



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **CAM/12UD/LIS/2022/0015**

Property : **64A Hammonds Drive, Peterborough
PE1 5AA**

Applicant : **Mr Kevin Rickard**

Respondent Landlord : **Connect 21 Community Ltd**

Represented by : **Firstport Property Services Ltd**

Type of application : **Application for payability and
reasonableness of service charges,
pursuant to s.27A Landlord and Tenant
Act 1985**

Tribunal : **Tribunal Judge Stephen Evans
Mr Alan Tomlinson**

Date of hearing : **12 July 2023 and 5 October 2023**

Date of decision : **4 December 2023**

DECISION

The Tribunal determines that:

(1) The Respondent having conceded the sums disputed by the Applicant, and having therefore agreed to give the Applicant a credit of £134.41 + £101.61 (total £235.92), the Tribunal determines:

- (a) That the service charge in respect of water charges for the year ending 2019 shall be £346.13 and there shall a credit of £65.64 pertaining to the under-recovery charge;**
- (b) That the service charge in respect of water charges for the year ending 2020 shall be £342.92 and there shall a credit of £14.22 pertaining to the under-recovery charge;**
- (c) That the service charge in respect of water charges for the year ending 2021 shall be £421.11 and there shall a credit of £54.45 pertaining to the under-recovery charge;**

(2) The application by the Applicant under s.20C of the Landlord and Tenant Act 1985 is granted. No costs of this s.27A application may be recovered from the Applicant through the service charges.

REASONS

Background

1. On 28 November 2008 Bellwinch Homes Limited granted a lease to the Applicant for a term of 999 years from 1 January 2007. The Respondent was also a party to the lease.
2. On 17 June 2016 the Respondent was registered with leasehold title to 2-302 (even) Hammond's Drive.
3. On 1 January 2020 the Applicant received a demand for service charges for water charges in the sum of £191.18, covering the period 1 January 2020 to 30 June 2020.
4. On 20 May 2020 the Applicant received a demand for service charge in respect of water charges in the sum of £191.18, covering the period 20 May 2020 to 31 December 2020.
5. On 1 January 2021 the Applicant received a demand for service charges for water charges in the sum of £191.18, covering the period 1 January 2021 to 30 June 2021.
6. On 28 May 2020 the Applicant received a demand for a balancing sum service charges for water charges in the sum of £45.41, covering the period 1 January 2020 to 31 December 2020.

7. On 21 January 2022 the Applicant wrote to the Respondent querying the water charges.
8. On 10 March 2022 a service charge demand for water charges was levied in the sum of £38.81.
9. On 21 March 2023 the Respondent wrote to the Applicant saying it did not have water charge calculations, but they were based on usage multiplied by unit costs, using normal industry standard calculations.
10. On 1 April 2022 the Applicant wrote to managers Firstport, requesting calculations for these charges, and sent a chaser on 13 April 2022.
11. On 5 May 2022 Firstport wrote to the Applicant accepting there had been contradictory figures given.
12. The Respondent wrote again to the Applicant on 24 May 2022.
13. On 15 October 2022 the Applicant issued a section 27A application in relation to some major works charge for lifts in 2022. (That is the subject of a separate determination of the Tribunal under case no. CAM/12UD/LSC/2022/0061 dated 3 December 2023).
14. On 22 October 2022 the Applicant issued this section 27A application in respect of water charges for the years 2019 to 2021.
15. On 5 January 2023 directions were given by the Tribunal procedural judge on both applications.
16. Statements of case and witness statements followed.

The Lease

17. The Lease terms may be briefly stated, as there is no disagreement between the parties as to interpretation or effect:
18. The Seventh Schedule sets out the service charge machinery. The Lessee's proportion (0.72%) of Maintenance Expenses (for which see schedule 6, but which includes payment of landlord's water supply (§10) and any service it is reasonable to provide (§11 and 15) is payable in advance on 1 July and 1 January in every year as an estimate of the amount reasonably and properly payable in the year. At the year end, an account is prepared, and an accountant's certificate must be served on the Lessee demanding any shortfall, which is payable by them within 21 days.

The Applicant's case in brief

19. The Applicant's case is complex, but the Tribunal notes it can be distilled to the following (per p.10 of his Application form):
 - (1) The Respondent has been charging 1.4% (1/68) rather than the lease percentage of 0.72%;

- (2) The Respondent applies a “recovery charge” in arrears, rather a charge based on actual usage, thereby falling foul of the Water Resale Orders of 2001 and 2006;
 - (3) The recovery charge is unfair, being apportioned to leaseholders equally (given some have low usage and others higher).
20. The Applicant took no other points on payability (i.e. that the sums sought to be recovered could not be recovered under the express terms of the Lease) save for (1) above.

The Respondent’s case in brief

21. The Respondent’s statement of case contends that OFWAT rules compliance, complaints handling, and calculation methodologies are not matters within the scope of section 27A of the Landlord and Tenant Act 1985 (and thus they do not fall for consideration by the Tribunal as part of the Application).
22. The Statement of Case then goes on to attempt to explain the water charge calculations for 2019, 2020 and 2021. The statement of case states that certain concessions can be made, such as not recovering the adjusted sums from the Applicant.

The first hearing

23. The matter first came on for hearing on 12 July 2023.
24. The morning was spent dealing with the Applicant’s other application (major works service charges).
25. The Applicant opened his case in the afternoon with reference to his Statement of Case, explaining that he had been charged £393.70 for 2019, £339.17 for 2020 and £478.91, but if a recalculation were made using the OFWAT guide to water resale, he would be liable only for £346.13, £342.92 and £421.11 respectively.
26. Accordingly, he had overpaid for these 3 years a total of £101.61.
27. He also contended that the application of the under-recovery charge at 1.4% instead of the Lease percentage 0.72% meant he had overpaid an additional £134.41.
28. The Respondent called Ms Karen Lacey and Mr Izzo to attempt to assist the Tribunal, but neither could explain the calculations in the Respondent’s Statement of Case, despite their witness statements deposing to the fact they believed the contents of the Statement of Case were true. However, they did confirm that only 68 leaseholders were being charged in the way the Applicant is, hence the 1.4% levy (1/68) for water charges.

29. The Tribunal decided that it would adjourn the case, and gave directions for the Respondent to give a witness statement explaining the calculation of the water charges for the years ending 2019, 2020 and 2021, and documentary evidence in support of the calculations, including accounts, spreadsheets, and Anglia Water invoices for the 3 years. Provision was made for the Applicant to give a response.

30. The Respondent did not comply with the directions; instead it wrote to the Tribunal, via its solicitors, to indicate it would concede the sums challenged by the Applicant (£134.41 and £101.61). They wrote in their email dated 16 August 2023:

“There is little doubt the water charges can be invoiced to leaseholders under the leases and without prejudice to the respondent’s position that water charges for under recovery would reasonably be chargeable and payable, the respondent has become concerned about the commercial realities of this aspect of the application... accordingly the respondent is willing to and will concede the disputed water charges specifically to Mr Rickard on a commercial basis only, as the sole applicant (the applicant will therefore be given the requisite credits to his service charge account). This concession on a commercial basis means that there now isn't anything to determine... thereby narrowing the issues to only the major works.”

31. They then alleged that s.27A(4)(a) of the 1985 Act applied, because the Respondent was agreeing to credit the water charges.

32. The Tribunal wrote to the parties on 30 August 2023 in these terms:

“The Tribunal notes the Respondent’s concession within the email dated 16 August 2023 timed at 16:40. The Tribunal’s view is unclear as to whether this is because the Respondent is now agreeing to calculate future water charges under the method proposed by the Applicant (in which case it might be presumed the matter actually is resolved), or whether the Respondent is only conceding in relation to years currently in dispute, in which case the Applicant does not regard the matter as resolved. Accordingly, the Tribunal is far from satisfied that s.27A(4)(a) applies on the grounds there is a matter which has been agreed or admitted by the tenant.”

33. The Tribunal therefore directed the Respondent to provide a supplementary Statement of Case (and any supporting evidence) detailing how it proposes to charge the Applicant for water in the future (i.e. after the years currently in dispute), by 4pm on 8 September 2023. Provision was made for the Applicant to respond.

The adjourned hearing

34. In its Supplemental Statement of Case (Water Charges) dated 7 September 2023, the Respondent confirmed its “commercial concerns” which had led it

to credit the “modest” sums sought by the Applicant (£134.31 and £101.61) for 2019-2021. As to the position going forward, para 13 of the Statement of Case stated:

“The % charge to each leaseholder of 68 units going forward will be that stated in their leases for now, so for the Applicant it will be 0.72% as prescribed (but subject to change, if the Respondent utilises the contractual machinery to alter the percentage charge) in accordance with clause 7.11.”

35. The Respondent, by counsel, then explained that its intention was to replace the bulk water meter, and a meeting was due to take place with Anglia Water on 25 October 2023.
36. The Respondent called Mr Izzo, who informed the Tribunal that they had invoices for August 2022 to October 2022, October 2022 to February 2023, February 2023 to April 2023 and April 2023 to July 2023. When asked by the Tribunal about the period 1 January 2022 to August 2022, Mr Izzo said he would speak to Anglia Water about it; the invoices had been requested but not received. He gave a figure for the calendar year ending 31 December 2022 which was £26,471.20, equating to £190.59, using the lease percentage of 0.72%. The Applicant pointed Mr Izzo to the figure of £20,978.31 for the above year end, present on a s.20B notice which he had been sent. Mr Izzo was unable to explain where the lower figure came from.
37. The Respondent contended that it was not impossible for the calculations to be done in the way the Applicant contends, but that is not what the lease permits.
38. The Respondent further contended that the Tribunal did not have jurisdiction to decide the issue, as the Applicant’s application did not cover 2022. The Tribunal posited whether it could utilise s.27A(3) to determine the charge as a future service charge. The Respondent’s position was that the sums for 2022 are too uncertain; Mr Izzo contending one sum and the Applicant another sum, and Mr Izzo did not have all the 2022 invoices.
39. The Tribunal then allowed the parties 20 minutes to attempt to reach agreement on a sum for water charges for 2022, but they were unable to do so.
40. In closing submissions, the Respondent took the Tribunal to the Water Industry Act 1991, s.150 for the very first time, pointing to the Water Resale Order 2006 at para.10: “where a purchaser pays a charge in respect of anything to which his order relates and the amount paid exceeds the maximum charge fixed by this order, the amount of the excess and the simple interest on that amount [at a certain rate] shall be recoverable by the purchaser from the reseller to whom he paid the charge.”
41. The Respondent also contended that the Applicant had paid on the basis he had for a substantial period of time; and the Tribunal must give effect to the Lease terms.

Determination

42. The Respondent having conceded the sums in dispute (£134.41 + £101.61 = £235.92) for the years challenged by the Applicant, we agree with the Respondent that the issue of the service charges for 2019, 2020 and 2021 is resolved. There is nothing further to determine for those years. We can, and do, determine the amounts payable, given the Respondent's concession.
43. The Tribunal has considered carefully whether it should allow the underlying issue of the method of calculation of water charges to be considered as a s.27A(3) determination as to future service charges. Rule 6(1) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 permits the Tribunal to regulate its own procedure, and Rule 6(3)(c) to allow an amendment to a document (here the Application, so as to include the year 2022).
44. The Tribunal, however, determines that it would be unwise to proceed to such a course, at least without clearer figures and invoices for 2022 and without more detailed submissions on the Water Industry Act 1991/ Water Resale Order 2006 than simply the guide that has been supplied in the bundle. Moreover, the Respondent has indicated that the bulk water meters are soon to be replaced, resulting in more accurate figures, and that it may seek to vary the Leases under clause 7.11 thereof to recalculate the percentage figures payable for water.
45. However, we can and do make the following general observations, which we hope the Respondent in particular will heed:
 - (1) We disagree with the Respondent's Statement of Case in so far as it alleges that the Water Resale Order 2006 does not bind it; if (and we can only say if at this stage) water charges are sought for 2022 onwards which breach the 2006 Order, we cannot see how they would be reasonable in amount, being unlawfully demanded. We do not consider that the remedy seemingly available to the Applicant under paragraph 10 of the Order would render the charge somehow legal; it provides but a remedy for an illegality;
 - (2) Whilst we are not able to determine the issue on the present material, we see force in the Applicant's submissions that the Water Resale Order 2006 applies, because all purchasers (here the leaseholders) are metered; accordingly the reseller (here the Respondent) must charge the same amount per cubic metre to each purchaser as they pay to the water company, and share the standing charge they pay to the water company equally among all purchasers;
 - (3) It is for the Respondent to resolve any difficulty presented by the Lease terms in the light of (2) above, and find a way forward, by agreement or if necessary by application to this Tribunal under s.27A of the 1985 Act (or

even the Landlord and Tenant Act 1987, if applicable). The Respondent will not be viewed sympathetically by this Tribunal if no such steps have been taken, and the Applicant is forced to bring a s.27A application of his own in the future, making the same points as he does herein.

Application under Section 20C/Paragraph 5A to CLARA

46. In *Tenants of Langford Court v Doren Ltd* (LRX/37/2000), HHJ Rich held:

"In my judgement the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise.....In my judgement the primary consideration that the LVT should keep in mind is that the power to make an order under section 20C should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that makes its use unjust. Excessive costs unreasonably incurred will not, in any event, be recoverable by reason of s.19 of the Landlord and Tenant Act 1985. Section 20C may provide a short route by which a Tribunal which has heard the litigation giving rise to the costs can avoid arguments under s.19, but its purpose is to give an opportunity to ensure fair treatment as between landlord and tenant, in circumstances where even although costs have been reasonably incurred by the landlord, it would be unjust that the tenant or some particular tenant should have to pay them."

47. In the instant case, we have no hesitation in finding that, given our views above, and the concessions which the Respondent has been forced to make, that a s.20C order should be made in favour of the Applicant Mr Rickard; accordingly, it is just and equitable to order that none of the Respondent's costs incurred in relation to this Application shall be recoverable through the service charges from the Applicant.

Judge:

S J Evans

Date:

4/12/23

ANNEX – RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written Application for permission must be made to the First-Tier at the Regional Office which has been dealing with the case.
2. 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.
3. If the Application is not made within the 28-day time limit, such Application must include a request to an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the Application for permission to appeal to proceed despite not being within the time limit.
4. 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 1

Landlord and Tenant Act 1985

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 20C

- (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 a court, a First-tier Tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, 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 or any other person or persons specified in the application.
- (2)
- (3)

- (4) The court or Tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

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.