FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BA/LSC/2018/0380**
Property	**:**	**3 Calonne Road, Wimbledon, London SW19 5HH**
Applicant	**:**	**Ms Fatima Luna**
Representative	**:**	**Ms R Coyle of Counsel**
Respondent	**:**	**3 Calonne Road Management Limited**
Representative	**:**	**Mr M Pollett of Moss & Co, Managing Agents**
Type of application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	**:**	**Tribunal Judge E Samupfonda** **Mr C Gowman** **Mr A Ring**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**1 April 219**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the sums set out in paragraph 15 below are payable by the Applicant in respect of the estimated service charges for the years 2018/19

(2) The tribunal makes the determinations as set out under the various headings in this Decision

(3) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that 50% of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge subject to the lease permitting.

(4) The tribunal determines that the Respondent shall pay the Applicant £150 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicant.

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 estimated service charge years 2018/2019.

The hearing

2. The Applicant attended and was represented by Ms Coyle at the hearing on 3 and 4 March 2019. Mr Pollett, managing agent represented the Respondent. Mr M Gallagher, Mr and Mrs Satchwell-Smith, Directors, and leaseholders accompanied Mr Pollett.

3. Immediately prior to the hearing Ms Coyle handed in her skeleton argument. The start of the hearing was delayed while the tribunal considered this and gave Mr Pollett an opportunity to also consider it.

The background

4. The property which is the subject of this application is a single detached house divided into 5 leasehold flats as well as a substantial front and rear garden.

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

6. The Respondent currently has 4 Company Directors, all of whom are Lessees being those of Flats 1, 3, 4 and 5. The Applicant is a Lessee of Flat 2. She is a shareholder in the Respondent Company but not a Director. The applicant's lease requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease will be referred to below, where appropriate.

The issues

7. The application was listed for two days. At the commencement of day 1 of the hearing, the tribunal gave the parties time to discuss the issues raised in the application in an effort to narrow the areas in dispute. The start of the hearing was delayed to the following day in order for Mr Pollett to seek legal advice.

8. The parties informed the tribunal that the Respondent would not be seeking to recover the service charge costs incurred prior to 2015. Ms Coyle confirmed that the Applicant no longer wished to pursue the points relating to the Respondent's failure to comply with Section 21B of the Landlord and Tenant Act 1985 (the Act) as the Respondent had provided all the necessary documents. Ms Coyle also confirmed that the Applicant did not challenge the service charge for the period prior to November 2015. Ms Coyle identified the outstanding issues in dispute for which the Applicant seeks a determination were

    (i) The payability of service charges for the period November 2015 to July 2016

    (ii) The reasonableness of the estimated service charges for the year 2018 to 2019

9. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

The payability of the service charge for the period November 2015 to July 2016

10. Essentially, Ms Coyle relied on Section 20B of the Act and submitted that the costs incurred by way of service charges in this period were not payable. Ms Coyle said she accepted that a demand for payment was made on 28 January 2018 and relied on the letter dated 15 June 2018 from the Respondent's Solicitors Gregsons to the Applicant which referred to that demand. The demand itself was not available. Ms Coyle said that the demand was invalid for a number of reasons, but she

accepted that it constituted notice for the purposes of section 20B. The thrust of her argument was that although the demand referred to "on account" costs, by that stage the costs could have been on account or could have been incurred or could have been a mixture of both. It was her submission that what is now formally demanded relates to costs incurred. Therefore, section 20B applies as the demand for payment was made more than 18 months after the cost had been incurred and the sums claimed are not payable.

11. Mr Pollett said that demands for payment were not issued sooner because the Applicant, when acting as co-Director and shareholder of the Respondent Leasehold Management Company, had frustrated the attempts of the other Directors to open a bank account into which service charges could be paid. This had led to her removal as a Director. By January 2018, when a bank account had been opened, enabling service charge demands to be issued, costs would have been incurred even though the demand for payment referred to them as being on account costs. He submitted that these costs are payable because the Applicant was fully aware that service charges were payable. She was a former Director of the Respondent Company, she had been paying services and had agreed to make future payments at a meeting of the Directors. He could not substantiate his submission with any evidence that the Respondent had given the Applicant formal written notice of the requirement to pay service charges. He said that the Applicant had paid £158.33 per month, totalling £1,108.31 for that service charge period. She should have been paying £160 per month.

The tribunal's decision

12. The tribunal determines that the amount claimed in respect of the service charge period November 2015- July 2016 is not payable.

Reasons for the tribunal's decision

13. Section 20B of the Act states that a landlord cannot recover service charge costs that were incurred more than 18 months before he formally demands them. In this case both parties agreed that the demand for payment was made on 28 January 2018. Mr Pollett agreed by that stage the costs had been incurred. Section 20B (2) states that costs are payable if the tenant is notified in writing within 18 months of incurring the costs, that those costs have been incurred. Whilst the evidence in this case indicates that the Applicant was aware that she was required under the terms of the lease to contribute towards service charges and had contributed by making payments, there is no evidence before the tribunal to demonstrate that the Applicant was notified in accordance with section 20B in writing that those costs had been incurred and that she would subsequently be required under the terms of her lease to contribute to them by the payment of a service charge. There are no

exceptions to Section 20B, and we do not consider that being told at a meeting is sufficient to satisfy 20B

The reasonableness of the estimated service charge for the year January 2018 – January 2019

14. The amount that the Respondent seeks to recover from each leaseholder is £260 per month which equates to £3,120 per year. This was an increase from £1,900 per annum paid in the previous year which the Applicant had previously agreed to pay. Ms Coyle challenged the estimated costs of a number of heads of expenditure. The items included the cost of Electricity, General Repairs and Maintenance, Cleaning, Gardening, Tree surgery, Building Insurance, Managing Agents fees, Legal Fees, Sinking Fund and Miscellaneous.

The tribunal's decision

15. The tribunal determines that the following amounts are reasonable; Electricity £350, General Repairs and Maintenance £750, Cleaning £700, Gardening £1,600, Tree Surgery £500, Building Insurance £3,500, Managing Agent's fee £200 (plus VAT) per unit, Legal Fees £1,500 and Sinking Fund £3,450. The tribunal was not satisfied that £500 for miscellaneous items was reasonable.

Reasons for the tribunal's decision

16. The tribunal heard submissions from Ms Coyle and Mr Pollett in respect of each item in dispute. Essentially, Ms Coyle submitted that the costs were excessive and therefore unreasonable. She based her argument by comparisons with the expenditure in the previous year that was not challenged by the Applicant. She took the tribunal through the previous service charge years. Of note was the submission that the Applicant should not be required to contribute towards the cost of gardening in the areas retained by another leaseholder. Mr Pollett accepted that the budget estimate of £1,200 for cleaning was unnecessarily high and agreed to reduce it to £700.

17. The tribunal accepted Mr Pollett's submission that they paid £324.31 for electricity in the previous year, therefore the amount claimed of £350 was considered to be reasonable. In regard to cleaning, Ms Coyle said £484 would be reasonable but then referred to a document dated December 2018 that showed a cost of £624 for cleaning. We considered £700 as suggested by Mr Pollett to be reasonable. With regards to gardening, the evidence was that the driveway is demised to another leaseholder, Mr Gardner, and there is a right of way. We were informed that Mr Gardner accepted responsibility to maintain the hedge at the side of the house and said he would cover the cost. There was no gardening required on the driveway. The parties agreed that the gardens are

substantial. Although the Applicant initially submitted that she did not have access to the front garden, it was explained that there was a chain across the garden that was not locked. The Applicant had access to both the front and rear gardens. Therefore, the tribunal reduced the service charge budget of £1650 for gardening by £50 to reflect the areas that Mr Gardener is responsible for. The entire property is in a conservation area. The tribunal accepted that there were trees with Tree Preservation Orders, high shrubs and bushes. As such there were gardening works that would be outside the scope and abilities of a regular gardener and may require professional expertise. Therefore, the sum claimed of £500 was considered reasonable. With regards to the building insurance, the Applicant provided an alternative cheaper quote at £2,000,20. The tribunal did not consider the Respondent's premium of £3,500 to be unreasonable. The managing agents had used a broker who had managed to obtain a reduced premium, but the cost increased by the addition of terrorism cover. The tribunal did not accept Mr Coyle's submission that terrorism cover was unnecessary given the location of the subject property. With regards to the management fee, the tribunal was referred to a number of failings in management. Whilst there was some evidence of poor management, the tribunal considered that management of the building was operating in very difficult circumstances. The Applicant did not provide an alternative quote as she was of the view there was no need for a property manager to be in place. The cost at £200 per unit per annum (plus (VAT) was in the tribunal's view at the lower end of the scale of management fees and not outwith the going rate. Mr Satchwell-Smith told the tribunal that he had searched the market and Moss & Co were by far the cheapest. In regards to legal fees, given the history of the case and the apparent acrimonious relationship between the parties, the tribunal considered that it was reasonable for the Respondent to have a contingency fee for this expenditure and the budget estimate of £1,500 was reasonable. The fact that legal costs had previously been expended as a one-off expenditure relating to the removal of the Applicant as a Director, did not lead, as Ms Coyle submitted, to a conclusion that it was unreasonable for the Respondent to have legal fees as a contingency in the budget. The tribunal disallowed the claim for £500 under the head of Miscellaneous as this was vague and unsubstantiated. In regard to the sinking fund, the tribunal is satisfied that the amount claimed is reasonable. The tribunal heard that the previous major works project was carried out in 2014 the lease requires works to the external decorations to be carried out every 7 years therefore by 2021 the Respondent will need to be considering major works. In addition, no works to the roof had been undertaken for at least 20 years and although estimates had yet to be obtained, substantial expenditure was anticipated. The Applicant had obtained a quote for £4,970 but this related only to a flat roof at the rear of the property, not to the main roof. The tribunal also heard that a Health Report identified electrical works that will need to be carried out fairly soon. In the circumstances the tribunal determined that the Respondent needed to build up funds for anticipated major works and the amount claimed is reasonable.

Application under s.20C and refund of fees

18. At the end of the hearing, the Applicant made an application for a refund of the fees that she had paid in respect of the application/ hearing[1]. Having heard the submissions from the parties and taking into account the determinations above, the tribunal orders the Respondent to refund £150 towards the fees paid by the Applicant within 28 days of the date of this decision.

19. Where an application is made under section 20C the issue is not whether the landlord might or might not be entitled to recover costs under the terms of the lease. The issue is also not whether the costs said to have been incurred are reasonable. Both of those issues are more properly considered under section 27A.

20. In *Tenants of Langford Court v Doren Ltd* (LRX/37/2000), HHJ Rich said as follows:-

> " In my judgement 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.

21. Having heard the submissions from the parties and taking into account the determinations above, the tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act. However, the tribunal was of the view that the Applicant was an unwilling service charge payer as she had historic service charge arrears and historically underpaid and she renaged on an agreement made when she was a Director to pay £1,900. Nevertheless, she was entitled to challenge the validity of the sums claimed and through these proceedings much of the Respondent's failings came to light that included serving invalid service charge demands and producing accounts very late in the day. From our observation of the parties' conduct in these proceedings, the tribunal formed the view that it was most unlikely that the parties could have resolved the dispute without recourse to the tribunal. Therefore, the tribunal determined subject to the lease permitting, the Respondent may not pass 50% of its costs incurred in connection with the proceedings before the tribunal through the service charge. The tribunal noted that the effect of the Applicant's dual role as shareholder and leaseholder is that she may, as a shareholder, may be required to make up any shortfalls in the Respondent's finances through a cash call from the Company.

[1] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

22. The tribunal determined that it was not appropriate for the Applicant to submit additional material that her Counsel had not received and after the conclusion of the hearing. Therefore, the additional documents submitted by the applicant were not considered.

Judge E Samupfonda

Date: 1 April 2019

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

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

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

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

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).