11905

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AU/LSC/2016/0077**
Property	:	**Middle Flat, 66 Gifford Street, NI 0DF**
Applicant	:	**Mr David McSweeney**
Representative	:	**In Person**
Respondent	:	**Dr Orit Sharon and Mr Moshe Rafiah**
Representative	:	**In Person (Dr Sharon)**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Tribunal Judge Richard Percival Mr M C Taylor FRICS**
Date and venue of Hearing	:	**12 May 2016 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**7 June 2016**

DECISION

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The application

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Respondent in respect of the service charge years from 2005 to 2016 (with the exception of the year from June 2013).

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

The property

3. The building in which the property is located is a terraced house converted into three flats. The Applicant acquired the leasehold of the Top Flat in 1992, and the freehold of the building in May 2005. He lives in the flat. The Respondents are the leaseholders of the Middle Flat, which is sub-let. The Middle and Top Flats share a communal front door and hallway. The Basement Flat has a separate entrance. An inspection was not necessary.

The lease

4. The lease provided to the Tribunal by the Applicant was missing page 2. The Applicant informed the Tribunal that he did not have that page, and that he believed that the lease was registered with the Land Registry without it. At the hearing, however, the Respondent produced her lease, which did have the missing page. It shows that the flat is demised for 999 years at a peppercorn rent.

5. By Clause 2(c) of the lease, the Respondent covenants to pay a service charge (termed "the maintenance contribution") of 40% of the costs of the lessor under the Fourth Schedule. The landlord covenants in clause 5 to undertake the obligations in the Fourth Schedule, which requires, among other things, the lessor to maintain etc the structure and services (paragraph 1), to maintain, clean and light the communal areas (paragraphs 11 and 12), redecorate the exterior (paragraph 2), employ people (paragraph 5), and maintain a reserve in a trustee account against the obligations imposed by the schedule, at the lessee's discretion. There is also an obligation to insure the building (in both clause 5 and paragraph 7 of the Schedule).

6. Clause 2 provides for the determination of the amount of the service charge by the certificate of the Lessor, managing agents or accountants on a yearly basis on 25 December each year, or as soon as possible thereafter. Clause 2(i) requires the lessee to pay £50 on account of the maintenance contribution on 24 June and 25 December in every year.

By Clause 2(ii), the Lessee is required to pay the balance within 14 days of the publication of the maintenance accounts. If the amount paid on account exceeds that expended, the excess is to be credited to the lessee, held on trust by the lessor, to be applied to future maintenance contributions.

The hearing

11. The Applicant and the first Respondent (hereafter, "the Respondent") appeared in person.

Preliminary

7. It was agreed that the following issues arose:

    (i) The lease.

    (ii) The application of section 20B of the 1985 Act.

    (iii) Whether certain legal costs were recoverable under the lease.

    (iv) The reasonableness of the service charge in relation to insurance.

The Lease

8. The Tribunal had expected to deal with the question of how the lease should be construed, given the initial lack of a page 2 (which included the demise in Clause 1 and much of Clause 2). That was obviated by the provision of page 2 by the Respondent.

9. The remaining issue raised by the Respondent related to the nature of the payments of £50 provided for in Clause 2(ii) on 24 June and 25 December each year. The Applicant, who referred to the payments as "nominal" in his statement of case and demands, said that he had been advised by the Leasehold Advisory Service that he was entitled to collect these charges irrespective of actual spending; although he agreed that the proceeds could only be applied to expenses properly incurred in discharging the freeholder's responsibilities under the lease. He said that he was not obliged to provide receipts to justify these demanded sums.

10. The Respondent complained that she had not been able to inspect receipts, and that the proper procedure of preparing accounts had not been undertaken. Her submission was, she agreed, in effect that it was a condition precedent of her obligation to pay the charges that she be allowed to inspect receipts and accounts. She referred us to the second proviso in Clause 2(ii).

11. The lease sets out a reasonable clear procedure for the demand and collection of the service charge. During the year, the Lessee is liable to pay the two charges of £50, which are *on account* of the final charge. On general principles, the Applicant should make a demand for these payments. The final charge is to be certified as soon as possible after the 25 December. If the final charge is more than that which has been collected (and/or any sums being held over from a previous surplus), the Lessee is liable to pay the unpaid amount 14 days thereafter. If the final charge is less, the Lessor holds the surplus in an account against future expenditure.

12. The Applicant appears to have understood the two payments of £50 as separate and distinct from, and in addition to, the final charge. Thus his service charge demands from February 2014 in effect comprise a final demand for actual expenditure, but with the two payments of £50 *in addition to* actual expenditure incurred. This is clearly incorrect.

13. On the other hand, we do not accept the Respondent's contention that her liability for service charge payments on account does not arise absent the discharge of the Applicant's procedural responsibilities under the lease. The question of whether certification is a condition precedent for liability for a service charge depends on the terms of the lease, and different courts and tribunals have come to differing conclusions in respect of the leases before them (see the account of the case law in *Clacy and Nunn v Alexander Sanchez and Others* [2015] UKUT 0387 (LC), [18] to [28]). In this case, however, there is no certification required before the payment on account provided for in Clause 2(i). The requirement to allow inspection of receipts in Clause 2(ii), upon which the Respondent relied, relates rather to the payment of the final service charge.

14. *Decision*: The payments provided for in Clause 2(i) of the lease during the course of the service charge year are to be held on account for the purposes of the final service charge to be determined after the end of the service charge year; that is, the final service charge is to be discounted by the amount paid during the course of the year. The payability of these sums is not dependent on the taking of other procedural steps by the Applicant.

15. A question about who was responsible for external decoration of the Respondent's flat under the lease appeared to be raised by the papers, but at the hearing both parties agreed that responsibility lay with the Applicant.

Section 20B of the 1985 Act

16. The Applicant accepted that he did not issue proper demands for service charges before February 2015 (following advice from the Leasehold Advisory Service). In her response, the Respondent argued

that his claim for earlier service charges was ineffective as a result of section 20B of the 1985 Act (see appendix).

17. The Applicant's claim before the tribunal included service charges from each year from June 2005 to that from June 2015, excluding 2013/14. In 2005/6 and 2011/12, the claim included £250 for maintenance/redecoration of communal areas. In 2012/13, the Applicant claimed £1,000 for legal fees. Otherwise, in every year, the Applicant's claim was for (one) £50 "nominal service charge fee".

18. The Applicant explained that he had undertaken redecoration in 2005/6 and 2011/12 himself. He now realised, he said, that he should have undertaken a consultation exercise under section 20 of the 1985 Act, and therefore he was only claiming for the sum allowed under that provision in the absence of consultation. He did not have any invoices or calculations of the sums actually spent. He (and the leaseholder of the basement flat) provided the labour.

19. The Applicant said he wrote to the Respondent asking for a contribution in respect of the works to communal areas. He agreed that the letters had not included any specification or the costs of the work; and that there had never been a demand in proper form for service charge relating to these works.

20. The background to the demand for legal costs in 2012/13 is set out below.

21. The Applicant said that he had had good reasons for acting as he did, and believed (again following advice from the Leasehold Advisory Service) that he was entitled to the costs.

22. We accept the Respondent's submissions. Section 20B applies to all expenditure incurred more than 18 months before demand. There has yet to be a demand for service charges before those contained in the demand issued in February 2015.

23. We considered whether the correspondence referred to by the Applicant could constitute a notice in writing of the costs incurred under section 20B(2), and concluded that it could not. We do not have the correspondence before us (except some in relation to legal costs). We do not know in what terms it was couched. We do not know whether the correspondence indicated that the Respondent would be subsequently required to contribute to the costs under the lease. We do know that it did not quantify the costs; and that the costs were never properly formally demanded.

24. *Decision*: The Respondent is not liable to pay such of the Applicant's claims as relate to expenditure incurred more than 18 months before a proper demand was made in respect of them by the Applicant.

Legal costs

25. In March 2012, a serious fire destroyed the building adjoining 66 Gifford Street. The fire, and water damage occasioned by fighting the fire, also caused significant damage to the flats in 66 Gifford Street.

26. In January 2013, the Respondents took action in the County Court, apparently against the Applicant for lost rent as a result of damage occasioned by the fire. There was some disagreement about what happened in respect of the action. The Applicant says it was struck out (which seems to us likely). The Respondent asserted in oral evidence that it had been settled.

27. In any event, it is clear that the Respondent paid legal fees of £2,160 (which we think represents a costs order by the Court). The sum that the Applicant sought to recover from the Respondent was £1,000. We were referred to a statement of account from his solicitors, which shows that he paid that amount to them on 8 February 2013.

28. It may be that the sum of £1,000 paid by the Applicant was, in fact, "incurred" for the purposes of section 20B somewhat later, the payment being in advance of the provision of services, but it cannot have been incurred later than the Applicant's final payment to the solicitors, which the account shows to have been on 27 June 2013.

29. The sums for legal fees have never been properly demanded. It is now incapable of being effectively demanded as a result of section 20B of the 1985 Act (see above).

30. In any event, it is not clear that such fees are are recoverable under the lease. The Applicant agreed that he could not rely on the clause relating to forfeiture proceedings in the lease (clause 2(d)) (we note that the clause is defective in referring to section 147 of the Law of Property Act 1925; and that it is of the narrower type, relating only to costs incurred for the purpose of, or incidental to, the service of a notice, and does not include costs "in contemplation" thereof).

31. The Applicant therefore sought to rely on a clause relating to indemnification of the cost of consents (Clause 2(k)), which is clearly inapplicable; and paragraph 10 of the Fourth Schedule, in which the Lessor covenants to "expend such monies as may be properly payable in relation to the good management of the property", including enforcing covenants against other lessees. We consider it unlikely that this clause would cover the legal costs contended for, but, in the light of our finding in relation to section 20B, decline to decide the question.

32. *Decision*: The Respondent is not liable to pay the legal costs for which the Respondent contends.

Insurance

33. The Applicant has properly demanded a contribution towards the insurance of the building in the demands issued since February 2015. The Respondent contends that the sums demanded are unreasonable.

34. The demands are for £413.21 for (it appears) the year from June 2014, and £429.16 for that from June 2015. This represents a third of the total premium (not the 40% for which it is now apparent the Respondent is liable).

35. The Respondent challenges the reasonableness of the premium. She owns another property nearby of similar type, and pays a premium of barely half that charged by the Applicant. She had been unable to obtain an alternative quotation, because the Applicant had failed to reveal the claims history.

36. The Applicant responds that, as a result of the March 2012 fire, there was a complicated claims history in relation to the building. In particular, he had been informed by his insurer that they had had to meet some of the costs, rather than the entire liability falling on the insurer of the building in which the fire took place. He had, he said, sought to obtain alternative quotations from other insurers, but given the history, he had been unable to.

37. The Respondent responded that the Applicant should have questioned what appeared to be the agreement between the insurers, if necessary taking legal action. She considered it could not be right to accept that the insurer of the fire-damaged building was not wholly responsible.

38. We conclude that it was not unreasonable of the Applicant not to challenge the insurer. To have done so to the point of legal action would have been to hazard a great deal for comparatively little gain. Even if successful, it is likely that the residual costs of an action would have swallowed up any gain; and the costs of failure would have been very significant.

39. *Decision*: The Respondent is liable to pay the service charge represented by the building insurance premium, as demanded.

Overall result

40. The result is that, as a final service charge, the Respondent is liable for £413.21, but not a further £50 in addition, for the year from June 2014. For the year from June 2015, the Respondent is liable for the £50 on account demanded on 24 June 2015. Were it to be demanded (which it

appears it has not been), she would also be liable for £50 on 25 December 2015. She is not yet liable for the insurance contribution, but will be so when it is properly demanded after the end of the service charge year, minus the amount she has paid on account, if any.

41. The Respondent is liable for the sums actually demanded, which were erroneously calculated at a third, rather than 40%, of the total expenditure. The Applicant may of course issue demands in the future using the correct proportion.

42. It will be noted that the Applicant is now operating the service charge on the basis of a service charge year that is different from that provided in the lease. We were not asked to consider the propriety of doing so by either party, and the Tribunal will not introduce technical novel points of its own motion (see *Jastrzembski v Westminster City Council* [2013] UKUT 0284 (LC) [13] to [20]).

43. The Applicant might nonetheless consider whether it would be advisable to return to the procedure provided in the lease, and summarised at paragraph 11 above. There are inherent difficulties in someone who is not a property, or related, professional exercising the responsibilities of a freeholder, even in a relatively simple property. The Applicant may find that ensuring that practice is in line with the procedure as set out in the lease would be of assistance.

Application under section 20C of the 1985 Act

44. At the close of proceeding, the Respondent made an application under section 20C of the 1985 Act that the costs of the proceedings should not be regarded as relevant costs for the purposes of the service charge.

45. The Respondent submitted that the proceedings were unwarranted. She further argued that the lease did not provide for expenditure on such proceedings to be included in the service charge.

46. We make no order. The proceedings cannot be said to be unwarranted. Both parties have enjoyed some success before us. To the extent that the Respondent has been successful, that is a result of technical deficiencies in the Applicant's conduct as freeholder, not as a result of substantive unreasonableness.

47. However, in declining to make an order, we make no finding as to whether the costs of proceedings are recoverable in the service charge under the lease.

Name: Tribunal Judge Richard Percival **Date:** 7 June 2016

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.

<u>Section 20</u>

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
- (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

<u>Commonhold and Leasehold Reform Act 2002</u>

<u>Schedule 11, paragraph 1</u>

(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).