FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**MAN/00BN/LSC/2022/0036 & 37**
Property	**:**	**125A and 143D Chorlton Road, , Hulme, Manchester M15 4JG**
Applicant	**:**	**Bahha-Aldin Ismail**
Respondent	**:**	**Loreto Place (Hulme) Management Company Limited**
Representative	**:**	**Stan Gallagher Counsel Tanfield Chambers**
Type of application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal member(s)	**:**	**Judge J White** **Ms S Latham (valuer)**
Venue	**:**	**Paper** **Northern Residential Property First-tier Tribunal, 1 floor, Piccadilly Exchange, 2 Piccadilly Plaza, Manchester, M1 4AH**
Date of determination	**:**	**1 December 2023**

DECISION

Decisions of the tribunal

(1) We make an order limiting the Applicants' liability to pay the litigation costs to 25% of the costs incurred by the Respondent in connection with these proceedings (as set out in their costs schedule).

(2) We make an order that the remaining legal costs are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant.

The Application

1. The Applicant sought 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 service charge years, 2020, 2021 and 2022.

2. The Applicant sought an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that none of the landlord's costs of the tribunal proceedings may be passed to the Applicant as an administration charge.

3. At the same time the Applicant sought an order under section 20C of the Landlord and Tenant Act 1985 that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

4. On 2 June 2023 the tribunal heard the application by video hearing.

5. We directed that the Respondent and Applicant make submissions on costs. The Respondent provided a submission and schedule of costs. The Applicant responded. The parties had agreed that the application for costs be considered on the papers. We considered that we were able to do so fairly and justly considering the issues involved and what was proportionate.

The Respondents costs application

6. Both of the Applicant's leases (the leases of units 125A and 143D are in materially the same terms, the lease of 125A is relied on:.

   (i) "*the Service Charge*" is defined at para 1 .23 by reference to "*…the total costs charges and expenses incurred by the Management Company… in performing its obligations set out in the Sixth Schedule*". This should read the Seventh Schedule.

(ii) Hence, the re-chargeable items of service charge expenditure (the Service Charge) are defined by reference to the list of obligations set out in the Seventh Schedule to the lease, which includes paragraph 5 & 6, the service charge accounting and recoupment machinery;

(iii) The lessee's obligation to pay the Service Charge is imposed by paragraph 10 of the Fourth Schedule to the Lease (the Lessee's Covenants) and clause 4 of the lease by which the lessee covenants with the Management Company to observe and perform the covenants set out in "the Fifth" Schedule 2 (again which is clearly a typographical error as the Lessee's covenants are set out in the Fourth Schedule to the lease);

(iv) The lessee's liability to pay the Management Company's costs of recovering unpaid service charge, including service charge litigation costs, is imposed by para 21 of the Fourth Schedule by which (coupled with clause 4 of the lease) the lessee is covenanted: "*Forthwith to reimburse ....the Management Company costs (including its surveyors and managing agents fees) incurred ... in the exercise of any rights pursuant to this Lease, which costs shall be a debt due from the Lessee to .. the Management Company* ".

7. The applicable right of the Management Company under the lease is the right to be paid by the Applicant, the Service Charge as certified and demanded in accordance with the accounting and Service Charge recoupment machinery (Schedule Seven, para 5 & 6). The exercise of that right by the Management Company viz. its right to be paid the Service Charge, has, in this case, included the Management Company defending the claim brought by the Applicant which sought to dispute the Applicant's liability to pay the Service Charge that had been certified and demanded in accordance with the lease.

8. The Applicant's contractual obligation to pay the Management Company's litigation costs (its costs of and occasioned by these proceedings) are therefore administrative charges and hence fall within para 5A of Sch 11 to the Commonhold & Leasehold Reform Act 2002. The details of which are itemised in the accompanying schedule, 14. Alternatively, these costs, form part of the Service Charge by dint of being costs incurred by the Management Company in complying with the Service Charge accounting and recoupment machinery prescribed by the leases (Schedule Seven, para 5 & 6). If so, which is not the Management Company's primary case , then the Management Company's litigation costs in these proceedings will fall within section 20C of the L & T Act 1985.

9. The general principles applying to the exercise of the discretion to make an order under section 20C and para 5A are similar, if not identical, though of course the application of these principles is fact sensitive to the

proceedings in question. The preference being for the Management Company's litigation costs that have been incurred in responding to the very largely failed claim brought against it by the Applicant to be borne by the Applicant and not by all leaseholders in accordance with their respective proportionate shares.

10. The principles are conveniently summarised in:

(i) The recent, and short, decision of the Upper Tribunal (Lands Chamber) in Avon Ground Rents v Ward [2023] UKUT 88 (LC), though this was something of an extreme case in which the FTT had found the landlord had been "misguided" to bring the proceedings even though the landlord had succeeded in them. At paragraph 23 the UT went on to say: *....it is unusual for orders under section 20C and paragraph 5A to be made where the landlord has been successful in the proceedings. Such orders are not costs orders that follow the event. They are an interference with the landlord's contractual right under the lease, to which the parties have signed up, and very careful thought has to be given to preventing the landlord from exercising its rights under the lease even where it has been unsuccessful. "*

(ii) The decision of the Upper Tribunal on the application of section 20C in Church Commissioners v Derdabi [2010] UKUT 380 (LC). 19. As stated in Church Commissioners at paragraph 16, citing the principles from the earlier Lands Tribunal case of Langford Court: "*the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise"*. Hence, Church Commissioners at paragraph 1 8 goes on to state: "*In very broad terms, the usual starting point will be to identify and consider what matter or matters are in issue, whether the tenant has succeeded on all or some only of them, whether the tenant has been successful in whole or in part (i.e. was the amount claimed in respect of each issue reduced by the whole amount sought by the tenant or only part of it), whether the whole or only part of the landlord's costs should be recoverable via the service charge, if only part what the appropriate percentage should be and finally whether there are any other factors or circumstances which should be taken into account*." and also at paragraph 19: " *By parity of reasoning, the landlord should not be prevented from recovering via the service charge his costs of dealing with the unsuccessful parts of the tenant 's claim as that would usually (but not always) be unjust and an unwarranted infringement of his contractual rights. "* .

11. In these proceedings the Applicant was very largely unsuccessful, having only succeeded in having a de minims amount reduced from his service charge (sum disallowed £18.90 (unit 125A) and £18.07 (unit 143D), total sum disallowed - £36.97). This sole success was the product of a single duplicated cleaning invoice (Substantive Decision para 49). This single (duplicated) invoice is to be weighed against the numerous other items across 4 years that were, unsuccessfully, put under challenge involving far greater sums of money. On any view the Management Company has succeeded in the litigation and for that reason alone it is respectfully submitted that it should not be debarred from exercising its contractual rights under the lease to recover its costs of the proceedings (whether under para 5 A, or section 20C) .

12. A further relevant factor, which also weighs against making a debarring order under para 5A or section 20C is that the Management Company is a leaseholder owned company with no sources of funds other than its contractual rights to recoup its costs under the terms of the leases. If a debarring order is made, there will be a funding shortfall which can only curtail its future capacity to manage the development for the benefit of all leaseholders.

13. They claim costs of a Grade A/B fee earner at £200/£150 per hour amounting to 17 hours and 54 minutes, totalling £4,422 (£3,375 plus £715 VAT). Of this 7 hours 31 are on documents and around 1 hour 36 on costs. Counsels hearing briefs are £4,200, and costs submission of £1,050. There is £15 Land Registry fee. Costs total is £10,787.

The Applicants case

14. The Applicant asks the tribunal to extinguish or reduce the costs. He contends that;

    (i) This is a no cost jurisdiction and that there is no clause in the Lease that allows costs recovery in his situation. Clause 12 of the Fourth Schedule only covers solicitors costs "*incidental to any notice required to be given under Sections 146 and 147 of the Law of Property Act 1925.*"Thus, if there was an applicable legal provision synonymous with his case, then it should have explicitly been written in the same way.

    (ii) He won on one of the five grounds and this would have a wider benefit.

    (iii) He had been careful to behave in a reasonable manner and the Respondents had not as set out in the determination.

    (iv) Scanlons Property Management LLP ("Scanlons") registered accounts has substantial assets to pay the legal costs.

(v) The total value of the dispute was around £300 and the costs of £10,787 is totally disproportionate. The newly admitted directors had expressed a view that they should not instruct expensive counsel. A proportionate amount would be £2,500.

(vi) The claimed fees for calculating the fees are too high. Mr Peter Cornell charged (200+VAT) for preparing Timesheets which should have been done by a secretary, where the Counsel charged 840+VAT which is 25% of the original fee.

(vii) He is an engineer with a family to support.

15. The Applicant refers to a number of FTT decisions, where costs were reduced or extinguished.

Our Determination

The substantive application and decision

16. The Applicant was concerned about the sudden increase in fees following the appointment of Scanlons in July 2019. He said he spoke for other leaseholders, though no other leaseholder was a party or provided evidence. In addition, he had identified a duplicate invoice amounting to £1,995.

17. Prior to the hearing the Respondent had not complied with directions. At paragraph 7 of our determination I said "*The Respondent was directed to file an agreed bundle 14 days before the hearing. They failed to do so. They had also failed to inform the tribunal whether they would be attending the video hearing listed for 2 June 2023. On 31 May 2023 I informed them that I was considering striking out the response as they had failed to comply with directions. The same day they sent a draft bundle that was agreed by the Applicant.*"

18. The day before the hearing Stan Gallagher filed a brief skeleton argument. He said that he had been instructed at the last minute, and during the hearing apologised that he was not as prepared as he might have been.

19. The Respondent had not addressed any of the points in dispute, with any specificity, instead choosing to state that the Applicant's case was not clear. They had not provided any witness statements. They had not investigated the duplicate invoice. At paragraph 26 of the decision I said *" As the Respondents set out in their Statement of Case we are required to examine the decision making process and outcome. Except broad statements of general improvements, the Respondent failed to explain the high increase until the date of the hearing. They did not provide any witness statements or point to specific reasons for the increases. If they had done so before the hearing, the Applicant may have been content with*

the explanation or a paper determination. It also meant that the hearing was longer than required."

20. We found that there had been a sudden increase in service charges of around £300 for each Property in 2020. The Applicant had identified the main areas of the increase as management fees, building insurance, estate electricity, apartment repairs and maintenance, reserve fund contributions. Following an explanation by Christian Taylor a property manager for Scanlan's and Johnathan Quayle, a director of both the Respondent and the cleaning company, we found that these charges were payable. In addition the Applicant contended that there was a failure in the accounts process and identified a duplicate invoice of £1,995 for a cleaning fee in 2021. His share totalling £36.97 (being £18.90 for 125A and £1 8.07 for 143 D). At the hearing the Respondents admitted that it did appear to be a duplicate and said they would investigate. As they had not provided any explanation for the duplicate we decided it was not payable.

The Lease

21. The Respondent has correctly identified the terms of the lease that would entitle it to demand the payment of contractual costs. The clauses identified did not refer specifically to legal fees, and so we approached this view with some caution. We note that the Applicant has submitted arguments that the clause needed to specifically refer to legal costs and it did not. The tribunal is a no costs jurisdiction as asserted and we therefore have to consider the terms of the lease. We have to consider whether costs are recoverable in terms of the type of application and who brought the application.

22. We have considered the cases on each side (see for example, Geyfords Ltd v O'Sullivan & Ors [2015] UKUT 683 and Conway al v Jam Factory Freehold Ltd [2013] UKUT 0592). Each lease is unique and the FTT cases supplied by the Applicant, though instructive of a general approach, are not precedents. In Geyfords Ltd v O'Sullivan & Ors [2015] UKUT 683 the Deputy president reminds us that "management" may sometimes include obtaining professional advice, including legal advice, that might involve litigation. In that case "management and running" were not "clear and unambiguous terms" using the test set out in Sella House Ltd v Mears [1989] 1 EGLR 65 . In each case we have to consider the wording of the lease and its proper construction as set out generally in Arnold v Britton & Ors *[2015] UKSC 36*.

23. The cases above find that clauses do not necessarily have to explicitly refer to legal fees. We have found that the wording of "*the total costs charges and expenses incurred by the Management Company… in performing its obligations*" is wider than clauses solely relating to costs of managing. It is clear enough to cover costs incurred in responding to applications made by lessors, relating to payability of particular service charges.

24. This is the case, notwithstanding, the clear typographical errors when referring to particular schedules in the lease.

Litigation costs

25. In the application form the Applicant sought an order under paragraph 5A of Schedule 11 of the 2002 Act. A Landlords contractual legal costs can be claimed against an individual tenant in accordance with schedule 11. Paragraph 5A makes provision for the tribunal to reduce or extinguish the tenant's liability to pay litigation costs. It may make whatever order it considers just and equitable.

26. The Respondent correctly identifies that a primary consideration is who has been the successful party. The Applicant's contention related to the seemly unreasonable increase in costs in 2020. The increase amounted to around £300 for each Property and a further smaller increase in 2021. At best this amounted to £1,200. The Applicant on the other had succeeded in identifying the invoice of £1,995 (£36.97 for his share, though would benefit other leaseholders).

27. In addition, we have to take into account that the Respondent is a leaseholder owned company with no sources of funds other than its contractual rights to recoup its costs under the terms of the leases. The Applicant, incorrectly identifies the Respondent as Scanlons, the managing agents. If an order is made reducing or extinguishing costs, there may be a funding shortfall which may affect its ability to manage the development for the benefit of all leaseholders.

28. Though we give greater weight to these primary factors, the tribunal's discretion is wide and, in addition to the extent to which a party has succeeded, we do also need to consider all the circumstances ,including conduct (Church Commissions v Derdabi [2010] UKUT 380 (LC).

29. Consequently, on the other side we have to weigh a number of factors. Firstly, that the Applicant did have some success. The relatively small amount of the Applicant's share of invoice must be coupled with the identifying of an issue of duplicate invoices, and will surely have alerted the Respondent to consider safeguards to prevent similar errors. They certainly had not investigated this issue prior to the hearing and appeared to be taken by surprise, though it had been raised at an early stage. We are particularly concerned by this approach, as a Director of the management company is also a Director of the cleaning company.

30. Secondly, we have to consider all the circumstances and the conduct of the Respondent in proceedings as set out above. This is not insignificant and has not been addressed by the Respondent at all, despite being highlighted in the substantive determination. The Applicant was clearly seeking an explanation for the increase in costs when Scanlons took over, and did not

receive a full or satisfactory one until the day of the hearing; or at least the Respondent did not disclose, as part of this application, any documents setting out an explanation.

31. In addition, the Respondents did not comply with directions, as set out above. There were no witness statements, full disclosure, or response to the items in dispute, and if they had, may well have led to settlement, or at least no need for an oral hearing. They clearly had not booked counsel in good time. The bundle had not been sent and the tribunal were forced to consider a debarring order. It was unclear what value the solicitors had brought to this application.

32. Thirdly, we remind ourselves that tribunals are primarily a no costs jurisdiction to enable parties to resolve disputes relatively cheaply and easily, particularly where, as in this case, the issues are straightforward. The Applicant states that costs would be prohibited in the county court as a small claim. Though we are looking at contractual costs agreed between the parties, the Upper Tribunal said in Avon Ground Rents Ltd v Child [2018] UKUT 0204 (LC) at paragraph 65…

"*…The procedure before the FTT is intended to be relatively informal and cost-effective. The legal principles for assessing the reasonableness of service charges are well-established and clear. In many cases there will be no issue about the relevant principles to be applied, and their application will not be so difficult as to make legal representation essential or even necessary. In such cases a representative from the landlord's managing agents should be able to deal with the issues involved….*"

33. The Respondent has appeared to rely almost solely, if not completely ,on lawyers without any explanation as to why they have done so and not proportionate to the issues in dispute, which were all straight forward and could have been easily dealt with by the management company.

34. Fourthly, we do have to consider proportionality. The total service charge costs in dispute were small as set out above, yet the costs claimed were £10,000. It is unclear what work was done by their solicitors, a grade A fee earner, considering the shortcomings identified in the preparation of their case. We have no criticism of counsel, who was instructed at the last minute, though again instructing an experienced London based counsel was disproportionate to the issues involved. The terms of the lease are not clear enough to give carte blanche to landlords lawyers, to charge excessive fees. Though we cannot, and should not make a finding on this, partly because we do not have the full picture, the payment of fees is clearly something that is open to be questioned by the Respondent.

35. Lastly, there are no particular conduct issues, relating to the Applicant, considering that he is a litigant in person. Though the Respondent had said that they did not know the case against them and the Applicant had not provided any alternative quotes, we had found in our substantive decision that his case was clear.

36. In balancing the above, together with the costs schedule, we find that it is a just and equitable to limit the litigation costs recoverable directly from the Applicant to 25% of £10,787 totalling £2,696.75.

Service charge costs

37. In the application form, the Applicant applied for an order under section 20C of the 1985 Act. Section 20C provides, so far as is material:

38. 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…*".

39. As 25% is recoverable through litigation costs, this potentially leaves 75% recoverable through the service charge. To reduce the ability of a tenant owned management company to recover costs at all from the service charge, would outweigh most of the factors against recovery set out above and it would not be just and equitable in the circumstances to reduce the Applicant's share of the service charge any further.

Judge J White
18 January 2024

RIGHTS OF APPEAL

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.