FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BK/LSC/2022/0112**
Property	**:**	**Flat C, 33 Clifton Gardens, Maida Vale, London W9 1AR**
Applicants	**:**	**Pietro Lamberti** **Carmen Maria Lamberti**
Respondent	**:**	**33 Clifton Gardens Ltd**
Representative	**:**	**RLS Law**
Type of Application	**:**	**Service charges**
Tribunal Members	**:**	**Judge Nicol** **Mr R Waterhouse FRICS BSc LLM MA**
Date and venue of Hearing	**:**	**7th November 2022;** **By remote video**
Date of Decision	**:**	**9th November 2022**

DECISION

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(1) The Tribunal has determined that the charges in dispute are payable to the following extent:

(a) A further £289.10 of legal costs is not payable by the Applicants to the Respondent as a result of the section 20C order made on 21st April 2022 in addition to the credits already given;

(b) The additional 10% charges or "commissions" levied in respect of the services of the Respondent's managing agent are payable, save when added to the following categories: Buildings Insurance, Management Fee, Annual Return Fee and Accounts Submission, Accountancy Fee, Legal Fees or "Miscellaneous";

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(c) The expenditure of £1,195 invoiced on 31st December 2021 for 5 visits to the subject property constitutes relevant costs to be taken into account when determining the amount of the Applicants' service charges.

(2) In accordance with section 20C of the Landlord and Tenant Act 1985, the Tribunal makes an order that 50% of the Respondent's costs of these proceedings are not to be regarded as relevant costs to be taken into account when determining the amount of the Applicants' service charges.

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

The Tribunal's reasons

1. The Applicants are the lessees of the subject property, one of 5 flats in a converted terraced house. The Respondent company is owned by the lessees of all the flats and is the freeholder.

2. The Applicants have applied for a determination under section 27A of the Landlord and Tenant Act 1985 ("the Act") as to the reasonableness and payability of service charges

3. The Tribunal heard the application on 7th November 2022 by remote video. The attendees were:

- Mr Luke Gibson, counsel for the Applicants;
- Mr Pietro Lamberti, the First Applicant;
- Ms Tricia Hemans, counsel for the Respondent;
- Mr Richard Webster of RLS Law, solicitor for the Respondent; and
- Mr Joshua Adler of Carlton Grove Surveying and Property Management, the Respondent's managing agent.

4. The parties have been in front of the Tribunal twice recently:

(a) The Respondent had previously made an application for the determination of the reasonableness and payability of earlier service charges (ref: LON/00BK/LSC/2020/0301). By the time of the hearing, the Respondent had conceded the majority of the charges. By a decision dated 21st April 2022 Tribunal upheld the remaining charges but made an order under section 20C of the Act that the Respondent could not recover the costs of the proceedings through the service charge. They also refused to require the Applicants to refund the Respondent their Tribunal fees.

(b) By a decision dated 11th October 2022 (ref: LON/00BK/LBC/2022/0020) the Tribunal held that the Applicants were in breach of the lease requirements in relation to floor coverings.

5. While the Tribunal is, of course, available for the resolution of disputes between lessors and lessees, it is disappointing that the parties feel the need to litigate so frequently. The parties have an ongoing relationship,

whether they like it or not, and it would be less expensive and less time-consuming if they could find a way to conduct that relationship without the need to resort to litigation. As this decision exemplifies, this requires both parties to consider their position and to find a way of moving it closer to each other.

6. The documents considered by the Tribunal were contained in a bundle of 297 pages, in electronic form, prepared by the Applicant. They included a Scott Schedule setting out the Applicants' objections to various charges with the Respondent's responses on each item. Ms Hemens also provided a skeleton argument.

Mr Adler's evidence

7. The First Applicant had provided a witness statement. Ms Hemans had prepared some cross-examination for him but Mr Gibson clarified one of the issues in opening (see the last issue below) and so she decided she didn't need to do so. Therefore, although the Tribunal noted what the First Applicant said in his statement, it did not hear from him.

8. The First Applicant was the only person to provide a witness statement. However, a previous hearing had been adjourned due to Mr Adler's unavailability to give evidence. The parties disputed in correspondence what the effect of his not giving evidence would be but neither thought to raise the issue that he had not given a witness statement.

9. Mr Gibson suggested that this was because the Tribunal often allows witnesses to give evidence without a statement. This is not correct. Unrepresented litigants before the Tribunal are often allowed to speak to their statements of case as most do not appreciate the difference between pleadings and witness statements. Also, it often happens that lessees are only too delighted to get the opportunity to put some germane questions to a managing agent who they may claim is difficult to get hold of.

10. However, both parties in this case have a full legal team who should appreciate the role of witness statements. As in a court, it would not normally be fair to one party to allow a witness to give evidence for the other party without there having been a statement from that witness in advance. The Respondent had more than enough time, even after the relevant directions had expired, to compile and serve a witness statement from Mr Adler.

11. Mr Adler had compiled the Respondent's comments in the Scott Schedule. The Applicants were clear in their own minds that there were issues of fact which were in dispute arising from those comments. It is possible that they saw the absence of a witness statement as a procedural error that they could exploit. This is not the right way to look at it. While a party is not obliged to fill in the gaps left in the other side's case, they are obliged to play their part in ensuring that the litigation moves smoothly and effectively.

12. The absence of a witness statement from Mr Adler has just confused the determination of this application. When he did give some oral evidence, it was all over the place, taking longer than it should have done while he struggled to master the issues or the documentation. Relevant facts were revealed for the first time during his evidence. Much of this could have been avoided if he had provided a statement in advance.

13. While the principal fault in the failure to produce a statement from Mr Adler was the Respondent's, the Applicants didn't help matters either. The case has proceeded to date on the understanding that he would be made available for cross-examination – Mr Gibson had his questions ready. In the circumstances, the Tribunal allowed Mr Adler to do no more than to confirm his comments in the Scott Schedule as his evidence in chief and to answer questions from Mr Gibson and the Tribunal.

Issues in Dispute

14. The Scott Schedule listed 8 items in dispute, although some concerned the same type of charge and could be considered together. They are addressed in turn below.

Legal Costs

15. In response to the section 20C order referred to above, the Respondent credited the Applicants' account twice:

- 7th April 2021 £500.76
- 1st February 2022 £180.84

16. However, there were 7 invoices from the Respondent's then solicitors, Gisby Harrison:

- 18th May 2018 £240
- 30th November 2018 £240
- 6th December 2019 £540
- 28th August 2020 £960
- 8th October 2020 £760
- 9th December 2020 £2,600
- 26th January 2021 £720

17. The Applicants' share of the expenditure used to calculate their service charges is 19.26%. £500.76 is 19.26% of £2,600. However, as became apparent during Mr Adler's evidence, the other credit of £180.84 is not 19.26% of any of the other invoices and there should have been credits given which were not.

18. Mr Adler's approach in his evidence was that it was fine for the figures to be approximate and that, if any lessee had objected, he would have negotiated a more reasonable figure. The Tribunal agrees with Mr Gibson that this is not the right approach. It is the Respondent's

obligation to calculate each service charge accurately. The Respondent is the one with ready access to the relevant information and the dedicated time and resources to organise that information appropriately. There is no need for figures to be approximate and it is not for the Applicants or any of their fellow lessees to force the Respondent to produce more accurate figures.

19. In relation to the invoices, Mr Adler said that three of them, the ones from 2018 and 2019, were "historic" by which the Tribunal understood him to be saying that the expenditure had been incurred before the previous application had been issued. Although they may relate to legal advice provided in relation to the same service charges which were later the subject of the application, that does not make them part of the litigation costs. Lessors are encouraged to take legal advice in order to understand their position, the better to avoid having to take part in litigation.

20. Mr Adler initially suggested that the costs covered by the section 20C order only included those directly related to the hearing of the application. The Tribunal pointed out that section 20C itself was correctly reflected in the Tribunal's written decision which referred not to the hearing but to the proceedings. Ms Hemens suggested that there was some confusion caused by the Tribunal's reference to the reimbursement of the hearing and application fees but that was an entirely separate matter, governed by rule 9 of the Tribunal's procedure rules, and was clearly separated out in the Tribunal's decisions.

21. When faced with the correct interpretation of the section 20C order, Mr Adler stated that credits were due from all 4 of the remaining invoices. Those invoices total £5,040, of which 19.26% is £970.70. The Applicants have so far only received credits of £681.60. Therefore, the Respondent owes them a further £289.10.

22. Mr Gibson ran a further argument that the Respondent was not entitled to all their legal costs. The relevant clause in the lease states:

> THE THIRD SCHEDULE above referred to
>
> The Service Charge
>
> (1) In this Schedule the following expressions shall have the following resective meanings where the context so admits:
>
> "Main Block Expenditure"
>
> means all items of expenditure under the following heads (including the recovery of Value Added Tax incurred or chargeable in respect thereof)
>
> (4) all other expenditure incurred by the Landlord in and about the maintenance and proper and convenient management and running of the Building including without prejudice to the generality of the foregoing the appointment and remuneration of managing and other

> agents solicitors surveyors and accountants and any other expenditure incurred by the Landlord …

23. Mr Gibson asserted that the wording of this clause was not apt to cover litigation costs. The Tribunal disagrees. The ordinary and natural meaning of the management of the Building includes chasing lessees for unpaid service charges which in turn includes paying for specialist help to do so by means of solicitors who may resort to litigation, if necessary.

Managing Agent Commissions

24. Under clause 20.2 of his management agreement with the Respondent, Mr Adler charges a Management Fee of £320 (plus VAT) per flat. The previous Tribunal expressly held that this is a reasonable amount.

25. Under clauses 20.7 and 20.8 of the agreement, Mr Adler additionally charges 10% on "small works and contracts" and on "large works" respectively. The previous Tribunal had nothing to say on this subject. Mr Gibson suggested an adverse view was implied but the current Tribunal is unable to see any such implication.

26. Mr Gibson alleged that Mr Adler was recovering twice (items 3, 4, 6 and 7 in the Scott Schedule). Again, the Tribunal cannot see this. His contract sets out what he is paid for his work. The provisions of clause 20.8 are common in that the overwhelming majority of managing agents will charge additional supervision and administration fees on major works programmes, although no such programme was relevant to the charges being challenged in this case.

27. However, the Tribunal is concerned about clause 20.7. According to a document from the Respondent showing the service charge budgets for 2021 and 2022 and the actual service charges for 2021, Mr Adler has applied his commission to everything except his own management fee. The Tribunal has no problem accepting that "small works and contracts" is apt to cover the categories of Building Repairs and Maintenance, Cleaning, Gardening, Electricity, Door Entry System, and Maintenance of Fire Alarm and Emergency Lighting.

28. However, the wording of clause 20.7 does not seem apt to cover Buildings Insurance, Management Fee, Annual Return Fee and Accounts Submission, Accountancy Fee, Legal Fees or "Miscellaneous". The "Annual Return Fee and Accounts Submission" is apparently a company cost so the Tribunal does not understand why it is in the service charge accounts at all, other than perhaps for convenience since all the service charge payers are also members of the Respondent company. Mr Adler relied heavily on the idea that his fees were standard in his industry but the Tribunal, as an experienced expert tribunal, can take notice of the fact that it has never come across such additional charges on these categories.

29. Further, it makes a nonsense of the structure of the management agreement for the 10% additional charge to be set out separately and defined as applicable to a limited class of expenditure if it is then to be applied to everything. There is nothing unlawful or necessarily unreasonable in structuring a management fee to include both a fixed element and a percentage element but, if that is the intention, that is what the contract can and should say.

30. The Tribunal rejects the Applicants' contention that Mr Adler is charging them twice for the same work but is satisfied that he has calculated additional charges based on elements of expenditure to which the relevant clause in his agreement does not apply. The additional 10% charge is neither reasonable nor payable insofar as it relates to the categories set out in paragraph 28 above.

Invoice for 5 visits

31. On 31st December 2021 Mr Adler's firm invoiced the Respondent for 5 visits to the property at a total cost of £1,195.55. The Applicants asserted that this was excessive and was a matter which should be included within Mr Adler's management fee.

32. The Tribunal would be minded to agree with the Applicants if Mr Adler had been visiting in his role as managing agent. However, he was investigating damage caused by flooding at the property – it is not in dispute that the flooding took place. Mr Adler is a surveyor. In his role as managing agent he commissioned himself, as a surveyor, to go look at the damage. As he pointed out in his evidence, it would have cost no less and probably more to employ an independent or outside surveyor to do the work.

33. The Tribunal is satisfied that Mr Adler's invoice is reasonable and payable.

Conduct of Account

34. The credits which Mr Adler did give the Applicants in relation to the section 20C order took nearly 10 months to be applied, from April 2021 to February 2022. The Applicants' case was initially that their account should be in credit, not showing arrears, but before the Tribunal Mr Gibson conceded that this was not the issue. Rather, he asserted that the Applicants were right in not paying their ongoing service charge because the way their account was being run meant that they did not know what the true outstanding amount was. As a result, the Applicants were obliged to bring these proceedings to clarify matters. Mr Gibson asserted that these were grounds for a section 20C order so that the costs of the current proceedings could also not be added to the service charge.

35. In turn, Ms Hemans responded that this position only became apparent at the hearing and should have been clarified much earlier.

36. When looking at whether to make a section 20C order, the Tribunal must bear in mind that the lease provides for the Respondent to recover their costs so that any such order would be limiting that right. There is no definition of the matters which can be taken into account but the most relevant matters are generally who has been successful and the reasons why the dispute resulted in a hearing before the Tribunal rather than being avoided through agreement.

37. The Tribunal is satisfied that there should be a section 20C order. The lack of a witness statement from Mr Adler has unnecessarily complicated the proceedings. Some matters were not clear until the Tribunal. The credits due in accordance with the previous Tribunal's order were only clarified, with considerable struggle and confusion on his part, during Mr Adler's evidence. It is understandable that the Applicants sought to resort to litigation.

38. However, the Applicants have only been partially successful. The Respondent should not be denied their entire costs. Therefore, the Tribunal has decided that the section 20C order should relate to only 50% of the Respondent's costs.

Name: Judge Nicol **Date:** 9th November 2022

Appendix of relevant legislation

Landlord and Tenant Act 1985

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 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.

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.

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).