FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	CHI/18UC/LSC/2024/0044
Property	**:**	Flat 2, 49 Union Road, Exeter EX4 6JU
Applicant	**:**	Mrs S Ricketts
Respondent	**:**	49 Union Road Exeter Limited
Representative	**:**	Plymouth Block Management
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 member	**:**	Judge H. Lumby
Venue	**:**	Paper determination
Date of decision	**:**	27 August 2024

DECISION

Decisions of the Tribunal

(1) The Tribunal determines that the Applicant's liability for service charge for the 2022/23 service charge year is to pay four eighteenths of the total sums incurred for that service charge year, amounting to (i) £2,106.97 for routine matters (including the initial surveyor's fees for the major works) and (ii) £20,774.70 for the major works.

(2) The Tribunal determines that the overpayment of £8,420.45 made by the Applicant in respect of that service charge year should be repaid to the Applicant or, at the landlord's option, be credited against future service charge payments.

(3) 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 Applicant as lessee through any service charge.

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

(5) The Tribunal dismisses the Applicant's application for reimbursement of her application fee and payment of her other costs by the Respondent.

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 payability and reasonableness of service charges in respect of the service charge year commencing on 1 October 2022. The Applicant also seeks guidance going forward.

2. The total amount the subject of the application is £8,422.74.

3. The Applicant also seeks costs orders pursuant to section 20C of the 1985 Act and pursuant to paragraph 5A of schedule 11 to the Commonhold and Leasehold Reform Act 2002 as well as the refund of her application fee and other costs.

The background

4. The Property comprises a flat within a converted building comprising four flats.

5. The Applicant is the leaseholder of the Property and the Respondent comprises the freeholder of the building. The freeholder is a company limited by guarantee owned by the leaseholders of the building.

6. The Applicant's lease is for a term of 199 years from 5 October 1985.

7. Dispensation from the consultation requirements of section 20 of the 1985 Act was given in relation to the building containing the Property by the Tribunal on 20 April 2023 (case reference CHI/18UC/LDC/2023/0029). This related to roof repairs, the eradication of dry rot in Flat 4 and repairs to the rendering on the building.

8. The Applicant states that the render repairs were not carried out, despite service charge payments being made to fund these. She contends that instead the monies raised were used to carry out dry rot works to Flat 3. In addition, dry rot works are now also being carried out to Flat 1. The Property will also be included in future dry rot works, if necessary. The Applicant states that no dispensation has been received from the Tribunal in relation to the works to Flats 1 and 3.

9. The application relates to the payment of service charge by the Applicant. She considers that she has been overcharged for the service charge year in dispute and seeks a refund as to the overpayment and guidance on service charges going forwards.

10. She also states that the service charge apportionments for the building do not add up to 100%. As a result, an application to the Tribunal pursuant to section 35 of the Landlord and Tenant Act 1987 for a variation of the leaseholders' lease will be necessary to correct this if the leaseholders cannot reach agreement (a "section 35 application"). This is outside the scope of this application.

11. The application was received on 11 March 2024 and Directions were issued by the Tribunal on 29 May 2024. A case management and dispute resolution hearing occurred on 21 June 2024, with further Directions issued on that day and on 9 July 2024.

12. This has been a determination on the papers, as agreed by the parties at the hearing on 21 June 2024. The documents that the Tribunal was referred to are in a bundle of 76 pages, the contents of which the tribunal have noted. The bundle contained the application, the Applicant's lease, a statement of case from the Applicant, all of the Tribunal's directions in the case, correspondence between the parties and service charge apportionments prepared by the Applicant.

The issues

13. The Applicant sets out her issues in the application. Her first issue is in relation to the apportionment of routine service charge demands for the year in question, amounting to £9,481.35 in total (including the initial surveyor's fees for the major project referred to separately). She states that the block manager charged her 30.4% of the total (amounting to £2,882.33) when her lease provides her share is 4/18ths of the total (which she says is 22.22%, meaning her share should be £2,106.76, some £775.57 less).

14. Her second issue relates to the major works carried out to the building containing the Property. These relate to the eradication of dry rot, roof repairs, render works and the replacement of rainwater goods. The total cost of the project (excluding the render works not carried out) for the service charge year in question was notified to the Applicant as being £93,486.13. The block manager applied the same 30.4% contribution for the Property, the Applicant again contending this should be 4/18ths; this breaks down as contributions of £28,419.79 on the demanded apportionment against £20,772.62 on the Applicant's calculation, an overcharge of £7,647.17.

15. The Applicant also queries the proportions payable by the other flats and how this can be corrected. She believes that Flat 1 has been paying 19.6%, she has been paying 30.4%, Flat 3 has been paying 25.4% and Flat 4 24.6%. She argues that the leases require Flats 1 to 3 to pay 22.22% (4/18ths each) and Flat 4 to pay 27.77% (or 5/18ths). This also highlights the defect in the proportions as this only covers 17/18ths.

16. Finally, she seeks guidance as to how to address the shortfall in apportionments until a section 35 application on this is determined.

17. The Applicant has not questioned the reasonableness of the sums demanded, just the proportion payable.

18. Accordingly, the issues to be determined by the Tribunal are:

    (a) the correct proportion payable by the Applicant in the service charge year in question for routine matters and towards the major works

    (b) whether any overpayment made by the Applicant should be refunded

    (c) the treatment of the 1/18ths of the service charge not apportioned to any leaseholder

(d) whether the Tribunal can provide guidance on apportionments going forward and order the freeholder to make a section 35 application for the leases to be varied to reflect a 100% apportionment

(e) whether any order should be made pursuant to section 20C of the 1985 Act and pursuant to paragraph 5A of schedule 11 to the Commonhold and Leasehold Reform Act 2002

(f) whether the Respondent should refund the Applicant's application fee paid to the Tribunal and other costs incurred by her

The lease

19. The Applicant's lease provides at clause 1 for the tenant to pay:

"four eighteenths of the Maintenance Costs as defined in Part 1 of the First Schedule hereto at the times and in the manner set out in Part 3 of the First Schedule hereto"

20. Clause 3 of the lease contains various obligations on the landlord, including to keep the structure and exterior of the building in good and substantial repair and condition. This obligation covers all the major works referred to in the application.

21. Maintenance costs are defined in Part 1 of the First Schedule as:

"The total of all sums actually expended by the landlord in connection with the management and maintenance of the said property and in particular but without prejudice to the generality of the foregoing shall include the following:

(1) The cost of complying with the landlord's covenants contained in clause 3 of this Lease …"

22. Part 3 of the First Schedule of the lease provides that:

"The Tenant shall pay four eighteenths of the maintenance cost in the following manner:"

The section then provides for the tenant to make quarterly or six monthly on account payments. The landlord is obliged to provide a maintenance account after each financial year (this is covered by Part 3 of this schedule). Paragraph 2 of Part 3 provides:

"On receipt of a duly certified maintenance account the tenant shall forthwith pay to or be entitled to receive from the landlord the balance (if any) by which the maintenance account shows that such account falls short of or exceeds the sums already paid by the tenant in respect of the financial year in question Provided Always that any amount repayable to the tenant under this sub-clause may at the option of the landlord be applied in or towards the payment of the sum due from the tenant for the next financial year"

There is no mechanism in the lease for the four eighteenths apportionment to be changed.

Submissions by the parties

23. The Applicant sets out her case in her statement of case. She says that previous leaseholders had worked on the basis of the service charge being apportioned by floor area, giving her a 30.4% share. However, the lease was never varied to reflect that and she is relying on the clear statement that her share is limited to four eighteenths. She initially paid at the higher percentage but raised the issue with the managing agents and the other leaseholders. She continued to pay under protest at the higher level to ensure the works were carried out (she is also a shareholder in the Respondent). She believes that a section 35 application should be made to vary the leases to provide for a proper apportionment but feels that this has been blocked by the leaseholders of Flats 1 and 4 who benefit from the apportionment based on area rather as provided by the leases. She argues that the leaseholder of Flat 3 is slightly overpaying on the area but feels the apportionment is fair.

24. She wants the invoices for the 2022/3 service charge year to be reinvoiced with the correct apportionments and the missing one eighteenth to be split equally between the four tenants, both for that year and going forward.

25. No submissions were received from the Respondent.

Tribunal consideration

26. Having considered all of the documents provided, the Tribunal has made determinations on the issues in question as follows.

27. The Applicant has not questioned the reasonableness of the sums demanded. She has also not argued as to whether there was a consultation compliant with section 20 of the 1985 Act or a dispensation from the requirement to consult in relation to all of the works. The Tribunal has therefore not considered the reasonableness as to sums incurred.

28. The primary issue in this case is the apportionment of the costs for the service charge year in question to the Property. The starting point is the lease. This unequivocally sets out the apportionment to the Property as being four eighteenths. There is no mechanism for the landlord to vary this.

29. However, previous and current leaseholders have been working on the basis of an agreed apportionment based on floor area, apparently agreed prior to the Applicant acquiring her flat to address the service charge

apportionment shortfall of one eighteenth. This apportionment was never documented by a lease variation or in some other binding manner. As a result, the Tribunal concluded that the agreement to apportion service charges on an area basis did not amount to a variation of the Applicant's lease and her share remained at four eighteenths.

30. The Tribunal next considered whether the Applicant was nonetheless prevented from relying on the lease apportionment on the basis that she had made payment at the higher level demanded in any event. In this context, it considered the application of section 27A(4) of the 1985 Act, which provides that no application can be made pursuant to section 27A of that Act in respect of a matter (inter alia) which "has been agreed or admitted by the tenant". This was considered in the case of *Cain v Islington LBC [2015] UKUT 542 (LC)*. In that case it was held that a tribunal could infer from a series of payments made without protest that the tenant had agreed that the amount claimed was properly payable; as a result the tenant in that case was barred by section 27A(4) from proceeding with the application.

31. Based on the submissions and evidence provided by the Applicant (which has not been challenged by the Respondent), the Tribunal is satisfied that the sums paid by her in relation to the service charge year in dispute were made under protest. In addition, section 27A(5) of the 1985 Act provides that "the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment". Accordingly, the Tribunal finds that the Applicant is not prevented from claiming that the sums were incorrectly apportioned to her by virtue of having made payment of the sums demanded for the service charge year in question.

32. The Tribunal therefore determines that the Applicant's liability for the 2022/23 service charge year amounts to four eighteenths of the sums incurred. This apportionment will apply to future years unless varied by agreement or order of the Tribunal.

33. The sums demanded for that service charge year were calculated from a total of £9,481.35 for routine matters (including the initial surveyor's fees for the major works) and £93,486.13 for the major works. The Applicant has not questioned these sums. Accordingly, her share of each of those totals is four eighteenths of the sums demanded. This equates to £2,106.97 and £20,774.70 respectively (these figures vary slightly from those calculated by the Applicant as she has used 22.22% to calculate her share rather than four eighteenths, which is the correct methodology).

34. The Tribunal therefore determines that the amounts payable by the Applicant for the 2022/23 service charge year is (i) £2,106.97 for routine matters (including the initial surveyor's fees for the major works) and (ii) £20,774.70 for the major works.

35. The actual payments made by the Applicant for that service charge year were £2,882.33 for routine matters and £28,419.79 in respect of the major works. The overpayment is calculated by deducting the actual sums payable from these amounts actually paid, giving overpayments of £775.36 and £7,645.09 respectively. This amounts to £8,420.45 in aggregate.

36. The Applicant's lease provides that any overpayment is to be refunded unless the landlord opts to use it as a credit against service charge payable for future years. The Tribunal therefore determines that the sum of £8,420.45 should be refunded to the Applicant or, at the Respondent's option, be credited against future service charge amounts payable by the Applicant.

37. The Applicant has requested that the Tribunal orders that the invoices for the 2022/23 service charge year be re-invoiced to reflect the apportionments set out in the various leases. However, the Tribunal can only consider the position in relation the Applicant's lease. Indeed, even if it was able to, it could not consider the position in relation to other flats without reviewing their leases and hearing submissions from the other leaseholders.

38. The Tribunal next considered the treatment of the one eighteenth service charge apportionment not allocated to any leaseholder. The Applicant has offered to split this equally with the other leaseholders. However, the Tribunal can only consider the sums payable by the Applicant under her own lease. The position here is that the Applicant as leaseholder is not required to pay any part of that missing one eighteenth. If the other leases are in the same form, it is probable that there is no obligation on the other leaseholders to pay it too. The Tribunal does not have the power to impose any solution; this is therefore a problem that can only be solved by agreement between the leaseholders or pursuant to a section 35 application to the Tribunal. By the same token, it cannot order that a section 35 application is made by any parties. In the meantime, the service charge collection shortfall caused by the irrecoverable one eighteenth is an issue which the Respondent as freeholder will have to contend with. If it cannot find a way to fund shortfall, then it may face issues in being able to continue to trade.

Tribunal Determination

39. The Tribunal therefore determines that the Applicant's liability for service charge for the 2022/23 service charge year is to pay four eighteenths of the total sums incurred for that service charge year, amounting to (i) £2,106.97 for routine matters (including the initial surveyor's fees for the major works) and (ii) £20,774.70 for the major works.

40. It further determines that any overpayment made by the Applicant in respect of that service charge year should be repaid to the Applicant or, at the landlord's option, be credited against future service charge payments.

Costs Applications

41. The Applicant has 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**"). She has also applied for her application fee to the Tribunal and other costs to be reimbursed.

42. 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…".

43. 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".

44. 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 Applicant 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 Applicant as an administration charge under the Lease.

45. In this case, the Applicant has been successful on the substantial point, being the apportionment payable by her under her lease. The Tribunal also noted that the Respondent had not made submissions to the Tribunal, despite attending the case management and dispute resolution hearing. This is a dispute where compromise between the parties to find a solution to the defective lease drafting would have avoided the necessity for this application. Having read the submissions from the Applicant 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 makes an order in favour of the Applicant that none of the costs incurred by the Respondent in connection with these proceedings can be added to the service charge.

46. For the same reasons as stated above in relation to the Section 20C cost application, the Applicant 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 Applicant that none of the costs incurred by the Respondent in connection with these proceedings can be charged direct to the Applicant as an administration charge under the Lease.

47. The Applicant has also requested that the application fee of £100 paid by her in making this application be reimbursed to her by the Respondent. There is a suggestion that she is seeking reimbursement of £1,000 incurred in retaining a surveyor to assist her in the ongoing apportionment dispute.

48. The basic power of the Tribunal to award costs is found in section 29 of the Tribunals, Courts and Enforcement Act 2007, which states that costs shall be in the discretion of the Tribunal but subject to, in the case of this Tribunal, the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the "Rules"). The Rules then proscribe the discretion substantially.

49. The Rules provide that costs may be awarded to a party if another party has acted unreasonably or an award of wasted costs is appropriate. More particularly, the relevant provision in the Rules reads as follows:

13 Orders for costs, reimbursement of fees and interest on costs

The Tribunal may make an order in respect of costs only –

a) Under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

b) if a person has acted unreasonably in bringing, defending or conducting proceedings……

50. The leading authority in respect of part (b) the above rule is the Upper Tribunal decision in *Willow Court Management Company (1985) Ltd v Alexander* (and linked cases) [2016] UKUT 290 (LC). This lays down guidance of general application when considering such cases. The Upper Tribunal considered three sequential stages which should be worked through, summarised as follows:

Stage 1: Whether the party has acted unreasonably. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed.

Stage 2: Whether the tribunal ought (in its discretion) to make an order for costs or not. Relevant considerations include the nature, seriousness, and effect of the unreasonable conduct.

Stage 3: Discretion as to quantum. Again, relevant considerations include the nature seriousness and effect of the conduct.

The Upper Tribunal expanded on what constitutes "unreasonable conduct". The Upper Tribunal said that an assessment of whether behaviour is unreasonable requires a value judgment and views may differ. However, the standard of behaviour should not be set at an unrealistic level. Tribunals must not be "over-zealous in detecting unreasonable conduct" and must use their case management powers appropriately. The Upper Tribunal referred to tests and comments from other case authorities.

51. The burden is on the applicant for an order pursuant to Rule 13 and where orders under r.13(1)(b) are to be reserved for the clearest cases.

52. Rule 13(1)(b) is quite specific that an order may only be made "if a person has acted unreasonably in … defending or conducting proceedings". Under the Rules, the word "proceedings" means acts undertaken in connection with the application itself and steps taken thereafter (Rule 26). Such an application does not therefore involve any primary examination of a party's actions before a claim is brought (although pre-commencement behaviour might be relevant to an assessment of the reasonableness of later actions in "defending or conducting proceedings").

53. Whilst the Applicant has argued that the Respondent has been unreasonable in its conduct prior to the application, she has not set out any basis of which the Respondent has been unreasonable in conducting or defending the proceedings. The three other leaseholders constituting the Respondent attended the case management and dispute resolution hearing. Seeking a service charge recovery on the basis of an area apportionment agreed on by previous leaseholders is a reasonable position. They chose not to participate in mediation which is within their rights to do so. They did not respond to the Applicant's statement of case but similarly are entitled to leave it to the Applicant to make out her case.

54. Accordingly, the Applicant has not identified anything amounting to unreasonableness by the Respondent in defending the proceedings or in its conduct such as to merit a costs order. By not identifying any unreasonableness, it follows that the application for costs on the basis of acting unreasonably falls at stage 1. The Tribunal therefore did not consider stages 2 and 3, there being no basis for doing so and so it makes no comment in relation to these.

55. The Tribunal therefore determines that the Applicant's application for reimbursement of her application fee and payment of her other costs by the Respondent is refused.

Rights of appeal

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk

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

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

APPENDIX

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

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

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

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

Section 27A

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

(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

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

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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