FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/21UD/LIS/2023/0005
Property	:	Top Flat, 60 Mount Pleasant Road, Hastings, East Sussex, TN34 3SH
Applicant	:	Mr Barry Markham
Representative	:	Mr Matthew Withers of counsel instructed by Gaby Hardwicke Solicitors
Respondent	:	Mr Mark Salanson
Representative	:	Mr Hugh Rowan of counsel instructed by KDL Law
Type of Application	:	Determination of liability to pay and reasonableness of service charges Sections 27A and 20C Landlord and Tenant Act 1985
Tribunal Members	:	D Banfield FRICS M J F Donaldson FRICS Ms T Wong
Date of Hearing	:	10 July 2023
Date of Decision	:	4 September 2023

DECISION

The Tribunal determines that;

1. **The outstanding sum due from the Respondent is £3,510.29.**

2. **It will not make an order under Rule 13 in the Applicant's favour.**

3. **Legal costs are not recoverable by way of service charge under the Third Schedule and the making of a S.20C Order is therefore unnecessary.**

Background

1. The Applicant seeks a determination of the Respondent's liability to pay and the reasonableness of service charges for the years 2015 – 2021 inclusive. The particulars of each disputed service charge were set out in an attachment to the application.

2. The application form refers to the total value of the dispute as some £4,512.52. However, such figure does not appear to take into account credit and payments totalling £737.06, as per the 'Summary of Service Charges due 2015-2021', such summary referring to arrears totalling £3,775.46.

3. The Applicant also refers to ground rent although no determination is sought, the Tribunal not having such jurisdiction.

4. The Property is described in the application as a one bedroom top floor maisonette in a converted house.

5. In its Directions of 6 March 2023 the Tribunal identified the following issues to be determined:

    - Are the sums claimed payable, reasonable and how are the amounts made up?
    - Have demands been issued in accordance with statute and in accordance with the lease?
    - Against which service charge costs have the credit and payments totalling £737.06 been allocated by the Applicant?
    - Whether the Respondent seeks to make an application under section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 preventing the Applicant from recovering the costs of the proceedings through either the service charge or as an administration charge.

6. Although not referred to in the application Mr Markham's statement of case dated 20 March 2023 also referred to a claim for S.146 costs at that point totalling £7,546.00 and costs under Rule 13(1)(b) of the Tribunal's Procedural Rules.

7. Further claims for S146 costs have been made;

- 6/3/23 to 25/4/23 £15,743.20
- 26/4/23-10/7/23 £5,541.60

8. The Tribunal originally considered that the application was likely to be suitable for determination on the papers alone without an oral hearing however, on receipt of the hearing bundle Judge Tildesley decided that a hearing was necessary. There is a significant dispute on the facts which can only be determined by the parties attending to give evidence. There is also an application for costs under rule 13(1)(b) of the Tribunal Procedure Rules 2013.

9. On 9 May 2023 the Tribunal directed that the Application would be heard on 25 May 2023 at Havant Justice Centre this date subsequently being altered to 10 July 2023.

10. Prior to the hearing four pdf bundles were received comprising a hearing bundle of 597 pages and 3 pdf documents detailing costs incurred. Immediately prior to the hearing the Applicant's solicitor sent a further bundle of 132 pages described as a supplementary bundle.

11. The Tribunal declined to accept the supplementary bundle which the Applicant's counsel agreed would add little to the proceedings.

12. References to pdf page numbers in this decision are shown as [*]

The Law

See the Appendix to this decision for the relevant law.

The Lease

13. The lease [50] is dated 23 July 1985 and is for a term of 99 years.

14. Clause 1 describes the property as; ALL THAT flat (hereinafter called "the Flat) being on the first and second floors of the Building and known as Upper Maisonette, 60 Mount Pleasant Road, Hastings aforesaid Together with the Landlord's fixtures and fittings sanitary apparatus and appurtenances installed therein or affixed thereto Together with the easements rights and privileges mentioned in the First Schedule hereto but subject as therein mentioned Excepting and Reserving from the said demise the main structural parts of the Building of which the Flat forms part including the foundations roof and external parts thereof including the window frames but not the glass of the windows of the Flat and the interior faces of such part of the external or internal walls as bound the Flat or the rooms therein and Excepting Nevertheless and Reserving unto the Lessor the rights mentioned in the Second Schedule hereto

15. Clause 3 requires the Lessee to;

(1) pay the reserved rents
(4)(a) Pay unto the Lessor all costs charges and expenses (including legal costs and fees payable to a Surveyor) which may be incurred by the Lessor incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 by the Lessor or incurred in or in contemplation of proceedings under Section 146 or 147 of that Act ……
(4)(b) Pay all expenses regarding service of notices in respect of wants of repair.
(5) *Repair maintain renew uphold and keep the Flat (other than the parts thereof comprised and referred to in paragraphs (i) and (ii) of Clause 6 (1) hereof and subject to Clause 9 (1) hereof) including all windows glass doors (including the entrance door to the Flat) locks fastenings hinges sanitary water gas electrical and central heating apparatus walls ceilings drains pipes wires and cables therein and all fixtures and additions thereto in good and substantial repair and condition save damage by any of the risks against which the Lessor maintains insurance except insofar as such insurance is vitiated by the act or default of the Lessee his servants agents licensees visitors or sub lessees and to replace from time to time all Landlords fixtures and fittings and appurtenances in the Flat which may be or become beyond repair at any time during or at the expiration or sooner determination of the said term*

16. Clause 5 requires the Lessee to;
(1) At all times hereafter during the said term to repair maintain renew uphold and keep the Flat as aforesaid as to afford all necessary support shelter and protection to the parts of the Building other than the Flat and to afford to the Lessees of the neighbouring or adjoining flats access for the purpose and subject to the condition set out in paragraph (9) of Clause 3 hereof
(2) Pay to the Lessor in addition to the rents hereby reserved one half of the expenditure incurred by the Lessor in carrying out their obligations under Clause 6 hereof and the other heads of expenditure as the same are set out in the Third Schedule hereto plus a Management fee of 10 per cent thereof and where major items of repair or decoration are to be carried out to pay to the Lessor a reasonable deposit in respect of the Lessee's contribution the amount of such deposit to be decided by the Lessor and to be taken into account when the work has been completed and the subsequent contribution requested
(3) Pay to the Lessor in addition to the rents hereby reserved and by way of additional rent an insurance contribution being a one half part of the amount or amounts (whether increased by an act or omission of the Lessee or not) which the Lessor shall from time to time expend in or in respect of effecting or maintaining insurance of the Building and fixtures and fittings therein as hereinafter provided

17. Clause 6 sets out the Lessor's repairing and maintenance obligations;
(*1) (Subject to contribution and payment as hereinbefore provided and provided that the Lessee has complied with all the covenants agreements and obligations on his part to be performed and observed) maintain replace and keep in good and tenantable repair and condition:*

(i) The main structure of the Building including the principal internal timbers and the exterior walls the foundations the roof and the main drains gutters and rainwater pipes (other than those included in this demise or in the demise of any other flat in the Building)
(ii) All such gas and water mains and pipes drains waste water and sewage ducts and electrical cables and wires here chimneys and flues and other service conduits and the like in under and upon the Building as are enjoyed or used by the Lessee in common with the owners or lessees of the other flats
(2) Paint the whole of the outside wood iron and other work (including the exterior walls) heretofore or usually painted with two coats of good quality paint and grain and varnish such parts as have been heretofore or are usually grained and varnished at such times as reasonably necessary
(3) Paint with two coats of good quality paint paper colour and whitewash all the interior parts of the said common parts of the said Building as have been or are usually painted papered coloured and whitewashed at such times as reasonably necessary
(4) Pay and discharge any rates (including water rates) taxes duties assessments charges impositions and outgoings assessed or charged on the Building as distinct from any assessments made in respect of any flat in the Building
(5) Maintain if and when installed by the Lessor at their discretion a communal television aerial or aerials serving the Building and pay all expenses in connection therewith.
(6) Maintain such fire extinguishers and install such further extinguishers as the Lessor may from time to time in their absolute discretion consider necessary and pay all charges in connection therewith.
(7) Without prejudice to the foregoing do or cause to be done all such works installations acts matters and things as may be reasonably necessary or advisable for the proper maintenance safety and administration of the Building.

18. The Third Schedule referred to above states;

1.*The expense of maintaining repairing redecorating and renewing amending cleaning repointing painting graining varnishing whitening or colouring the Building and all parts thereof and all the appurtenances apparatus and other things thereto belonging .*
2. The cost of periodically inspecting maintaining overhauling repairing and where necessary replacing the whole of the water system serving the Building
3. All charges assessments (including V.A.T.) and other outgoings (if any) payable by the Lessor in respect of all parts of the Building
4. The costs of maintaining repairing and renewing the television and radio receiving aerials if any installed on the Building and used or capable of being used by the Lessee in common as aforesaid

19. The Fourth Schedule contains the restrictions

The Issues

20. The Respondent says that the issues are;
    - whether the sums claimed are payable and reasonable in which a number of items are challenged
    - Whether the demands have been properly issued
    - How has the sum of £737.06 been allocated
    - Costs

21. The Applicant says the issues are;
    - Whether the demands for the years 2015-2020 were validly demanded?
    - Of those validly demanded and of the 2021 demand, which sums are valid under the lease and of those which are reasonable? A Scott Schedule has been provided setting out each item disputed.
    - Of the payments made by the Respondent, do they affect any amount the tribunal determines he should pay, by reference to them relating to the 2021 service charge year or not? The Applicant has accepted payments of £126.89 and £601.34 but refused the cheque for £81.95 dated 25 April 2023.
    - Should an order for costs pursuant to Rule 13(1) (b) be made in favour of the Applicant?
    - Should a s.20C order be made in favour of the Respondent?

The Hearing

22. The hearing was attended the Applicant Mr Markham represented by Mr Withers of counsel and the Respondent Mr Salanson represented by Mr Rowan of counsel.

23. Mr Withers referred to the Applicant's statement of case [32] and reply [446] and tendered Mr Markham for cross examination.

24. Mr Markham confirmed that he purchased the property in 2003 and that the only lease was that of the First and Second Floor Maisonette as shown in the Charges Register [44]. He pays his share of the service charge based on demands raised by the managing agent HAS Property Management.

25. Mr Markham said HAS had been his wife's concern but following her death he became the proprietor in 2013. He described it as a "sole trader" business with three full time employees whose duties were interchangeable.

26. Whoever prepared Notices would send them electronically with paper copies put in a tray for posting. The same procedure has been in place for 30 years and whilst he doesn't send notices out himself, he does take responsibility for it being done. Various members of staff have had the task over the years. All important documents are sent by hard copy and a copy is kept. He confirms that copies of the Summary of Tenants' rights and obligations are always sent.

27. Electronic copies are kept on individual PCs as they do not have a centralized system.

28. Mr Rowan referred to a letter dated 5 April 2022 from a member of staff who Mr Markham said had retired.

29. With regard to the repair cost of £720 in the 2021 service charge year Mr Markham accepts that he missed the required S.20 consultation and concedes that he is limited to recover £250.

30. Mr Rowan called Mr Salanson who confirmed his witness statement.

31. In cross examination Mr Salanson said that House Boat Samichon had previously been sited at 16 Riverbank but had never formed part of his address. He accepted that he had received some correspondence from the Applicant but denied that this ad included service charge demands.

32. With regard to the Companies House document [530] which included House Boat Samichon in his address Mr Salanson said that it had "probably just popped up" automatically when the post code was entered. He referred to the manuscript entry completed by him at the foot of the page which omitted any reference to Samichon. Mr Salanson said that he hadn't noticed the discrepancy in addresses as he suffers from dyslexia.

33. Mr Salanson accepted that he had probably signed for correspondence that had included Samichon in the address but said that it was 30 years since the houseboat had been on site.

34. Mr Salanson said that the address was not the issue and if sent they would have been served. However, he does not believe they were ever sent. His reference in his letter of 16 August 2020 [411] to only withholding payment until he was satisfied that previous works had been completed to specification did not mean that he had received the demands and the wording was inaccurate due to his dyslexia.

35. In re-examination Mr Salanson said that he couldn't recall why he had raised issues from 2015 in his letter of 24 May 2019 [409] but probably because the roof works now required should have been part of the major works.

36. In respect of whether the demands had been served Mr Withers referred to Clause 10 of the lease which provides that Section 196 of the Law of Property Act 1925 applied to all notices to be served and that Act simply requires any notice to be sent by post.

37. If on the balance of probabilities, the Tribunal was satisfied that the demands had been addressed to Mr Salanson and had been posted then they were validly demanded whether or not they had been received.

38. Mr Rowan said that for the Applicant to demonstrate that the demands have been properly served and to satisfy the requirements S.7 of the

Interpretation Act 1978 Mr Markham should provide proof that they were properly addressed, pre-paid and posted.

39. Following Southwark LBC v Akhtar [2017] UKUT 1050 (LC) it is not necessary for evidence to be provided in respect of the individual letter, but evidence of the "process" is required. Further guidance is provided by Chiswell v Griffon Land [1975] 1WLR 1181.1185.

40. In summary, in the absence of such evidence the Tribunal cannot be satisfied that the demands were ever sent.

41. In support of this he referred to Mr Markham's infrequent attendance at HAS, initially said to be "once a month" but later amended to "every day" and as such Mr Markham is unable to provide the evidence required. In the absence of such evidence the burden of proof is on the Applicant which has not been demonstrated.

42. The Scott Schedule [577] and individual item of expenditure were then examined.

Insurance (all years)

43. Mr Rowan confirmed that the only challenge in respect of insurance was the question of whether service had been effected.

Management (all years)

44. Mr Rowan confirmed that the only challenge was the question of whether service had been effected.

Accountancy (all years)

45. Mr Rowan confirmed that the only challenge was the question of whether service had been effected.

Electricity (all years)

46. Electricity costs of £246 [286]for the common hallway were challenged and it was said that there was no separate metering from the flats. Further amounts for electricity included in the demands were for £344 in 2019 [330] and £95.14 in 2020 [352] and £11.37 in 2021 [368]. No charges had been levied in 2016, 2017 and 2018.

47. There was no evidence of actual consumption provided or that the costs have been reasonably incurred.

48. The invoice from e-on [378] gave an estimated consumption as £0 with a standing charge only.

49. Mr Withers said that the UK Power was not a supplier of electricity and their invoice [286] was for the installation of a separate landlord's supply.

50. With regard to the 2019 charge of £172.06 this comprised; the outstanding amount of £196.20 referred to in the letter of 16 May 2019 [133],and invoices from Npower for £113.13 [134], £11.20 [135] and £23.59 [136] totaling £344.12 of which 50% was charged to the service charge.

Bank Charges (all years)

51. Mr Rowan questioned whether bank charges were recoverable under the lease and questioned whether the statement from Nat West for 2015 dated 9 December 2021 [288]with HAS Property Management as the Account was in respect of the subject property given that from 2016 the statements were all in the name 60 Mount Pleasant. The various statements remained unexplained. With regard to the charges payable in 2017 Mr Rowan says that they weren't included in the service charge demand [296] and are therefore not payable.

52. Mr Withers said that the recovery of bank charges was permitted by Clause 6(4) which referred to "any charges" and paragraph 3 of the third schedule which refers to "all charges assessments and other outgoings." Such clauses were wide enough to include bank charges as necessary for the maintenance of the building.

53. The account name was changed to that of the property, but the account number remained the same. The name change was immaterial as both were only in respect of the property.

Repairs

2015

54. Of the £350 cost of roof repairs which exceeded the S.20 limit £250 is admitted.

2016

55. Mr Rowan questioned the £120 for Repairs to ceiling. Mr Withers referred to the invoice [298] and the explanation given to Mr Salanson in a letter dated 21 June 2019 [181] that it was in respect of water damage following a previous roof leak.

2018

56. The cost of the door lock was not challenged save for whether service of the demand had been effected.

57. The £75.00 cost of the plaque [319] was challenged, Mr Rowan saying that it was to advertise HAS rather than for the benefit of the building. He also said that the amount was not included in the original service charge demand and was not therefore payable. Mr Withers pointed out that it was required to comply with the HMO licensing conditions and as such was

supplementary to the general management of the building and a service charge expense.

2019

58. Mr Rowan said that the works totalling £1,612 [129 to 132] were one set of works and subject to S.20 consultation in the absence of which liability is limited to £250.00. Mr Withers disagreed saying that these were 4 separate sets of works each with its own invoice and for different purposes following the guidance of paragraph 36 of *Phillips and another v Francis and another [2014]EWCA Civ 1395*. [129] was for decoration, [130] for Fire safety alterations, [131] to replace carpets and [132] to fit a handrail to the basement area which Mr Withers accepted was required to satisfy the HMO Licence requirements.

2020

59. Gutter cleaning of £105.00 was challenged solely on whether a demand had been served.

2021

60. The External Maintenance and repair at cost of £360 was not subject to s.20 consultation and it is conceded that liability is restricted to £250 subject to whether demands were properly made.

Other Costs

61. With regard to both the plaque and the Licence fees totalling £640 [321&322] Mr Rowan said there was a lack of information as to why the HMO Licence was required and suggested it was in relation to the use of the Applicant's flats rather than the building as a whole. He pointed out that the Top Flat is not licenced as an HMO and is not covered by the additional HMO Licence for which the fee was payable.

62. The expenditure of £30 in 2018 on EICR was only challenged on the question of whether service had been effected

Costs

63. Mr Withers confirmed that he was not claiming costs pursuant to a S.146 application but that the claim was under S.13(1)(b) of the Tribunal's Procedural Rules and that he was seeking the full amount referred to in paragraphs 6 and 7 above. He said that the issue was not one of the Respondent's conduct of the case before the Tribunal but that his client had been put to costs over a £4,000 Landlord and Tenant issue due to a historic dispute between the parties including the 2010 litigation which had clouded the Respondent's position as in his untrue statement that "Houseboat Samichon" had **never** been part of his address.

64. In response Mr Rowan said that the historic dispute was irrelevant, and the simple matter was that in the absence of demands it was reasonable to pursue the case as he had.

65. The Applicant had not put that the Respondent was lying which was a reasonable point to raise before the Tribunal. The statement at page 264 12 (ii) refers to “my address” rather than “the address” the former being an accurate statement.

66. In the Companies House document [530] the handwritten address completed by Mr Salanson omits reference to “Samichon” whereas the typed address was likely to have been automatically generated when the post code was inserted.

67. Mr Salanson’s letter of 16 August 2020 [411] only referred to withholding payment for maintenance, not generally. The letter had never been followed up.

68. The Applicant had wasted a great deal of costs in pursuing the address point whereas the test under S.13(1)(b) was in respect of the Respondent’s conduct in the proceedings before the Tribunal not more generally.

69. The costs are not recoverable as S.146 costs as provided for in the lease at 3.(4)(a) as it is plain from the judgments in *Khan v Tower Hamlets LBC* [2022] EWCA Civ 831 and *No 1 West India Quay (Residential) Ltd v East Tower Apartments Ltd* [2022]HLR 38 that the cost of proceedings before the Tribunal are not recoverable. In any event the rent demand served on 26 February 2023 plainly recognizes the continuation of the lease.

70. There is a distinct lack of pre-action correspondence, and the proceedings should have been commenced in the County Court not the Tribunal.

71. Mr Withers said that an application under S.27A was part of the route necessary in contemplation of proceedings under S.146 but confirmed that the only costs he was currently seeking were those under S.13(1)(b)

Section 20C

72. Mr Rowan seeks an Order under S.20C on the grounds that, based on *Khan v West India Quay* LBC [2022] EWCA Civ 831 and *No 1 West India Quay (Residential) Ltd v East Tower Apartments Ltd* [2022] HLR 38 the costs are nor recoverable under the lease. He refers to the Tribunal’s wide jurisdiction to make any order that it considers to be just and equitable.

73. Mr Withers resists the Order on the basis that the application was made properly following historic and repeated arrears the operation of costs being pursuant to the lease representing contractually agreed provisions. In answer to a question from the Tribunal as to proportionality Mr Withers agrees that it is relevant but considers that this applies equally to the actions of both parties.

Apportionment

74. Mr Withers says that the payments made by the Respondent of £126.89 on 30 January 2018 and £601.34 made on 22 May 2019 should be apportioned to the oldest debt in accordance with the rule in *Clayton's Case* [1814-23] All ER.Rep. 1, [1816] 7 WLUK 42. The Applicant's further payment of £81.95 on 23 May 2023 was not accepted and repayment made.

75. Mr Markham's point is that if the Tribunal finds that there is no liability for the Respondent to pay the service charges demanded then there is no historic debt and the Respondent's account stood in credit.

Discussion and determination

76. At the hearing the parties were represented by counsel both of whom had submitted useful skeleton arguments which proved to be of assistance in clarifying the issues, for which the Tribunal thanks them.

77. The first matter to be determined was whether the service charge demands had been properly served. Both counsel agree that the issue is not whether such demands have been received by the Respondent but whether they were sent.

78. Some considerable time was spent on whether "Houseboat Samichon" formed part of the Respondent's address but the Tribunal finds this somewhat immaterial given that it was not suggested by the Respondent that an error in the address invalidated the demand but simply that the demands had not been received. Given the issue is whether they were sent the Tribunal does not propose to spend time on considering the name issue further.

79. As to whether the demands were sent, we remind ourselves that we are looking at the civil standard of proof namely what had occurred on the balance of probabilities.

80. Southwark LBC v Akhtar requires there to be some evidence as to the "process" followed in dispatching the demands. Mr Markham explained they were sent by both email and hard copy; the latter being placed in a tray for dispatch by post. Mr Markham does not attend the office frequently and in any event it was his staff that dealt with such administrative tasks, as such he is unable to confirm that the process was followed.

81. Mr Salanson cannot help the Tribunal in its determination as of course his evidence must necessarily be as to whether demands were received, not how they were sent.

82. We have therefore looked at whether there could be any reason why, over a number of years demands were not sent. An occasional omission could occur but the likelihood of the same error happening on repeated occasions seems unlikely and as such is dismissed. The Tribunal therefore finds as a matter of fact that the demands were sent and in accordance with S.7 of the

Interpretation Act 1978 properly served. As such we do not need to consider whether or not they were received in respect of which we make no findings.

83. Whilst the format of the demands is not as the Tribunal is used to seeing we accept that, with the exception of the letter dated 16 January 2018 they provide the information required. We also accept that the letter dated 25 April 2019 and accounts rectifies any failure in the earlier demand in accordance with s.20B(2) of the Landlord and Tenant Act 1985.

84. Having determined that the demands were properly made we now turn to the expenditure as set out in the Scott Schedule. Demands where the only challenge was in respect of service have been indicated by * and are determined as payable in full.

85. **2015**

Insurance* £108.28

Roof repairs* (lack of S.20) £250.00 admitted

Electricity supply works £123.00

The Tribunal is satisfied that the invoice relates to the provision of a landlord's supply and is properly charged.

Management* £58.13

The Tribunal adjusts this in respect of the reduction in roof repair charges to 10% of £507.25 i.e., £50.73, **a reduction of £7.40**

Bank Charges £25.97

The Tribunal determines that these charges are recoverable under the lease and that the amount is reasonable.

Total payable for 2015 £557.98

2016

Insurance* £108.81

Repairs to ceiling £60.00

We accept that these repairs followed an earlier roof leak and as such are recoverable through the service charge.

Management * £16.88

Bank Charges £0.29

These were not demanded in the letter of 15 February 2017 and are therefore not payable.

Total payable for 2016 £185.69

2017

Insurance* £115.35

Management* £11.53

Bank Charges £10.77

Total payable for 2017 £137.65

2018

Insurance * £121.11

Front door lock* £32.50

Property Management Plaque £37.50

The Tribunal accepts that this plaque was a requirement of the Local Authority in respect of an HMO licence condition and not for HAS's advertising purposes.

EICR*	£30.00
Management*	£64.94
Accountancy*	£288.00
Bank Charges	£30.20
Licence Fees	£320.00

Neither party has provided evidence as to what the Licence refers to, presumably it is for an HMO. The Respondent has indicated that it does not concern his property yet inexplicably in his letter of 24 May 2019 [180] Mr Salanson says "I have paid for the licence fee directly" and in the letter of 21 June 2019 [141] HAS write "I think you will have paid Hastings Borough Council direct for your "Selective Licence", The Council also Charge an "Additional Licence " for the building. On the balance of probabilities, the Tribunal determines that this sum is properly charged.

Total payable for 2018 **£924.25**

2019

Insurance*	£93.62
Decorate communal areas	£235.00
Maintenance for Fire regs	£245.00
Carpets for communal areas	£170.00
Handrail	£156.00

The Respondent's challenge to the above costs is that they form one set of works and that the handrail is not in the common parts and not therefore payable. The Tribunal disagrees and finds that these were separate works and as such did not require consultation under S.20. We were told that the handrail was another licence requirement which explanation we accept. The amount is payable in full.

Electricity £172.06

The Respondent says that only receipts totalling £147.92 are available which excludes the sum of £196.20 referred to in GB Energy Supply's letter of 16 May 2019. Whilst some explanation would have been helpful, given that no charges for electricity were made in 2106,2017 & 2018 and the standing charge in 2020 was £47.57 we allow £45 for each of the "missing" three years. We therefore allow a total of **£282.92** of which the Respondent is liable for **£141.46**

Management* £145.29

The Tribunal adjusts this in respect of the reduction in electricity costs to 10% of £1,180.18 plus VAT i.e., £141.61, **a reduction of £3.68**

Accountancy*	£108.00
Bank Charges	£31.10

Total payable for 2019 **£1,321.79**

2020

Insurance*	£93.62
Gutter cleaning *	£105.00
Electricity*	£47.57

Management*	£38.56	
Accountancy*	£108.00	
Bank charges	£31.43	
Total payable for 2020		**£424.18**

2021

Insurance	£174.97	
External maintenance (lack of S.20	£250.00 admitted	
Electricity	£55.69	
Management*	£87.75	

The Tribunal adjusts this in respect of the reduction in External maintenance costs to 10% of £621.26 plus VAT i.e., £74.55, **a reduction of £13.20**

Accountancy*	£108.00	
Bank Charges	£32.60	
Total payable for 2021		**£695.81**
Grand Total		**£4,247.35**

86. From this sum must be deducted payments of £737.06 acknowledged by the Applicant as received from the Respondent. **The outstanding sum due from the Respondent is therefore determined at £3,510.29.**

Application for Costs

87. In this modest dispute of some £3,775.46 [30] of alleged arrears the Applicant has already incurred legal costs approaching £29,000. The hearing bundle extended to 597 pages with many documents duplicated a number of times. On the day of the hearing the Applicant's solicitors wished to introduce a further 132-page bundle which with the concurrence of the Applicant's counsel would have provided little assistance to the Tribunal should it have been admitted.

Rule 13 Costs

88. Up until shortly before the hearing the Applicant's case included a claim for costs under S.146 to be determined by the Tribunal Judge sitting "double hatted". The error of this approach having been indicated by the Respondent's solicitor the costs claim was then altered to being under Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013/1169) ('the Rules')

89. The Applicant does not claim unreasonable behaviour in the Respondent's conduct of the case before the Tribunal but says that the Applicant has been forced to pursue the application due to the long-term dispute between the parties which lead to the Respondent's refusal to acknowledge that service charges were due.

90. The tribunal's jurisdiction under section 29(4) of the Tribunal Courts and Enforcement Act 2007 is to make orders for costs wasted as a result of any improper, unreasonable, or negligent act or omission on the part of any legal or other representative of a party.

91. The tribunal's jurisdiction to make orders for costs under Rule 13 of the Tribunal's Rules is, in so far as is presently material, as follows:

> *13 (1) The Tribunal may make an order in respect of costs only –*
> *(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;*
> *(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in –*
> *(ii) a residential property case...*
>
> *(4) A person making an application for costs-*
>
> *(a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made;..*
>
> *(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the tribunal sends (a) a decision notice recording the decision which finally disposes of all issues in the proceedings..*
>
> *(6) The Tribunal may not make an order for costs against a person ('the paying person') without first giving that person an opportunity to make representations.*

92. As to the test of whether a party or its representative has acted unreasonably for the purposes of the above provisions, this was considered by the Upper Tribunal (UT) in Willow Court Management Company (1985) Limited v Alexander & others [2016] UKUT 290 (LC) In that case the UT approved the guidance in Ridehalgh v Horsefield [1994] 3 All ER 848, the well-established lead authority on the wasted costs jurisdiction.

93. As to the test to be applied , the UT accepted that 'Unreasonable ... aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case' (per Sir Thomas Bingham MR in Ridehalgh). The test it was said may be expressed in different ways; Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's 'acid test': is there a reasonable explanation for the conduct complained?'

94. In Willow Court the UT directed that a three-stage approach was required. The first stage is whether a person has acted unreasonably. A decision in this respect does not involve an exercise of discretion but the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will

be judged to be unreasonable, and the threshold for the making of an order will have been crossed.

95. At this point a discretionary power is engaged with the Tribunal considering whether, in the light of the unreasonable conduct it has determined it ought to make an order for costs.

96. If the decision is positive, then the third stage is reached when the question is what the terms of the order should be.

97. Applying the above test, the Tribunal is not satisfied that there is no "reasonable explanation for the conduct complained" as per Sir Thomas Bingham's "acid test". In making its determination in the substantive matter the Tribunal was asked to decide whether the demands had been sent rather than received. It was not required therefore to determine that the Respondent had maintained an unreasonable position simply whether the method of serving the service charge demands satisfied the statutory test. Given that lack of receipt remained a possibility the Tribunal is not satisfied that the "high bar" of unreasonable behaviour has been reached.

98. Given this determination the tribunal does not need to consider stages 2 and 3 and determines that **it will not make an order under Rule 13 in the Applicant's favour.**

S.20C

99. In essence the Respondent has applied for an Order on the grounds that the lease does not permit recovery of such costs and the Applicant opposes the Order on the grounds of the Respondent's repeated failure to meet his obligations under the lease and whilst acknowledging that proportionality has a part to play considers that this applies to both parties.

100. The difficulty the Tribunal is faced with is that on the Respondent's grounds that the contractual provisions of the lease do not permit the recovery of such costs the Applicant has not responded. Rather making a separate point that the Applicant was acting reasonably in pursuing the application.

101. The Tribunal's general approach to making such Orders is that it is not always necessary to examine the precise terms of the lease before considering whether an Order can be made. In some instances where an Order is not made recovery can be successfully challenged at a later date on grounds either of reasonableness or lack of contractual liability.

102. The Tribunal are not considering costs under Clause 3(4)(a) in respect of S.146 costs or 3 (4)(b) regarding wants of repair but simply whether they are recoverable under the Third Schedule. Given this limited issue the Tribunal finds the cases of Khan and West India Quay to be persuasive and **determines that the legal costs are not recoverable by way of service charge under the Third Schedule**.

103. For the avoidance of any doubt the Tribunal confirms that it makes no determination as to recoverability under Clause 3(4)(a) of the lease.

104. Having made this determination, **the making of a S.20C Order becomes unnecessary.**

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.