FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BF/LSC/2023/0107**
Property	**:**	**Albion Court, Albion Road, Sutton, Surrey SM2 5TB**
Applicants	**:**	**Mark Atherton and the other leaseholders listed in Appendix 1**
Representative	**:**	**Amanda Gourlay of Counsel**
Respondent	**:**	**MB Freeholds Ltd**
Representatives	**:**	**Marcello Amodeo and George Davies of Residential Management Group**
Type of Application	**:**	**For the determination of the liability to pay a service charge**
Tribunal Members	**:**	**Judge P Korn** **Judge M Jones** **Mrs A Flynn MRICS**
Date of hearing	**:**	**4 September 2023**
Date of Decision	**:**	**12 October 2023**

DECISION

Description of hearing

This was a face-to-face hearing.

Decisions of the tribunal

(1) The estimated six-monthly service charge for the period 25 March to 28 September 2022 in the sum of £1,738.96 per leaseholder is not payable.

(2) The tribunal has no jurisdiction to make a determination as to (a) whether the £364.77 credit relating to 'Insurance Costs YE 2020' should be higher, (b) whether the £659.28 credit relating to the 'Reserve Budget 25/03/21 – 24/03/22' should be higher or (c) whether the Respondent's reversal or purported reversal of the payment of £1,000 per leaseholder originally paid under the 2020 Settlement Agreement referred to below to the leaseholders named in that Agreement was lawful.

(3) We hereby make an order in favour of the Applicants under section 20C of the Landlord and Tenant Act 1985 that none of the costs incurred by the Respondent in connection with these proceedings can be added to the service charge. We also make an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 that none of the costs incurred by the Respondent in connection with these proceedings can be charged direct to the Applicants as an administration charge under their respective leases.

Introduction

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

2. The Property is a purpose-built development comprising 27 flats. The Applicants are between them the long leaseholders of the majority of the individual flats within the Property, and the Respondent is their landlord. It is common ground between the parties that the Applicants' leases are in an identical form for all purposes relevant to this application.

3. The Applicants' challenge, as clarified at the start of the hearing, is to the following items:

    - The estimated six-monthly service charge for the period 25 March to 28 September 2022 in the sum of £1,738.96 per leaseholder.

    - A challenge in relation to an item characterised as FTT Credit – Insurance Costs YE 2020 in the sum of -£364.77 (a negative amount).

- A challenge in relation to an item characterised as FTT Credit – Reserve Budget 25/03/21 – 24/03/22 in the sum of -£659.28 (a negative amount).

- The reversal or purported reversal of sums paid under a 2020 Settlement Agreement in the amount of £1,000 per leaseholder.

Parties' respective submissions

Estimated six-monthly service charge

4. In written submissions the Applicants state that the estimated charges for the period 25 March to 28 September 2022 were demanded on 4 November 2022 and that by then it was too late to make such a demand. The Applicants submit that under their leases the estimate must relate to the six months succeeding the date of the estimate. They further state that the Respondent has not acted in accordance with that requirement, despite having acknowledged it in a letter accompanying the accounts and demand dated 4 November 2022 and in a response dated 14 December 2022 to the Applicants' pre-action letter.

5. The Applicants add that the estimate sent to them on 4 November 2022 was undated and in relation to this point they rely on paragraph 33 of Newey LJ's judgment in *Kensquare Ltd v Boakye [2021] EWCA Civ 1725*. In the alternative, they state that the balance of the Maintenance Fund is not accounted for on the demand. Further in the alternative they state that the budget for the period 25 March to 28 September 2022 includes a charge of £33,911 described as "balance of the maintenance fund" and that if that charge is intended to be a contribution to a reserve fund, the lease does not allow for the accumulation of such a fund. If the charge is not a contribution to a reserve fund, the Applicants do not know the nature of the works or services for which the estimated charge was made and state that no works justifying that sum have been carried out at Albion Court in 2022.

6. In response, the Respondent denies that the demand was issued too late and quotes from clause 3(vi) of the sample lease in the hearing bundle as follows: *"Within one month after receipt of written notification from the Lessor of the sum due…to pay to the Lessor a sum equal to 1/27th part of…(b) the amount by which the Lessor shall estimate that the cost of repairs and maintenance and other payments and expenses incurred or to be incurred…during the succeeding six months from the date of the estimate"*. It states that there are two parts to this clause that need to be treated in isolation. The first part is the part up to the letter (b) which contains the mechanism for payment upon receipt of written notification of the sums due. The second part, from the letter (b) onwards, relates solely to the sums due. Based on

this, the Respondent argues that the leaseholder is required to pay the costs within one month of receipt of written notification of those costs.

7. The Respondent also submits that there is an evident difference between the Albion Court leases and the lease under consideration in *Kensquare Ltd v Boakye*, as Ms Boakye's lease stated that notice was *"to be served on the Lessee not less than one month prior to the commencement of that financial year"*, which provides an explicit timing for a demand to be issued. In contrast, the Albion Court leases do not do so and require payment of the costs *"after receipt of written notification from the Lessor of the sum due"*.

8. Regarding the Applicants' argument on the "balance of the maintenance fund", the Respondent states that this is not associated with the reserve fund and is a separate item. The budget for 2021/22 was reversed, and effectively the deficit for the year ending March 2022 represented the full actual cost. They add that the insurance can be excluded because that charge was raised separately. The balance was calculated by taking the total expenditure (£53,182) and removing both the reserve contribution (£17,801) and the buildings insurance (£1,470). No quarterly contributions were received as at 25 March 2022, and so these were not accounted for. The Respondent's stated basis for applying this charge is that clause 3(vi)(b) of the lease states that the landlord shall estimate costs in excess of the balance of the Maintenance Fund. Due to the budget being reversed there was no income for the period, and so the balance was in a negative state and "required being a part of the estimate".

9. Separate points were made by each party as to whether the estimated electricity costs in particular were too high.

<u>FTT Credit – Insurance Costs YE 2020</u>

10. The Applicants state in written submissions that the credit of £364.77 per leaseholder allowed for the insurance year 2019-20 is too low. The 2019/20 service charge accounts record the insurance cost as £11,418.00, equating to £422.89 per leaseholder. That figure was disallowed by the First-tier Tribunal (FTT) in the 2021 proceedings for the reasons set out at paragraph 22 of the FTT's decision (Ref: LON/00BF/LSC/2021/0320). The Applicants submit that the credit should be £422.89 per Applicant and comment that the Respondent is therefore 'required' to credit each Applicant's service charge account with a further £58.12.

11. In response, the Respondent merely notes the Applicants' comments in written submissions.

FTT Credit – Reserve Budget 25/03/21 – 24/03/22

12. This point did not form part of the Applicants' original case. The Applicants' submission at the hearing was that the credit allowed to leaseholders in relation to the reserve budget is too low. Ms Gourlay said that the Applicants were looking for a further credit of £328.25.

13. At the hearing Mr Davies accepted (a) that the aggregate reserve budget balance of £8,863 brought forward from 25 March 2021 should not have been charged to leaseholders and (b) that it had not yet been credited back to them.

2020 Settlement Agreement

14. The Applicants note that an earlier dispute in 2020 between the parties to the current dispute and also involving John Sayers (Flat 2) and Tomas Craven (Flat 8) but not involving Esther Merrill (Flat 24) was settled by agreement and that a formal Settlement Agreement was signed pursuant to which each leaseholder was subsequently paid the sum of £1,000 by the Respondent. They also note that the invoice dated 4 November 2022 refers to a charge of £1,000 levied on each of the leaseholders as a "reversal of settlement". The Applicants take this to mean that the Respondent unilaterally decided to reverse the settlement payment, but they submit that the Respondent was not entitled to do this as there had been no breach of the Settlement Agreement on the part of the relevant leaseholders.

15. The Respondent states in written submissions that it is not within the tribunal's jurisdiction to make a determination in respect of the reversal of the Settlement Agreement. At the hearing the Respondent's representatives said that the Settlement Agreement had been reversed because in the Respondent's view the Applicants had breached the terms of the Settlement Agreement by bringing an application in the FTT. Ms Gourlay for the Applicants disagreed.

Tribunal's analysis

Estimated six-monthly service charge

16. One of the Applicants' arguments relates to a point that came up in the case of *Kensquare Ltd v Boakye*, but the Applicants have not developed this point in sufficient detail for it to be a persuasive basis for disallowing this charge.

17. In relation to what seems to be the Applicants' primary argument, namely the construction of the wording of the lease, the Respondent in response has quoted from clause 3(vi) of the sample lease in the hearing bundle although it has not quoted enough of that clause for the

part quoted to make grammatical sense. The relevant part reads as follows:

"Within one month after receipt of written notification from the Lessor of the sum due from the Lessee …to pay to the Lessor a sum equal to one twenty-seventh part of…(b) the amount by which the Lessor shall estimate that the cost of repairs and maintenance and other payments and expenses incurred or to be incurred pursuant to the Lessor's covenant contained in Clause 4 sub-clause (c) (i) to (vi) hereof during the succeeding six months from the date of the estimate shall exceed the balance at the date of the estimate of the Maintenance Fund …".

18. The written notification triggering an obligation to pay must therefore be a notification of the landlord's estimate of the cost of repairs/maintenance etc during the succeeding six months from the date of the estimate. So, for example, a notification given at the beginning of October 2023 would need to relate to the costs to be incurred from that date up to the end of March 2024. Whilst it is slightly curious that the clause uses the words "incurred or to be incurred", the reference to "incurred" could for example relate to costs whose amount is already known but which nevertheless do relate to the succeeding six-month period. In any event, the key words in our view are *"during the succeeding six months from the date of the estimate"*.

19. In this case it is common ground that the written notification was dated 4 November 2022 but purported to relate to the period 25 March to 28 September 2022. A notification of costs incurred in an earlier period is not an estimate. And whilst it might not in practice be a statement of actual costs either, if no accounting process has yet taken place, the key problem for the Respondent is the wording of the lease covenant itself. Under clause 3(vi) the notification dated 4 November 2022 needed to relate to the succeeding six-month period, i.e. to the period from the date of the notice up until early May 2023, and it did not do so. This is not simply an inconvenient technical point; leaseholders are entitled to expect that service charge demands will be compliant with their leases for budgeting and for other purposes, and it is incumbent on landlords to comply with the contractual provisions of the lease by demanding service charges at the correct time in respect of the correct period where the lease requires them to do so.

20. Therefore, the service charge demand is defective and the charges to which it relates are not payable as estimated service charges pursuant to that demand.

<u>FTT Credit – Insurance Costs YE 2020</u>

21. The Respondent has not argued, or at least has not argued strongly, that the Applicants are wrong in their assessment that they are due a

further credit. It may therefore be that there is no dispute between the parties on this issue.

22. However, if and to the extent that the point remains in dispute the Applicants are asking the tribunal for a determination that instead of a credit of £364.77 each they are entitled to a credit of £422.89 each. This, though, is not something that the tribunal has jurisdiction to determine.

23. The tribunal's jurisdiction to make a service charge determination derives from section 27A of the 1985 Act. Sub-section (1) of section 27A begins: *"An application may be made to the appropriate tribunal for a determination whether a service charge is payable …"*. In this case, the tribunal is not being asked to determine whether a service charge is payable, because the sum in dispute is already below zero in the sense that it does not represent an amount being demanded by the landlord but rather an amount being refunded by the landlord. It is common ground between the parties that nothing is payable by the Applicants under this head; the only dispute between them – to the extent that it even remains in dispute – is whether the Respondent as landlord should be refunding to the Applicants a greater sum than it has refunded to date. This is not a dispute over which the tribunal has jurisdiction.

24. In conclusion, therefore, it is outside the jurisdiction of the tribunal to make a determination on this point.

<u>FTT Credit – Reserve Budget 25/03/21 – 24/03/22</u>

25. The Respondent appears to have conceded this point and therefore it appears no longer to be in dispute. However, if and to the extent that the point remains in dispute the position is the same as for the insurance costs point above. That is to say that, again, the tribunal is not here being asked to determine whether a service charge is payable, because the sum in dispute is already below zero.

26. Therefore, for the same reasons as set out in relation to the insurance costs, it is outside the jurisdiction of the tribunal to make a determination on this point.

<u>2020 Settlement Agreement</u>

27. We have read the Settlement Agreement and note that the Respondent agreed to pay to the leaseholders listed in the Settlement Agreement £1,000 each in full and final settlement of a dispute which had arisen in relation to the costs applied to the service charge for the years 2017/18, 2018/19 and 2019/20.

28. It is clear, in our view, that the £1,000 sum in question is not itself a service charge within the meaning of section 18(1) of the 1985 Act. It is a sum that was agreed to be paid in settlement of a dispute, and although the dispute arose in connection with service charges the sum does not itself represent payment *"for services, repairs, maintenance, improvements or insurance or the landlord's costs of management … the whole or part of which varies or may vary according to the relevant costs"*. Indeed, the sum was paid by the Respondent landlord to the named leaseholders and therefore neither it nor its 'reversal' can itself represent payment for services.

29. In conclusion, therefore, this tribunal has no jurisdiction to make a determination as to whether the Respondent was entitled to reverse – or to purport to reverse – the Settlement Agreement by reclaiming or seeking to reclaim the £1,000 paid to each named leaseholder under that Settlement Agreement.

Cost applications

30. The Applicants 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**").

31. 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 …".

32. 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".

33. 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.

34. The Applicants have been successful on the one issue in respect of which we have jurisdiction. At the end of the hearing the Respondent's

representatives said that the Respondent did not intend to charge the Applicants, whether directly or through the service charge, the costs (if any) incurred by the Respondent in connection with these proceedings. In the circumstances we consider it appropriate to make both a Section 20C order and a Paragraph 5A order to formalise the agreed position.

35. Accordingly, we hereby make a Section 20C order in favour of the Applicants that none of the costs incurred by the Respondent in connection with these proceedings can be added to the service charge and a Paragraph 5A order that none of the costs incurred by the Respondent in connection with these proceedings can be charged direct to the Applicants as an administration charge under their respective leases.

Name: Judge P Korn **Date:** 12 October 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 1

List of Applicants

Stela Alekova	Leaseholder of Flat 1
Phena O'Connell	Former leaseholder of Flat 3
Jennifer Woodhead	Leaseholder of Flat 4
Sio Lun Ho & Susana Chao	Leaseholder of Flat 5
Wesley Paulo Batista & Cintia Denadai	Leaseholder of Flat 6
Nathan John Peter Attwell & Hannah Leanne Attwell	Leaseholder of Flat 9
Mark Brewer & Caroline Brewer	Leaseholder of Flat 10
Faye King	Leaseholder of Flat 14
Margarita Nesbitt	Former leaseholder of Flat 16
Michael Grafton	Leaseholder of Flat 18
Xueying Mao	Leaseholder of Flat 20
Francis Mark Atherton	Leaseholder of Flat 21
Noel Allison	Former leaseholder of Flat 24
Esther Merrill	Leaseholder of Flat 24
David Evans	Leaseholder of Flat 25
Duane Stubbington	Leaseholder of Flat 26
Carlos & Ciska Salta	Leaseholder of Flat 27

APPENDIX 2

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.