FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AG/LSC/2023/0217**
Property	:	**Flat 25 Palace Court 250 Finchley Road London NW3 6DN**
Applicant	:	**Folasade Jibike Abiola**
Representative	:	**Sam Madge-Wyld**
Respondent	:	**P C Residents (Finchley Road) Ltd**
Representative	:	**John Stenhouse**
Type of application	:	**For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985**
Tribunal members	:	**Mrs E Flint FRICS** **Mr A Parkinson MRICS** **Ms J Dalal**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of decision **Reviewed**	:	**19 January 2024** **6 June 2024**

DECISION

Decisions of the tribunal

(1) The tribunal makes the determinations as set out under the various headings in this Decision

(2) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

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 in respect of the service charge years 2019, 2020, 2021 and 2022.

The hearing

2. The Applicant was represented by Sam Madge-Wyld of counsel at the hearing and the Respondent was represented Dr Ali, a director of the respondent and Ms D Fisher, the managing agent. The Tribunal also had a skeleton prepared by John Stenhouse of counsel who we were told was unable to attend the hearing.

3. Dr Ali at the outset requested an adjournment as the respondent's usual counsel was not able to attend the hearing due to possible disruption on the railway.

4. Mr Madge-Wyld objected to the request. The applicant has incurred his costs of attending the hearing. Moreover, the train strike had been announced a couple of weeks ago. If counsel could not attend due to industrial action, then he could have requested a remote hearing. The applicant does not spend a great deal of time in the UK as she lives in Nigeria.

5. After a short adjournment the Tribunal refused the request for an adjournment. There had been no request for either a video or hybrid hearing once the dates of the industrial action had been announced which would have enabled the hearing to go ahead with the respondent fully represented. Nevertheless, the respondent is represented by a Director and its managing agent who have both provided witness statements and the Tribunal had a copy of counsel's skeleton.

The background

6. The property which is the subject of this application is a flat within a seven storey building. There are commercial premises on the basement and ground floor and twenty one flats in two blocks on the first to fifth floors.

7. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

8. The Applicant holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

9. The respondent is the registered freehold owner of Palace Court. The respondent is owned collectively by the flat owners.

The issues

10. The applicant sought a determination as to the amount of service charges she is required to pay in respect of the years 2019, 2020, 2021 and 2022. Following disclosure of the accounts and invoices the parties identified the relevant issues for determination as follows:

    (i) Is the Respondent entitled to retain the year end surplus in a reserve fund or must it be credited back to the applicant

    (ii) Is the respondent entitled to a contribution towards its "professional fees" incurred in 2020, 2021 and 2022

    (iii) Is the respondent entitled to recover more than £100 per year from the applicant in respect of the lift maintenance contract

    (iv) Has the respondent actually incurred the sums set out within its accounts for (1) repairs and maintenance and (2) electricity. The dispute regarding the electricity was agreed during the lunch break.

11. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

The Lease

12. By paragraph 3 of the Fourth Schedule the tenant covenants with the landlord "*To pay to the Landlord by way of additional and further rent*

in two equal instalments …. such estimated sums as shall be required by the landlord or its agents and notified to the Tenant ….of the expense to the Landlord …of performing the obligations and covenants …in Part I of the Seventh Schedule and …Part II of the Seventh Schedule"

13. The lease provides for balancing credits and debits to be paid on the issue of a certified summary of expenses which is to be issued as soon as possible after the service charge year end.

14. At paragraph 5(iii) the landlord may use his discretion to set up a reserve fund "*to provide towards the renewal of equipment and/or materials required for the provision of services and amenities herein provided and/or carrying out works other than those of an annual occurring nature ….any sum so allocated shall be set aside by the landlord and utilised only for the purpose for which it was so allocated shall not be subject to adjustment under the provisions of paragraph 2 of the Fourth Schedule" ….*

15. Part I of the Seventh Schedule includes the cost of complying with the landlord's repairing obligations, other than in respect of the passenger lift, the costs of employing any solicitor accountant surveyor architect engineer managing agent or any other company or person …. for the collection of rents or in connection with the Landlord's obligations or with the general management security and maintenance …

16. Part II of the Seventh Schedule relates to the costs in respect of the passenger lift in Block C.

17. There are no references to a reserve fund in the Seventh Schedule.

<u>Year end surplus</u>

18. Mr Madge-Wyld said that although the lease does not provide for a reserve fund his client agrees that a reserve fund is a good thing therefore the reserve fund itself is not opposed. However, the movement of all surpluses into the reserve fund is challenged.

19. The accounts indicated that £10,000 had been transferred into a reserve fund for each of the years in question. It was unreasonable to add any surpluses to the reserve fund without being based on any form of plan or strategy.

20. The lease terms are clear any surplus should be credited to the Tenant as soon as the accounts have been certified.

21. In his skeleton Mr Stenhouse asserted that as the Lease does not forbid a reserve fund, the landlord and the Tenants may agree between

themselves to operate a reserve fund into which any surpluses are paid. Indeed, this is what has been going on for some ten years. This arrangement does not prejudice the applicant as the reserve fund is held on trust for all tenants.

22. Furthermore, the applicant is not entitled to be paid back anything out of the reserve fund because she has not paid her service charge for the years in question.

The tribunal's decision

23. The tribunal determines that the surpluses for each year should be credited back to the service charge account. The following amounts based on the amounts in the Income and Expenditure Accounts should be credited to the service charge account for Palace Court and the appropriate percentage share deducted from the applicant's outstanding account :

2019:	£29,502	Applicant's share £1,799.62
2020:	£8,744	Applicant's share £533.38
2021:	£10,559	Applicant's share £644.10
2022:	£17,125	Applicant's share £1,044.62

Reasons for the tribunal's decision

24. The Landlord and the Tenants have agreed to set up a reserve fund into which £10,000 per year has been paid. No explanation has been provided as to the costs of which equipment or materials the additional monies were to cover. It is unreasonable to add additional amounts which are indeterminate prior to the budget setting. The contributions to the reserve fund should be based on a proper consideration of the expenditure which will necessarily become payable in the future. It is prudent to review the annual amounts payable into the reserve fund on a regular basis taking into account any planned maintenance. The provisions of the lease do not provide for the reserve fund to be set up to cover unpaid service charges.

Lift Maintenance

25. Mr Madge-Wyld stated that the lift maintenance contract is "*for a period of 12 months and shall continue thereafter unless terminated by either party giving three month's notice in writing*" The contract is a Qualifying Long Term agreement as it is in identical terms to the agreement in Corvan (Properties) Ltd v Abdel-Mahmoud [2018] EWCA Civ 1102.

26. He stated that since section 20 consultation had not been undertaken the respondent is limited to collecting £100 per year as opposed to £139.20 (2019), £221.90 (2020), £149 (2021) and £155.80 (2022) based on the amounts in the Income and Expenditure Statements.

27. Mr Stenhouse asserted that this was a bad point as the applicant had not proved that there had been no consultation. She had been a Director when the contract was entered into by the respondent. As all the other tenants have paid their share of the cost of the lift maintenance it should be assumed that there had been a form of consultation.

28. Ms Fisher, in her evidence confirmed that the respondent was willing to concede on this point and credit to the applicant's account the differences set out at paragraph 25 above.

29. The Tribunal has no further jurisdiction on this issue.

30. Professional Fees

31. Mr Madge-Wyld stated that professional fees of £226, £549 and £62 were incurred in the years 2020-2022. No invoices have been disclosed relating to these amounts. He asserted that the Tribunal cannot be satisfied that the sums were reasonably incurred and recoverable as a service charge without any information as to who or why they were paid. He said that there was no suggestion of dishonesty, merely that there ought to have been disclosure to enable the parties and the Tribunal to confirm whether the payments fell within the service charge provisions in the lease and the reasonableness of the charges.

32. Mr Stenhouse suggested that the applicant was proposing that the landlord had acted dishonestly, unlawfully or outside the terms of the lease. Since the applicant had not produced any such evidence he asserted that the Tribunal should that there is no valid challenge to these sums.

33. Ms Fisher said that the fees mainly related to Land Registry fees, obtaining title information to demand service charges, copy leases and payment of the Data Protection fee. The remaining £549 related to a surveyor's fee when it was thought there might be Japanese knotweed at the site. The proposed treatment would have cost c£1480; the landlord decided not to go ahead with the recommendations in the report.

34. During the extended lunch break Ms Fisher was able to obtain further documentary evidence. Following which the costs relating to Land Registry were accepted together with the surveyors fees.

35. The Tribunal has no further jurisdiction in light of the agreement

Repairs and Maintenance

36. Mr Madge-Wyld agreed that only external repairs and maintenance had been challenged on the Scott Schedule. He said that it was clear that the expenditure for repairs and maintenance had been accounted for on a cash basis. It was therefore possible to add up the invoices to determine if the expenditure in the accounts tallies with the costs actually incurred.

37. **2019:** The invoices total £964. The accounts recorded £1897 therefore the service charge account should be reduced by £933 and the applicant's contribution by £60.55.

38. 2020: The invoices total £3027.66. The accounts recorded £6416 therefore the service charge account should be reduced by £3,388.34 and the applicant's contribution by **£220.24.**

39. **2021:** The invoices total £7790.53. The accounts recorded £10,085.63 therefore the service charge account should be reduced by £2,295.10 and the applicant's contribution by **£149.18**.

40. **2022:** No invoices had been disclosed for 2022. It is assumed that some maintenance has been carried out therefore the applicant proposes that a 50% reduction be made in the expenditure in the accounts of £4,500 based on previous year's amendments. This would reduce the applicant's contribution by **£137.25**.

41. Mr Stenhouse asserted that as the applicant had not produced any evidence that the costs incurred were unreasonable she had not established that the costs incurred were not payable. He was concerned that the applicant was questioning the honesty of the landlord. In addition, although some invoices were missing the landlord had produced bank statements showing payments had been made in respect of the missing invoices.

42. Ms Fisher was unable to explain why there were no invoices available for 2022. She confirmed that she carried out a book keeping function: everything was reconciled, the bank statement and ledger were given to the accountants who could raise queries as and when they arose.

43. After lunch the repairs and maintenance issues were agreed between the parties. £472 was agreed on the balance of probabilities to be a not unreasonable contribution for the repairs and maintenance for 2022.

44. **The Tribunal has no jurisdiction following the agreement between the parties**.

<u>Application under s.20C</u>

45. In the application form, the Applicant applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Respondent may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

46. Mr Stenhouse, in his skeleton stated that the respondent would make a separate application under rule 13 (5) First Tier Tribunal Rules 2013 for costs to be awarded on the basis that the applicant had acted unreasonably.

47. Dr Ali said that the Seventh Schedule allowed the landlord to add all the costs which would include the costs of the solicitor, counsel, managing agent and her own time.

Name: E Flint

Date: 19 January 2024
Amended 6 June 2024

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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 regional office which has been dealing with the case.

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.

If the application is not made within the 28-day time limit, such 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 such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).