FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AY/LSC/2022/0378**
Property	**:**	**33 Fitzgerald House, Stockwell Park Road, London SW9 0UG**
Applicant	**:**	**Louisa Imanene**
Representative	**:**	**Not represented**
Respondents	**:**	**SW9 Community Housing (First Respondent) and Network Homes Limited (Second Respondent)**
Representative	**:**	**First Respondent represented by Shomik Datta of Counsel. Second Respondent not represented.**
Type of Application	**:**	**For the determination of the liability to pay a service charge**
Tribunal Members	**:**	**Judge P Korn** **Miss M Krisko FRICS**
Date of Decision	**:**	**24 July 2023**

DECISION

Description of hearing

This has been a remote hearing on the papers. The form of remote hearing was **P**. An oral hearing was not held because the Applicant confirmed that she would be content with a paper determination, the Respondents did not object and the tribunal agrees that it is appropriate to determine the issues on the papers alone. The documents to which we have been referred are in an electronic bundle, the contents of which we have noted. The decisions made

are described immediately below under the heading "Decisions of the tribunal".

Decisions of the tribunal

(1) For the reasons set out below, the Applicant's service charge challenges are dismissed and the gas charges for 2022/23 and 2023/24 as actually billed are payable in full.

(2) The tribunal makes no cost orders.

Introduction

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("**the 1985 Act**") as to the reasonableness and payability of certain service charges.

2. The Applicant is the tenant of the Property under an Assured Shorthold Tenancy Agreement ("**AST**") dated 21 September 2016. She is not the original tenant, the AST having been assigned to her on 1 August 2022. The First Respondent is described in the witness statement of Dipak Patel, its Head of Corporate Services, as the managing agent of the Property, although under the AST it purported to grant the tenancy itself. The Second Respondent is the freehold owner of Fitzgerald House ("**the Block**").

3. The specific challenge is to the gas charges for 2022/23 and 2023/24. The Applicant states that the charge for 2022/23 is £104.76 per month but the First Respondent states that it has in fact billed the Applicant £113.49. No figure is specified for 2023/24.

The application

4. The Applicant has not provided a statement of case. In her application she asks a series of questions, including whether the charges are fair. She states that gas charges are not mentioned in the AST and questions why meters have not been installed. Installing meters would enable the Respondents to calculate how much gas each property has used and then to charge on the basis of usage rather than through equal apportionment. Alternatively, she argues, charges should vary according to the size of the property so that a one-bedroom property would pay less than a three-bedroom property.

5. The Applicant also asks why the communal boiler cannot be removed so that tenants can go to the gas company direct. In addition, she requests certain additional information from the Respondents.

The First Respondent's case

6. The Property is a one-bedroom flat within the Block. The Block (and each property within it) is served by a communal heating system. The First Respondent states that the gist of the Applicant's challenge is about the method of apportionment, with the Applicant asserting that the method used takes no account of actual consumption and so is unfair. The First Respondent also notes that she has asked for individual meters to be installed.

7. Under clause 3.2 of the AST, the tenant covenants to pay the rent and service charge. The rent and service charge as at the date of grant of the AST were specified in clause 1.2 as £86.80 and £30.55 respectively per week. Under clause 1.7.1 the First Respondent is required provide certain services for which the tenant must pay the service charge. The relevant services are set out in an attachment to the witness statement of Mr Patel.

8. Clause 1.7.2 of the AST permits the First Respondent to add or remove services upon consultation with the affected tenants. Clause 1.7.5 specifically provides: *"The cost of services shall be apportioned equally between all the properties concerned except as provided otherwise in this agreement."* By clause 1.7.6, the First Respondent must provide an annual account of the costs actually occurred in any service charge year. This necessarily occurs after the relevant year end, and usually in September of each year.

9. At the end of clause 1.8.2 it is stated that *"The Service Charge may be reviewed not more than twice in any one year. SW9 Community Housing shall give the Tenant one calendar month's notice of any change in the Service Charge."* This is effectively done by the annual review documents sent to the tenants in February of each year.

10. The gas/heating charges are calculated by equal division between the dwellings at the Block, and the First Respondent accepts that this takes no account of actual consumption. However, that is because this is the only permissible method of apportionment under clause 1.7.5 of the AST (see above).

11. The First Respondent submits that the statutory consideration of reasonableness under section 19 LTA 1985 has no impact on issues of apportionment – see *Schilling v Canary Riverside LRX/26/2005* and *Williams v Aviva Investors Ground Rent [2023] UKSC 6* – and that fundamentally, this is a matter of contract as the AST prescribes the apportionment method.

12. As regards the suggestion that meters be installed, the Second Respondent is currently reviewing the viability of doing this but the

First Respondent submits that the tribunal has no jurisdiction to order the installation of meters.

13. The First Respondent notes that the Applicant has suggested in her application that that there has been a failure to pass on to the Applicant government support that may have been provided to the First Respondent or to the Second Respondent. However, the disputed charges are based on estimated expenditure (set at the annual review in February 2022 and 2023 respectively) and those charges were therefore set before any applicable relief was received under the relevant government scheme. Clause 1.7.6 of the AST provides for an annual account of costs actually incurred after the year end, and this usually occurs in September of each year. Any support received under the government scheme would fall to be accounted for then. If it was not accounted for at that stage this might be the subject of future challenge, but the First Respondent submits that it is precipitate to raise it as an issue in relation to future charges. In addition, the First Respondent says that it wrote to the Applicant on 15 November 2022 stating that it did not receive the £400 per household government grant as it was a commercial supplier.

14. In his witness statement, Mr Patel states that in the deed of assignment of the AST in favour of the Applicant the total weekly rent was expressed to be £140.26 per week, *"including service charge and gas charge"*, and he has provided a copy of the deed of assignment. He adds that the gas charge is explained by an explanatory document that was provided to the original tenant on about 11 February 2022 by way of an annual review of rent and service charges. The service charges were broken down to show (amongst other things) £26.19 per week as being referable to an 'individual heating' charge, based on a 1.28% share of the total estimated expenditure.

15. In connection with the general level of the gas charges, Mr Patel states that following the start of the conflict in Ukraine in early 2022 wholesale fuel prices increased markedly across the world, affecting both gas and electricity prices for the Block.

Tribunal's analysis

16. As noted by the First Respondent, the Applicant's key challenge is to the method of apportionment of the gas charges. The Applicant considers it unfair that all tenants pay the same and that apportionment is not according to usage or affected by size of property, and we have some sympathy for her position.

17. However, the wording of the AST (her tenancy agreement) is clear on this point, as clause 1.7.5 states: *"The cost of services shall be apportioned equally between all the properties concerned except as provided otherwise in this agreement"*. The AST does not provide

otherwise in relation to gas charges. In the case of *Schilling v Canary Riverside LRX/26/2005*, the Upper Tribunal noted that Section 27A of the 1985 Act provides that costs are to be taken into account only to the extent that they are reasonably incurred. The Upper Tribunal went on to state that if costs **are** reasonably incurred they then fall to be apportioned in accordance with the terms of the lease. In other words, it is not open to a tribunal to decide that the method of apportionment itself is unreasonable if that method is set out in the lease (or, in this case, the AST).

18. We now turn to the other relevant points. First of all, although the initial service charge was a fixed amount, under clause 1.8.2 *"The Service Charge may be reviewed not more than twice in any one year"*, and so the amount of the service charge (including gas charges) can vary. Therefore, the amount of the service charge (including gas charges) can be increased.

19. Secondly, it is clear from the wording of the deed of assignment that the Applicant was on notice when she took an assignment of the AST that the service charge would include gas charges.

20. Thirdly, there is no evidence before us that the Respondents have failed to pass on any government subsidy available to them.

21. Fourthly, on the question of whether the supply should be metered, whilst there might be a case for arguing in favour of installing meters, this is not something that it is within the tribunal's jurisdiction to require. In any event, there is insufficient information before us (for example as to cost of installation) to enable us to conclude that installing meters would necessarily be cost-effective or otherwise beneficial. Fifthly, and similarly, there is insufficient information before us to enable us to conclude that it would be cost-effective to remove the communal boiler, and the Applicant has also failed to make a case as to why the Respondents should be under any obligation to do so.

22. We note the First Respondent's comments on the overall level of world gas prices, but the Applicant's challenge is not to the overall level of cost.

23. On a separate point, we note that in the AST the First Respondent is expressed to let the Property to the tenant, but there is no evidence before us that the First Respondent has any property interest in the Block, and Mr Patel describes the First Respondent as the managing agent. On the basis of the information before us the AST should be clearer on this point, but this does not affect the analysis of the specific issue in dispute in relation to the gas charges.

24. In conclusion, there is no legal basis for the tribunal to determine that the gas charges are unreasonable, and accordingly the gas charges are payable in full.

Cost applications

25. The Applicant has applied for cost orders under section 20C of the 1985 Act and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002. The combined point of these applications was to seek an order that no part of the Respondents' costs incurred in connection with this application be chargeable to the Applicant.

26. As the Applicant has been unsuccessful in her main application and as we have not received any submissions as to any other basis for her cost applications, those cost applications are refused.

Name: Judge P Korn **Date:** 24 July 2023

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. 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.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. 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.

APPENDIX

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

(6) An agreement by the tenant of a dwelling … is void in so far as it purports to provide for a determination – (a) in a particular manner, or (b) on particular evidence.