



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case reference** : **LON/00BG/LSC/2020/0170**

**HMCTS code  
(paper, video,  
audio)** : **P: PAPERREMOTE**

**Property** : **4 Edgemere House, 3 St Anne's Street,  
London E14 7QA**

**Applicant** : **Gerard Edmund Airey**

**Representative** : **In person**

**Respondent** : **(1) Metropolitan Housing Trust Limited  
(2) Avon Ground Rents Limited**

**Representative** : **(1) Mr John Beresford, counsel  
(2) Ms Lorraine Scott, solicitor**

**Type of application** : **Liability to pay service charges – costs  
issues**

**Tribunal members** : **Judge Nicola Rushton QC  
Mr Peter Roberts DipArch RIBA  
Ms Lucy West, lay member**

**Venue** : **10 Alfred Place, London WC1E 7LR**

**Date of decision** : **21 May 2021**

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**DECISION ON COSTS ISSUES**

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## **Covid-19 pandemic: description of hearing**

This has been a hearing on the papers which has been consented to by the parties. The form of remote hearing was P: PAPERREMOTE.

In addition to retaining the hearing bundles, the tribunal received written submissions on costs from the parties as set out below.

## **Decisions of the tribunal**

- (1) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 (“**the 1985 Act**”) that 75% of the costs incurred by the Second Respondent in connection with these proceedings are not to be regarded as relevant costs in determining the amount of any service charges to be paid by the First Respondent.
- (2) The Tribunal makes an order under section 20C of the 1985 Act that 60% of the costs incurred by the First Respondent in connection with these proceedings are not to be regarded as relevant costs in determining the amount of any service charges to be paid by the Applicant and/or the tenants of the other 15 flats listed in section 9 of the application.
- (3) The Tribunal makes an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (“**the 2002 Act**”) extinguishing any liability of the First Respondent to pay any administration charges in respect of the Second Respondent’s costs of this application insofar as these might otherwise have been payable under the Head Lease.
- (4) The Tribunal makes an order under paragraph 5A of the 2002 Act extinguishing any liability of the Applicant to pay any administration charges in respect of the First Respondent’s costs of this application insofar as these might otherwise have been payable under his Sub-Lease with the First Respondent.
- (5) The Tribunal makes an order pursuant to rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (“**the 2013 Rules**”) that the Second Respondent shall reimburse the Applicant the £100 application fee and £200 hearing fee that he has paid, within 28 days of the date of this Decision.

## **The parties’ submissions on costs**

1. The tribunal’s substantive decision on the Applicant, Mr Airey’s application under s.27A of the 1985 Act was sent to the parties on 31 March 2021. In that decision the parties were invited to submit written

submissions on all costs issues within 21 days of receipt, including any applications under s.20C of the 1985 Act, paragraph 5A of Schedule 11 to the 2002 Act and for reimbursement of tribunal fees paid.

2. Relevant extracts from the legislation are set out in an appendix to this decision. Abbreviations are as in the substantive decision.
3. Written submissions have been received from Mr Airey; from counsel Mr Beresford, on behalf of the First Respondent MHT; and from the Second Respondent Avon's solicitor, Ms Lorraine Scott.
4. In summary, the parties submissions were as follows:
5. Mr Airey applies for an order under s.20C on behalf of all of the tenants of Edgemere House that neither of the Respondents' legal costs of his application should be regarded as relevant costs in determining the amount of any service charges. He also submits that the application fee of £100 and hearing fee of £200 incurred by him should be reimbursed by one or both of the Respondents.
6. In his original application, Mr Airey also included an application under para. 5A of Schedule 11 to the 2002 Act to reduce or extinguish any liability which he might have, to pay any administration charge in respect of litigation costs.
7. On behalf of MHT, Mr Beresford submitted that:
  - (i) Avon has no entitlement under the Head Lease to claim its costs of this application from MHT either through the service charge or as an administration charge.
  - (ii) In any event, the tribunal should make an order under s.20C preventing Avon from passing on any of its costs to MHT through the service charge. To the extent that a full order is not made, any such costs of Avon will be passed on to the leaseholders of Edgemere House through the service charge.
  - (iii) The tribunal should also make an order under para. 5A preventing Avon from charging its litigation costs to MHT as an administration charge.
  - (iv) MHT has a contractual entitlement to recover its costs of the application by way of service charge from the leaseholders of Edgemere House under clause 7.4(c) of the Sub-Lease (it is assumed that all the sub-leases are in the same terms).

- (v) Overall Mr Airey succeeded in obtaining a reduction of 42% in the service charges payable.
  - (vi) MHT should be permitted to pass on 60% of its costs of these proceedings to the leaseholders of Edgemere House through the service charge, i.e. 40% should not be regarded as relevant costs.
  - (vii) Insofar as any party should reimburse Mr Airey's tribunal fees, it should be Avon.
8. Mr Beresford confirmed that MHT did not intend to pass on any of its costs to Mr Airey by way of an administration charge, but invited the tribunal to make an order under para. 5A as a matter of completeness. The tribunal accedes to that invitation.
9. On behalf of Avon, Ms Scott submitted that:
- (i) No order should be made in favour of MHT under s.20C (with the knock on effect that all of Avon's costs of the application should be passed on to the leaseholders of Edgemere House through the service charge) nor under para. 5A.
  - (ii) No order should be made in favour of Mr Airey for reimbursement of his tribunal fees.
  - (iii) Avon's costs of the application are recoverable from MHT through the service charge under clauses 10(a) and (b) and 11 of the Fourth Schedule and clause 11 of the Seventh Schedule.
  - (iv) Mr Airey has not been successful on the great majority of the issues listed by the tribunal at paragraph 27 of its decision.
  - (v) The tribunal should take into account the unreasonable conduct of Mr Airey, in particular in failing to provide a statement of case or witness statement in accordance with the tribunal's directions; challenging various heads of expenditure without advancing any positive case; seeking unsuccessfully to put in late evidence; and making wide-ranging and opportunistic challenges.
  - (vi) Some of Mr Airey's complaints as to lack of clarity and unpredictability of services charges were justified because of MHT's failings, not Avon's.
10. Ms Scott did not contend that Avon's costs of the application were recoverable from MHT by way of an administration charge and the tribunal was not directed to any provision in the Head-Lease under which it was suggested they were. The tribunal has therefore proceeded

on the basis that Mr Beresford is correct and there is no such entitlement under the lease. As a matter of clarity and completeness, it makes an order under para. 5A as between Avon and MHT as well.

11. Mr Beresford and Ms Scott both referred the tribunal extensively to the decision of HHJ Gerald in the Upper Tribunal in *The Church Commissioners v. Derdabi* [2011] UKUT 380 (LC), guidance which the tribunal has considered in full. It has also considered the other authorities referred to by Ms Scott when reaching its conclusions, in particular *The Tenants of Langford Court (Sherbani) v Doren Limited* LRX/37/2000 (HHJ Rich QC); *Schilling v. Canary Riverside Development PTE Ltd* LRX/26/2005 (HHJ Rich QC) and *Scmla (Freehold) Limited* [2014] UKUT 0058 (LC).
12. Taking into account all of the written submissions of the parties, which have been very helpful, and the decisions reached in its substantive determination, the tribunal has reached the following conclusions on these costs issues.

#### **Entitlement to claim costs through the service charge**

13. The tribunal accepts the submissions of Ms Scott that Avon is contractually entitled under the lease to recover its costs of this application from MHT through the service charge.
14. Clause 11 of the Seventh Schedule to the Head-Lease permits Avon to recover by way of service charge the costs of engaging “*persons in connection with the provision of the Services or the Landlord's other obligations under this Lease on such terms as the Landlord reasonably considers necessary or desirable from time to time and all incidental expenditure and benefits including (but not limited to):...(c) the proper and reasonable fees charges and disbursements of professionals... engaged by the Landlord... to provide or carry out legal services... in respect of the Block or the Estate...*”
15. The tribunal considers that Avon’s costs of this application are clearly fees or disbursements of professionals to carry out legal services in respect of the Block and the Estate, and that this would encompass a service charge dispute.
16. So far as the Sub-Lease is concerned, the tribunal considers that MHT’s costs of this application are covered by clause 7.4(c) of the service charge provisions which cover “*all reasonable fees, charges and expenses payable to... any solicitor... whom [MHT] may from time to time reasonably employ in connection with the management or maintenance of the Building and/or the Estate...*”

17. While service charge provisions must always be considered by reference to their specific terms, the tribunal considers that both clauses are similar in their references to the costs of legal advisers to the clauses in *Staghold v. Takeda* [2005] 3 EGLR 45, which were held to extend to the costs of LVT service charge proceedings.
18. Insofar as any service charge is payable by MHT in respect of Avon's costs of the application, MHT will be entitled to recharge this to the leaseholders of Edgemere House including Mr Airey through their service charges. This is for the reasons set out at paragraphs 41 and 42 of the substantive decision.

### **Applications under s.20C**

19. So far as Avon's costs of the application are concerned, taking into account the parties' submissions, the substantive decision reached and all the circumstances, the tribunal has concluded that 75% of Avon's costs are not to be regarded as relevant costs in determining the amount of any service charges to be paid by MHT, i.e. only 25% may be recovered through the service charge. It considers it is just and equitable to limit Avon's contractual rights to this extent.
20. In reaching that conclusion the tribunal considers the following factors of particular significance:
  - (i) The biggest issue, in terms of both value and the amount of time devoted to it in the evidence and at the hearing, was the proper apportionment and reasonable amount payable for the portage/concierge services. Mr Airey was successful on that issue.
  - (ii) However Mr Airey took an indiscriminate approach to challenging items of service charge, even where he was unable to identify any evidence to support his challenge, which increased the length and complexity of the hearing. There was a large number of such items which were allowed by the tribunal as charged, even though individually each did not take up much time. Similarly, there were various legal issues raised by Mr Airey unsuccessfully, even though none individually took up a lot of time and effort.
  - (iii) Mr Airey's approach, in failing to provide a statement of case or witness statement, did not properly comply with the directions, which as a legal professional he should have realised.
  - (iv) Mr Airey did however give MHT and Avon ample opportunity to resolve the issues prior to issuing his application and it appears

unlikely that the main issue of portering/concierge costs would have been resolved without that application.

21. So far as MHT's costs of the application are concerned, taking into account the parties' submissions and all of the circumstances, the tribunal has concluded that 60% of MHT's costs are not to be regarded as relevant costs in determining the amount of any service charges to be paid by the leaseholders of Edgemere House including Mr Airey, i.e. only 40% may be recovered through the service charge. It considers it is just and equitable to limit MHT's contractual rights to this extent.
22. In reaching that conclusion the tribunal considers the following factors of particular significance:
  - (i) While it was not unreasonable of Mr Airey to have joined MHT to the application, neither was it strictly necessary<sup>1</sup> (because Avon was responsible for all of the services whose costs were being challenged), and costs have been increased as a result of that decision. Mr Kuszneruk specifically drew the tenants' attention to the fact that any application should be made against Avon and not MHT, before the application was issued.
  - (ii) The tribunal found that MHT did genuinely seek to investigate the tenants' concerns as to the service charges.
  - (iii) However the tribunal has also found there was a lack of clarity and were delays by MHT when recharging Avon's service charges, which justified some of Mr Airey's complaints about MHT's management and made the hearing more complex.

### **Refund of tribunal fees**

23. Given its conclusion that the Applicant has been successful on the most important issue in dispute, and that it is unlikely that this would have been resolved without the need for this application, the tribunal has concluded that Avon should reimburse the application and hearing fee paid by Mr Airey, pursuant to rule 13(1)(b) of 2013 Rules. It orders that it should do so within 28 days of the date this decision is received.

**Name:** Judge Nicola Rushton QC      **Date:** 21 May 2021

### **Rights of appeal**

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<sup>1</sup> *Oakfern Properties Ltd v Ruddy* [2006] EWCA Civ 1389

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).



## **Appendix of relevant legislation**

### **Landlord and Tenant Act 1985 (as amended)**

#### **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 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.

Proceedings to which costs relate	“The relevant court or tribunal”
Court proceedings	The court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, the county court
First-tier Tribunal proceedings	The First-tier Tribunal
Upper Tribunal proceedings	The Upper Tribunal
Arbitration proceedings	The arbitral tribunal or, if the application is made after the proceedings are concluded, the county court.