

12260



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

Case reference : **LON/00 AY/LSC/2016/0384**

Property : **53 Wavertree Road London SW2
3SL**

Applicant : **Mr Evan Lerwill**

Representative : **In person**

Respondent : **Gala Properties Ltd**

Representative : **Mr SG Clacy
Mr B MacEvoy**

Type of application : **For the determination of the
reasonableness of and the liability
to pay a service charge**

Tribunal members : **Mr A Harris LLM FRICS FCI Arb
Mr J Francis QPM**

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

Date of decision : **22 June 2017**

DECISION

Decisions of the tribunal

- (1) The tribunal determines that the sum of £2245 is payable by the Applicants in respect of the service charges for the year 2014, £720 for 2015 and £600 for 2016 in respect of the disputed items as shown on the attached spreadsheet.
- (2) The tribunal makes the determinations as set out under the various headings in this Decision
- (3) The tribunal refuses leave for the respondent to make a section 20ZA application orally at the hearing
- (4) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.
- (5) The tribunal determines that the Respondent shall pay the Applicant £300 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 Applicants in respect of the service charge years 2014, 2015 and 2016.

The hearing

2. A hearing was held on 26 May 2017 at 10 Alfred Place London. The Applicant appeared in person at the hearing and the Respondent appeared was represented by Mr SG Clacy and Mr B MacEvoy.
3. Immediately prior to the hearing the respondent handed in a further document namely the terms of payment used by MPM building surveyors.
4. At the start of the hearing the applicant confirmed he was also acting as representative for the lessees of flats A and B although the correspondence did not appear in the bundle or in the tribunal file. The respondent did not object to this. The tribunal acceded to this request
5. The respondent made an oral application under section 20 ZA of the Landlord and Tenant Act 1985 for dispensation from the consultation requirements in respect of works carried out in 2014. The applicant

objected on the grounds that this was far too late being three years after the works were carried out.

The background

6. The property which is the subject of this application is a converted house now arranged as three flats.
7. 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.
8. The Applicants hold long leases of flats A, B and C which require the landlord to provide services and the tenants to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

The issues

9. At the start of the hearing the parties identified the relevant issues for determination as follows:
 - (i) The payability and/or reasonableness of service charges for 2014 relating to damp proofing works including surveyors fees specialist damp proofing and remedial drain and associated works. The management charge was also disputed.
 - (ii) The payability and/or reasonableness of service charges for 2015 including a charge for cleaning gutters, and an 8% interest charge for alleged late payment arising from the 2014 accounts and a management charge of £300 per flat.
 - (iii) The payability and/or reasonableness of service charges for 2016 being the management charge of £300 per flat
10. 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.

2014

Surveyors fees claimed of £900

The tribunal's decision

11. The tribunal determines that the amount payable in respect of surveyor's fees is £nil.

Reasons for the tribunal's decision

12. In 2013 and the early part of 2014 the lessee of flat A complained about dampness in the flat. MPM surveyors were instructed to report on the dampness and their report is included in the bundle. The report identifies causes of the dampness and proposes remedial work. Two fees were charged dated 31st of January 2014 in the sum of £450 including VAT and on 31st of March 2014 for a total of £450 including VAT. No issue is taken with the quality of the surveyor's work.
13. For whatever reason the accounts for 2014 were not presented to the leaseholders until 20 October 2015 which is over 18 months after the invoice was incurred. The applicant objects to these invoices being included in the service charges by virtue of the provisions of section 20B of the 1985 Act. The provisions of the Act are set out below.
14. Section 20B provides that if relevant costs are incurred more than 18 months before a demand for payment of the service charge then the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred. Under subsection 2 if the tenant was notified in writing within 18 months of the date the costs were incurred that those costs had been incurred then the service charge is payable.
15. There is no evidence before the tribunal that the lessees had been notified in writing of that amount and the tribunal is satisfied that the demand was made more than 18 months after the fees had been incurred. The tribunal therefore holds that the surveyor's fees of £900 including VAT are not recoverable.

Damp proofing works totalling £3,610 pounds including VAT

The tribunal's decision

16. The tribunal determines that the amount payable in respect of damp proofing works is £2245.

Reasons for the tribunal's decision

17. Damp proofing works to flat A of £510 carried out by Assured Preservations Limited are not disputed and are not included in the totals above.
18. An area of contention from the applicant is that the respondent broke down the cost of the works into various elements most of which fell below the consultation threshold of section 20 of the 1985 Act. The elements are the excavation of a trial pit, renewal of underground drainage, renewal of rainwater goods, masonry repairs and jetting of the drains. The first four items were carried out by one contractor and the jetting of the drains by a different contractor. The accounts from J Contracting record that works were carried out at more or less the same time.
19. On 20th of February 2014 a trial pit was dug and the results reported to the supervising surveyor. The total account is £420. Following this the contractors were instructed to carry out remedial works to the underground drainage which were carried out on 24th 27th and 28th of February 2014. The invoice for the repairs to the drains totals £1395 including VAT. The applicant argues that these two pieces of work are part of a single job notwithstanding two invoices and that the total is over the threshold for consultation under section 20 of the 1985 Act of £250 per flat. The respondent argues that the first invoice is below the consultation threshold. No application for dispensation from the consultation requirements under section 20 ZA was made notwithstanding the fact that correspondence shows the managing agents were clearly aware of the requirements.
20. The tribunal agrees that these two invoices are part of the same job and therefore subject to the consultation requirements. As no dispensation has been given from the consultation requirements the maximum recoverable is £250 per flat in respect of this item.
21. The next invoice is for renewal of rainwater goods with the works being dated 26 February 2014. The amount of the invoice is £395 including VAT. The applicant argues this is part of the same damp proofing works and the respondent argued that although the works were carried out at the same time they did not have to be and did not form an integral part of the underground drainage works.
22. The tribunal has considered both arguments and gives the benefit of the doubt to the respondent and holds that this amount is recoverable.
23. The next invoice is for masonry repairs carried out on 14 March 2014. The applicant again argues this is part of a single job relating to the replacement of rainwater goods and repairs to drainage. The

respondent again argues that although it was carried out by the same contractor it was about two weeks later and did not need to form part of the underground drainage works.

24. The tribunal has considered the arguments and again gives the benefit of doubt to the respondent and holds of this amount is recoverable.
25. The final item is the jetting of the drains on 28 March 2014. The applicant argues this is still part of the same works. However, the account is from a different contractor over a month after the underground works and the tribunal therefore holds this amount is recoverable.

Managing agent's fees totalling £300 per flat

The tribunal's decision

26. The tribunal determines that the amount payable in respect of the managing agents fees is £200 per flat totalling £600 chargeable to the service charge.

Reasons for the tribunal's decision

27. The applicant argues that the managing agents have given poor service to the lessees. In particular, for each of the years in question the service charge accounts have been delivered very late notwithstanding the requirement in the lease to produce the accounts as soon as practicable after the end of the service charge year. The fact that the surveyors invoice has been held not to be payable because of the delay in notifying the lessees is evidence of this. This makes it hard for the lessees to budget for service charges.
28. The respondent disputes that the agents have given poor service and highlights the work that had to be undertaken to remedy a defective lease of flat B.
29. The tribunal accepts the argument that the managing agent's fees should be reduced firstly as the accounts have been produced very late for the year in question and secondly the agents have failed to communicate adequately with the lessees who pay the service charge. The dispute over the payability of the service charge for the underground works would have been avoided by better communication.

2015 service charge year

Managing agent's fees totalling £300 per flat

The tribunal's decision

30. The tribunal determines that the amount payable in respect of the managing agents fees is £200 per flat totalling £600 chargeable to the service charge.

Reasons for the tribunal's decision

31. The applicant argues that the fee charged of £300 per flat is excessive given the late delivery of the accounts, the late response to the questions about the cleaning of the gutter and the inclusion of an interest charge not in accordance with the provisions of the lease.
32. The tribunal accepts the applicant's arguments and holds that the managing the agent's fees should be limited to £200 per flat.

Gutter cleaning of £120

The tribunal's decision

33. The tribunal determines that the amount payable in respect of the gutter cleaning is £120 in total chargeable to the service charge.

Reasons for the tribunal's decision

34. The applicant argues that the price is excessive for the length of gutter to be cleared and that even though he worked at home frequently as did one of the other lessees nobody had seen the work being carried out. The applicant stated he had photographs of debris in the gutter but these were not available at the hearing. The invoice had not been produced despite frequent requests.
35. The respondent stated that the gutters were cleaned by a contractor who carries out gutter cleaning over a large portfolio under their management.
36. On the balance of probabilities, the tribunal concludes that the work was carried out and that the charge of £120 is payable.

Interest charge of hundred and £131.33 in respect of flat C.

The tribunal's decision

37. The tribunal determines that the interest charge is not due under the service charge provisions of the lease and does not lie within the jurisdiction of the tribunal. The tribunal however notes that 8% is in excess of the interest provision of the lease which is for 2% above the base rate of Barclays Bank.

2016 service charge year

Managing agent's fees totalling £300 per flat

The tribunal's decision

38. The tribunal determines that the amount payable in respect of the managing agents fees is £200 per flat totalling £600 chargeable to the service charge.

Reasons for the tribunal's decision

39. The applicant argues that the fee charged of £300 per flat is excessive given the late delivery of the accounts.
40. The tribunal accepts the applicant's arguments and holds that the managing the agent's fees should be limited to £200 per flat.

Application under s.20C and refund of fees

41. At the end of the hearing, the Applicant made an application for a refund of the fees that he had paid in respect of the application / hearing¹. Having heard the submissions from the parties and taking into account the determinations above, the tribunal orders the Respondent to refund any fees paid by the Applicant within 28 days of the date of this decision.
42. In the application form, the Applicant applied for an order under section 20C of the 1985 Act. 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, so that the

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

Respondent may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

Name: Mr A Harris LLM FRICS FCI Arb Date: 22 June 2017
Valuer Chair

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.

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 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).

| year | item | per flat | Landlord claim |
|------|---------------------------------|----------|-------------------|
| | | 3 | |
| 2014 | management charge | £ 300.00 | £ 900.00 |
| | trial dig | | £ 420.00 |
| | renewal of underground drainage | | £ 1,395.00 |
| | surveyor | | £ 450.00 |
| | surveyor (2) | | £ 450.00 |
| | renewal of rainwater goods | | £ 395.00 |
| | masonry repairs | | £ 360.00 |
| | jetting drain | | £ 140.00 |
| | | | <u>£ 3,610.00</u> |
| | | | £ 4,510.00 |
| 2015 | management fee | £ 300.00 | £ 900.00 |
| | interest | | |
| | gutters | | <u>£ 120.00</u> |
| | | | £ 1,020.00 |
| 2016 | management charge | £ 300.00 | £ 900.00 |

| Lessee response | Lessee total | tribunal |
|-----------------|-----------------|------------|
| £ 200.00 | £ 600.00 | £ 600.00 |
| | |) |
| | |) £ 750.00 |
| | | £ - |
| | | £ - |
| | | £ 395.00 |
| | | £ 360.00 |
| | | £ 140.00 |
| £ 250.00 | <u>£ 750.00</u> | <u>-</u> |
| | £ 1,350.00 | £2,245.00 |
| £ 200.00 | £ 600.00 | £ 600.00 |
| £ - | £ - | £ 120.00 |
| £ 200.00 | £ 600.00 | £ 600.00 |