the Respondents:
    - Mr Michael Rosenberg
    - Mr Paul Fecher
    - Mr Mark Novick
    - Mr Kenneth Shaw
- Mr D Butcher, a director of the Respondents

4. The documents before the Tribunal consisted of:

(a) A bundle of 1,074 pages;
(b) Outline Submissions, a Chronology, and a short list of issues from Mr Warwick;
(c) A Skeleton Argument from Ms Shea; and
(d) A joint bundle of authorities[1].

Procedural issues

5. The Tribunal had originally intended to inspect the property on the first morning. However, various procedural issues arose and, when the Applicants suggested that the inspection be put off and the hearing started early, at 10am on the first morning, to deal with those issues, the Tribunal agreed.

6. The application was issued over 2 years ago. Directions were first given on 10th August 2021. Part of the delay was caused by a laudable, though unsuccessful, attempt to mediate but, nevertheless, the parties have had plenty of time to get their respective cases in good order. Instead, the Tribunal was faced with applications from both parties to add to or amend their cases which were raised no more than the day before the hearing was due to start.

Amendment of Applicants' statement of case

7. In the week before the hearing, Mr Warwick provided his skeleton argument, entitled "Outline Submissions". It alleged that the parties were bound to follow the original, by-block method of calculating the service charges due to estoppel by convention. As Ms Shea emphasised, this argument had not been mentioned in any document or in any shape or form before or during this dispute at any time.

8. When the Respondents' solicitors objected in correspondence, the Applicants decided to apply, the day before the hearing, to amend their statement of case. Mr Warwick supplied a draft amended statement of case at the hearing.

9. While the Applicants were quite right to think that the introduction of this new argument required an amended pleading, they were just way

[1] The Tribunal noted that the bundle of authorities included original judgments where reports were available and photocopies of books when downloaded electronic versions would be clearer, more reliably up-to-date and searchable. While bundles of authorities are likely, by definition, to be compiled in a short time period, it should take no longer to use reports and electronic versions of books.

too late in making their application. Mr Warwick submitted that his argument just provided a cloak to fit over the witness evidence provided well over a year ago and that, since the relevant evidence had already been provided, the Respondents could and should have anticipated this argument. He further asserted that the Respondents would suffer no prejudice if the amendment were allowed.

10. The Tribunal has no hesitation in rejecting Mr Warwick's submissions. The argument as to estoppel by convention could and should have been notified to the Respondents, from the beginning of the case, if not at least months in advance of the hearing. On Mr Warwick's own submissions, the availability of the argument was apparent from his own witness statements dating from November and December 2021. On the other hand, the argument would turn to a large extent on the evidence, meaning that the Respondents would need time to consider what further disclosure may be required and what witness evidence to put forward. Ms Shea protested that she had not even had time to research the law on what is a "tricky" concept, let alone for her clients to be advised and compile their evidence.

11. Mr Warwick queried what the Respondents thought the Applicants' witness evidence was for, if not to support the argument as to estoppel by convention. However, it is unfortunately not uncommon for witnesses who feel strongly to include in their statements material which is irrelevant to the matters a court or tribunal has to decide. Despite the Tribunal's directions specifically including reference to the guidance on witness statements in *JD Wetherspoon plc v Harris* Practice Note [2013] EWHC 1088 (Ch); [2013] 1 WLR 3296, the statement of the lead Applicant, Mr Pollock, still included matters, such as submissions, which should not have been included. Further, the Tribunal agrees with Ms Shea that issues arise from and are defined by the pleadings, on the basis of which the parameters of any witness statements are set, not the other way around. The Respondents were not required to analyse the witness statements to see what arguments could be based on them and then to prepare to meet any such arguments – rather, it is for the Applicants to set out their case in good time.

12. Therefore, the Applicants' late application to amend their statement of case was refused and they could not rely on the argument of estoppel by convention. The parties were informed of the Tribunal's conclusion during the hearing.

Further witness statement on behalf of Respondents

13. Mr Paul Fecher, one of the Respondents, had provided a witness statement dated 3rd December 2021 which had been included in the hearing bundle. On the day before the hearing, the Respondents' solicitors warned that they intended to put in a further witness statement. It was provided at the hearing. It consisted of a short further witness statement from Mr Fecher alleging that the two new-build blocks

at the property had required more maintenance than the 5 refurbished blocks.

14. The witness statement was entirely hearsay. The evidence could and should have come from a person with direct knowledge of the relevant matters, namely an employee of the First Respondent's managing agents.

15. However, more significant was the fact that the witness statement dealt with matters up to 3 years old. It suffered from the same problems as the Applicants' estoppel by convention argument, namely that it could and should have been produced much earlier and the failure to do so has deprived the Applicants of any proper consideration or response.

16. Therefore, the Respondents' application to admit a further witness statement was refused. The parties were again informed of the Tribunal's conclusion during the hearing.

Sector 1 Proportion

17. Mr Warwick had identified his estoppel by convention argument as the first issue to be decided. Even if the Tribunal had allowed him to run the argument, this seemed to put the cart before the horse. The principal issue between the parties was how to apportion service charges arising from expenses incurred in relation to the building or buildings containing the 49 flats. The answer to this must start by looking at the lease. If the lease provides the answer without more, then any arguments about estoppel by convention would fall by the wayside.

18. All the leases are in identical form with the following provisions being relevant:

1 DEFINITIONS

This Lease incorporates the following conditions:

"Building or Buildings"	the building shown on the Estate Plan containing in total 49 apartments and all structural parts thereof including the roofs gutters rainwater pipes foundations floors all structural walls bounding individual Flats therein and all external parts of the building, and all Service Installations not used solely for the purpose of an individual Flat
"Maintenance Expenses"	the moneys actually expended or reserved for periodical expenditure by or on behalf of the Management Company or the Landlord at all times during the Term in carrying out the obligations specified in Schedule 4 and specified in Schedule 6
"Sector 1 Proportion"	The proportion of the expenses reasonably and properly incurred by the Management

	Company in the particular Accounting Year which are referable to the Building in which the Property is situated calculated in accordance with the following formula: A divided by B (where A is the net internal floor area of the Property) (where B is the aggregate of the net internal floor areas of all the Flats in the Building
"Sector 2 Proportion"	The sum 1/X x Y where: X = the number of properties on the Estate and the adjoining development entitled to use the Communal Areas Y = the expenses reasonably and properly incurred by the Management Company in complying with its obligations in Clause 6 and Schedule 4 in relation to the Estate in the particular Accounting year
"Tenant's Proportion"	The Sector 1 Proportion and the Sector 2 Proportion of the Maintenance Expenses payable by the Tenant

5 MAINTENANCE EXPENSES

5.1 The Tenant hereby covenants with the Landlord and the Management Company and with and for the benefit of the owners for the time being of the Residential Units on the Estate that throughout the Term the Tenant will pay to the Landlord or Management Company as appropriate the Tenant's Proportion of the Maintenance Expenses …

19. In *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619 the Supreme Court reiterated that the interpretation of a contractual provision, including one as to service charges, involved identifying what the parties had meant through the eyes of a reasonable reader, and, save in a very unusual case, that meaning was most obviously to be gleaned from the language of the provision. It was further reiterated in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173 that this was not a literalist exercise focused solely on a parsing of the wording of a particular clause but required consideration of the contract as a whole. However, the starting point is always the words of the lease and, in most cases, the interpretation of those words ends at that point.

20. With all due respect to the Applicants' references to the history of this matter and the context in which the lease was written, the language of the lease in this case is clear. The Sector 1 Proportion is calculated by reference to "B", defined as the aggregate of the net internal floor areas of all the Flats in the "Building". "Building" is clearly defined as the building or buildings containing all 49 flats.

21. The Applicants point to the words "the Building *in which the Property is situated*". They argue that the wording which has been italicised here is otiose unless it refers to the particular one of the 7 blocks in which the particular flat is located. However,

(a) Mr Warwick argued that "Building" had a different meaning from that in the definition section due to the addition of the italicised words but those words do not provide any, let alone sufficient, grounds to depart from the express definitional provision in the lease.

(b) The words don't change the natural meaning of the language. As a matter of ideal English, the words might seem superfluous but they are still consistent with the "Building" referring to the whole property rather than just one block.

(c) Mr Warwick argued that there is a presumption against "surplusage" but, assuming that is true, it cannot be more than a very weak presumption in the context of English leases which are often drafted deliberately with words which have similar or overlapping meanings.

(d) The italicised words are contained in a different part of the definition of "Sector 1 Proportion". The definition of "B" is clear and self-contained.

(e) As Ms Shea pointed out, there is nothing in the lease providing the basis for any alternative definition of "Building". The 7 blocks or courts are nowhere referred to, let alone defined.

22. Therefore, the Tribunal is satisfied that the ordinary and natural meaning of the words used to define the Sector 1 Proportion is that it is calculated across all 49 flats, not only in reference to the particular sub-division, block or court in which a flat happens to be located.

23. If the Tribunal had held otherwise, the First Respondent sought to argue that they were permitted to change the formula by reference to clause 5.2 of the lease:

> If due to any re-planning of the layout of the Estate or the Building by the Landlord or if it should at any time become necessary or equitable to do so the Management Company shall recalculate on an equitable basis the Tenant's Proportion for all Residential Units comprising the Estate …

24. The Tribunal has severe doubts that this clause grants the First Respondent the wide powers they argue for. However, it is not necessary to decide this point in these proceedings. The Tribunal's findings as to the interpretation of the Sector 1 Proportion are sufficient to determine the apportionment issue in the Respondents' favour.

25. The parties had provided statements from 9 witnesses and this was one of the main reasons why the hearing had been listed for 3 days. In fact, the above findings meant that it was not necessary to hear from any of the witnesses, save in respect of the allocation issue addressed below. The Tribunal also did not need to inspect the property.

Allocation of certain expenses

26. As can be seen in the above-quoted lease provisions, the service charges payable by the lessees are split into two parts. Sector 1 refers to the building or buildings containing the flats whereas Sector 2 refers to the remainder of the estate. Some expenses are incurred across both Sectors but the lease is silent as to how to allocate such expenses between the Sectors. It is essentially a matter of judgment for the First Respondent, subject to their decisions being reasonable within the meaning of section 19 of the Landlord and Tenant Act 1985.

27. The Applicants identified 4 items for which the new board had decided to change the previous allocation between the Sectors in the service charge estimate for the year to 31st October 2021:

(a) The electricity costs used to be allocated entirely to the estate but the First Respondent decided to allocate 80% to the building.

(b) Similarly 45% of the salaries for the two employed concierges were re-allocated to the building.

(c) £4,500 of the pension and national insurance contributions for the concierges was also moved to the building.

(d) £8,100 of the managing agents fees of over £19,000 were re-allocated to the building.

28. The Applicants said they were unable to expand on their objections to the re-allocations because the Respondent had provided no justification for them, despite a number of requests to do so. For these issues, the Applicants had raised them in good time, in their Reply, but the Respondent failed to provide any relevant documents or witness evidence. Ms Shea suggested there was not much but even the concierges' employment contracts or the managing agents' contract would have been extremely useful.

29. In the event, the Respondents presented one of their number, Mr Michael Rosenberg, to answer Mr Warwick's questions on the subject, despite the fact that his witness statement was silent on these matters.

30. Mr Rosenberg explained that the re-allocation of these expenses was a matter of the judgment of himself and two of his fellow directors based on discussions between themselves and information obtained verbally from the managing agents and the concierges.

31. The electricity charges had the best evidential basis for the re-allocation. It was easy to identify that some electricity would be consumed on the estate for external lighting and water pumps while some would be consumed in the internal communal areas for lighting, heating and the lifts. Also, there is a number of separate meters. However, the First Respondent had not disclosed any electricity bills or meter readings.

32. The other re-allocations appeared to be no more than guesstimates arrived at after informal discussions. Mr Warwick understandably

objected to the poor to non-existent evidential basis for the allocation of expenses and the First Respondent's inexplicable failure to provide previously what evidence they did have.

33. However, it is not enough simply to point out the inadequacies in the First Respondent's allocation exercise. It is obvious that the four categories in question should be allocated between the estate and the building – there is no argument that the previous 100% allocation to the estate reflects reality. The Applicants had no alternative to present. The First Respondent should be co-operating with any reasonable requests for information or disclosure, and must be expected in future to do so, but, in the meantime, the Tribunal has to reach a decision on the basis of the available evidence.

34. The Tribunal accepts that Mr Rosenberg, whatever the deficiencies of his evidence, was genuinely doing his best to answer questions truthfully and honestly. While the exercise could certainly have been carried out with greater professionalism, and have generated a proper paper trail, the re-allocations represent the First Respondent's reasonable efforts at a proper allocation of expenses. Therefore, the service charges arising from that allocation are reasonable and payable.

Costs – section 20C

35. The Applicants sought an order under section 20C of the Landlord and Tenant Act 1985 that the First Respondent should not be permitted to add any costs of these proceedings to their service charges. In this case, the most significant determinant of this issue is that the Respondents succeeded on the primary issue between the parties.

36. However, as explained in the above paragraphs, the First Respondent failed in their obligations to address in disclosure and witness evidence the Applicants' objections to the re-allocation of certain expenses. The Applicants were denied the opportunity to refine their case or even withdraw their objections. In the circumstances, the Tribunal determined that the First Respondent may not put more than 90% of their costs through the service charges.

Name: Judge Nicol **Date:** 5th May 2023

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
  (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
  (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
  (a) "costs" includes overheads, and
  (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
  (a) only to the extent that they are reasonably incurred, and
  (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
  (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
  (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
  (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the

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

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -

(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -

(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -

(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.