FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AU/LSC/2020/0285 P**
HMCTS code (paper, video, audio)	**:**	**P: PAPER**
Property	**:**	**Flat 1, 3-5 Omega Place, London N1 9DR**
Applicant	**:**	**Mr RJ Bier**
Respondent	**:**	**Assethold Ltd**
Representative	**:**	**Eagerstates Ltd**
Type of Application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge /administration charge**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival** **Mr A Fonka MCIEH CEnvH M.Sc**
Date and venue of Determination	**:**	**5 May 2021** **Remote**
Date of Decision	**:**	**6 May 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was P:PAPER, a course to which the parties consented. The documents that we were referred to are in four bundles, a principal and supplementary bundle from each party, comprising a total of 263 pages, the contents of which have been noted.

The application

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and paragraph 5, schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of service charges or administration fees payable by the Applicant. The period in question is referred to in the application as 2018/19. The service charge year is the calendar year. It appears that the principal issue arises in connection with the 2019 service charge year, albeit in part as a result of issues in relation to reconciliation following the previous year or years' service charge demands.

2. The relevant legal provisions are set out in the Appendix to this decision.

The property

3. The property is a two bedroom flat in a purpose built block of five flats. The block as a whole is known as 3 to 5 Omega Place.

The lease

4. The lease, dated 4 February 2015, is for a term of 125 years from January 2014. The lease makes provision for separate charges for building insurance (clause 7) and a service charge (clause 8). The service charge year is the calendar year.

5. As to the mechanics of the service charge, the landlord is required to send the tenant details of an estimated service charge before the start of the financial year. After the end of each year, the landlord must send an account, showing actual expenditure, with a summary of the items of expenditure, and a certificate "signed by (at the Landlord's discretion) the Landlord's account, auditor or managing agent." Provision is made for reconciliation, by the tenant paying an underpayment on demand

and being credited for an overpayment. There is a contractual right for the tenant to inspect the accounts, invoices and receipts.

The issues

6. The principal issue is that the Applicant submits that accounting errors have meant that demands have been made for excessive service charge payments, and in respect of ground rent. In the result, two errors in the final accounts for 2019 mean that he is right to withhold a payment of £574.58. In addition, he should not be held liable for £475 costs of the instruction of a debt collection agency, a cost which, as far as we are aware, is yet to be demanded, whether through the service charge or by way of an administration charge. We consider each in turn.

7. Such subsidiary issues as are raised are dealt with in paragraphs 34 to 39 below.

The withholding of £574.58

8. The Applicant asserts that the Respondent's6 managing agents, Eagerstates, have persistently made accounting errors over a number of years, which were revealed by the Applicant. He alleges that Eagerstates have in the past changed service charge accounts to cover these errors.

9. The Applicant provides a four page statement, to which is appended 23 pages of emails, from 12 January 2018 to 4 January 2021. Many of the emails refer to enclosures, and/or other documents, but none of these have been provided by the Applicant. In the emails, the Applicant expresses, in robust terms, dissatisfaction with various iterations of the service charge accounts. He frequently asserts that he has proven that there are discrepancies or errors in the accounts. The alleged discrepancies and errors, however, are not in general explained in the emails, and, because of the lack of related documents, we are, largely, unable to come to a view as to the merits of the Applicant's complaints relating to earlier service charge years.

10. The Respondent submits that the accounting system, which has not been amended, is clear and accurate.

11. The issue before us is crystalised in the one service charge demand and account that we have been provided with, dated, respectively, 2 December 2019 and 28 November 2019.

12. The service charge account shows the following payments:

02.01.2019: Service charge: £1,225.02 Ground rent: £470
04.02.2019: Service charge: £1,498.13
26.06.2019: Service charge: £1,240.45

13. The account given by the Applicant is the same, except that he gives a figure of £1,345.02 for the payment on 2 January 2019, which he assumes is applied to the service charge. He states that "They say £230 Ground Rent is outstanding. All ground rents were paid in full and on time."

14. From the figures that he provides, the Applicant states that his total payments were £4,083.60, which is the sum of the service charge payments he claims he made. He notes then that the Respondent claimed that the total paid at this time was £3,739.02. He therefore concludes that the Respondent has made two errors. One is that £230 of ground rent was owing. The other is the difference between the two totals of his payments (£344.58), and the sum is the contested amount, £574.58.

15. Mr Gurvits, in the Respondent's reply, states that the total payment by the Applicant was £4,443,60 (we calculate the figure at £4,433.60, which we assume is either a small arithmetical error or a typographical error). He then says that, of that sum, £470 was applied to ground rent, and "104.58 to the balance brought forward". He goes on that as a result "the total received on account for that year is £3,739.02" (we note there is another error here, the total of these sums being £4,313.60). Since, accordingly to the Respondent, two years' ground rent fell to be paid, at a total of £700, £230 remained outstanding.

16. Why the sum of £104.58 was classified as a balance brought forward, when it clearly was not a balance brought forward, is not apparent to us. But since, as so considered, it was applied against the Applicant's service charge liability, it does not form part of the Applicant's "two errors," even on the Applicant's approach.

17. But in any event, the Applicant's approach to the second "error" appears to be misconceived. It is true that the Respondent's figure for contributions to the service charge was £3,739.02, but that was because he applied two sums elsewhere – to the claimed arrears of ground rent and to the "balance brought forward". The Respondent's case is that the total payment made by the Applicant was £4,443.60 (or £4,433.60), as against the Applicant's figure of £4,083.60. It appears, therefore, that there is no second error at all. Indeed, the Respondent considers that the Applicant paid, in total, more than the Applicant thinks that he did.

18. It is worth noting that, if there is a factual dispute about how much the Applicant paid in January 2019, as the Applicant considered there to be, then it is surprising that he did not provide the easily obtainable documentary evidence of a bank statement.

19. That leaves the Applicant's first "error", which is the claim for outstanding ground rent. That is, in reality, what the dispute is about.

20. As the parties are aware, we have no jurisdiction to determine issues relating to ground rent. Again, in addition, we note that even if we did have jurisdiction, we have been provided with no proper evidence as to the payment or otherwise of ground rent in any year.

21. *Decision*: The underlying dispute between the parties relates to the payment or otherwise of ground rent. Accordingly, the Tribunal has no jurisdiction in relation to the dispute.

The prospective charging for debt collection

22. The debt collection agency were instructed in July 2020.

23. By clause 4.14, the tenant covenants in the lease to pay "all reasonable losses incurred by the Landlord as a result of … a breach of any of the Tenant's obligations under this Lease." This amounts to an administration charge, within the meaning of Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 1. There is in addition a general indemnity clause in favour of the landlord against losses resulting from breach by the tenant (clause 4.21).

24. The lease allows for the charging to the service charge of "the reasonable fees, charges and disbursements of professionals or others engaged by the Landlord to provide accounting, administration, auditing, legal, management or rent collecting services in relation to the provision of the Services or the performance of the Landlord's obligations under this lease generally" (clause 8.5.4).

25. We received no legal submissions from either party as to the scope of these provisions. In the absence of legal argument, we consider that the charging of the costs of debt collection would be recoverable by an administration charge under clause 4.14. We are not, however, prepared to come to a determined view in respect of the service charge provision quoted above. It would accordingly be open to the Applicant or another leaseholder to challenge the payability under the lease of a contribution towards the costs of service charge for debt collection, were the Respondent to make such a charge.

26. We do, however consider it appropriate to consider our jurisdiction in relation to the reasonableness of administration charges under paragraph 5 of schedule 11 to the 2002 Act.

27. The question for the Tribunal is whether it was reasonable for the Respondent incur expenditure to engage a debt collection company at the time that it did so, and whether that expenditure is in amount reasonable.

28. The reasonableness of a decision to expend money on debt collection services, with a view to charging that as an administration charge,

depends in part on the extent of the debt, and the conduct of the debtor. At the time that the debt collection agency were instructed, it appears that the Applicant agreed that he was liable for £1,076.42 in advance service charge for 2020, but the Respondent was demanding £1,651. We add at this point that we have not been provided with a demand or any other documentary evidence of the estimated service charge for 2020.

29. The Applicant had made it clear in December 2019 that he would not pay *any* contribution to the service charge unless the invoice was – in his eyes – corrected to reflect his view in relation to dispute referred to above.

30. It may not have been proportionate to instruct a debt collector in relation to a debt of £574, but we consider that it was not an unreasonable response to a debt of £1,651, in the light of what must have appeared to Mr Gurvits as the Applicant's settled intention not to pay even what he considered to be the amount due.

31. In the event, the Applicant says that he paid £1076.42 in August 2020, after the instruction of the debt collection agency, with whom he entered into email correspondence.

32. As to the amount of the charge made by the debt collection agency, we have been provided with no evidence of charges in this market in general. There is accordingly no evidence that the charge is unreasonable, and the Applicant has failed to make his case.

33. *Decision*: It would be reasonable to charge the costs of engaging the debt collection agency as an administration charge under the lease.

Other issues

34. The Applicant raises, somewhat obliquely, a number of other issues. We deal with them briefly under this heading.

35. First, the Applicant takes the view that some payments of service charge were made as part of a compromise, because he stated that the payments were made "in full and final settlement". It appears that the payments were direct bank payments.

36. For a payment to be made under a contract compromising a dispute, both parties must accept that there is an agreement to enter into such contractual relations. Traditionally, the presentation of a cheque was at least capable of amounting to an acceptance by conduct of an offer of settlement. The position is different in relation to a direct bank payment, where the sole act of the debtor accomplishes the transfer. Silence or inaction in the face of the words "in full and final settlement" do not usually constitute acceptance, and a party cannot make silence

an acceptance by telling the other party that they will so consider it. Further, looking more widely at the communications between the parties, no one could reasonably consider that the Respondent had accepted the offer of a contract to compromise the debt.

37. Secondly, the Applicant complains that the Respondent did not properly discharge its obligations under section 22 of the 1985 Act. The Applicant has not provided any argument as to how any such failure could have had an impact on any dispute before the Tribunal. Section 22 is primarily enforced as a criminal offence (see section 25).

38. Thirdly, the Applicant asserts that the Respondent failed to provide the landlord's address, presumably in breach of sections 46 and 47 of the Landlord and Tenant Act 1987. As the Respondent made clear, an address is clearly provided on the one service charge we have. The Respondent asserts that it is not a correct address, apparently because it is the same address as Eagerstates, but offers no evidence that the address is not correct. There is accordingly no evidence of breach of the statutory provisions.

39. Finally, the Applicant complains that the Respondent procures the removal of critical postings on a website. This is obviously not a matter for us.

Issue 5: Application for orders under Section 20C of the 1985 Act/Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A

40. The Applicant has ticked the boxes in the application form indicating an intention to make applications under section 20C and paragraph 5A. He also asked on the application form for the leaseholders of other flats in the block to be included in the section 20C application. The Tribunal has not, however, received authorisations from any of the other leaseholders, which means we could not include them in an order (*Plantation Wharf Management Ltd v Fairman* [2019] UKUT 236 (LC), [2020] L & T R 7).

41. An application under section 20C is to be determined on the basis of what is just and equitable in all the circumstances (*Tenants of Langford Court v Doren Ltd* (LRX/37/2000). The approach must be the same under paragraph 5A, which was enacted to ensure that a parallel jurisdiction existed in relation to administration charges to that conferred by section 20C.

42. Such orders are an interference with the landlord's contractual rights, and must never be made as a matter of course. We should take into account the effect of the order on others affected, including the landlord: *Re SCMLLA (Freehold) Ltd* [2014] UKUT 58 (LC); *Conway v Jam Factory Freehold Ltd [2013] UKUT 592 (LC); [2014] 1 EGLR 111*.

43. The success or failure of a party to the proceedings is not determinative. Comparative success is, however, a significant matter in weighing up what is just and equitable in the circumstances.

44. The Respondent has been successful before us, and, while that is not wholly determinative of an application for these orders, it is only in an exceptional case that an unsuccessful tenant can expect orders to be made. This case does not fall into that category.

45. Having so determined, we do so on the basis that we have not heard argument or considered whether the costs of proceedings are recoverable under the lease. We make no decision as to whether such costs are payable under the lease.

46. *Decision*: We decline to make orders under Section 20C of the 1985 Act and Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A.

Rights of appeal

47. 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.

48. 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.

49. 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.

50. 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: Tribunal Judge Professor Richard Percival **Date:** 6 May 2021

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 provision 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.

(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 of an application under subsection (1) or (3).

(7) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

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 20ZA

(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

(2) In section 20 and this section—

"qualifying works" means works on a building or any other premises, and

"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

(a) if it is an agreement of a description prescribed by the regulations, or

(b) in any circumstances so prescribed.

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—

(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,

(b) to obtain estimates for proposed works or agreements,

(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) Regulations under section 20 or this section—

(a) may make provision generally or only in relation to specific cases, and

(b) may make different provision for different purposes.

(7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

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 tribunal2 or leasehold valuation tribunal or the First-tier Tribunal3 , or the Upper Tribunal4 , 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 the county court ;

(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal;

(c) in the case of proceedings before the Upper Tribunal4 , 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 the 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]1 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).