FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BA/LSC/2019/0022**
Property	**:**	**Flats 1 & 2 105 Hamilton Road, Wimbledon SW19 1JG (Also known as 212 Merton High Street, London SW19 1AX)**
Applicants	**:**	**Ms Melissa Gough Flat 1** **Ms Erica House Flat 2**
Representative	**:**	**Ms Gough & Ms House In Person**
Respondent	**:**	**SMDR Estates Limited (1)** **Assethold Limited (2)**
Representatives	**:**	**SMDR Estates – none** **Assethold – Mr Richard Clarke -counsel and Mr Ronni Gurvits of Eagerstates – managing agents**
Type of Application	**:**	**S27A Landlord and Tenant Act 1985 – determination of service charges - payable and s20C - costs**
Tribunal Members	**:**	**Judge John Hewitt** **Mr Stephen Mason BSc FRICS FCIArb** **Mr John Francis QPM**
Date and venue of Hearing	**:**	**30 May 2019** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**15 June 2019**

DECISION

The issues before the tribunal and its decisions

1. The issues before the tribunal were:

    1.1 The services charges payable for the accounting years ending:

    31 December 2017;

    31 December 2018

    1.2 The service charge budget for the accounting year ending 31 December 2019; and

    1.3 The applicants' application under s20C Landlord and Tenant Act 1985 (the Act)

2. The decisions of the tribunal are:

    2.1 The services charges payable by each applicant for the accounting years ending:

    31 December 2017: £nil

    31 December 2018 total £1,179.90 and the balance now payable by each applicant is £404.90 as set out in Appendix 1 to this decision

    2.2 The service charge budget for the accounting year ending 31 December 2019 shall be as set out in Appendix 2 to this decision; and

    2.3 An order shall be made (and is hereby made) pursuant to s20C of the Act to the effect that none of the costs incurred or to be incurred by the second respondent (Assethold) in respect of or in connection with these proceedings are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by either of the two applicants.

Legal and procedural background

Title matters

3. As at July 2017 the first respondent (SMDR) was registered at HM Land Registry as the proprietor of 212 Merton High Street, London SW19 1AX – title number SGL632518. Evidently that property was originally constructed as a retail shop with a flat above it, perhaps in the early 1900s.

    The Charges Register records that a lease of the ground floor shop was granted on 3 March 2015 for a term of 999 years from the date of grant.

The title number of that lease is SGL757534 which records that the lease was granted by Book 123 Limited. We have not seen a copy of that lease.

4. SMDR carried out a redevelopment to create two self-contained flats above the shop. This development included the construction of a new roof.

5. By a lease dated 21 July 2017 SMDR demised Flat 1 to the first applicant (Ms Gough) for a term of 125 years commencing on the date of grant and by a lease dated 20 October 2017 SMDR demised Flat 2 to the second applicant (Ms House) for a term of 125 years commencing on the date of grant.

   We were provided with a copy of the lease of Flat 1. We were told that the two flat leases were in common form.

6. At some point Assethold made a loan to SMDR. The loan was secured by a charge on the freehold interest. One of the terms of the loan was that SMDR was to appoint Eagerstates, a company closely associated with Assethold, to be the managing agent. That appointment took effect in or about January 2018.

   On 9 August 2018 SMDR transferred the freehold interest to Assethold. On 27 February 2019 Assethold was registered at HM Land Registry as the proprietor. The Register records that the price stated to have been paid in August 2018 was £20,000.

The residential leases

6. Clause 1.1 defines **'Building'** to mean the building known as 212 Merton High Street …

   Clause 1.12 defines **'Quarter Days'** to mean 25 March, 24 June, 29 September and 25 December in each and every year of the term;

   Clause 1.15 defines **'rents'** to mean the Rent, The Insurance Rent and the Service Charge Rent;

   Clause 1.18 defines **'Service Charge Rent'** to mean the Estimated Service and the Service Charge Shortfall payable by the Tenant under clause 8 and payable by the Tenant as additional rent;

   Clause 6.5 is a covenant on the part of the Tenant: To pay to the Landlord the Service Charge Rent in accordance with the provisions of clause 8.5;

   Clause 8 sets out the service charge regime in some detail. Not much of the clause was controversial and it is convenient to set out a summary of the material provisions:

   Clause 8.1 sets out a number of definitions, including:

Accounting Year: Period 1 January to 31 December (Unless and until changed by the landlord – as yet no notice of change has been given)

Service Charge: a fair and reasonable proportion as determined by the landlord's surveyor acting impartially, as long as the aggregate proportions payable by all of the lessees in Building equates to 100%.

(It was not in dispute that a one third share to each lessee was a fair and reasonable proportion of the expenditure on the building as a whole and that a one half share was a fair and reasonable proportion of the expenditure referable to the two flats only.)

Estimated Service Charge: an advance payment on account of a fair and reasonable proportion of the amount the landlord reasonably estimates for each accounting year. The estimated amount is payable by four equal instalments in advance on the Quarter Days (clause 8.5.1.1);

Certificate: a written statement signed and certified by the landlord's accountant or other appropriately qualified person, accurately setting out a summary of the expenses and the amount of any balancing debit or credit for each accounting year;

The Expenses: Clause 8.2 sets out a comprehensive list of expenditure which is to comprise the service charge. It is sensible to highlight two particular provisions:

8.2 (c) *Repairing, maintaining, renewing, resurfacing, decorating, pointing, cleaning, carpeting … the Common Parts*

8.2 (j) *Pursuing and enforcing any claim, or taking or defending proceedings or actions in respect of the whole or part of the Building to the extent that the same relate to matters that do not fall within the obligations of the Tenant or any other lessee of any part of the Building or insofar as the costs thereof are not recoverable from the lessee in breach of covenant;*

Clause 8.2 (q) provides that the landlord may in its discretion create a reserve fund, but as yet no such fund has been created

Clause 8.4.2 provides that the landlord shall keep accounts with proof of all payments received or payable in connection with the Expenses or the Services;

Clause 8.4.3 provides that the landlord shall as soon as reasonably practicable after the expiry of the relevant accounting year prepare or cause to be prepared the Certificate and to supply a copy of the Certificate to the tenant as soon as reasonably practicable thereafter;

Clause 8.4.5 provides that where there is a balancing credit the amount is to be repaid by the landlord to the tenant, unless the tenant consents to the amount being credited against the next payment due;

Clause 8.5.1.2 provides that where there is a balancing debit the amount is to be paid by the tenant to the landlord within 14 days of the landlord supplying the Certificate.

The proceedings and the hearing

7. The application form is dated 7 January 2019. Directions were given on 23 January 2019.

SMDR has not taken any part in these proceedings and was not represented at the hearing.

Assethold, acting by its managing agent, Eagerstates has taken part. The applicants and Assethold have filed and served materials they wish to rely upon.

8. At the hearing:

Ms Gough and Ms House attended and presented their case in person. Several members of their respective families attended to support and assist them.

Assethold was represented by Mr Richard Clarke of counsel assisted by Mr Ronni Gurvits LLM who is the son of the officers of both Assethold and Eagerstates

The service charges in dispute

2017

7. The first accounting year we are concerned with is from the date of grant of the leases to 31 December 2017. Ms Gough ad Ms House tell us that on the grant of the leases they each paid £400 to SMDR on account of the service charge for the period ended 31 December 2017.

At the year-end SMDR was the landlord and the party responsible to provide the Certificate. It has not done so. Despite a number of efforts by Ms Gough and Ms House, SMDR has failed to provide any account or information about service charge expenditure incurred in the period ended 31 December 2017.

8. At the hearing, Mr Gurvits said that there was a business connection between Assethold and SMDR but the officers and beneficial owners of the two companies were not in any way connected. He also said that although he was not appointed to represent SMDR, he wished to hand in a document which he claimed was evidence that the building was insured during 2017. The document was stated to be a Certificate of Insurance issued by QBE, It states the risk address to be 212 Merton High Street, London SW19 1AX. The period of cover was 17 January 2017 to 16 January 2018. The building value sum assured was

£900,000 and the declared value £600,000. Details of excesses were recorded. There was no indication of the amount of the premium paid.

9. The applicants might ordinarily be responsible to make a one third contribution to the cost of buildings insurance apportioned from the date of their respective leases to 16 January 2018. However, no information to enable a calculation to be made has been provided. Further, as stated above, SMDR has failed and neglected to issue a year-end certificate.

10. In these circumstances we cannot properly find that any service charges are payable by the applicants to SMDR for the period(s) from the grant of their respective leases to 31 December 2017. It follows that we consider that SMDR should reimburse to each applicant the £400 paid by them on account – clause of the lease 8.4.5 refers.

2018 Certificate

11. As at 31 December 2018 the freehold had been transferred to Assethold. Mr Gurvits produced the Certificate. It is dated 3 December 2018. It contained some errors – incorrect dates for which Mr Gurvits apologised.

The Certificate claimed the following expenditure:

Costs shared equally between three lessees:

Buildings Insurance + broker's fee	£1,823.07
Fire, Health & Safety Risk Assessment	£ 300.00
Management fee	£ 846.00
	£2,969.07

Costs shared equally between the two residential lessees:

Common parts cleaning	£198.40
Common parts lighting repair	£182.02
Key cutting	£ 30.00
	£410.42

The Certificate recorded a payment of £775.00 on account and claimed a debit balance of £419.90.

Insurance £1823.07

12. Ms Gough and Ms House did not challenge the cost of the insurance claimed but prior to the hearing had put Assethold on notice that they considered the cost to be very high compared with quotes they had obtained and that they expected a much lower premium to be payable in 2019.

Fire, Health & Safety Risk Assessment £300

13. Ms Gough and Ms House challenged the Fire, Health & Safety Risk Assessment fee of £300. Their main argument was that it was unnecessary to obtain a report because SMDR had procured a report dated 27 August 2017 which had not identified any remedial works required.

14. Mr Gurvits said that the above report had not been handed over by SMDR on completion of the transfer. He did not explain why Assethold had not insisted on handover of all material documents which is usual practice and part of due diligence usually undertaken on the sale of a property by one business to another.

    Mr Gurvits said it was standard practice for Assethold to obtain an independent report from its own contractor upon acquiring an asset. He also said, initially that it was practice to obtain a report each year. In detailed questioning Mr Gurvits conceded that there was no statutory obligation to obtain an annual report and that whilst contractors might recommend an annual report, that was a self-serving recommendation and that experienced professional property managers should take an informed view having regard to the specific features of each development. Here the common parts comprised a very small lobby behind the street door and a short internal staircase to the first floor lit by one light fitting. In the absence of any alterations or works an annual report would not amount to an expense reasonably incurred and Mr Gurvits reminded us that the cost of such a report was not included in the 2019 budget.

15. We gave detailed consideration to the report procured by Assethold. It is dated 23 October 2018. It is an important document. In section 1.2 it drew attention to the absence of a fire detection or alarm system located in the common parts. It also drew attention to the responsibility of the landlord to ensure 30 minute fire doors to each demise and that smoke/carbon monoxide detection units are fully functional. This of itself draws concerns about the utility/value of the report procured by SMDR. However, that said we were disappointed to learn that having gone to the expense of procuring a report, Assethold did not provide a copy of it to the applicants straightaway and that it has still not taken any steps to implement any of the recommendations made. We urge it to do so promptly.

16. On this occasion and given the above and that important safety factors that have been identified, we find that it was reasonable to incur the expense of the report and that the amount incurred was a reasonable amount. However, we do wish to emphasise that as a general proposition where a landlord procures such a report which makes recommendations but where the report is not shared with the lessees (who will bear the cost of it) and where the landlord fails, without good reason, to take steps to implement reasonable recommendations, many tribunals will struggle to find that such expenditure was reasonably incurred.

Common parts cleaning £198.40

17. There was no dispute about the cost of cleaning claimed. Ms Gough and Ms House explained that the cost was quite high for the service provided and that going forward they were willing to undertake the cleaning to the very small common parts themselves. It will be shown shortly that the parties have come to an understanding about future cleaning.

Lighting repair £182.02

18. There was no dispute about the lighting repair cost.

Key cutting £30

19. Mr Gurvits withdrew the claim to key cutting £30 because he was unable to adduce any evidence as why the cost was incurred and to whom the £30 was paid.

Management fees £846

20. Management fees were contentious. The applicants contended they were unreasonable in amount. They relied upon a quote of £500 for the whole block from Sandton Chartered Surveyors dated 5 April 2019. That firm is based in Morden, Surrey. The quote did not mention VAT, but it did mention that very few services were to be provided.

21. Mr Gurvits gave evidence. He said the charge was £705 + VAT = £846. That equated to a unit fee of £235 before VAT. Mr Gurvits claimed it was a competitive fee. He based his evidence of that on keeping an eye on the competition. Mr Gurvits also said that the fee includes bookkeeping, accountancy and the production of the annual certificate all of which are prepared in-house to save incurring additional external costs.

Mr Gurvits said that Assethold had not recently gone out to competitive tender for managing agents services, although he acknowledged it was good practice for landlords to go to competitive tender for all services periodically.

Mr Gurvits observed that the quote obtained by the applicants appears to have been given without reference to the lease and the services to be provided.

22. We have given careful consideration to the rival contentions. There is no obligation on a landlord to seek out the lowest cost for a service. We find it not unreasonable for a landlord with a large portfolio to place all, or most of its business, with one tried and trusted agent, even if a small local agent might offer a lower price. That said, the agreed fee must still be within the range of what is reasonable in the market.

We also bear in mind that smaller developments often attract a higher unit fee because there is no economy of scale. Where, as here, the unit fee is £235 before VAT, we find that it is a fee within (but only just) the

scale of reasonable fees for this type of development in the subject location.

23. Of course, where the fee is at the higher end of the scale, lessees are entitled to expect the level and quality of service provided to be commensurate with the cost of it.

24. In these circumstances we find that the fee of £846 was reasonably incurred and is reasonable in amount.

2019 Budget

25. The budget as issued was as follows:

Costs shared equally between the three lessees:

Buildings Insurance + broker's fee	£1,914.22
Drainage cleaning	£ 400.00
Buildings re-insurance survey	£ 900.00
Repairs (emergency fund)	£1,000.00
Management fee	£ 853.20
	£5,067.42

Costs shared equally between the two residential lessees:

Common parts electricity	£ 200.00
Common parts cleaning	£ 500.00

26. The budget has to be based on a reasonable expectation of anticipated expenditure within the knowledge of the person at the time the budget was prepared. Obviously the budget will not be exact in every particular and reasonable estimates have to be factored in.

Insurance £1,914.22

27. Mr Gurvits gave evidence. He said the £1,914.22 was included because the insurance was to be effected in January 2019 and when the budget was prepared it was known this was the amount of the premium and brokers fee that was going to be payable.

28. The hearing today was not the appropriate forum or occasion to determine whether that was a sum reasonable in amount. But we find that since it was a known sum, it was reasonable to include it in the budget.

29. At the hearing there was a good deal of discussion about the cost of insurance. The applicants had produced quotes of £930.09 inc tax and £1,101.01 inc tax. Having gone through them the applicants appreciated they were not like for like with the buildings insurance effected by Assethold and there were some caveats.

30. Mr Gurvits sought to rely upon an undated letter from Kruskal Insurance Brokers to Eagerstates. It states that an annual review of the market is undertaken to ensure that the rates are competitive taking into account a range of specified cover required. The letter also stated that *"… the portfolio is currently insured with AXA Insurance."*

The certificate of insurance for the period of cover 24 January 2018 to 1 February 2019 appears to have been issued by AXA.

31. Mr Gurvits agreed that each year the brokers provide a report to Assethold summarising the market testing undertaken and the responses from the insurers approached and making recommendations. He said that Assethold would consider the report and give an instruction to the brokers. Mr Gurvits was unable to explain why the report and letter of instruction had not been exhibited to Assethold's statement of case.

32. For the moment we only have to decide the reasonableness of the amount entered in the budget. We have done so. At year-end when the certificate is given the applicants will be entitled to challenge any amount they consider to be unreasonable. If an agreement cannot be reached it will be open to them to make a further application to the tribunal under s27A of he Act. If they were to do so we would urge both parties to give detailed consideration to the evidence they would wish to rely upon. We would expect both parties to take full account of the criticisms we have made about the inadequate evidence presented by both of the parties in these proceedings.

Drainage cleaning £400

33. Mr Gurvits told us that he had not prepared the budget and he did not know how the sum had been arrived at. He suggested it might cover the cost of two cleans of the guttering, downpipes and actual drains. He also suggested it might have allowed for the possibility of some de-scaling. Mr Gurvits was unable to identify the specific drains he had in mind.

34. The applicants produced a quote from Sam's Gutters dated 4 April 2019 for £125 + VAT to attend the property to clear the gutters and check the downpipes for any blockages.

35. This is a relatively new development so there is not much of a history or track record to have regard to. That makes budgeting a bit more difficult. On the limited evidence put before us we were not persuaded that two gutter cleans per year was a reasonable estimate. We have adjusted the budget to £200 which we find to be a more realistic reasonable sum.

Buildings re-insurance survey £ 900.00

36. Having regard to the terms of the lease, and that Assethold had no information as to how the historic buildings insurance valuations had

been arrived at, it was eventually agreed that it was not unreasonable for a re-insurance valuation to be carried out.

37. Mr Gurvits said that going forward such re-valuations are undertaken every five years or so, depending on the circumstances of each individual development.

38. Mr Gurvits was unable to explain how the sum of £900 had been arrived at. He said that Eagerstates uses several different surveyors for this service.

39. The applicants referred to a quote of £500. This sum struck a chord with the experience of the members of the tribunal and we have adjusted the budget to this sum.

Repairs (emergency fund) £1,000.00

40. Following a short adjournment to discuss matters, the parties informed us that they had agreed this item should be £300.

Management fee £853.20

41. For the reasons explained earlier in paragraphs 20-24 we find that as a budget sum £853.20 is a reasonable sum. That assumes the high level of service commensurate with that cost is actually is delivered. Should that turn out not to be the case the applicants will be able to challenge the sum that is claimed in the year-end certificate.

Common parts electricity £200

42. Mr Gurvits withdrew this sum when he was reminded that there is no landlord's supply to the common parts. Evidently the one light fitting on the common parts stairway is powered from Flat 1's supply and Ms Gough told us that she was willing to bear the very modest cost incurred.

Common parts cleaning £500

43. The parties told us they had agreed that as from July 2019 the landlord would cease to provide this service and the applicants would make their own arrangements. The applicants will pay a reasonable sum for the service delivered up to June 2019 and it was agreed the budget sum to cover that cost was £250.

Conclusion

44. Having regard to the above matters the budget for 2019 determined by us is that set out in Appendix 2. For avoidance of doubt and to assist the parties we have set out the amounts of, and the dates on which, the advance payments are due and payable.

S20C application

45. The application form included an application for an order pursuant to s20C of the Act.

46. The application was opposed by Assethold. Mr Gurvits told us that Assethold would be looking to recover an hourly charge for all the time spent by him managing the proceedings and preparing for and attending the hearing. He did not give an estimate as to what the amount of such costs might be. He also said that Assethold would look to recover Mr Clarke's brief fee which was £1,300 + VAT = £1,560.

47. The applicants submitted that they had no representation and had handled the proceedings themselves and that it would not be fair if they had to pay the landlord's costs. They had tried to resolve matters amicably through correspondence but Eagerstates had not been responsive. They were therefore forced to come to the tribunal to get redress and clarity. They also reminded us that they were first-time buyers with no experience of residential leasehold management, whereas in contrast Assethold and Eagerstates has very considerable experience in this area.

48. Mr Clarke submitted that, as matter of contract, Assethold was entitled to put its costs through the service charge account. He relied upon clause 8.2(j) of the lease which we have set out in full in paragraph 6 above. He also submitted that Assethold had not acted unreasonably and he relied upon some correspondence. Mr Clarke accepted that during the course of the hearing both parties had made some concessions and had compromised on some issues.

49. S20C provides that a tribunal may make such order as it considers just and equitable in the circumstances.

50. We have decided to make an order because it is just and equitable to do so. We prefer the submissions made by the applicants. We are far from persuaded that clause 8.2(j), construed as a whole and in context, provides a clear and unambiguous provision that certain costs not recoverable from a lessee in breach of covenant may be put through the service charge account. In these proceedings no question of a breach of covenant by a lessee arises. Assethold is simply responding to an application concerning the payability of certain service charges it has claimed are payable.

51. Even if clause 8.2(j) was to be construed so as to give Assethold a contractual right to pass its costs of these proceedings through the service charge we find it just and equitable to make an order prohibiting it from doing so.

52. We have carefully reviewed the correspondence put before us by the parties. Contrary to Mr Clarke's submission, we find that it does not show that Eagerstates has acted reasonably. Given that applicants are inexperienced first-time buyers Eagserstate was not as responsive as it ought to have been, particularly bearing in mind its management fees were at the high end of the range.

53. Further, we are not persuaded that all of the costs identified by Mr Gurvits were (or will be) reasonably incurred or reasonable in amount, or indeed proportionate.

With no disrespect to the contribution made by Mr Clarke, the application did not raise any significant or complex legal or factual points. Mr Gurvits is an experienced managing agent, has a legal qualification, and regularly appears at proceedings in this tribunal both as a witness and as an advocate. He also regularly prepares sets of instructions to counsel.

54. Standing back and looking at the circumstances in the round we are reinforced in our view that justice and equity requires an order to be made.

Judge John Hewitt
15 June 2019

Appendix 1

Services charges payable year-ending 31 December 2018

Costs shared equally between the three lessees:

Buildings Insurance + broker's fee	£1,823.07	
Fire, Health & Safety Risk Assessment	£ 300.00	
Management fee	£ 846.00	
	£2,969.07 ÷ 3 =	£989.69

Costs shared equally between the two residential lessees:

Common parts cleaning	£198.40	
Common parts lighting repair	£182.02	
	£380.42 ÷ 2 =	£190.21
		£1,179.90
Less paid on account		£ 775.00
Balance now payable by each applicant		£ 404.90

Appendix 2
Service charge budget for the year-ending 31 December 2019

Costs shared equally between the three lessees:

Buildings Insurance + broker's fee	£1,914.22
Drainage cleaning	£ 200.00
Buildings re-insurance survey	£ 500.00
Repairs (emergency fund)	£ 300.00
Management fee	£ 853.20
	£3,767.42 ÷ 3 = £1,255.80

Costs shared equally between the two residential lessees:

Common parts cleaning	£ 250.00 ÷ 2 = £ 125.00

Total payable on account by each applicant £1,380.80

Payable by four equal instalments of £345.20 each on 25 March 2019, 24 June 2019, 29 September 2019 and 25 December 2019

ANNEX - RIGHTS OF APPEAL

1. By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify parties about any rights of appeal they may have.

2. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to this tribunal - the First-tier Tribunal at the regional office which has been dealing with the case.

3. The application for permission to appeal must arrive at the regional office within 28 days after the date on which the tribunal sends out to the person making the application the written reasons for the decision.

4. 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.

5. 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.

6. If the tribunal refuses permission to appeal, a further application for permission may be made directly to the Upper Tribunal (Lands Chamber)