**FIRST-TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case Reference** | **:** | **LON/00AP/LSC/2018/0450** |
| **Property** | **:** | **Flat 1 63 Woodland Gardens London N10 3UE** |
| **Applicant** | **:** | **63 Woodland Gardens Limited** |
| **Representative** | **:** | **Mr Johnathan Wragg-Counsel** |
| **Also in attendance** | **:** | **Mr Malcolm Star- HML Group Limited**<br>**Deborah Bayliss**<br>**Daniel Shersby Leaseholder** |
| **Respondents** | **:** | **Mr Michael Cassell**<br>**Ms Rubina Cassell** |
| **Representative** | **:** | **In person** |
| **Type of Application** | **:** | **For the determination of the reasonableness of and the liability to pay a service charge** |
| **Tribunal Members** | **:** | **Judge Daley**<br>**Mrs A Flynn MRICS**<br>**Ms Dalal- lay member** |
| **Date and venue of Hearing** | **:** | **17 June 2019 at 10:00 am 10 Alfred Place, London WC1E 7LR** |
| **Date of Decision** | **:** | **6 August 2019** |

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**DECISION**

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## Decisions of the tribunal

The tribunal makes the following determination-:

(1) The Tribunal makes the determination set out in paragraphs 39-50

(2) The Tribunal makes no order under section 20C in respect of the landlord's costs.

(3) The Tribunal makes no order for the reimbursement of the Applicant's cost of the application.

(4) This matter shall now be referred back to the county court for any enforcement or further directions.

## The application

1. The applicant sought and the tribunal are required to make as a result of a transfer for a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to whether service charges are payable from the county court pursuant to an order dated 30 November 2018.

2. Directions were given at a case management conference, on 8 January 2019. Where the tribunal has identified the following issues to be determined paragraph 3 [though these may be amplified by the parties in their statement of case]:

- Whether the interim service charges for the period 29 September 2017 to 24 March 2018 in the sum of £1128.34 is reasonable and payable.

- Whether the Admin charged in the sum of £472.00 are reasonable and payable.

- Whether the respondent is entitled to set off sums to be determined by the Tribunal on account of water penetration and disrepair.

- Whether to make an order under section 20C of the Landlord and Tenant Act 1985, and whether to order that the landlord's cost of the hearing fee are reimbursed.

## The background

1. The applicant is the tenants' management company who is responsible for the management of the premises and for the setting and collection of service charges. The respondent is the leaseholder of the premises known as Flat 1, 63 Woodland Gardens London N10.

2. The Leaseholder's flat is situated in a converted house comprising three flats; the other two leaseholders (Mr Shersby and Mr & Mrs West) are shareholders of the Applicant management company which owns the freehold of the premises.

3. The respondent's premises are subject to a lease agreement dated March 1988, which provides that the Applicant will provide services, the costs of which are payable by the Respondent as a service charge.

4. Where specific clauses of the lease are referred to, they are set out in the determination.

## The Hearing

5. At the hearing the applicant was represented by Mr Johnathan Wragg, counsel, instructed by PDC Law. Also in attendance were representatives of the managing agents, HML Group managing agents, Mr Malcolm Starr and Ms Deborah Bayliss. Mr Shersby, who was a director of the Applicant, company and Mr Michael Cassell the Respondent represented himself as a litigant in person, the other respondent Rubina Cassell did not appear and was not represented.

6. Mr Wragg informed the tribunal that the premises are subject to a 125 year lease granted in March 1988, the lease provided for service charges to be paid twice yearly.

7. He firstly set out how the Administration Charges had been incurred and the obligation of the lease. He stated that on 11.01.2018 HML group Property & Estate Management sent a demand for the period 29/09/2017 to 24/03/2018 which was payable within 14 days of the invoice. The invoice was in the sum of £1,128.34. A reminder was sent on 30 January 2018. The reminder stated-: "… Please pay within 7 days of receipt of this reminder to prevent any further action or reminders. After this date if a further reminder is issued a Debt Management Fee of £60.00 +Vat will be added to your account…"

8. On 7 February 2018 a further reminder was sent which incurred a charge of £60.00. On 7 March 2018 a further reminder was sent as an

application for payment which detailed current charges of £150.00 for referral instruction fee. There was a further Application for Payment invoice dated the same date which also included a fee to PDC Legal in the sum of £240.00.

9. In the applicant's Statement of Claim, the applicant referred to clause 3.2 of the lease which stated-: . "…The Lessee shall on the Twenty fifth day of March and the Twenty ninth day of September in each year pay to the Lessor such sum in advance and on account of the maintenance contribution as the Lessor shall at its discretion demand as a fair and reasonable payment.". The applicant is to recover the administration fees of £72.00 for chasing the debt and this is recoverable in accordance with the lease. The 72.00 fee is to check the arrears, draft the arrears letters, save the letter to the system and to update the applicant's agent's records. The applicant relies on clause 5.6 of the Lease to recover the admin charges. . In addition the Lease provision that the applicant relies on for admin costs is also Clause 2.8 of the Lease- The Lessee hereby covenants with the Lessor as follows-: To pay all expenses (including solicitors costs and surveyors' fees) which may be incurred by the Lessor in or contemplation of or incidental to the preparation and service of a Schedule of Dilapidations and Notice to repair or any Notice under Section 146 or Section 147 of the Law of Property Act 1925 (notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court) and in connection with every application for consent made under this Lease whether or not such consent granted."

10. Mr Wragg stated that the applicant had charged £150.00 for reviewing the matter and referring it to a debt recovery company. Counsel stated that there had been no response to the letter dated 12 March 2018 outlining what the respondent's objections were. A claim was issued in the county court on 26 July 2018 and judgement was obtained and then set aside by the Respondent Mr Cassell. He referred to the fact that the letter sent to Mr Cassell referred to the "charges being incidental to…" This was wide enough to include a referral to the Tribunal which was a precursor for the recovery of costs.

11. The Administration Charges, Mr Cassell stated that the landlord was not entitled to the charges referred to and in his statement of case, at paragraph 6 & 7, he put the Applicant to proof.

12. In relation to the service charges, Mr Wragg set out the obligations in the lease which provided for the payment of the service charges, and the landlord's obligations.

13. Counsel set out the obligations in the lease, clause 2.3 stated-: "To the reasonable satisfaction of the Lessor's Surveyors during the said term

well and substantially to cleanse repair support uphold maintain and generally to keep in good and substantial condition the whole of the Demised Premises and any addition which may be made thereto and the Demised Premises and any addition which may be made thereto, and the Landlord's fixtures and fittings…"

14. Mr Wragg also referred to clause 5, Landlord's obligations to provide services. " The Lessor hereby further covenants with the Lessee but subject as provided in clause 6 hereof that so long as the Maintenance contribution is received by it in full it will in a proper manner and at reasonable cost perform the following services namely-: 5.1 To maintain and keep in good and substantial repair and condition and renew or replace when required the Main Structure the Common Parts and the Common Services of the Building and the boundary walls and fences thereof not included in the lease of any flat in the building…"

15. The insurance clause was 4.5 a) To insure and keep insured or procure to be insured and kept insured the Building against loss or damage by the insured the Building against loss or damage by the Insured Risks to the full reinstatement value.."

16. Counsel noted that the landlord's covenant was quite specific in that it stated "*so long as the Maintenance contribution is received by it in full it will in a proper manner*." He stated that the covenant was predicated on the landlord receiving the maintenance contribution.

17. The tribunal was referred to the accounts in the total sum of £5770.00. The respondent's share was £1923.33.

18. The Tribunal was informed that the first item was the reserve fund contribution (which was not shown in the accounts was £961.67). Each leaseholder's contribution was £333.33. In respect of the actual charges, £375.67 was credited to the Respondent's account as it had not been spent.

*The reserve fund charge*

19. The Tribunal asked Mr Cassell to explain what his objection to the reserve fund charges were; he stated that the monies for the reserve fund were not expended unless it was for the benefit of a leaseholder who was also a freeholder. He stated that he had reported that water penetration/damp was coming into his living room through the ceiling. He also said that damp was coming from the basement. Mr Cassell referred to an email dated 17 July 2017, to Tracey Tarpey of HML Hathaway. In her reply Ms Tarpey stated that-: "As overflow pipes are for the sole use of an individual property, it is the flat owner's responsibility to deal with the repair of the cause… it is most likely coming from a boiler, faulty ball valve in a toilet cistern or cold water

tank. Therefore, you need to instruct your own plumber to deal with this matter…"

20. Mr Cassell noted that this approach was in contrast to what happened in 2003 when the landlord provided insurance details and the work in his flat was undertaken by insurance. In paragraph 12 of his statement Mr Cassell stated 12…The First Respondent asserts that the damage to the ceiling of the living room is a matter properly dealt with under buildings insurance as it was in July 2003 when the same damage occurred at the same place from the en suite bathroom in flat 3. I have included photos of the historic damage and repair … As such the damage is not a matter for a service charge but an insurance claim as it was dealt with in 2003…"

21. Mr Cassell accepted that the sum of £166.00 for the reserve fund for cyclical maintenance was reasonable, however he had withheld it as in he stated the landlord had not responded to his complaint or remedied the leaks/water penetration within his property.

22. In reply Mr Shersby stated that there was an overflow pipe which caused damp to flat 2. The managing agent was concerned about water running down the front of the building. The owners of flat 2, Mr & Mrs West were contacted and the overflow pipe between the properties was traced back to Mr Cassell's flat. The pipe was re-routed at Mr & Mrs West's expense. Ms Taylor of HML asked Mr Cassell to investigate the overflow leak.

23. The Tribunal was referred to two invoices, one from Newcourt Builders dated 26 July 2017 which was for attending and visually inspecting the property and reporting back on their findings in the sum of £85.00 and the other from CCB properties dated 25 September 2017 which was further work of accessing the roof and the loft and checking for blocked gutters and leaks in the roof and leaking in the loft. This invoice was in the sum of £96.00.

*The insurance*

24. The next item was insurance which was in the sum of £856.04 for the period 2.02.2017 to 1.06.2018. The insurance for 2018 was £694.00. The Tribunal was referred to clause 4.5(a) which stated-: "To insure and keep insured or procure to be insured and kept insured the Building against loss or damage by the Insured Risks in the full reinstatement value thereof including an amount to cover professional fees and other incidental expenses in connection with the rebuilding and reinstating thereof and to insure the fixtures and fitting plant and machinery of the Lessor against such risks as are usually covered by a Comprehensive Policy and to insure against third party claims made against the Lessor in respect of management of the Building."

25. Mr Cassell was asked why he objected to the costs of insurance. He stated that he did not object to the cost of the insurance, he accepted it as reasonable and payable save for the Director's Liability Insurance.

*The General repairs*

26. The Tribunal was referred to the two invoices from Newcourt Builders and CCB Properties, the reasons for the invoices was to ascertain the cause of the leak. As a result of the investigative work undertaken by Newcourt Builders, further work was undertaken. The Tribunal was referred to an invoice dated 4 January 2018, the work involved " Using GVS, clear and flush through all gutters, Gain access to the roofing ladders supply and fit mastic seal to cement flashing. Rear Elevation Balcony Using GVS, clear and flush through all gutters…Re-point various sections of flashing Aquapol section of felt and flashing etc. The total cost of the work was £684.00. Mr Shersby accepted that £79.00 of the cost of the work should be removed as this work was outside of the scope of the service charges.

*The Inspection Reports*

27. The managing agent arranged for two inspection reports to be obtained; these were an Asbestos Management survey in the sum of £330.00 and a Fire Risk and Safety Report in the sum of £439.20. The panel was informed that both of these reports were available. The panel noted that it was not uncommon for new managing agents to obtain reports if none existed concerning the condition of the property.

28. In respect of the cost of the work, Mr Cassell stated that there had been a lack of communication and also very little investigation in relation to the problems of water penetration in the basement. Mr Cassell stated that he had sent letters to HML from legal advisers which had largely been ignored. Mr Cassell's in his statement of case had a counterclaim of over £4000.00 that he wished to have off-set against the arrears.

*The management charges*

29. The management fee was £1920.00 for 2018. This was £640 per unit. Mr Wragg informed the Tribunal that this involved undertaking all of the administration, preparing the budget and service charges, dealing with the insurance and the initial collection of the service charges and also the annum inspection and any disrepair.

30. Mr Shersby stated that it was a last resort to engage a managing agent as Jo West the other freeholder had tried to undertake the management herself, however as a result of difficulties with collecting monies from

Mr Cassell and agreeing on work to be done it was decided that the freeholders would engage managing agents. Mr Shersby stated that Ms West had found it difficult to find managing agents who were prepared to act for small leasehold properties. Mr Shersby stated that he had no experience of managing agents and their fees, and had thought that it was expensive; however he had come to the conclusion that it was not a lot of money to spend on a company who might be able to sort the problems that existed at the property.

31. Mr Cassell did not agree that the costs represented good value for money. He pointed to the lack of communication from the managing agents and the fact that he had on-going problems with water penetration throughout the period. He was asked by the Tribunal what he considers to be a reasonable managing agents' fee given that it was clear that the managing agents had undertaken some work. Mr Cassell stated that they should waive the charges as a result of their appalling lack of communication, however at the most he considered that their fee should be limited to £10.00 per annum. Or £120.00 per year.

32. No issue was raised on the accounting fees by the Respondent.

***Section 20C and counterclaim***

33. Mr Wragg noted that the section 20C case law determinations are largely that if the landlord recovers the service charges then no order should be made in the landlord's favour however if the Respondent succeeds then the order should be made. He stated that the Tribunal should take into account the Respondent's lack of engagement with the Applicant's managing agent before the proceedings were issued. In respect of the counterclaim, Mr Wragg noted that it was for the Respondent to prove what he was asserting and that he had failed to do so. He referred to Judge Carr's directions, and the fact that the Respondent had failed to attend the Case Management Conference.

34. He stated that the Respondent had not set out any case concerning the counterclaim, and he stated that this case should be dismissed or referred back to the county court. He noted that the Respondent had not set out what the cause of the water penetration was and why the landlord was alleged to have breached the terms of the lease.

35. He stated that the ingress of water in the bathroom was the responsibility of the individual tenant. He referred to clause 3 of the first schedule of the lease which stated that the cisterns, tanks and drains within the demise were the responsibility of the tenant, and that if Mr Cassell alleged that the leak was coming from Mr Shersby's, premises, then he should bring action against him.

36. In respect of the landlord's obligations to carry out work, this was conditional on service charge contributions being paid which had not occurred. Therefore the landlord was not obliged to carry out work in accordance with the terms of the lease.

37. Mr Wragg further submitted that the respondent had not suffered loss, he referred to the quotation provided by Mr Cassell from Mr Farzad of PDI Trade Ltd dated 18 February 2019, in the sum of £5,880.00. He stated that a quotation was insufficient, and that the first time the respondent had referred to the problem of damp was in his email dated 17 July 2017 and although Mr Cassell referred to containing a plumber no proof of the matters alleged by him had been provided.

38. In reply, Mr Cassell rejected the criticisms of his non-attendance at the Case Management Conference, noting that he had not been able to attend because of a private matter. He noted that the landlord had accepted responsibility for the disrepair in 2003 and that the work had been carried out, and paid for by insurance. He stated that the Applicant had failed to respond to the letters and emails in March 2017 and September 2017. Mr Cassell stated that it would not be necessary for this matter to be before the Tribunal but for the managing agents' failure to communicate. He submitted that an order should be made under Section 20C of the Landlord and Tenant Act 1985.

**The Tribunal's decision**

39. The Tribunal considered the documents before it together with the oral evidence and representations from both parties and makes the following findings

40. The Reserve fund- £166.67, The Tribunal noted that the lease provided for the contribution to the Reserve Fund, that is that the Lessor shall set aside such funds as are reasonably required to meet future costs in replacing and renewing the items that the landlord has covenanted to repair. The Tribunal noted that in principle the landlord may budget for future works and that as the work was not carried out a credit was given to the leaseholder. The Tribunal therefore makes no determination save that the provision of the fund and the amount budgeted was reasonable.

*Insurance*

41. The Tribunal noted that the respondent had accepted that the sum charged for insurance was reasonable and payable save for the Director's insurance in the sum of £3.00 which he stated was not payable in accordance with the lease. (This sum was conceded by the Applicant). Accordingly the insurance in the sum of £694.00 was

reasonable save for the respondent's share of the £3.00 which is conceded as not payable by the respondent.

*The General Repairs*

42. The Tribunal noted that the applicant provided invoices in support of the work to the roof and the cost of the inspection, and that the applicant reduced this sum by £79.00. The tribunal is satisfied on a balance of probabilities that the sums claimed for roof works is reasonable and payable.

*The management charges*

43. The Tribunal had little information provided by either party to justify the fees charged for management. Although the applicant considered the charges were justified because of the problems at the premises, however the Tribunal noted that the problems were no different from those which occur on a regular basis and which are common place. The respondent did not provide any alternative estimates for the management charges, however in the experience of the tribunal these charges are outside of the norm for the size of the building, the tribunal noted the number of invoices which in the Tribunal's view, is somewhat indicative of the degree of complexity of the management issues at the building.

44. Taking all of the evidence into account including the lack of response to some of the issues raised by the respondent, the Tribunal has decided that the cost of management should be reduced to £375.00 plus VAT.

*The Admin Charges*

45. The Tribunal accepts in accordance to the terms of the lease that the Administration Charges are payable under the terms of the lease, it has then considered whether the charges themselves are reasonable.

46. The Tribunal has also taken a global approach to the Administration charged. It has considered whether the charges are reasonable. It has considered the work that the applicant has stated was carried out and it has decided that the charges as set out are not reasonable and that the charges ought to be reduced to reflect the failings in management, accordingly the tribunal finds that the charges ought to be reduced by 20% to reflect the lack of responsiveness.

*The Counterclaim*

47. The Tribunal noted that no directions were given for the full determination of the counterclaim in that no expert reports were

provided for. It considered that it had insufficient information to deal with Mr Cassell's counterclaim without reports setting out the cause of the water penetration.

48. In reaching this decision the Tribunal has considered the fact that Mr Cassell is a litigant in person and that as such specific directions would have assisted him in better preparing his case. The Tribunal noted that he had not been able to attend the hearing. Accordingly the Tribunal has decided that it is appropriate to stay his case. Mr Cassell may apply to reinstate it in the county court and should he apply for the case to be reinstated then directions, including if considered necessary obtaining expert reports.

**Application under s.20C and refund of fees**

49. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal determines that it is just and equitable in the circumstances that no order to be made under section 20C of the 1985 Act.

50. The Tribunal makes no orders for the leaseholder applicant's fees to be refunded by the landlord.

51. This matter shall now be remitted back to the county court for any enforcement or further directions

**Name:** Judge Daley

**Date:** 06.08.2019

## ANNEX - RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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

### (1) Section 27A

(1) An application may be made to a leasehold valuation 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 a leasehold valuation 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.

**Leasehold Valuation Tribunals (Fees) (England) Regulations 2003**

**Regulation 9**

(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

of any question which may be the subject matter of an application under sub-paragraph (1).

**Schedule 12, paragraph 10**

(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where—

(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or

(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—

(a) £500, or

(b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.