FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BB/LSC/2020/0288**
HMCTS code	**:**	**V:CVPREMOTE**
Property	**:**	**Flats 1 – 49 Oceanis Apartments 19 Seagull Lane London E16 1BY**
Applicant	**:**	**Oceanis Apartments E16 Residents Association**
Respondent	**:**	**Clarion Housing Association**
Represented by	**:**	**Miss S Evans solicitor**
Type of application	**:**	**For the determination of the reasonableness of and the liability to pay service charges**
Tribunal members	**:**	**Mrs E Flint DMS FRICS** **Mr T Sennett MA FCIEH**
Date and Venue of hearing	**:**	**7 April 2021**
Date of decision	**:**	**12 May 2021** **20 May 2021 with typographical corrections**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was CVPREMOTE with all participants joining from elsewhere. 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 the Tribunal were referred to are in a bundle of almost 800 pages pages, the contents of which have been noted. The order made is described below.

Decisions of the tribunal

(1) The Tribunal determines that the standard management fees are payable, the administration charges are not payable and should be refunded within 28 days of this decision.

(2) 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 lessee through the service charge account.

(3) The Tribunal orders that the Respondent refund the application and hearing fees incurred by the Applicant.

The application

1. The Applicants seek a determination under Section 27A of the Landlord and Tenant Act 1985 (the Act) as to whether service charges for the years 2008-9, 2009-10, 2010-11, 2011-12, 2012-13, 2013–14, 2014–15, 2015-16, 2016-17, 2017-18, 2018-19, 2019-20 and 2020-2021 are payable. The Applicants seek a determination under section 20C of the Landlord and Tenant Act 1985 in respect of the landlord's costs in relation to the tribunal proceedings and also reimbursement of their fees.

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

The background

3. The Applicants represent 36 of the 49 lessees of Oceanis Apartments, a shared ownership block of flats; the Respondent landlord holds a sub underlease of the block but does not provide management services directly to the block. The Respondent is the landlord of the Applicants having granted a sub underlease to each of the lessees.

4. The estate comprises five blocks of flats totalling 388 residential units and two commercial units. The Respondent holds a long lease of two blocks: Atlantic and Oceanis Apartments. The entire estate, including the internal common parts of the subject block is managed on behalf of the freeholder, Fairhold Properties No. 8 Limited, by First Port Bespoke Property Services Ltd (First Port).

5. First Port issue service charge demands and provide service charge accounts to the Respondent. The Respondent apportions the charges and invoices the individual lessees.

6. 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.

The Lease

7. A copy of a specimen underlease was included in the bundle. The following clauses are relevant for the purposes of this application:

a) By Clause 3(2)(b) the Lessee covenants "*To pay the service charge in accordance with clause 7*"

b) By Clause 3(2)(c) the lessee covenants "*To pay the landlord's reasonable per flat annual administration fee by equal monthly instalments in advance on the first day of each month during the term*".

c) By Clause 7(1) the leaseholder covenants to pay the service charge and be subject to the service charge provisions in the superior lease.

d) By Clause 7(2) Administration charges "*In addition to the proportion of the Service charge under the Superior lease the leaseholder covenants to pay all reasonable fees, charges and expenses payable to the Surveyor any solicitor, accountant, surveyor, valuer, architect or other person whom the Landlord may from time to time reasonably employ in connection with the management or maintenance of the shared ownership leases in the Landlord's estate including the computation and collection of rent (but not including fees charges expenses in connection with the effecting of any letting or sale of any premises) including the cost of preparation of the account of the Service Charge and if any such work shall be undertaken by an employee of the Landlord then a reasonable allowance for the Landlord for such work*"

8. A copy of the superior lease between Barratt Homes Limited, Peveral OM Limited and Circle 33 Housing Trust Limited dated 11 April 2007 was included in the bundle. The Service Charge is described

as the Maintenance Expenses in the Particulars and "*means the monies actually expended or reserved for periodical expenditure by or on behalf of the manager of the lease at all times during the term in carrying out the obligations specified in the Sixth Schedule"*

The Issues

9. The relevant issues set out for determination are as follows:

10. The payability and reasonableness of the amounts described as "management fee" and "administration fee" as part of the service charge demands levied by the Respondent. Despite the label "administration fee" it was conceded by the Respondent at the beginning of the hearing that the charge is a service charge within the meaning of the Act.

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

The Applicant's case

12. Mr Mullen, a committee member of the Residents Association, representing the Applicants said that it had been very difficult to ascertain the amounts being paid for the management of the building due to a lack of transparency. Many figures had been based on estimates.

13. He said that the actual services were provided by First Port. As far as he was aware Clarion did not scrutinise the individual amounts which make up the service charges but merely apportioned the service charge costs, sent the invoices to the individual lessees and paid First Port the amounts demanded. He thought invoicing the lessees was a largely automated process. Until 12 March 2018, owing to the format of the paperwork provided by the Respondent, it had not been apparent that Clarion were making two charges: the standard management fee plus an administration charge of 5% which had been added to the First Port Invoice plus the ground rent, the administration charge was increased to 15% in 2019 -20. In some years the total cost of management, including that payable to First Port was approximately £1,000 per flat.

14. The applicants consider the amount of the administration fee to be unreasonable: the standard management fee should cover the cost of the service provided by the Respondent. He referred to the tribunal decision in Svetlana Prokhorova v Clarion Housing

Association Limited(1) Berkeley Seventy-Seven Limited(2) (LON/00BG/LSC/2018/0057) where the facts were similar in that the services were provided by a managing agent, Clarion's management related to the social housing units and the service charges levied by the managing agent were apportioned by Clarion, in addition a management fee and administration fee were charged. The Tribunal determined that the standard management fee was payable but the additional administration charge was not payable. In its reasoning it stated: *The Tribunal first looked at the service charge provisions in the Underlease. The applicant is liable "To pay the Landlord's reasonable per flat annual administration fee by equal monthly instalments" (clause 3.3.3). The "Service Provision" shall include "all reasonable fees, charges and expenses payable to the Authorised Person any solicitor, accountant, surveyor, valuer, architect or other person whom the Landlord may from time to time reasonably employ in connection with the management of the management or maintenance of the premises demised by the Head Lease…and if any such work shall be undertaken by an employee of the Landlord then a reasonable allowance for the Landlord for such work" (clause 7.4(c)). (96) Confusingly, R1 claims it management fees under 3.3.3 and its administration fees under 7.4(c), which appears the wrong way around. To add to the confusion, the administration fee payable under 3.3.3 is actually a service charge under section 18 of the 1985 Act; rather than an administration charge under schedule 11 of the 2002 Act. (97) The applicant is liable to pay R1's administration fee and management fees, by virtue of clauses 3.3 and 7.4(c)). However, these fees have to be "reasonable", as this word appears in both clauses.*

Having regard to Mr Shaw's evidence, the fee increase explanation in the Centra Living leaflet and the members' knowledge and experience of management fees, the Tribunal finds that fees of £135 (2015/16) and £185 (2016/17) are reasonable. However, these sums should cover both the management and administration fees. It is not reasonable for the applicant to pay administration fees on top, bearing in mind that she is already contributing to R&R's fees for managing the Estate and the Building. She should not have to pay two lots of fees to R1, in addition to R&R's fees. (100) The Centra Living leaflet refers to the administration fee covering their "costs for obtaining and managing the particular services and the cost of preparing and reconciling the service charge account." In this case, the services are obtained and managed by R&R, who also produce the service charge accounts. On Mr Shaw's evidence, the administration fee simply covers "administering the service charges". An additional 5% fee for this service is wholly unreasonable, given R1 is also charging 24 a management fee. In the circumstances, the Tribunal caps the combined management and administration fees to the sums claimed for management fees.

15. During questioning Mr Mullen confirmed that the lessees contacted the concierge regarding any matters relating to the building or the common parts. Clarion were not responsible for the maintenance of the structure or common parts, reporting issues to First Port was part of the role of the concierge, who provided this service to the whole estate. If there was an insurance issue then the lessees went direct to First Port who had arranged the insurance cover; Clarion do not hold the policy.

16. Mr Mullen said that the Residents association was set up in 2019. Mr Shaw had been helpful in that he had provided the Residents Association with the budgets set by First Port, previously the budgets were sent to the lessees in the three standard blocks and to Clarion but not to the shared ownership lessees in Oceanis.

17. In respect of major works First Port issued the initial notice which Clarion forwarded to its lessees. Feedback was made directly to First Port.

18. Mr Mullen confirmed that the applicants wished the tribunal to determine that the costs payable should be limited to the Respondent's standard management fees as set out below and that the administration fee should be reduced to nil for each of the years as the service provided by Clarion ought to have been covered by the management fee:

2008-9 to 2014-15	£75 pa per flat
2015-16	£135 pa per flat
2016-17 to 2018-19	£185 pa per flat
2019-20 to date	~~£165~~ £160 pa per flat

He confirmed that although Clarion had waived the management charge for 2019-20 and 2020-21 as a goodwill gesture because of the large increase in the administration charge the Applicants were willing to pay the management charge as they were seeking a reduction to nil for the administration charges for those years.

The Respondent's case

19. Miss Evans referred to the relevant clauses in the standard lease, a specimen had been included in the bundle and said that both management fees and administration charges were payable under the terms of the lease.

20. Miss Evans said that the Leaseholders of Fable Apartments v Clarion Housing Association (LON/00AU/LSC/2019/0246) (Fable House) case was more favourable to the Respondent than the Ashmore House decision. In the Fable House case the Tribunal determined that as Clarion *" acts as a first filter for leaseholder enquiries, carries out the accounting role referred to above, and levies the demands. The Tribunal agrees that in principle that this should be a fixed fee, and for the purpose of this Application, which involves mainly estimated budgets, fixes that fee at £200 per unit per annum. The Tribunal has taken the Peabody fee as a guide, and has applied an uplift to allow for the "first filter" element and any further accounting service which may exist in this case*". She noted that Ashmore House involved consideration of whether there was a Qualifying Long Term Agreement in place and the consequential capping of costs.

21. Mr ~~Andrew~~ Adrian Shaw, Head of Service Charges at Clarion was available to answer questions, he had not provided a witness statement. He was the witness for Clarion in the Ashmore House case. He confirmed that the standard management fee referred to by Mr ~~Muller~~ Mullen was the fee charged across the respondent's estate where there was third party involvement in the provision of services.

22. Mr Shaw was asked what Clarion do in relation to the management of the block. He said that Clarion have a direct relationship with the freeholder's managing agents: First Port were responsible for the internal common parts of Oceanis and Atlantic Apartments. Clarion do not have a direct relationship with any of the contractors appointed under the service charge regime. However, Clarion do monitor the services provided by inspecting every 6 to 8 weeks, although he accepted this would be carried out when the neighbourhood team were inspecting the social rented accommodation in Atlantic. He did not know if the Residents Association had been provided with contact details for the neighbourhood response team.

23. Clarion's only involvement with the insurance of the building related to claims in respect of the common parts of the block.

24. He confirmed that historically Clarion had not challenged First Port regarding the budgets, he did not dispute that the budgets had been very full on several occasions. He said that Clarion had begun to take a more active approach in the last two years. He had taken over in 2018 and thought that there was a lack of transparency in the service charge accounts. He thought a management fee of £200 was not unreasonable.

25. He confirmed that the 5% administration charge predated his employment. An administration charge of 15% had been decided upon prior to the merger with Circle 33. A new computer system had been installed in 2019 and an administration fee of 15% had been applied automatically and shown as a separate amount. The increased administration fee, in his opinion effectively included the management fee.

26. The Centra Living leaflet had been issued in 2014 and set out the management fees, he did not think that it had been updated. He was not aware of the lessees being informed of the increased percentage of the administration fee. However, he pointed out that the new administration fee incorporates the management fee, as a consequence the management fee had been reduced It is accepted good practice and recommended by the professional bodies that the fee should be a fixed amount for general management rather than a percentage of the costs incurred in any one year. The reasonable management fees in the circumstances of the present case are limited to the following amounts:

2008-9 to 2014-15	£75 pa per flat
2015-16	£135 pa per flat
2016-17 to 2018-19	£185 pa per flat
2019-20 to date	~~£165~~ £160 pa per flat

No administration fees are payable in addition to the above figures.

Reasons for the Tribunal's decision

27. The Tribunal first looked at the provisions in the Underlease. The administration charges are required to be reasonable based on the services provided. The lease terms include a provision that the charges are subject to the provisions of sections 18 to 30 of the landlord and Tenant Act 1985 (as amended).

28. The Centra Living leaflet refers to the administration fee covering their "costs for obtaining and managing the particular services and the cost of preparing and reconciling the service charge account." In this case, the services are obtained and managed by First Port, the service charge accounts submitted to Clarion already includes a charge for managing the estate, including the Oceanis block externally and the internal common parts. On Mr Shaw's evidence, the administration fee simply covers "administering the service charges". An additional 5% or in later years 15% fee for this service is wholly unreasonable, given Clarion is also charging the Lessees a

management fee. In the circumstances, the Tribunal caps the fees to the sums above.

Application under s.20C

The appellants' case

29. The Applicants' grounds are that it ought to have been possible to reach an agreement without involving the tribunal taking into account the two previous decisions referred to during the hearing. The applicants should not be out of pocket as they had no alternative but make the application and attend the hearing.

30. **The respondent's case**

31. Miss Evans said that Clarion did not intend to put the costs on the service charge account and confirmed that Clarion did not object to the S20c application.

32. In addition Miss Evans considered that it would be appropriate to reimburse the fees if the applicants were successful in their application.

The decision of the Tribunal

33. Having considered the submissions from the parties, the Tribunal determines that in the circumstances it is just and equitable that an order is made under section 20C of the 1985 Act because the applicants had no option but apply to the tribunal in order to bring this matter to a proper conclusion as discussions between the parties had not resulted in an agreement. The supporting paperwork over a prolonged period of time had effectively hidden the total charges being levied by the Respondent.

34. It is ordered that the Respondent reimburse the Applicant the application and hearing fees.

Name: E Flint **Date:** 20 May 2021

ANNEX - RIGHTS OF APPEAL

i. 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.

ii. 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.

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

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

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
  (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
  (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
  (a) "costs" includes overheads, and
  (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,
   (d) the date at or by which it is payable, and
   (e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
   (a) the person by whom it would be payable,
   (b) the person to whom it would be payable,
   (c) the amount which would be payable,
   (d) the date at or by which it would be payable, and
   (e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
   (a) has been agreed or admitted by the tenant,
   (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
   (c) has been the subject of determination by a court, or
   (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 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).