FIRST-TIER TRIBUNAL

PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AA/LSC/2023/0126**
Property	**:**	**49 Sir John Lyon House, 8 High Timber Street London EC4V 3PA**
Applicant	**:**	**Mr Neil Morgan**
Representative	**:**	**n/a**
Respondent	**:**	**Sir John Lyon House Management Ltd**
Representative	**:**	**Mr Stuart Armstrong, 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 O'Brien, Mr Kevin Ridgeway MRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**29 July 2024**

DECISION

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Decisions of the tribunal

(1) The tribunal determines that the service charges which fell due on 1 December 2022 were payable by the previous leaseholder Dr Smith for the period 1 December 2022 to 31 May 2023.

(2) The tribunal does not make any determination as to whether that sum has or has not been paid by Dr Smith for the reasons set out in this decision.

(3) The cost of replacing the extraction fans are maintenance expenses within the meaning of Schedule 6 to the lease and recoverable as a service charge.

(4) The sum sought in respect of the reserves for the year 1 December 2022 to 30 November 2023 is reasonable.

(5) The sum of £3,684 is reasonable in relation to the budgeted cost of insurance for the year 1 December 2022 to 30 November 2023.

(6) The tribunal makes a partial order under section 20C of the Landlord and Tenant Act 1985 so that only 80% of the Respondent's costs can be considered relevant costs for the purposes of the service charges payable by the Applicant, insofar as they may be recoverable under the terms of the applicant's lease.

(7) The Tribunal makes a partial under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 so that no more than 80% of the respondent's costs may be recovered from the Applicant as an administration charge insofar as they are so recoverable under the terms of the applicant's lease.

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 in respect of the service charge year 1 December 2022 to 30 November 2023. .

The hearing

2. The application was heard at a face-to-face hearing on 5 July 2024. The Applicant appeared in person at the hearing and the Respondent was represented by Mr Armstrong.

3. Both the Applicant and the Respondent sought permission to rely on witness statements which were served some considerable time after the dates provided in the Tribunal's directions dated 20 February 2024 had passed. Mr Morgan sought to rely on a further witness statement dated

30 June 2024. The Respondent sought to rely on a witness statement from a Mr Christian Lambertucci of Stirling Estates Management, served in response to Mr Morgan's late statement and dated 4 July 2024. Both objected to the other having permission to rely on late evidence.

5. We determined that it would be in the interests of justice if both statements were admitted. The salient parts of Mr Morgan's statement relate to the factual issue of the function he believed the fans/ventilation plant on the roof fulfilled. He exhibits a letter sent to all leaseholders which he considered was particularly relevant to this issue dated 24 June 2024. Mr Lambertucci's evidence concerned the same factual issue. As the function of these items of plant was central to the recoverability of the costs of replacing and/or maintaining them, we permitted both parties to rely on this late evidence. Additionally Mr Lambertucci attended the tribunal for cross examination.

6. We had the benefit of a 509-page bundle prepared by the applicant. Additionally we had the additional witness statement of Mr Lambertucci.

The background

4. The property which is the subject of this application is a top floor apartment in a central London riverside purpose-built block built in or about 2009. The block, Sir John Lyon House, consists of 67 self-contained flats with commercial premises, presently a restaurant, on the ground floor. The block includes an underground car park which is reserved for the exclusive use of some only of the leaseholders.

5. Neither party requested an inspection, and the Tribunal did not consider that one was necessary, nor would it have been proportionating to the issues in dispute.

6. The Applicant holds a lease of 49 Sir John Lyon House which requires the management company to provide services and the leaseholder to contribute towards their costs by way of a variable service charge. Mr Morgan purchased the leasehold interest in the property on or around 13 January 2023 from a Dr Nigel Smith. The lease is for a term of 125 years from 25 March 2009. The specific provisions of the lease will be referred to below, where necessary. The Respondent is the management company.

7. By an application dated 26 March 2023 Mr Morgan sought a determination of his liability to pay specific service charges for the year 1 December 2022 to 30 November 2023. In his application the Applicant initially sought to join the legal and beneficial owners of the freehold of Sir John Lyon House. He additionally sought to challenge the apportionment of service charges which the Respondent had applied to his flat. At a hearing before Judge Carr on 18th October 2023 the Tribunal determined as a preliminary issue that the claims against the owners of

the freehold should be struck out and also determined that it should not intervene in the apportionment under the terms of the lease. The Applicant sought permission from the Upper Tribunal to challenge the Tribunal's decision in respect of apportionment but was refused.

The issues

8. At the start of the hearing the parties and the Tribunal together identified the relevant issues for determination as follows:

(i) The reasonableness of the sums demanded on account in respect of insurance for the year 1 December 2022 to 30 November 2023.

(ii) The reasonableness of the sums demanded in respect of reserves for the year ending 30 November 2023.

(iii) Whether the cost of works to the ventilation fans on the roof of the building came within the definition of maintenance expenses under Schedule 6 of the lease and consequently were a relevant cost for the purposes of Mr Morgan's liability to pay service charges.

9. Mr Morgan indicated that he also wanted the tribunal to determine the reasonableness of the charges levied in respect of the ventilation fans. He explained that up until recently he had understood that the fans related to air conditioning plant and not simple ventilation/air extraction fans. He explained that this had only been made clear to him when he received the letter dated 24 June 2024. He did not raise this point in his statement dated 26 March 2024 and it was not considered in the statement of case filed by the Respondent in response. Mr Morgan questioned whether the cost was reasonably incurred his second witness statement dated 30 June 2024, but did not challenge the amount. In the hearing he indicated that he also wished to challenge the amount. We declined to consider the issues as to whether the sums spent on the ventilation fans were reasonably incurred or reasonable in amount as they had not been raised in a timely manner by the Applicant, and in any event we had no proper evidence in respect of either issue.

10. Mr Armstrong and Mr Morgan also invited us to make a finding of fact as to whether Dr Smith had paid the full sum that was due on account on 1 December 2022 in respect of the period 1 December 2022 to 31 May 2023. The tribunal has concluded that it cannot do so for 2 reasons; Firstly it has no jurisdiction to consider issues of payment/accounting under s27A of the 1985 Act, and secondly, even if we had jurisdiction to consider it, it would be to say the least unfair to Dr Smith to make any finding on this point in proceedings to which he is not a party.

Budgeted costs of insurance £145,500

11. The budgeted cost for buildings insurance for the year 1 December 2022 to 30 November 2023 was £145,500 for the residential units alone. This resulted in a demand in respect of Mr Morgan's apartment of £4,859. Mr Sherrard explains in his statement that the budgeted cost for the year 2022/2023 was based on the actual cost incurred for annual building insurance to 30 November 2022, with an uplift for contingency. It was accepted by the Respondent that the reasonableness of the budgeted cost will depend on the reasonableness of the actual cost and the reasonableness of the uplift for contingency.

12. The total cost of insuring the whole building in the year February 2022 to February 2023, including tax but excluding terrorism and engineering insurance was £140,000. A copy of the certificate of insurance is included in the bundle at page 231. The actual cost of insurance for the whole building, again including tax but excluding terrorism and engineering insurance for the year February 2023 to 2024 was £153,421 (see page 214). The cost of insurance for the whole building, again including tax but excluding engineering and terrorism insurance for the year February 2024 to February 2025 was £136,814 (see page 405 of the bundle). The total *budgeted* cost of the same insurance for the service charge year December 2022 to 30 November 2023 was £169,920, of which £145,500, approximately 85.6% of the total, related to the residential units alone.

13. The Applicant and is very critical of the Respondent's conduct in obtaining this policy of insurance. He asserts in his witness statement that the Respondent failed properly to go to market in order to obtain a better quote for the year in question. He criticises them for insisting on using only one broker, Howden, with whom they have had a long-standing relationship. He is very critical of the commission charged by Howden for the relevant year at £32,315, and notes that this commission is more than the annual management fee for the entire building. He doubts whether Howden is in fact the true beneficiary of this commission. He is critical of what he describes as the '*opaque racket of freeholder block insurance policies'* at paragraph 26 of his statement. He suspects that there are excessive commissions hidden within this insurance premium which have not been disclosed to the leaseholders. He asserts in his witness statement that such practises are standard and commonplace features within the residential leasehold property management sector. He confirmed in his evidence that he himself has extensive professional experience of managing and insuring residential leasehold blocks and has worked in the industry for over 40 years.

14. In addition to the concerns he raises about poor practices in the area of leasehold building insurance, he has additionally obtained comparable evidence in the form of quotations in respect of his flat alone from Compare the Market and Money Supermarket. As these were in respect of his flat alone they are of limited value as the management company is obliged under the terms of the lease to insure the whole block. Additionally he was able to use his contacts within the building insurance sector to obtain an estimate in respect of the entire building. The manner

in which this evidence came into being is curious. Mr Morgan approached a broker through whom he has himself has placed buildings insurance for both commercial and multi-unit residential premises. The broker was unaware that the purpose of this approach was to obtain comparison evidence for use in these proceedings. As far as they were concerned they were being approached with a view to arranging buildings insurance for Sir John Lyon House. Mr Morgan told us that this was the only way he realistically could get the information; he considers that had the broker in question known that the purpose of the approach was to obtain evidence for use in these proceedings, he certainly would have declined. He told us that the broker would effectively be ostracised by both the insurance industry and institutional freeholders if it were known that he was assisting a leaseholder to obtain a true market quote for building insurance, uninflated by secret commissions and hidden reverse premiums. It is for this reason he told us that he has redacted the broker's name and contact details from the email exchange which he has exhibited to his statement.

15. Mr Morgan has annexed a series of emails passing between this broker. The broker initially had the following information when he provided his estimate in March 2023;

    (i) The name and address of the building.
    (ii) The number of residential units
    (iii) The cladding EWS1 certificate

    They were told that the value of the building to be insured was £28.8 million. They responded that it was difficult to be precise without knowing who currently insured the property, the details of its construction and its past claims experience. At that point they gave a likely range of between 12p and 15p of every £100 of sum insured i.e. between £34,200 and £42,750, excluding insurance premium tax of 12%.

16. In a further email dated 20 February 2024, Mr Morgan supplied the broker with the following additional information; he confirmed that the building was of steel/concrete construction and he attached the claims history which had been disclosed by the respondent pursuant to the directions of the tribunal. The broker responded by email sent on 1 March 2024, that in the light of the claim's history '*ordinarily we'd expect to see rates maybe of around 20p to 23p of every £100 insured*'. Assuming a sum insured of £28.5 million, this would result in a premium of between £57,000 and £65,500 plus 12% insurance premium tax.

17. It appears that Mr Morgan asked the broker to carry out a comparable exercise and calculate indicative rates for 2021 and 2022. In his statement he states that he was told by his broker that the rates for 2022 were 11p to 13p for every £100 insured. There is no email to this effect.

18. Mr Sherrard in his statement does not accept this evidence. He exhibits to his statement a letter from a Mr Nigel Todd of Howdens dated 7 May 2024. Mr Armstrong underlined the importance of this letter in his submissions and urged us to read it closely when considering our decision. In this letter Mr Todd comments on the estimates that Mr Morgan obtained from his broker. Firstly he considers that the sum insured is too low. He considers that the sum insured should be £37,687 for the year in question, and not £28.5 million which was the sum on which Mr Morgan's broker based his estimates. He explains that the difference between the insured sum and the declared value of the building is a contingency built into the premium to cater for possible increases in building costs between the inception of the policy and the date of completion of any reinstatement works. He further states;

> *"I note that the broker initially suggested a premium based on .12% to .15%. I would not disagree with that range. However where there are risks in this case created by flammable cladding and a bad claims history [sic]. I note that once Mr Morgan's broker saw the (incomplete) claims history he revised these to .20% to .23%....I think that the premises in this case would take that the appropriate percentage to .3%.* ***I have no reason to think that the broker in this case would disagree if given all the relevant information'****.*

Mr Todd states in this letter, as does Mr Sherrard in his statement, that neither his firm nor the landlord nor the agent charge any kind of 'hidden commission' or 'reverse premium' and refutes any suggestion that there is a personal relationship between his brokerage firm and Stirling Estates and/or the landlords.

The tribunal's decision

19. The tribunal determines that the amount payable in respect of budgeted buildings insurance for the year 1 December 2022 to 30 November 2023 is £3,674 for flat 49.

Reasons for the tribunal's decision

20. If the percentage of .3% is applied to an insured value of the building of £37,687,163, this would result in a premium of £126,628 approximately, inclusive of 12% tax, in respect of the whole building for the period February 2022 to February 2023. We note that there was no change in the sum insured between February 2022 and February 2023; both renewal premiums were based on a sum insured of £37,686,163. We accept that the sum insured in respect of building insurance is generally higher than

the declared value of the building for the reasons set out in Mr Todd's letter.

21. The total *budgeted* cost for the whole building in the service charge year 1 December 2022 to 30 November 2023 was £169,920, of which £145,500, or 85.6% of the total, related to the residential part alone. This seems to the tribunal to be surprisingly high in the light of the actual costs for the previous and subsequent years. Bearing in mind that this is a budgeted cost rather than an actual cost, and considering our experience as an expert tribunal we consider that the sum of £130,000 would have been a reasonable budgeted figure for the buildings insurance for Sir John Lyon House for the service charge year 1 December 2022 to 30 November 2023. Of that 85.6% related to the residential units for the service charge year 2022-2023, or £111,280. Applying the tenant's proportion of 3.34% this results in a charge of £3716.

22. We do not consider that the online estimates in respect of Flat 49 are of any use as comparable quotations. We have no evidence in this case of any hidden commission or reverse premiums being paid to any party to this lease or their agents. There is a lack of clarity regarding the information before the mystery broker, in particular as regards the nature of the commercial premises on the ground floor. We do note however that it is common ground that Howdens carried out more extensive market testing prior to February 2024 and reduced their commission. This reduced the premium payable to £136,814 in respect of the whole building. A copy of the invoice in respect of the premium paid for the year February 2024 to February 2025 is included in the bundle at page 266. Making due allowance for inflation this would suggest that Mr Todd's estimate of a rate of .3%, applied to a sum insured of £37,687,163 is an accurate reflection of what a reasonable premium would have cost had fuller market testing been carried out prior to the renewals in February 2022 and February 2023, and had Howden's commission been set at its current level which, according to Mr Todd's letter, now represents '*fair value renumeration*'.

<u>Reserves £22,500</u>

23. The applicant submits that it was not reasonable to increase the reserves in the year 2022-2023 from £99,547 to £122,000. He considers both sums to be excessive. Mr Sherrard at paragraph 35 of his statement says that the management company was aware in particular of the need to replace the extractor/ventilation fans when the demand towards the reserves was made. It transpired that the quotations eventually obtained by the Respondent in relation to the ventilation system varied from £90,000 to £120,000. Mr Sherrard also points out that the residential units in the block are expensive and that the lessees expect the building to be kept to a certain standard.

<u>Decision of the Tribunal</u>

24. The Tribunal determines that the amount payable in respect of reserves is the relevant proportion of £22,500.

Reasons for the tribunal's decision

25. The amount claimed in respect of the reserves for the building from the residential leaseholders increased the total being held in the reserve fund to £122,000. Given that the sums set out in the budget as the total anticipated expenditure for the 67 units for the year 2022/2023 was just over £400,000, this does not seem like an excessive amount to hold in a reserve fund. We do not consider that the sums allowed for in the 2022/2023 budget in respect of the reserves were unreasonable in view of the size and nature of the block and the levels of expenditure required to maintain it.

Ventilation System

26. According to Mr Sherrard's statement it became apparent in early 2022 that the ventilation system serving the residential units was not functioning correctly. Included in the bundle at page 441 is a consultation notice served by the respondent pursuant to s.20 of the 1985 Act on all leaseholders dated 9th February 2023. There is a further letter dated 24 June 2024 in respect of the ventilation system which indicates that the works have only very recently been completed. The applicant disputes his liability to contribute towards this cost under the terms of his lease. His primary case is that none of these items of plant serve his apartment because it has its own independent air conditioning and air extraction installations. Consequently he maintains that he should not have to contribute towards the expense of maintaining or replacing the ventilation system or any part of it.

27. In his witness statement dated 4 July 2024 Mr Lambertucci states at paragraph 3 and 4 that the works that were carried out related to the air extraction/ventilation system for the whole block. His witness statement indicates that the system extracted air from the kitchens and bathrooms of all flats, but accepted in oral evidence that some flats might have an independent system.

28. Mr. Armstrong for the Respondent directed our attention to the case of *Solarbeta Management Company Ltd v Ms Adetinuke Akindele [2014] UKUT 0416 (LC)* in which the Upper Tribunal held that the actual benefit, direct or indirect, of an expense to a tenant was not relevant to the construction of his or her legal obligations under the provisions of the lease.

29. Clause 1.1. of the lease defines the tenant's proportion of the maintenance expenses. The maintenance expenses are defined by Schedule 6 of the lease and include (para 15) the cost of '*maintaining renewing and*

reinstating' the '*maintained property'*. The maintained property is defined in Schedule 2 to the lease. It includes '*all service installations not used exclusively by any individual unit'* (para 1.5) and excludes '*All service installations utilised exclusively by individual units'* (para 2.3).

30. Mr Morgan's argues that because paragraph 2.3 of Schedule 2 excludes installations used by individual '*units*' as opposed to repeating the wording of paragraph 1.5 which refers to '*any individual unit*', that plant that serves some but not all of the residential units in the block is not to be regarded as maintained property within the meaning of Schedule 6. We consider that this is a misreading of Schedule 2 which in our view clearly only meant to exclude installations that serve one unit exclusively. This provision is echoed in Schedule 3 to the lease which includes in the demise all service installations utilised exclusively by the demised premises.

31. Consequently the ventilation/air extraction system which serves the majority of the residential properties in the block is maintained property within the meaning of the lease, and the costs of maintaining it are thus recoverable under the terms of the applicant's lease.

Application under s.20C and refund of fees

32. At the end of the hearing, the Applicant made an application for a refund of the fees that he had paid in respect of the hearing. Having heard the submissions from the parties and taking into account the determinations above, the tribunal does not order the Respondent to refund any fees paid by the Applicant. We bear in mind that the applicant has succeeded in part but that the reduction is relatively modest.

33. In the application form and at the end of the hearing, the Applicant applied for an order under section 20C of the 1985 Act and for an order under paragraph 5A of Schedule 11 to the 2002 Act. Both applications were resisted by the Respondent. Both parties acknowledged that both applications would be dependent on the outcome. However Mr Morgan was in addition highly critical of the conduct of the Respondent generally and in particular with regard to the insurance and what he regards as poor management of the project to replace/upgrade the ventilation system. Mr Armstrong reminded us that that as far as these proceedings are concerned his client complied with every deadline set by the tribunal, in contrast to the Applicant who breached numerous directions leading to one strike out application and an unless order. Neither the Applicant nor the Respondent made any submissions as to whether the Respondent's costs were recoverable under the terms of the lease. It is not immediately clear that the management company's legal costs are so recoverable under the lease, but as we have not heard argument on this point, we will not determine it.

The law and relevant authorities

34. Section 20C of the LTA 1985 as amended provides:

> 1. A tenant may make an application for an order that all or any of the costs incurred or to be encouraged 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 or any other person or persons specified in the application.
>
> 2. The court or tribunal to which the application is made may make such order in the application as it considers just and equitable in the circumstances.

35. Paragraph 5A of schedule 11 to the CLRA 2002 provides:

> 1. A tenant of a dwelling in England may apply to the relevant court tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.
>
> 2. The relevant court or tribunal may make whatever order on the application it considers just and equitable.

36. In *The Tenants of Langford Court (Sherbani) v Doren Ltd LRX/37/2000* HH Judge Riche QC set out the principals upon which the s20C discretion should be exercised:

> 31. *In my judgement the primary consideration that the LVT should keep in mind is the power to make an order under section 20C should only be used in order to ensure that the right claim costs as part of service charge is not used in circumstances that make its use unjust. Excessive costs unreasonably incurred will not in any event be recoverable by reason of section 19 of the Landlord and Tenant Act 1985. Section 20C may provide a short route by which a tribunal which is heard the litigation giving rise to the costs can avoid arguments under section 19 but its purpose is to give an opportunity to ensure fair treatment as between landlord and tenant, in circumstances where even although costs have been reasonably and properly incurred by the landlord, it would be unjust that the tenants, or some particular tenant, should have to pay them.*

37. In *Re SCMLLA (Freehold) Ltd [2014] UKUT 58 (LC)* Martin Roger QC sitting in the Upper tribunal observed:

> *An order under section 20C interferes with the parties' contractual rights and obligations and for that reason or not to be made lightly or as a matter of course but only after considering the consequences of the order for all those affected by it and all other relevant circumstances.*

38. The importance of considering the consequences of the order was reinforced in *Conway v Jam Factory Freehold Limited [2013] UKUT592* (LC) where it was emphasised that in any application for section 20C it is essential to consider what will be the practical and financial consequences for all of those who will be affected by the order and to bear those consequences in mind when deciding on the just and equitable order to make.

39. In *Church Commissioners v Derdabi [2010] UKUT 380 (LC*) HHJ Gerald considered the approach which the Tribunal should take in cases where the tenant has partially succeeded, and the tribunal is considering reducing the costs recoverable by the landlord;

22. Where the landlord is to be prevented from recovering part only of his costs via the service charge, it should be expressed as a percentage of the costs recoverable. The tenant will still of course be able to challenge the reasonableness of the amount of the cost recoverable, but provided the amount is expressed as a percentage it should avoid the need for a detailed assessment or analysis of the costs associated with any particular issue.

23. In determining the percentage it is not intended that the tribunal conducts some sort of mini taxation exercise rather, a robust, broad brush approach should be adopted based upon the material before the tribunal and taking into account all relevant factors and circumstances including the complexity of matters an issue and the evidence presented and relied in respect of them, the time occupied by the tribunal and any other pertinent matters. It would be a rare case where the appropriate percentage is not clear. It is the tribunal seized with resolving the substantial issues which is best placed determined all of these matters.

38. Having heard 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, so that the Respondent may only pass 80% of its costs incurred in connection with the proceedings before the tribunal through the service charge, insofar as they are recoverable. Similarly no more than 80% of those costs may be recovered from the applicant as an administration charge, insofar as those legal costs are recoverable from him as an administration charge under the terms of his lease. We consider that, while the Applicant has failed in respect of many of his arguments, much of the focus of these proceedings has been the cost of building insurance and in that regard the application has resulted in a significant reduction which should be reflected in a partial s20C /Para 5A Order.

Name: Judge O'Brien **Date:** 29 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).