FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/OOAG/LSC/2023/0075**
Property	**:**	**Flat 26 St Stephens Close, Avenue Road, London NW8 6DB**
Applicant (Claimant)	**:**	**St Stephens Close (Residents Association) Limited**
Representative	**:**	**Iris Ferber KC of Counsel, instructed by Brethertons LLP**
Respondent (Defendant)	**:**	**Little Rock Property Inc (a company incorporated in Panama)**
Representative	**:**	**Adel Nassif, director of Respondent company**
Type of Application	**:**	**For the determination of the liability to pay a service charge (transferred from County Court)**
Tribunal Members	**:**	**Judge P Korn** **Mr S Wheeler MCIEH CEnvH**
Date of hearing	**:**	**20 July 2023**
Date of Decision	**:**	**18 August 2023**

DECISION

Description of hearing

This was a face-to-face hearing.

Decisions of the tribunal

(1) The service charges which are the subject of this transferred County Court claim, in the aggregate sum of £13,014.86, are payable in full.

(2) In relation to the administration charge of £180.00, only £3.96 is payable (representing 2.2% of the total), and it is payable as a service charge rather than as an administration charge.

(3) The tribunal having made its determination on those aspects of the County Court claim which were transferred to it, the case is now transferred back to the County Court for final disposal.

Introduction

1. The Applicant issued proceedings in the County Court on 3 May 2022 (under Claim Number J18YJ673) making a claim in the total sum of £15,443.29. That sum broke down as follows:

    - Service Charges: £13,014.86
    - Administration Charges: £180.00
    - Administration Charges (legal fees): £1393.20
    - Ground Rent: £240.00
    - Interest: £615.23.

2. A defence was filed by the Respondent on 28 July 2022. On 14 December 2022 District Judge Bowen made the following order: *"The claim is transferred to the First Tier Tribunal (Property Chamber)"*. It was determined by the tribunal at the directions stage, with the agreement of the parties, that the tribunal would only deal with the reasonableness and payability of the service charges and the administration charge of £180 levied by the managing agents on the basis that the case would then be returned to the County Court to deal with all other matters.

3. The Applicant seeks to recover unpaid service charges for the periods June to December 2021 and January to March 2022 as well as an administration fee of £180 which was demanded in January 2022. The Respondent is the long leasehold owner of the Property under a lease dated 17 September 1996 ("**the Lease**") which itself incorporates by reference the terms of an earlier lease dated 29 September 1970 ("**the Original Lease**").

4. The Applicant has provided a copy of the Lease and a copy of the Original Lease and has set out the relevant service charge and administration charge provisions in its statement of case. It asserts that the unpaid service charges and administration charge were properly demanded and were each accompanied by copies of the relevant summary of rights. It has provided a breakdown of the unpaid service charges, copies of the unpaid service charge demands and unpaid administration charge demand, and it states that the unpaid service charge demands reflect quarterly 2.2% proportions of the cost of works, outgoings and other matters listed in the Fifth Schedule to the Original Lease which it states are payable by the Respondent under clause 3(15) of the Original Lease (as incorporated into the Lease).

5. The Applicant asserts that the unpaid service charges have been properly accounted for and that the service charge accounts give clear and straightforward evidence of the services provided and of the cost of those services certified by an accountant. The Applicant has provided copy service charge accounts for the 2020 and 2021 service charge years and draft service charge accounts for 2022 as these have not yet been finalised.

Respondent's case

6. The Respondent's written objections to the unpaid charges are of a general nature, and Mr Nassif was invited by the tribunal at the hearing (with the agreement of the Applicant's representative) to particularise the Respondent's concerns.

7. Mr Nassif said that he felt that the building had not been managed very well in the past, although he conceded that it was now being managed more effectively. He said that previously there were frequent changes of managing agent and that there had been a problem with the style of management, including communication problems with the chasing of arrears. There had also been an issue with what he described as derelict pipes, and he said that an unconnected pipe had caused serious damage.

8. In relation to the boiler, he questioned why it had not been replaced earlier to avoid the need to pay for repairs each year. He also felt that there was a conflict of interest as a consultancy used by the Applicant was owned by its managing agents. He considered the consultancy fees to be excessive.

9. In relation to the contributions to the reserve fund periodically sought by the Applicant, he would prefer a 'cash call' just a year in advance of the carrying out of any necessary major works instead of regular demands for contributions to the reserve fund. He also felt that the Applicant's priorities were wrong as there had been no internal redecoration for a long time. There were ripped carpets and broken

windows, and outside the building there were abandoned cars. However, he willingly conceded that the position had improved and said that Ms Winn of Rendall and Rittner (the current managing agents) was doing a good job.

Applicant's response

10. In relation to the boiler, Ms Ferber referred the tribunal to the copy invoices for the work done and to the copy letters in the hearing bundle explaining to leaseholders in detail the reasons for the costs incurred. There is also a detailed explanation of the reasons for this expenditure in the witness statement of Richard Daver of Rendall and Rittner. Ms Ferber added that her instructions (supported by the paperwork) were that the boilers were replaced in 2017 and that the further costs incurred in 2020 were due to a breakdown believed to have been caused by flooding rather than a failure to maintain the boilers.

11. Regarding the allegedly frequent change of managing agent, Ms Winn had been the managing agent since 2019. Prior to that, a different person was in charge but that person was still an employee of Rendall and Rittner and there was a smooth handover to Ms Winn. Rendall and Rittner have been the managing agents for 20 years.

12. In relation to the pipes, Ms Ferber said that her instructions were that one downpipe got blocked during a big storm in 2021. Referring the tribunal to relevant copy photographs in the hearing bundle, Ms Ferber said that it was accepted by the Applicant that there was an area within the building which did not look good aesthetically, but this was because it was disused apart from a functioning rainwater downpipe. Regarding a point raised previously by Mr Nassif about a burst pipe causing damage in his flat, Ms Ferber said that her instructions were that this was investigated when the penthouse directly above Flat 26 was empty and it was discovered that the cause of the leak was a toilet overflow pipe within the penthouse flat which was the responsibility of the leaseholder of that flat and not of the Applicant. In conclusion, in Ms Ferber's submission, the evidence did not support the proposition that the pipes in the common parts were generally 'derelict'.

13. Regarding the Respondent's claim that it represented a conflict of interest for the Applicant to use a consultancy which was owned by its managing agents, this was a reference to Cardoe Martin being used as surveyor and project manager for the external redecoration. Cardoe Martin was acquired by Rendall and Rittner in 2015 but had already been the Applicant's retained surveyor for many years. The relationship, being one of parent and subsidiary, is considered by the Applicant to be transparent and it is declared to all leaseholders and clients. Cardoe Martin were used for the external redecoration because they gave the cheapest quotation of those approached, and the

Respondent did not raise any concerns about them at the consultation stage.

14. In relation to the reserve fund, the Applicant notes in written submissions that paragraph (16) of the Fifth Schedule to the Original Lease allows the landlord *"In computing the total sum payable in any year by virtue of the Lessors obligations under this schedule to make reasonable and adequate provision for expenditure on items requiring attention periodically"*. Ms Ferber submitted at the hearing that the above provision is broadly drawn and clearly allows for the collection of a reserve fund. In further written submissions the Applicant notes a comment made by the Respondent in written submissions that the reserve fund balance of approximately £290,000 as at December 2021 was large enough and that therefore no further contributions needed to be collected. The Applicant comments in response that reserve fund expenditure in 2021 was £642,327 and submits that it is clear from this that the reserve fund needs to be replenished at regular intervals. As for the Respondent's preference for a 'cash call' to be made when money is needed, the Applicant does not accept that relying on leaseholders' willingness to provide large cash injections at short notice is a sensible way to manage the block.

15. Regarding the Respondent's complaints about abandoned cars not being moved, the driveway is owned by a separate company and therefore this is not something over which the Applicant has complete control. There are, though, ongoing negotiations to remove a specific car.

16. The Applicant does not accept that there has been poor communication in respect of the collection of arrears. Its managing agents send out two reminder letters to any leaseholders who are late in paying, and then if payment has still not been made the file is passed to solicitors. There is then a letter of claim and an informal chasing letter, and if payment is still outstanding at that stage proceedings are then issued.

17. As to the Applicant's priorities and the need for internal redecoration, Ms Ferber referred the tribunal to a schedule of planned works in the hearing bundle setting out – together with costings – what works are proposed in which future years. There is an Annual General Meeting ("**AGM**") to discuss priorities, and her instructions were that Mr Nassif had not previously raised the issue of internal redecoration being particularly urgent, whether at an AGM or otherwise. She was also instructed that there was an online portal to obtain access to service charge information but to which Mr Nassif had not signed up, and that Mr Nassif had not attended the last four AGMs. Ms Ferber added that the building was an old building and that inevitably there were going to be competing priorities.

Follow-up by Respondent

18. Mr Nassif said that the separate company which was responsible for the driveway was 50% owned by the Applicant. He also said that the Respondent's building insurance excess should be lower.

Richard Daver's witness evidence

19. Richard Daver of Rendall and Rittner has provided a written witness statement and was available to be cross-examined on his statement at the hearing. He confirmed that the boilers were replaced in 2017 and then later repaired having been damaged by flooding. Most of the repairs were covered by insurance.

20. Mr Daver's witness statement covers a range of points, including the service charge budgets, demands and accounts, the building insurance (including the poor claims record resulting in part from the ageing pipework), the reserve fund, the external redecoration works (including the role of Cardoe Martin) and the boilers.

Closing submissions

21. Ms Ferber referred the tribunal to the Applicant's written statement of case in the hearing bundle which contains more detailed information on the points in dispute. On the Respondent's point regarding the building insurance excess, it was not realistic to expect the insurers to agree a different level of excess in relation to each flat on a block policy.

22. Regarding the administration charge of £180, this was a standard fee levied by the Applicant in connection with the Respondent's failure to pay service charges in accordance with the Lease. The charge reflected the work that needed to be done by Rendall and Rittner to prepare a debt file for referral to solicitors. The Applicant's primary position was that it was recoverable under the Lease as an administration charge, but its alternative position was that it was recoverable as a service charge.

23. Mr Nassif said that he did not know whether Cardoe Martin was in fact the cheapest and therefore whether leaseholders were getting value for money.

Tribunal's analysis

Service charges

24. The Applicant has done its best to set out a detailed case in support of the various service charges claimed, but its task has been made harder

by the Respondent's inability to set out a clear set of legitimate concerns accompanied by appropriate evidence.

25. We will deal first with the issues raised by the Respondent. First of all, to the extent that the concerns raised have been vague in nature and/or unparticularised, they do not constitute a serious challenge to the reasonableness of any of the charges.

26. In relation to the chasing of arrears, there is no persuasive evidence before us that this has been carried out in an unreasonable manner. In relation to the works to the boilers, the Applicant has dealt satisfactorily with the concerns raised by the Respondent. As regards the Respondent's concerns about possibly derelict or otherwise problematic pipes, again we consider the Applicant's explanations and supporting information to be more persuasive than the Respondent's assertions.

27. There is no credible evidence that there have been frequent changes of managing agent. The Respondent's suggestion that each leaseholder could negotiate its own building insurance excess is wholly unrealistic.

28. The Respondent's point about a possible conflict of interest in relation to Cardoe Martin could in principle form the basis of a legitimate challenge, but the Respondent has provided no evidence whatsoever that Cardoe Martin's charges were unreasonably high.

29. In relation to the reserve fund contributions, we are satisfied that the wording in the Lease is sufficiently wide to enable the landlord to seek contributions towards the reserve fund for the purposes for which the Applicant did in fact seek contributions. As regards the amount of the contributions sought, whilst it might be superficially attractive to regard a reserve fund of £290,000 as sufficient and therefore as not needing to be further topped up, the key issue is whether it was reasonable in all the circumstances to seek further contributions. The Applicant has provided evidence regarding the expenditure needed on this ageing building with its various problems, and we are satisfied on the basis of the information and evidence before us that the reserve fund contributions forming part of these disputed charges were reasonable in amount. Mr Nassif's proposal that instead of building up the reserve fund the Applicant should make a 'cash call' whenever a major works project is coming up is hopelessly unrealistic, and a landlord or property manager who managed a building in such a cavalier manner would be vulnerable to criticism if it failed to collect the sums necessary to carry out the work required.

30. On the question of whether the Applicant has had the correct priorities when considering what works to carry out when, the Respondent has only made general comments. If the Respondent had managed to make more persuasive and more evidence-based submissions on this point

then those submissions might possibly have formed the basis of a challenge to the standard of management and therefore to the level of management fees. However, in the absence of more detailed submissions – coupled with the information provided by the Applicant including its works programme for the coming years – it is not appropriate to make any reduction to the level of management fees. In any event, the evidence suggests that Mr Nassif has not previously been sufficiently concerned by this issue to attend any of the last four AGMs when he could have raised the question of priorities.

31. Specifically regarding the abandoned cars in the driveway, whilst we are not wholly persuaded by the Applicant's explanation as to why it has not dealt with the problem more effectively to date, a failure to remove abandoned cars more quickly is not a sufficient basis for determining that the level of service charge is unreasonable, especially as again the Respondent has not articulated its case in sufficient detail for the Applicant to have had an opportunity to answer it fully.

32. More generally, we have considered the contents of the Applicant's statement of case, Mr Daver's witness statement and Ms Ferber's submissions and are satisfied that between them they contain sufficient evidence that the service charges were all reasonably incurred in the absence of a more effective challenge by, or *prima facie* case on the part of, the Respondent.

Administration charge

33. In relation to the £180 administration charge, the Applicant contends that it is recoverable under the Lease as an administration charge. Clause 3(9) of the Original Lease, which has been incorporated into the Lease by reference, contains a covenant by the tenant *"To pay all costs charges and expenses incurred by the Lessors in the preparation and service of any notice under Section 146 and 147 of the Law of Property Act 1925 notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court"*.

34. A similar issue arose in the Court of Appeal decision in *Freeholders of 69 Marina, St Leonards-on-Sea v Oram (2011) EWCA Civ 1258* ("**69 Marina**"), where it was determined that the landlord's costs incurred at what was then the Leasehold Valuation Tribunal could be recovered from the tenant as an administration charge because those costs were incidental to the, or in contemplation of the preparation and service of proceedings under section 146 or 147 of the Law of Property Act 1925.

35. However, the relevant clause in 69 Marina read as follows: *"To pay all expenses including solicitors' costs and surveyors' fees incurred by the Landlord incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 or incurred in or in contemplation of proceedings under Section 146 or 147 of the Act*

notwithstanding in any such case forfeiture is avoided otherwise than by relief granted by the Court and to pay all expenses including solicitors' costs and surveyors' fees incurred by the Landlord of and incidental to the service of all notices and schedules relating to wants of repair of the premises …". That clause expressly allows for recovery of costs which are 'incidental' to the preparation and service of a section 146 or 147 notice or incurred in 'or in contemplation of' proceedings under section 146 or 147. This language is what enabled the Court of Appeal to conclude that those costs were recoverable under that lease clause.

36. In the present case there is no reference in the relevant lease clause to the recovery of costs which are 'incidental' to the preparation and service of a section 146 or 147 notice nor – more relevantly – to the recovery of costs incurred in 'or in contemplation of' proceedings under section 146 or 147. The clause merely refers to costs (and charges and expenses) incurred *"in the preparation and service of any notice under Section 146 and 147"*, and it is clear that this £180 charge was not incurred in the preparation and service of any notice under Section 146 and 147. It is therefore not recoverable as an administration charge under that clause.

37. Paragraph (1) of the Fifth Schedule to the Original Lease allows the Applicant *"To employ managing agents to supervise the management of the building its services and common parts and to pay the managing agents reasonable rates of remuneration for their services"*. The evidence before us indicates that the £180 charge is for the managing agents' time spent in preparing a debt file for referral to solicitors in connection with the Respondent's unpaid service charges. Whilst it is arguable that paragraph (1) of the Fifth Schedule is only intended to cover the general management fee and that it does not refer to the chasing of unpaid service charges, on balance we accept that it is wide enough to cover the cost incurred by the managing agents in dealing with these unpaid service charges and that the £180 is reasonable in amount. However, paragraph (1) of the Fifth Schedule is a service charge provision, not an administration charge provision, and therefore the Applicant can only recover from the Respondent its service charge proportion of this sum, namely 2.2% of it, which equals £3.96.

Cost applications

38. No cost applications have been made to the tribunal. The parties have reserved their position in relation to County Court costs.

Name: Judge P Korn **Date:** 18 August 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.