FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BA/LSC/2021/0062**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**Various Properties, Aventine Avenue, Mitcham, Surrey, CR4**
Applicant	**:**	**(1) Paul Shakell** **(2) Sorin Biletchi** **(3) Showat Sharamshi**
Representative	**:**	**Gitte Joergensen**
Respondent	**:**	**Brenley Park Management Limited**
Representative	**:**	**Ms Jane Hodgson of Counsel**
Type of application	**:**	**For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985**
Tribunal members	**:**	**Judge H Carr** **Ms A Flynn**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**6th October 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: **V: CVPREMOTE .** A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 2383 pages, the contents of which I have noted. The order made is described below.

Decisions of the tribunal

(1) The tribunal determines that the applicants should be reimbursed the costs of the bin store as follows:

a. Applicant 1 - £10.83

b. Applicant 2 - £17.29

c. Applicant 3 - £10.77

(2) The remaining service charges challenged are reasonable and payable.

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

(4) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of service charges and (where applicable) administration charges payable by the Applicants in respect of the service charge years 2013 - to 2021 .

The hearing

2. The applicants did not appear. They were represented by Ms Gitte Joergensen at the hearing. The respondent company was represented by Janet Hodgson of Counsel . The tribunal is grateful to both representatives for the careful way they presented their cases.

3. Premila Maudhoo appeared as witness for the applicants.

4. Jessica Barley, Mark Menezes and Kristel Tracey who are current directors of the property appeared. Ms Barley and Mr Menezes are chartered accountants.

5. The tribunal adjourned the proceedings for an hour to enable the applicants to provide a useable Scott Schedule as the one provided in the bundle was too difficult to read on screen and needed to be updated to take account of concessions by the Applicant.

6. The updated Scott Schedule is appended to this decision.

The background

7. The various properties which are the subject of this application are situated at Brenley Park a residential development built between 2011 - 2013.

8. Brenley Park is a low-rise development comprising seven two and three storey blocks of self-contained flats and a terrace of eight two and three storey townhouses attached to one of the blocks. There is a total of 169 residential units, of those 136 are leasehold or shared ownership properties and 33 properties are social rented housing.

9. The Applicants hold long leases of the property which 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.

10. The leases of the private flats are tripartite leases with Brenley Park Management Ltd, the Respondents as the manager and the third party being the individual leaseholder.

11. In 2015 a number of leaseholders took over management of BPML and were appointed directors. Paul Shackell, the first applicant, and Sorin Biletchi the second applicant were two of those directors.

12. In 2015 the directors engaged Trinity Estates as managing agents. In May 2018 Trinity Estates were replaced by Treehouse Property Management Limited. Premila Maudhoo wife of one of the directors was appointed to act as BPMLs accountant through her company ASP Accounting Services Limited.

13. In January 2019 Treehouse terminated their contract with BPML The respondent says this was because Treehouse was not being provided with key information by the then directors.

14. Allegedly as a result of dissatisfaction with the performance of the then directors, in April 2019 the leaseholders voted to appoint additional directors of BPML. Subsequently the first applicant and the second applicant resigned as directors.

15. In June 2019 the new directors re-appointed Treehouse to manage the estate.

16. The current directors of the respondent are Mark Menezes, Ronelle Wentzel, Jessica Barley Alberton Mijoler and Edmond Brati. Mr Menezes and Ms Barley gave evidence to the tribunal who found them to be impressive witnesses.

17. There are important background points to note here

(i) A number of the challenges to the service charges arise from problems with managing the estate in the early years prior to the RTM company being formed.

(ii) The property appears to be particularly challenging to manage, not least because of the complexity of the charging regime for the communal heating.

(iii) Service charges are made up as follows:

(a) Maintenance accounts

(1) Estate charges

(2) Block charges

(3) Parking charges

(b) Heating and hot water which covers charges for usage and an element of charges for maintenance of the communal hot water and heating system.

18. The owners pay a percentage contribution to the costs based upon the size of their property. The first and third applicant contribution to estate charges was 0.561%, to block charges was 16.419% and parking 0.926%. The second applicant's contributions are 0.896 % to estate charges, 26.391 to block charges and 0.926% to parking charges.

The issues

19. 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 the years 2013 – 2021 inclusive.

    (ii) There are ten separate challenges to the service charges that are outlined in the Schedule attached to this decision. This is reduced from the 17 issues that formed the application.

    (iii) The amounts the applicants are disputing total £5,234,23 over the period of the claim as follows:

        a. Applicant 1 - £1,333.28

        b. Applicant 2 - £2,311,87

        c. Applicant 3 - £1,589.08

20. 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.

Service charges levied in absence of certified accounts - £11,596

21. The applicants' arguments and the respondents response are contained in the attached Scott Schedule

22. In summary the applicants object to paying the costs of the accounts when those accounts have not been certified.

The tribunal's decision

23. The tribunal determines that the amount charged in respect of the accounts is payable and reasonable.

Reasons for the tribunal's decision

24. The applicants are arguing that the monies charged for the accounts should not be paid because the accounts have not been certified. The respondent has explained the difficulties they faced in certifying the accounts and the decision they made that it was not proportionate to do the necessary investigative work so that the accounts could be certified. The tribunal agrees with the reasoning of the respondents and notes that the applicants were not able to achieve certification when they were in control of the management of the company.

25. The tribunal notes that the accountants did the accountancy work that was charged for. Although the applicants allege that the job was incomplete they do not suggest that the work was not done, nor that the charge was unreasonable. Nor do they suggest a charge that would be reasonable for the works that are done.

26. In the tribunal's view the challenge is misconceived. It appears to it that the applicants are using the failure to certify as an attack on the competence of the current directors. That is not how the tribunal understands its role. It has to decide whether the charges for preparing the accounts were reasonable and payable. There is no evidence that they were not. The tribunal also notes that there has been a considerable delay in bringing this challenge, which contributes to its reluctance to overturn the charges.

Missing surplus - £20.000.00

27. In the applicants' schedule of challenges this challenge is described as a missing surplus. When the applicants explained their concerns, it became clear that the problem they were concerned with was that in the years in question there was a misallocation of the heating funds to the estate accounts which meant that heating charges were calculated on the basis of estate charges. This meant that applicants 3 and 1 had overpaid by £155.30 and applicant 2 by £248.

28. The respondent explained some of the background to the issue which arose because when the new directors were appointed in April 2019 there had been no certified and approved service charge accounts since 2013. Nor was there a detailed handover from the previous directors. The new directors used the best of their knowledge and ability to account for the heating and hot water costs in the way they considered it was supposed to be accounted for.

29. The respondent also says that there is no evidence to support the adjustment that the applicants seek, that there is no missing surplus and it would be impossible to remedy any mistake now, if one has been made.

30. The respondent says that the decision making process in respect of these costs was reasonable and the sum charged was reasonable. The costs were reasonably incurred and payable.

The tribunal's decision

31. The tribunal determines that there is no missing surplus.

Reasons for the tribunal's decision

32. The tribunal accepts the argument of the respondent and notes the relevant provision in the lease which does not prescribe which account the monies has to be paid into. Instead it gives extensive discretion to the manager.

33. The tribunal listened carefully to the evidence of Ms Premila Maudhoo and read her statement but found it very difficult to understand her explanation of why the money was payable.

34. It also notes that the detriment allegedly suffered by the applicants is relatively small, and it would be disproportionate to interfere with the decision of the respondents.

35. In addition the tribunal notes the very limited difference that would be made

Transfer of service charges surplus to reserve fund - £32,978 2016 – 2018 , £49544 2019, £31,904 2020

36. The applicants argument and the respondent's response are set out in the Schedule attached.

37. In summary the applicants explained that they considered that the overpayment of service charges in the years 2016 - 2018 should not have been paid into the reserve fund. They argued that the decision was unreasonable and not in accordance with the lease.

38. The point was made that it was leaseholders' monies, that they should be free to decide how to spend their own money, and that the needs of those who wanted to sell their properties should not prevail over the needs of the majority who wanted to continue to live at the development.

39. In the applicants' view, there is nothing to prevent the respondents overestimating the service charge as a way of building up the reserve fund and that is not reasonable.

40. The argument about the lease is that it requires a decision to transfer the surplus to be reasonable. The applicants also said that the transfer was unreasonable because the reserve fund was not held in the distinct pockets of estate charges, block charges and parking charges.

41. Ms Barley gave evidence to explain why the directors considered that it was a reasonable and prudent decision. They considered the lack of maintenance in the development since 2013, the recommendations of a report commissioned when the applicants were directors, the risks posed by cladding and the timber fascia and balconies and the potential expenses if the heating system had a catastrophic failure.

42. The directors considered themselves to be representative of the leaseholders. They have had no concerns expressed to them about their decision other than from the applicants

43. When challenged by the applicants about the very limited need for works to the cladding, Ms Barley pointed to the confused government advice and the RICs advice.

44. The respondents contended that they had complied with the terms of the lease and that there was no requirement for the funds to be held in separate pockets for funding.

The tribunal's decision

45. The tribunal determines that it was a reasonable decision to pay the surplus service charges into the reserve fund.

Reasons for the tribunal's decision

46. The decision was reasonable and in compliance with the terms of the lease.

47. The tribunal was impressed with the thoughtfulness and prudence of the directors who had taken a careful overview of the risks facing the property in the future and had put in place the reserve funds necessary to manage those risks.

48. The tribunal did not consider that the sums in the reserve fund were excessive.

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Charge for producing 'maintenance expenses service charge accounts - £7,200

49. The applicants' and respondents' arguments are set out in the attached Schedule.

50. In summary the applicants argue that they have been charged for the costs of certified accounts for the period 2016-2019 which they have not been provided with.

51. The respondents say that when they took over they were provided with uncertified accounts. Therefore an independent accountant was needed to certify the work carried out by Ms Barley and Mr Menezes, to reassure the leaseholders that the historic accounts were drawn up in line with applicable accounting standards. with a full explanation.The decision-

making process in respect of these costs was reasonable and the sum charged was reasonable and in line with current charges. The costs were reasonably incurred and are payable.

The tribunal's decision

52. The tribunal determines that the amount charged for the certification of the accounts is reasonable and payable.

Reasons for the tribunal's decision

53. The tribunal accepts the arguments of the respondent. It appears to the tribunal that this was a reasonable and prudent course of action by the respondents.

Charges for binstore - £1,930.00

54. The applicants contend that under the lease there is no provision for them to pay for the erection of a new bin store. The only clause that they consider might be relevant is in paragraph 4 of the maintenance expenses which is in the block costs part of the sixth schedule and that only allows for repair and rebuilding. The charge was not charged as block costs but estate costs.

55. They also argue that the charge is for use of one block only, Minerva and that the new bin store is not for fly tipping or bulk items. They refer to a letter at page 1427 of the bundle which is addressed to all the residents of Minerva House and says that the new bin store is not for fly tipping or bulk items.

56. The respondent says that the erection of the bin store is allowable under the lease. It points to the definition of the Estate in the First Schedule of the lease.

57. It says that the new bin store was erected to solve problems of fly tipping which had been identified in a Fire Risk Assessment and rodents.

58. The bin store was agreed to be necessary by the directors, the freeholder and the local authority.

The tribunal's decision

59. The tribunal determines that the applicants should be refunded the charges for the bin store.

Reasons for the tribunal's decision

60. The tribunal accepts the evidence of the applicants that the bin store was for the use of Minerva House residents only and that therefore the charge should have been made as a block rather than an estate charge.

Excess heating charges 2019 – 20 £50000

61. The applicants' and respondent's arguments are on the attached Schedule.

62. The applicants contend that the level at which the heating unit charge has been and is set is unreasonably high. It has been previously 9.21 p and is now 7 pence/kwh. They argue that it should be set at a level of a total accumulated surplus of £10,000 at any time to cover for expenditures' meter checking, meter replacing' as listed in the Lease.

63. The respondents explained the basis on which they had charged the heating charge.

The tribunal's decision

64. The tribunal determines that the amount payable in respect of heating charges 2019 and 2020 is payable and reasonable.

Reasons for the tribunal's decision

65. The tribunal finds that the arguments of the respondents are reasonable. The applicants must understand that there may have been alternative approaches to deciding what was a reasonable heating charge. As long as the respondent has behaved reasonably in its approach the monies are payable.

Charge for directors' unavailability £12,000 charged in 2020 and £2000 charged in 2021

66. The applicants' and respondent's arguments are on the attached Schedule.

67. In summary the applicants say that there is no provision in the lease to cover these charges. The respondents say that it was a prudent course of action in case they were unavailable to sort out the historical accounting difficulties. They agreed with the tribunal that it was misleading to refer to this as directors unavailability when what was really meant was a contingency charge for accountancy fees.

68. They point out that there was never any intention that the directors would be paid. They considered it was a reasonable sum to set aside in the event that neither Ms Barley nor Mr Menezes were available to complete the work on the historic accounts. The figure was reasonable based upon the charge of £1000 per month paid to ASP Accounting,

The tribunal's decision

69. The tribunal determines that the amount payable in respect of contingency charges for accounting services is reasonable and reasonably incurred.

Reasons for the tribunal's decision

70. The tribunal accepts the argument of the respondent. This was a sensible course of action. In the event the applicants, and all of the leaseholders have benefitted from the work of the directors who are qualified accountants and the money has not had to be expended.

Tribunal costs

71. The applicants say that the respondent's costs for the tribunal should be covered by the D & O liability insurance. They say that if the policy does not cover those costs it is because the respondents reduced the cover even though they have said that the cover is identical. In that event they say that the costs are not payable because they are not reasonably incurred.

72. The tribunal does not make any determination on this matter as no costs have been demanded of the applicants. If and when this happens, if the applicants consider that the costs are not payable or not reasonable then they can make an application to the tribunal for a determination under s. 27A.

Closing comments

73. The applicants said in closing that their primary concern is that the respondents follow the terms of the lease. They reject the evidence that the vast majority of the leaseholders support the current directors. They also say that the Brenley Park Portal which is used to communicate the directors' decisions is password protected and that the password gets changed at the convenience of the directors.

74. The respondent directors say that they are doing their best in very difficult circumstances and have abided by the terms of the lease and ensured in a responsible way that the property is managed effectively and economically.

75. The tribunal is aware that the applicants have invested a great deal of time into this application and that they will be disappointed with the outcome. The applicants have had extensive involvement over the years with the building and have also been trying to do their best with the difficulties that faced the development.

76. The tribunal was faced with a voluminous bundle, and a complex history. It is not concerned with the politics of the management of the development, but it is aware that the respondent needs the support of all the leaseholders to put the management of the development back on tract. In supporting (in the main) the actions of the respondent, the tribunal is making no comment on the efforts of the applicants to manage the property in the past. However it considers that the respondent has done an excellent job in getting the historical problems of the development under control and moving the development onto a more secure and effective footing.

Application under s.20C

77. In the application form the applicants 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 not to make an order under s.20C of the Landlord and Tenant Act 1985,

Name: **Date:** October 2021

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).