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

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| **Case reference** | **:** | **LON/00AW/LSC/2023/0235** |
| **Property** | **:** | **Basement Flat 277 Westbourne Park Road, London, W11 1EE** |
| **Applicant** | **:** | **Demprotas Enterprises Limited** |
| **Representative** | **:** | **Mr T Yianni, as managing agent** |
| **Respondent** | **:** | **Mr A Flynn** |
| **Representative** | **:** | **In person** |
| **Type of application** | **:** | **Section 27A application seeking decision on payability and reasonableness of service charges** |
| **Tribunal members** | **:** | **Prof R Percival**<br>**Mr J Naylor FRICS FIRPM** |
| **Venue and date of hearing** | **:** | **10 Alfred Place, London WC1E 7LR**<br>**18 January 2024** |
| **Date of decision** | **:** | **29 January 2024** |

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**DECISION**

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## Decisions of the tribunal

(1) The Tribunal strikes out the application insofar as it relates to £11.50 alleged arrears in the service charge year 2021/22, under (First-tier Tribunal)(Property Chamber) Rules 2013, rule 9(3)(d).

(2) The Tribunal determines that the demand for an interim charge made on 17 May 2023 is payable by the Respondent.

(3) The Tribunal declines to make orders under section 20C of the 1985 Act or under Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A.

## The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act")#[and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act")] as to the amount of service charges [and (where applicable) administration charges] payable by the Applicant / Respondent in respect of the service charge years ending 28 September 2022 and 28 September 2023.

2. The relevant statutory provisions referred to may be consulted at:
https://www.legislation.gov.uk/ukpga/1985/70/contents
https://www.legislation.gov.uk/ukpga/2002/15/contents

## The background

3. The property which is the subject of this application is a two bedroom flat in a converted Edwardian or Victorian house. The house has been converted into four flats.

## The lease

4. The lease is dated 24 March 1983, for a term of 99 years (from September 1981)

5. By clause 4(4), the tenant covenants to pay the interim and service charge, as provided for in the fifth schedule. That schedule defines the "Total Expenditure" as that incurred by the lessor in performing their covenants in clause 5(5) (see below) "and any other costs or expenses reasonably and properly incurred … (a) the cost of employing Managing Agents (b) the cost of any Accountant or Surveyor employed to determine the Total Expenditure and the amount payable by the Tenant hereunder …". The service charge is the tenant's percentage (25% - particulars). The interim charge on account is payable on 29 September and 25 March each year. Provision is made for reconciliation on a

certificate to be served as soon as practicable after the end of the service charge year.

6. The lessor's repairing covenant is in clause 5(5)(a), and includes to "keep in good and substantial repair and condition" the main structure, including the external walls and roof, pipes and other conduits, the common parts, and the boundary walls and fences. By clause 5(5)(b), the lessor covenants, as and when it deems it necessary, to paint and varnish the building externally and to decorate the common parts. By clause 5(5)(d), the lessor must clean and light the common parts and clean the windows thereto.

7. The lessor, at its discretion, covenants to employ managing agents, and other professionals (clause 5(5)(j)).

8. There is an insurance obligation (clause 5(5)(c)).

9. At the end of the main lessor's covenants, there is a sweeper clause at clause 5(5)(o).

10. Provision is made for a reserve fund in clause 5(5)(q).

11. In clause 3(9), the tenant covenants to pay legal fees incurred by the lessor "in or in contemplation of any proceedings … under sections 146 and 147 of the Law of Property Act 1925 … including in particular all such costs charges and expenses of and incidental to the preparation and service of a notice under the said Sections … notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court".

12. We note that the Respondent asserts rights over parts of the exterior of the building, and has made a statutory declaration to that effect. As it is not relevant to this application, we do not consider the issue further.

## The hearing

*Introductory*

13. Mr Yianni, director of the managing agents, D and J Yianna Ltd, represented the Applicant. He was accompanied by Ms Dounetas, also of the managing agents. Mr Flynn represented himself.

14. We had been provided with a hearing bundle prepared by the Applicant. At the hearing, it emerged that the Respondent had also prepared a bundle and had submitted it to the Tribunal office. It proved possible to supply the Tribunal with copies of the bundle in digital form during the hearing, and we were accordingly able to consult it.

*The issues*

15. The issues before the Tribunal under section 27A of the 1985 Act were:

(i) The payability and/or reasonableness of service charges for the year from 29 September 2021 to 28 September 2022; and

(ii) The payability of the interim (advance) service charge in respect of major works, in respect of which a consultation process under section 20C, and the regulations made thereunder, had taken place in 2021/22.

*The 2021/22 service charges*

16. The arrears alleged to be outstanding on Mr Flynn's account for the service charge year were £11.50.

17. We told Mr Yianni that we considered this part of his application to be potentially frivolous, and were therefore considering striking it out under Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, rule 9(3)(d), and invited his submissions.

18. Mr Yianni said that, while it was a small amount of money, it set a precedent for the Respondent not paying the whole of the service charge, which might involve much larger sums. He conceded that he had only added it to the case because he was taking the case in respect of the major works anyway, and would not have done so had it been freestanding.

19. We took time to consider, and concluded that we would strike this part of the case out under that provision in the rules. Rule 9(3)(d) provides that the Tribunal may strike out a the whole or part of a case if we consider that it is "frivolous or vexatious or otherwise an abuse of the process of the Tribunal …". For an applicant to ask the Tribunal to spend any amount of time determining liability for so small a sum obviously falls within that rule. We were not convinced by Mr Yianni's argument that it "set a precedent". It obviously does no such thing in any legal or formal sense. And the idea that any tenant would decide not to pay substantial service charges because he had once got away with arrears of £11.50 strikes us absurd. Further it is an extreme example of disproportionality. Proportionality in dispute resolution is something that the overriding objective in rule 3 of the 2013 Rules exhorts us to take into account (rule 3(2)(a)).

20. *Decision*: The Tribunal strikes out the application insofar as it relates to £11.50 alleged arrears in the service charge year 2021/22, under (First-tier Tribunal)(Property Chamber) Rules 2013, rule 9(3)(d).

*The interim service charge demand in respect of the major works*

21. On 17 May 2022, the Applicant issued a demand for an interim service charge in the sum of £7,950, to be paid within 21 days.

22. We put to Mr Yianni that the lease specified that the interim charge should be paid on 29 September or 25 March, not 21 days after 17 May. He modified his case to be that the sum should have been paid on 29 September 2023.

23. We set out the information and submissions provided by the parties first.

24. The service charge demand related to major works, in respect of which a consultation exercise under section 20C of the 1985 Act had taken place in 2021 and 2022. The notice of intention had been served in April 2021. It identified four categories of work. Those were full external decoration to the front and rear of the building, re-roofing of the flat roofs at the front and rear of the property, repair to the external guttering and external re-pointing and the upgrading of the electrical installation in the communal hallway. The latter, we were told, had in the event been undertaken separately at some point, and was no longer part of the dispute. The remaining stages of the section 20 process took place during 2021 and 2022, and the Respondent did not take any technical points in relation to the conduct of the statutory process. The work could not go ahead as originally planned in August 2022, as the Respondent had refused to allow the erection of scaffolding on what he asserts is his land at the rear of the building. This is the subject matter of a separate dispute between the parties.

25. The Respondent did make a generalised complaint that he had not, unlike at least some of the other leaseholders, been engaged in the process by the managing agent, in a more general sense. He said that he had not been involved in the process of drawing up the specification for the work, and was prevented from taking a full part in the process of securing quotations. He did not dispute that he had not made observations during the formal process. Nonetheless, he said that the whole process had not been conducted in a constructive and reasonable fashion.

26. The Respondent did not agree that the major works should be undertaken at all. There had been two previous occasions since he acquired the leasehold interest (in 2004) when such works had been undertaken, and the quality of the work done, and its management, had been poor.

27. The Respondent made a number of specific points that, he argued, rendered the proposed major works so flawed that we should not find that the interim payment was payable.

28. First, the builder carried insufficient insurance. The building insurance certificate for 277 Westbourne Park Road showed that the rebuild value of the property was given as £1,803,789. The estimate provided by the preferred bidder (Spark Decorating) stated that its indemnity policy was limited to £1 million. Mr Flynn had spoken with a representative of the building's insurer, and had ascertained that no notification of building works had been made. Mr Flynn argued that Spark could not properly be contracted to undertake the work unless its insurance cover was at least that of the rebuild figure.

29. Secondly, Mr Flynn noted that the estimate from Sparks stated that payment would be due on completion of the work. He argued that, therefore, there was no need to collect the entire cost in advance. Rather, he suggested that the sensible way forward was for 50% to be demanded in advance, and the final 50% demanded after or at completion of the work.

30. Finally, he said that he had been told by other leaseholders that the Applicant had come to arrangement with them to only pay half of the full sum demanded at this stage. He did not object in principle to that (as is clear from his argument above), but it showed inequitable treatment, he said. He had been offered the opportunity of only paying half in advance, but in terms that made it more of a threat than a genuinely helpful offer.

31. Mr Yianni replied. The Respondent had been given the opportunity to respond during the appropriate phases of the section 20 consultation process, but had not done so.

32. As to the insurance issue, it was his practice to notify the building insurers when he had a date fixed for work to commence. He would provide details of the contractor's insurance cover. If that was inadequate, he would expect the building insurer to require alternative insurance arrangements. He did not see a problem with asking the builder to provide greater insurance cover for the duration of the job, if it were necessary. It was his unvarying practice to make the notification to the building insurer, as managing agent of about a hundred blocks. He had not had prior experience of a building insurer requiring more cover from a contractor, but did not envisage any difficulty if they did. He did say that insurers ask about the nature of the work, and if it included a significant amount of, for instance, hot work, they would make conditions as to fire precautions.

33. Mr Yianni rejected the Respondent's submission of unequal treatment. All three of the other leaseholders had paid in full. Given the delay to the work, he had returned the money to two of the leaseholders, subject to letters confirming that they would re-pay the charges when called upon to do so when the works were ready to proceed. The third had been in the process of sale, so Mr Yianni had continued to hold the service charge, on the basis that the parties to the conveyance would accommodate that.

34. Mr Flynn was anxious to make a final point, which we allowed. He said that Mr Yianni was lying about the insurance. In the light of the gravity of the charge, we allowed Mr Yianni to respond. He denied dishonesty, and said what he had described was standard practice.

35. We add that both parties produced a great deal of information in documentary form relating to matters that were not relevant to the Tribunal's task in adjudicating this application. We pass over all of those matters in silence.

36. We now turn to our determination.

37. The lease requires the Applicant, or the managing agent, to set the interim charge at what they consider to be "a fair and reasonable interim payment". Such a payment is a advance on what will be the leaseholder's contribution to the "total expenditure". The total expenditure, in turn, is that which is expended by the Applicant in performance of its covenants under clause 5(5) of the lease. Those include the maintenance of the main structure, which includes the roofs and external walls, and the periodic ("when the Lessor shall deem necessary") painting and decorating of the exterior.

38. The major works that the Applicant seeks to undertake fall within its responsibilities under clause 5(5) of the lease. We have not heard an argument that any of the repairs are unnecessary. Rather, the way that the Respondent puts it is that the Applicant should not undertake (in particular) the external decoration, because if it does, it will be of inferior quality. We do not consider that that criticism, if made out (and it is not, as yet, made out), would invalidate the decision to undertake that work. It could, on an application under section 27A following the completion of the work, lead to a conclusion that the work was of unreasonable quality, and thus there should be a reduction in a final service charge demand, but that is not where we are now.

39. Nor has the decision to undertake the roof works been substantively criticised by the Respondent, even if he may doubt the ability of the Applicant to undertaken the work to a sufficiently high standard. Again, if that is a possibility that eventuates, it is open to a leaseholder to make an application under section 27A.

40. On the face of it, then, the interim demand was payable on 29 September 2023. The question is, do the Respondent's points invalidate the proposals of the Applicant to the extent that the interim charge is not payable? Our conclusion is that they do not.

41. First, as to the insurance point, we do not agree that Mr Yianni is lying. His claim is that a building insurer will interrogate a notification of building work, and take steps to ensure its interests are protected by

means of conditions, if necessary. We do not doubt that that is the case. Notification of building works is a general condition in landlord's building insurance policies. The purpose of the notification procedure is to protect the insurer's interests, and once the condition have been met, the building insurance will remain valid (albeit the insurer may have the comfort of adequate insurance cover taken out by a builder). In those circumstances, it is difficult to see what Mr Yianni could be lying about, even if we were inclined to accept Mr Flynn's charge, as he acknowledges that he has yet to make the notification, and will not do so until a start date is known.

42. We do not doubt the honesty of either Mr Yianni or Mr Flynn. We accept that Mr Flynn genuinely thinks that Mr Yianni is lying. But we think he is wrong, in the light of the objective circumstances, and the inherent logic of the workings of building insurance.

43. Accordingly, we do not have to consider whether, if Mr Flynn were right about the insurance issue, it would make any difference to the validity of the interim demand.

44. As to the Sparks' payment conditions, we do not think that affects the validity of the interim demand. Given that all of Sparks' invoice will become due during the following service charge year, it must be "fair and reasonable" for the advance interim charge to include it, as it would any expenditure that will fall due during the course of the year. The cleaning of the common parts might be billed on, say, a monthly basis. The fact that the last invoice will not be presented until the eleventh month of the year does not mean that all of the expenditure on community parts cleaning should not be collected in the interim charge.

45. Further, as a matter of practicality, any managing agent is well advised to ensure that it has all of the funds necessary to discharge major works bills in advance of the work starting.

46. We do not think Mr Flynn is right, either, about what he alleges is discrimination against him as to the terms under which the interim charge has been made. We see no reason to disbelieve Mr Yianni's account. On that account, he returned the two other leaseholder's contributions precisely because the major works could not proceed given Mr Flynn's failure to pay (and to co-operate in the context of the other dispute). We do not think Mr Flynn can reasonably object that, in those circumstances, what happened amounted to inappropriate differential treatment.

47. *Decision*: The Tribunal determines that the demand for an interim charge made on 17 May 2023 is payable by the Respondent.

48. The parties should note that this is a determination that the *interim charge* was properly demanded and is payable. This does not prevent any of the leaseholders challenging the reasonableness of the final service charge on reconciliation, which may include a challenge to the quality of any of the work undertaken as part of the major works.

49. We note the following, in the event that it is of some assistance to the parties. The lease specifies that "the Accounting Period" is the calendar year. Unlike many leases, there is no discretion expressed for the landlord to choose another year. The dates for the payment of the interim charge for the following year are posited on that year, with the certificate required by the lease to be provided as soon as practicable after the end of each year providing the basis for reconciliation. It appears that the Applicant has adopted an alternative for its service charge year (29 September to 28 September). We did not see certificates in the bundle. It may be that a closer adherence in practice to the express system set out in the lease will benefit all parties, and provide greater clarity. This observation is, we repeat, merely made in case it is of assistance, and has no greater force or significance than that.

## Applications for additional orders

50. At the close of the hearing, the Respondent applied for an order under section 20C of the 1985 Act that the costs of these proceedings may not be considered relevant costs for the purposes of determining a service charge; and an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 extinguishing any liability to pay an administration charge in respect of litigation cost in relation to the proceedings.

51. Insofar as the orders under section 20C and paragraph 5A are concerned, we consider these applications on the basis that the leases does provide for such costs to be passed on either in the service charge or as administration charges, without deciding whether that was the case or not. Whether the lease does, in fact, make such provision is, accordingly, an open question should the matter be litigated in the future.

52. An application under section 20C is to be determined on the basis of what is just and equitable in all the circumstances (*Tenants of Langford Court v Doren Ltd* (LRX/37/2000). The approach must be the same under paragraph 5A, which was enacted to ensure that a parallel jurisdiction existed in relation to administration charges to that conferred by section 20C.

53. Such orders are an interference with the landlord's contractual rights, and must never be made as a matter of course.

54. We should take into account the effect of the order on others affected, including the landlord: *Re SCMLLA (Freehold) Ltd* [2014] UKUT 58 (LC); *Conway v Jam Factory Freehold Ltd* [2013] UKUT 592 (LC); [2014] 1 EGLR 111. There is nothing to suggest that the landlord is in a vulnerable position.

55. The success or failure of a party to the proceedings is not determinative. Comparative success is, however, a significant matter in weighing up what is just and equitable in the circumstances.

56. The Applicant has been largely successful before us. We do not think that it would be appropriate in the circumstances of this case to make either of the orders. It is open to the Respondent to challenge costs imposed through the service charge with an application under section 27A of the 1985 Act, and to challenge an administration charge under paragraph 5 of schedule 11 to the Commonhold and Leasehold Reform Act 2002, as to either payability or reasonableness, or both.

**57.** *Decision*: The Tribunal declines to make orders under section 20C of the 1985 Act or under Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A.

## Rights of appeal

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

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

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

61. The application for permission to appeal must identify the decision of the Tribunal to which it relates, 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.

**Name:** Judge Prof Richard Percival **Date:** 29 January 2024