FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AG/LSC/2023/0289**
Property	**:**	**Flat 22 Bracknell Gate, Frognal Lane, London Nw3 7EA**
Applicant	**:**	**Mr Ian Rose**
Representative	**:**	**Mr Hassanally Counsel**
Respondent	**:**	**Bracknell Gate Properties Limited**
Representative	**:**	**Mr Upton Counsel**
Type of application	**:**	**For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985**
Tribunal members	**:**	**Judge H Carr** **Mr J Naylor FRICS FIRPM**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**7th May 2024**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the applicant's share of the sums demanded in connection with the estimated costs of works to be carried out by ARC, Monalco, Carbogno and Bawtrys in respect of the estimated service charges for the major electrical and associated works are payable by the applicant.

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

(3) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of estimated major works costs.

The hearing

2. The Applicant appeared in person at the hearing and was represented by Mr Hassanally of Counsel. Also in attendance on behalf of the Applicant were Mr Toby Vanhejan, a barrister who explained he was not acting in his professional capacity at the hearing, Ms Valerie Wilson, a flat owner, and Ms Tant, the expert instructed by the Applicant.

3. The Respondent was represented by Mr Upton of Counsel instructed by Dale and Dale Solicitors. Mr Peter Elliot, a Director of the Respondent Company, was in attendance and gave evidence on its behalf, as did Mr Alexander Marshall-Clark from Bawtrys Estate Management Ltd (Bawtrys), the managing agents of the property.

4. Immediately prior to the hearing the parties raised three preliminary matters for the consideration of the Tribunal;

(1) the Applicant's application to rely on an addendum report prepared by Ms Tant

(2) the Respondent's application to rely on the evidence of Alex Marshall-Clarke in place of Mr Nick Edwards (both of whom are employed by Bawtrys)

(3) The Respondent's application to include an updating report on the position re the electrical works.

5. The Applicant had no objection to the statement of Mr Marshall-Clarke although he did ask why the original witness was not available as dates had been circulated some time before the hearing.

6. He raised an objection to the updating report on the electrical works.

7. The Respondent objected to the addendum report as there had been no opportunity to take further instructions on its contents.

The Tribunal's decision

8. The tribunal determined to allow all three documents.

The reasons for the Tribunal's decision

9. The tribunal did not consider that the evidence of Mr Marshall-Clarke would differ significantly from that of Mr Nick Edwards. The updating of the state of the electrical works would benefit the tribunal and the tribunal did not consider that it would prejudice the Applicant. The tribunal noted what the Respondent said about the addendum to the expert report but determined to allow the additional report. If it became evident that the contents were prejudicial to the Respondent applications could be made in relation to this report.

The background

10. The property which is the subject of this application is one of 25 flats within three 1930s mansion blocks. A, B and C at Bracknell Gate. 24 of the flats are leasehold and one flat, formerly the porter's flat (in block A) is owned by the respondent. The applicant's flat is Flat 22 which is in Block C. The amount of service charge payable depends upon the size of the flat. Flat 22 pays 4.95% of the service charges demanded.

11. The respondent is the freeholder of the building and a resident owned freehold company. Its shareholders comprise all the long leaseholders of the 24 flats in the building.

12. The current managing agents are Bawtrys who were appointed on 1st February 2023. Their fixed term agreement came to an end on 30th January 2024. A new contract was entered into on 31st January 2024.

13. The previous managing agents were Michael Richards & Co who, the Respondent says, failed to provide a full handover of the respondent's records.

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

15. The applicant holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The applicant acquired his leasehold interest in 2013.

The issues

16. At the start of the hearing the parties narrowed the relevant issues for determination as follows:

    (i) The reasonableness and payability of the estimated costs of major works to upgrade the electricity to the blocks including the costs of the professionals used in these works. In particular the applicant challenges

        a. The demand of £331, 019,70 to pay ARC Group London for proposed electrical works

        b. Carbohno Ceneda Architects Ltd (£8,953.00)

        c. The Monalco Partnership charges of £12,438

        d. Bawtrys - £6620.39

17. The parties also asked for a recording of their agreement on the liability of the applicant for reserve fund payments.

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

The reserve fund

19. The parties asked the tribunal to record that they had agreed that the applicant was not liable for reserve fund payments demanded on the basis either that the payments were not lawfully demanded or that if the payments were demanded of the Applicant in his capacity as shareholder of the Respondent company, fall outside of the jurisdiction of the FTT.

20. The respondent reserved its position as to whether the lease allowed for the creation of a reserve fund relying on the authority.

The tribunal's decision

21. The tribunal determines that applicant is not liable for service charges in respect of payments to the reserve funds demanded in previous years.

Reasons for the tribunal's decision

22. This was agreed between the parties.

23. The tribunal makes no determination on the issue as to whether a reserve fund power is contained in the lease. It heard no arguments on that matter.

The charges for the proposed electrical works

24. There is no disagreement between the parties about the necessity for the electrical works.

25. The parties are also agreed that no statutory consultation was followed in relation to Monalco, Carbogno or Bawtrys.

26. The lease at Clause 3(3) requires the respondent to maintain and keep the wiring in the Building in good condition. There is no dispute about the obligations under the lease.

27. The respondent – and the applicant has produced no evidence to the contrary - says that the electrical works are required to replace the current outdated electrical wiring which includes the replacement of the main electrical head fuse board, distribution board and cabling and other associated work. The respondent's position is that the wiring in the building has not been upgraded since the blocks were constructed in the 1930s and requires replacement of the main electrical supplies.

28. Shortly after Bawtrys were appointed on 1st February 2023 the respondent asked them to proceed with the rewiring of the electrics project on the basis that the current electrical works fail to conform to current standards.

29. Mr Elliott, Director with the respondent, provided the tribunal with a full explanation for the works, what had already happened in connection with the works, and set out what he considered would be the next steps following the difficulties revealed by the UKPN works and how the respondent is planning to deal with the current shortfall in finances as a result of not all leaseholders contributing.

30. Mr Elliott provided the tribunal with a copy of a letter provided to the leaseholders on 27th March 2024. This letter updated the position with the works. In particular it explained how it was going to respond to the the discovery by UKPN of a sub-surface conduit bridge connecting blocks A and C which was undocumented. The letter explains that multiple options had been considered, and bearing in mind the costs and complexity of execution, the course of action is now as follows:

    (i) Arc will complete all re-wiring inside the blocks and upgrade the equipment first.

    (ii) When Arc's rewiring is complete, UKPN will come back to the site, disconnect the power and will be drilling through the concrete to put new cable.

    (iii) In parallel, the re-connection of new cables and equipment will be taking place on the same date.

    (iv) If work is undertaken in a well-coordinated manner between Arc and UKPN this should be completed within one day minimising the time of Bracknell Gate without power.

    (v) Once the project is completed, the maps/UKPN lease may need to be amended to reflect the actual situation and presence of sub-surface conduit bridge.

The ARC Group charges of £331,019.70

The applicant's arguments

31. The applicant has been served with a service charge demand for £14,406.85 on account for his share of estimated charges of £331,019.70 to be paid to ARC for proposed electrical works.

32. The applicant argues that the works are not reasonable. He argues that there is no evidence such as an electric report or electrical safety certificate to show that the works are required, necessary or are a Service Charge item recoverable under the lease.

33. He argues that there has been a failure to consult appropriately. He relies upon an expert report plus an addendum report prepared by Ms Tant discussed below.

34. He says that ARC's tender is not on a like-for-like basis and that their costs are not based on the proposed schedule of works. For instance, he says, they have not quoted for the reinstatement works once the project

is completed. He suggests that their price cannot be compared with other tenders.

35. He says that ARC was awarded the contract instead of GS, but the GS tender was nonsensical because it priced unnecessary items including an arbitrary provision sum which is irrelevant for this type of project.

36. He points out the value of consultation. As a result of even the limited consultation that took place and the objections from the Applicant and from Ms Wilson money has been saved

37. He says that the sum of £331,019.70 is unreasonable. He points to overlaps in provision between the various contractors.

The expert reports prepared for the applicant.

38. Ms Tant of Tant Building Surveying Ltd prepared two reports for Mr Rose. One is dated 1st February 2024, the other dated March 25th 2024. The second report is described as an addendum report as it refers to information provided in the supplemental bundle prepared by the respondent which had not been considered by Ms Tant at the time of her original report.

39. The reports contained a careful analysis of the documentation provided that informed the consultation process.

40. Ms Tant observes in connection with the works in her initial report that whilst in her opinion the costs are high there is a clear need for the works. She does not understand why only three quotes were obtained given the size of the project particularly as one contractor dropped out part way through. The difference between the two tender sums received is £142,628.10 which is a difference of around 150% and for the addendum works the difference is £187,735.32 a difference of around 80%. She suggests that the tenders are not proportionate and that a third tender should have been obtained or a full cost assessment undertaken.

41. She states that it has not been possible to analyse the tenders as none of the tenders have quoted on a like for like basis and two contractors not even tendering in the prescribed format.

42. She is unclear about the involvement of Kubic, a different contractor, in testing the value for money of the ARC tender.

43. Ms Tant also says that when there is a change in scope of works there should be re-consultation. She suggests that the decision not to go ahead with the tarmacking is a substantial change and therefore there should be re-consultation on the works.

44. The conclusion of the addendum report was as follows:

> 4.1 The evaluation of these additional documents has made the process more confused with the main areas of concern being that these two additional tenders have not been tendered on the same basis as the original tendering 9 contractors. The new documentation for these two contractors has been based on a schedule of works dated 2nd July 2023 which is after the date of the Notice of Estimates which was dated 19th June 2023. Therefore, these tenders have not been summarised nor shared with the leaseholders to enable scrutiny.
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> 4.2 In addition, the schedule of works sent to the two new contractors has been materially changed from the original to include an Addendum A. However, this Addendum A contains different works to the Addendum A that was sent to the original tendering contractors on 14th May 2023.
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> 4.3 The drawings that were included in one of the tender returns by the new contractors has not been included in the other tenders and were not included in the original tender package. In addition, these drawings do not have a consultant's stamp on them and therefore it is impossible to know who has drawn them, the date of the drawings and to what they refer to.
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> 4.4 Lastly, these two additional tenders do not contain contractor names apart from Arc being named at the bottom of one of them although this appears to have been added to this document as the format is different to the remaining document. The dates of the submission have also not been included and the tenders are unsigned which does raise concerns as to the validity of these tenders.

The respondent's arguments

45. The respondent considers that the estimated charges for the major works are reasonable and payable.

46. The respondent says that the applicant whilst on the Board prior to November 2015 introduced the need for the electrical works to be carried out and has continued to insist on the need for the works. The respondent also referred to an audit report dated 10th December 2017 which recommended a 'programme of rewiring of the distribution circuits (VIR cables) to each apartment'.

47. A consultation processed was followed between 2019 – 2021 run by the previous managing agents.

48. The respondent says that the work was urgent because the Buildings insurance policy did not contain any fire cover. The respondent was unable to obtain full insurance coverage to include fire cover because of the need to upgrade the electrical wiring. The respondent has now obtained fire cover for the building, but strictly on the basis that the electrical works be carried out quickly.

49. The respondent's intention is to proceed with ARC as the main contractor. In response to the applicant's argument that the tenders are not on a like for like basis the respondent says that the contractors who were invited to tender were all given the same specification.

50. Following completion of the formal statutory consultation process the respond informally approached another contractor KUBIK and invited them to tender. This was to ensure that the quote from ARC was a competitive quote. The quote came in much higher than ARC's quote. On that basis the respondent did not feel the need to re-serve the notice of estimates on the leaseholders.

51. The applicant has contested the cost of the tarmac works to the courtyard. ARC is not now proceeding with the proposed tarmac works which will render the quote much cheaper. The respondent is going to pursue a cheaper alternative in the form of rubber tiles which it considers are a better solution.

Carbogno Ceneda Architects charges of £14,052

52. The applicant says that there was a failure to consult on this payment and therefore the charges are not payable. The applicant's liability is limited to £250 for this work.

53. The applicant also argues that it is unclear what the sum relates to. This is because there has been no tender, no other quotes have been made and there has been no disclosure of the proposed contract. He argues that therefore it has not been lawfully demanded as a service charge under the lease.

54. The applicant also argues that the amount is not reasonable. He says that Carogno Ceneda are the wrong type of contractor. He argues that an M and E consultant should have been used. The proposed drawing only shows the ground floor indicative locations and is therefore useless for the flats above.

55. The applicant further argues, and his expert agrees, that in the financial year ending June 2022 Carbogno Ceneda were paid £8,953 for works in relation to the proposed electrical works and the refurbishment of the common parts. He says they were instructed to design how the wiring was going to run into each flat. The applicant says this is unlawful

because the length of time they have been working for the respondent means that the arrangement is a qualifying long-term agreement and because there was no s,20 consultation and no dispensation obtained the applicant's liability is limited to £100 for this work.

56. The respondent has failed to disclose the contract so that the applicant is unable to assess the nature and scope of the works.

57. The applicant also asserts that the amount is not reasonable.

The respondent's arguments

58. The respondent says that it employed Cabogno Ceneda Architects as the architect in relation to the electrical works to prepare the plans which formed part of the specification prepared by the electrical consultants the Monalco Partnership LLP.

59. The respondent argues that the work to be done by Cabogno Ceneda Architects is not covered by the consultation requirements as they are neither qualifying works, a qualifying long-term agreement or qualifying works under a long term agreement.

60. Mr Elliott when asked by the tribunal said that Cabogno Ceneda Architects were paid for specific items of work; if work was not carried out over a particular period then Cabogno Ceneda Architects would not be paid.

The Monalco Partnership charges of £12,438

61. The applicant says that the Monalco Partnership charges in connection with the electrical works are not payable because there was a failure to consult at all on that element of the works. Therefore, the applicant is limited to £250 for this work.

62. The applicant says that it is unclear what the sum relates to. This is because there has been no tender and no other quotes have been obtained.

63. The applicant also argues, and his expert agrees, that Monalco are not the correct type of contractor for the works. He argues that an M&E consultant should have been used.

64. He says that three of their drawings were done so late that they could not be used for the tender. His expert notes that three of the drawings are dated 20th June 2023, after the date of the tender analysis. It is therefore

unclear how the tendering contractors could have used the three drawings when preparing their tenders and why there were drawn so late.

65. The respondent says that it instructed Monalco to deal with the technical aspects and design of the works. Monalco prepared the specification and schedule of works and drawings used for the competitive tender exercise in 2023.

66. The respondent's response to the applicant's allegation of failure to consult, is to argue that there is no requirement to consult on this type of contract. It points out that the statutory requirement is limited to 'works on a building' which ' comprise matters that one would naturally regard as being 'building works': see *Paddington Walk Management Ltd v Peabody Trust* [2010] L. & T.R. 6 at [92]. This means that in general, "qualifying works" do not include the cost of related professional fees: Marionette Ltd v Visible Information Packaged Systems Ltd [2002].

67. Monalco prepared the specification and schedule of works and drawings used for the competitive tender exercise. The respondent says that in the light of the case law it was not required to consult in relation to the cost of these services. The respondent says that in the absence of any evidence that the work was not carried out to a reasonable standard, the applicant's argument that Monalco were the 'wrong type of consultants' is without merit.

68. The respondent also states that it was plainly necessary for the work to be carried out. The applicant has adduced no evidence that the costs were not reasonably incurred.

Bawtrys - £6620.39

69. The applicant argues that this money is not payable because it has not been subject to s20 consultation procedures. He says that his liability is limited to £250.

70. There has been no disclosure of the proposed contract. This means that it is entirely unclear what the sum relates to.

71. The amount is inconsistent with that set out in Appendix 1 of Bawtrys' contract dated 10th January 2023.

72. The applicant also argues that the amount is not reasonable. He says that Bawtrys are the wrong sort of contractor and that an M & E consultant should have been used.

73. He also argues that because Bawtrys were appointed on 1st February 2023 for the annual sum of £7,500, that if the contract continues after 30th January 2024 it will be a qualifying long-term agreement and will require consultation. No consultation has occurred and therefore the liability is limited to £100 per annum.

The respondent's arguments

74. The respondent says that the sum of £6.620.39 in connection with the electrical works is Bawtrys' costs for dealing with contract administration. This involves serving statutory consultation notices on the leaseholders reporting to the respondent on the observations, liaising with the contractors who have been invited to tender and co-ordinating the works once the works start. It says that there is no overlap or duplication in any work carried out by Bawtrys. The costs are set out in the management agreement.

75. The respondent repeats its argument about the contract not requiring consultation because the works Bawtrys will carry out in relation to the project are not building works.

76. In connection with whether or not the contract requires consultation as a QLTA, the respondent says that the contract is not a QLTA because the agreement between the parties sets out the length of the agreement as twelve months less one day.

The tribunal's decision

77. The tribunal determines that the applicant's share of the sums demanded in connection with the estimated costs of works to be carried out by ARC, Monalco, Carbogno and Bawtrys in respect of the estimated service charges for the major electrical and associated works are payable by the applicant.

Reasons for the tribunal's decision

78. It is clear to the tribunal that the proposed major works to the electrical wiring needs to be carried out. It notes what the respondent has said about the difficulties it has faced in getting insurance. The respondent has provided evidence of the necessity for the works and the applicant's own expert agrees that the works are necessary.

79. It is also clear that it is a major and complex project the parameters of which have not yet been fully determined. It notes, for instance, the unexpected developments that have emerged from the work carried out by UKPN. This is consistent with the provision at this stage of estimated costs.

80. It also notes that at this stage the challenge is to estimated costs.

81. The tribunal was impressed with the evidence of Mr Elliott who demonstrated a very good grasp of the complexities of the project and, despite being subject to extensive and robust cross examination was able to provide very clear explanations of the decision-making process.

82. The primary challenge is to the estimated service charge demand for monies to pay ARC. The tribunal agrees with the respondent that the applicant has failed to demonstrate a *prima facie* case that the estimated charges were unreasonable - *2 St John's Road (Eastbourne) Management Co Ltd v Gell* [2021] EWCA Civ 789. It is simply not sufficient to assert that the charges are unreasonable; there must be some evidence in support of this. No substantive evidence was provided as to reasonableness.

83. In relation to the applicant's position that the consultation process has been flawed in relation to these works, the tribunal has taken into account the expert reports of Ms Tant. It notes her conclusions, that the consultation process was not followed properly. The problem appears to be that she considers that there was a significant failing because two of the tendering contractors did not follow the Schedule of Works but created their own specification which meant it was difficult to compare the tenders. It notes that she considers that there should have been statutory consultation in relation to the Carbogno and Monalco contracts on the basis that the works exceeded the consultation threshold and that the contracts lasted for longer than 12 months. However it does not agree with Ms Tant that the problems she identifies means that the applicant's costs are limited to the statutory levels. This is for the following reasons.

    (i) The tribunal accepts the argument of the respondent that the work done by Monalco and Carbunko fall outside of the statutory requirements. The first issue is that it is not the period of time for which these firms worked for the Respondent but whether there was an agreement which was capable of lasting more than 12 months which would mean that the contracts were QLTA. Mr Elliott gave evidence that the contractors were only paid when specific tasks were carried out. This means that these contracts could not possibly be classified as QLTA.

(ii) In addition the tribunal agrees with the respondent that the works they carry out fall outside of the scope of the consultation because they do not relate to building works.

84. Moreover the applicant has provided no basis for suggesting that these two contractors were inappropriate or that the work that they were contracted to do was not necessary. It is not sufficient to assert that they were required to be M and E contractors; this needs to be supported with evidence.

85. The tribunal spent more time considering the position of Bawtrys. The decision of *Corvan v Abdel Mamoud* makes it clear that what is required for the statutory consultation requirements to apply is that on a proper construction of the agreement the agreement must last for more than 12 months.

86. The relevant provisions of the contract between Bawtrys and the Respondent are as follows:

(i) The agreement states that it commences on 1st February 2023 and is for a term of twelve months less one day

(ii) Clause 7.01 of the agreement states that 'This agreement will end at the expiry of the Term following service by either Party of notice in writing on the other party giving not less than three months notice. For the avoidance of doubt a notice to terminate can be served after 9 months of the Term have expired.

87. Whilst clause 7.01 is confusing the tribunal considers that it must be read alongside the clause stating that the term is twelve months less one day. The tribunal therefore determines that the intention of the parties is that the agreement lasted for less than 12 months and that it was an agreement that the parties intended should be excluded from the statutory consultation requirements.

88. This interpretation is consistent with the behaviour of the parties. A new agreement with Bawtrys was entered into on 30th January 2024. This agreement states that it commenced on 31st January 2024 and runs to 29th January 2025.

89. Moreover the works that the applicant complained of were not part of the QLTA but separate charges. These charges, as with Monalco and Carbunko charges fall outside of the requirement for statutory consultation as they do not relate to works to a building.

90. The applicant has argued that the amount charged by Bawtrys is not reasonable. He has however provided very little evidence in support of this. The tribunal accepts the argument from the respondent that the applicant has to demonstrate that the charges are unreasonable and not simply assert it.

91. It may be that when service charge demands are made for actual costs some of the issues that the applicant has raised in the course of this challenge will become relevant. At this stage however because the tribunal finds no breach of the consultation requirements and nothing to substantiate the argument that the estimated charges are unreasonable the tribunal determines that the sums demanded in relation to the estimate costs are payable and reasonable.

Application under s.20C and refund of fees

92. In the application form the Applicant applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the tribunal determines not to make an order under section 20C.

Name: Judge H Carr **Date:** 7th May 2024

Rights of appeal

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

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

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

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

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

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