FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/37UF/LSC/2022/0028**
Subject Properties	**:**	**Flats 26, 30, 31, 36, 42, 70 and 73 St Crispins Court Stockwell Gate Mansfield Nottinghamshire NG18 5GL**
Applicants	**:**	**(1) Mr Alan Ashford (26) (2) Mrs Doris Otomewo (30) (3) A P Charles Investments Ltd (31) (4) Ms Nadina Rauf (36) (5) Mr Alan Paul Hanson and Mrs Camilla Hanson (42) (6) Mr Paul Phelan (70, 73)**
Representative	**:**	**Aaron Charles**
Respondent	**:**	**RMB102 Limited**
Representative	**:**	**J B Leitch**
Type of Application	**:**	**Application under section 27A of the Landlord and Tenant Act 1985 for the determination of the payability of service charges in respect of the subject properties**
Date of hearing	**:**	**20 June 2023**
Tribunal Members	**:**	**Deputy Regional Judge Nigel Gravells Mr Graham Freckelton FRICS**
Date of Decision	**:**	**18 July 2023**

DECISION

Introduction

1 This is a decision on an application under section 27A of the Landlord and Tenant Act 1985 ('the 1985 Act') in respect of service charges relating to seven flats at St Crispins Court, Stockwell Gate, Mansfield, Nottinghamshire NG18 5GL ('the subject properties').

2 The Applicants are all long leaseholders of the subject properties, holding under leases granted on various dates in 2014 for a term of 99 years from 1 June 2012. The freeholder of the properties is RMB102 Limited.

3 By application dated 8 November 2022 the Applicants made three applications: (i) under section 27A of the 1985 Act for the determination of the payability of service charges demanded by Premier Property Management on behalf of the RMB102 Limited ('the section 27A application'); (2) under section 20C of the 1985 Act for an order for the limitation of costs ('the section 20C application'); and (3) under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 for an order reducing or extinguishing the Applicants' liability to pay administration charges in respect of the Respondent's litigation costs ('the paragraph 5A application').

4 On 22 November 2022 the Tribunal issued Directions for the conduct of the section 27A application. The section 20C application and the paragraph 5A application were stayed pending the determination of the section 27A application. The Tribunal issued further Directions on 2 February 2023, 8 March 2023 and 28 March 2023.

5 A video hearing was held on 20 June 2023. Those attending the hearing were (i) Mr Aaron Charles, representing the Applicants, and (ii) Ms Camilla Waszek (J B Leitch) and Mr Howard Lederman (of Counsel), representing the Respondent.

6 In the interests of transparency the Tribunal informed the parties that Mr Lederman is a fee-paid Judge of the First-tier Tribunal (Property Chamber) in the Southern Region but that the members of the Tribunal have had no engagement with him in any capacity. Mr Charles raised no objection to Mr Lederman appearing before the Tribunal.

Background

7 St Crispins Court comprises a substantial building containing 86 residential units, two commercial units (leased under a single lease), car parking spaces and internal and external common parts. The subject properties are seven of the residential units.

8 The Applicants provided a copy of the lease of flat 31. It was not suggested that the other residential leases were materially different (except that under the leases of some flats the leaseholder does not have an allocated car parking space).

9 By clause 3.2 of the lease the leaseholder covenants to pay 'the service charge'; 'the service charge' is defined in clause 1.27 as 'a sum equal to the [leaseholder's] share of the 'total expenditure''; 'total expenditure' is defined in clause 1.31 (so far as relevant) as 'the aggregate of the expenditure incurred … by the [freeholder] in carrying out its

obligations under clause 6 of [the] lease'; clause 6 contains the usual landlord's covenants for the maintenance and repair of St Crispins Court (other than the demised flats), including the external and internal common parts, the car parking spaces and the service media.

10 Most significantly for the purposes of the present application, the [leaseholder's] share of the total service charge expenditure is defined in clause 1.29 as 'such percentage as the [freeholder] acting reasonably shall from time to time deem to be fair and reasonable (which may consider among other matters the size of [an individual flat] in proportion to [the land and building owned by the freeholder])'.

11 By paragraph 1 of the Fifth Schedule the leaseholder covenants to pay to the freeholder (i) the 'interim charge' (based on estimated expenditure for the service charge year) by equal half yearly payments in advance and (ii) any balancing charge when the actual costs for the relevant year have been determined and certified by the freeholder's accountant. Paragraph 2 provides that 'the said certificate shall be conclusive and binding on the parties hereto except in the case of manifest error but the [leaseholder] shall be entitled to inspect the receipts and vouchers relating to the payment of the total expenditure'.

12 The service charge year runs from 1 January to 31 December. Prior to 2018 the total service charge expenditure (less £4,000.00 payable by the leaseholder of the commercial units) was apportioned equally among the leaseholders of the residential units, irrespective of the size of the residential unit and irrespective of whether the leaseholder had an allocated car parking space. That approach of equal apportionment among the residential units continued to be adopted even after (retrospective) changes were made to the apportionment of expenditure between the residential units and the commercial units.

13 For 2018 E & J Ground Rents No 9 Limited, the predecessor of RMB102 Limited as freeholder of St Crispins Court, devised a new apportionment method that took into account the differential floor areas of the residential units, whether the leaseholder had an allocated car parking space and usage of the services provided. However, that apportionment method was not applied retrospectively to the service charge years 2015-2017, which are the only years covered by the present application.

14 For 2019 E & J Ground Rents No 9 Limited revised the 2018 apportionment method by excluding the usage factor.

15 On 21 December 2018 E & J Ground Rents No 9 Limited made an application to the First-tier Tribunal under section 27A of the 1985 Act, seeking a determination of the reasonableness of the estimated service charge for 2019 *and the revised apportionment method*. With one minor exception the leaseholders of the residential units expressly agreed with (or at least did not oppose) the revised apportionment method. On 25 June 2019 the Tribunal issued its decision and determined that the expenditure apportioned to the residential units should be apportioned among the individual residential units in proportion to the floor areas of the individual units and that the residential leaseholders with an allocated car parking space should pay

a further contribution in proportion to the size of the allocated car parking space: see BIR/37UF/LSC/2018/0017.

16 RMB102 Limited acquired the freehold of St Crispins Court on 26 July 2019, four weeks after the First-tier Tribunal issued that decision. RMB102 Limited decided to revisit the service charge years 2015-2019 and apply to all years the apportionment method approved for the service charge year 2019. On 22 November 2019 RMB102 Limited wrote to the leaseholders of the residential units, informing them of that decision and issuing replacement service charge demands for the service charge years 2015-2019. RMB102 Limited provided revised statements of account, showing credits for the original service charges demands for 2015-2019 and replacement debits calculated in accordance with the approved apportionment method.

17 As a result a significant number of residential leaseholders (including six of the seven Applicant leaseholders) received demands in respect of the service charge years 2015-2017 for sums in excess of the sums originally demanded and paid in respect of those years.

18 On 8 November 2022 the seven residential leaseholders applied to the First-tier Tribunal to challenge the reapportionment of the service charge expenditure for the service charge years 2015-2017. Since the challenge was largely based on the argument that section 20B of the 1985 Act requires service charge demands to be made no more than 18 months after the relevant costs were incurred, the Applicants' challenge did not include the reapportionment of the expenditure for the service charge years 2018-2019 (which were within the 18-month period).

Preliminary issues

19 On 13 January 2023 J B Leitch made an application to the Tribunal, arguing that the Applicants' application was invalid and should be struck out on a number of grounds relating to the identity of the Applicants. By decision dated 2 February 2023 the Tribunal rejected that application. For the avoidance of doubt, the Tribunal also exercised its power under rule 10 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 to confirm the named Applicants.

20 However, the Tribunal also added E & J Estates Limited as a Respondent on the supposed ground that that company was the predecessor of RMB102 Limited as freeholder of St Crispins Court. That was an error – arguably understandable since the predecessor to RMB102 Limited was E & J Ground Rents No 9 Limited and both companies were owned by Eyre & Johnson Ltd, which trades as E & J Estates. E & J Estates *Limited*, which was dissolved in 2015, never had any connection with St Crispins Court.

21 The Tribunal refused the Applicants' subsequent application to add Eyre & Johnson Ltd as a Respondent to the application on the ground that there has never been any contractual relationship between that company and the Applicants.

22 Mr Charles was persistent in his observations both in his written representations and in his oral submissions about the supposed connection between RMB102 Limited, E & J Ground Rents No 9

Limited and Eyre & Johnson Ltd. However, the Tribunal is satisfied that any such connection has no relevance to the issues before the Tribunal in the context of the present application.

Statutory framework

23 Section 27A of the 1985 Act, so far as material, provides –

(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.

24 Sections 18 and 19 of the 1985 Act provide –

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.

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 provision 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.

25 Section 20B of the 1985 Act provides –

> (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.

Discussion and determination

26 The scope of the section 27A application is limited –

(i) The application relates to the three service charge years 2015, 2016 and 2017 only.

(ii) The Applicants do not argue that the costs included in the service charge accounts for those years were not reasonably incurred.

(iii) The Applicants do not argue that the apportionment method approved by the Tribunal in relation to the service charge year 2019 is not fair and reasonable.

(iv) The Applicants simply argue that that apportionment cannot be applied retrospectively to the service charge years 2015-2017.

27 In view of the limited scope of the application, the Tribunal found that a number of submissions from both parties were not relevant to the issues before the Tribunal.

28 Thus, Mr Charles sought to argue that the original service charge demands for the service charge years 2015-2017 were invalid because they failed to reflect the proper apportionment of the service charge costs between the residential leaseholders and the commercial leaseholders. It was not clear how that argument assisted the Applicants' argument on the issue of retrospective apportionment among the residential leaseholders; but in any event the Tribunal determines that the demands were not invalidated on the ground argued by Mr Charles.

29 Similarly, Mr Lederman argued at length that the Respondent has a contractual discretion under the terms of clause 1.29 of the lease to determine *and redetermine* the fair and reasonable apportionment of the service charge costs among the residential leaseholders. Such a discretion was discussed in the decision of the Supreme Court in *Aviva Investments Ground Rents GP Limited v Williams* [2023] UKSC 6; and Lord Briggs stressed the limited scope for the First-tier Tribunal to interfere with the exercise of such contractual discretions. However, none of that is challenged by the Applicants save that they argue that any replacement service charge demands based on a redetermination of the apportionment of costs must comply with the other contractual terms (in the leases) and with any relevant statutory provisions. And Lord Briggs confirmed the jurisdiction of the First-tier Tribunal to

review the contractual and statutory legitimacy of the Respondent's replacement demands.

30 Mr Charles challenged the retrospective reapportionment of the service charges for 2015-2017 on a number of grounds, although he did not perhaps articulate and develop his arguments as effectively as he could.

31 First, he argued that it was unfair to reopen the service charges for the three years that had already been 'finalised and settled'. He suggested that it was particularly unfair because in some instances the retrospective reapportionment has resulted in service charge demands for some persons in respect of periods before they became residential leaseholders at St Crispins Court. The Tribunal would have some sympathy for persons in that position, especially since it would probably be very difficult for them to recover the sums involved from their predecessors in title. However, in the absence of evidence that such persons exist, the Tribunal cannot base any determination on supposition. More generally, it is dangerous to make determinations based solely on subjective notions of fairness.

32 The Applicants might be in a stronger position if they linked their argument that the service charges had been 'finalised and settled' to the terms of the lease. Specifically, paragraph 1.4 of the Fifth Schedule provides that, where the actual costs incurred in a service charge year exceed the interim payments made on account, the leaseholder shall pay his/her share of the excess costs within 14 days of service on the leaseholder of the certificate referred to in paragraph 1.5. Paragraph 1.5 requires the Respondent landlord's accountant to submit to the leaseholder service charge accounts setting out details of the total expenditure for the service charge year and the leaseholder's share and to certify the amount (if any) due from the leaseholder. Paragraph 2 provides that 'the said certificate shall be conclusive and binding on the parties hereto except in the case of manifest error but the [leaseholder] shall be entitled to inspect the receipts and vouchers relating to the payment of the total expenditure'.

33 In the view of the Tribunal, it is clearly arguable that the original demands for any balancing charges in the service charges years 2015-2017 (which necessarily factored in the then current method of apportionment among the leaseholders) were conclusive and binding on the parties, subject only to an application to the Tribunal.

34 However, the Applicants' principal – and, in the view of the Tribunal, most persuasive - argument is based on section 20B(1) of the 1985 Act. Mr Charles argues that the Applicants are not liable to pay the service charge demands dated 22 November 2019 because the demands in part reflect service charge costs that were incurred in 2015, 2016 and 2017, that is more than 18 months before the date of the demands.

35 The Respondent sought to argue that the Applicants could not rely on section 20B(1).

36 First, the Respondent relied on section 20B(2), which states that section 20B(1) does not apply if, within the period of 18 months beginning with the date when the relevant costs were incurred, the leaseholder 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. The Respondent appeared to argue that the demands for interim service charge payments in 2015, 2016 and 2017 constituted section 20B(2) notices so as to 'stop the clock' for the purposes of section 20B(1). The Tribunal does not accept that argument. First, the interim service charge demands cannot qualify as section 20B(2) notices because they are based on estimated *future* expenditure and cannot therefore notify the leaseholder that relevant costs *had been* incurred. Second, if interim service charge demands can qualify as section 20B(2) notices, there would be no time limit on the serving of final demands and section 20B would serve no useful purpose.

37 Second, the Respondent argued that the service charge accounts for 2015, 2016 and 2017 constituted section 20B(2) notices. Again, that argument is inconsistent with the wording of section 20B(2). A section 20B(2) notice must inform the leaseholder that he would *subsequently* be required to contribute to the relevant costs by the payment of a service charge; but the accounts envisaged by paragraph 1.5 of the Fifth Schedule to the lease include an immediate demand for the payment of any excess charge.

38 Third, the Respondent argued that section 20B does not apply to apportionment revisions; but the Respondent failed to explain why a service charge demand which reflects such an apportionment revision is excluded from the clear wording of section 20B(1).

39 Fourth, the Respondent argued that section 20B does not apply because the effect of the revised apportionment method is that the total amount demanded from the residential leaseholders in relation to the service charge years 2015-2017 in November 2019 is less than the total originally demanded. In the view of the Tribunal that argument seems to adopt a global view of the service charge expenditure apportioned to the residential leaseholders collectively. However, section 20B clearly addresses the position of any individual leaseholder.

40 In response to that view Mr Lederman argued that any Applicant would have to establish that the November 2019 service charge demand required him/her to pay a sum in excess of that originally demanded. And he submitted that the Applicants had failed to do so.

41 Mr Lederman also argued that the final 12 words of section 20B(1) – the tenant shall not be liable to pay *so much of the service charge as reflects the costs so incurred* (that is costs incurred more than 18 months before the demand) - require the Tribunal to determine when precisely relevant costs were incurred. That might be correct where the 18-month period includes part of the service charge year under consideration; but in the present case the 18-month period begins in May 2018, five months after the service charge years under consideraton.

42 In the view of the Tribunal, Mr Lederman over-complicates the issue.

43 The Tribunal can refer to the letter dated 22 November 2019 from Premier Property Management to A P Charles Computer Services Ltd, the name of Mr Charles' company at the time and the leaseholder of flat 31. That is a demand for payment of the outstanding balance on the

statement of account relating to flat 31. Stripping out the 'balance brought forward' and credits and reapportioned charges for 2018 and 2019, the remaining items on the statement comprise credits for the services charges originally paid in respect of the service charge years 2015-2017 and replacement demands for those years reflecting the revised apportionment method. The credits total £4076.10; and the replacement demands total £4090.04. There is therefore a net demand of £13.94.

44 The Tribunal determines that the net demand of £13.94 relates to costs incurred in 2015-2017, more than 18 months before the date of the demand; and that by virtue of section 20B(1) of the 1985 Act A P Charles Investments Ltd (as A P Charles Computer Services Ltd is now known) is not liable to pay that demand. Moreover, for completeness, the Tribunal determines that there was no document that constitutes a section 20B(2) notice so as to stop the clock for the purposes of section 20B(1).

45 The other Applicants did not provide copies of their individual demands (which were presumably also served in November 2019). However, if any of those Applicants applies the simple 'accounting exercise' set out in paragraph 43 above and the exercise results in a net demand in respect of the service charge years 2015-2017, the determinations in paragraph 44 apply equally to him/her.

46 If any of the Applicants applies the simple 'accounting exercise' set out in paragraph 43 above and the exercise does not result in a net demand in respect of the service charge years 2015-2017, then section 20B would appear not to be engaged.

Appeal

47 If a party wishes to appeal this Decision, that appeal is to the Upper Tribunal (Lands Chamber). However, a party wishing to appeal must first make written application for permission to the First-tier Tribunal at the Regional office which has been dealing with the case.

48 The application for permission to appeal must be received by the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

49 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(s) for not complying with the 28-day time limit. The Tribunal will then consider the reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

50 The application for permission to appeal must state the grounds of appeal and state the result the party making the application is seeking.

Section 20C and paragraph 5A applications

51 The Tribunal has issued Directions in relation to the Applicant's section section 20C application and paragraph 5A application.

18 July 2023

Professor Nigel P Gravells
Deputy Regional Judge