FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BF/LSC/2021/0320**
HMCTS code (paper, video, audio)	**:**	**CLOUD VIDEO HEARING (CVP)**
Property	**:**	**2 Albion Court, Albion Road, Sutton, Surrey SM2 5TB.**
Applicant	**:**	**Mr Francis Mark Atherton and the other leaseholders of the Property, as listed in the application**
Representative	**:**	**Miss Amanda Gourlay, of Counsel**
Respondent	**:**	**MB Freeholds Limited**
Representative	**:**	**Mr Marcello Amodeo of RMG Ltd (Managing Agents)**
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 SHAW** **Ms F MACLEOD** **Mr O MILLER**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**7th March 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which was consented to by the parties. The form of remote hearing was a remote hearing by video link (CLOUD VIDEO CVP). A face-to-face hearing was not held because it was not practicable, given the pandemic. The documents to which the Tribunal was referred were in a bundle and the contents were fully noted and considered by the Tribunal. The decisions of te Tribunal on the disputed issues are as set out below.

Introduction

1. This case involves an application for a determination of the liability to pay service charges in respect of a development called Albion Court Albion Road Sutton Surrey SM2 5TB (the "Property"). The Applicant is Francis Mark Atherton (who is the owner of Flat 21) is the lead Applicant on behalf of the other leasehold owners of the flats in the development, as identified in the schedule attached to the application. Mr Atherton and the other leaseholders, will be referred to as the "Applicants".

2. The Property comprises three blocks, identified as blocks A, B and C, and there are twenty-seven residential units in the blocks. The property is owned by MB Freeholds Ltd ("the Respondent") which acts through managing agents called Residential Management Group or RMG. The Applicants were represented at the hearing by Ms Amanda Gourlay of Counsel. The Respondent owners were represented through their Managing Agents, and in particular by Mr Marcello Amodeo and Mr George Davies.

3. The application is dated 10th September 2021 and the Applicants have supported their case in accordance with directions by an Amended Statement of Case and a Scott Schedule, together with a full witness statement by Mr Atherton the lead Applicant. The Respondent has also prepared a Statement of Case and its own comments in the Scott Schedule, and there has been a further Response to the Respondent's Statement of Case by the Applicants. Directions were given by the Tribunal on both 7th and 25th October 2021.The parties have helpfully prepared a hearing bundle which runs to some 200 pages. Bracketed number references in the Decision below are to page numbers within the bundle.

The Hearing

4. The parties, represented as mentioned above, appeared before the Tribunal by video link, on 14th February 2022. At the inception of the hearing Mr Amodeo on behalf of the Respondent, applied to the Tribunal for an adjournment of the hearing. That application was first intimated in an email sent on the morning of the hearing, to the Tribunal, and forwarded to the parties. Having been advised by the Tribunal through the Case Manager, that the application would have to be made directly to the Tribunal at the hearing, Mr Amodeo did so.

5. The application was made for the reason that Mr Amodeo had tested positive for Covid, and as a result was firstly precluded from going to his office from where he had intended to conduct the Respondent's case at this hearing, and where he had some relevant notes; he was also suffering, he told the tribunal, from a sore throat and a general feeling of feverishness and fatigue.

6. The application for an adjournment was opposed on behalf of the Applicants by Miss Gourlay, but it is not necessary for current purposes to go through the respective arguments on both sides, because Mr Amodeo during the course of the argument did not proceed with the application, and said that he would proceed with the hearing, taking breaks as may be necessary during the course of the hearing, and being assisted by Mr Davies.

7. The Tribunal would wish to express its gratitude to Mr Amodeo for having taken this position, and for having stoically proceeded with the hearing although he was not feeling in complete good health for obvious reasons. In the event he summarised the Respondent's case most adequately, and by reference to the substantial documentation before the Tribunal.

8. Miss Gourlay as well as having prepared a statement of case which appears in the bundle referred to [22] also prepared a skeleton argument to supplement that material and has taken the Tribunal through her argument in the course of submissions to the Tribunal. It transpired that

although a large number of issues arose on the documents, as is often the case, by the time the case came before the Tribunal the issues had crystallised into four main areas although some of those issues had sub-issues.

9. It is proposed to deal with these issues separately summarising the parties' respective positions and in respect of each issue to give the Tribunal's finding.

It should be said at the outset that although the leaseholders in the development are listed in the application, one of the flats has changed hands during the course of this dispute and a separate position applies to the leaseholder of that flat, which is flat 15 and in relation to which a particular issue and findings relating to that difference will be alluded to in the course of this determination. That aspect is not really in dispute as between the parties.

The First Issue

10. The first issue which arises, and upon which the Tribunal has been invited by the parties to make a finding, is in respect of a charge of £11,418 equating to £422.89 in respect of each leaseholder, and levied in respect of the service charge year from March 2019 – March 2020. The sum relates to the premium payable for buildings insurance for that year. There is some doubt as the precise figure because there is stated in a policy document appearing at [155] of the bundle a separate figure of £10,728.16, but the thrust of the Applicants' opposition to this charge is that in July 2020 the parties reached a settlement agreement, which incorporated that figure and thus it is irrecoverable.

11. Unhappily, the relationship between the parties has been strained in this case. and there was a proposed application to the Tribunal in respect of this and other matters which in the event was resolved by a compromise agreement. It was on the basis of that agreement that the Applicants did not proceed with their application (which was ready, and in draft form) and which had been supplied to the Respondent in this case.

12. The settlement agreement appears at [146] of the agreed bundle. The agreement contains some full recitals before the substance of the agreement is set out. In particular it provides:

"Upon Francis Mark Atherton confirming that he acts not only for himself, but is also authorised to act on behalf of the persons named in the Schedule to this agreement (together "the Proposed Applicants") in the settlement of a dispute that has arisen between the Proposed Applicants and MB Freeholds Limited in relation to the costs applied to the service charge for the 2017-18; 2018-19 and 2019-20 ("the disputed costs") at Albion Court, Albion Road, Sutton, Surrey, SM2 5TB (the "estate")."

13. It was declared at the beginning of the agreement that it related to the costs to be applied to the service charge for those three service charge years. The effect of the agreement was that upon the Respondent in a letter dated 5th May 2020 offering to pay £1,000.00 ("the payment") to each of the Proposed Applicants in full and final settlement of the disputed costs (it being remembered that those disputed costs were the service charge costs to be applied for those service charge years) then in full and final settlement of the disputed costs the Respondent would pay £1,000 to each Proposed Applicant, and on that basis the Applicants would not be making their application to the Tribunal either then or at any time in the future. There were other provisions in the agreement with which the Tribunal may not need to be concerned at this stage.

14. The thrust of Miss Gourlay's submission was that that agreement is perfectly clear in its terms. It defines the disputed costs as being the service charges referable to the 3 years mentioned and it says that upon payment of the sum by the Respondent to the Applicants, that that would be in full and final settlement of those disputed costs.

15. The figure claimed by the Respondent in these proceedings is £11,418 [82] and yet it is plainly referable to the insurance costs incurred during one of those three service charge years mentioned in the agreement. It is said on behalf of the Applicants that the Respondent is precluded by that agreement from pursuing that further sum. Moreover Miss Gourlay demonstrated by reference to the draft application which was not pursued, that the figure had been precisely identified amongst the

proposed matters to be determined by the Tribunal, in the application which was abandoned because of the settlement agreement.

16. A secondary part of the opposition to this payment is that by virtue of a finding of the Upper Tribunal in 2017, it had been determined that the particular insurance provisions within the lease governing the parties' contractual arrangements permitted the Respondent to charge the Applicants only for insurance referable for the common parts in the development, and not in respect of the whole building. Nonetheless the figure raised does indeed relate to the whole of the property.

17. So, says Miss Gourlay, even if the Applicants were wrong in their construction of the agreement the figure is inconsistent with the sum which has been determined as being claimable under the terms of the lease.

18. In response to that submission, Mr Amodeo contended that as a matter of accounting, the further sum raised was not within the three year period and was not covered by the terms of the settlement agreement. His contention was that if it were, then by virtue of the payment of £1,000 to each of the Applicants there would be double recovery by the Applicants because they would be receiving payment for an element of that subsequent payment and therefore be unjustly rewarded for the cover that had been obtained.

19. He did not dispute that the figure had been well known at the date of the agreement by both sides, nor did he dispute that the figure incorporated a sum referable not only to the common parts but the whole of the building. Indeed, the Applicant, when supplementing his written evidence before the Tribunal, expressed some frustration that notwithstanding the fact that the Applicants had successfully challenged the charging of a figure for the whole building the Applicants were still receiving demands in stark contradiction of that finding.

20. Further he impressed upon the Tribunal that the agreed terms involved a degree of compromise on his part and on the part of the other leaseholders, and (although not expressly put in this way) the agreement

would not have been reached had it not been anything other than what it is stated to be, that is, “full and final”.

21. In response to that, Mr Amodeo said that he agreed that the lease does not permit the recovery of insurance for the whole of the building and the Respondent would be amending the situation for the future. However, this was a less than complete answer, in the view of the Tribunal, to the point being made.

22. In the light of the evidence, and having considered the settlement agreement, the Tribunal is in no doubt that this sum cannot be raised against the Applicants for the two reasons put forward by the Applicants.

    1) It is not recoverable under the lease, a point that has been conceded by the Respondent, and

    2) Because it is unarguably part of the disputed costs that were included in the settlement agreement. It would have been entirely open to the Respondent to make some kind of reservation in respect of these further costs that it intended to pursue or to raise it at the time. There is no suggestion, or any issue put forward on behalf of the Respondent, that this figure involved fresh material or that it was unknown to the Respondent at the time when the agreement was made.

23. Accordingly, this first issue is determined in favour of the Applicant, and the Tribunal’s finding is that this further sum, be it £11,418 or £10,728, is not recoverable by way of service charge against the Applicants., because it was disposed of and part of the Settlement Agreement signed on behalf of the Respondent on 15th July 2020.

24. As mentioned above, Mr Veglio, who was not party to that settlement agreement, and is the leaseholder of flat 15, is not covered by this finding and will accordingly have to pay what was understood by the Tribunal to be £58.12 in relation to this matter.

The Second Issue

25. The second issue relates to a small balancing payment of £14 raised by the Respondent against the Applicants by way of so-called balancing charge. As is well known it is not unusual for leases to make provision for an estimate to be made in relation to annual service charges and for there to be some reconciliation at the end of the service charge period, to the extent that there is a disparity between the estimate made and the actual costs incurred.

26. The provisions relating to the recovery of a balancing charge appearing in this lease are to put it charitably, obtuse. At clause 1 of the lease, leaseholders are required to pay the annual sum of £20 in quarterly instalments in arrears as a contribution to the *"Maintenance Fund."* This fund is defined at Clause 4(c)(vi) as being *" all sums received from the Lessee and from the lessees of the flats and maisonettes at ALBION COURT…"*

27. The service charge machinery appears at clause 3(1)(vii) and obliges the leaseholders to insure the property demised to them. At clause 3(1)(vi) the leaseholders are required to make payment of :

"(b) the amount by which the lessor shall estimate that the cost of repairs and maintenance and other payments and expenses incurred or to be incurred pursuant to the Lessor's covenant contained in Clause 4 sub-clause (c)(i) to (vi) hereof during the succeeding six months from the date of the estimate shall exceed the balance at the date of the estimate of the Maintenance Fund hereinafter referred to."

The proportion of contribution of all leaseholders is the same, that is to say, one twenty-seventh.

28. It is not contested on behalf of the Respondent that there is no provision in the lease for the recovery by way of balancing payment in the circumstances that have occurred in this case (see paragraph 6(b) of the Respondent's Statement of Case at page 36 of the bundle). As will have been observed in the recital of the relevant terms of the lease set out above, there is some limited provision for recovery of some disparity between estimated and actual costs within 6 months from the end of the service charge period but that is not really relied upon so far as the Respondent is concerned.

29. Instead, the Respondent's contention is that notwithstanding the absence of express provision in the lease for recovery of such balancing charge in the circumstances obtaining here), it is entirely reasonable for the Respondent to operate on this basis, and indeed this has been the position between the parties up until this time. Miss Gourlay took the point that in the final sentence of the Statement of Case by the

Respondent there was an implicit acceptance that the Applicants were entitled to bring any such informal arrangement to an end because the words used were *"Therefore the view is that the leaseholders have accepted this methodology of service charge billing until now."*.

The use of the expression *"until now",* says Miss Gourlay, infers that the current challenge cannot be made, because there is acceptance that the informal arrangement is always open to be brought to an end. The Tribunal does not consider this to be the Applicants' best point and does not rely on that wording in the Statement of Case of the Respondent as being any particular bar to the Respondent.

30. The more difficult hurdle that the Respondent has to clear is that it is, (as are the Applicants), bound by the terms of the lease agreed by their predecessors in title. Whether or not it is reasonable for the Respondents to conduct accounting in this way, is in the view of the Tribunal by the by. The Tribunal is satisfied that the absence of a provision enabling a balancing charge of the kind now claimed, in this perhaps slightly antiquated and peculiar lease, precludes recovery of this sum.

This issue is accordingly determined in favour of the Applicants.

The Third Issue

31. The third issue arises out of the insurance cost for the year 2020-2021. It is agreed between the parties that the correct figure in respect of the insurance of the common parts for that year is £1359.46. Notwithstanding that (and notwithstanding that precise figures were identified in the settlement agreement) the Respondent has purported to raise by way of s.20B notice, a charge of £3,997.

32. The Respondent in its Statement of Case at [37] of the bundle says in respect of this challenge that *"the Respondent acknowledges that the cost for insuring the common parts of the buildings and public liability insurance for 2020-2021 were £1359.46."*

There does not appear to be any substantive contrary argument in the Respondent's Statement of Case. Mr Amodeo when giving evidence to the Tribunal again acknowledged the correctness of that figure, but in so far as understood by the Tribunal, said that the disparity came about as a result of other sums incurred which he referred the Tribunal to, in an internal document which he had prepared at [192] of the hearing bundle. By reference to the addition of various other sums, not really explained in the Statement of Case nor in the witness statements prepared on behalf of the Respondent, he contended that that was the true balance outstanding.

33. That internal document which is not supplemented by the primary documents upon which it is based, and which was not to the satisfaction of the tribunal clearly explained at the hearing, was not so far as the Tribunal is concerned, helpful for the Respondent. It does not stand with the clear statement of the recoverable costs for the common parts insurance plainly stated in the settlement agreement and in the documents at [149] and [37] in the bundle. On the balance of the evidence before the Tribunal the Tribunal is satisfied that the greater figure is not one that can be recovered by the Respondent and it is limited to the £1359.46 referred to above.

The Fourth Issue

34. The fourth issue brought before the Tribunal, is in respect of two further quarterly charges which the Respondent has purported to raise, and are contended by the Respondent to be due by 24 June 2021. They are not large figures but it is important that the point in principle is determined.

35. The first of these charges is £260.58, described as quarterly service charge in arrears. The provisions referred to above relating to the recovery of service charges and in particular those provisions set out at clauses 1 and 3(vi)(b) of the lease make specific provision as to how sums can be collected by way of contribution to a maintenance fund in arrears. As alluded to above, there is a (what is now plainly historic but nonetheless contractually agreed) limit of £20 for the year for such demands in other words £5 per quarter.

36. Moreover there is a qualification for the making of these demands to the extent that they are required to be for the 6 months succeeding the date of the estimate, and to the extent that those costs exceed the balance of the maintenance fund as described in the lease. The amount demanded plainly is not within that contractual limit, and although there is some specific reservation made in relation to insurance, this sum does not relate to insurance.

37. There is a further sum of £164.82 demanded, described as quarterly reserve in arrears, but the Respondent has again reasonably conceded as to an extent it is obliged to do, that there is no provision in this lease for provision of a reserve fund. In the absence of provision in the lease for recovery of these sums, the Tribunal finds that they are irrecoverable.

38. There are some residual matters of dispute which have occurred in the context of the Scott Schedule which was prepared consequent upon directions given by the Tribunal. In that Scott Schedule a sum is claimed which is referrable to the cost of obtaining an insurance valuation on the basis of which insurance was subsequently obtained.

39. The short point taken by the Applicants is that this lease, which is not short on verbiage, makes no reference to an entitlement on the part of the Respondent to recover the cost of insurance valuations, and the fallback position of the Respondent (as it has been in respect of other disputed costs) to the effect that it is "reasonable" that such a cost should be recoverable, does not avail the Respondent.

40. The Tribunal has pondered this point because there is some attraction in the point made both by Mr Amodeo and Mr Davies (albeit not in a witness statement) that it would be foolhardy to obtain insurance without support of an insurance valuation. The point was made on behalf of the Applicants that in any event it is unnecessary to obtain a valuation because one had been obtained 3 years previously and it was surplus to requirements. Mr Davies said that it was the Respondent's agents' practice to obtain such valuations after a period of about 3 years and not only would the agents be subject to criticism they would not he providing a proper service and ensuring that they were insured for the proper amount.

41. After some consideration the Tribunal accepts that the point made by the Respondents has some force, but that, again, however reasonable it may be to obtain such a valuation, there is no provision in the lease for recovery of this sum by way of service charge.

The answer to the point put to Counsel for the Applicants, was to the effect that this would mean that the freeholder must meet the cost itself, is indeed, so the Tribunal finds, the case. It is one of the incidents of property ownership which is to be put into the balance together with the benefits that accrue from such ownership. The freeholder is not in respect all costs entitled to an indemnity from the leaseholders, unless provision is made in the lease to this effect, or there is some other statutory or other provision which can be relied upon. In all the circumstances the Tribunal accepts that this is not a recoverable cost.

40.The final matter relates to another insurance figure claimed for insurance of the common parts for the service charge year 2021-2022, an estimated figure. The figure claimed is £2062. That is an uplift of 51% over the previous service charge year cost of £1359.46. It is manifestly a very large uplift and exceeds what was advised to the Respondent by its own broker, who suggested an uplift of 9% (it is to be observed that even the 9% is beyond the 5% suggested by the UT in its decision of December 2017).

50.The Tribunal takes the point that some allowance and flexibility should be afforded the Respondent in what is after all only an estimate. However, an increase of more than half in the course of a year, and an increase exceeding the Respondent's own advice as to the appropriate uplift, seems to the tribunal to go beyond the level of indulgence which should be granted on questions of reasonableness. The amount allowed in respect of this premium is the actual sum £1491.39 [161].

Costs Applications

51.As well as robustly proceeding with this application on behalf of the Respondent, Mr Amodeo also helpfully and reasonably indicated to the Tribunal at the start of the hearing, that it was not the intention of the Respondent to seek to recover by way of service charge, the costs incurred by the Respondent in the context of this application and accordingly for the avoidance of doubt the Tribunal makes orders to the effect that no such costs shall be recoverable under the provisions of both s.20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

53. Each of the remaining points in dispute between the parties is determined in favour of the Applicants, for the reasons set out, and the service charge account between the parties must be adjusted accordingly.

JUDGE SHAW **7th MARCH 2022**

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).