FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BE/LSC/2023/0166**
Property	**:**	**Flat 14, The Old Telephone Exchange, 20 Liverpool Grove, London, SE17 2PY**
Applicants	**:**	**The Old Telephone Exchange Management Limited**
Representative	**:**	**Thackray Williams LLP**
Respondent	**:**	**Paul Singleton and Andy Male**
Representative	**:**	**In person**
Type of Application	**:**	**Liability to pay service charges – section 27A Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Judge Prof R Percival**
Date and venue of Hearing	**:**	**10 July 2023** **Paper determination**
Date of Decision	**:**	**10 July 2023**

DECISION

The application

1. The Applicant seeks a determination pursuant to section 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 the service charge years 2017 to 2023.

2. The relevant legal provisions are set out in the Appendix to this decision.

The property

3. The Old Telephone Exchange is an old commercial building converted into 14 flats let on long leases. There is no description of Flat 14 in the papers.

The lease

4. The lease, which is in tripartite form, was granted to the Respondents in July 2001 for a term of 125 years.

5. The lease makes provision for a service charge to be paid to the Applicant management company in clause 3(a), by which the lessees covenant

> "To pay to the Management Company … by way of further rent (i) a service charge equal to the due proportion of the amounts expended by the Management Company in respect of their obligations under Clauses 4(1) and 4(2) hereof … (ii) interest at the rate of four per cent per annum over National Westminster Base Rate from time to time in force on any rent or other sum due within twenty one days of the due date of payment."

6. Clause 4(1) and (2) contain the management company's repairing etc and insurance covenants.

7. Clauses 3(b)(i) to (iii) deal with the mechanics of the service charge. Clause 3(b)(i) makes provision for a certificate relating to the service charge, and clause 3(b)(iii) states

> "The Certificate shall contain a summary of the Management Company's said expenses and outgoings incurred by the Management Company during the twelve month period to which it relates …"

8. Clause 3(b)(iv) provides

> "The expression "the expenses and outgoings" incurred by the Management Company as hereinbefore used shall be deemed to include not only those expenses outgoings and other expenditures which have been actually disbursed incurred or made by the Management Company 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 including a sum or sums of money by way of reasonable provision for anticipated expenditure in respect thereof as the Management Company may in their discretion allocate to the twelve month period in question as being fair and reasonable in the circumstances."

9. Provision is made for an advance service charge on a quarterly basis (clause 3(v)).

Determination

10. The only issue (subject to paragraphs # below) is whether the lease makes provision for a reserve fund to be accumulated at the discretion of the management company.

11. The Applicant contends that clause 3(b)(iv) does so.

12. The Respondents argue that it does not. In their statement of case, they submit:

> " … the operation of a reserve fund at The Old Telephone Exchange is voluntary and can only be a suggested option rather than a mandatory one.
>
> The Lease refers at 3(3)(b)(iv) to there being "a reasonable provision for anticipated expenditure which they may allocate to a 12-month period.
>
> We contend this means *if* the landlord/managing agent knows that major works are due in the next financial year, they could add the estimated cost to the service charge budget which;
>
> - is in line with S20 requirements
> - is good practice
> - wouldn't mean you add in that estimate annually if you had no plans to complete work in any given year
> - doesn't allow the landlord to accumulate money for multiple years in a reserve fund
> - and any underspend of any provision fund collected that year would have to be refunded in the service charge actuals

> We contend the landlord cannot retain money in a provision fund for the building. We contend this is not allowed under this specific Lease. ”

13. The Respondents statement of case also sets out various matters relating to the (alleged) conduct of the managing agents and to the history of the dispute. The Applicant's response deals with some of this matter. None of this material is relevant to the issue.

14. There is no requirement that the words “reserve fund” to appear in a lease for it to be the case that a landlord or management company is entitled to accumulate a fund that might be referred to as a reserve or sinking fund. What matters is the proper construction of the terms of the lease.

15. The drafting of the relevant clauses in this lease, set out above, is somewhat convoluted. Clause 3(b)(iv) puts the expression “the expenses and outgoings” in inverted commas, suggesting it refers to a term of art used earlier. In fact, as far as I can see, it only occurs “hereinbefore” in clause 3(b)(iii), which sets out what must be summarised in the certificate, and where the term does not appear in inverted commas. It is clear, however, that the certificate itself relates to “the amount of the service charge hereinbefore covenanted to be paid” (clause 3(b)(i)). Thus, the reference in clause 3(b)(iv) must be back to the basic definition of the costs to the management company of its repairing etc and insurance covenants in clause 4(1) and (2). For the definition of the extension of the charge provided for in clause 3(b)(iv) to hang on a term only used in describing the mechanics of the certificate is awkward and unsatisfactory in drafting terms, but nonetheless, its proper meaning is clear enough. I note that this clause is similar or identical to others that the Tribunal is aware of from other leases, but in those leases, one would expect the term in inverted commas to relate directly to the basic definition of the service charge, rather than appear in the roundabout way it does here.

16. My conclusion is that clause 3(b)(iv) provides a power for the management company to demand, as part of the service charge, sums to be expended in the future for the relevant purposes. It is a mandatory power, not a suggestion, and it is not limited to the following year.

17. The relevant purposes are those identified in the covenants in clause 4(1) and (2). The particular form of that expenditure being dealt with is that which is “periodically recurring”. The timing of when such expenditure may be incurred is “whenever disbursed”, and includes “a sum or sums of money by way of reasonable provision for anticipated expenditure in respect thereof”. The “thereof” refers back to expenditure of a “periodically recurring nature”. The management company is entitled to “allocate to the year in question” expenditure

falling within that description. By "allocate", the clause means that the management company can charge it to a particular year, but the expenditure itself is "recurring" and "disbursed whenever", which includes in the future – "anticipated expenditure". There is nothing that limits it to the following year.

18. So I find that the lease does provide for the management company to accumulate a fund for future expenditure of the nature described, of a recurring nature, and which is anticipated to be needed in the future. It is reasonable to describe this fund as a "reserve fund", but the use of that term has no particular importance.

19. A demand for a sum by way of service charge in respect of such a fund is, therefore, payable under the lease. The Respondents do not contest the reasonableness of the charge, once it is established that it may be made under the lease. Accordingly, I find that the contested charges are reasonable and payable.

20. On the application form, which Judge Latham, in his directions, directed should stand as the Applicant's statement of case, the Applicant also requests that the Tribunal determine that interest is payable, and seeks the costs of the application.

21. It appears to me that these applications are for judgment interest in the first instance, and for costs in the context of a cost-shifting jurisdiction, in the second, neither of which apply to this Tribunal. However, I consider them on their merits insofar as they may be considered in such a way as to make them relevant to my jurisdiction.

22. There is no provision for the Tribunal to make orders for judgment interest. However, the lease makes provision for contractual interest in clause 3(a)(ii). The Tribunal does have a jurisdiction in respect of administration charges (which would include such a charge) under schedule 11 to the Commonhold and Leasehold Reform Act 2002. However, there is no evidence that a demand for an administration charge has been made, and no specification of the basis upon which I am asked to make a determination as to the payability and reasonableness of such a charge. In these circumstances, I decline to make a determination.

23. As to costs, the relevant circumstances in which I may make a costs order are set out in Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, rule 13(1)(b). That would require that the Respondents have acted unreasonably in defending the application. The threshold of unresaonableness, particularly for litigants in person, is a high one: *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 290, [2016] L&TR 34. To make an order under this provision, an applicant should cite that case and make the application on the basis set out therein. Clearly, that is not the case here. And on

the face of it, there is no possible basis for finding that the respondents in this case have acted unreasonably. I make no order under rule 13(1)(b).

24. However, as Judge Latham indicated in his directions, an order for reimbursement of Tribunal fees may be made under rule 13(2). In the light of the Respondent's success in this application, it appears to me to be just and equitable to make an order under this rule.

25. I order that the Respondents reimburse the Applicant's application fee of £100.

Rights of appeal

26. 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 London regional office.

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

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

29. The application for permission to appeal must identify the decision of the Tribunal to which it relates, 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.

Name: Tribunal Judge Professor Richard Percival **Date:** 10 July 2023

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 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.

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 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—

(a) complied with in relation to the works or agreement, or

(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or

(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in

determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.

Section 20ZA

(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

(2) In section 20 and this section—

"qualifying works" means works on a building or any other premises, and

"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

(a) if it is an agreement of a description prescribed by the regulations, or

(b) in any circumstances so prescribed.

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—

(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,

(b) to obtain estimates for proposed works or agreements,

(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) Regulations under section 20 or this section—

(a) may make provision generally or only in relation to specific cases, and

(b) may make different provision for different purposes.

(7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

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 tribunal2 or leasehold valuation tribunal or the First-tier Tribunal3 , or the Upper Tribunal4 , 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 the county court ;

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

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

(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal;

(c) in the case of proceedings before the Upper Tribunal4 , 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 the 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.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—

(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—

(a) specified in his lease, nor

(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on [the appropriate tribunal]1 in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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 matter of an application under sub-paragraph (1).