



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

**Case Reference** : **BIR/OOCN/LIS/2022/0016**

**Property** : **57, 58 and 59 Elmwood Court,  
Edgbaston B5 7PE**

**Applicant** : **James Gallagher, who appeared as a litigant in  
person**

**Respondent** : **John Andrews and Paul Curry  
(Personal Representatives of  
Mr Irving Carter Deceased)**

**Representative** : **Mr Simon Clegg of Counsel instructed by  
The Wilkes Partnership LLP**

**Application** : **Service Charges (Landlord and Tenant Act 1985)**

**Hearing** : **Centre City Birmingham, 25<sup>th</sup> March 2024**

**Tribunal Members** : **Judge Anthony Verduyn  
Mr David Satchwell FRICS**

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**DECISION**

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1. This decision addresses the final disposal of Mr James Gallagher’s application in respect of service charges levied by Mr Irving Carter, until his death, and then by his personal representatives (“the Respondents”) in respect of Elmwood Court in Edgbaston, Birmingham.

#### THE SITE

2. Elmwood Court is a large development combining high and low rise flats, with garages, set in pleasant gardens. It retains much of the characteristic features of the work of its architect, Mr John Madin FRIBA, from completion in or about 1961.
3. Mr Gallagher is the long leaseholder of three flats at the top of the 12-storey block comprised in Elmwood Court. When the Tribunal inspected in December 2023, the block was undergoing extensive works relating to fire safety. Nevertheless, the general appearance of Elmwood Court was of a reasonably well maintained estate. It was consistent with the description we heard at the final hearing of there being a 10-year renovation plan, now in its 3<sup>rd</sup> year, with short-term maintenance also being undertaken. Maintenance has been said to be hampered by issues with the prompt payment of service charges, and the garages and their environs showed some significant wear and tear. The Tribunal noted that car sizes now probably meant most garages were only being used for general storage (in the manner Mr Gallagher used his), if at all. Mr Gallagher’s three flats can be described as being largely stripped out and ready for renovation; although the visual evidence suggested that they had been unchanged for some significant time.

#### THE PROCEEDINGS

4. Mr Gallagher has been engaged in protracted litigation in the County Court with the Respondents over roof repair, in which he has already achieved some significant success in getting works undertaken. The Tribunal is not concerned with the progress of those proceedings, which are largely incidental to the service charge dispute.

5. The application made by Mr Gallagher has demanded a good deal of Tribunal time and resources. Signed, dated and filed 29th April 2022, the application form disputed service charges from 2009 to 2022. For each year, Mr Gallagher required disclosure of documents and challenged whether the Service Charges were fair and reasonable, ought to have been levied on an individual leaseholder, or were properly demanded. Mr Gallagher indicated he was willing to engage in mediation, but that was not progressed. On 8<sup>th</sup> June 2022 Regional Judge Jackson directed a hearing in respect of the early years of the application and their potential striking out. Following submissions made in writing and a hearing of 7<sup>th</sup> December 2022, I struck out the application in respect of service charge years covered by payment made in or before December 2016 by Order dated 31<sup>st</sup> January 2023. The earliest year left under consideration was that with year ending 29<sup>th</sup> September 2017.
6. Directions were issued on 15<sup>th</sup> March 2023. These were important as the application was skeletal and the initial response had been the Respondents seeking a strike out. After that was resolved, an invitation by the Tribunal for mediation was declined by Mr Gallagher. Now the Tribunal directed disclosure of documents by the Respondents by 13<sup>th</sup> April 2023, to be followed by the drawing up of a schedule identifying the item and amount in dispute, the reasons for any dispute and the amount that Mr Gallagher would pay for each item. A statement was required setting out the service charge provisions and legal submissions. Witness statements of fact were also directed. Mr Gallagher's directions were to be completed by 4th May 2023. The Respondents were given reciprocal directions to be completed by 25th May 2023, but with only one column to be added by way of response to the schedule. The matter was then listed for disposal on 7th December 2023, preceded by the site view.
7. At the December 2023 hearing further directions were given. The schedule prepared was unwieldy, running to 52 pages and including numerous items that were agreed (including removal of some late payment fees). Where there was disagreement, this was typically in whole and no rival quotations were provided. Further, there was no supporting statements at all from Mr Gallagher or other witnesses. The Respondents objected that the schedule lacked any particularity and cited HH Judge Rich in Schilling v Canary Riverside, unreported, 2005 LRX/26/2005, Lands Tribunal, emphasising "the necessity for the tribunal to ensure that the parties know the case which each has to meet and for the evidential burden to require tenants to provide the prima facie case of

unreasonable cost or standard”. The Respondents observed by way of a note of submissions that: “[Mr Gallagher] seeks to contend that the sums should not be paid by him because the charges are not reasonable or for some other reason. The burden is thus on him to show that they were not reasonable. To do that he must particularise the manner in which they are not reasonable and support his contention with evidence. He has not sought to do that. Accordingly it is submitted that he does not begin to approach the standard of proof necessary successfully to challenge the invoices which have been raised by [the Respondents].” It was stated that the Respondents had not received any evidence from Mr Gallagher to controvert and could now know what to adduce in any event, for want of particularity in his complaints.

8. The Tribunal found itself in a difficult position and decided to give directions with further disclosure of supporting documents and an updated Schedule to be provided by the Respondents (omitting agreed items) by 29<sup>th</sup> January 2024. Mr Gallagher then had to 19<sup>th</sup> February 2024 to update the schedule to include any challenges to the expenditure accounts in addition to the points already raised and provide “a witness statement explaining his challenges as set out in the schedule, and any legal submissions in support of the challenge to the service charges claimed, including argument, if liability to pay is at issue.” Provision was also made for alternative quotations. The Respondents had to 11<sup>th</sup> March 2024 to reply to the Schedule and provide its own witness statements. The case was relisted for 25<sup>th</sup> and 26<sup>th</sup> March 2024.
9. The Respondents gave very full disclosure and provided revised schedules, as directed, and by service charge year. The new schedule also included a copy of the previous schedule.
10. Mr Gallagher did not address the new schedule or enlarge on the content of the former one. At the hearing he stated that he had difficulty addressing it, but accepted that no such difficulties were notified to the Respondents or the Tribunal. He also accepted that he could use the spreadsheet software that the Respondents had used to provide the schedule. Faced with no comments on the revised schedule, the Respondents had made no additional comments of their own. No rival quotations for works were submitted by Mr Gallagher.
11. Mr Gallagher had attempted to fulfil the direction for the provision of a witness statement, which he confirmed in evidence. The content, however, was of very limited

assistance: there were generalised complaints: e.g. “This application was made as a result of the applicants increased frustration and concerns that the property managers were not maintaining the estate, unnecessary works carried out, works were being repeatedly conducted and the refusal to share ... Maintenance Plans”. Once stripped of irrelevancies (in particular, comments regarding the matters in the County Court proceedings, irrelevant history and his response to the decision of 31<sup>st</sup> January 2023) there was very little identifiable support for the complaints in the original schedule. Mr Gallagher accepts that maintaining Elmwood Court is “Not a simple matter”, but it is hard to discern the substance of his complaints. Mr Gallagher seemed to be asserting a suspension of service charges until roof repairs were to be satisfactorily completed (as yet undone according to Mr Gallagher), but there is little by way of detail. He refers to a bundle of documents attached for reference if required at the hearing. The documents were jumbled and a significant proportion related to years before those still in question. Page numbers were added at the insistence of the Tribunal, but pages were not put in any sensible order.

#### THE HEARING

12. At the hearing, the Respondents sought a strike out under Rule 9 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 (“the “Rules”). The directions issued 8<sup>th</sup> December 2023 had been headed in bold: “Mr Gallagher, the Tenant, is warned that any matters not raised in the schedule and/or statement referred to in paragraphs 3 and 4 below may not be considered by the tribunal at the final hearing.” Paragraph 3 related to the updated Schedule and paragraph 4 witness evidence. In light of the failure to update the schedule and the negligible useful content of the witness statement, the Respondents asserted that they still did not know what case they had to answer. Whilst, it was conceded that the warning may not have been sufficient to invoke Rule 9(3)(a) (striking out for failure to comply with a direction), there was a failure to cooperate, the shortcomings amounted to an “abuse of process” and there was no real prospect of Mr Gallagher now succeeding (Rule 3(2)(b), (d) and (e) respectively).
13. The Tribunal took the view that the warning was insufficient to invoke Rule 9(3)(a) and that the failure to cooperate was not so serious as to warrant striking out. The failure of compliance was also insufficient to be characterised as an abuse of process and there

was little point at a final hearing to go into any detailed assessment of reasonable prospects of success. Even so, the Respondents were considerably disadvantaged in knowing what case they had to meet. The schedule for the December 2023 hearing lacked particulars and the Tribunal had made orders intended to rectify the situation and ensure a fair disposal. The severity of the difficulties for the Respondents was illustrated when Mr Gallagher was invited to explain, as an example, his challenge to one invoice. He selected one relating to repairs (100205399/207) for £132 “Disputed patch repair to long since expired roof” and he referred to: physical condition in the 1990s; scheduled works for 1999; issues in 20014, 2017 and 2020 relating to roof replacement; and, access being afforded through a roof hatch (but not by him). Mr Gallagher’s explanation showed the extent of the difficulties the Respondents and the Tribunal would experience going forward were the December 2023 schedule to be used: the documentation Mr Gallagher wanted to point to was very extensive and unsorted, some of the suggestions were going to be very hard to assess (when was the roof in need of replacement, for example, and why was a patch repair prior to replacement warranted or unwarranted?), and the Respondents were not on sufficient notice for almost all of this detail. Even then, it may also be noted that Mr Gallagher accepted that works done recently were not rendered more expensive by reason of his claimed neglect in the past. The issues were somewhat unclear and the Respondents asserted that they were prejudiced in not having sufficient notice to address the points actually being made (such as they were). The Tribunal having already considered that the schedule presented in December 2023 was inadequate for the purposes of determining the application (hence the provision for a further schedule and witness evidence), and noting that the witness evidence since adduced did not enlarge on it to the extent necessary for the Respondent to know the case it was expected to answer, decided that it was appropriate to restrict Mr Gallagher to matters arising from his witness statement. This was consistent with the Tribunal’s overriding objective to deal with matters fairly and justly and Rule 8(2)(e) (constraining participation after failure to comply with a direction).

14. Neither party supported a further adjournment and the Tribunal considered that this was not warranted in the circumstances and would lead to disproportionate costs and delay.

15. Mr Gallagher confirmed the contents of his witness statement, but the Respondents considered it unnecessary to cross examine him upon it.
16. The Respondents called Mr William Drake-Lee, owner and director of Proxim Property Management Ltd (“**Proxim**”), the appointed managing agent for Elmwood Court from 1<sup>st</sup> April 2019. Mr Drake-Lee was, in fact, an employee of the previous agent for a few months before taking over. Mr Gallagher cross-examined him competently, albeit not in a particularly focused way. Mr Drake-Lee accepted that Elmwood Court was a management challenge, not least because of some dissatisfied leaseholders withholding service charges, including Mr Gallagher. Meetings with residents had been attempted, but largely abandoned as unproductive of useful communications. Indeed, there had been a period where Proxim had required communications with Mr Gallagher to be via solicitors, because of the tensions in relations. Normal correspondence resumed in late 2023. Hand over from the former agent had not been smooth in 2019 and accounts at the time of the transition were only signed off when Proxim was satisfied with them. There was a long term management plan prepared about 3 years ago and in operation, as well as annual works identified when service charge demands were issued. The plan was comprehensive, although made difficult to implement because of shortfalls in payment of service charges. Mr Drake-Lee accepted that there were past roof problems. He did not accept that service charges had been suspended pending roof repairs. In re-examination it was pointed out that Letters of Claim in respect of service charge arrears had been issued to Mr Gallagher in July 2020 and January 2021.

#### DISCUSSION AND FINDINGS

17. At the start of the hearing, Mr Gallagher made clear his concern was that historically works had not been done in a timely manner. He stated that he was not saying that Proxim had over-charged for works. Although his explanation of his case for the invoice for roof repairs suggested that delay have led some bills to be incurred for temporary works, which may have been avoided had full works been brought forward, there was no evidence to substantiate this and Mr Gallagher’s witness evidence did not address this point. The roof had to be repaired at some point, interim measures are not unusual in such circumstances, and the costs of works was not subject to challenge.
18. Mr Gallagher accepted that Proxim was working to overcome historic neglect, which in context means prior to their appointment in April 2019. The evidence of Mr Drake-Lee

was that billing for the period prior to Proxim's appointment was delayed, but completed when satisfied that sums were properly due. There was no discernible challenge to the long term management plan or that it was comprehensive, and short term plans were also actioned appropriately. By the end of the hearing it was difficult to discern what the issues really were for Mr Gallagher, save criticism of the accumulation of works required prior to the period under consideration. Indeed, Mr Gallagher complimented Mr Drake-Lee for being "solution focused" and having devised a plan, albeit not one that entirely excluded some repeated expense. Indeed, at one point Mr Gallagher criticised earlier managers for failing to charge sufficient sums to accumulate a reserve.

19. There is accordingly no basis for the Tribunal to find that the service charges were not reasonably incurred or incurred in respect of services or works that were of an unreasonable standard.
20. The Tribunal notes, however, that some minor concessions were made by the Respondents in the December 2023 schedule. These concessions stand and are unaffected by this judgment.
21. In respect of Mr Gallagher's contention that service charge demands were suspended, this is rejected by the Tribunal. Firstly, it is accepted by Mr Gallagher that demands were first made by Proxim only on the basis that it was satisfied that the sums were due and after time for the provision of accounts was extended. This is inconsistent with a suspension of demands. Secondly, there were two letters of claim from the Respondents' solicitors in 2020 and 2021, demonstrating that no suspension was recognised. Thirdly, it appears that Mr Gallagher was demanding suspension until roof repairs were carried out, but roof issues are addressed in the County Court proceedings and works have been done. There is nothing from Mr Gallagher to suggest that liability to pay was not accepted once the works were done, and they have been. This was not advanced as a case where there was any permanent waiver of the right to demand service charges, and the case for there being an agreed suspension is not made out: Mr Gallagher may have wanted a suspension and acted accordingly, but there is no evidence for either waiver of service charges or a continuing suspension in this case.
22. The application is accordingly dismissed.



## LIMITATION OF COSTS

23. Some leases provide for a landlord to include costs incurred in connection with proceedings before the tribunal as part of a service charge. Section 20C of the Landlord and Tenant Act 1985 gives the Tribunal power on an application to make an order that such costs are not to be included in the amount of any service charge payable by the tenant or any other person specified in the Section 20 application. Mr Gallagher made such an application, and added a similar application under paragraph 5A of schedule 11 to the Commonhold and Leasehold Reform Act 2002 in relation to administration charges in respect of litigation costs. Without determining whether such charges can be applied pursuant to the leases of residential properties at Elmwood court (neither party having identified that they were), the Tribunal declines to make an order under either of these provisions. This is because Mr Gallagher has been substantially unsuccessful in his applications, substantial costs have been incurred in meeting his allegation and he was significantly underprepared for both substantive hearings.

Tribunal Judge Verduyn

4<sup>th</sup> April 2024