FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00Bk/LSC/2021/0015**
Property	:	**Flat 3, 168 Sutherland Avenue, London, W9 1HR**
Applicant	:	**Ms Kim Ishola**
Representative	:	**In person**
Respondent	:	**Oakleaves Association of Freeholders Limited**
Representative	:	**Mr Seb Oram, counsel, instructed by Dean Wilson LLP**
Type of application	:	**For the determination of the payability of service charges under section 27A of the Landlord and Tenant Act 1985**
Tribunal members	:	**Judge Tueje** **Judge Pittaway** **Mrs A Flynn MRICS**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of hearing	:	**23rd and 24th October 2023**
Date of decision	:	**21st November 2023**

DECISION

REVIEWED AND AMENDED on 28th February 2024

In this determination, statutory references relate to the Landlord and Tenant Act 1985 unless otherwise stated.

a) The tribunal exercised its powers under Rule 55 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 to (1) review its decision dated 21st November 2023, which was issued on 23rd November 2023; and (2) clarify its decision. The tribunal's substantive decision is unchanged. The clarification confirms that under section 27A Ms Ishola is not liable for, nor are service charges payable by her, for the year ending 2017. The amendments are in underlined text at paragraph (7) (on page 2), paragraphs 88, 111 and 112 of the decision.

b) The background to the review is that in a letter dated 15th December 2023, the respondent requested the tribunal reviews its decision under Rule 55 to clarify whether Ms Ishola is liable for service charges for the year ending 2017.

Decisions of the Tribunal

(1) The payment of service charges for the years 2017 to the first quarterly service charge for 2022 (due on 25th December 2021) as a condition of relief from forfeiture, does not preclude consideration by the Tribunal of the relevance of section 20B.

(2) Section 20B applies to the service charges for the years 2017, 2018, 2019, 2020, and up to 27th May 2021.

(3) Section 20B does not apply to sums due after 27th May 2021.

(4) The Respondent did not serve service charge demands in accordance with section 20B(1).

(5) The absence of section 20B(1) demands, on its own, does not make the service charges unpayable.

(6) The Respondent did not comply with the requirements of section 20B(2) in relation to service charges for the year ending 2017.

(7) ~~No service charges are payable by Ms Ishola for the year ending 2017.~~ Under section 27A, Ms Ishola is not liable for, nor are service charges payable by her, for the year ending 2017.

(8) The Respondent complied with the requirements of section 20B(2) in relation to service charges for the years 2018, 2019, 2020 and up to 27th May 2021.

(9) Service charges are payable for the service charge years 2018, 2019, 2020 and up to 27th May 2021.

(10) The Tribunal has no jurisdiction in respect of any sums due after 27th May 2021.

(11) The Tribunal makes no determination as to the reasonableness of the sums charged by way of service charge from 2017 up to 27th May 2021.

(12) The Tribunal makes no determination in relation to section 20C and paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002, which are yet to be determined.

The application

1. Ms Ishola seeks a determination pursuant to section 27A as to the amount of service charges payable by her for the service charges years ending 2017, 2018, 2019, 2020 and 2021 (the "current Application"). The total amount in dispute is £21,399.72.

The hearing

2. Ms Ishola appeared in person at the hearing. The Respondent was represented by counsel, Mr Oram. A solicitor and trainee solicitor from Dean Wilson LLP were also in attendance.

3. Ms Ishola provided the Tribunal with the following documents:
   - Hearing Bundle containing documents at sections A to E;
   - A 385-page electronic disclosure bundle;
   - Case law authorities: ***OM Property Management Ltd v Burr*** and ***Cookson v Assethold Limited [2020] UKUT 0115 (LC)***

4. Ms Ishola's hearing bundle contained her witness statements dated 1st May 2023, 31st July 2023, and 2nd August 2023.

5. The Respondent provided the Tribunal with the following documents:
   - A 337-page electronic hearing bundle, including a witness statement from Mr O'Sullivan dated 27th July 2023.
   - A bundle containing 13 authorities; and
   - A 13-page skeleton argument.

6. Before the hearing started, the Tribunal provided a copy of ***Roberts v Countryside Residential (South West) Limited [2017] UKUT 386 (LC),*** highlighting paragraphs 58 to 72. There was a delayed start to allow the parties an opportunity to consider the authority.

7. The Tribunal heard opening statements from both parties. Ms Ishola confirmed her application did not seek to challenge the reasonableness of the disputed service charges.

8. Following Mr Oram's opening statement, the Respondent provided a travelling schedule of works relating to repairs and/or improvements carried out to the Building. To allow Ms Ishola an opportunity to consider this schedule, there was an extended lunch break before any evidence was heard.

9. The Tribunal heard evidence, from Ms Ishola, and from Mr Simon O'Sullivan a director of the Respondent.

10. The Tribunal heard closing submissions from Mr Oram, followed by Ms Ishola's closing submissions.

The background

11. This application relates to the property known as Flat 3, 168 Sutherland Avenue, London, W9 1HR ("the Property"). The Property is understood to be a first floor one bedroom flat in a Victorian terraced building ("the Building"), which was converted into seven flats in around the 1980s.

12. The lease, dated 10th January 1986, was granted for a term of 125 years commencing 29th September 1985. The Respondent owns the freehold of the Building. The company's shareholders comprise leaseholders of flats in the Building. The Tribunal was informed some leaseholders may have extended their term, but otherwise, in all material respects, the leases are believed to contain substantially the same terms.

13. Clause 3(2) of the lease deals with payment of service charges, defining these as *"the expenses and outgoings incurred by the lessor in the repair maintenance renewal and insurance of the Building"*. Sub-clauses 3(2)(e) and (f) are relevant. They read:

> *(e) The expression "the expenses and outgoings incurred by the Lessor" as hereinbefore used shall be deemed to include not only those expenses outgoings and other expenditure hereinbefore described which have been actually incurred or made by the Lessor during the year in question but also such reasonable part of all such expenses outgoings and other expenditure hereinbefore described which are of a periodically recurring nature (whether recurring by regular or irregular periods) whenever disbursed incurred or made and whether prior to the commencement of the Term or otherwise including a sum or sums of money by way of reasonable provision for anticipated expenditure in respect thereof as the Lessor or its accountants or managing agents (as the case may be) may in their discretion allocate to the year in question as being fair and reasonable in the circumstances*
>
> *(f) The Lessee shall if required by the Lessor pay to the Lessor on the usual quarter days such sum in advance and on account of the service*

charge as the Lessor or its accountants or managing agents (as the case may be) shall specify at their discretion to be a fair and reasonable interim payment.

14. Schedule 2 to the lease sets out what items amount to service charges under the lease. Paragraph 13 of the schedule expressly allows a reasonable sum to be paid towards a reserve fund.

15. In mid-2017 the Respondent issued claim number D38YX798 against Ms Ishola in the County Court at Willesden, claiming £9,463 for service charges due for 2014 to 2016 (the "2017 claim"). The 2017 claim was transferred to the Tribunal to determine whether those service charges were payable. In a decision dated 13th April 2018, the Tribunal concluded the interim service charge demands for the 2014 to 2016 service charges were payable.

16. The 2017 claim was transferred back to Willesden, and on 11th February 2019 amongst other terms, District Judge Ahmed ordered Ms Ishola pays the following:

    (1) Service charges from 2014 to 2016 of £9,223.95 plus interest of £1,238.93; and
    (2) The Respondent's costs, to be assessed.

17. The Respondent accepts no documentation relating to the 2017 service charges was sent to Ms Ishola.

18. The Respondent received a tender dated 18th May 2018, in respect of works to be carried out to the Building. The contract value was £94,515.00 (excluding VAT), and the tender included a schedule of works containing a number of provisional sums. The parties accept the schedule of works included works to be carried out to the Building which the Respondent was responsible for, as well as works for which individual leaseholders were responsible. According to the accounts for the year ending 2019, the cost of works charged to the service charge account was £93,664, which was slightly less than the original contract value.

19. On 24th June 2019 the Respondent's solicitors e-mailed Ms Ishola's former solicitors her statement of account and service charge accounts for the year ending 2018. The e-mail was expressed to be without prejudice, and notified her the attached documents set out the costs incurred by the Respondent, which included sums that would be due from her in the event her lease was continuing.

20. On 22nd June 2020, the Respondent's solicitors again e-mailed Ms Ishola's former solicitor, attaching the service charge accounts for the year ending December 2019. The e-mail was similar, albeit briefer, than the June 2019 e-mail, but the later e-mail didn't refer to the lease.

21. The Respondent's costs of the 2017 claim were assessed, as set out in a Final Costs Certificate dated 30th November 2020, which required Ms Ishola pays costs amounting to £46,975.35, which consisted of the following:

    (1)Costs of the 2017 claim assessed at £44,003.15; and
    (2) Costs of the assessment at £2,972.00

22. Ms Ishola states that in December 2020 the Respondent sent her budgets for the years 2017 to 2020, which all included a reserve fund.

23. The Tribunal received the current application on 9th January 2021 (the "current application"). In general terms, the current application claims service charges for the disputed years are not payable because no service charge demands or any valid notification under section 20B(2) was served.

24. On 20th April 2021, the Respondent served a forfeiture notice under section 146 of the Law of Property Act 1925 on Ms Ishola, requiring her to pay the following:

    (1) £9,223.95 representing the judgment in the 2017 claim;
    (2) £1,283.98 being the interest awarded in the 2017 claim;
    (3) £9.30 being interest accrued on money awarded by the Court Funds Officer;
    (4) £46,975.35 as awarded under the Final Costs Certificate dated 30th November 2020;
    (5) £6,161.74 being the interest due on the amount awarded in the Final Costs Certificate; and
    (6) £18,569.16 for service charges for 2017 to 2020.

25. The Respondent subsequently issued forfeiture proceedings against Ms Ishola on 25th May 2021 (the "forfeiture claim"), which included a claim for mense profits. The forfeiture claim was served on around 27th May 2021, and as a consequence of which, the lease was forfeited on that date.

26. The Tribunal stayed the current application pending the final determination relating to unpaid service charges and costs arising from determinations made by the tribunal in relation to the 2014-2016 service charges.

27. The Respondent accepts from 2017 no service charge demands were served on Ms Ishola. This was to avoid risking waiving its right to forfeit the lease.

28. On 23rd June 2021 the Respondent's solicitors e-mailed Ms Ishola a letter stated to be notice under section 20B(2). A section 20B Expenditure Notice was also sent detailing the budget and expenditure for that period.

29. On 15th March 2022, District Judge Worthington made a possession order in the forfeiture claim, granting relief from forfeiture on condition Ms Ishola pays the following:

(1) Service charges of £9,223.95 up to 11th February 2019, plus interest of £1,283.98 pursuant to District Judge Ahmed's order;
(2) £46, 975.35 costs pursuant to the Final Costs Certificate, consisting of £44,003.35 costs, plus £2,972 being the costs of the assessment;
(3) £4,408.07 being interest on the costs payable under the Final Costs Certificate, less Ms Ishola's payment on account of the costs;
(4) £2,500 being the combined total of interim costs orders made in the 2017 claim; and
(5) In accordance with clause 3(7) of Ms Ishola's lease, the costs of the forfeiture claim, summarily assessed at £10,795 including VAT.

30. District Judge Worthington declined to order payment of the 2017 to 2020 service charges as a condition of granting relief from forfeiture. The Respondent appealed against that part of the order.

31. In the interim, the Respondent sent a letter to Ms Ishola dated 8th July 2022, enclosing a Section 20B Expenditure Notice for the period 25th December 2020 to 24th December 2021, and an Application for Payment of £17,292.73.

32. The Respondent's appeal against District Judge Worthington's order was heard by His Honour Judge Dight CBE on 12th December 2022, who allowed the appeal (the "appeal order"). The preamble to the appeal order includes the following:

"AND UPON paragraph 2 of this Order not precluding any further application by the First Respondent, or any further determination, under section 27A of the Landlord and Tenant Act 1985 in respect of the service charges described in that paragraph".

33. Paragraph 2 of the appeal order inserted an additional sub-paragraph to paragraph 4 of District Judge Worthington's order, requiring Ms Ishola also pays as a condition of relief from forfeiture service charges of £22,522.89 for service charges from 2017 to the first quarterly service charge for 2022 (due on 25th December 2021).

34. Following the conclusion of the Respondent's appeal, the Tribunal lifted the stay imposed on the current application.

35. The Respondent disputed the Tribunal's jurisdiction to deal with the current application. That challenge was on the grounds that the disputed service charges had been subject to determination in the forfeiture claim, when the Court ordered, as a condition of granting relief from forfeiture,

Ms Ishola must pay service charges from 2017 to the first quarterly service charge for 2022 (due on 25th December 2021). In a determination dated 8th March 2023, Judge Powell decided the Tribunal retains jurisdiction. In a directions order dated 21st March 2023, Judge Powell granted Ms Ishola's request to add to the current application a challenge to the payability of service charges for the year 2021.

36. This determination sets out the Tribunal's decision and reasons in respect of the current application following a hearing on 23rd and 24th October 2023.

37. Neither party requested an inspection, and the Tribunal did not consider that one was necessary.

The issues

38. The Tribunal identified the following issues as requiring determination.

(1) The effect of the 2017 claim and the appeal order upon the payability of the service charge for the years 2017 to the first quarter's demand in 2022 (due on 25th December 2021). This is dealt with at paragraphs 48 to 62 below.

(2) The payability of service charges for the years ending 2017 to the first quarterly service charge for 2022 (due on 25th December 2021), where the Respondent failed to serve demands in accordance with section 20B(1). This is dealt with at paragraphs 63 to 68 below.

(3) The applicability of, and compliance with, section 20B(2), dealt with at paragraphs 69 to 114 below.

39. The above issues relate only to the payability of the disputed service charges. Ms Ishola having clarified at the start of the hearing that there is no challenge to the service charges on the grounds of reasonableness.

40. The current application includes applications under section 20C and paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

The Relevant Legislation

41. The definition of service charges is found at section 18, which reads:

18.— Meaning of "service charge" and "relevant costs"
(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.

42. Section 19 deals with the reasonableness of service charges, it states:

19.- Limitation of service charges: reasonableness
(1) Relevant costs shall be taken into account in determining the amount of service charge payable for a period-

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provision 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.

43. Section 20B, addresses the requirements for service charge demands, states:

20B.— Limitation of service charges: time limit on making demands.
(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.

44. The Tribunal's jurisdiction to determine service charge disputes is dealt with at section 27A, which states:

27A Liability to pay service charges: jurisdiction

(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.

The Tribunal's Determination

45. The Tribunal reached its decision after considering the witnesses' oral and written evidence, including documents referred to in that evidence, and taking into account its assessment of the evidence.

46. This determination does not refer to every matter raised by the parties, or every document the Tribunal reviewed or took into account in reaching its decision. However, this doesn't imply that any points raised or documents not specifically mentioned were disregarded. If a point or document was referred to in the evidence or submissions that was relevant to a specific issue, it was considered by the Tribunal.

47. The tribunal has made determinations on the various issues as follows.

Whether section 20B is engaged where forfeiture proceedings are issued to recover service charges.

48. The Respondent contemplated forfeiture proceedings during 2017 to 2021, so took steps to determine the payability of the 2014 to 2016 service charges. Therefore, Mr Oram, argues section 20B did not apply from 2017 to 2021. He contends forfeiture is inconsistent with section 20B as it would require a landlord to risk waiving its right to forfeiture by serving a demand under section 20B(1). Or, risk waiving its right to forfeiture by relying on the terms of the lease if notification is given under section 20B(2).

49. As the current application relies on the Respondent's alleged non-compliance with section 20B, if as Mr Oram contends, section 20B does not apply, it would follow non-compliance with section 20B couldn't be relied on to pursue the current application.

50. Relying on paragraphs 20 and 21 of ***Gilje v Charlegrove Securities Ltd [2003] EWHC 1284 (Ch),*** Mr Oram also argues section 20B does not apply because the Respondent lawfully recovered service charges without serving a demand. Instead it recovered the service charges as a condition of Ms Ishola obtaining relief from forfeiture. Therefore, ***Gilje*** applies because Ms Ishola made payments on account, the actual expenditure did not exceed the payments on account, so there was nothing further to demand.

51. Mr Oram further relies on ***Mohammadi v Anston Investments Limited [2003] HLR 8.*** This case confirms section 20B does not apply during the so-called *"twilight period"* between forfeiture of the lease when proceedings are served, and reinstatement, if relief from forfeiture is subsequently obtained.

52. Ms Ishola argues there is no dispensation of section 20B where a landlord issues forfeiture proceedings. Accordingly, a landlord must decide whether to pursue forfeiture, or seek payment of service charges from the tenant. But, Ms Ishola argues, a landlord cannot have it both ways.

The Tribunal's Decision

53. The payment of service charges for the years 2017 to the first quarterly service charge for 2022 (due on 25th December 2021) as a condition of relief from forfeiture, does not preclude consideration by the Tribunal of the relevance of section 20B.

54. Section 20B applies to service charges from 2017 up to 27th May 2021.

55. Section 20B does not apply to sums due after 27th May 2021.

Reasons for the Tribunal's Decision

56. The issue decided at paragraph 53 above arises here because of the procedural history of this matter. In particular, the appeal order requiring Ms Ishola pays the service charges for 2017 to the first quarterly service charge for 2022, as a condition of obtaining relief from forfeiture, prior to a determination of the payability of those service charges. However, the preamble to the appeal order expressly states it does not preclude any further determination under section 27A. That the Tribunal retains jurisdiction under section 27A is also confirmed in the order of Judge Powell dated 8th March 2023.

57. As to section 20B, there is only one qualification of section 20B(1), which is where notification is sent in accordance with section 20B(2). Therefore, as Ms Ishola correctly argues, section 20B applies even where forfeiture proceedings are being brought. Accordingly, section 20B applies during

the period a landlord issues proceedings to determine the amounts payable pursuant to section 81 of the Housing Act 1996.

58. The decision in ***Mohammadi*** was primarily regarding the application of section 81 of the 1996 Act; there was no substantive issue before the Court regarding section 20B. There, section 20B arose as a case management issue (see paragraph 39 of ***Mohammadi),*** in the context of the Court finding there was no evidential basis for concluding service charge demands had been sent more than 18 months after the relevant costs were incurred.

59. That said, the Tribunal accepts the decision in ***Mohammadi,*** which concluded section 20B does not apply in the twilight period after forfeiture proceedings are served. During that period, service charges would no longer be payable, and the landlord's claim would be for mense profits. The Tribunal also accepts that if the tenant subsequently obtains relief from forfeiture, section 20B doesn't apply retrospectively (paragraph 39 of ***Mohammadi).*** Instead, from the date the lease is forfeited, up to the date it's reinstated as a result of the tenant obtaining relief from forfeiture, the landlord's right to claim payments is as a claim for mense profits.

60. In this case, section 20B applied when the 2017 claim was issued, and continued to apply up to 27th May 2021 when the forfeiture proceedings were served. Therefore, section 20B applied to the documentation sent to Ms Ishola from 2017 to 27th May 2021 (referred to at paragraphs 71(1) to 71(3) below). But according to ***Mohammadi,*** section 20B did not apply during the subsequent twilight period, and any sums due to the Respondent during that period would be payable as mense profits. This would only apply to the 8th July 2022 letter and enclosures relating to the 2021 charges (referred to at paragraph 71(5)), because the 2020 service charges were included in the forfeiture notice.

61. However, for completeness, whether the Respondent did comply with section 20B(2) between 2017 to 27th May 2021 is dealt with at paragraphs 69 to 114 below.

62. As Mr Oram points out, a landlord that serves a service charge demand risks waiving its right to forfeiture. However, that does not mean the landlord must elect between pursuing forfeiture and notifying a tenant of costs it has incurred. For instance, if such written notification is sent on a without prejudice basis, particularly if it expressly states it is not to be treated as a demand for payment of service charges.

Payability of Service Charges under Section 20B(1) for 2017 to 2021

63. Ms Ishola states the Respondent did not send her service charge demands throughout the period 2017 to 2021, pursuant to section 20B(1). The

Respondent accepts that, because it was contemplating forfeiture proceedings, no service charge demands were sent between 2017 to 2021.

64. The dispute between the parties is what is the effect of the Respondent not serving demands under section 20B(1). Ms Ishola contends this means the service charges are not payable; the Respondent disputes that.

65. The Respondent argues, if, contrary to its primary position, section 20B applies, service charges are payable under section 20B(2), which provides an alternative mechanism to recover service charges where no section 20B(1) demand has been served. Therefore, the absence of section 20B(1) demands does not make the service charges unpayable.

The Tribunal's Decision

66. The Respondent did not serve service charge demands in accordance with section 20B(1).

67. The absence of section 20B(1) demands, on its own, does not make the service charges unpayable.

Reasons for the Tribunal's Decision

68. Service charge demands are subject to the 18-month rule imposed by section 20B(1), but section 20B(2) provides an exception to that rule, as stated in the opening words of section 20B(2), quoted at paragraph 43 above. So, while the Respondent admits no section 20B(1) service charge demands were sent for the years 2017 to 2021, section 20B(1) does not prevent recovery of the service charges if section 20B(2) applies, and has been complied with.

Whether the Respondent complied with section 20B(2)

69. The Respondent's primary position is that section 20B did not apply from 2017 to 2021, when it was contemplating forfeiture proceedings. Therefore, it did not serve demands under section 20B(1). Nor, therefore, prior to the lease being forfeited on 27th May 2021, did it serve written notification expressed to be pursuant to section 20B(2), because such notification requires a landlord to rely on the terms of the lease.

70. Alternatively, the Respondent argues, if section 20B(2) written notification was required, the documents provided to Ms Ishola meet the requirements of section 20B(2) in respect of costs incurred after 24th December 2017.

71. Mr Oram argues, in the context of contemplated forfeiture proceedings, where the Respondent did not want to risk waiving its right to forfeiture, the following documents provide the required notification:

    (1) The Respondent's solicitors e-mail attaching the 2018 accounts sent on 24th June 2019 (see paragraph 19 above);

    (2) The Respondent's solicitors e-mail attaching the 2019 accounts sent on 22nd June 2020 (see paragraph 20 above);

    (3) The forfeiture notice dated 20th April 2021 served on Ms Ishola (see paragraph 24 above);

    (4) On 23rd June 2021 the Respondent's solicitors e-mailed a section 20B(2) notice, and a section 20B expenditure notice containing a budget and expenditure, for the year ending December 2020 (see paragraph 28 above); and

    (5) The letter to Ms Ishola dated 8th July 2022 enclosing an Application for Payment of £17,292.73 and a Section 20B Expenditure Notice for the year to 24th December 2021 (see paragraph 31 above);

72. Ms Ishola argues the documents the Respondent relies on in purported compliance with section 20B(2) were invalid as a result of those documents seeking to recover the following:

    (1) The cost of works that were outside the requirements of the lease;
    (2) Service charge payments on account;
    (3) Service charges based on estimated costs; and
    (4) Contributions to the reserve fund.

Works Outside the Requirements of the Lease

73. Ms Ishola argues the documentation relied on by the Respondent included works that were outside the scope of the requirements of the lease.

74. She claims any sums received from leaseholders for works carried out to their properties were not recorded in the service charge accounts, and therefore were not credited to the account. She also argued the schedule of works contained provisional sums for works which were not in fact carried out. Additionally, she says, the limited difference between the original 2018 contract value compared to the final cost, did not sufficiently reflect the savings that should have resulted from works which were not carried out.

75. Ms Ishola believes the Respondent financially mismanaged service charge funds when arranging these works. Connected to this, was her belief that individuals associated with the appointed contractors had criminal

convictions. She relied on media reports and accompanying photographs, supposedly relating to the criminal convictions of individuals associated with the appointed contractors. But during cross examination, she confirmed she hasn't met any of the particular contractors.

76. From her oral evidence, the Tribunal concluded Ms Ishola genuinely believes the Respondent charged the collective service charge fund for works that individual leaseholders were liable for.

77. Mr O'Sullivan gave evidence on behalf of the Respondent. He is a leaseholder of one of the flats in the Building, and a director of the Respondent company. His evidence was that some leaseholders requested works be carried out to their properties, but those leaseholders were billed individually for those works. He relied on invoices exhibited to his witness statement showing the sums recharged to leaseholders. The Tribunal was told payments due from these leaseholder were recorded in the 2019 accounts as £6,214 under sundry debtors, but in the 2020 accounts, that entry was nil, showing these sums had been reimbursed.

78. He explained the schedule of works contained provisional sums to allow for works that might be required, because until scaffolding was erected, it was not possible to ascertain the full extent of the works required. In the end, a number of these works were omitted. However, he said, additional works were carried out, there were variations to some existing items which increased the costs, and these are all set out in the travelling schedule. He explained that was why the difference between the contract sum and the final cost of works was not greater.

79. Mr Oram argued that in any event, a section 20B notification is not invalidated if it gives a figure which is more than the costs claimed in the subsequent service charge demand. He cites ***Brent LBC v Shulem B Association Limited [2011] 1 WLR 2014 (Ch)*** as authority for this.

80. Finally, Mr O'Sullivan denied there was any financial mismanagement, and stated he had met the contractors that Ms Ishola alleged had criminal convictions, and they were not the individuals shown in the photographs she relied on. He therefore denied Ms Ishola's allegations.

Costs Incurred

81. Ms Ishola's further challenge relating to section 20B(2) is on three grounds, namely that the Respondent cannot rely on section 20B to recover service charges for payments on account, for a reserve fund, or for costs based on estimates. All three grounds rely on the same point, which is that section 20B applies where (emphasis added) "*… the tenant was notified in writing that those <u>costs had been incurred</u>…".*

82. Ms Ishola seems to accept, in principle, the Respondent is entitled to serve demands for payments on account. Her objection is that, like service charge demands based on estimates or for the reserve fund, payments on account do not relate to costs actually incurred. Therefore, the Respondent can't rely on section 20B to recover those costs. She cites ***OM Property Management Ltd v Burr [2012] UKUT 2 (LC),*** which states a cost is incurred when the cost is invoiced or paid. So, she argues, if the Respondent has not yet incurred the costs referred to in the documentation, that documentation does not satisfy the requirements of section 20B.

83. She also relies on ***Cookson v Assethold [2020] UKUT 0115 (LC)***, and at paragraph 3(a) of her witness statement dated 1st May 2023, states:

"The recent Upper Tribunal case of Cookson v Assethold Judge Elizabeth Cooke Conclusion 9 April 2020: An Estimates cannot be a notice that satisfies section 20B (2) of the 1985 Act because it does not inform the tenant that charges have been incurred. It is a demand for service charges on an estimated basis."

84. The Respondent relies on paragraphs 20 and 21 of ***Gilje v Charlegrove Securities Ltd 1 All ER 91 (Ch),*** stating section 20B does not apply (see paragraph 50 above).

85. The Respondent also relies on the Court of Appeal's decision in ***Burr v OM Property Management Ltd [2013] 1 WLR 3071*** (which upheld the Upper Tribunal decision Ms Ishola relies on), arguing section 20B requires the cost, and not the liability, is incurred within 18 months.

86. Regarding payments towards the reserve fund, Mr Oram argued ***Skelton v DBS Homes (Kings Hill) Ltd [2018] 1 WLR 362*** confirms the section 18 definition of service charges applies to costs incurred as well as costs to be incurred.

The Tribunal's Decision

87. The Respondent did not comply with the requirements of section 20B(2) in relation to service charges for the year ending 2017.

88. ~~No service charges are payable by Ms Ishola for the year ending 2017.~~ Under section 27A, Ms Ishola is not liable for, nor are service charges payable by her, for the year ending 2017.

89. The Respondent complied with the requirements of section 20B(2) in relation to service charges for the years 2018, 2019, 2020 and up to 27th May 2021.

90. Service charges are payable for the service charge years 2018, 2019, 2020 and up to 27th May 2021.

91. The Tribunal has no jurisdiction to deal with any sums due after 27th May 2021.

Reasons for the Tribunal's Decision

92. Firstly, a general point regarding whether any notification under section 20B is invalidated by the inclusion of costs which are not payable. The Tribunal has taken into account the decision in ***Shulem B Association Limited***, stating a section 20B notification containing a figure greater than the costs subsequently claimed is not invalid. The Tribunal adopts that reasoning, and finds if any section 20B notification sent by the Respondent claims a greater sum than the amount actually incurred, that does not invalidate the notification.

Works Outside the Requirements of the Lease

93. Based on Mr O'Sullivan's written and oral evidence, the Tribunal finds the collective service charge fund did not meet the cost of works that were outside the requirements of the lease. The Tribunal accepts items in the schedule of works which were outside the requirements of the lease were recharged to the relevant leaseholders. This was evidenced by the invoices exhibited to Mr O'Sullivan's witness statement. Furthermore the 2020 service charge accounts show the amount the leaseholders were liable for was recorded in the 2019 accounts under sundry debtors, but in 2020, that entry was nil, indicating those costs had been reimbursed.

94. Mr O'Sullivan's evidence was supported by the travelling schedule provided at the hearing, and which assisted the Tribunal in reaching its decision. It set out the works which were recharged to individual leaseholders. Furthermore, where works were carried out, this colour-coded comprehensive document compared the original cost in the tender against the actual cost, recording the reason for any differences. It also specified works which were not carried out, and variations to the works contained in the schedule of works, including any reduced or additional costs resulting from those variations. Therefore, the Tribunal accepted Mr O'Sullivan's oral evidence that there had been no financial mismanagement.

95. The Respondent did not explain why the travelling schedule was first provided at the hearing. That lateness is unfortunate, because if it had

been provided to Ms Ishola sooner, it may have lessened her mistrust, perhaps resulting in more moderated claims and/or allegations.

Costs Incurred - Payments on Account

96. Clause 3(2)(f) of the lease makes provision for the payment of service charges quarterly on account. Paragraph 9 of Mr O'Sullivan's witness statement dated 11th October 2022, suggests that is how payments were in fact claimed. This is supported by the various leaseholder statements of account that have been provided. For instance, the statement of account attached to the Respondent's solicitor's e-mail sent on 24th June 2019 shows that payments were due quarterly on account. Furthermore, the FTT's decision dated 13th April 2018 is based on whether interim service charges for 2014 to 2016 were reasonable.

97. The service charges which Ms Ishola disputes in the current application have been paid, that was the effect of the appeal order which inserted an additional sub-paragraph to District Judge Worthington's order dated 15th March 2022 granting Ms Ishola relief from forfeiture.

98. The Respondent's unchallenged position is that beyond what has already been paid, no excess payments are sought, nor have any been paid in respect of the disputed service charges.

99. According to the decision in ***Gilje***, as Ms Ishola has made payments on account, the Respondent's actual expenditure did not exceed the payments on account, and the Respondent does not request nor has Ms Ishola made any further payment, section 20B does not apply. It follows, it is not open to Ms Ishola to rely on section 20B to argue that payments on account are not payable.

100. For completeness, had section 20B(2) applied, the Tribunal finds its requirements were complied with as set out at paragraphs 101 to 114 below.

Costs Incurred – Estimated Costs

101. The Tribunal did not find the ***Cookson*** case to be of assistance. The Upper Tribunal overturned the FTT's decision because it was unclear which documents the FTT found had satisfied the requirements of section 20B. The Upper Tribunal did not overturn the decision because the service charges were based on estimated costs.

102. Clause 3(2) of the lease (see paragraph 13 above) defines service charges as *"the expenses and outgoings incurred by the lessor in the repair maintenance renewal and insurance of the Building"*. Clause 3(2)(e) clarifies this includes costs (or expenses and outgoings) actually incurred, "*... but also such reasonable part of all such expenses*

outgoings and other expenditure hereinbefore described which are of a periodically recurring nature (whether recurring by regular or irregular periods) whenever disbursed incurred or made…" (Emphasis added).

103. The statutory definition of relevant costs which are payable as service charges can be found at section 18 (see paragraph 41 above), which so far as is relevant states:

(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) (a) …

(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."

104. Therefore section 18(2) expressly defines relevant costs to include estimated costs, and subsection 18(3)(b) makes clear the definition applies to costs that have not yet been incurred. Clause 3(2)(e) of the lease also envisages costs may relate both to costs already incurred as well as costs not yet incurred.

105. Furthermore, in ***Skelton,*** the Court stated (at paragraph 17):

"In my judgment, it is clear from the definition of "service charge" in section 18 that section 20B applies to service charges in respect of costs to be incurred as much as costs that have been incurred."

106. Therefore, statutory and case law authority support the conclusion that "costs incurred" has a wide meaning. These authorities show that the wide meaning can include costs that have yet to be incurred, and according to section 18(2), estimated costs incurred or to be incurred. In light of the abovementioned authority, the Tribunal concludes estimated costs are relevant costs for the purposes of section 18, and are therefore also costs incurred as referred to in section 20B.

Costs Incurred – Payments for the Reserve Fund

107. The Tribunal's reasons for finding that the term "costs incurred" applies to a reserve fund are broadly the same as the reasons already given relating to estimated costs, particularly as stated at paragraphs 103 to 106 above. Essentially, it is because the subsection 18(3)(b) definition of "costs incurred" can apply to costs (emphasis added) *" … to be incurred,*

in the period for which the service charge is payable or in an earlier or later period." This definition encompasses costs relating to a reserve fund.

The Respondent's Compliance with Section 20B(2)

108. The decision in ***Brent LBC v Shuelm B Association [2011] 1 WLR 3014*** (at paragraph 65) states the requirements of the written notification under section 20B are as follows:

(1) It must state the amount of the costs incurred by the landlord;

(2) The costs stated in the written notification must not be less than the amount claimed in a subsequent service charge demand;

(3) The notice will be valid even if the amount of the costs stated in the section 20B notification is greater than the amount later claimed in the service charge demand; and

(4) The notification must inform the leaseholder that under the terms of her lease she will subsequently be required to pay a contribution of those costs by way of service charges.

109. This authority also makes clear (at paragraph 65) the landlord is not required to inform the leaseholder what proportion of the costs she will be required to pay, nor inform her what the amount of the service charge will be.

110. The Tribunal finds ***Roberts v Countryside Residential (South West) Limited [2017] UKUT 386 (LC)*** is persuasive authority supporting the conclusion that the provision of service charge accounts satisfies the requirements of section 20B(2) (see paragraph 71 of the judgment).

111. Considering the above requirements, the Tribunal finds the Respondent has not complied with section 20B in respect of the 2017 service charges for the following reasons:

111.1 The Tribunal notes the Respondent accepts no documentation has been provided to Ms Ishola in respect of these service charges except for the 2017 budget sent to her in December 2020.

111.2 Furthermore, the 2017 budget does not comply with section 20B(2), and was sent more than 18 months after any relevant costs were incurred.

112. However, the Tribunal doesn't have power to order the Respondent repays the sums paid by Ms Ishola in respect of the 2017 service charges. There is no mandatory requirement under section 19(2) requiring a landlord must repay excess sums, even where the amount already paid exceeds what is recoverable under section 20B. The extent of the Tribunal's jurisdiction is stated at section 27A (see paragraph 44 above), and that is the effect of the decision in ***Parmar v 127 Ladbroke Grove Ltd [2022] UKUT 213 (LC)*** (at paragraph 50 and paragraph 56). Given the extent of the Tribunal's powers, it does not have jurisdiction to appropriate service charges.

113. Applying the points dealt with at paragraphs 108 to 110 above to the remaining service charges in dispute, the Tribunal finds as follows:

(1) Service charge year ending 2018: The service charge accounts for the year ending 2018 notified Ms Ishola of the costs incurred. Those accounts were attached to Respondent's solicitor's e-mail sent on 24th June 2019, which notified her without prejudice, that the service charge accounts included the sums that she would have been required to pay under the terms of her lease if the lease was continuing.

(2) Service charge year ending 2019: Paragraph 1 of the forfeiture notice dated 20th April 2021, refers to Ms Ishola's liability to pay service charges under the lease. Amongst the amounts being claimed at paragraph 3 of that notice were service charges for 2019.

(3) Service charge year ending 2020: Paragraph 1 of the forfeiture notice dated 20th April 2021, refers to Ms Ishola's liability to pay service charges. Amongst the amounts being claimed at paragraph 3 of that notice were service charges for 2020.

(4) Also in relation to service charges for the year ending 2020: The section 20B statutory notice and section 20B expenditure notice (or budget) relating to the year ending 2020, were both attached to an e-mail sent to Ms Ishola by the Respondent's solicitors on 23rd June 2021. These documents state the amount of the costs incurred, and refer to the liability to pay under the terms of the lease.

(5) Service charges up to 27th May 2021: The Tribunal finds the statutory requirements have been met. The requirements are met by the letter dated 8th July 2022 enclosing a section 20B expenditure notice, and a service charge demand dated 27th May 2022 relating to the year ending 2021. These documents refer to the costs incurred and liability to pay a contribution towards the costs, which according to ***Shulem B Association Limited,*** meet the requirements of section 20B(2).

114. For the above reasons, and to the extent section 20B(2) applies, the Tribunal finds service charges for the period the 2018 up to 27th May 2021 are payable because the Respondent complied with section 20B(2).

The reasonableness of the sums charged by way of service charge in the years in question

115. Neither the current application nor Ms Ishola's evidence sought to challenge the reasonableness of the service charges in the years 2017 to 2021. Ms Ishola also confirmed at the start of the hearing that she was not challenging reasonableness.

The Tribunal's Decision

116. The Tribunal makes no determination as to the reasonableness of the sums charged by way of service charge in the years in question.

Reasons for the Tribunal's Decision

117. The current application does not raise any issues regarding the reasonableness of the service charges.

Applications Relating to Costs

118. The current application includes applications under section 20C and paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

The Tribunal's Decision

119. The Tribunal makes no determination in relation to section 20C and paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002, which are yet to be determined.

Reasons for the Tribunal's Decision

120. The Tribunal accedes to the Respondent's request that these applications are dealt with after this determination is promulgated.

Name: Judge Tueje **Date:** 21st November 2023
Amended: 28th February 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 either party wishes to appeal this reviewed 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 reviewed 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).