-First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	**:**	**CHI/45UG/LSC/2021/0037**
Property	**:**	**Flat 10 Old Auction House, 70 Guildford Street, Chertsey, KT16 9BB**
Applicant	**:**	**Rebecca Wraight**
Respondent Represented by	**:**	**Eagerstates Ltd. Mr. Ronni Gurvits (lay rep.)**
Date of Application	**:**	**11th April 2021**
Type of Application	**:**	**to determine reasonableness and payability of service charges and administration charges**
The Tribunal	**:**	**Bruce Edgington (Lawyer Chair) Michael Ayres FRICS Leslie Packer**
Date & place of hearing:		**22nd November 2021 as a video hearing from Havant Justice Centre in view of Covid pandemic restrictions**

DECISION

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1. The Tribunal's decisions in respect of six agreed matters for determination are:

   (a) On the balance of probabilities, the sum of £8,279.06 on account of service charges was clearly being held by the previous landlord, Lux Homes Ltd. on 26th June 2019 and the amount in credit on the subsequent sale of the Property to the Respondent was passed on to the Respondent. The Applicant's share of £8,279.06 would be 5.09% i.e. £421.40. A copy letter was produced by the Respondent at page 21 in the bundle showing that a credit had been given to the Applicant in the sum of £356.25 (service charges) plus £200 (ground rent) as money "*received on handover*". No further monies are owed to the Applicant under this item.

   (b) The £250 referred to by the Applicant as the threshold for requiring a full consultation process under Section 20 of **The Landlord & Tenant Act 1985** ("the 1985 Act") is £250 for each tenant, not the total cost each item of work. Any service charge item exceeding about £5,050.00 would mean a payment of over £250 from the Applicant which would require

consultation. None appear to come within that category save for the repairs to the roof which are dealt with below.

(c) As the kitchen ceiling of flat 8 would appear to be part of that flat and is therefore excluded from the definition of 'retained parts' in the lease, the sum of £135.00 claimed for this work is not subject to a claim for service charges and is to be excluded.

(d) The Applicant does have to pay for the maintenance and repair of the roof over 70A Guildford Street as this was owned by Lux Homes Ltd. and is now owned by the Respondent. The definition of 'services' includes work to *"all parts of the Landlords Estate"*.

(e) The Applicant is clearly being asked to contribute to a reserve fund which the lease does not permit. Any unidentified sum on account of service charges is therefore to be excluded from any demand.

(f) The Applicant is also being asked to pay towards the upkeep of the parking area and the security gates. The Tribunal determines that this area and the gates are not part of the common parts and the Applicant should not have to contribute to their upkeep.

2. As far as costs are concerned, the Applicant has asked for orders that no costs incurred by the Respondent in these proceedings shall be the subject of any service charge or administration charge. The Tribunal makes orders under (a) Section 20C of the 1985 Act i.e. that any costs incurred by the Respondent in these proceedings are to be excluded from any service charge and (b) under Paragraph 5A of Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") preventing the Respondent from recovering costs of this litigation from the Applicant.

Reasons

Introduction

3. This is an application by a long leaseholder for the determinations set out above. During the course of the proceedings, further matters have been raised but they all link to the six determinations. The parties agreed at the hearing that these were the correct matters for the Tribunal to consider. Section 27A of the 1985 Act says that this Tribunal can determine "*whether a service charge is payable*" and, in accordance with section 19 of that Act, "*to the extent that they are reasonably incurred*".

4. Directions orders were made by the Tribunal on the 14th May and 29th July 2021 timetabling the case to a hearing on the 14th October 2021 and a bundle of documents was duly lodged. Both parties have provided statements of case and supporting documents. Any reference to page numbers in this decision are references to the page numbers in that bundle. However, as is set out below, a number of further documents have been filed and they don't have page numbers. They will be identified as appropriate.

5. In the said bundle, the Respondent's case is not very detailed but states, in effect, that the Applicant is mistaken in respect of all her allegations and that the Respondent has acted reasonably and in accordance with the terms of the lease throughout.

6. On page 24, the Applicant says that she bought her flat from the previous freehold owner, Lux Homes Ltd., on 12th May 2017. At that time, 10 purpose built flats (7-16) had been added to 6 duplex properties (1-6) which had been extended from the original Constitutional Hall built in around 1890. All these flats were in the building described as 70 Guildford Street.

7. She then goes on to say that 70A Guildford Street was built in 2018 and 9 parking spaces were created which were accessible from Heriot Road. She adds that the leaseholders who have these parking spaces "*pay higher annual service maintenance payments compared to the other apartments on site*". As she has no parking space, this would not include her. As a matter of information the Tribunal members have looked at Google Earth and note that 70A Guildford Street was present when the Applicant bought her flat. They conclude that it was the internal work on new flats within that building which happened in 2018.

8. The final hearing date was fixed for the 14th October 2021 but, at the last minute, the Respondent's representative informed the Tribunal that he could not attend the hearing as he was isolating at home as his wife and children had tested positive for COVID. After a discussion with the representative involving the Tribunal members and the Applicant, it was agreed that the hearing take place on the 22nd November and, in the meantime, an order was made requiring the parties to answer a number of questions which the Tribunal members had on the information submitted.

The Lease

9. The Directions Orders required the Applicant to include a copy of the lease in the bundle. This is particularly important in this case because some of the issues depend on its precise wording. The original papers just included an undated draft lease. Helpfully the Applicant has now provided certified copies of the lease and other title documents.

10. The term is 125 years from the 1st January 2017 (as opposed to 2016 in the draft lease previously submitted). As to service charges, there are references to them in various parts of the lease. In the definitions section the Service Charge is defined as "*the Tenant's proportion of the service costs*". There does not appear to be any definition of what the tenant's proportion is. However, the Applicant herself says, on page 45, that her "*5.09% share*" is payable.

11. One of the questions raised in the Tribunal's Order following the hearing on the 14th October was in paragraph 3(e) which asked for details of what the percentages were at the commencement of the lease and details of all the percentages as they now are including, in particular, the differences between those flat with parking spaces and those with none.

12. The Applicant said that she has spoken to a neighbour with a parking space who says that she pays 6.88%. The Respondent has simply refused to answer the question despite the fact that this information must be readily available. However, the Applicant has managed to obtain a list of 16 flats and a retail unit on the site and there are clearly several differing service charge proportions. However, it is not possible to say which flats have parking spaces.

Furthermore, the Applicant states (as set out in the introduction above) that there were a total of 16 flats before the part of the building known as 70A Guildford Street was developed.

13. The building in which the property is situated is said to be "*the building known as Old Auction House, 70 Guildford Street, Chertsey K16 9BB*".

14. As to the parking spaces and access through the gate in Heriot Road are concerned, the lease is vague, which is unfortunate, to say the least, because clause 13 says "*This lease constitutes the whole agreement between the parties and supersedes all previous discussions, correspondence, negotiations, arrangements, understandings and agreements between them relating to their subject matter*".

15. Having said that, the lease would appear to be written in the same terms as other flats in the development save as to flat numbers, parties and price. Whenever a parking space is mentioned, the words 'if applicable' or similar appear. For this flat there is a right of way on foot and for motor vehicles over common parts but no right to use a parking space or, in fact, any right to park save on the allocated spaces which are not common parts. The Applicant confirms that she cannot and does not park on site.

16. Furthermore, the Applicant has been given no details of the access code for the security gate leading to and from Heriot Road. There would only appear to be a narrow access on foot only from the other common parts.

17. Common parts are described as being "*all remaining parts of the Landlord's Estate….that are not part of the Property or the Flats and which are intended to be used by the tenants and occupiers of the Building and the Flats and shown hatched and cross hatched black on the Plan*".

18. On the plan, the hatching does not include areas which appear to be parking spaces i.e. such parking spaces are not included in the common parts.

19. The only other part of the lease which appears relevant is in Schedule 6 which says that a service charge demand shall be "*a notice giving full particulars of the Service Costs and stating the Service Charge payable by the Tenant and the date on which it is payable as soon as reasonably practical after incurring, making a decision to incur, or accepting an estimate relating to, any of the Service Costs*".

20. In answer to the further questions raised by the Tribunal in the Order following the hearing on the 14th October, the Respondent says that this wording covers a reserve fund.

The Law

21. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'. Under section 27A, this Tribunal has the jurisdiction to determine whether service charges are reasonable or payable including service charges claimed for services not yet provided. Schedule 11 of the **Commonhold and**

Leasehold Reform Act 2002 ("the 2002 Act") makes similar provisions with regard to administration charges.

22. Section 22 of the 1985 Act says that a leaseholder may, by notice in writing, require a landlord to afford him reasonable facilities for inspecting accounts, receipts or other documents relevant to the service charge accounts. The landlord must also permit facilities for copying them at the leaseholder's expense. The lease itself also sets out a similar contractual right.

23. Section 20C of the 1985 Act gives the Tribunal the power to order that any costs incurred by a landlord in a case before the Tribunal can be excluded from any service charge. Paragraph 5A of Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") allows a Tribunal to make orders preventing a landlord from recovering costs of litigation from a tenant.

24. Section 20 of the 1985 Act deals with one of the main points made by the Applicant when she refers to service charges being more than £250. That section says that where a contribution by a tenant towards a particular service charge or prospective service charge exceeds "*an appropriate amount*" as defined by regulations, then a landlord must consult with all the tenants paying the service charge and a set procedure is explained.

25. As indicated by the Applicant, the consultation will involve obtaining quotations and inviting suggestions for contractors and then sending copies of quotations to the tenants and taking account of their comments. However, the **Service Charges (Consultation etc.) (England) Regulations 2003** say that "*the appropriate amount is an amount which results in the relevant contribution by any tenant being more than £250*". In other words, it is a particular tenant's contribution which triggers the requirement for consultations rather than the total service charge.

The Inspection

26. With the present pandemic, Tribunals do not usually inspect properties and as the issues in this case involve the contractual relationship between the landlord and the tenant, and what has happened to money, it was not felt that an inspection would have really assisted the members in making this determination.

The Hearing

27. Those attending the hearing were the Applicant, Ms. Wraight and Mr. Ronni Gurvits from the Respondent. A Tribunal case officer introduced the attendees. The Tribunal chair then introduced himself and the Tribunal members. He said that the Tribunal members had looked at the papers and determined that the questions to be determined by the Tribunal were the six questions set out in the decision. He asked Ms. Waight and Mr. Gurvits whether they agreed and they both said that they did.

28. He then said that he had some questions to raise on the papers filed. He would do that and then ask the parties to put their cases. He would ask the other Tribunal members to ask any questions they had. That is in fact how the hearing was dealt with.

29. As regards the agreed first question, the Tribunal chair referred the Applicant to page 21 in the bundle which appeared to be a letter from the Respondent to the Applicant (undated) which set out the sum of £556.25 as having been received on the handover from Lux Homes Ltd. to the Respondent i.e. £200 for ground rent and £356.25 for service charges. She said that she had not noticed that before and agreed that it appeared to show monies credited to her.

30. The chair then asked Mr. Gurvits about the parking spaces at the rear. The spaces themselves are not hatched on the lease plan and as they could not be used by people without a parking space, they were not common parts. Furthermore as people such as the Applicant, did not have a pass key for the gate, they could not use such gate. They could only get into the parking area on foot from the building and that would serve no purpose to them. He asked how could the parking area and the security gate be 'common' parts? Mr. Gurvits' only answer was that the lease said so.

31. He was asked whether a capital sum had been paid to, effectively, 'buy' the parking space. He said that he did not know. He said that he also did not know whether the service charge percentages had been increased for those who had parking spaces to pay for the maintenance of the spaces and security gate. He said that the percentages had stayed the same since the Respondent purchased the site.

32. The other Tribunal members then asked other questions and the parties were then invited to put their cases. Both Ms. Wraight and Mr. Gurvits said that the documents and their comments today encapsulated their cases and they had nothing further to say.

Discussion

33. In **Schilling v Canary Riverside Development PTD Ltd** LRX/26/2005; LRX/31/2005 & LRX/47/2005 His Honour Judge Rich QC had to consider upon whom lay the burden of proof. At paragraph 15 he stated :

> *"If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the Yorkbrook4 case make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard."*

34. In this case, the Applicant challenges the payability of some services charges rather than suggesting that the cost or standard of a particular service was unreasonable.

35. In view of the prospective ambiguities in the lease as to the definition (a) of 'common parts' and the Applicant's contribution to the upkeep of the parking spaces and the gate at Heriot Road and (b) whether monies can be collected for a sinking fund, the Tribunal has considered general rules of interpretation. In

order to assist courts (and Tribunals) in these difficult matters, the *contra proferentem* rule was devised many years ago. It is not, of course, the only rule of interpretation but it is, perhaps, the most relevant to this problem. It translates from the Latin literally to mean "against (*contra*) the one bringing forth (the *proferens*)".

36. The principle derives from the courts' inherent dislike of what may be described as 'take it or leave it' contracts such as residential leases which are the product of bargaining between parties in unfair or uneven positions. To mitigate this perceived unfairness, this doctrine was devised to give the benefit of any doubt to the party upon whom the contract was 'foisted'.

37. In the case of **Granada Theatres Ltd v. Freehold Investments (Leytonstone) Ltd** [1958] 1 WLR 845, Mr. Justice Vaisey said, at page 851, that "*a lease is normally liable to be construed contra proferentem, that is to say, against the lessor by whom it was granted*".

38. Thus, if there is ambiguity, *contra proferentem* would appear to dictate that a ruling is made in favour of the Applicant lessee. Without any other considerations, the end result of this is that, in law, the leaseholders are not liable to pay service charges on account unless and until a decision has been made to incur that service charge or an estimate for the work has been obtained. There is also no provision for a general sinking fund.

The Six agreed Questions to be determined

(a) The sum of £8,279.06 was clearly being held by the previous landlord, Lux Homes Ltd. and the sum held on the date of sale was passed on to the Respondent. The approximate amount appears to be confirmed by an internet search of the company Old Auction House Management Company Ltd., which was the company holding leaseholders' credits when Lux Homes Ltd. owned the site. This company was dissolved on the 15th December 2020. The last filed accounts show cash in hand of £8,298.00 on the 31st May 2020. A bank statement for that company at page 28 in the bundle says that the end balance on the 27th June 2020 was £8,279.06.

5.09% of £8,279.06 is £421.40. However, one of the documents provided by the Respondent at page 21 in the original bundle is a copy of an undated letter sent to the Applicant which gives her a credit of £556.25 for service charges and ground rent with the description "*received on handover*". As the subsequent letter of the 20th December 2020 is simply asking for anticipated service charges, it does appear that credit has been given for monies handed over, as the Applicant agreed at the hearing.

(b) The £250 referred to by the Applicant is £250 for each tenant, not the total cost of the work. Any service charge item exceeding about £5,050.00 would mean a payment of over £250 for the Applicant. None appear to come within that category save for the repairs to the roof which are dealt with below.

(c) As has been said, the kitchen ceiling of the flat in question would appear to be part of that flat and is therefore excluded from the definition of 'retained

parts' in the lease. Without some clear explanation, which has not been forthcoming, it therefore cannot be the subject to a claim for service charges and is to be excluded. If, in fact, the damage was caused by the suggested failure of the roof of 70A Guildford Street, then this could be a claim against the developer. If that does not succeed, then the amount is due from that particular flat owner(s) or their insurers, not the Applicant.

(d) The Applicant does have to pay for the maintenance and repair of the roof over 70A Guildford Street as this was owned by Lux Homes Ltd. and is now owned by the Respondent. The definition of 'services' includes maintenance/repair work to *"all parts of the Landlords Estate"* which appears to include 70A.

Having said that, there are 2 issues which need to be mentioned. Firstly the total figure claimed for the roof work is £7,741.20 which is in a series of invoices from M3S Property Services Ltd. to the Respondent within pages 147 to 180 in the original bundle, which all contain the same reference number. That company had clearly been given the task of investigating "*the roof and valleys as its leaking rain water into the flat below in two areas*". If the total of those invoices related to those roof repairs then there would have had to be a proper consultation with the tenants as the cost per tenant would have been more than £250.00. The suggestion that parts of the work from the same contractor for the same job should be taken separately, is clearly wrong and appears to be a deliberate attempt to evade the consultation process.

However, when giving its explanation, the Respondent says that work to install 100mm loft insulation under the roof was done at the tenant's request as it was economical to do this whilst the scaffolding was up. The invoice for that work was £2,912.40 which brought the other roof work below the consultation threshold. At the hearing Mr. Gurvits said that this work was to prevent leaks through the roof. The Tribunal simply does not accept that the installation of loft insulation could be described as such.

Thus, the second point is whether the insulation work is actually a service charge which can be recovered as such. The definition of 'Services' in the lease does not include improvements. The definition does include work which "*the Landlord may in its reasonable discretion….provide for the benefit of the tenants and occupiers of the building*". However, this work seems to have been at the request of and for the benefit of one tenant. It certainly will not benefit the other tenants and therefore the insulation work and its cost of £2,912.40, does not come within the definition of a service charge and is not recoverable as such.

(e) The Applicant is clearly being asked to contribute to a reserve fund which the lease does not permit, contrary to the Respondent's belief. However clause 4 of Schedule 6 makes it clear that service charges are only payable "*as soon as reasonably practical after incurring, making a decision to incur, or accepting an estimate relating to, any of the Service Costs*". This does not allow the Respondent to just collect money for possible future service charges.

(f) The question of the parking bays is difficult. If the lease plan is to be followed then the parking area contains 9 parking spaces which are not hatched black. The rest of that small area is hatched black. There would appear to be access from the buildings on foot. As stated above the lease defines common parts and says that these "*are intended to be used by the tenants and occupiers of the Building and the Flats*".

The problem is that the tenants who do not have parking bays have no reason to use the parking area at all. It is assumed that they are all in the Applicant's position in not having codes so that they can use the security gate to get in and out. It is simply unrealistic to infer that they would just walk into the parking area and sit there or walk around.

The fact is that the parking bays themselves are not hatched. They do not form part of the common parts and any repair or maintenance of the bays cannot form part of a service charge. The Tribunal concludes that the remainder of the parking area and, in particular, the security gate are also not common parts. Thus the tenants who do not have parking bays should not have to pay for the parking area or the security gate as part of their service charges.

Conclusions

39. Taking all these matters into account and doing the best it can, the Tribunal's conclusions are that the lease terms are not clear in certain respects. This is unfortunate, to say the least, as it is written in highly complex and legalistic language. The provision as to payments on account of service charges is clear, as stated above, and it does not include a general sum on account of future service charges. This rather defeats the object of a sinking fund because that relies on a plan over some years as to when general repairs, decoration and maintenance should be undertaken.

40. The provision as to the repairs to the roof excluding the insulation can be included in the service charge because it seems to be agreed that the repairs were necessary. The landlord's legal requirement is to keep the structure of the whole of the buildings in repair which means that such costs can form part of the service charge. Having said that, if the work was required because of a breach of contract or negligence on the part of the builder within 6 years or 3 years respectively prior to the defect being discovered, then the cost must be claimed from the contractor.

41. If the Respondent has not made a demand against either Lux or the contractor, if different, and then instituted court proceedings within the statutory limitation period, then it is possible that such a demand is now out of time in which case the Respondent needs to consider its position. In theory, leaseholders could launch litigation against Lux Homes Ltd. but, in practise, it is the Respondent who should have started any claim on time rather than just expect the leaseholders to pay.

42. To suggest that the roof repair was below the insurance excess limit of £1,000 is not correct. It is wrong to split one contract for work into separate costs for scaffolding, inspecting, cleaning the valleys and replacing tiles etc. The

company used was not just a scaffolding company and the total estimated cost would or should have been known after the scaffolding was erected.

43. There is no suggestion by the Applicant that the cost to her was more than £250 in respect of any particular item of service charge i.e. she cannot use the total amount or just add up all the service charges. Thus no consultation has been necessary.

The Future

44. The Tribunal cannot enter into a public examination by calling its own evidence. All it can do is use its members' experience and apply that to the evidence presented. It apologises for having to use such technical legal language, but the whole case has turned on what are quite complicated legal principles which could not really have been described in any other way. Both parties will no doubt be disappointed with some of this decision but the manager's communication skills could be described as have been sadly lacking.

45. The Tribunal recommends that the Respondent and the leaseholders should meet to discuss the future. The Tribunal agrees that a properly planned sinking fund is a good idea for leaseholders as it spreads the cost of major anticipated maintenance over a number of years.

46. If everyone agrees to this, the leases should be revised to allow for a sinking fund, and should be brought into line with modern lease standards at the cost of the landlord for the reasons set out in the costs decision. It is hoped that the following suggestions would help:-

(a) The lease should make it clear how the proportions of the service charges are to be calculated. Leaving the decision as to proportions to the landlord alone may well be void for uncertainty. It is not even suggested, for example, that the total collected should be 100% of the costs incurred.
(b) It should be made clear that those without parking spaces do not have to pay service charges for either the parking area or the security gate. This would involve removing the hatching from the parking area.
(c) A properly planning sinking fund should be set up.
(d) An annual meeting between leaseholders and landlord would be very helpful.
(e) The lease allows the landlord to employ managing agents or collect costs of management. The Tribunal was not asked to make any decision about the current arrangement. However, the Respondent seems to be collecting a management fee for itself which, without some evidence about what costs have been actually incurred, is somewhat doubtful as to its validity. The ground rents are not exactly small.

Costs

47. The Tribunal has been asked to make orders to ensure that the Applicant does not have to pay for the landlord's costs of representation in this case. The Respondent has been asked whether it intends to ask for costs and it says that it will. At the hearing, neither party wanted to expand on their basic case that they wanted, or did not want, as the case may be, such orders.

48. The Tribunal's jurisdiction is not what is sometimes referred to as 'costs shifting' which is contrary to the situation in the civil courts. In other words, the 'winning' party can expect a costs order in the courts but not before a Tribunal. In this case the Respondent relies upon the terms of the lease which provide for costs to be recovered in this sort of case subject to any over-riding decision of this Tribunal.

49. With respect to the Applicant, she should have taken legal advice before starting along this road. She would then have understood the £250 rule and that under the terms of the lease she has to contribute to repairs to the roof of 70A Guildford Street even though her flat is not under that roof.

50. Nevertheless, the Applicant has succeeded on significant issues and many of the problems have been created by a highly complex but inadequate lease which is, of course, the landlord's responsibility. Even though the current landlord is not Lux Homes Ltd., the Respondent must have seen these leases when it purchased the site and is now the responsible landlord. The Tribunal has had to rely on *contra proferentem* to a considerable degree to ensure justice to the leaseholder Applicant and, indeed, to the other leaseholders.

51. The Respondent's lay representative attended both hearings without any legal representation and the conclusion of the Tribunal is that, on balance, it should make the two Orders requested by the Applicant.

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Judge Bruce Edgington
25th November 2021

ANNEX - RIGHTS OF APPEAL

i. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. 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.

iii. 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.

iv. 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.