In the FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Tribunal Case Reference	**:**	**LON/00AE/LSC/2022/0332**
Property	**:**	**29 Thanet Lodge, 10 Mapesbury Road, London NW2 4JA**
Applicant	**:**	**Arun Mirchandani**
Respondent	**:**	**Thanet Lodge (Mapesbury Road) RTM Co Ltd**
Type of Application	**:**	**Payability of service charges**
Tribunal	**:**	**Judge Nicol** **Mr O Dowty MRICS** **Mr ON Miller**
Date and venue of Hearing	**:**	**31st November 2023** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**12th December 2023**

DECISION

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(1) The service charges challenged at the hearing of this matter are reasonable and payable by the Applicant to the Respondent, save in the following respects:

(a) The relevant costs of the balcony works are reduced by £1,400 to take account of the lack of an insurance-backed guarantee;

(b) The Applicant's service charges in respect of the roof works (invoice 22050) and the external decorations (invoices 19405 and 22048) are limited to £250 each;

(c) In accordance with paragraph 2 of Schedule 8 to the Building Safety Act 2022, no service charge is payable arising from the cost of the reports obtained in relation to fire safety issues from Celador Consulting (£3,000), Fire Prevent Ltd (£4,320), BBD Surveyors (£2,220) and Part B Group (£3,000);

(d) The Applicant's service charge in respect of internal decorations to the communal corridors carried out between August and October 2020 is limited to £250;

(e) Service charges arising from legal fees are not payable under the terms of the Applicant's lease.

(2) In the light of the decision at paragraph 1(e) above, the Tribunal makes no order pursuant to section 20C of the Landlord and Tenant Act 1985.

Relevant legal provisions are set out in the Appendix to this decision.

Reasons

1. The Applicant is the lessee of the subject property, one of 43 flats in a 5-storey block managed by the Respondent, a right to manage company. Day-to-day management is undertaken by HML Property Management Ltd as the Respondent's agents.

2. The Applicant applied on 25th October 2022 for a determination under section 27A of the Landlord and Tenant Act 1985 ("the Act") as to the reasonableness and payability of certain service and administration charges.

3. The Tribunal heard the case on 31st November 2023. The attendees were:

- The Applicant
- Mr R Levy, representing the Applicant
- Mr Nigel Woodhouse, counsel for the Respondent
- Ms I Jelea, solicitor
- The Respondent's witnesses:
  - Mr Paul Crawford
  - Ms Anna Skurczynska

4. The documents before the Tribunal consisted of:

- A bundle of 763 pages;
- A revised supplementary bundle of 84 pages (replacing an earlier version of 66 pages);
- A skeleton argument and summary analysis from the Applicant; and
- A skeleton argument from Mr Woodhouse.

5. In accordance with the Tribunal's directions, the parties prepared a Scott Schedule listing the matters in dispute. They are dealt with in turn below.

External building repair works

6. On 13th August 2019 the Respondent notified the lessees in accordance with section 20 of the Act that they intended to carry out water-proofing works to balconies, specified and overseen by BBD Chartered Surveyors. Following the completion of the works, the Applicant complained that

there wasn't an insurance-backed guarantee of the work as opposed to a warranty of the materials, as mentioned by BBD in their tender analysis and costed at £1,400. There is no evidence that the insurance-backed guarantee was ever obtained and so the relevant costs must be reduced by £1,400 when calculating the resulting service charge.

7. The Applicant raised concerns about the lack of such a guarantee in the future but that is matter for a later stage, if and when works are required for which the guarantee would have been relevant. The absence of a guarantee does not mean it is inevitable that further costs will be incurred.

8. The balcony works had required the erection of scaffolding. The Respondent was aware that there were other problems that needed addressing and decided to take advantage of BBD's involvement and the scaffolding to see if they could be addressed. They used the same contractors, Dayco, to carry out the following works:

   (a) Works to the roof were carried out at a cost of £8,952. The Respondent had been using a rule of thumb that works costing under £10,000 did not engage the statutory consultation requirements under section 20 of the Act and the Service Charges (Consultation Requirements) (England) Regulations 2003. Therefore, they did not consult on the roof works. In fact, variations in the service charge percentages between leases meant that some lessees paid more than the £250 threshold for consultation. The Respondent conceded that the Applicant's service charge in relation to the roof works should be limited to £250.
   (b) External decorations were carried out at a cost of £7,548, plus an extension to the scaffolding costing £2,394. Again, the Respondent erred in thinking that the consultation requirements were not engaged and conceded that the Applicant's service charge in relation to the external decorations should be limited to £250.
   (c) Further external decoration work was carried out to the other side of the building at a cost of £3,983.

9. Works to the rainwater pipes were carried out by another contractor, Cascadia, at a cost of £5,712.

10. The Applicant argued that the balcony works and all these other works were part of the same project and should have been consulted on as one. On that basis, all of the additional works were not consulted on and should collectively be limited to a single amount of £250.

11. The Applicant based his argument on the fact that the works (save for one item) were carried out by the same contractor and all the works were carried out at around the same time. However, while such factors may be relevant to determining whether works constitute a single project, they are by no means conclusive by themselves. The Tribunal has to look at all the circumstances.

12. The Tribunal is satisfied that the Respondent acted reasonably in considering the works referred to above as separate items. They were

related in that they involved areas of the building next to each other and utilised the same contractors and the same scaffolding but that is normal in building management. Each set of works was separately commissioned for separate purposes. The concessions by the Respondent in relation to the lack of consultation are correct but there is no basis for any further reductions in the amount of the service charges for these works.

Fire safety

13. In 2020 the Respondent instructed Celador Consulting Ltd at a cost of £3,000 to undertake an assessment of the building in order to complete the External Wall Safety Review form, known as the EWS1, introduced following the Grenfell Tower disaster. In their report dated 20th November 2020, they concluded that the original building gave no cause for concern but the penthouse flats, constructed by the landlord in 2006 with timber cladding, required further assessment by a fire engineer.

14. Therefore, the Respondent then instructed Fire Prevent Ltd to carry out a further assessment. In their report dated 20th January 2021, they concluded that the cladding was not an issue but compartmentation was needed to the floor between the penthouse flats and the flats below.

15. The Respondent instructed BBD Surveyors to prepare an application for planning permission in case any remediation works required alterations which would be subject to planning requirements, such as changing the cladding.

16. They also instructed the Part B Group to put forward technical options for the remediation of defects identified by BBD and Fire Prevent. According to paragraph 3.1 of their report, Part B Group were considering the following issues identified in the reports provided to them:

- The steel structure [on top of which the penthouse flats are located] is not fire rated
- There is no compartment floor between the flats in the existing building and the new penthouse
- There is a cavity on the underside of the steel
- Compartmentation is not continued down to the floor.

17. Part B Group provided 3 options for achieving the required fire resistance. It appears that none of these have yet been pursued.

18. One other item in relation to fire safety, this time not connected to the EWS1, consisted of payments for two invoices from Dayco for works concerning the installation of and repair to the automatic opening vent in the communal staircase.

19. The Applicant alleged that the costs of these fire safety measures were not payable under the Building Safety Act 2022. In particular, paragraph

2(2) of Schedule 8 provides that no service charge is payable in respect of a measure taken in this type of building to remedy a defect which causes a risk arising from the spread of fire or the collapse of the building (or prevent such a risk arising or reducing the severity of any incident arising from such a risk) if the landlord is responsible for the defect. In this case, the landlord had constructed the penthouse flats in around 2006 and the Applicant argued that the landlord was thereby responsible for any fire safety defects which arose from that construction.

20. Mr Woodhouse argued that the service charge items challenged by the Applicant did not come within the Building Safety Act for two reasons:

(a) The expenditure was incurred prior to the commencement of the Building Safety Act on 28th June 2022 and there was no provision for retrospective effect in relation to the particular provisions relied on. Mr Levy pointed out that, under section 120(3) the construction in question was covered if it was carried out within the 30 years prior to the Act coming into force but Mr Woodhouse was referring to the works to remedy any defects arising from that construction and the consequent service charges which were not caught by the 30-year provision.
(b) The expenditure was incurred in order to obtain the EWS1 certificate and therefore did not relate to a "relevant measure" as defined in paragraph 1(1) of Schedule 8 in that it was not to remedy a defect which causes a risk arising from the spread of fire or the collapse of the building or prevent such a risk arising or reducing the severity of any incident arising from such a risk.

21. Mr Woodhouse said he derived his arguments from a case summary on the website of JB Leitch. JB Leitch were the solicitors for the Appellant in *Adriatic Land 5 Ltd v The Long Leaseholders at Hippersley Point* [2023] UKUT 271 (LC) and it would seem that this is the case from which the case summary derived. Edwin Johnson J, the Chamber President, was concerned with the application of paragraph 9 of Schedule 8 to the Building Safety Act, rather than paragraph 2, but it seems to the Tribunal that the following reasoning is equally applicable:

> 165. Ultimately, and keeping firmly in mind the importance of following the language of Paragraph 9, I find myself drawn to the most obvious interpretation of Paragraph 9(1). It seems to me that the words *"No service charge is payable"* mean what they say. As from 28th June 2022, when Paragraph 9 was brought into force, no service charge is payable in respect of Qualifying Services. The new regime applies, regardless of when the costs of the Qualifying Service were actually incurred, and regardless of when the relevant service charge became payable.
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> 170. Drawing together all of the above analysis of the question of whether Paragraph 9 can apply to the Costs, bearing in mind the date when Paragraph 9 was brought into force, I reach the following conclusions:
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> (1) The effect of Paragraph 9 is that, as from 28th June 2022, no service charge is payable in respect of Qualifying

Services, regardless of when the costs of those Qualifying Services were incurred, and regardless of when the relevant service charge actually became due for payment.

(2) Accordingly, Paragraph 9 is capable of applying to the Costs, notwithstanding the date when Paragraph 9 was brought into force.

22. The Tribunal rejects Mr Woodhouse's first point based on the above reasoning.

23. In relation to the second point, the facts do not appear to support Mr Woodhouse's argument. While Celador's work was commissioned for the express purpose of obtaining the EWS1 certificate, it resulted in the identification of work required to remedy the inadequate compartmentation incorporated into the construction of the penthouse flats. The original concern was the timber cladding, which turned out not to be an issue, but the Fire Prevent report shifted the focus to compartmentation and the Part B Group report was entirely about compartmentation.

24. In the Scott Schedule, the Respondent sought to separate out the early stages of the investigations involving Celador, Fire Prevent and BBD as being when the issue was cladding from the later stages when Part B Group looked at compartmentation but it is clear that they were all part of the same process.

25. Presumably, works will now be commissioned in order to comply with Part B Group's recommendations. Those works would clearly constitute a relevant measure within the meaning of the provisions of the Building Safety Act referred to above. The investigations which resulted in those works being commissioned cannot reasonably be considered as anything other than part of those works. Therefore, in accordance with paragraph 2 of Schedule 8, no service charge is payable in respect of them.

26. The Dayco item for £3,904 was nothing to do with the process described above and seems to come within the Respondent's repairing obligations under clause 5(4) of the lease. The Building Safety Act does not exclude from the service charges every item of work relating to fire safety and the Tribunal is satisfied that this is one of those matters which properly remains within the service charges.

Internal decoration

27. The Respondent carried out internal decoration works to the communal corridors between August and October 2020 in order to remedy damage done to the internal decorations by the installation of fire alarms. Some of the Respondent's directors were reimbursed for paint they bought for the contractors to use as part of these works.

28. The Respondent conceded that:

(a) The reimbursements for paint should be added to the invoices of the contractor, AP Stevens, to identify the full cost – by the Tribunal's calculation, the sums incurred for these works thereby totalled £13,284; and
(b) This sum exceeded the threshold for the statutory consultation requirements but no consultation was carried out and so the Applicant's service charge for these works is limited to £250.

29. In January 2021, the Respondent had the same contractor carry out decoration of the communal fire escape staircases. Again, some of the Respondent's directors were reimbursed for paint. On this occasion the total cost was £4,007 which is not large enough to engage the statutory consultation requirements.

30. However, the Applicant argued that the two sets of works should be regarded as one project since they involved the same contractor at about the same time. As already discussed above, these factors do not by themselves mean that such works constituted one project. The works were separated by several months and involved different parts of the building. The Tribunal is satisfied that they were separate and did not need to be consulted on together.

31. The Applicant also criticised the Respondent for carrying out such decoration work when there was a capital expenditure programme, worked out with the assistance of a report dated February 2020 (and revised in August 2020) from Shaw & Co chartered surveyors, which identified other priorities.

32. However, the Tribunal is only concerned with the reasonableness of the service charges. The Applicant argued that the lack of consultation, by itself, rendered the charges unreasonable but that is not correct. It was not in dispute that the decoration work needed doing. There was no evidence that any other work was delayed as a result of doing the decoration work first. The fact is that, even if the decoration work had been delayed until after other works had been completed, it would still have been done and the cost would still have been incurred. There is no evidence that the Applicant's service charge would have been a different amount if the work had been re-ordered in any way.

Works within flats

33. The Applicant challenged four invoices for work done within the flats of four lessees. As is normal, the leases require repairs to the demise of each flat to be carried out by the lessees and so the Applicant queried why the cost of these particular works had been included in the service charges.

34. The Tribunal was concerned about the lack of evidence provided by the Respondent on this issue. Their agents, HML, should have been able to provide details but, apparently, decided to ignore the Respondent's reasonable requests to do so. The bundle included Dayco's invoices and the brief description of the works given there suggested that there had

been water penetration from outside. However, the Respondent had nothing else.

35. Damage caused by water penetration would nearly always be the Respondent's responsibility. It would also normally be covered by the buildings insurance. There was no evidence as to whether an insurance claim had been made. For all the Tribunal knows, there is a sum of money from the insurers which has been or is about to be credited to the service charge account in respect of these items.

36. On the other hand, HML is a well-established firm of managing agents. It is not credible that they would carry out works on behalf of a lessee and then charge them incorrectly to the service charge account. The challenge to such invoices has to consist of more than just the fact that the work was done inside a lessee's demise. The Applicant was unable to point to anything other than that fact as a reason for thinking that these were not items properly included within the service charges.

37. On balance, the Tribunal finds these items to have been reasonably incurred so that they are payable.

Legal expenses

38. The Respondent incurred various solicitors' charges which they included within the service charge:

• 19th March 2020	Rose & Rose	£1,848
• 18th May 2020	Yugin Law	£1,100
• 16th July 2021		£960
• 31st May 2021	Storrar Cowdry	£1,830
• 19th July 2021	Mr H Lederman	£480
• 19th October 2021	Mediator's fee	£1,000

39. The only challenge to these items was that legal expenses are not chargeable under the Applicant's lease. Mr Woodhouse pointed to the following clauses:

> Lessors' Covenants
>
> 5. The Lessors … HEREBY COVENANT with the Tenant as follows
>
> Expenditure of Service Charge
>
> (4)(g) (i) To employ at the Lessors' discretion a firm of Managing Agents and Chartered Accountants to manage the Building and discharge all proper fees salaries charges and expenses payable to such agents or such other person who may be managing the Building including the cost of computing and collecting the rents and service charges in respect of the Building or any parts thereof

THE FIFTH SCHEDULE

The Service Charge

1. In this Schedule the following expressions have the following meanings respectively:-

(1) "Total Expenditure" means the total expenditure incurred by the Lessors in any Accounting Period in carrying out their obligations under Clause 5(4) of this Lease and any other costs and expenses reasonably and properly incurred in connection with the Building including without prejudice to the generality of the foregoing (a) the cost of employing Managing Agents (b) the cost of any Accountant or surveyor employed to determine the Total Expenditure and the amount payable by the Tenant hereunder and (c) an annual sum equivalent to the fair rent of any accommodation owned by the Lessors and provided by them rent free to any of the persons referred to in Clause 5(4)(f) of this Lease and (d) interest charged upon Bank accounts maintained for the purposes of the Management of the Building

40. In *Arnold v Britton* [2015] UKSC 36 Lord Neuberger stated [15]:

When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", ... And it does so by focussing on the meaning of the relevant words ... in their documentary, factual and commercial context. That meaning has to be assessed in the light of

(i) the natural and ordinary meaning of the clause,
(ii) any other relevant provisions of the lease,
(iii) the overall purpose of the clause and the lease,
(iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and
(v) commercial common sense, but
(vi) disregarding subjective evidence of any party's intentions."

41. Prior to *Arnold v Britton*, there was a number of cases which emphasised the need for clarity in a lease if a landlord wished to impose a service charge arising from expenditure on a particular item: *Sella House Ltd v Mears* (1988) 21 HLR, *Gilje v Charlgrove Securities Ltd* [2003] EWHC 1284 (Ch) and *Phillips v Francis* [2014] EWCA Civ 1395. For example, in *Sella*, the Court of Appeal were considering the payability of service charges arising from legal fees and pointed out that the lease did not contain any specific mention of lawyers, proceedings or legal costs. They held that liability would require a clause in clear and unambiguous terms.

42. Clause 5(4)(g)(i) is clearly aimed at the employment of professionals for the purpose of implementing other obligations under the lease. It is wide enough to include lawyers but there has to be an obligation elsewhere in the lease for which such lawyers may be used. This particular clause does not create obligations rather than specify the means by which obligations spelled out elsewhere may be achieved.

43. Paragraph 1 of the Fifth Schedule refers to "any other costs and expenses reasonably and properly incurred in connection with the Building". Taken in isolation, these words could cover anything and everything but they must be read in context. When creating the contract, the parties sought to identify their respective liabilities. All certainty would disappear with an interpretation of these words which was too wide, giving rise to unknown future liabilities of unknown size. The Tribunal has concluded that the lease in this case has the same issue as that in *Sella* – the absence of any specific mention of lawyers, proceedings or legal costs suggests that the general words of paragraph 1 of the Fifth Schedule are not meant to be read as covering such matters.

44. Therefore, the service charges arising from the bills for legal fees are not payable. Further, this conclusion renders otiose the Applicant's application for an order under section 20C of the Act.

Name: Judge Nicol **Date:** 12th December 2023

Appendix of relevant legislation

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, residential property tribunal or the Upper 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) The application shall be made—
  (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
  (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
  (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the

application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) 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.