FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LSC/2024/0356**
Property	**:**	**Flat 14, 26 Medway Street, London SW1P 2BD**
Applicant	**:**	**Ms Emma Marsh**
Representative	**:**	**In person**
Respondent	**:**	**26-27 Medway Street Management Ltd**
Representative	**:**	**Mr Castle of counsel**
Type of application	**:**	**For the determination of the liability to pay service charges**
Tribunal members	**:**	**Judge Professor R Percival** **Mr J Stead BS (Hons) MSc** **Mr C Piarroux JP**
Venue and date of hearing	**:**	**10 Alfred Place, London WC1E 7LR** **17 April 2025**
Date of decision	**:**	**1 May 2025**

DECISION

Decisions of the tribunal

(1) The Tribunal makes the determinations as set out under the various headings in this Decision.

(2) 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 lessees through any service charge.

(3) The Tribunal makes an order under paragraph 5A of schedule 11 of the Commonhold and Leasehold Reform Act 2002 extinguishing any liability to pay an administration charge in respect of litigation cost in relation to the proceedings.

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 by the Applicant in respect of the service charge years 2021/2 to 2024/25.

2. Sources of free legal information, including the legislation referred to in this decision, are set out in the appendix to this decision.

The background

3. The property which is the subject of this application is a two bedroom flat in a 1930s purpose built block, containing, now, 21 flats.

4. The Applicant holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The relevant provisions of the lease are noted below.

The lease

5. The lease is dated 1984 for a term of 125 years.

6. The "Tenants Contribution" is defined as 4.23%, but subject to clause 12. That clause provides that flats not connected to the central heating and hot water system would not be charged for their costs. Those costs are to be charged to the flats that are connected on a pro rata basis. Below, we refer to the fact that the parties operate an alternative basis for the calculation of service charges.

7. The tenant's repairing covenant excludes "the exterior surfaces of the window frames and the external window sills … of which form part of the

Service Obligations". The latter term is defined as the landlord's obligations under clause 6 (see below). The demise includes "the windows and window saches [sic] of the Flat" (first schedule, part 1).

8. Clause 5.1 makes provision for the service charge (the payment of the "Tenant's Contribution"). It provides for an advance service charge to be paid on 24 June and 25 December each year of a sum which

> "the Landlord or its agents may reasonably consider sufficient (together with the contribution paid or payable by the other tenants and by the Landlord under Clause 7(c)) to meet the Service Charge for the period until the next due date" (clause 5.1(ii).

9. The term "Service Charge" is defined as the cost of the "Service Obligations" (less irrelevant matters).

10. Within 14 day of an auditor's certificate (provided for in clause 6.10) of the total expenditure on "Service Obligations" incurred by the landlord in the previous accounting year, the tenant covenants (in effect) to pay any deficit after taking account of the advance payment (clause 5.1(iii)).

11. There is no express provision for circumstances where the advance charge results in a surplus.

12. The term "the Service Obligations" is defined as "the obligations undertaken by the Landlord to provide the services and other things specified in clause 6" (clause 1.4).

13. The landlord's repairing etc covenant (clause 6.2) is to "keep the Common Parts and Service Conduits in the Building in repair and rebuild or replace any parts that require to be rebuilt or replaced". Common Parts are defined as "foundations main structure roof and otherwise those parts of the building and curtilage thereof not comprised in this lease or any other lease …" (clause 1.3).

14. Clause 6.4 requires the landlord to maintain "suitable supply of hot water to the radiators in those flats served by the central heating system". Clause 11, however, stipulates that the landlord is not liable for interruptions in the performance of the Service Obligations by mechanical breakdown or other things beyond the control of the landlord.

15. By clause 6.6, the landlord covenants to "redecorate and paint the Common Parts and the exterior surfaces of the window frames and of the window sills and the exterior of the external door or doors of the Flat" at such intervals as the landlord's surveyor considers necessary.

16. Clause 6.10 makes provision for the auditing and certifying of the service charge, and for the tenant to be allowed (for a reasonable charge) to inspect "vouchers and receipts".

17. The employment of managing agents and other professionals by the landlords is covered by clause 6.11, and there is a sweeper clause at 6.12.

18. By clause 4.14, the tenant covenants to pay

> "all proper costs charges and expenses (including legal costs on a full solicitor and own client basis and surveyors fees on usual professional scales) of and incidental to; (i) the preparation and service of a Notice under Section 146 of the Law of Property Act 1925 notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court (ii) the recovery of the rents hereby reserved and made payable of the same are not paid at the time hereby provided".

19. Clause 4.15. requires the tenant to pay interest (at 4% above Barclays' base rate) "on all sums payable to the Landlord pursuant to the provisions of this lease which have not been paid within 14 days of become due …"

20. There is no provision for a reserve or sinking fund in the lease.

The hearing

Introductory

21. The Applicant represented herself. She was accompanied by Mr Swift, whose witness statement had been disclosed, but in the event he did not give oral evidence. Mr Castle of counsel represented the Respondent, with Mr Ross Wilson, his solicitor. Mr Buccafusca and Mr Su, directors of the Respondent, attended. The former had provided a witness statement, but did not give oral evidence. Mr Wiles, of the managing agents (Prime Property Management) attended. In addition, three residents at the property attended as members of the public.

22. The members of the Respondent company are the leaseholders of the property. We understood that provision was made in the company's articles of association to ensure that shareholding was limited to existing leaseholders, and that all leaseholders held shares (we did not have a copy of the articles of association).

23. The original application related to, in effect, eight headings, and two issues the Applicant described as "queries". In advance of the hearing, four of the headings and one of the queries had been resolved or withdrawn. Of the four remaining headings, or claims, one, relating to late payment charges, was conceded by the Respondent. The remaining

issues were "funds held on account", claims relating to a major works programme and a category described as "general service level". The final query related to the Applicant's percentage contribution to the service charge, but that was resolved in the context of the major works, and was not dealt with separately.

24. We deal with each in turn. As matters proceeded, we dealt with the application largely by submissions from both parties on each issue in turn, with some informal evidence being taken from both parties (directly from the Applicant, in the form of instructions as to matters of fact provided to Mr Castle for the Respondent).

Funds held on account

25. The substance of this issue related to the collection and use of funds for a "reserve fund", the purpose of which, according to the Applicant, was to fund the major works (see below). Funds had been collected for this purpose from the Applicant's predecessor in title (she acquired the leasehold interest in 2015), and subsequently from her.

26. As we noted above, the lease does not provide for a reserve fund. Neither party argued that it did. Mr Castle's position was that the fund that had operated since at least 2014, and into which both the Applicant's predecessor in title and the Applicant had paid, was one operated on the basis of, in Mr Castle's expression, consent. Both parties agreed with this assessment. There was no suggestion that a contract or formal agreement of any sort had been entered into under which these contributions were required. They were voluntary.

27. Our jurisdiction under section 27A of the 1985 Act is to determine whether a service charge is payable. "Service charge" is defined in section 18 as "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 …".

28. The sums that constitute a service charge must be "payable". We conclude that that term (which appears twice in section 18 and again in section 27A) refers to an *obligation* to pay, under the lease or some other agreement that imposes an obligation on the payee. Voluntary contributions to the purposes specified in section 18 may be paid, but are not "payable". In the result, we conclude that we do not have jurisdiction to determine any question relating to the voluntary payments towards the major works.

29. *Decision*: The challenge under the heading "funds held on account" is outwith the Tribunal's jurisdiction under section 27A of the 1985 Act.

The major works

30. We heard considerable submissions from both parties in respect of this issue. For reasons that will become apparent, we do not need to rehearse them at length in this decision.

31. The background is a major works project in respect of external works. This project encompasses repairs (or replacement) of the Crittall windows and their sills in the building; and various other external works. It is the project as it relates to the windows that is the subject matter of the dispute.

32. The lease is clear that the windows are demised, but that the Respondent's covenants included an obligation to "decorate and paint the exterior surfaces of the window frames and of the window sills". However, it became apparent that the directors of the Respondent had misinterpreted this covenant to include a wider obligation to *repair* the windows. Mr Castle was clear in the hearing that the obligation did not extend beyond painting/decorating the external surface of the windows.

33. In light of the how the issue played out, we can summarise the history of the project briefly. When the Applicant bought her flat, her survey indicated that the windows were old, but would last well if properly maintained. She was informed at the time of the purchase that a major works programme would start imminently. The project, however, was delayed every year thereafter. A start date of 1 September 2024 was eventually set for the project, but that was subsequently delayed until spring of 2025.

34. There came a point in 2022 when the Respondent offered the leaseholders two options in respect of the windows of their flats. Option A was that each leaseholder would pay for the replacement of their windows, and contribute only to the other external works matters through the service charge. Option B was that the leaseholder would pay for the repair of windows and for their share of the other external works through the service charge.

35. It appears that in 2022, the advice from the Respondent's then managing agents (Rendall and Rittner) was that all or most of the windows, at least on one side of the building, were beyond repair. The Applicant understood that this applied to her windows.

36. Subsequently, that advice has changed, and the major works now anticipated are to repair the windows possibly to be included in the project.

37. On 25 March 2024, the Respondent sent a letter to the leaseholders, said to be arising out of the section 20 consultation notice of estimates of the same date. The letter assumes that repair of the external windows is the responsibility of the Respondent, and refers throughout to service charge

matters. The letter gives a sum of £20,744.04 for "communal works" and of £39,641.59 for "Demised works (if applicable)", which sums were added together (to give a figure of £60,385.63). The paragraph immediately preceding the figures, following a passage explaining the lack of a reserve fund, is as follows:

> "In line with tender analysis, we have broken down your individual apportionment of the forthcoming major works based on the recommended tender from [a company]. The costs have been split to reflect the costs of communal works for which all leaseholders are required to contribute as well as any costs associated with demised works to the windows."

38. The letter goes on to specify the terms of payment of the service charge, and the consequences of failure to pay.

39. Thus the letter does draw a distinction between "communal works" and "demised works", but as a whole, the works, demised or not, are treated as part and parcel of the section 20 consultation process, and references are made to a single service charge apportionment.

40. As a result of the letter, the Applicant said, she was very concerned about the total, and thereafter took steps to contract to replace her windows, in the belief (accurate, as it turned out) that she could do so more cheaply than the figures given in the letter. She has now commissioned windows, which have been made up, but not yet fitted.

41. We were told that the Applicant is the only leaseholder who has taken the option of replacing the windows.

42. As pleaded, there were two components to the Applicant's case in relation to the window major works.

43. The first was a claim by the Applicant for a sum representing, she argued, her loss of income in relation to a service charge paid in July 2024, in order, it was said, for the external works to start in September 2024. The work did not start then, and the relevant service charge sum was not reimbursed. Her case is that she should be compensated for her loss of income in terms of interest on the sum that has been retained past the 2024/25 service charge year. Her claim was for £371.56 in interest at 4%.

44. The jurisdiction of the Tribunal under section 27A of the 1985 Act is to declare what services charges are or will be payable and reasonable. It does not include declaring whether and how much interest is payable on a retained sum.

45. The lease does not, as we note above, make provision for over-collection of the service charge, only for under-collection. There is no provision for a reserve fund, so the Respondent is not entitled to apply any over-

collected funds for future years, as some leases allow. There is only provision for the collection of a service charge for expenditure in the year for which it is collected. Therefore, the options open to the Respondent if it has over-collected service charges are either to replay the surplus to the leaseholders, or to credit them to that amount against the next year's service charge demands. Where the lease is silent as to the question, we consider that the choice between these two options is for the Respondent – to put it another way, we do not consider that there are any considerations that should make us imply one or other of these two possible options. But if the surplus is credited, the credit must relate to the collection of service charges for the following year's in-year expenditure only.

46. For the reasons we give below, however, there is now no issue in relation to service charges paid by the Applicant in respect of the major works charges in 2024/25.

47. As to the cost of replacement windows, the Applicant's core case was that her windows had deteriorated to the extent of needing replacement because of the Respondent's failure over many years to "decorate and paint" the windows. Accordingly, she argued that the Respondent should pay a proportion – she argued for 50% - of the costs of her windows.

48. Again, the claim, put this way, does not readily fit the Tribunal's jurisdiction under section 27A, relating, as it does, only to service charges. However (and this was presaged in the directions), it could possibly give rise to an issue of equitable set off of a disrepair claim against a service charge demand for work that would not have been necessary, or would have been cheaper, had the disrepair not occurred (*Continental Property Ventures v White* [2006] 1 E.G.L.R. 85).

49. But that approach requires that there be a service charge demand against which the set-off could be put. The Tribunal may only use the concept of equitable set-off to reduce (up to but no further than extinguishing) a service charge sufficiently linked to the subject of the set-off. We cannot order a payment in excess of such a service charge, as the set-off is a means for the Tribunal to get to the end of declaring a service charge, in part or in whole, not payable.

50. During the morning of the hearing, we heard extended and robust submissions from Mr Castle to the effect that we should not entertain an equitable set-off claim without expert evidence (as opposed to the non-expert possible evidence of Mr Swift, a building contractor, as to the state of the windows), and that it would be procedurally unfair of us to do so without any advanced disclosed evidence as to quantum at all. Over the lunch time adjournment (which we extended at the request of the parties), we asked the parties to identify what possible service charges were relevant to a possible set-off, before we could decide how to proceed in relation to any plausible set off argument.

51. When we returned, the position was set out by Mr Castle and the Applicant. The first point is that it appeared clear that both parties agreed that they had operated different proportions for the calculation of the service charge than those (largely) provided for in the lease.

52. The lease provides effectively for two service charge percentages, one general one and one in relation to the costs of communally supplied heating and hot water (see above at paragraph 6). However, the service charge had been operated on the basis of five service charge percentages. These were (for the Applicant) 3.668% for external works, 4.4411% for internal works, 5.2248% for lift costs, 6.2286% for hot water and heating via the boiler, and 4.4526% for water related costs.

53. It is necessary to establish the relevant service charge that the Applicant had been properly charged in relation to the major works. For that, it was necessary to start not with the figures in the letter of 25 March 2024, but with a re-tender process that took place in July 2024. The figure for "communal works" in the 25 March 2024 letter did not include any window works. In the re-tender, an amount for window repairs *was* identified, at (as a total for the property as a whole) £95,801.10. It was apparent that the Applicant's proportion of the 25 March 2024 "communal works" sum was charged at 3.67 (ie a rounding to two decimal places of the external works sum given above). Applying a similar percentage to this sum, her contribution attributable to window repairs amounts to £3,515.90.

54. Mr Castle accepted that that sum was not chargeable to the Applicant as a service charge. If, however, one returned to the percentage in the lease, Mr Castle said, the result was that the Applicant was being under-charged. In relation to the major works (ie the non-window "communal works"), had the lease proportion been applied, she would have paid £24,305 rather than £20,744.04. There would also be an additional £155.28 as a result of inflation at the time of the re-tender, giving a total of £24,460.28. In the result, Mr Castle submitted, if the correct lease percentage had been charged, then she had been undercharged by £67.81.

55. The result, therefore, said Mr Castle, was that there was no service charge against which an equitable set-off could bite.

56. The Applicant argued, on the contrary, that the five-category service charge percentage approach should be respected. The Respondent had suggested that this arrangement had come about when, in about 2019, a flat or flats in the basement were added to the block, but the Applicant's evidence was that it was the express basis upon which she purchased her leasehold interest in 2015, it having been explained to her by her predecessor in title, a then director of the Respondent. We note that Mr Castle asserted the 2019 change somewhat tentatively, and it may be that

that the Respondent lacked clarity on the question of when the system was introduced as a result of a change in managing agent.

57. In any event, we put it to Mr Castle that both parties had operated on the basis of the five-category approach for some considerable time, which, on the face of it, at least amounted to an estoppel by convention preventing the Respondent relying on the lease percentage now; or, further than an estoppel, a positive agreement by the parties to abide by the five-category approach.

58. Mr Castle agreed that there must be at least an estoppel by convention arising, and in those circumstances, the Applicant had been overcharged the £3,515.90 attributable to window repairs actually charged, on the five category basis. He therefore conceded that that sum would be reimbursed to the Applicant.

59. So insofar as there was a service charge to which a putative equitable set-off could apply, the whole of that service charge, the Respondent now concedes, falls to be reimbursed to the Applicant.

60. Since it purported to be a service charge, it is within our jurisdiction to declare that it is not payable as such, and we would do so, had that concession not been made.

61. *Decision*:
(1) The Tribunal may not order a sum to be paid to recompense the Applicant for loss of income;
(2) where the Respondent now accepted that the £3,515.90 charged for window repairs was not payable and conceded that it should be reimbursed, there was no service charge against which an equitable set-off could be made in respect of the alleged failure of the Respondent to comply with its covenant to decorate the external surfaces of the windows. Had the concession not been made, we would find that that service charge not payable.

General service level

62. Under this heading, the Applicant raised a number of issues as examples of what she said was a poor standard of management service. We deal with each in turn.

63. First, the cleaning of the inside communal areas had been reduced from three visits a week by the cleaner to one visit a week, which resulted in a lower level of service. The cleaner also did not undertake external cleaning, in particular in respect of pigeon fouling.

64. The lift was out of service, and had been since Christmas eve 2024. A section 20 consultation process was ongoing, but was proving lengthy.

65. There had been problems with the hot water system. In her statement the Applicant had put some stress on an earlier positive finding of the legionella bacterium, but in her oral submissions she concentrated on a complaint that a pump had malfunctioned which meant that she had to wait for four and half minutes before hot water arrived in her flat.

66. Her entry phone had malfunctioned, and she had been asked to pay up-front for the investigation of the fault. In the event, the fault was found to have occurred to a part of the system outside her flat and thus within the Respondent's repairing covenant.

67. Mr Castle responded on each point.

68. Cleaning had been reduced internally as a cost saving measure. It was a rational decision by the Respondent to change the frequency and the outcome was within the reasonable range. The result had been a saving in service charge demands.

69. There was no charge to the external schedule (ie that relating to external works percentage in the five category system) for cleaning. The Applicant may prefer that there was, but as there is not, there is no service charge in relation to it. These were decisions taken by the Respondent itself – the leaseholder directors – not by the managing agent.

70. As to the lift, it was not being said that any specific item of expenditure was excessive. Any delay was a result of the time taken to undertake the section 20 consultation.

71. Mr Castle's instructions were that the pump had been fixed (a point contested by the Applicant), but again there had been no charge in relation to it.

72. There were initial delays in relation to the repair to the entry phone as a result of discussions about the call out fee with the Applicant (on the basis that if the fault was within the flat, she would have to pay the call out fee), and then a further delay as a result of the instruction of a contractor who proved to be unreliable. It was subsequently found to be the responsibility of the Respondent to effect the repair, and they did so.

73. Insofar as the particular issues raised here were indicators of poor management, we noted that the Applicant's share of the managing agents fee amounted to £211 in 2023/24 (a year for which we had outturn figures). The Tribunal indicated to the parties that, as a matter of general acquittance with the market for managing agent's services in London, not susceptible to the disclosure of discrete pieces of evidence, we would consider that a charge of up to about £400 per unit would normally be within the reasonable range for properties of this type, depending to an extent on the specific terms of the management agreement.

74. It does not appear to the Tribunal that any of these issues raises direct questions as to whether a service charge in relation to them is not payable or is unreasonable in amount. We accept that that was not the primary submission made by the Applicant.

75. But nor do we think that the Applicant has discharged the burden of persuading us that they are either unreasonable decisions, as opposed to decisions with which she does not agree (the cleaning), or that they amount to such a dereliction of the Respondent's duties and responsibilities as to justify a reduction in the managing agent's fees, which in any event and moderate and well within the reasonable range.

76. *Decision*: We do not find that any of the complaints under this heading relate to specific expenditures from the service charge that are either unpayable or unreasonable in amount; and we do not consider that the complaints are such as to justify a reduction in the managing agent's fee.

Applications for additional orders

77. The Applicant applied for an order under section 20C of the 1985 Act that the costs of these proceedings may not be considered relevant costs for the purposes of determining a service charge and an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 extinguishing any liability to pay an administration charge in respect of litigation cost in relation to the proceedings.

78. We raised with the parties as a potential precondition to the making of the orders whether the lease made provision for recovery of legal proceedings on either basis. While it is true that the Tribunal in general considers the making of these orders on the hypothetical basis that the lease did allow for passing on legal costs, we are not obliged to, and the issue could always potentially arise on an application for the orders.

79. Mr Castle said that the Respondent was prepared to concede that the lease did not provide for the recovery of the costs of these proceedings either as an administration charge, save in circumstances that do not apply here set out at clause 4.14 (the preparation and service of a section 146, Law of Property Act 1925 notice and recover of rents), or as a service charge.

80. Under those circumstances, Mr Castle said that the Respondent could not object to the making of the orders, and we make them.

81. *Decision*: The Tribunal orders

(1) under section 20C of the 1985 Act that the costs incurred by the Respondent in proceedings before the Tribunal are not to be taken into account in determining the amount of any service charge payable by the Applicant; and

(2) under Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A that any liability of the Applicant to pay litigation costs as defined in that paragraph be extinguished.

Rights of appeal

82. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the London regional office.

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

84. If the application is not made within the 28 day time limit, the application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at these reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

85. The application for permission to appeal must identify the decision of the Tribunal to which it relates, give the date, the property and the case number; state the grounds of appeal; and state the result the party making the application is seeking.

Name: Judge Prof R Percival **Date:** 1 May 2025

APPENDIX: SOURCES FOR FREE LEGAL MATERIALS

Legislation

The legislation referred to in this decision may be found at:

https://www.legislation.gov.uk/ukpga/1985/70
https://www.legislation.gov.uk/ukpga/2002/15/contents

Case Law

The dedicated website for Upper Tribunal (UT) cases, which are binding on this Tribunal, is:

https://landschamber.decisions.tribunals.gov.uk/Aspx/Default.aspx

The search engine does not allow for free text searching. Sufficient information to use the provided search engine (such as the date of the case or the parties names) may be available via a google search.

Alternatively, the official National Archive website is at:

https://caselaw.nationalarchives.gov.uk/

This has a better search engine, but does not contain UT decisions before 2015, and there may be gaps in its provision thereafter.

The National Archive website can also be used for finding cases in higher courts, including those referred to in UT decisions.

Alternatively, many UT decisions, and most other important cases in all courts, are available on:

https://www.bailii.org/ .

Bailii stands for British and Irish Legal Information Institute. It is a charity that has published free caselaw for many years, and has in some cases loaded up earlier case law.