FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(REIDENTIALPROPERTY)

HMCTS code: (audio, video, paper)		**P: PAPERREMOTE**
Case Reference	**:**	**CAM/00KF/LSC/2020/0050**
Property	**:**	**149 Brightwell Avenue, Westcliff-on-Sea, Essex SS0 9EQ.**
Applicant	**:**	**Valerie Humphries**
Respondent	**:**	**Pace Property Lettings & Management Ltd**
Type of Application	**:**	**Application for the determination of the reasonableness and payability of service charges**
Tribunal Members	**:**	**Tribunal Judge S Evans**
Date and venue of Hearing	**:**	**Paper determination**
Date of Decision	**:**	**26 January 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote decision on the papers. The form of remote decision was P:PAPERREMOTE. A hearing was not held because it was not necessary; all issues could be determined on paper. The documents before the Tribunal were a bundle from the Respondent and a bundle from the Applicant, plus emails from the Respondent dated 19 and 20 January 2021.

DECISION

The Tribunal determines that:

(1) The cost of a management fee is recoverable under the terms of the lease.

(2) The part of the application which relates to service charges for the years 1994 to 2012 is struck out, pursuant to rule 9(3) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013;

(3) The costs demanded of the Applicant for the years 2013 to 2020 in respect of management costs are reasonably incurred and reasonable in amount;

(4) The charge to the Applicant of 50% of the cost of a fire safety report and 50% of an asbestos report in 2018 is reasonable;

(5) It is reasonable on current advice for the Respondent to commission a fire safety report every 2 years.

(6) The Tribunal refuses the Applicant's application for an order pursuant to s.20C and/or paragraph 5A of Schedule 11 to CLARA 2002.

Introduction

1. The Tribunal is asked to determine the payability and reasonableness of costs to be incurred by way of service charges pursuant to an application made under s.27A of the Landlord and Tenant Act 1985.

Relevant law

2. The relevant statutory provisions are set out in Appendix 1 to this decision.

Background

3. The Property consists of a lower (ground floor) maisonette in a building, in an avenue in Westcliff-on-Sea. There is one upstairs maisonette above the Property.

4. The salient facts as are follows:

5. In or about 18 December 1978 the Applicant was registered with leasehold title to the Property at the Land Registry.

6. In about 1994 the Respondent purchased the freehold and the leasehold interest in the upper maisonette.

7. From that date, the Applicant alleges, the Respondent has demanded and recovered sums in respect of management fees by way of service charges in relation to the Property.

8. The Respondent's records in relation to the Property date only from 2013, when they were computerised, because all paper records were lost in a flood in or about July 2015.

9. The documents before the Tribunal reveal that the Respondent has sent demands to the Applicant from 2 May 2013 onwards in respect of management fees, commencing at £150 plus VAT per year (£180) and rising to £160 plus VAT (£192) from 1 April 2019, except for the year 2017 when owing to an administrative error a management fee was not demanded.

10. It is common ground that the Applicant has paid these charges every year.

11. On 19 August 2013 the Respondent obtained legal advice which it has disclosed in the course of these proceedings, in support of its contention that it is permitted to recover management fees under the terms of the Lease.

12. On 21 December 2017 Pace Estate Agency Limited acquired the freehold to the Property.

13. On 14 March 2018 the Respondent commissioned a fire risk assessment by DX Safety Solutions Limited.

14. On 20 March 2018 it commissioned a survey report from the same company concerning suspected asbestos in the common parts.

15. On 1 April 2018 a charge was made on the Applicant's statement of account in the sum of £360 for her due proportion of the cost of both the above reports.

16. From 5 August 2019 onwards, the Applicant (through her son) has started to make inquiries of the Respondent about service charge information, and latterly the cost of management charges.

17. On 9 September 2019 the Applicant (via her son) informed the Respondent that her son had inquired into the basis for service charges at some point between 2009 and 2011, but was "unfortunately given a fairly hazy answer", and that he and the Applicant were not in a position to investigate matters further at that time.

18. On 14 October 2019 the Applicant obtained advice from LEASE, which has also been disclosed.

The Lease

19. The Lease is dated 3 October 1974. It was granted by an individual, Jonathan Frank Hassock, to Kevin Albert Wilson and Janice Mary Wilson, for term of 999 years at a ground rent of £20 per annum.

20. The following are the most material parts of the lease for present purposes:

21. By clause 2(2) the lessee covenants with the lessor:

> "To pay all rates taxes assessments charges impositions and outgoings which may at any time during the term hereby granted be assessed charged or imposed upon the demised premises or the owner or occupier in respect thereof and in the event of any rates taxes assessments charges impositions and outgoings being assessed charged or imposed in respect of any premises of which the demised premises form part to pay the proper proportion of such rates taxes assessments charges impositions and outgoings attributable to the demised premises…."

22. By clause 2 (6) the lessee further covenants:

> "At all times during the said term to pay and contribute a due and fair proportion of the expense of repairing maintaining rebuilding and cleansing that part of the roof and roof timbers (over the maisonette) above the demised premises (and also in the case of the Lease of the upstairs maisonette of the front path and entrance hall) and all sewers drains pipes water courses water pipes systems gutters party walls party structures fences easements and appurtenances entrances belonging to or used or capable of being by the Lessee in common with the Lessor or the tenants or occupiers of the maisonette above (or below) the demised premises and also all such used in common with the Lessor and the lessees or other occupiers of any neighbouring

premises such proportion in the case of difference to be settled by the Surveyor for the time being of the Lessor whose decisions shall be binding and to keep the Lessor indemnified against all costs and expenses so far as aforesaid and a proper proportion to be assessed as aforesaid of the cost of repairing and maintaining the floor dividing the upper maisonette from the lower."

23. By clause 2 (11) the lessee further covenants :

"To permit the Lessor or its Agents or such workmen as may be authorised by the Lessor at all reasonable times upon reasonable notice during the said term to enter into and upon the demised premises and examine the state of repair and condition of the same…."

24. By clause 2 (12) the lessee further covenants:

"At all reasonable times during the said term on notice to permit the Lessor and the lessees or occupiers of any other part of the building with workmen and others to enter into and upon the demised premises or any part thereof for the purpose of repairing any parts of the building of which the demised premises form part and for the purpose of making repairing maintaining rebuilding cleansing lighting and keeping in order and good condition all sewers drains pipes cables water courses gutters wires rights of way party structures or other conveniences belonging to serving or used for the same…"

25. Clause 3 of the lease consists of the Lessor's covenants with the Lessee: firstly, to give quiet enjoyment, and secondly to enforce the covenants entered into by the lessee of the other maisonette in the building (if reasonably required by the Lessee of the Property), in return for an indemnity.

The Application

26. By her Application dated 1 November 2020 and made pursuant to section 27A of the Landlord and Tenant Act 1985, the Applicant challenges the service charges for (1) 1994 to 2013, (2) 2014 to 2019, and (3) 2020 onwards.

27. In relation to the years up to 2013, the Applicant does not state what management fee was demanded, putting that it is of "unknown value" for each of those years. However, the Applicant does ask the Tribunal to decide if the lease provides a provision for the freeholder to charge the leaseholder an amount chosen by the freeholder to contribute towards their management costs, and if so, how that fee should be calculated.

28. In respect of the years 2014 to 2019, the amounts of service charge relating to management fee are set out, and again the Applicant asks the same question in relation to payability.

29. In respect of 2020 onwards, yet again the Applicant poses the same question above, but also asks the Tribunal to determine whether or not it is reasonable to charge her 50% for an asbestos report and 50% for a fire safety report every two years, given that no asbestos was found on the last report, and the entrance hall was rated as a low fire risk. The Applicant makes it clear in her application that the costs of the initial fire safety report and asbestos report are not being disputed.

30. The matter came before the Tribunal for directions. On 18 November 2020 Judge Wayte gave directions for the provision of a written statement of case by each party, for disclosure, and for any witness statement in support to be served. These directions were complied with sequentially, starting with the Respondent.

31. By emails dated 19 and 20 January 2021, the Respondent has asked the Tribunal for permission to respond to certain allegations made by the Applicant in her response. The Respondent's further representations are short, being contained in 8 bullet points, and cover approximately one page of A4 paper. There is no new evidence submitted therein, and the bullet points are effectively submissions and/or repetitions of points already made. The Applicant has not responded to the email application.

32. In all the circumstances, the Tribunal accedes to the application to submit further representations. The Tribunal does not consider the Applicants have been prejudiced in anyway by this application, not least because the points which are made in the emails of 19 and 20 January 2021 do not constitute new evidence which may have a significant impact on the determination of the issues raised between the parties.

The Issues

33. The Tribunal considers there are 5 main issues which arise:

(1) Is the cost of a management fee recoverable under the terms of the Lease?

(2) Should the Applicant be able to challenge service charges prior to 2014?

(3) The reasonableness of the management charges in dispute, in terms of their amount;

(4) Are the landlords entitled to charge the Applicant 50% of the cost of a fire safety report and of an asbestos report, and how often?

(5) Whether the Tribunal should make an order pursuant to s.20C and/or paragraph 5A of Schedule 11 to CLARA 2002.

Is the cost of a management fee recoverable under the terms of the Lease?

34. The Applicant's position would appear to be simple: the terms of the Lease do not make express provision for the recovery of a management fee, and therefore none is payable.

35. The Respondent, by contrast, relies on clause 2(6) of the Lease, and adds:

> "During each year, we inspect the Property for necessary maintenance, health and safety, breaches of the lease and so on. We prepare the accounts and collect the service charges, liaising with the residents and keep records. This is all done by various members of staff overseen by a manager. It is not easy to say how much the hourly cost of this is- for instance, the wages per staff are obvious but what share of the general cost of office space, liability insurance, electric vehicles. So, we charge what seems to us to be a standard management fee in the market to cover these costs instead."

36. The Respondent further relies on the advice obtained from its solicitors in 2013, which contains reference to four FTT/LVT decisions. In these, the respective leases made no express reference to management fees, yet it was held in each case that management fees were due and payable by the tenants.

37. The Tribunal notes that the above FTT/LVT cases are only persuasive authority to this Tribunal, so it is necessary to consider whether there is any binding Upper Tribunal or even higher authority concerning leases in which there was no express reference to management costs falling within the service charge mechanism, yet the same were recoverable.

38. In *Embassy Court Residents Association v Lipman* [1984] 2 EGLR 60, the Court of Appeal held that there must normally be an express

provision in a lease if management costs were to be recoverable. On the facts of that case, there was no such express provision, but the lower court had taken the view that, in order to give business efficacy to the transaction contemplated by the parties in what was a tripartite lease, it was necessary to imply a term that the Management Association company should have the power to incur necessary expense for the performance of the administration of the obligations that the parties had contemplated, and to be able to recover pro rata from the individual lessees a sufficient proportion of such expenses. The Court of Appeal emphasised that it was right to take into account the background and matrix of the initial transaction in order to ascertain the intention of the parties. On the ordinary principles of construction of contracts, the Court of Appeal considered that the judge had been clearly right in holding that it was necessary (in order to give business efficacy to this transaction) to imply a term that the reasonable, necessary administrative expenses of the Management Association (a) should be recoverable by the Association and (b) should be recovered from individual lessees pro rata, pursuant to an implied covenant so to do.

39. Cumming-Bruce LJ (with whom, Parker LJ agreed) held that:

> "No doubt in the case of leases entered into between a landlord and a tenant it is necessary for the landlord to spell out specifically in the terms of the lease, and in some detail, a sufficient description of every financial obligation imposed upon the tenant in addition to the tenant's obligation for rent …"
>
> And
>
> "Again, it is perfectly clear that if an individual landlord wants to do that and to recover costs from the lessee, he must include explicit provisions in his lease. But here the transaction contemplated management by the Association company, which had no funds, and somebody had to do the administrative work."

40. The above case was considered by the President of the Lands Tribunal in *London Borough of Brent v Mrs Nellie Hamilton* [2006] EWLands LRX_51_2005. The President also considered *Gilje v Charlegrove Securities Limited* [2001] EWCA Civ 1777 [2002] 1 EGLR 41, which is authority for the proposition that if a landlord seeks to recover money from the tenant, on ordinary principles there must be clear terms in the contractual provisions said to entitle him to do so.

41. The President, however, considered that, on the terms of the lease before him, no question of implying a term in the lease arose, because

the provisions were clear enough to enable the costs of management to be included in the total expenditure incurred in fulfilling the lessor's obligations under the lease. In so finding, he held:

> "To be recoverable the expenditure must be incurred by the council in fulfilling the obligations and functions set out in clause 6. There is in my judgment no ambiguity in this. To the extent that expenditure must be incurred it is recoverable, and whether it is so incurred is a question of fact. Clause 6 includes usual landlord's covenants, of which the provision of services is one, and with the exception of the covenant for quiet enjoyment they will require expenditure to be occurred by the council in their performance. If repairs are to be carried out or windows painted or staircases cleaned someone will have to be paid for doing the work and someone will have to arrange for the work to be done, supervise it, check that it has been done and arrange for payment to be made. Since the council can only act in these respects through employees or agents it will have to incur expenditure on all these tasks. If it does incur such expenditure, the lessee will be liable to pay a reasonable part of it."

42. It is trite to say that each case must be based on its own facts, on the terms of each individual lease. Applying the facts of the instant case to the principles obtained from the above decisions, in this Tribunal's view there is equally no need to imply a term into the instant lease to give it business efficacy. In the Tribunal's determination, as was the situation in the *Brent* case, the terms of the Lease are wide enough to include limited sums levied in respect of management costs/services. It is quite clear that, although the lessor Mr Hassock in 1974 was an individual, the parties did not intend to restrict him to personal performance of all the matters contained in clause 2 (6) of the Lease. The Tribunal in this regard derives assistance from clauses 2(11) and (12), which make it clear that the parties envisaged but the lessor might from time to time employ "Agents" and "workmen", at least to enter the demised premises and examine their state of repair and condition, and for the purposes of repairing any parts of the building of which the demised premises form part. In the instant case, the Respondent advises that it carries out inspections and arranges repairs to be executed. The Tribunal notes that the Lease is not restricted to inspection only when a repair has been reported, but at all reasonable times upon suitable notice.

43. In respect of the second part of its functions (being the Respondent's preparation of accounts, collecting the service charges, liaising with the residents, and keeping records), in the Tribunal's consideration this

falls within the lessor's duty under the lease to ascertain and seek a due and fair proportion of the expenses incurred under clause 2(6). These acts serve to the benefit of the Applicant as well as the Respondent in ensuring that only reasonable costs, duly calculated, are demanded.

44. The Respondent has not advanced any argument in in its written case (although it did in correspondence with the Applicant) that such management fees could be recoverable under clause 2(2) of the Lease. Given the Tribunal's determination above, it is not necessary to consider this point, although I would have been inclined to the view that clause 2(2) concerns only external charges imposed on the lessor or any occupier or on the building, and is not wide enough to cover management fees charged by the lessor on the lessee.

Should the Applicant be able to challenge service charges going back to 1994?

45. Both parties would appear to accept that there is no strict limitation period in respect of an application under section 27A of the Landlord and Tenant Act 1985. However, the Respondent disputes that the Applicant should be able to dispute the management fee charges going back to 1994, for the following reasons:

    (1) Ms Horwood, who provided the Respondents written case / witness statement has personally been working for the Respondent since 2007, and has either dealt with or overseen the service charges for the few properties where they own the freehold, but does not recall any disputes with the Applicant;

    (2) The Respondent has no record of the Applicant disputing her service charges until it heard from her son in August 2019;

    (3) Service charges were paid promptly by the Applicant and there are no letters disputing the charges on file;

    (4) To attempt to dispute service charges now would be unreasonable, given cases such as *Cain v Islington* [2015] UK UT 0542 in which the Upper Tribunal found that Mr Cain had agreed or admitted his liability for all service charges falling due before 2007 /2008, by reason of his having made payment of the service charges for these years without reservation, qualification or other challenge or protest. Pursuant to section 27A(4)(a) of the 1985 Act, a tenant is unable to pursue an application in respect of service charges that have been agreed or admitted;

    (5) The Respondent only has records dating back to 2013 when they computerised the current section of the business. There used to be

paper files, but they were in the Respondent's storage lockup on the corner of Shaftesbury and Victoria Avenues in Southend when that road flooded in July 2015, and it lost the older paper records at that point.

46. The Applicant has provided no witness statement. Her written case (drafted by her son) in response alleges:

(1) "There was at least one occasion prior 2009, and she believes there to be multiple times that she has challenged the management fee (or service charge) that the freeholder has charged each year. At least one of these times was via telephone, where she spoke with a male member of staff, who she found to be intimidating due to his claims that she was lucky as the fee was much lower than it could be, and his general dismissal of her claims.";

(2) That she is easily intimidated by "corporations";

(3) The Freeholder has intimidated her, through its notices for ground rent which contain legal jargon and sometimes contain incorrect information;

(4) Her son while at university did contact the freeholder via telephone, at some stage between 2009 and 2011, speaking with a male member of staff whom he did not find intimidating; he was told that the reason why a fee for management was being charged was because it was in the Lease; at this time the Applicant did not have the Lease (only her solicitor did), so the matter was not pursued further at this point;

(5) That in respect of *Cain v Islington*, the Applicant's position is:

(a) In contrast to that case, no other cases had been brought forward by the Applicant or the freeholder of any nature;

(b) The Applicant is in good standing in terms of compliance with her lease;

(c) The Respondent has not been of assistance with provision of information, such that there has never been enough information provided by the freeholder to raise a challenge;

(d) Lack of knowledge and funds prevented a challenge;

(e) The Applicant was making payments out of "fear of reprisals";

(f) Case management powers should not be used to strike out a case which is too old, or due to the fact that the costs of litigation exceeding the amount at stake;

(g) It is not her fault that the Respondent cannot provide the figures prior to 2013, and that even if there were storage facilities provided for records (which she doubts), they were clearly not suitable ones.

47. This Tribunal has considered the *Cain* case in detail, and both parties have had sufficient notice of each other's position for the Tribunal to make a determination as to whether the Applicant should be able to challenge historic charges.

48. The Tribunal determines that the Applicant's challenge to service charges prior to the year 2013 should be struck out under the Tribunal's case management powers, for the following reasons:

(1) The Applicant cannot challenge the reasonableness of any service charge in respect of management costs for 1994 to 2012 for the simple reason that she cannot inform the Tribunal what the amount for each of those years was. It is a fact that the Respondent cannot provide such figures either. The Tribunal is in no position to determine whether the Respondent can be held at fault for the loss of its paper records in July 2015, but even if it were, that would not put the Tribunal in any position to determine whether such costs were reasonably incurred. The Tribunal is unable to operate in an evidential vacuum;

(2) The Tribunal agrees with the general observations of HHJ Gerald at paragraphs 37 and 38 of the decision in *Cain* - that case management powers should not be used to strike out a case simply because it is too old, or because the costs of litigating far exceed the amount at stake. This Tribunal is not striking out the Applicant's challenge to service charges on those grounds, in particular on the grounds that the challenge is stale. It is striking out the Applicant's challenge before 2013 on the grounds that it does not have the evidential material to determine the issue, noting in particular that neither party has adduced any evidence of what the managements costs were, or indeed what any comparable market rate for management costs were for a Property of this kind between 1994 and 2012.

49. It is therefore unnecessary for me to consider whether the Applicant has agreed or admitted service charges for the purposes of s237A(4)(a) of the Act, but I would incline to the view that the Applicant has agreed or admitted them, at least before 2009. As the Upper Tribunal in *Cain* held at para. 18:

> "Looking at the reasoning behind this provision, no doubt the reason why the making of a single payment on its own, or without more, would never suffice is that such will often be insufficiently clear but also, in the peculiar area of landlord and tenant, it is common enough for tenants to pay (even expressly disputed) service charges so as to avoid the risk of forfeiture and preserve their home and the value of their lease. But the reason why a series of unqualified payments may, depending on the circumstances, suffice is because the natural implication or inference from a series of unqualified payments of demanded service charges is that the tenant agrees or admits that which is being demanded. Putting it another way, it would offend common sense for a tenant who without qualification or protest has been paying a series of demanded service charges over a period of time to be able to turn around and deny that he has ever agreed or admitted to that which he has previously paid without qualification or protest. Self-evidently, the longer the period over which payments have been made the more readily the court or Tribunal will be to hold that the tenant has agreed or admitted that which has been demanded and paid. It is the absence of protest or qualification which provides the additional evidence from which agreement or admission can be implied or inferred."

50. In the instant case, on the evidence before the Tribunal, there is little record of qualification or protest by the Applicant. There was an inquiry sometime between 2009 and 2011 by the Applicant's son in relation to the requirement to pay a management fee. Neither he nor his mother progressed the enquiry at the time. The Tribunal is not persuaded by any argument of fear or reprisals or intimidation; any qualification or protest could simply have been made in writing, and if payment of ground rent and service charges were made (as they were) there was no risk of forfeiture. The evidence of the Applicant's personal dealings with the Respondent is but hearsay; without a witness statement from her giving more detail, and testifying to the year or years in questions when her challenge was made, the Tribunal would take the view that payments before 2009 were unqualified, at least so far as the management costs element was concerned.

51. Accordingly, this Tribunal determines that the Applicant may only dispute management costs charged for the years from 2013 onwards, and that the application is struck out as regards the years 1994 to 2012.

The reasonableness of the management charges in dispute in terms of their amount

52. As noted above, neither party has provided evidence of management costs in the marketplace from 2013 to date. The Respondent's case says:

    "The Tribunal will have seen many more management fees than us and be better placed to say what is standard but from the properties we own where we are ourselves a leaseholder (approx. 50) and from the block management side of our business where we are an ARMA licensed agent, we know these fees to be at the mid to low end of what other freeholders are charging for smaller blocks. Where we have a one flat in a block with one other flat, we are regularly charged £250 to £350 p.a. in management fees ."

53. The Applicant does not provide comparable market figures but draws the Tribunal's attention to ostensible arrangement/supervision fees of between 10 and 20% placed on repair costs, and states the reasons for these costs are unknown. By implication, the Applicant is concerned that the Respondent may be recovering twice for the same matters.

54. She also draws attention to the fact that a subsidiary of the freeholder which deals with the market rental also acts as the freeholder's agent.

55. In the absence of market comparables, the Tribunal must use its experience. In *Forcelux v Sweetman* [2001] 2 EGLR 173 the Lands Tribunal examined the reasonableness of management fees by considering whether the fees charged were in line with market rates but accepted that once "reasonably incurred" it was not necessary for the fees to be the cheapest.

56. The RICS Residential Code (3rd edition) states that "charges must be reasonable for the task involved" and" basic fees are usually quoted as a fixed rather than as a percentage of outgoings or income. This method is considered to be preferable."

57. In *Skilleter v Charles* (1992) 24 HLR 421 it was held that there is no reason why a landlord could not employ a company which he wholly owned, provided it was not a complete sham.

58. There is no evidence of any sham relationship here.

59. In the Tribunal's determination, a fixed management fee which was charged at £180 for the period April 2013 to April 2019, and £192 thereafter, was reasonably incurred for this type of Property and in this location, in the light of the uncomplex management functions provided. The Tribunal considers the management fees to be suitably low, given the limited management functions both needed and executed.

60. The Tribunal notes the concern about double recovery of supervision costs, but no challenge has been made within the application to those supervision/arrangement fees, and the Tribunal is not in a position to determine such matters.

Are the landlords entitled to charge the Applicant 50% of the cost of a fire safety report and 50% of an asbestos report, and if so, how often?

61. The Respondent relies on the legal duty under the Control of Asbestos Regulations 2012 in relation to common parts, so as to be responsible for managing asbestos, both emphasising that the duty is to ascertain whether the premises contain asbestos and if so, where it is, what condition it is in, and to assess the risk, make a plan to manage the risk, and thereafter to act on it.

62. The Respondent accepts that in March 2018 the survey found no asbestos in the common parts. The Respondent has confirmed that there is no intention to inspect for asbestos again.

63. The Applicant does not challenge the cost of the asbestos report from 2018, and has sensibly accepted the Respondent's reassurance that it will not unnecessarily repeat the asbestos report.

64. Therefore, this Tribunal determines, by agreement, that the cost of the asbestos report was reasonably incurred and that a fair proportion to charge the Applicant was 50% (on the basis there are 2 flats in the building).

65. As regards the fire safety report, again the Applicant has sensibly conceded that she does not challenge the cost of the report undertaken in 2018. However, she does not accept the need to carry out future reports every 2 years going forward. She does not consider that a 2 year repeat interval is necessary, relying on the fact that the Regulatory Reform (Fire Safety) Order was passed in 2005, and yet no report was obtained by the Respondent until 2018. The Applicant accepts that there is no mandated review or repeat interval listed in the relevant legislation, but argues that a repeat report should be conducted 4 yearly. In this regard she relies on a document from the Local Government Association entitled "Fire Safety in Purpose-built Flats"

and in particular section 40, which is cross-headed “Review of fire risk assessments”.

66. The Tribunal does not find this document to be of much assistance in this case. It concerns purpose-built flats in blocks, but even if this were not the case, section 40.4 states “the date by which a fire risk assessment should be reviewed should be determined as part of the process of carrying out a fire risk assessment ". In the instant case, the relevant fire risk assessor has determined, against a score of 8 points, that the building is classified as “a low risk building and will have a full fire risk assessment undertaken every two years”.

67. The Tribunal notes that the report is authored by a Robert Ryce Tech IOSH AIIRSM. No point is taken by the Applicant about his qualifications to undertake the report. The Tribunal sees no reason to go against the expert advice of Mr Ryce that the common parts of this building should be reassessed every 2 years.

68. The Tribunal is sympathetic to the Applicant’s point that there had been no previous fire risk assessment before 2018. However, that does not mean that a report every 2 years starting from 2018 would be a cost which is not reasonably incurred. Moreover, there has been a necessarily sharp focus by landlords on fire safety since 2017, by reason of the tragic circumstances of the Grenfell tower fire.

69. In practical terms, this means that the Respondent would have been entitled to undertake a reassessment in 2020, but the Respondent informs the Tribunal that this will take place now in 2021, owing to restrictions caused by the coronavirus pandemic.

70. The Applicant will be able to challenge the reasonableness of the cost of any such report in 2021, if and when any charge is demanded of her in relation to it.

71. Accordingly, the only determination the Tribunal need make is that on present expert advice the commission of a fire safety report at intervals of 2 years is reasonable.

Whether the Tribunal should make an order pursuant to s.20C and/or paragraph 5A of Schedule 11 to CLARA 2002

72. The Applicant has included an application for an order under section 20C and/or para.5A, restricting the ability of the Respondent to include all or any of its costs incurred in connection with these proceedings as part of a service/administration charge. In other words, that such costs should not be regarded as relevant costs to be taken into account in

determining the amount of any service charge or administration charge payable.

73. The Tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances: s.20C(2)/ para 5A(2).

74. In *Tenants of Langford Court v Doren Limited* (LRX/37/2000) HHJ Rich held that the circumstances include the conduct and circumstances of all parties, as well as the outcome of the proceedings in which they arise; the primary consideration is that the Tribunal should keep in mind that the power to make an order under section 20C should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that makes its use unjust.

75. The above considerations apply with equal force to the Applicant's application made under paragraph 5A of CLARA 2002.

76. It is not clear whether the Respondent has in fact incurred any relevant costs, but given all the circumstances of the case, and for the avoidance of doubt, the Tribunal considers that it is not just and equitable to grant an order in favour of the Applicant, particularly in the light of this Tribunal's determination of the merits of the application.

Judge: S J Evans

Date: 26/1/21

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 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 to 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 1

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 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

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.

Schedule 11 para 5A of the Commonhold and Leasehold Reform Act 2002

(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph-
(a) "litigation costs" means costs incurred or to be incurred by the landlord in connection with proceedings of a kind mentioned in the table [First-tier Tribunal proceedings].