



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

Case Reference:	CHI/21UD/LSC/2023/0060
Property:	39-40 Cornwallis Gardens, Hastings, TN34 1LX
Applicant:	39-40 Cornwallis Gardens Residents Association Ltd
Representative:	Mr G Okines
Respondent:	Ms J Kenna
Representative:	-
Type of Application:	Section 27A and 20C of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002 Liability to pay service charges Landlord's application for the determination of reasonableness of service charges.
Tribunal Members:	Regional Surveyor WH Gater FRICS Tribunal Member Mr D Jagger MRICS Tribunal Member Mr L Packer
Date and venue of Hearing:	11 December 2023 Havant Justice Centre and by Video
Date of Decision:	23 January 2024

DECISION

Background

1. On 9 May 2023 the Applicant submitted an application for a determination of the Respondent's liability to pay and the reasonableness of service charges for the years 2017 to 2022. The application sets out the total amount said to be due of £10,897.80.
2. Directions were issued on 17 August 2023 in usual terms, including providing for a response from the Respondent. The application was directed to be determined at a hearing.
3. On 13 September 2023, the Applicant's representative wrote to the Tribunal stating that the Respondent had failed to comply with the Directions. Therefore, by an order dated 20 September 2023, the Respondent was barred from taking further part in the proceedings and the Directions were varied such that the determination be made on the papers.
4. On 10 October 2023 the Tribunal rejected an application seeking to delay the hearing date to allow time for the Applicant to make a second application for determination of liability to pay administration charges and for that to be determined at the same time as this application.
5. On 1 November the Tribunal issued directions for a hearing and the submission of further evidence in respect of the service charge percentages sought by the Applicant. The Respondent was given an opportunity to respond to this further evidence, notwithstanding the debarring Notice issued previously.

The Property

6. The property comprises a Victorian house converted into 10 flats. The Respondent's flat is located at basement level.

The Lease

7. The Lease requires at Clause (5) for the Lessor to provide and use its best endeavours to maintain the services of contractors for the performance of certain duties in the building.
8. The Fifth Schedule, Part I and Clause 1(a)(b) require the Lessee to reimburse the Lessor a percentage of the cost of carrying out those duties.

The Law see Appendix below

9. The Tribunal has power under section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The Tribunal can decide by whom, to whom, how much and when a service charge is payable.
10. By Section 19 of the Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is

claimed are of a reasonable standard. Section 19 (2) concerns where a service charge is payable before the relevant costs are incurred, no greater amount than this is payable.

Lack of Engagement.

11. The Respondent has taken no effective part in the proceedings, and this is regrettable. The Tribunal must therefore make its decision on the evidence available see **Schilling v Canary Riverside Development PTE Limited LRX/26/2005 at paragraph 15.**
12. “Once a tenant establishes a prima facie case by identifying the item of expenditure complained of and the general nature (but not the evidence) of the case it will be for the landlord to establish the reasonableness of the charge. *There is no presumption for or against the reasonableness of the standard or of the costs as regards service charges and the decision will be made on all the evidence made available*”.
13. **London Borough of Havering v Macdonald [2012] UKUT 154 (LC)** Walden-Smith J at paragraph 28. “The lessee is obliged to identify the costs which s/he disputes and to give reasons for his/her challenge. The landlord is expected to produce evidence which justifies the costs and answers the lessee’s challenge. If the lessee succeeds in persuading the Tribunal that the costs should be reduced, *the Tribunal will expect him/her to produce evidence of the amount by which the landlord’s costs should be reduced.* It is a key element of the section 27A determination process (The Gateway (Leeds) Management Ltd v (1) Mrs Bahareh Naghash (2) Mr Iman Shamsizadeh [2015] UKUT 0333 (LC)).”
14. The Tribunal must therefore do the best that it can as an expert Tribunal and takes into consideration the only available evidence, that of the Applicant. The Upper Tribunal reiterated in **Knapper v Francis [2017] UKUT 3 (LC)** that the Tribunal can make its own assessment of the reasonable cost.

The Hearing.

15. The hearing took place from Havant Justice Centre on 11 December 2023. The Applicant’s representative, George Okines joined by video. The Respondent did not take part but submitted an email to the Tribunal referred to below, on the morning of the hearing. The hearing was recorded.

Preliminary issues.

16. The Tribunal invited submissions from the Applicant in respect of the late email submitted by the Respondent. Mr. Okines objected to the admission of that email in evidence on the grounds that the Applicant had been given time to comply with directions and had failed to do so.
17. The Tribunal adjourned and on return determined that it would not admit the email on the grounds that it was issued too late, after ample opportunity had been given to the Respondent to contribute as directed. The Tribunal notes that the Respondent had been barred from proceedings earlier on similar grounds and had subsequently been given a chance to make proper submissions as directed.

18. Accordingly, the Tribunal is now deciding the case on the evidence provided by the Applicant.

The issues

19. The applicant seeks a determination:-
a) as to the correct percentage to be paid by the Respondent for service charges,
b) that the charges levied for the years 2017-2022 inclusive are reasonable and payable within the meaning of the Act.

The correct percentage.

20. The Applicant submits that whilst the lease states in Schedule 5 that the correct proportion of services charges for this flat is 7% , with other flats paying differential amounts totaling 100%, all 10 lessees, including the Respondent agreed some 17 years ago that they would pay equal amounts of 10%. It was acknowledged at the time that the leases needed to be varied but they had never got around to doing so.
21. The Applicant's contention is that the informal variation should now be legally binding having been agreed by all the leaseholders and gone undisputed for 17 years. There is no formal documentation to support the informal agreement. It is historical and has not been contended at any time. The Applicants are however willing to concede, should the Tribunal so determine, that the charge payable shall be 7% in accordance with the lease.
22. In further submissions the Applicant recounted the history of agreement by the leaseholders to informally alter the service charge percentages. It was noted that there may be problems in future but the matter was intended to be formalized later.
23. Two County Court proceedings were undertaken against the Respondent. Documents for the first are missing but the judgement of 2 July 2012 in the Northampton Court was provided and the Applicant contends that this shows that the Respondent made no challenge to the service charges.

Consideration

24. The Lease deals with the proportion of service charges payable in two places.
25. The Fifth Schedule, Part I sets out that "The maintenance rent payable by the Lessee to the Lessor shall be the yearly sum equal to Seven per cent of the costs of expenses outgoings and matters incurred by the lessor in respect of the matters specified in Part II hereof and shall be certified by a Chartered Accountant to be appointed by the Lessor....."
- a. Clause 1(a)(b) provides "also paying by way of further or additional rent from time to time a sum or sums of money equal to 7% of the amount which the lessor shall expend in affecting or maintaining the insurance of the building against loss of damage by fire and another usual risks as a landlord sees fit as hereinafter mentioned such last rent to be paid without deduction upon demand after the said expenditure thereof and....."

26. The Tribunal noted that the other leases had service charges ranging from 8 to 12%. The factual matrix here is that when the leases were granted the parties calculated a sum for each flat in proportions which were agreed and which totaled 100% of the Lessors costs.
27. The lease is the primary source of evidence as to the intention of the parties to that lease and the means by which service charges are calculated under the Act. When considering the wording of the lease, the Tribunal adopts the guidance given to it by the Supreme Court:
Arnold v Britton and others [2015] UKSC 36 Lord Neuberger:

“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”, to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, 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”.
28. The contention that there has been an informal agreement to vary the lease, albeit one that endured for 17 years, is subjective evidence that is insufficient to rebut the primary document, the lease.
29. Had the parties wanted to evidence their unanimous agreement this could have been set down in a variation of the lease. This route was not chosen.
30. The reference to the County Court cases and the submission of documents such as a handwritten note that 10% is to be charged carries no evidential weight. The fact that the Respondent did not challenge service charges does not evince proof that the Court determined the percentage.
31. Accordingly, the Tribunal determines that the correct percentage payable under the lease clauses and paragraphs referred to above is 7%.
32. In doing so the Tribunal is mindful that the amount of service charge costs recoverable below will be accordingly restricted. The Applicants are aware that it is open to the parties to vary the terms of the lease by agreement, or, if not agreed, they are at liberty to apply to the Tribunal for a variation of the lease which may include an application to apply the amended charges retrospectively.

Service Charges

33. The Tribunal has considered each of the service charges for each of the years referred to in the application. The determination is set out in the table below showing the total sum for each payable item to which the appropriate percentage must be applied for each year:-

Accountants' fees

34. The Applicant states that such fees are payable by virtue of Schedule 5 Part II(d) of the lease. This provides for payment of "The fees of the Chartered Accountant in respect of the matters mentioned in Part I of this Schedule. Part 1 provides for certification of the costs, expenses and outgoings.
35. Decision. The Tribunal finds that such fees are payable under the lease. In the absence of evidence to the contrary from the Respondent and using its own judgement, it finds the sums charged are reasonable.

Communal Electricity

36. The Applicant states that such fees are payable by virtue of Clause 5(2) of the lease. This requires the lessor to "keep clean and reasonably lighted and in good repair and condition the passages landing staircases and other parts of the said building so enjoyed or used by the lessee in common as aforesaid."
37. Decision. The Tribunal finds the costs of lighting the common parts referred to in Clause 5 (2) include the cost of communal electricity. Accordingly such fees are payable under the lease. In the absence of evidence to the contrary from the Respondent and using its own judgement, it finds the sums charged are reasonable.

Management fees

38. The Applicant contends that these costs are covered in Schedule 5 Part II(e) which refers to "the fees of any agents or surveyor instructed by the lessor to manage the property".
39. Decision. The Tribunal finds that Management fees are payable as claimed by virtue of Schedule 5 of the lease. In the absence of evidence to the contrary from the Respondent and using its own judgement, it finds the sums charged are reasonable.

Insurances

40. The Applicant contends that these costs are covered in Schedule 5 Part II(a) which refers to "the costs and expenses incurred by the lessee or in carrying out its obligations under the covenants contained in clause 5 (1)(2) and (5) hereinbefore contained including any architect and surveyors fees.
41. Decision. The Tribunal finds that insurances are payable as claimed and in the absence of contrary evidence from the Respondent finds that the charges levied are reasonable.

Repairs and Maintenance

42. The Applicant contends that these costs are covered in Schedule 5 Part II(a).
43. In the year ending September 2018 the actual amount claimed is not £18670 but £3270.
44. Decision. The Tribunal notes that these items include some managing agent call out charges but that such charges are payable under the lease as management fees. The Tribunal finds that the costs of repairs and maintenance are payable as claimed and in the absence of contrary evidence from the Respondent finds that the charges levied are reasonable.

Sundry.

45. The applicant has confirmed that these charges are not being levied and therefore no determination is required.

Bank Charges

46. The Applicant submits that these charges are a natural consequence of the managing agents requirement to maintain suitable accounts and that they are therefore recoverable under the terms of SCh5 Part II (e) of the lease.
47. Decision. The Tribunal accepts the evidence of the Applicant and in the absence of contrary evidence from the Respondent finds the charges levied to be reasonable.

Legal and professional

48. The applicant has confirmed that these charges are not being levied and therefore no determination is required.

Reserve fund provision

49. The Applicant submits that the Lease is wholly deficient, in that it only allows advance payment of £50 per annum and there is no reserve fund clause. Therefore, the Applicant is restricted to recovery of only those sums which the Lessor has actually expended.
50. An amount is collected each year for a reserve, notwithstanding that this is not mentioned in the lease. Up to now all the lessees including the Respondent have always paid an amount of the annual budget prepared at the start of each year in two payments 6 months in advance.
51. The Applicant submits that whilst this is not provided for in the lease, it is reasonable to defray costs of major works. Nine lessees have voluntarily paid into the fund and the Respondent contributed following court recovery proceedings. At present the lease only provides for a £50 advance payment.

52. Decision. Whilst the parties may operate a voluntary fund, the lease does not provide for this. Not all leases provide for a reserve fund.
53. In the absence of an express provision the Tribunal must be guided by the lease and finds that reserve fund payments are not payable.

Fire Alarm maintenance

54. The Applicant states that whilst this is not specifically mentioned in the lease, it does form part of the communal maintenance provisions of the lease at Sch 5 part II (b) which refers to “the costs of and incidental to compliance by the lessor with any notice regulations or orders of any competent local or other authority in respect to the building or any part or parts thereof”. Lessees who are also freeholders have a duty to maintain a safe building.
55. There is a significant increase in the number of tests undertaken since 2018 and costs have therefore increased.
56. Decision. The fact that some lessees are freeholders is not relevant as this application involves the liability of a leaseholder to pay charges. The two titles should not be conflated for this jurisdiction. The Tribunal accepts that these charges are sufficiently covered in Schedule 5 and determines that they are payable. In the absence of contrary evidence from the Respondent the Tribunal finds that the charges levied are reasonable.

HMO license fees

57. The Applicant points out that these fees were imposed by the Local Authority from 2018. The fee is payable every two years. They used powers to declare the property an HMO on the grounds that it was converted before 2001. The Applicants cite Sch 5 part II (b) of the lease as the basis on which this sum is recoverable.
58. Decision. The Tribunal accepts that these charges are sufficiently covered in Schedule 5 and determines that they are payable. In the absence of contrary evidence from the Respondent the Tribunal finds that the charges levied are reasonable being the actual charges by the Council.

Emergency lighting testing

59. This work is required monthly and is now undertaken by the managing agents. Further tests are carried out twice yearly by external contractors.
60. Decision. The Tribunal accepts that these charges are sufficiently covered in Schedule 5 and determines that they are payable. In the absence of contrary evidence from the Respondent the Tribunal finds that the charges levied are reasonable.

Reserve Fund expenditure

61. The Applicant pointed out that the payments so described referred to various items of expenditure paid for out of the reserve fund operated informally, notwithstanding the absence of powers under the lease, as follows:
62. 2018: £2580. These are in fact Section 20 professional fees of the managing agents in drawing up tenders and specifications for approximately £26000 of work on the exterior. It was made up of £450 +vat for the Consultation exercise and £1700+vnt for the tender and specification exercise.
63. 2020: £5102. Again, these related to the following Section 20 professional fees in respect of works to the exterior including the roof and drains.
64. 2022: £5512. The S20 fees relate to Major works re:1) redecoration and associated repairs including bay roof repairs and 2) Dry Rot works to basement flats 1a and 2a.
65. The sum is made up of £4140 for 1) and £962 for 2).
66. The Applicant explained that dry rot works were required to the basement flats as a result of a leak in a flat roof for which the Lessor was responsible, causing water to run inside wall linings which led to the outbreak.

Determination.

67. The table below shows the total sum to which the appropriate percentage must be applied for each year:-

Expenditure	£	2017	2018	2019	2020	2021	2022
Accountant's fees		360	360	360	360	360	360
Communal electricity		245	253	207	116	184	171
Management fees		2496	2616	2496	2616	2796	3216
Insurances		2035	2118	2299	2588	2885	2955
Repairs and Maintenance		615	3270	1005	2432	1398	1154
Bank charges		68	19	21	10	22	23
Fire alarm Maintenance		694	1304	890	1290	722	1006
Emergency Lighting Testing	-	-	-	-	220	230	348
Reserve fund expenditure			2580		5102		5512

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

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 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would

subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.”

Section 21B - Notice to accompany demands for service charges

(1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.

(2) The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.

(3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.

(4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

(5) Regulations under subsection (2) may make different provision for different purposes.

(6) Regulations under subsection (2) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.]

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.

Section 20

- (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
 - (a) complied with in relation to the works or agreement, or
 - (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal.
- (2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.
- (3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
- (4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
 - (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
 - (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.
- (5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
 - (a) an amount prescribed by, or determined in accordance with, the regulations, and
 - (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.
- (6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the

works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]