FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BJ/LBC/2022/0374**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**Flat 1 163 Balham Hill, London SW12 9DJ**
Applicants	**:**	**Mr Marc Dillon & Mr Patrick Dickens**
Representative	**:**	**Mr Tom Frazer of Counsel**
Respondents	**:**	**Crescent Trustees Ltd**
Representative	**:**	**Mr Jonathan Upton of 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	**:**	**Mr Mark Taylor MRICS Valuer Chair** **Ms Helen Bowers – Valuer Member** **Ms Rachael Kershaw-Professional Member**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of Hearing	**:**	**22 May 2023**
Date of decision	**:**	**7th July 2023**

DECISION

Description of hearing

This has been a remote video hearing which has been not objected to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because of an accommodation of one of the parties on medical grounds, and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 543 electronic pages, the contents of which the tribunal noted.

Decisions of the tribunal

(1) The tribunal makes the determination that the advance service charge payment as contribution to a reserve fund for years 18/19 (£310.20), 20/21 (£372.24) & 21/22 (£372.24) are not payable as incorrectly demand under the terms of the lease.

(2) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985 as the lease has now been sold by the applicants.

(3) The Tribunal does not make an order under Sch 11 Para 5A of the Commonhold and Leasehold Reform Act 2002 as per 2 above.

The application

1. The Applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of service charges payable by the Applicants in respect of the service charge years ending 2016, 2018, 2019, 2020 & 2021.

2. It emerged during submissions and hearing that the parties to this case have been the subject of other previous proceedings in the County Court in respect of Flat 1. Claim F4YX157 was dealt with under a Tomlin Order and H8AY2E6F by Consent Order of the Court.

3. By virtue of section 27A(4)(c) of the Act, the Tribunal has no jurisdiction where a matter has been determined by a Court. However, the current application, as clarified, was not, at least in part, included in those proceedings. Therefore, the Tribunal finds that it does have jurisdiction in relation to the application.

The hearing

4. The Applicants were represented at the hearing by Mr Frazer, and the Respondent by Mr Upton, both of Counsel.

5. At the commencement of the hearing, it was confirmed that, apart from a skeleton argument from Mr Frazer, the bundle of 543 pages comprised the entirety of the documents under consideration. Mr Upton confirmed that he did not submit a skeleton and relied on his Statement of Case.

The background

6. The subject property is located on the 1st Floor of a substantial three storey Victorian era building with 15 flats in total, with the entire ground floor providing retail/showroom space. This is based on Google Streetview, as photographs were not provided by the parties.

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

8. The Applicant 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 lease of flat 1 was originally held for a term of 99 years under a lease dated 29th July 1988.It was subject to a Deed of Variation dated 1st December 2005 which extended the term of the lease to 189 years from 24th June 1986.

9. On account demands in relation to Flat 1 had been subject to prior judgment by the county court (see above).

10. The service charge year runs from 29th Sept to 28th Sept each year.

The issues

11. From the directions and submissions, the Tribunal identified the following matters as requiring determination:

    (i) The reasonableness and payability of disputed service charges as set out on the Scott Schedule and in respect of the service charge years 2016, 2017, 2018, 2019, 2020 and 2021.

(ii) The payability of legal fees of £9,196.27 incurred in previous proceedings.

(iii) Whether the Tribunal has jurisdiction given previous Court proceedings

(iv) A section 20C application

(v) A Sch. 11 Para 5A application.

12. Mr Frazer helpfully clarified that a number of items were now conceded by the tenants with only the following items outstanding.

(i) The payability of the advance contributions towards the reserve fund for years 18/19, 20/21 & 21/22.
(ii) The payability and reasonableness of legal fees of £9,196.27.

The Law

13. Relevant extracts of statutes are set out in the Appendix, below.

Reasons for the tribunal's decision

The Applicants' Case

14. Mr Fraser in his skeleton argument stated that the applicants will accept the demands were made where the respondent has evidenced the demands. The applicants' position was that the sums demanded for the advance contribution are not payable as they have not been demanded in accord with the service charge provisions of the lease, primarily Clause 5. In respect of the legal fees he submits that these are not payable as it relates to a discontinued action, further legal fees were not specifically mentioned as being recoverable under the service charge and may, depending on a breakdown, raise an issue of reasonableness.

15. In opening Mr Frazer also confirmed that he could only seek a declaratory award as it was not within the Tribunals jurisdiction to make an order in respect of repayment. It was also confirmed that the applicants had disposed of their leasehold interest sometime around the Summer of 2022.

16. The service charge provisions in the leases are set out at Clause 5 and the 7th Schedule of the lease, these clauses are not in dispute save in respect of the recovery of two issues remaining.

17. In essence Mr Frazer's argument is one of construction and form of the demands as Clause 5(3)(d), in his view does not entitle, the respondent to demand a contribution to a reserve fund in addition to a service charge demand.

18. Mr Frazer advanced the general principles derived from the authorities of ***Arnold v Britton*** **[2015] AC 1619** and ***Wood v Capita*** **[2017] UKSC 24.**

The Respondents' Case

19. Mr Upton in his Statement of case was essentially arguing that due to the previous County Court claims' estoppel removed the tribunal's jurisdiction and that the principle of unjust enrichment would be an abuse of process. In opening he dealt first with the recovery of legal fees and took the Tribunal to pages 239 and 240 of the bundle. He explained that the amount of £9,196.27 appeared on the statement and not on that set out at page 240 because this was a standalone demand for administration charges. The third action in the County Court, discontinued, was for debt recovery and sought permission to forfeit under s81 of the Housing Act 1996 and therefore costs incurred in contemplation of forfeiture and therefore recoverable. As it was neither an estimate nor in the service charge accounts the Tribunal did not have jurisdiction under this application.

20. Mr Frazer referred to the pleadings and that this was the first he was aware that this was not being dealt with other than as service charge. In light of this the Tribunal allowed a short adjournment so that Mr Frazer could take instructions and discuss the matter with Mr Upton.

21. Mr Frazer confirmed that he agreed that as argued this matter fell outside s27A and therefore outside the scope of the application. Whilst Tribunal does have jurisdiction of this under Schedule 11 Part 1 Commonhold and Leasehold Reform Act 2002 and was prepared to hear this matter to make effective use of time Mr Frazer felt unable to make effective argument without proper preparation and a fresh application would therefore be necessary.

22. Before moving from this point Mr Frazer raised the issue of costs under Rule 13 as the respondent had given no evidence on this point and it was beyond the applicant's knowledge.

The Witness Evidence

23. Mr Dickens was called and examined by Mr Upton with some questions on his understanding of how the service charge was demanded. Mr

Dickens answered to the best of his knowledge but there was no real evidence of fact.

24. Mr Davidoff was called to assist in the process adopted in demanding the service charge and contribution to the reserve. He said that it was considered that demanding for the service charge and contribution to the reserve was in his opinion more transparent from a tenant's perspective. As the company has built up its management portfolio the methodology of issuing separate demands for the main service charge and contribution to a reserve has become the default.

25. Mr Frazer expanded his argument adopting "the natural meaning of the words". He confirmed in his view this meant that whilst the respondent is clearly entitled to establish a reserve fund this should come from the service charge demanded and not a separate charging item.

26. Mr Upton considered that the contribution for the reserve was plainly a part of the service charge which was the case whether this was shown on two separate bits of paper or not. He put forward an alternative analysis of Clause 5 which suggest that sub-clause (d) does not sit well with sub- clauses (a) and (b) and should have been a separate clause. In terms of authority, he put forward *London Borough of Southwark v. Dirk Andrea Woelker [2013] UKUT 0349 [LC].* In essence his argument was that the demands satisfy the terms of the lease and there is no necessity for this all being in one document.

Findings

27. Clause 1(i) The service charge

all sums payable to lessee under provisions of Clause 5 hereof and seventh Schedule hereto

Clause 5(3)(d)

"*The lessor shall be entitled to set aside a yearly sum to be determined from time to time to provide a fund for:-*

(i) The periodic replacement repair and maintenance ….

(ii) the future repairs and redecorations of the structure and of the common parts

(4) In computing the sums required to be paid by the lessee in accordance with this clause the lessor shall…..be entitled to provide for and take in account such fund as is referred to in sub-clause 3(d) of this clause"

28. The wording of Clause is perhaps unusual but does not seem defective or in error and the Tribunal finds Mr Frazer's submission persuasive on this point. There is a perfectly reasonable natural and ordinary meaning of the clause [Woodall Volume 1 7.163.1] and as a result the process that a landlord to follow in preparing the service charge demand is prescribed.

29. The Tribunal also agrees with Mr Frazer that this case is distinguishable from *Woelker*. Whilst noting the Deputy President's discussion at paragraph 33 regarding the limited assistance, in service charge cases, likely to be found in other courts of other leases; the main question in that case, at para 47, is whether the lessor was entitled to omit from the service charge estimate some component which it could reasonably have anticipated. We do not have a question of a "minimum trigger standard". But rather one of the methodology of the preparation of demands not being in accord with that required by the lease. It was clear from Mr Davidoff's evidence that his company adopt a standardised approach to the preparation of demands; without specific regard to the wording of the service charge provisions of the lease. This is not being critical of the commercial and practical reasons for this given the majority of leases may well fit this approach.

Payability

30. The contribution to reserve fund for 18/19, 20/21 and 21/22 totalling £1054.68 are not payable as not demanded in accord with clause 5 of the lease.

Application under s.20C

31. An order is not required as the leasehold interest has been disposed of by the applicant.

Application under schedule 11, paragraph 5A of the 2002 Act

32. Not required as per paragraph 31 above.

Application under Rule 13

33. It is open to either party to make an application for costs under Rule 13 but the Tribunal would remind them that there is a high bar in it exercising its discretion as per decision in *Willow Court Management Co (1985) Ltd v. Alexander [2016] UKUT 290 (LC)*. If such an application is made then Directions will be issued for a determination on the papers.

Name: Mark Taylor MRICS **Date:** 7th July 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).

Appendix of relevant legislation

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 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.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "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) for or in connection with the grant of approvals under his lease, or applications for such approvals,
(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

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

Schedule 11, paragraph 5

(1) An application may be made to the appropriate Tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate Tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject matter of an application under sub-paragraph (1).

Schedule 11, paragraph 5A

5A(1)A tenant of a dwelling in England may apply to the relevant court or Tribunal for an order reducing 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 in the table, and

(b)“the relevant court or Tribunal” means the court or Tribunal mentioned in the table in relation to those proceedings.