FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/OOAC/LSC/2023/0097**
Property	**:**	**6 Barrydene, Oakleigh Road North, London N20 9HG**
Applicant	**:**	**David Cooke**
Representative	**:**	**In person**
Respondent	**:**	**The Barry & Peggy High Foundation**
Representative	**:**	**Ms C Edmonds of Counsel instructed by Howes Percival LLP**
Also present	**:**	**Mrs Cooke (the Applicant's wife) and Mo Nimba of Davis Brown (Respondent's managing agents)**
Type of Application	**:**	**For the determination of the liability to pay a service charge**
Tribunal Members	**:**	**Judge P Korn** **Mr R Waterhouse FRICS**
Date of hearing	**:**	**21 August 2023**
Date of Decision	**:**	**24 August 2023**

DECISION

Description of hearing

This was a face-to-face hearing.

Decisions of the tribunal

(1) The estimated charges for cleaning for 2023 are unreasonably high. In the tribunal's assessment a reasonable charge would be £750.00, of which the Applicant's share is 5.5%. Therefore only £41.25 is payable by the Applicant.

(2) The other estimated service charges for the 2023 service charge year are payable in full.

(3) The Applicant's cost applications are refused.

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 estimated service charges in the 2023 service charge year.

2. The Property is a three-bedroomed flat in a purpose-built block comprising 22 flats.

3. The estimated service charge items disputed by the Applicant – all in respect of the 2023 service charge year – are listed in a 'Scott' Schedule and are as follows:

   (i) estimated lift maintenance charges;

   (ii) estimated general maintenance charges;

   (iii) estimated charges for temporary replacement cleaner; and

   (iv) estimated entry-phone charges.

4. The Applicant is the long leaseholder of the Property pursuant to a lease ("**the Lease**") dated 31 March 2017 and originally made between The Official Custodian for Charities (1) Barry High, John Baker, Ian Lewis, Antony How, Susan Bindon Howell and Antony Bindon Howell (2) and Educational Equipment Supplies Limited (3). The Respondent is the Applicant's landlord.

Parties' respective submissions

Consultation

5. The Applicant states that (a) the Respondent failed to go through the consultation process required under section 20 of the 1985 Act before levying the estimated lift maintenance and estimated general maintenance charges and (b) in the absence of such consultation the Respondent cannot recover more than £250 per leaseholder in respect of each of those charges.

6. At the hearing, Ms Edmonds for the Respondent said that the statutory consultation requirements do not apply to interim/estimated service charges. Furthermore, neither the estimated lift maintenance charges nor the estimated general maintenance charges related to a specific set of works on which it would have been possible to consult.

Lift maintenance

7. In addition to the consultation point referred to above, the Applicant also challenges the reasonableness of the estimated lift maintenance charges themselves.

8. In written submissions, the Applicant states that the most recent service charge accounts available (for 2021) show a spend of £4,366 on lift maintenance. The estimated charge for 2023 is £15,000 and he submits that it is unreasonable for the Respondent to seek to recover more than three times that amount in the current year for lift maintenance.

9. At the hearing the Applicant said that he had been told that the actual cost of lift maintenance in 2022 was £11,000, but on looking at a breakdown he considers that a significant proportion of that cost related to one-off items such as the replacement of a door. He commented that these one-off items will not need to be charged again in 2023. In his submission, the increase to £15,000 is too high, and if in fact that level of further maintenance is required then the lifts should be replaced.

10. Ms Edmonds for the Respondent said at the hearing that the lifts were ageing as could be seen from the report within the hearing bundle. It was therefore prudent for the Respondent to make provision for a certain degree of maintenance. As regards whether the lifts should already have been replaced, lift replacement is very expensive and in her submission there was no evidence to support the proposition that it is unreasonable to delay replacement by spending some money on further maintenance in the meantime.

11. In relation to the recent items of expenditure on lift maintenance, Ms Edmonds referred the tribunal to the relevant copy invoices in the hearing bundle and conceded that some of them were probably one-off items of expenditure. However, in her submission there would in the future be other items of one-off expenditure and these needed to be budgeted for.

General maintenance

12. In addition to the consultation point referred to above, the Applicant also challenges the reasonableness of these estimated general maintenance charges.

13. At the hearing the Applicant questioned how the Respondent had arrived at a figure of £13,000 for general maintenance. To the extent that it was based on actual charges for 2022 the Applicant said that there were various charges for 2022 which he did not consider reasonable (albeit that he accepted that the current application did not itself relate to the actual charges for 2022). For example, he believed that certain charges should have been covered by insurance and therefore not been charged to leaseholders. Also, some of the charges for 2022 were one-off items and therefore should not be budgeted for in 2023.

14. Ms Edmonds for the Respondent referred the tribunal at the hearing to the items of actual expenditure on general maintenance in 2022 and to the Respondent's written summary of those items of expenditure. She did not accept that the cost of many (if any) of these items could have been recovered through insurance. She added that, in any event, making small insurance claims is not always a good idea as there is generally an excess to be paid and also as making claims can increase the following year's premium.

Charges for temporary replacement cleaning

15. This item represents the estimated cost of providing cover for when the live-in caretaker is on holiday. In written submissions, the Applicant states that the actual charge for this service in 2021 (the latest year for which formal service charge accounts have been provided) was £553 and yet the estimated charge for 2023 is £2,585. The Applicant goes on to refer to what, in his view, is the limited extent of the services required to fulfil the caretaker's usual cleaning role. He estimates this to be a maximum of 4 person hours per week, which at an hourly rate of £25 would equate to £100 per week and therefore £400 in total to cover 4 weeks' annual leave.

16. Ms Edmonds said at the hearing that her instructions were that the caretaker cleans the common parts and also clears up rubbish. When

the caretaker is away 2 contractors come 3 times a week for 4 hours. The building is a 5-floor block with 2 staircases, 2 lifts and a small corridor.

17. It was put to Ms Edmonds and to Mr Nimba at the hearing that not much would have changed since 2021 in relation to the duties required of the temporary cleaners. The Applicant also commented that there was very little rubbish to remove and that the temporary cleaners merely clean and hoover.

Entry-phone

18. In written submissions the Applicant states that the 2021 service charge accounts show a credit of £83 for the entry-phone on estimated costs of £2,650 and that it is unreasonable for the Respondent to estimate these costs at £4,305 for the 2023 year. At the hearing he added that nothing had happened to justify increasing the estimate of the amount that needed to be spent on the entry-phone.

19. Ms Edmonds referred the tribunal to the relevant copy documentation in the hearing bundle. The current rental charge for the entry-phone was £2,152.73 + VAT but the rental contract was up for renewal and the new contract was currently being negotiated. The indications so far were that the new contract will be more expensive and that it may not include the cost of maintenance. The Respondent has therefore had to budget for a significant increase.

Tribunal's analysis

Consultation issue

20. The Applicant argues that the Respondent should have gone through the statutory consultation process under section 20 of the 1985 Act in relation to the estimated lift maintenance charges and the estimated general maintenance charges. However, this is not legally correct.

21. The statutory consultation requirements under section 20 of the 1985 Act only apply to qualifying long-term agreements and to qualifying works. The Applicant has not identified (or sought to argue that the Respondent has entered into) any qualifying long-term agreements, but he does appear to be arguing that the estimated lift maintenance charges and the general maintenance charges relate to qualifying works.

22. *"Qualifying works"* are defined in section 20ZA of the 1985 Act as *"works on a building or any other premises"*. This is not a particularly illuminating definition, but the position is made clearer when one

considers the relevant parts of sub-sections 20(1) and 20(2) of the 1985 Act, which read as follows:-

(1) Where this section applies to any qualifying works … the relevant contributions of tenants are limited … unless the consultation requirements have been either – (a) complied with … or (b) dispensed with …

(2) In this section "relevant contribution"… in relation to a tenant and any works … is the amount which he may be required under the terms of his lease to contribute … to relevant costs incurred on carrying out the works …

23. In the case of *23 Dollis Avenue (1998) Limited v Nikan Vejdani and Nahideh Echraghi (2016) UKUT 0365 (LC)*, the Upper Tribunal said in paragraph 33a of its decision that *"the limitation in [section] 20 to the contribution payable by the tenant is referable to costs incurred by the landlord in carrying out the work rather than in respect of work to be carried out in the future"*.

24. Applying the Upper Tribunal's decision in *23 Dollis Avenue* and the wording of sub-sections 20(1) and 20(2) of the 1985 Act, it is clear in our view that the statutory consultation requirements do not apply to the estimated lift maintenance charges or to the estimated general maintenance charges. In each case these are interim estimated charges and there is no evidence that they relate to a specific set of actual works intended to be carried out. In such circumstances, not only is there no statutory requirement to consult but it is not possible to carry out a meaningful consultation as envisaged by section 20 of the 1985 Act and by the detailed consultation regulations themselves. In particular, it is not possible to provide a specification of works on which to invite comments from leaseholders, as there is no particular set of works envisaged, and it is not possible to obtain comparable quotations for the same reason.

25. Therefore, the Applicant's consultation challenge fails.

<u>Lift maintenance</u>

26. The only real evidence before us as to the condition of the lifts is the lift condition survey report dated 9 January 2023 and prepared by International Lift & Escalator Consultants. That report recommends modernisation rather than full replacement, but there is nothing in that report to indicate that a full modernisation should already have taken place.

27. We have also not seen any evidence that the budgeted lift maintenance costs for 2023 are themselves unreasonable. The lifts are ageing and

the Respondent as landlord is entitled to a degree of discretion when budgeting for future maintenance costs. Whilst it is true that certain costs incurred in 2022 may be one-off costs, lifts are complex and expensive machines to run, and it is prudent to make some provision for different problems arising in the following year. This is particularly the case given that residents are often very reliant on the lifts.

28. In the absence of any expert evidence in support of the Applicant's position or any other evidence demonstrating that the estimated lift maintenance charges are unreasonable, we would only be able to find in the Applicant's favour if we were satisfied based on the tribunal's own expert knowledge that the estimated charges were manifestly unreasonable, and this is not the case here.

29. Therefore, the Applicant's challenge to the estimated lift maintenance charges fails.

General maintenance

30. The Applicant's challenge to the estimated charges for general maintenance is rather unfocused. He has made comments querying some of the actual charges for 2022, but he has offered no real evidence to support those queries and in any event those queries are not directly relevant to the question of whether the budgeted charges for 2023 are reasonable. We are not persuaded that there is any basis for concluding that the Respondent's estimated figure for general maintenance is an unreasonable one.

31. Therefore, the Applicant's challenge to the estimated general maintenance charges fails.

Charges for temporary replacement cleaning

32. It is common ground between the parties that the actual charges for the temporary replacement cleaning was £553 in 2021, this being the latest year for which the Respondent has provided actual service charge accounts (albeit that the 2022 accounts have very recently been produced and will presumably be provided to leaseholders). The estimated charge for 2023 is £2,585, representing an increase of over 350% in 2 years.

33. Ms Edmonds and Mr Nimba between them said at the hearing that the temporary cleaners had to deal with cleaning and the removal of rubbish. The Applicant was sceptical as to the amount of time needed to clear occasional items of rubbish, but in any event the Respondent struggled to explain what had changed to justify such an enormous increase. Whilst we accept that inflationary pressures can increase costs and that there may be good reason to anticipate slightly longer

hours for the temporary cleaning staff in 2023 compared to 2021, this does not account for such a large increase.

34. There is also no evidence before us to indicate that the amount spent on temporary cleaners in 2021 was unusually low for a specific (and valid) reason.

35. Taking all of the above points into account, we consider the estimated charges for temporary replacement cleaning to be unreasonably high. Based on our knowledge and experience as an expert tribunal, and in the absence of any more detailed evidence, we consider that a reasonable estimate – allowing for inflation and other relevant factors – is £750.

36. Accordingly, the Applicant is only required to pay 5.5% of £750, with 5.5% being the percentage of the service charge payable by him under the Lease.

Entry-phone

37. The Respondent has provided a convincing explanation for the increase in the budgeted cost for 2023. On the basis of the evidence before us we accept that the entry-phone contract is being renegotiated, that the contract cost is likely to increase significantly and that maintenance costs may no longer be included within the rental charge. There is no evidence before us that the Respondent has acted unreasonably in connection with the contract negotiations, and nor has the Applicant provided any comparable evidence to demonstrate that the estimated cost is unreasonable.

38. Therefore, the Applicant's challenge to the estimated entry-phone charges fails.

Cost applications

39. The Applicant has applied for a cost order under section 20C of the 1985 Act ("**Section 20C**") and for a cost order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("**Paragraph 5A**").

40. The relevant parts of Section 20C read as follows:-

(1) "A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before … the First-tier Tribunal … are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant …".

41. The relevant parts of Paragraph 5A read as follows:-

"A tenant of a dwelling in England may apply to the relevant … tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs".

42. The Section 20C application is therefore an application for an order that the whole or part of the costs incurred by the landlord in connection with these proceedings cannot be added to the service charge. The Paragraph 5A application is an application for an order that the whole or part of the costs incurred by the landlord in connection with these proceedings cannot be charged direct to the Applicant as an administration charge under his lease.

43. The Applicant has been successful on one issue but has lost on all of the others. In monetary terms, his one success has been relatively modest. Whilst he was entitled to make the application and has acted reasonably in pursuing it, the Respondent has also acted reasonably as well as having won on most issues.

44. In these circumstances, whilst we would certainly not have made a cost award **against** the Applicant if the Respondent had applied for one, it does not follow that a Section 20C order or a Paragraph 5A order should be made in the Applicant's favour. If and to the extent that the Lease provides for the Respondent's costs to be recoverable through the service charge or as an administration charge, we do not consider that it would be appropriate – on the facts of this case – to make an order reversing the contractual presumption set out in the Lease. As noted above, the Respondent has won on most issues and has acted reasonably. The Respondent is also a charitable organisation. The test in relation to Section 20C and Paragraph 5A applications is that the tribunal may make whatever order it considers to be just and equitable, and taking all of the circumstances into account we do not consider that it would be just and equitable to make either order.

45. Accordingly, the Applicant's cost applications are both refused.

Name: Judge P Korn **Date:** 24 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 20

(1) Where this section applies to any qualifying works ... the relevant contributions of tenants are limited ... unless the consultation

requirements have been either – (a) complied with … or (b) dispensed with ….

(2) In this section "relevant contribution"… in relation to a tenant and any works … is the amount which he may be required under the terms of his lease to contribute … to relevant costs incurred on carrying out the works …

Section 20ZA

(2) … "qualifying works" means works on a building or any other premises …

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.