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

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| **Case Reference** | **:** | **LON/OOAG/LSC/2022/0331** |
| **Property** | **:** | **Flat 1, 5 Ainger Road, London NW3 3AR** |
| **Applicant** | **:** | **Clare O'Neill** |
| **Representative** | **:** | **In person** |
| **Respondent** | **:** | **3, 5 and 7 Ainger Road Limited** |
| **Representative** | **:** | **Richard Miller of Counsel instructed by Comptons Solicitors LLP** |
| **Type of Application** | **:** | **For the determination of the liability to pay a service charge** |
| **Tribunal Members** | **:** | **Judge P Korn**<br>**Miss M Krisko FRICS** |
| **Date of hearing** | **:** | **19 October 2023** |
| **Date of Decision** | **:** | **5 December 2023** |

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**DECISION**

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**Description of hearing**

The hearing was set up as a face-to-face hearing, although in the end the Applicant joined the hearing by telephone.

## Decisions of the tribunal

(1) The Applicant's share of the following sums is payable in full:-

- The annual estimated **video entry maintenance charge** for the two years ending 31 March 2023 and 31 March 2024.

- The actual **management fee** for the year ending 31 March 2022 and the estimated management fee for the two years ending 31 March 2023 and 31 March 2024.

- The actual **building insurance premium** for the year ending 31 March 2022 and the estimated building insurance premium for the two years ending 31 March 2023 and 31 March 2024.

- The estimated **electricity charges** for the year ending 31 March 2023.

- The actual **repair and maintenance charges** for the year ending 31 March 2022.

- The estimated **cleaning charge** for the two years ending 31 March 2023 and 31 March 2024.

- The £55,000 estimated **major works charge**.

(2) The following amounts are not payable by the Applicant:-

- The actual **secretarial fees** for the year ending 31 March 2022 and the estimated secretarial fees for the two years ending 31 March 2023 and 31 March 2024.

- The estimated **reserve fund contributions** for the years ending 31 March 2023 and 31 March 2024.

(3) The estimated **fire alarm costs** for the two years ending 31 March 2023 and 31 March 2024 are reduced to £800 per year and the Applicant's share of these costs is reduced accordingly.

(4) The estimated **electricity charges** for the year ending 31 March 2024 are reduced from £1,600 to £1,000 and the Applicant's share of these costs is reduced accordingly.

(5) We make no cost orders.

## Introduction

1. The Applicant seeks a service charge determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("**the 1985 Act**").

2. The Property is a flat within a terraced house (5 Ainger Road). The Applicant is the long leaseholder of the Property, and her leasehold interest derives from a Deed of Surrender and Lease ("**the Lease**") dated 7 February 2018 and originally made between the Respondent (1) and Jason Warren and Caroline Warren (2). The Respondent is her landlord. The Lease has been drafted by incorporating most of the terms of the previous lease ("**the Original Lease**") by reference.

3. Relevant to this dispute is the fact that the Respondent is the freehold owner of the whole of 3, 5 and 7 Ainger Road, each of which has been converted into 4 flats. The Original Lease defines the whole of 3, 5 and 7 Ainger Road as "the Building" and as a consequence the Applicant is required to pay by way of service charge a proportion of the cost of services that are provided to the 3 terraced houses as a whole (including cleaning of the common parts of all 3).

4. The disputed service charge issues relate to actual service charges for the year ending 31 March 2022 and/or estimated service charges for the two years ending 31 March 2023 and 31 March 2024 in respect of the following items:

    - video entry maintenance
    - management fees
    - building insurance
    - secretarial fees
    - fire alarm costs
    - electricity charges
    - repairs and maintenance
    - cleaning
    - a reserve fund
    - certain major works.

## The parties' respective cases

Video entry maintenance

5. The Applicant challenges the estimated cost for 2022/23 and 2023/24 and says that she cannot understand why these charges are so high. The video entry system either works or does not – it is not complex – and an electrician would only charge £250.

6. The Respondent states that video entryphone maintenance is required under paragraph 7 of the Third Schedule to the Original Lease and that it was reasonable to incur costs maintaining this facility. The amount charged covers all three buildings and the fee is £141.90 per block including VAT, and so the Respondent contends that this is cheaper than the Applicant's own estimate. The Respondent adds that the payments are pursuant to a maintenance contract and include all repairs to the video entryphone that are needed.

7. At the hearing, the Applicant expressed the view that there was no need for a separate maintenance contract for the video entryphone. Mr Miller for the Respondent said that the cost was recoverable under the Lease and that it was a reasonable decision for the Respondent to enter into a maintenance contract so that maintenance could be dealt with at a set cost however many call-outs there were in a year.

Management fees

8. The Applicant challenges the actual cost for 2021/22 and the estimated cost for 2022/23 and 2023/24 and states that alternative agents (Haus) have quoted a price of £250 to £300 per unit and that this appears to be the average price. The Applicant also says that she has never seen any representative from the managing agents, Rennie and Partners, or witnessed any site visits.

9. The Respondent states that Rennie and Partners' fee includes elements not covered by the Haus quote such as preparation of the service charge accounts and an out-of-hours service.

10. The Respondent states that the management fees are reasonable in amount and well within the market range. In its submission, the Applicant's alternative quotes are not comparable.

11. At the hearing, the Applicant suggested that an annual management fee of £300 + VAT would be fairer than £350 + VAT. Mr Miller for the Respondent said that Haus' alternative quotation of £300 + VAT was based on their 'Haus-lite' service and that this was not appropriate for flats which were worth in excess of £1 million.

Building insurance

12. The Applicant challenges the actual cost for 2021/22 and the estimated cost for 2022/23 and 2023/24 and states that insurance premiums appear to be highly inflated. Galleghers Insurance brokers are triple A rated and their alternative quotation was £4,891.59 utilising the information and statistics in the Reinstatement Cost Assessment disclosed via the conveyancing process.

13. The Respondent says that it spoke to its insurance broker about the Applicant's alternative quotation and that it is based on an incorrect declared buildings value, namely £3.45 million rather than £5.177 million. The Respondent has also provided copies of the six insurance quotations received last year by its insurance brokers. Of the quotes obtained, the Respondent went with the lowest. The Respondent adds that there has been a history of subsidence, and so the insurance has always been quite high.

Secretarial fees

14. The Applicant challenges the actual cost for 2021/22 and the estimated cost for 2022/23 and 2023/24 and states that she has only received a one-page invoice and so is at a loss to why the secretarial fees are so high. Alternative agents quote £383 per annum.

15. The Respondent states that the secretarial fees are reasonable in amount and that all other quotes were significantly higher than the costs actually incurred.

16. The Respondent adds that the secretarial fees vary. For the year ending 31 March 2021 they totalled just £146, whereas for the year ending 31 March 2022 they were £1081 due to extra accounting works for the deeds of variation of the leases which were entered into.

17. At the hearing, the Applicant said that these were wasted costs. In response to a question, Mr Miller for the Respondent said that they related to general administrative responsibilities such as attendance at the AGM. The fees included dealing with lease surrenders and valuations.

Fire alarm

18. The Applicant challenges the estimated cost for 2022/23 and 2023/24 and says that this estimated cost for fire alarm checks is highly over-inflated. She also states that Haus (the firm of managing agents) say that they can do the fire alarm checks for £75 a visit.

19. The Respondent asserts that the fire alarm costs are reasonable in amount. It rejects the Applicant's assertion that they constitute "*highly over inflated prices*" and contends that the assessment of fire safety in flats is a sensitive and highly regulated matter. It is therefore reasonable to instruct a trained fire safety officer to do the check, and the Applicant has not provided a comparable cost for that.

20. At the hearing, Mr Miller for the Respondent referred the tribunal to the relevant invoice for the work confirming three separate inspections. He did not accept that the Applicant's alternative quote was genuinely comparable as it assumed that the work would be carried out by a basic managing agent with no relevant expertise.

Electricity

21. The Applicant challenges the estimated electricity cost for 2022/23 and 2023/24 and states that she would require evidence of bills and readings and that the cost appears excessive for three lightbulbs plus some vacuum cleaning for a few minutes every few weeks.

22. The Respondent has provided details of the electricity terms for the electricity for the three blocks. It challenges the Applicant to find a cheaper quote and states that it tries to lock in cheap one-year fixed rates. Its broker has said that the new rates will drop by 35-40% during the current year due to the market falling.

23. At the hearing, Mr Miller for the Respondent said that – in addition to the lighting – the alarms and the intercom use up electricity and that the Respondent believed the charges to be reasonable.

Repairs and maintenance

24. The Applicant challenges the cost of repairs and maintenance for the 2021/22 year. She states that there is very little evidence of regular repairs and maintenance being undertaken. The letterbox flap has been broken for over a year, the casing to the telephone wires has been missing for 2 years, and the Applicant would challenge any expenditure under this heading.

25. The Respondent states that the Applicant has not specified any issue with any of the works actually carried out on the Respondent's behalf and for which it has produced invoices. Instead, it notes that the Applicant has alleged that the letterbox flap, telephone wire casing and door closure have been broken. The Respondent asserts that this is not the case and that none of the photographs evidences such disrepair. The Respondent adds that even if it were true this would not affect the payability of the cost of such repairs and maintenance as were undertaken.

26. The Respondent adds that the repairs were for three separate buildings, namely 3 and 5 and 7 Ainger Road. For 2021/22, £96 was spent on a secure door closer at 7 Ainger Road, £60 was spent on rubbish removal at 5 Ainger Road, £850 was spent on painting the railings for all three entrances in black and painting the masonry for all three entrances in white, £108 was spent on fixing the fire alarm at 5 Ainger Road, £402 was spent on a fire risk assessment for 3, 5 and 7 Ainger Road, and £306 was spent on an asbestos survey for all three buildings. In relation to the rubbish removal, the rubbish consisted of building materials dumped outside Flat 1, 5 Ainger Road which the Respondent believes was the Applicant's own rubbish that she failed to remove herself. The Respondent believes each of these costs to be fair and reasonable.

27. At the hearing, the Applicant said that there is very little communal space and that the charges were ridiculous for the work done. She did not, though, have any specific challenge to any of the invoices provided by the Respondent. She accepted that the £1,720 charge for 2021/22 was spread across all 12 units and that therefore her share was £163.40 (this being 9.5% of the whole). She was unable to say what a fair charge would be. Mr Miller for the Respondent said that there was evidence of repairs having been undertaken and that the Applicant was not being charged for any of the things that she had complained about.

Cleaning

28. The Applicant challenges the actual cost for 2021/22 and the estimated cost for 2022/23 and 2023/24 and states that a cleaner visits every few weeks to vacuum the hall carpet but the carpet is very dirty. The flat is located near Primrose Hill Park and every resident owns a dog. A superficial vacuum is inadequate, and no effort has been made to remove any marks or stains. The Applicant purchased a carpet cleaner from the supermarket and applied it to the carpet as some greasy fluid had escaped a neighbour's rubbish bag. A light rub not only removed the greasy stain which had been there for several months but also revealed a different colour to the carpet, i.e. minus the dirt.

29. The Respondent states that the cleaner cleans every two weeks and that the cleaning is not confined to the entrance hall carpet. Each block has common parts which are identical and comprise a ground floor entrance, staircase to first floor, first floor landing, staircase to second floor, second floor landing and staircase to third floor. The cleaning schedule includes vacuuming three floors for three blocks, dusting, sweeping outside, polishing the light fittings and wiping down the door. The cleaner cleans all three blocks for £163.80 including VAT, which works out at £45.50 + VAT per block per month. The Respondent has also made reference to the AGM minutes from 1 November 2022 which record its acknowledgement that 5 Ainger Road and 7 Ainger Road are

'scuffed' and state that the internals will be repaired as part of the major works.

30. The Respondent also argues that in relation to cleaning the Applicant appears to be relying on her own defaults. She is the only one with a dog in the building and there was a sign in 2022 stuck up on the door to say that the Applicant was sorry about the mess and would arrange to get the carpet cleaned. The Respondent has also adduced evidence showing that works that the Applicant undertook to the Property caused damage to the carpet and common parts for which she is liable. Furthermore, the Applicant's observations are confined to the area immediately outside the Property (i.e. her flat) and not the other parts of the building which are cleaned. In the Respondent's submission there is therefore no basis for reducing the costs sought.

31. At the hearing, the Applicant said that there was very little to clean, the building was not cleaned properly, and she had rarely seen a cleaner. Regarding the note on her door, she said that this was temporary. She suggested that £1,080 would be a reasonable annual charge rather than £1,775. Mr Miller said that the Applicant had accepted that her builders had spilled things on her carpet, and no other works were taking place at the time. He also referred the tribunal to copy photographs in the bundle.

Reserve fund

32. The Applicant challenges the estimated reserve fund contributions for 2022/23 and 2023/24 and states that the Lease does not specify a reserve fund contribution and submits that the sums collected by way of regular service charges should be more than sufficient to cover any major works. She adds that routine maintenance should not be left and then identified as major works.

33. The Respondent concedes that the Lease does not allow for the collection of a reserve fund but states that the interim service charge demands only cover the predicted amount of annual expenditure for all three buildings. It adds that each flat has a share in the freehold company and that at the AGMs of October 2021 and November 2022 those shareholders present voted unanimously to collect monies for a reserve fund. However, as the Respondent acknowledges that the Lease does not cover reserve fund contributions it agrees to return the amount contributed by the Applicant.

34. At the hearing, Mr Miller confirmed that it was conceded by the Respondent that the reserve fund contribution was not payable as a service charge.

The major works

35. Although the charges for major works are not listed on the Applicant's Scott Schedule as being in dispute, in part of her statement of case the Applicant states a wish to *"address the issue of non-receipt of the initial section 20 notice"*. She adds that the non-receipt of a number of letters and important documents has been a serious issue since she purchased the Property. She states that there is no post rack for the post to be collated and so it just remains in a pile on the floor in the hall. She also comments that there appears to be confusion between flat 1, number 5 Ainger Road and 1 Ainger Road and that she has had to redirect a number of delivery drivers. She clarified at the hearing that the challenge was to her share of the £55,000 interim major works charge.

36. In response, the Respondent states that the allegation that the initial section 20 notice was not served on the Applicant is denied and that the initial notice was sent to the Property. The Respondent adds that on about 22 March 2022 Olivia Rennie from Rennie and Partners visited the block and spoke to the Applicant's builder as she had not been able to receive a response from the Applicant by letter or previous visits. Ms Rennie gave the builder her email address and mobile number and asked him to pass the contact details to the Applicant urgently. She then wrote to the Applicant that day to further emphasise the need to get in contact but there was no response from the Applicant. Rennie and Partners therefore made every effort to get in touch with the Applicant. The solicitor who was instructed to recover arrears of service charges from the Applicant received the same contact details for the Applicant, but the Applicant responded only to the solicitor and not to Rennie and Partners. In all the circumstances the Respondent contends that the initial notice in respect of the intended major works was properly served on the Applicant at the Property. The hearing bundle contains photographic evidence to show the delivery of the Applicant's post left lying in the hallway.

37. The Respondent adds that the statutory consultation regulations require a landlord to "*give notice in writing*" of its intention to undertake major works to each tenant and that it has adduced evidence that letters addressed to the Property do get delivered there. It submits that the Applicant does not in fact challenge the proposition that the initial notice was sent, and the fact that her address could be confusing to a postman has nothing to do with the Respondent.

38. At the hearing Mr Miller for the Respondent referred to the decision of the Upper Tribunal in *23 Dollis Avenue (1998) Limited v Vejdani (2016) UKUT 365* and argued that this was authority for the proposition that where – as here – the charge is an estimated charge in advance of the carrying out of the works the consultation requirements do not operate to limit the estimated charge.

## Tribunal's analysis

Video entry maintenance

39. The Respondent has explained why there is a maintenance contract in place, and based on the information before us we accept that entering into a maintenance contract was a reasonable thing to do. Video entry systems do malfunction from time to time, and sometimes the solution to the problem is not obvious or simple. As with all maintenance contracts, if the system works perfectly then one ends up paying for a service that – with the benefit of hindsight – was not needed, but it is a form of insurance so that if there are multiple and/or complex problems then having a maintenance contract in place should save money.

40. Only estimated charges are challenged in relation to video entry maintenance. We have looked at the annual estimated charge for the two years ending 31 March 2023 and 31 March 2024 in the above context and we consider them to be reasonable and therefore payable in full.

Management fees

41. The Applicant claims not to have seen a representative from the managing agents but, even if this is the case, it does not follow that the managing agents are not doing their job.

42. We note that the annual charge is £350 + VAT per flat. The Applicant has provided details of an alternative quotation from Haus of between £250 to £300 + VAT per flat but, as the Respondent points out, the Haus offering is not fully comparable to the Rennie and Partners service. In particular, the quotation seems to be based on Haus's 'lite' service and does not include an out-of-hours service or preparation of service charge accounts.

43. Based on the tribunal's own expert knowledge of the market, it is arguable that £350 + VAT per unit is very slightly on the high side. However, it is established case law that a landlord is not under an obligation to achieve the cheapest possible outcome, and we consider that a charge of £350 + VAT per unit is within the bounds of what is reasonable in all the circumstances. The actual management fee for the year ending 31 March 2022 and the estimated management fee for the two years ending 31 March 2023 and 31 March 2024 are therefore all payable in full.

Building insurance

44. We have considered the level of the premium. At first sight, we agree with the Applicant that it appears to be on the high side. In addition, the apparent increase in rebuilding cost seems larger than one would normally expect. However, the Applicant has failed to provide any genuine comparable evidence and therefore there is no reliable information before us as to what would be a reasonable premium for these buildings. The Applicant's quotation is based on what appears to be incorrect information regarding the sum insured, it does not seem to take into account possible concerns regarding subsidence, and generally it seems unrealistically low for buildings of this nature.

45. We are therefore not in a position to conclude that the insurance premium is clearly outside the market norm. In addition, there is evidence before us of market testing by the Respondent. It has used an insurance broker, and its evidence is that the broker obtained six different quotations and went with the lowest one. Therefore, the actual insurance premium for the year ending 31 March 2022 and the estimated insurance premium for the two years ending 31 March 2023 and 31 March 2024 are all payable in full.

Secretarial fees

46. The Respondent has explained what these fees relate to, namely to general administrative responsibilities such as attendance at the AGM and dealing with lease surrenders and valuations.

47. The Applicant has described these fees as wasted costs. We do not agree with this assessment, but we do consider them to constitute a normal part of a managing agent's responsibilities. As such, we do not consider it reasonable to charge extra for these functions, especially where (as here) we already consider the managing agents' fees to be slightly on the high side. In the circumstances, on the basis of the information before us as to what the fees relate to, we do not accept that the Respondent is entitled to charge an additional amount for these items on top of the management fee.

48. Accordingly, the actual secretarial fees for the year ending 31 March 2022 and the estimated secretarial fees for the two years ending 31 March 2023 and 31 March 2024 are disallowed in their entirety.

Fire alarm

49. The estimated cost is £1,200 for 2022/23 and £1,500 for 2023/24. The Applicant states that Haus (the firm of managing agents) can carry out fire alarm checks for £75 a visit, whilst the Respondent contends that the assessment of fire safety in flats is a sensitive and highly regulated

matter and that it is therefore reasonable to instruct a trained fire safety officer to do the check.

50. We accept that it is reasonable to appoint a trained fire safety officer to carry out these checks but the checks in question are very quick to do and we do not accept that either £1,500 or even £1,200 is a reasonable charge for this work in the absence of any detailed justification by the Respondent.

51. Whilst necessarily we are forced to take a broad-brush approach to the reasonableness of these estimated charges in the absence of better information being available from the parties, we consider that £800 would be a reasonable charge in each year. Accordingly, the estimated fire alarm costs for the two years ending 31 March 2023 and 31 March 2024 are reduced to £800 per year.

Electricity

52. As noted by the Respondent, it is not just light bulbs that consume electricity. The alarms and the intercom also use electricity. We note that the estimated cost for 2022/23 is £850 across all three buildings, and on the basis of the information before us and in the absence of any comparable evidence we are not in a position to conclude that this is an unreasonable estimate.

53. However, the estimate then goes up from £850 in 2022/23 to £1,600 in 2023/24. This is a huge increase. Some of it can be explained by allowing for inflation, which in the case of utilities there is reason to think may be higher than general price inflation because of relevant current global events. But the Respondent has not offered any justification for increasing the estimated charge by quite so much. Making a generous allowance for inflation, we consider that a reasonable estimate for 2023/24 would be £1,000 (reduced from £1,600).

54. Accordingly, the estimated electricity charges for the year ending 31 March 2023 are payable in full and the estimated electricity charges for the year ending 31 March 2024 are reduced from £1,600 to £1,000.

Repairs and maintenance

55. The Applicant has made complaints about various matters not having been attended to. However, we are not persuaded that she has made a compelling case on these points in that the Respondent has provided a credible response.

56. More relevantly, even if it is the case that certain items have not been dealt with there is no evidence that the Applicant has been charged for

those items. The invoices and breakdown of costs for those items for which the Applicant has been charged all seem reasonable in the absence of any specific challenge to those invoices and costs, and therefore the actual charges for the year ending 31 March 2022 are payable in full.

Cleaning

57. The Applicant's share of the cleaning charges works out at about £165 to £170 per year. There is conflicting evidence as to how well cleaned the blocks are, and on balance we prefer the Respondent's evidence on this issue. It has provided some evidence of the blocks having been kept in reasonable condition and – whilst neither party's evidence is particularly detailed – we also consider that there is reason to conclude that some of the dirt in the vicinity of the Property was caused by the Applicant's builder and/or by her dog and that some accumulated rubbish may have been generated by the Applicant's builder.

58. In our view, the Applicant understates the amount of cleaning required over the three blocks, and we consider the cleaning charges to be reasonable in amount in the absence of any comparable evidence from the Applicant. Accordingly, the actual cleaning charge for the year ending 31 March 2022 and the estimated cleaning charge for the two years ending 31 March 2023 and 31 March 2024 are all payable in full.

Reserve fund

59. The Respondent has conceded that this is not payable under the terms of the Lease and we agree with this analysis. Accordingly, the estimated reserve fund contributions for the years ending 31 March 2023 and 31 March 2024 are disallowed in their entirety.

The major works

60. This was a weak challenge from the beginning on the part of the Applicant as it does not feature in the Scott Schedule and as her statement of case contains only a vague reference to non-receipt of an initial section 20 notice in relation to unspecified major works.

61. In any event, the Respondent has provided some evidence – albeit not perfect evidence – that it sent the initial notice, and therefore on balance we do not accept that the Applicant has shown that the Respondent failed to comply with the consultation requirements in respect of the major works to which she is referring.

62. Furthermore, the Respondent is assisted by the decision of the Upper Tribunal in the case of *23 Dollis Avenue (1998) Limited v Vejdani (2016) UKUT 365*. In giving his reasons for the decision of the Upper

Tribunal in that case, His Honour Judge John Behrens stated 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. This is clear from the wording of [sections] 20(2) and 20(3)… In our view therefore there is no statutory limit to the amount that can be recovered by way of an on account demand under the lease other than under [section] 19(2). It is, in our view, not necessary that there should be a valid consultation process before a sum in excess of £250 can be recovered by way of a service charge in respect of intended works"*.

63. As the evidence before us is that this was an on-account charge for the estimated cost of works to be carried out in the future, it follows that under *23 Dollis Avenue* any failure to consult in these circumstances does not by itself serve to reduce the amount payable.

64. Therefore the Applicant's share of the £55,000 estimated charges for major works is payable in full in the absence of any other challenge.

## Cost applications

65. 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**"). The Respondent has applied for a cost order under paragraph 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**Rule 13(1)(b)**").

### Section 20C and Paragraph 5A

66. 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 …".*

67. 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".*

68. 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.

69. The Applicant has been successful on certain points, but the Respondent has been significantly more successful. In many respects the Applicant's application was quite a weak one, and there is some evidence to support the proposition that she lodged the application without first trying to engage with the Respondent in a more measured way, for example by attending annual general meetings of the Respondent company to put across her views before resorting to litigation. In the circumstances we do not consider it appropriate to make either a Section 20C order or a Paragraph 5A order.

Rule 13(1)(b)

70. The relevant parts of Rule 13(1)(b) of the Tribunal Rules ("**Rule 13(1)(b)**") read as follows: *"The Tribunal may make an order in respect of costs … if a person has acted unreasonably in bringing, defending or conducting proceedings in … a leasehold case …".*

71. The leading case on this issue is the decision of the Upper Tribunal in *Willow Court Management Ltd v Mrs Ratna Alexander [2016] UKUT 290 (LC).* In *Willow Court*, the Upper Tribunal prescribed a sequential three-stage approach which in essence is as follows: (a) applying an objective standard, has the person acted unreasonably? (b) if so, should an order for costs be made? and (c) if so, what should the terms of the order be?

72. The first part of the test, namely whether the person acted unreasonably, is a gateway to the second and third parts. As to what is meant by acting "unreasonably", the Upper Tribunal in *Willow Court* followed the approach set out in *Ridehalgh v Horsfield [1994] EWCA Civ 40, [1994] Ch 205*, albeit adding some commentary of its own, and stated (in paragraph 24) that *"unreasonable conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test 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" [in Ridehalgh]: is there a reasonable explanation for the conduct complained of?".*

73. The Upper Tribunal in *Willow Court* (in paragraph 23) also expressly rejected the submission that *"unreasonableness should not be interpreted as encompassing only behaviour which is also capable of being described as vexatious, abusive or frivolous".* Therefore, in

order for conduct or behaviour to qualify as "unreasonable" under the *Willow Court* test it needs to be vexatious and/or abusive and/or frivolous and/or designed to harass the other side and/or needs to be such that there is no reasonable explanation for it.

74. We do not accept that the Applicant's conduct in this case was sufficiently unreasonable to justify a cost award under *Willow Court*. There have been some case management issues for which she arguably bears some responsibility, but equally she has had some difficulties of her own for which she has provided explanations and some supporting evidence. Whilst her application was weak in parts and whilst she seemingly did not try to resolve issues by for example attending annual general meetings, she has been successful on a couple of issues and the bringing and conducting of proceedings by her was in our view neither vexatious, abusive, frivolous nor designed to harass the Respondent, and neither was there no reasonable explanation for her conduct.

75. Accordingly, the Respondent's Rule 13(1)(b) cost application is refused.

**Name:** Judge P Korn **Date:** 5 December 2023

**RIGHTS OF APPEAL**

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

## APPENDIX

## Appendix of relevant legislation

### Landlord and Tenant Act 1985 (as amended)

### Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

### Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

### Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,

(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment

(6) An agreement by the tenant of a dwelling … is void in so far as it purports to provide for a determination – (a) in a particular manner, or (b) on particular evidence.