FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case References	**:**	**(1) LON/00AP/LSC/2019/0143 &** **(2) LON/00AP/LSC/2019/0146**
Property	**:**	**Flats 1 and 2, 1, Methuen Park Road, Muswell Hill, London, N10 2JR.**
Applicants	**:**	**(1) Ms. M. Aatkar** **(2) Ms. N. Leighton**
Representative	**:**	**In Person**
Respondent	**:**	**Dr. Mary J. Olivet Nicholaspillai**
Representative	**:**	**Mr. P. Cleaver of Urang Property Management**
Type of Application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge and related orders**
Tribunal Members	**:**	**Tribunal Judge Stuart Walker (Chairman)** **Mr. Michael Taylor FRICS** **Mrs. J. Hawkins**
Date and venue of Hearing	**:**	**25 July 2019 at** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**25 July 2019**

DECISION

Decisions of the Tribunal

(1) The Tribunal determines that no sums are payable by the Applicants in respect of the service charges demanded for the years 2018 to 2019 and 2019 to 2020.

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(2) The applications for orders 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 are granted for both Applicants.

(3) The applications for orders under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, so that none of the landlord's litigation costs can be recovered as an administration fee, are granted for both Applicants.

(4) The Tribunal makes an order under rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for the re-imbursement by the Respondent of the fees of £200 paid by each Applicant in bringing this application. Payment is to be made within 28 days.

Reasons

The application

1. The Applicants seek determinations pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by them in respect of the service charge years 2018 to 2019 and 2019 to 2020.

2. Directions were issued on 23 April 2019. These identified that the issues in the two cases were the same and that the applications should be heard together. The identified issues were whether a total of £2,468.50 per flat was payable for each service charge year, whether orders should be made under section 20C of the 1985 Act ("section 20C") and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("paragraph 5A"), and whether there should be an order for re-imbursement of the application/hearing fees. No costs orders were sought by the Applicants.

3. The relevant legal provisions are set out in the Appendix to this decision. Page numbers in what follows are references to the agreed bundle.

The Parties

4. The Applicants were present but not represented. The Respondent was represented by Mr. P. Cleaver of Urang Property Management.

The Background

5. The property which is the subject of these applications consists of a house converted into four flats.

Preliminary Issue: 2018/2019 Service Charge Year

6. The Tribunal noted that the Respondent had not completed a Scott Schedule in respect of the 2018-2019 service charge year and that that for the 2019-2020 year stated that the only amounts demanded were for 2019-2020 (Tab 5 page 5). The Tribunal enquired of Mr. Cleaver whether anything was being sought in respect of the 2018-2019 service charge year and he replied that nothing was

being demanded for that year as the demands had been withdrawn. That being the case, the Tribunal concluded that no service charges were payable by either Applicant for the 2018-2019 service charge year.

The Lease

7. The lease for Flat 2 was before the Tribunal (Tab 2 at page 28 onwards). The lease for Flat 1 was not in the agreed bundle. However, the parties agreed that it was, in all material terms, identical.

8. The relevant provisions in the leases are as follows.

9. By Clause 4(2) the Applicants covenant to;

> "*Contribute and pay the sum of £40.00 on the signing hereof and thereafter annually one fourth part or £40.00 whichever shall be the greater towards the costs expense outgoings and matters mentioned in the Fourth Schedule hereto*".

10. The Fourth Schedule sets out the costs, expenses etc. as follows;

> "*1. All costs and expenses incurred by the Lessor for the purpose of complying or in connection with the fulfilment of his obligations under sub-clause (4)(5) and (6) of clause 5 of this lease*
> *2. All rates taxes and outgoings (if any) payable by the Lessor in respect of the roads, paths, forecourts and gardens of the said building*
> *3. The cost of management of the said building*

11. The Respondent's Scott Schedule (Tab 5 page 5) stated that all amounts sought were budget sums. No invoices were provided in respect of any items of expenditure. Mr. Cleaver confirmed to the Tribunal that the sums sought were all budget sums.

12. The Tribunal invited Mr. Cleaver to explain how, given the wording of the Fourth Schedule, the terms of the lease enabled the Respondent to recover sums in respect of expenditure which had not yet been incurred.

13. Mr. Cleaver initially objected to the Tribunal raising this as an issue as he contended that the Applicants had not raised it in their applications.

14. The Tribunal concluded that the applications that were made sought to challenge the payability of the sums demanded. It also noted that the correspondence from the Applicants repeatedly sought evidence of what sums had in fact been spent. It considered that this, at least inferentially, raised the question of whether sums could be recovered if no expenditure had yet been made and so no invoices existed.

15. The Tribunal also concluded that, in any event, it could not simply shut its eyes to the express terms of the lease. It could not conclude that future expenditure was recoverable when the lease did not provide for that.

16. Mr. Cleaver then conceded that the Tribunal's conclusion was correct and that the lease did not permit the recovery of future expenditure.

17. At this point the Tribunal asked whether Mr. Cleaver wished for some time in which to consider his position and whether he wished to argue that any of the sums sought in the 2019-2020 demand were, nevertheless, recoverable. However, his response was that nothing was presently recoverable although fresh demands may be issued.

18. On the basis of this concession the Tribunal concluded that no service charges were payable by either Applicant in respect of the 2019-2020 service charge year.

Applications under s.20C and paragraph 5A

19. The Tribunal noted that whilst Ms. Leighton in her application had sought orders under section 20C and paragraph 5A, Ms. Aatkar had not done so (Tab 2 page 6). Ms. Aatker explained that this was an oversight on her part and that she wished to apply for orders under both provisions.

20. The Tribunal invited Mr. Cleaver's views on this and, whilst he made submissions on whether or not such orders should be made, he did not object to the Tribunal considering applications by Ms. Aatkar. The Tribunal was satisfied that the directions issued on 23 April 2019 indicated that orders were sought by both lessees and it did not consider that the Respondent would be prejudiced in enabling Ms. Aatkar to pursue such applications at the hearing and so it considered applications by both her and Ms. Leighton.

21. Mr. Cleaver objected to the making of such orders. He argued that had the lessees pointed out the terms of the lease then there would have been no requirement for the cases to come before the Tribunal. He argued that there had been no attempt by the lessees to use the complaints procedure available to them. There was an awful lot of work which needed to be done at the premises and the Respondent had undertaken considerable work preparing for the hearing. He did not consider it reasonable for the Respondent not to be able to recover the costs of that work.

22. The Tribunal considered the two financial years. In respect of the 2018-2019 service charge year the Respondent's case was that the demands had been withdrawn. Mr. Cleaver initially stated that correspondence clearly showed this, however the e-mail he relied on (Tab 1 page 8) did not, in the Tribunal's view, make it clear that the Respondent was no longer seeking recovery in respect of the 2018-2019 demand, which had undoubtedly been made. The Tribunal was satisfied that it was reasonable for the Applicants to pursue their application in respect of this year in the absence of a clear indication that the demand had been withdrawn. In any event, the Applicants were still faced with the 2019-2020 demand and, given the nature of the cases, only minimal additional costs, if any, could be attributed to the 2018-2019 year alone.

23. With regard to the 2019-2020 service charges, the Respondent had now, having considered the terms of the lease, conceded that nothing was recoverable. The Tribunal found no merit in the argument that no orders should be made because the Applicants should have drawn the weakness of the Respondent's position to their attention. It is a fundamental consideration, when making demands for service charges, that no demand should be made unless it is justified under the terms of the lease. In these cases little more than a cursory examination of the relevant terms shows that there is no provision for the recovery of future expenditure. There is also no provision for a reserve fund, yet the demand included an element in respect of such a fund. Having issued demands for which it is now conceded there was no basis, the Respondent was then faced with applications to this Tribunal. Even if the terms of the lease had not been considered earlier, the Tribunal would have expected the Respondent to have considered them in the light of those applications. Had this been done the difficulty would have been immediately obvious. The Tribunal concluded that the Respondent could not blame their own oversight on the failure of non-qualified lessees to draw it to their attention.

24. Whereas the Respondent argues that the hearing would not have happened if the Applicants had drawn the terms of their lease to their attention, it is more realistic to conclude that the hearing would not have happened if the Respondent had read the lease and, having done so, realised that there was no basis for the demands made of the Applicants.

25. Given the Respondent's concessions the Applicants have been completely successful in their cases.

26. The test for whether orders should be made under section 20C and paragraph 5A is whether or not the making of such an order is just and equitable. The Tribunal considered that it was both just and equitable to make orders in favour of both Applicants under both provisions.

Re-imbursement of Fees

27. The Tribunal reminded itself that it has the power to order the re-imbursement of fees under rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 of its own motion.

28. The Tribunal was satisfied that an order should be made re-imbursing the Applicants the sums of £200 each in respect of the fees paid and that this should be done within 28 days.

Name: Tribunal Judge S.J. Walker **Date:** 25 July 2019

ANNEX - RIGHTS OF APPEAL

- The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.

- If a party wishes to appeal against 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.

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.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
  (a) complied with in relation to the works or agreement, or
  (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate Tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
  (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
  (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
  (a) an amount prescribed by, or determined in accordance with, the regulations, and
  (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(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 a court, residential property Tribunal or the Upper Tribunal, or in connection with arbitration proceedings, 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 application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property Tribunal, to that Tribunal;
- (b) in the case of proceedings before a residential property Tribunal, to the Tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property Tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the Tribunal;
- (d) in the case of arbitration proceedings, to the arbitral Tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or Tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
  (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
  (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
  (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
  (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
  (a) specified in his lease, nor
  (b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate Tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate Tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
  (a) in a particular manner, or
  (b) on particular evidence,
  of any question which may be the subject matter of an application under sub-paragraph (1).

Schedule 11, paragraph 5A

5A(1)A tenant of a dwelling in England may apply to the relevant court or 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 to be just and equitable.

(3)In this paragraph—

(a)"litigation costs" means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and

(b)"the relevant court or Tribunal" means the court or Tribunal mentioned in the table in relation to those proceedings.