FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BF/LSC/2022/0346**
Property	**:**	**456A London Road, London SM3 9JB**
Applicant	**:**	**Burren Developments Ltd**
Representative	**:**	**Anne Dowd**
Respondents	**:**	**Richard Perkins and Dorothy Perkins**
Representative	**:**	**The Respondents did not appear, but make email representations**
Type of application	**:**	**Application for a determination of the reasonableness and payability of service charge under S.27A Landlord and Tenant Act 1985**
Tribunal	**:**	**Judge Adrian Jack, Tribunal Member Kevin Ridgeway MRICS**
Date of Decision	**:**	**25th April 2023**

DECISION

Covid-19 pandemic:
Description of hearing: This has been a face-to-face hearing on 20th April 2023. The Tribunal had an electronic bundle of three parts prepared by the applicant. In addition the Tribunal was given a copy of a letter dated 9th November 2021 from W H Matthews & Co, the applicant's solicitors to Streeter Marshall, the respondents' solicitors, and an exchange of emails between those firms on 11th and 17th November 2021.

Background and procedural

1. The property comprises a maisonette over commercial premises. A more detailed description appears below.

2. The applicant tenant applies for determination of the payability of final service charges in the service charge years 2016-17 to 2021-22 inclusive. (The service charge year runs to Michaelmas.) It also seeks relief in respect of the current year 2022-23 and the future years 2023-24 to 2026-27.

3. The Tribunal gave directions on 24th November 2022. These were largely ignored by the respondent landlords. Despite having been given an opportunity to give dates to avoid for a hearing, the landlords failed to attend and instead informed the Tribunal that they were elderly and in any event on holiday. Mr Perkins made representations to the Tribunal in emails of 3rd January and 1st March 2023.

The invalidity of the invoices

4. None of the invoices for service charges included a summary of the tenant's rights and obligations. The effect of section 21B of the Landlord and Tenant Act 1985 is that by reason of that failure no monies are due in respect of 2016-17 to 2021-22.

5. Pursuant the 2021 correspondence between W H Matthews & Co and Streeter Marshall, the sum of £3,346.63 is held by the latter firm pending a determination by this Tribunal of the payability of service charges in those years. Since no service charges are due, these monies will stand to be released. As we explained to Ms Dowd, who represented the tenant, apart from making a declaration that no service charges are due in the years 2016-17 to 2021-22, we have no power to make an order in respect of those monies. Any dispute must go to the County Court or the High Court.

Insurance

6. Insurance was a live issue in each of the service charge years 2016-17 to 2021-22. The landlord has failed to produce evidence that the property was insured in all of those years. Mr Perkins claims that documentation was destroyed after the ending of each service charge year. Only a policy document for 2017 was produced. We do not accept that there is such a dearth of evidence. The landlord claimed to use the well-known firm of Towergate to obtain insurance of the premises. In our judgment it is not credible that no documentation of the existence of the insurance exists. Further we do not accept that Towergate would not have retained evidence of the steps they had taken to test the market. It would have been extremely simple to obtain a letter from Towergate confirming that the property had been insured throughout and the amount of premium paid in each year.

7. Ms Dowd also makes the point that the amount being charged the tenant was remarkably stable between £160 and £180 a year with some years repeating a figure of £166.40. We agree that this is suspicious.

8. We find that the landlord has not proved the property was insured in all of the relevant years. Accordingly, even if the section 21B point were not fatal to the landlord's recovery of the insurance premiums, we would have disallowed the insurance claim in the years 2016-17 to 2021-22.

9. We should add that there is also a question as to the division of the insurance premium. The property held by the landlords consists of two adjacent maisonettes, 456A and 454A. These two maisonettes are over commercial premises currently used as solicitors' offices which are also held by the landlord. The ground floor premises extend at the back as a result of an extension which has been built. Although Ms Dowd has attempted to assess the floor area of the maisonettes and the commercial premises, more accurate plans would be needed to make an assessment based on square footage.

10. It appears that the landlord has invoiced the tenant for a quarter of the total premium (assuming there was insurance). It is unclear whether this division is appropriate. The lease between the parties reserves as part of the reddendum the insurance monies by way of "further or additional rent" in "the amount which the Lessor may expend in effecting or maintaining the insurance of the maisonette against loss or damage by fire and such other risks (if any) as the Lessor thinks fit…" No adequate means of determining the appropriate proportion of the total premium which should be paid by the tenant is set out in the lease.

Parapet wall

11. The landlord seeks to recover £2,500, being half the cost of repairing the parapet wall at the front of 456A and 454A. Our first observation is that no consultation was carried out pursuant to section 20 of the 1985 Act. In consequence the sum which can be claimed is limited to £250 in any event (quite apart from the section 21B point). The landlord has made no application under section 20ZA to be relieved of this limit.

12. Ms Dowd, however, submits that the claim in respect of the parapet wall is bad in any event. The two maisonettes and the commercial premises were originally held by Quickcustom Properties Ltd. The transfer by Quickcustom to the Perkins was made on 8th July 1997. The property transferred comprised the maisonettes and the commercial premises. However, the "brown access" was not transferred.

13. The "brown access" comprised a walkway at the front of the maisonettes about 1.5 metres wide used for access to the front doors of the maisonettes. The walkway was over the front of the commercial premises, so that the maisonettes were set back from the front of the building by that distance. The parapet wall was the extension upwards

of the front wall of the commercial premises. In our judgment, having looked at the plans, the parapet wall was not part of the land transferred to the Perkins. It was part of the flying freehold of the brown access which was retained by Quickcustom. Accordingly the landlord had no repairing obligation in respect of the parapet wall and can in consequence not recover the cost from the tenant under the repairing provisions of the lease.

14. We would add that the landlord has in any event not proven that the cost of repair was £5,000. Even if the landlord could in principle recover in respect of this work, the amount claimed would have been disallowed on this basis too.

Current and future years

15. No service charge demand has yet been raised in respect of the current service charge year. The only matter which would be justiciable in respect of the current and future years is potentially the appropriate division of the cost of insurance. For the reasons we have set out, we do not consider that we have sufficient material to make a determination. We bear in mind that the division of the cost insurance potentially affects the tenants of 454A and of the commercial premises. There may need to be an application for a variation of the various leases to ensure that 100 per cent of the cost of insurance is payable by the tenants in possession.

16. In our judgment it is inexpedient to determine this liability in respect of the current and future years.

Costs

17. The Tribunal has a discretion as to who should pay the fees payable to the Tribunal. These comprise £300. The approach generally taken is to look at the degree of success enjoyed by each side. The tenant has not succeeded in obtaining a decision in respect of the current and future service charge years, but this issue took very little time and was not the subject of any submissions by the landlord. In these circumstance, we consider that the tenant is the substantive winner and the landlord should pay these costs.

18. The tenant sought an order under section 20C of the Landlord and Tenant Act 1985. The landlord has not indicated whether they intended to recover any of the costs of the current proceedings through the service charge account or otherwise. Although the Tribunal is reluctant to interfere with the contractual rights of landlords, in our judgment this is a case where the landlord should not be able to recover their costs of the current proceedings through the service charge. To do otherwise potentially nullifies the tenant's success.

19. Lastly the tenant sought an order in respect of the legal costs it had paid a solicitor, Brett Holt of Worcester Park, in the sum of £325. The Tribunal only has jurisdiction to order such costs where a party has

acted unreasonably: see rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. In our judgment the landlord has acted unreasonably in this case. They have failed to engage in the proceedings. They have failed to produce documentation. They are professional landlords, albeit in a comparatively small way. The effect has been to cause the tenant to incur costs which it should not have had to incur. In our discretion we consider the sum of £325 in respect of legal costs is reasonable.

DETERMINATION

a) The tenant owes nothing in respect of the service charge years 2016-17 to 2021-22 inclusive.

b) The Tribunal declines to make a declaration in respect of the current and future service charge years, 2022-23 to 2026-27 inclusive. This is without prejudice to the rights of the parties or any or some of them to apply in the future for declarations or other determinations.

c) The respondents shall reimburse the applicant £300 in respect of the fees payable to the Tribunal.

d) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 preventing the respondents claiming any costs in respect of these proceedings through the service charge account or otherwise.

e) The respondents shall pay the applicant £325 in respect of the applicant's legal costs.

Name: Judge Adrian Jack **Date:** 25th April 2023

Landlord and Tenant Act 1985 (as amended)

Section 18

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

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

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

Section 19

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

   and the amount payable shall be limited accordingly.

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

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,
   (d) the date at or by which it is payable, and
   (e) the manner in which it is payable.

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

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
   (a) the person by whom it would be payable,
   (b) the person to whom it would be payable,
   (c) the amount which would be payable,
   (d) the date at or by which it would be payable, and
   (e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
   (a) has been agreed or admitted by the tenant,
   (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
   (c) has been the subject of determination by a court, or
   (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
   (a) complied with in relation to the works or agreement, or
   (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
   (a) if relevant costs incurred under the agreement exceed an appropriate amount, or

(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 21B

(1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.

(2) The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.

(3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.

(4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

(5) Regulations under subsection (2) may make different provision for different purposes.

(6) Regulations under subsection (2) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.