FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AN/LSC/2023/0413**
Property	**:**	**113 Milson Road, London W14 0LA**
Applicants	**:**	**Monika Wood (Second Floor Flat)** **Enzo Volpe (First Floor Flat)**
Representative	**:**	**None**
Respondent	**:**	**Orchidbase Limited**
Representative	**:**	**Michael Richards & Co**
Type of application	**:**	**For the determination of the payability and reasonableness of service charges under section 27A of the Landlord and Tenant Act 1985**
Tribunal members	**:**	**Judge H. Lumby** **Mr S Mason BSc FRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of hearing	**:**	**14 May 2024**
Date of decision	**:**	**15 July 2024**

DECISION

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Decisions of the tribunal

(1) The tribunal determines that only £883.50 is reasonable and payable in respect of the management fee charged in respect of the 2023 external works.

(2) The tribunal determines that the amount paid to contractor in respect of the 2023 external works is reasonable and payable by the leaseholders.

(3) The tribunal determines that the amounts charged for electricity based on the actual meter reading are reasonable and payable.

(4) The tribunal determines that the amount of £540 payable in the 2023 service charge year for a fire risk assessment is reasonable and payable.

(5) The tribunal determines that the amount of £420 charged in the 2023 service charge year for an asbestos refurbishment and demolition survey is reasonable and payable.

(6) The tribunal determines that no amount is payable in relation to the carpet clean referred to in the 2024 service charge year budget.

(7) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the Applicants as lessees through any service charge.

(8) The tribunal makes an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 in favour of the Applicants that none of the costs incurred by the Respondent in connection with these proceedings can be charged direct to the Applicants as an administration charge under the Applicants' Leases.

(9) The tribunal makes an order in favour of the Applicants that the Respondent should reimburse to the Applicants both the application fee and the hearing fee paid to the tribunal, amounting to £300 and to be paid within 28 days of this determination.

The application

1. The Applicants seek 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 the 2020, 2021, 2022,

2023 and 2024 service charge years. A Scott Schedule was completed by both parties identifying the issues in dispute.

2. A case management hearing took place on 12th December 2023. That hearing identified the issues to be determined as follows:

- The external works then being carried out at the Property and specifically the price of those works, the consultation for those works and the standard of those works.
- whether the landlord has complied with the consultation requirement under section 20 of the 1985 Act
- whether the works are within the landlord's obligations under the lease/ whether the cost of works are payable by the leaseholder under the lease
- whether the costs of the works are reasonable, in particular in relation to the nature of the works, the contract price and the supervision and management fee
- the ongoing annual increase in service charge over the last three years.
- whether an order under section 20C of the 1985 Act and/or paragraph 5A of Schedule 11 to the 2002 Act should be made
- whether an order for reimbursement of application/ hearing fees should be made

3. At the beginning of the hearing the Applicants confirmed that they were not seeking to challenge items from the 2020, 2021 and 2022 service charge years. The items listed on the Scott Schedule for those years were not considered by the tribunal further.

4. The Applicants confirmed the following items remained in dispute between the parties:

(i) Repair works to the exterior of the Property - £33,014.52 (the issues were the management fee for the works and the consultation process, the amount paid to the contractor was accepted)

(ii) Electricity bill for common parts for 2023 - £1,027.98 but reduced to £737.46, the Applicants are seeking an additional £537 refund

(iii) Fire Risk Assessment in 2023 - £540

(iv) Asbestos Refurbishment and Demolition Survey in 2023 - £420

(v) Carpet cleaning in March 2024 - £378

(vi) Repair and maintenance underspend refund - £105.44

(vii) Ant eradication in 2023 - £114

The background

5. This application relates to 113 Milson Road, W14 0LA, a four storey mid terrace late Victorian house which has been converted into four flats, being basement level, ground floor, first floor and top (second) floor. Various extensions have been constructed to the rear.

6. The application has been issued by Monika Wood, the leaseholder of the top floor. Enzo Volpe, the leaseholder on the first floor subsequently confirmed that he wished to be joined as a party to the application.

7. The Applicants are both long leaseholders, holding their interests pursuant to leases in materially the same form. The immediate reversion to the leases is vested in the Respondent, who is responsible for providing the services to the Property.

8. The Property is managed by Michael Richards & Co on behalf of the Respondent.

9. The tribunal carried out an inspection of the Property on the same day as the hearing.

The lease

10. The lease provided in the bundle is for 125 years from 25 March 1976 and is dated 30 September 1976. It appears to be incomplete but the tribunal was able to satisfy itself as to the relevant provisions. It provides for an annual service charge including amounts for anticipated expenditure. The tenant is to pay by way of service charge an interim and final service charge. The tenant's proportion of the costs is a fixed percentage proportion of the service costs incurred by the landlord. Any excess is to applied against the following year's service charge. The

landlord is responsible for the maintenance of the exterior and structure of the Property as well as the common parts.

The Tribunal's determination

11. Monika Wood attended the hearing on behalf of the Applicants. Mr Volpe did attend for part but left early. Ms Wood was accompanied by a friend, Mr Umberto Aguiar. Ms Carol Cherriman and Ms Oriana Pawlowska from Michael Richards & Co attended on behalf of the Respondent.

12. The documents that the tribunal was referred to are in a bundle of 249 pages together with three videos, the contents of which the tribunal considered in full and have noted. The bundle included the Applicant's statement of case. A separate Scott Schedule was also provided.

13. Having considered all of the documents and the three videos provided and heard the submissions made by the parties, the tribunal has made determinations on the various outstanding issues as follows.

Service charge sums in dispute

14. The tribunal considered each of the items identified as remaining in dispute in turn.

External works in 2023

15. Redecoration and repair works were carried out to the front of the Property in 2023, with the cost initially estimated to be £33,014.52 in total (including the management fee), which covered the front and the rear. The managing agent proposed to meet the cost primarily from the reserve fund (£23,239.70) with the balance (£9,774.82) demanded in advance from the leaseholders. Following consultation with the leaseholders, the works were limited to the front of the Property and included redecoration, roof inspection repairs, any required repairs to the soffit/fascia boards, replacement gutters/downpipes, and any required repointing/timber/masonry works.

16. The Applicants initially complained at the cost of the works. The exterior had last been decorated in 2009, which at that time cost £13,512.50 for the redecoration of the front and rear as well as the internal communal areas and the provision of a new stairway carpet. The Applicants considered that the costs quoted for the works in 2023 were too high and provided their own quotation showing a cost of £17,169.30 plus VAT, to include a new stair carpet in the communal area.

17. The actual cost was in fact £19,442.92 including the managing agents fee of £1,767 and the Applicants accepted that this amount was reasonable and a good job was done. The full cost could be met from the reserve fund. The tribunal did not consider the cost of the works further, given the Applicants had accepted these were reasonable. However, the Applicants had two complaints about the works, being the management fee charged and the failure to carry out a proper consultation. The tribunal considered each of these in turn.

Management fee for external works

18. The managing agents charged a management fee equal to 10% of the cost of the works, amounting to £1,767. The Applicants argued that this was double counting with the management fee already charged and there were failures in the carrying out of the works which meant that the managing agents should not be paid their fee in any event. They pointed to a failure to specify the correct paint, initially specifying one not suitable at the time of year when the works were done. This failure was pointed out by the Applicants at the time and the paint changed. They in addition point to the failure to provide scaffold alarms which they also raised as an issue at the time. Health and safety concerns were raised including in relation to workmen not wearing hard hats. Finally, they contended that the landlord consulted about the front door colour in 2009 but had not done so in 2023, meaning the leaseholders had to raise this direct with the contractors.

19. The Respondent accepted that the wrong paint (which was only usable down to 5 degrees centigrade) had been specified and changed this to zero degrees paint when the issue was pointed out by the leaseholders. The weather was also monitored to ensure work was not done on colder days. On the scaffolding alarms, they had been omitted initially to avoid them being triggered by cats but accepted they should have consulted on this with leaseholders in advance. On the front door paint, they argued that they would not normally raise this with leaseholders and that in any event the leaseholders got the colour they wanted, albeit after they had raised the issue themselves.

20. The tribunal considered whether the management fee should be payable at all or in part. A management fee in relation to the works in addition to the regular annual management fee was reasonable in principle and the percentage (10%) charged reasonable in normal circumstances. Work had been done by the managing agents, including preparing a specification and a tender document and carrying out inspections. Some level of management fee was therefore appropriate. However, issues with consultation with leaseholders, the upset caused by demanding payments for a higher scope and programming the works for the wrong time of year and specifying the wrong paint were failures of a sufficient degree that the tribunal does not accept that 10%

fee in this case is reasonable. It finds that a 5% fee is the appropriate amount here.

21. The tribunal therefore finds that the management fee should be reduced by 50% and that only £883.50 is reasonable and payable.

Consultation in respect of external works

22. The Applicants argue that a proper consultation was not carried out in respect of the external works and so the amount payable in respect of those works should be reduced to £250 per leaseholder.

23. The Respondent contended that a stage 1 consultation was carried out with the leaseholders and launched on 21 July 2020 using letters and emails. A specimen of the letter was produced to the tribunal. They have no proof of service and no responses were received. Ms Wood argued that she had never received it and that the email address used by the managing agents had been out of use for over ten years, providing evidence of this. None of the other leaseholders have been definitive on whether they received the 21 July 2020 notice and Mr Volpe had unfortunately left the hearing before the tribunal could ask him about this.

24. A stage 2 consultation was launched by notices served on 3 August 2022. This was received by the leaseholders and the Applicants state how shocked they were by the figures quoted from the tender process the managing agents had carried out. They point out that the stage 1 consultation only referred to the front of the Property but the stage 2 quotations also included the rear. The Respondent did not deny this but pointed out that only the front works were carried out.

25. The Applicants argue that the failure to serve the notices for the stage 1 consultation together with the long gap between the two stages meant that a proper consultation has not been carried out. On the long gap, they referred to the case of *Jastrzembski v City of Westminster [2013] UKUT 284 (LC)* where the Upper Tribunal had found that a period of two years for the works to start after the consultation and changes to the work specification rendered the consultation invalid. Finally, they pointed out that no dispensation from the consultation requirements had been obtained from the tribunal.

26. The Respondent argued that even if there had been a failure to consult (which they denied), as the Applicants were not disputing the cost of the works, they have suffered no prejudice. The Applicants responded that they would have liked to have nominated contractors to submit tenders, especially the contractor who did the works in 2009.

27. The tribunal considered whether there had been a failure to consult and, if so, the consequence of this.

28. Section 20 of the Landlord and Tenant Act 1985 (as amended) ("the 1985 Act") and the Service Charges (Consultation Requirements) (England) Regulations 2003 require a landlord planning to undertake major works, where a leaseholder will be required to contribute over £250 towards those works, to consult the leaseholders in a specified form.

29. Should a landlord not comply with the correct consultation procedure, it is possible to obtain dispensation from compliance with these requirements by an application to the tribunal pursuant to section 20ZA of the 1985 Act. That section provides as follows:

> *(1) Where an application is made to a leasehold valuation 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.*
>
> *(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.*

30. In the case of *Daejan Investments Limited v Benson* [2013] UKSC 14, by a majority decision (3-2), the Supreme Court considered the

dispensation provisions and set out guidelines as to how they should be applied.

31. The Supreme Court came to the following conclusions:

a. The correct legal test on an application to the tribunal for dispensation is: "Would the flat owners suffer any relevant prejudice, and if so, what relevant prejudice, as a result of the landlord's failure to comply with the requirements?"

b. The purpose of the consultation procedure is to ensure leaseholders are protected from paying for inappropriate works or paying more than would be appropriate.

c. In considering applications for dispensation the tribunal should focus on whether the leaseholders were prejudiced in either respect by the landlord's failure to comply.

d. The tribunal has the power to grant dispensation on appropriate terms and can impose conditions.

e. The factual burden of identifying some relevant prejudice is on the leaseholders. Once they have shown a credible case for prejudice, the tribunal should look to the landlord to rebut it.

f. The onus is on the leaseholders to establish:

i. what steps they would have taken had the breach not happened and

ii. in what way their rights under (b) above have been prejudiced as a consequence.

32. Applying these provisions to this case, the tribunal began by considering whether the consultation requirements of the 1985 Act applied to these works. Given that the cost was substantially in excess of the threshold for consultation, it determines that the consultation requirements needed to be complied with or a dispensation obtained from the tribunal.

33. The next issue was whether a proper consultation was carried out. The issue turns on whether the July 2020 stage 1 consultation notices were served by the managing agents on the leaseholders. There is no conclusive evidence either way but, on balance, the fact that a letter was produced to launch the consultation suggests that the notices were served.

34. The Applicants had also argued that the delay between the two stages of the consultation meant that the stage 1 consultation was void, citing the case of *Jastrzembski v City of Westminster*. In that case, it was identified that the passage of time between the stage 1 consultation and the works could be a factor in the validity of a notice on the basis that the longer the gap, the more changes could occur that would affect the way in which leaseholders would view the works. In that case, the passage of two years and the removal of three properties from the scope of works meant that the earlier notice was invalid.

35. In this case, there was a change between the stage 1 works and the stage 2 works, in that the works to the rear had been added. However, the addition of the rear was removed following feedback from the leaseholders about the cost and so there was no change between stage 1 and the works themselves. In addition, these were works the leaseholders wanted to be done, the issue was cost. However, they have now accepted that the cost was reasonable and the works carried out to a good standard. The tribunal therefore finds that the long period between the stage 1 consultation and the works being done did not invalidate the stage 1 notice.

36. The case of *Jastrzembski v City of Westminster* also considered whether the tribunal erred in that case in concluding that if it was wrong in concluding the relevant consultation was valid, it would have granted a dispensation under section 20ZA of the 1985 Act. The Upper Tribunal found in that case that the leaseholder was not under a disadvantage that he would not have suffered had the consultation requirements been met. Accordingly, it concluded that the tribunal did not err in considering that the defect should be dispensed with pursuant to section 20ZA.

37. The tribunal therefore considered whether, if it was wrong on whether the consultation was invalid, it would have granted dispensation under section 20ZA. In doing so, it applied the tests set out in *Daejan Investments Limited v Benson* referred to above.

38. The onus is on the Applicants to show that they have suffered a prejudice as a result of the failure to consult. The Applicants have argued that the prejudice is the inability to nominate a contractor for the works. However, as the Applicants have accepted both the cost and workmanship of the works as reasonable, the tribunal cannot find prejudice to the leaseholders. Indeed, its own quotation for the work was little different to the cost of the contractor employed. The leaseholders in addition had a full opportunity to consult with the managing agents at the stage 2 consultation, resulting in the scope of the works being reduced. It therefore determines that dispensation would in any event be given for these works pursuant to section 20ZA of the 1985 Act.

39. This means that there is no difference whether the consultation was valid or not as the result would have been the same in either instance.

40. The tribunal therefore determines that the amount paid to contractor in respect of the 2023 external works is reasonable and payable by the leaseholders.

Electricity charges

41. The 2024 service charge budget allocates a cost of £1,076 for communal electricity.

42. The amounts charged for electricity supplied to the common parts from 2021 have been £83.24 (2021), £176.89 (2022) and £1,027.98 (2023). The Applicants challenged the substantial increase in 2023. The energy supplier (Positive Energy) accepted that this was based on an estimated usage (showing 2000 kWh) rather than an actual reading of the meter (which was 843.8 kWh). It therefore reduced the amount payable to £737.46. The Applicants seek a further refund of £537, given that the electricity is just powering four lightbulbs.

43. The Respondent explained that historically the electricity company had only been charging a standing charge and not for electricity consumed. Whilst their estimate was clearly wrong, it had been recalculated with the correct figure and was therefore now correct. The figures had been twice checked with the supplier. There had been a catch up required which was why the 2023 figure was still high but it would be much lower going forward. In addition, as the leaseholders had paid on the basis of the higher figure, there would be a credit for them against future costs.

44. The Applicants wanted to refer the matter to the ombudsman and the Respondent confirmed they had no objection to this. They also suggested the installation of a smart meter but the Applicants do not want one.

45. The tribunal considered the submissions made by the parties on this issue. It finds that the revised charge for 2023 of £737.46 (as reflected in the November 2023 invoice from Positive Energy is the correct figure, based on current meter readings and the need to catch up with payment for previously uncharged amounts. As a result, the figure in the 2024 service charge budget is too high and the leaseholders should be given credit for overpayments made based on this figure.

46. The tribunal therefore determines that the amounts charged for electricity based on the actual meter reading are reasonable and payable.

Fire Risk Assessment 2023

47. The Applicants argue that the charge of £540 for a fire risk assessment is excessive, they have obtained three quotations for £220, £129 and £161 and actually engaged one of these.

48. The Respondent replied that the freeholder uses the same firm to do all fire risk assessments every three years, with the charge based on a flat fee per unit, including fire door inspections. The Applicants confirmed that their assessment included five doors as well.

49. The tribunal considered the amount charged for the assessment. A landlord does not have to utilise the cheapest contractor and should ensure that a contractor is able to do a good job. It finds the amount of £540 within the range of reasonable fees and a three year cycle of inspections reasonable.

50. The tribunal therefore determines that the amount of £540 payable in the 2023 service charge year for a fire risk assessment is reasonable and payable.

Asbestos Refurbishment and Demolition Survey 2023

51. The Applicants questioned the £420 expended in 2023 for an asbestos refurbishment and demolition survey, especially why this was necessary and the amount payable, having got a separate quotation for £248 from a company that works with Foxtons.

52. The Respondent explained that this was done as a survey before major works. There was an existing asbestos survey but this was unlikely to cover high level guttering. It is best done when the scaffolding is up and to do so before undertaking works is preferable to discovering asbestos whilst the works are underway. They were not comfortable with working with an asbestos surveyor they have not engaged before and knew the chosen contractor would do a good job. Despite the reference to demolition in the report title, no demolition was contemplated and this is just the name given to these surveys, which are often misunderstood.

53. The tribunal considered the submissions made by the parties. It finds that it was reasonable to carry out this survey before the works and the cost was within the range of reasonable expenses.

54. The tribunal therefore determines that the amount of £420 charged in the 2023 service charge year for an asbestos refurbishment and demolition survey was reasonable and payable.

Carpet cleaning 2024

55. The Applicants object to the charge of £378 for cleaning the communal stairway carpet, arguing that reputable carpet cleaners would do the job for much less, that the contractors arrived in dirty boots, finished the job in twenty minutes, leaving the carpet in a worse state than when they arrived, as evidenced by photographs in the bundle.

56. The Respondent accepted that there were issues with the cleaning but said the contractors would be returning on 28 May 2024 to do a free clean.

57. The tribunal considered this issue and found that the cleaning was not to a satisfactory standard and by leaving the carpet in a worse state than when they arrived, no payment was appropriate. The promise of a future clean was not relevant.

58. The tribunal therefore determines that no amount is payable in relation to the carpet clean referred to in the 2024 service charge year budget.

Repair and maintenance excess payments

59. The Applicants argue that there has been an excess of payments towards repair and maintenance in 2021 and 2022, in that the on account payments exceeded the amounts actually spent. They want the excess returned.

60. The Respondent stated that the excess had been added to the reserve fund but would be refunded in accordance with their request.

Ant eradication

61. Reference was made by the Applicants in the bundle as to whether the cost of ant eradication in the garden of 113A Milson Road was recoverable as a service charge item and this was referred to as an issue in dispute when the parties were identifying the issues at the hearing. However no submissions were received from the parties on this issue. As a result, the tribunal has not considered it and makes no determination.

Applications under s.20C and paragraph 5A and for costs of hearing

62. The Applicants have applied for cost orders under section 20C of the Landlord and Tenant Act 1985 ("Section 20C") and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("Paragraph 5A"). They have also requested that the fees payable to the tribunal in making the application and the hearing fee both be refunded by the Respondent (these fees are £100 and £200 respectively).

63. The relevant part of Section 20C reads as follows:-

> (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 … the First-tier Tribunal … 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…".

64. The relevant part of Paragraph 5A reads as follows:-

> "A tenant of a dwelling in England may apply to the relevant … tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs".

65. A Section 20C application is therefore an application for an order that the whole or part of the costs incurred by the Respondent in connection with these proceedings cannot be added to the service charge of the Applicants or other parties who have been joined. A Paragraph 5A application is an application for an order that the whole or part of the costs incurred by the Respondent in connection with these proceedings cannot be charged direct to the Applicants as an administration charge under their respective Leases.

66. In this case, the Applicants have been successful on a number of issues, including the performance of the managing agents in relation to the 2023 external works. This dispute could have been avoided if the Respondent had engaged more with the Applicants. Having read the submissions from the parties and taking into account the determinations above, the tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act. The tribunal therefore make an order in favour of the Applicants that none of the costs incurred by the Respondent in connection with these proceedings can be added to the service charge.

67. For the same reasons as stated above in relation to the Section 20C cost application, the Applicants should not have to pay any of the Respondent's costs in opposing the application. The tribunal therefore makes an order in favour of the Applicants that none of the costs incurred by the Respondent in connection with these proceedings can

be charged direct to the Applicants as an administration charge under the Leases.

68. Finally, and for the same reasons as for the Paragraph 5A and Section 20C applications, the Applicants should not have to pay the fees paid to the tribunal for bringing this case. The tribunal therefore makes an order in favour of the Applicants that the Respondent should reimburse to the Applicants both the application fee and the hearing fee paid to the tribunal, amounting to £300 and to be paid within 28 days of this determination.

Name: Tribunal Judge Lumby **Date:** 15 July 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).