FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BE/LSC/2021/0451**
Property	**:**	**Flat 74 Spenlow House, Jamaica Road, London SE16 4SL**
Applicant	**:**	**London Borough of Southwark**
Representative	**:**	**Mr Peter Cremin (in-house lawyer)**
Respondent	**:**	**Mr Warwick Ronald Lowe**
Representative	**:**	**In person**
Type of application	**:**	**For the determination of the reasonableness and liability to pay service charges**
Tribunal members	**:**	**Judge N Rushton KC** **Ms S Phillips**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of hearing	**:**	**19 October 2022**
Date of decision	**:**	**21 October 2022**

DECISION

Decisions of the tribunal

(1) The tribunal determines that:

a. A service charge of **£543.51** is payable by the Respondent, Warwick Lowe, to the Applicant, the London Borough of Southwark, in respect of the balancing charge for the major works in the service charge year 2014/2015.

b. No other service charges are payable by the Respondent in respect of those major works, in any service charge year.

c. It was not reasonable for the service charge apportioned to the Respondent to include £700.97 or any sum in respect of works to the private balconies carried out as part of the major works, given that his flat does not have a balcony.

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

(3) As to the Applicant's application under to rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**the 2013 Rules**") to recover the tribunal fees of £300 which it has paid for the application and hearing, the tribunal orders that these shall not be recoverable from the Respondent.

(4) This matter is to be transferred back to the County Court in relation to any outstanding matters, but the tribunal gives the indication (at the invitation of the parties) that it does not consider that any of Southwark's costs (specifically the issue fee of £70) or the interest claimed should be recoverable by Southwark from Mr Lowe, given the findings it has made.

The claim and application

1. The Applicant, the London Borough of Southwark ("**Southwark**") issued proceedings in the County Court (claim number G1QZ6504) on 7 January 2020 for service charges of £1,244.48 plus interest of £39.41 (increasing at a daily rate of £0.20) and issue fee of £70, against the tenant of Flat 74 Spenlow House, Jamaica Road, London SE16 4SL ("**the Flat**"), who is Mr Warwick Ronald Lowe ("**Mr Lowe**").

2. Mr Lowe occupies the Flat under a 125-year lease dated 14 July 2003 ("**the Lease**") which he bought from the previous owner, Ms Raquel Meseguer on about 13 November 2015. The lease includes provision for payment of variable service charges by way of quarterly payments on

account, and a balancing charge based on a final account after the end of the year.

3. Mr Lowe disputed his liability to pay the service charges by a Defence dated 5 March 2020. He challenged payability on grounds both of the reasonableness of the allocation of service charges to him and Southwark's delay in demanding the charge from him.

4. On 2 December 2021 District Judge Bell, sitting at the County Court at Clerkenwell and Shoreditch, made an order which provided "*Transfer to First Tier Tribunal (Property Chamber)*". Following transfer, the case was given the FTT (Property Chamber) reference LON/00BE/LSC/2021/0451.

5. On 24 June 2022 Judge Martynski issued directions which provided that the tribunal would decide the question of reasonableness and payability of the service charge at a hearing on 19 October 2022. The directions provided among other things for Southwark to provide a statement of case responding to Mr Lowe's Defence and to prepare a hearing bundle, both of which were done.

6. The tribunal's determination of reasonableness and payability is made under s.27A of the Landlord and Tenant Act 1985 ("**the 1985 Act**").

7. The Flat is one of 81 flats in the building, Spenlow House, which is owned by Southwark. The occupiers of the flats are a mix of private long-leaseholders and council tenants.

8. The obligation on Mr Lowe, as the current tenant, to pay service charges is set out in clause 3(a) and (b) and the mechanism for the service charge is in the Third Schedule to the Lease. The service charge year runs from 1 April to 31 March.

9. Extracts of relevant legislation are set out in an appendix to this decision.

The hearing

10. An in-person hearing took place on 19 October 2022. Southwark was represented by its in-house lawyer Mr Peter Cremin, who was accompanied by Mr Shaun Nicholson, who was the witness for Southwark. Also at the hearing was a Mr Rehigio Esposito, attending from Southwark as an observer. Mr Lowe represented himself and was accompanied by his partner, Mr Igor Derihiz. The hearing started at about 10.10am and ended at about 11.30am.

11. Mr Cremin informed the tribunal that the maker of the witness statement on behalf of Southwark which was in the bundle, Mr Trevor

Wellbeloved, was unwell, and Mr Nicholson was attending to give evidence in his place. Mr Nicholson explained that he and Mr Wellbeloved were both managers for the two teams which oversaw construction works and he was able to confirm the evidence in Mr Wellbeloved's statement. In those circumstances, and with no objection from Mr Lowe, the tribunal permitted Mr Nicholson to give evidence in place of Mr Wellbeloved.

12. Mr Nicholson accordingly gave evidence for Southwark (confirming Mr Wellbeloved's statement) and Mr Lowe had the opportunity to cross examine him. Mr Nicholson also answered questions from the tribunal. Mr Cremin presented Southwark's case as to the payability of the service charges. Mr Lowe presented his own case and answered questions in cross examination from Mr Cremin and also questions from the tribunal.

13. The tribunal considers that both witnesses gave straightforward and credible evidence and were doing their best to assist the tribunal, very little being in dispute on the facts. It has referred to the oral evidence of the witnesses as relevant below.

Issues

14. The issues between the parties are:

    (i) Whether it was fair (under the terms of the lease) and reasonable (as a matter of the tribunal's jurisdiction to review service charges) for a proportion of those costs which were incurred in relation to the private balcony works to be apportioned to the Flat.

    (ii) Whether Southwark's delay in rendering the final account and balancing charge means that it is not payable, whether because it is time-barred or by reason of estoppel.

15. There is no dispute that the private balconies do not form part of the demise under any lease and so form part of the structure of the building which Southwark has the responsibility to repair and maintain under the terms of the various leases. Under the Lease, the repair and maintenance obligation is to be found in clause 3(2) and (3). If this was not the case, Southwark would not have had the ability to recharge the cost of the works to the balconies to any leaseholder.

16. However this alone does not answer the question of whether it was fair or reasonable to charge to the owner of the Flat any part of the cost of the works to the private balconies. In relation to apportionment, paragraph 6 of the Third Schedule to the Lease states:

"*6(1) The Service Charge payable by the Lessee shall be a fair proportion of the costs and expenses set out in paragraph 7 of this Schedule [which is all costs and expenses among other things of maintaining the building] incurred in the year*

(2) The Council may adopt any reasonable method of ascertaining the said proportion and may adopt different methods in relation to different items of costs and expenses."

17. Southwark has generally (but not exclusively, as explained below) adopted a weighted bed method of allocating service charges, and has applied 4/482 units to the Flat.

Factual background

18. Mr Cremin explained that the outstanding service charge was a balancing charge of £1,244.48 from major works known as the "Dickens Warm Dry Safe" programme. Those works were carried out in about 2014-2015 and included fire safety works, repairs to roofs, drainage and rewiring, as well as the repair and renewal of the asphalt surfaces of the private balconies attached to many of the flats. The total cost of the major works was £4,018,658.94 according to the draft final account notified to leaseholders on 9 January 2019 (which was in the bundle).

19. It was only the charge in respect of the works to the private balconies which was contested by Mr Lowe. This was on the basis that his studio flat did not have a balcony. He did not contest the charge for any other part of the works (except he said there had been an excessive delay in issuing the final balancing charge).

20. The service charge account for the Flat was in the bundle. Charges for the major works were shown as a separate item from the usual annual charges. The account records show that an on-account charge of £6,221.22 was debited on 22 January 2014 (the account then being held by Ms Meseguer). She chose to discharge this by four quarterly payments in that service charge year, the final one being made on 30 December 2014. This discharged the on-account service charges in full.

21. The tribunal notes that the service charges for the major works must therefore have related to the service charge year 2014 to 2015 (and not 2013/2014 as stated in the Particulars of Claim). This appears to have been the case even though the costs were spread by Southwark over 3 of its financial years (as is apparent from the invoice dated 22 January 2014 for the on-account charge), and leaseholders had the option of spreading payments over 3 years (which Ms Meseguer did not take up). The tribunal has therefore treated this application as made in relation to the 2014/2015 year.

22. There was then a long delay before the final account was prepared. A final balancing charge of £1,244.48 for the major works was debited from the account for the Flat (by then held by Mr Lowe) on 15 May 2019.

23. Accordingly, the total charge for the major works which was assessed as being payable by the owner of the Flat was £7,465.70. The draft final account of 9 January 2019 shows that this total was made up of £4,291.01 for the major works to the building; £1,799.26 described as costs for the Flat's "front entrance door"; £696.73 professional fees and £678.70 administration fee.

24. The tribunal invited Mr Nicholson to explain and calculate what proportion of this £7,465.70 related to the private balcony works. Included with the bundle was an Excel spreadsheet which set out the total costs of the various parts of the works. Mr Nicholson showed the tribunal that £68,905.83 was the total cost of the balcony works. This was approximately 10.54% of the whole cost of the major works. Applying the same method as had been used to calculate the total service charge, 4/482 units equated to £571.83 for the private balcony works, to which he said should be added a proportional part of the professional fees and administration fees, making a total of £700.97.

25. Accordingly, the amount which Mr Lowe had been charged which related solely to the (total) costs of the private balcony works was **£700.97**.

26. Since the unpaid balancing charge was £1,244.48, this meant the difference of £543.51 related to the rest of the major works. The tribunal asked Mr Lowe if he accepted that he was liable to pay this difference and Mr Lowe agreed that he was (subject to the argument about whether the balancing charge had been demanded too late).

27. As to his objection to paying for the costs of the private balcony works, Mr Lowe explained that there were only 3 flats out of 81 which did not have a balcony (his was a small studio flat). He did not consider it was fair that he should have to contribute to the cost of repairing the balconies when he had no use of them. He said there were no communal balconies and the walkways had not been repaired as part of these works.

28. The bundle also included a letter dated 21 November 2013 from Southwark to Ms Meseguer, responding to her objection to having to contribute to the cost of the repairs to the private balconies. Southwark's justification was simply that the balconies formed part of the structure of the building and not the demise to the flats, and so was part of Southwark's responsibilities to repair. However, as already explained, while this may be necessary to justify recovery through the service charge, it is not in the tribunal's view sufficient.

29. Mr Nicholson agreed that leaseholders treated their balconies as a private part of their flats, and indeed frequently did not accept or understand that they were not strictly speaking part of their demise, so that there were issues for example with excessively heavy plants being kept on balconies.

30. The tribunal also enquired about the treatment of front doors. Mr Nicholson and Mr Cremin agreed that the front doors of flats were not part of the demise in each case either, but about 10 years ago a decision had been taken to allocate the costs of repair or replacement of any front door to the owner of that particular flat. Prior to that the costs had been treated in the same way as repairs to other parts of the structure. However, they explained that there had been a lot of issues both around fire safety and with householders replacing their own doors (believing them to be their own) and then becoming upset if Southwark found it necessary to change the doors. Also some tenants damaged their doors while others maintained them well. Therefore only the costs relating to their own door were now allocated to a leaseholder, since in some cases no costs were incurred and in others, significant costs. In the case of the Flat, there had been repairs to the front door and Mr Lowe as owner of the Flat had been charged a final sum of £1,799.26 for front door works.

31. In relation to the service of demands for the service charges, the bundle included a series of notices served annually by Southwark pursuant to s.20B of the 1985 Act (from 2014 to 2018) giving an update each year on the total costs incurred to date on the major works. Mr Lowe agreed that he had received these notices.

32. Mr Lowe also explained that a retention of £1,000 had been kept by his lawyers when he bought the Flat, from which it had been intended that any balancing service charge for the major works would be met. However, when he contacted his lawyers after receiving the final account in 2019, he discovered that they had released this money back to the seller without his authorisation a couple of years earlier. Upon being contacted, Ms Meseguer had refused to cover those costs, saying it was too late for him to demand that she do so. His lawyers had failed to give any good explanation for their decision to release the funds, but he had given up on trying to get recompense from them. In response to cross examination by Mr Cremin he said he had not made a formal complaint as they had shown no interest. They had asserted they had spoken to him but had no proof. Mr Lowe also confirmed, in response to a question from the tribunal, that there was nothing that Southwark had said or done which had caused him to believe that it would not pursue the balancing charge, it was just the length of the delay.

33. In response to a question from the tribunal as to why it had taken Southwark 4 years to finalise the account and issue demands for balancing charges, Mr Nicholson said that there were often issues with signing off the final costs and he said there were changes in the costs until

July 2017. However, he agreed that it appeared that the final account had been agreed by about September 2017.

34. Having considered the oral evidence and submissions by or on behalf of the parties, and the documents which were in the bundle, the tribunal has made determinations on the issues between the parties as follows.

Reasonableness of charging costs of the private balconies

35. The tribunal has concluded that it was not reasonable for Southwark to have charged any part of the costs of repairing or maintaining the private balconies to the Flat, and so to Mr Lowe, because the Flat did not have a balcony and he had no use of any such balcony.

36. While of course there are frequently parts of the structure of a building which are not used by particular tenants, or from which some tenants receive less benefit than others (Mr Cremin gave the example of the roof, by tenants who do not live on the top floor), the tribunal considers that private balconies fall into a different conceptual category. They do not provide support or protection to the occupants of the building as a whole; rather they provide amenity value to the occupant of the particular flat.

37. The tribunal considers that the position of the balconies is far more comparable to the front doors, where Southwark has already decided to allocate to the particular tenant the costs relating to their own door, depending on how much if any work was required. This also illustrates that Southwark is quite readily able to allocate certain costs only to those tenants whose flats require work. In addition, Mr Nicholson was readily able to separate out the costs of the works to the private balconies from the costs of the whole works, since it was a separate head of cost. The tribunal considers that this exercise could easily have been done as part of calculating the balancing charges, allocating the costs of the balcony repairs only to the 78 flats which had balconies.

38. Southwark had a discretion under the Lease in deciding how to allocate the costs of the repair works to the private balconies. However the tribunal's conclusion is that a decision to allocate those costs to flats, including the Flat, which did not have a balcony at all, was not one which was within the range of reasonable decisions open to them. This is especially so since paragraph 6(2) of the Third Schedule expressly recognises that Southwark may apply different allocation approaches to different costs. In the tribunal's view this was an unfair and unreasonable decision (and so did not comply with clause 6 of the Third Schedule) and so this element of the service charge has also not been reasonably incurred so far as the Flat is concerned, for the purpose of s.19(1) of the 1985 Act.

39. Mr Lowe agrees that the balance of the outstanding service charge is payable (subject to the point on delay) so the tribunal assesses the reasonable amount of the balancing charge as **£543.51**.

40. The tribunal notes however that it was not until the oral hearing that Southwark's witness carried out the exercise of calculating what proportion of the outstanding service charge related to the private balcony works, and what part did not. Mr Lowe was not told or given the option of paying at least this sum of £543.51 prior to the hearing. In principle therefore and given the findings it has made, the tribunal considers that it would not be right for interest to be charged to Mr Lowe on this outstanding sum, although it recognises that this is a matter for the original County Court claim.

Payability of the service charge and delay

41. The tribunal considers that there has been a surprising and, on the face of it, possibly unreasonable delay in the finalising of the account and calculation of the balancing charge in this case, which has not been properly explained by Southwark.

42. In practical terms this has had an impact on Mr Lowe because the works were carried out before he bought the Flat and the retention which was intended to cover the balancing charge has long since been returned to the seller, without his consent.

43. However, the tribunal accepts that Southwark has served a series of valid notices of the amount of the incurred costs, between 2014 and 2018, before the final account was served in January 2019. The tribunal concludes that these have been effective to extend time for recovery of the balancing charge, pursuant to section 20B(2) of the 1985 Act.

44. In addition, it does not consider that Southwark is estopped from recovering the balancing charge from Mr Lowe. Mr Lowe agreed that there was no word or action of Southwark which had led him to believe that the charge would not be pursued, which is a necessary element of any estoppel. Silence alone is not sufficient, and in any event there was not silence in this case, as a series of s.20B notices were served which indicated that Southwark intended to pursue a balancing charge.

45. Accordingly, the tribunal has concluded that the balancing charge of **£543.51** remains payable by Mr Lowe and is not time-barred or otherwise irrecoverable.

Tribunal fees and County Court claim

46. Southwark has applied for an order under rule 13(1)(b) of the 2013 Rules that Mr Lowe be ordered to pay its £300 of fees for the tribunal

application. The tribunal declines to make such an order, because Mr Lowe has been successful on the main substantive issue between the parties and was never told or given the opportunity to pay the element of the balancing charge which the tribunal has concluded is payable by him.

47. Mr Cremin invited the tribunal to exercise the jurisdiction of the County Court, if it was able to do so, and deal with the outstanding elements of issue costs of £70 and interest (now calculated by him to be £203.20 for 1003 days, on the full sum of £1,244.48).

48. The tribunal has concluded that it does not have the jurisdiction to do so, and orders that this matter now be returned to the County Court. However, for the assistance of any future District Judge, it would indicate that in its view, it would not be appropriate for Southwark to recover its issue fee, given its findings as set out above, and it would not be appropriate for it to recover any interest bearing in mind both the tribunal's findings and the very lengthy delays by Southwark in bringing this matter to a resolution.

Name: Judge Nicola Rushton KC **Date:** 21 October 2022

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).

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -

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

(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination –

(a) in a particular manner; or

(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on [the appropriate tribunal] in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.]

Section 20B

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

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.