FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

V: CVPREMOTE

Case reference	**:**	**CAM/00KA/LSC/2022/0046**
Property	**:**	**Flat 45, The Elms, St. John's St, Luton, LU1 2EE**
Applicants	**:**	**(1)Kiran Tiwana (2) Pavan Tiwana**
Represented by	**:**	**In person**
Respondent	**:**	**Michael Laurie Magar Ltd, t/a MLM Property Management**
Represented by	**:**	**Mr Craig Forrest MIRPM AssocRICS**
Type of application	**:**	**Application for payability and reasonableness of service charges, pursuant to s.27A Landlord and Tenant Act 1985**
Tribunal	**:**	**Judge Stephen Evans** **Mrs Michele Wilcox BSc FRICS**
Date of hearing	**:**	**11 November 2022**
Date of decision	**:**	**8 December 2022**

DECISION

DECISION

The Tribunal dismisses the application and determines that all the relevant costs challenged by the Applicant were costs reasonably incurred and reasonable in amount.

REASONS

Background

1. The Applicants, by their application dated 28 July 2022, seek a determination as to the payability and reasonableness of service charges, pursuant to s.27A of the Landlord and Tenant Act 1985.

Relevant Law

2. See Annex 1 to this decision.

The Property

3. The Property is in a flat a building of 52 flats, built in about 2017.

4. The Respondent took over management of the building in October 2019.

5. No inspection was deemed necessary by the procedural judge, nor did we consider one was needed. Photographs and videos were provided in the bundle.

Lease Terms

6. The Lease is dated 15 September 2017 between the Applicants, the lessor and the Respondent's predecessors in title as Management Company.

7. The Lease terms can be briefly stated, since no point was taken by the Applicant that any services for which a charge has been made by the Respondents did not fall within the service charge machinery of the Lease.

8. The Applicants are required to pay a fair and reasonable proportion of the service charge expenses.

9. The service charge year is the calendar year, but the lessor may change the dates of the service charge year (as it had in this case, to the year ending 24 March).

10. Service Costs are those set out in Part 2 of Schedule 7 of the Lease.

11. The Services are those undertaken by the lessor or the management company as set out within Part 1 of Schedule 7.

12. By clause 6, the Management Company covenants to perform the obligations contained in clause 10, paragraphs 2, 3, and 4 of Schedule 6.

13. By Schedule 1 to the Lease, the Property excludes certain retained parts.

14. Schedule 4 contains the leaseholder's covenants, which include at paragraph 2.1 an obligation to pay an estimated service charge on the rent payment dates in 2 equal instalments, i.e. 25 March and 29 September.

15. It also contains at paragraph 5.2 the following:

> "5.2 To pay:
>
> 5.2.1 a fair and reasonable proportion determined by the landlord of any such rates, taxes or other impositions and outgoings that are payable in respect of the Building; and
>
> 5.2.2 a fair and reasonable proportion determined by the landlord of any such rates, taxes or other impositions and outgoings that are payable respect of the Property together with other land (whether or not including any other parts of the Building)"

16. Schedule 6 contains the lessor's covenants, including a covenant to give quiet enjoyment and to insure the building (paragraphs 1-2); to rebuild following destruction or damage (paragraph 3); to provide the Services (paragraph 4); to provide an estimate of Service Costs before or at the start of the service charge year (paragraph 4.2); and as soon as reasonably practicable after the end of the service charge year to provide a certificate of service charge costs and the Service Charge for that year (paragraph 4.3).

17. Schedule 7 contains the relevant Services and Service Costs.

The Hearing

18. At the commencement of the hearing it was necessary to undertake a scoping exercise to define the issues.

19. After the Tribunal's directions had been sent out in August 2022, in September 2022 the Respondent had finally produced service charge accounts for the year ended 24 March 2021, together with draft accounts for 2022. In addition, in September 2022 the Respondent had served a demand for the balancing deficit for the year ending 24 March 2021. In October 2022 it produced service charge accounts for the year ending 24 March 2022,and yet another demand.

20. The Applicant's first Scott Schedule was produced on or about 22 September 2022, but then another revised schedule was produced on 26 October 2022. Although the Respondent had been able to respond to the September 2022 Scott Schedule, it had not been afforded any time for, and

there had been no directions for, the Respondent to respond to the Applicants' October 2022 Scott Schedule.

21. It was confirmed with the First Applicant on behalf of both Applicants that the only matters they wished the Tribunal to consider were the items in the October 2022 Scott Schedule (entitled "New Schedule of Disputed Service Charges"). The Respondent was in a position to be able to respond to the items on that Schedule during the hearing, and the parties were in agreement to proceeding on that basis.

22. During the course of the hearing, the Second Applicant wished to join the video hearing for a limited time. The Tribunal was informed she was joining from Germany where she works. Pursuant to the guidance which had been given in *Agbabiaka (evidence from abroad); Nare guidance)* [2021] UKUT 286 (IAC), the Tribunal informed the Applicants that the Second Applicant might not give evidence, only observe and make submissions (legal arguments) based on written witness statements/ documents. This is because witnesses (the parties and others) cannot give oral evidence from abroad unless permission has been obtained from the country they would be giving evidence from; the Tribunal notes that Germany has objected to evidence being given in this way.

23. The Second Applicant was willing and able to participate for a short while by observing and making representations on the written evidence before us.

Issues

24. The Applicants, either during the scoping exercise or later in the course of the hearing, withdrew challenges to the following items on the New Schedule of Disputed Service Charges:

    (1) Additional cleaning charges £155;

    (2) Front door replacement (part of demand for £218.21);

    (3) No reserve fund contribution;

    (4) Invoice dated 9 September 2022.

25. The Tribunal struck out the following item on line 2 of the Scott Schedule:

    "Future repairs and maintenance identified in Brian Johns Associates report: tenants should be given visibility of identified and forecasted repairs following Brian Jones Associates report including estimated value (total and per tenant) and timings. This will allow us to budget."

26. The Tribunal struck out that item pursuant to the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013, Rule 9(1)(e), on the grounds there was no reasonable prospect of the Applicants' case succeeding on this item. The Applicants were given the opportunity of

making representations, but were unable (as their own Scott Schedule reveals) to identify any cost for this item, because the Respondent had not served any demand yet, whether actual or estimated, or budget in respect of this item. Such costs might never be incurred. It was an item for the future, if at all, we determined.

27. Accordingly, this left only the following matters to be considered:

    (1) Invoice, 26 July 2022, for cold water booster works (£153);
    (2) Invoice, 23 June 2022, for deficit for year ending 24 March 2020 (£188.45);
    (3) Invoice 14 October 2022, for £218 (Part only of this sum - electricity element and refuse removal).

Determination

(1) Invoice, 26 July 2022, for £153 for cold water booster works

28. The relevant demand gives a description of "replacement cold water booster pump" in the sum of £153.

29. The Applicants' complaint was that the Respondent had claimed that it was due to wear and tear with this pump required replacement: see the Respondent's e-mail of the same date, timed at 2:31pm. The Applicants questioned how it was possible that this wear and tear occurred, given that the building is only 5 years old; and that, unless it was a result of vandalism, the charge for the repair ought to have been claimed via insurance.

30. Furthermore, they asked whether, if the replacement of this pump was due to genuine wear and tear or vandalism, what was the root cause of the issue, and would it become a regular payment? They also wanted to know whether or not it would resolve the numerous issues that the Applicants said that they had had with water and heating. They also wanted to know whether or not the replacement of the pump had been identified by Brian Johns Associates in their report.

31. The Respondent explained that it had become apparent when undertaking routine servicing that there were issues with the cold water booster pumps. They had suffered wear and tear. The cost of replacement was not recoverable from any third party; it had not arisen from an insurable risk. The Respondent wrote to all leaseholders to notify them of the issue.

32. At the same time, 2 quotations were obtained for necessary works, from the existing contractor and another specialist. The lower quote was charged to the leaseholders in a total sum of £7956 including VAT. All leaseholders pay 1.9231% of the relevant costs, hence the £153 charge.

33. An ad hoc demand had to be raised, because the Respondent did not have sufficient sums to pay the total sum. It is a RMC with no assets. It has managed to successfully receive payment from all the leaseholders.

34. The Respondent relied on Schedule 4, paragraph 5.2 for its contractual ability to recover this sum.

35. The Respondent further stated that, to the best of its knowledge, the issue with the cold water pumps had been resolved; but the Respondent emphasised it did not have a crystal ball. The Respondent said that there is an annual contract for maintenance (for a term of 12 months less a day) which is already in place.

36. The Respondent clarified that Brian Johns Associates had been asked to provide a formal specification for the maintenance of the system, but they had not been instructed to do a condition report. The Respondent explained that it would engage a specialist to do such work, because as managing agents they were not consultants; although they had a good understanding of systems such as this, they were not expert enough to do a specification for such a complex system.

37. The Respondent went on to explain the costings of the Brian Johns Associates, which are not strictly relevant for these purposes. The Respondent also explained that servicing will always be part of the service charge, but it did not at this stage expect any third party to have to rewrite the specification.

38. In the Tribunal's determination, the sum demanded was a service charge payable in respect of a relevant cost which had been reasonably incurred. The pump required replacement, and did not result from vandalism or an insurable risk, rather from wear and tear. The cause of the wear and tear is irrelevant. As was explained in *Daejan Properties v Griffin* [2014] UKUT 0206 (LC):

> "88.... The question of what the cost of repair is does not depend on whether the repairs ought to have been allowed to accrue. The reasonableness of incurring the cost of remedial work cannot depend on how the need for a remedy arose."

39. As to the amount claimed, the Applicants had no alternative quotation. In *Enterprise Home Developments LLP v Adam* [2020] UKUT 151 (LC) the Upper Tribunal held at paragraph 28:

> "Much has changed since the Court of Appeal's decision in *Yorkbrook v Batten* but one important principle remains applicable, namely that it is for the party disputing the reasonableness of sums claimed to establish a prima facie case. Where, as in this case, the sums claimed do not appear unreasonable and there is only very limited evidence that the same services could have been provided more cheaply, the FTT is not required to adopt a sceptical approach."

40. It is equally trite law that the landlord need not choose the least expensive option available to it. Pursuant to *Forcelux v Sweetman* [2001] 2 EGLR 173, a landlord is not obliged to obtain the lowest possible price available on the market. However, in this case, the Respondent did choose the lower of the 2 quotations obtained.

41. For all the above reasons, we find the sum reasonable in amount and the proportion of £153 payable by the Applicants.

(2) Invoice, 23 June 2022, for deficit value for year ending 24 March 2020 (£188.45);

42. The relevant demand bears a description "balancing deficit y/e 24/03/2020".

43. The Applicants confirmed that they had settled payment of this invoice, as otherwise they would have incurred an administration charge.

44. The Applicants' argument was simple: pursuant to section 20B(1) of the Landlord and Tenant Act 1985 the demand fell outside of the 18 month period afforded by the legislation.

45. The Applicant in its statement of case referred to *No.1 West India Quay (Residential) Ltd* v *East Tower Apartments Ltd* [2020] UKUT 163 (LC) which, they say, clarified 2 key elements: (1) demand of service charge costs within a period of 18 months and (2) recovery of legal costs by their landlord, where a leaseholder has challenged the reasonableness of the service charge.

46. The Respondent's response was equally simple: it relied on a letter dated 22 September 2020, which stated it was a s.20B(2) notice relating to the year ended 24 March 2020, and which included the following words:

"You will be required to pay your proportion of this amount less any on account payments you have already made. Total Costs £48,914.32."

47. The Respondent further contended that the above figure was less than the actual expenditure on page 5 of the relevant accounts, which is stated to be £44,899.

48. The Applicants in response contended that they were not saying that the letter did not comply with the requirements of the law.

49. The Tribunal notes the *West India* case went to the Court of Appeal (reported at [2021] EWCA Civ 1119; [2022] H.L.R. 38) but fails to see the relevance of the case, save that it confirms a s.20B notice must be a valid contractually demand. The case otherwise concerns legal costs, which are not in play here.

50. Given no challenge was made to the letter of 22 September 2020, we are satisfied that the Respondent has complied with s.20B(2) of the Act, and that the sum of £188.45 is contractually payable. We were not informed when the relevant costs relating to the balancing exercise were incurred, but taking the earliest possible date of 24 March 2019, the letter was in time. Moreover, it informed the Applicants that costs had been incurred and that they would be required to contribute to them (which they knew would be in accordance with their percentage of 1.9321%). The actual cost for the year was lower than the sum on the s.20B Notice.

51. We therefore dismiss the Applicants' challenge to this sum.

(3) Invoice 14 October 2022, for £218 (Part of this sum - electricity element and refuse removal only)

52. The Applicants complained that electricity had been increasing significantly yearly, and asked what the Respondents could do to reduce it. The Applicants pointed to the fact that the actual figure for electricity in 2021 was £6669, but had shot up to £11947 in the year ending 2022.

53. The Applicants accepted that the cost was reasonably incurred but challenged the reasonableness of the amount.

54. Mr Forrest explained that the Respondent used Full Power Utilities, an ARMA partner for energy supplies. This body goes to the competitive market and seeks tenders to identify the cheapest providers. The Respondent did not have the utility contracts to hand, however.

55. The Respondent explained that when the electricity bills were submitted there was an additional £3900 over the budgeted figure of £8000 for that year. Readings taken had been estimates, and then the actuals came in higher.

56. The Respondent explained that it was conceivable that prior to 2019 the building was not fully occupied, so electricity usage would have been less.

57. The Tribunal accepts that the increase in electricity costs here is such as to raise a prima facie challenge as to reasonableness on the part of the Applicants, but we determine that the Respondent has answered the questions and met the objections satisfactorily. It had shopped around in the market for the cheapest supplier, and had paid the actual amounts which had been demanded by that provider. There was at least an explanation as to why electricity might have been at a lower cost in previous years.

58. The Applicants did not assert alternative figures. We determine that the cost charged over and above the budgeted cost was reasonable in amount.

59. As to refuse removal, the Applicants' written case asks how the Respondent is intending to identify those responsible for the additional refuse, which

they agree requires removal, and for which they are being charged - despite not occupying the property, nor being responsible for the littering when they did occupy the property.

60. The Applicants refer to their e-mail of 28 April 2020 to the Respondent, in which they state "refuse removal- not agreed-we have never had any rubbish that overflows. On top of the council tax we are not prepared to pay this in addition. I would suggest this is raised with the council."

61. The Applicants relied on photographs which showed Luton Borough Council "Biffa" type bins overflowing into the bin store, and also some videos of the same. These were taken one day after the Respondent's representative had attended the property for inspection. There were also photographs dating from 31 August 2021 and 16 October 2022 showing the same thing. The Applicants explained that every time they visited the Property, that was the state in which the bin store presented. This had the unfortunate result that whenever they entered the building, they could smell this refuse coming from the bin store.

62. The Respondent explained that the bin rooms are cleaned as and when required, once per week on a Monday. Photographs taken on a Saturday or Sunday, some 6 or 7 days after such cleaning, could be expected to show a considerable state of refuse. The Respondent accepted that the landlord could increase removal to a daily collection, but it did not consider that would be reasonable.

63. The Respondent denied there was evidence of continuous problems. In this regard it relied on its own photographs which showed the bin store in a good state. These date from April 2021, June 2021 and August 2021.

64. The Respondent pointed to the letter to PCS Services dated 15 March 2020 in which the Respondent accepted that company's quotation regarding cleaning at the building, to commence on 25 March 2020 for a period of 364 days; and that such cleaning included "sweep/litter pick internal and external bin stores on a weekly basis and ensure all floors are cleared of rubbish."

65. However, the relevant refuse removal cost was additional to the contract, as we understand it.

66. The Respondent explained there was a handful of people making a lot of mess, which had resulted in costs of £3388 in the year ended 2022, as per the accounts on page 5. This was an increase over the budget of £1500, but we note it is less than the actual figure for 2021, which was £3650.

67. The Respondent explained that there had been no other complaints from any other leaseholders regarding the bin store.

68. In response to the Respondent's submissions, the Applicants stated that the Respondent's photographs were "not legitimate", because they had never seen the bin store as tidy. They did not seek to argue for a daily clean.

They said other leaseholders had not complained because many were subletting.

69. In the Tribunal's determination, the cost of refuse removal was both reasonably incurred and reasonable in amount. The removal of additional refuse had to be undertaken, not least from a hygiene perspective. In the Tribunal's wide experience, Councils will not remove refuse if it is not correctly deposited in bins. We consider that both parties' photographs are genuine, but only represent a spot check in time. We cannot be satisfied that the bin store is more often than not in the state asserted by the Applicants; they accept that their inspections are infrequent, and we accept that no other leaseholder has complained. We agree with the Respondent that a weekly refuse removal cost is reasonable, and that misuse of the bin store may occur between cleans which does not represent a lack of cleaning or supervision on the part of the Respondent.

70. The Applicants have no alternative quotations, and the Tribunal has no reason to be sceptical about the costing. We consider it reasonable in amount, therefore.

Application under Section 20C/Paragraph 5A to CLARA

71. In *Tenants of Langford Court v Doren Ltd* (LRX/37/2000), HHJ Rich held:

> "In my judgement the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise.....In my judgement the primary consideration that the LVT should keep in mind is 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. Excessive costs unreasonably incurred will not, in any event, be recoverable by reason of s.19 of the Landlord and Tenant Act 1985. Section 20C may provide a short route by which a Tribunal which has heard the litigation giving rise to the costs can avoid arguments under s.19, but its purpose is to give an opportunity to ensure fair treatment as between landlord and tenant, in circumstances where even although costs have been reasonably incurred by the landlord, it would be unjust that the tenant or some particular tenant should have to pay them."

72. The Tribunal understands the Applicants' central complaint to be that they always feel unable to budget, because the estimated service charges are often considerably lower than the actual figures in due course. They agree the Respondent can levy ad hoc payments under the Lease, but they never had any issue pre October 2019, when the other managing agents were in place. Nowadays, they do not know what to expect. They considered the Respondent had fobbed off their complaints, but could not point to specific correspondence showing this.

73. In response, the Respondent emphasised the Applicant's failure to follow the directions, which had resulted in an amended Scott Schedule as late as October 2022. It considered that it was wholly unreasonable for the Applicants to go on a fishing expedition without evidence to back up their claims. It was clear that the number of items had been withdrawn or struck out, either because they had not been pleaded well or not well argued. Mr Forrest also pointed to the fact that he had spent about 10 hours on these proceedings at a rate of £150 ex VAT, together with disbursements of £77.50.

74. He accepted that the Respondent was only just getting through a period of getting up to date with management of the estate after the previous agents left.

75. In the instant case the Tribunal determines that the Applicants' application under s.20C/para 5A fails; accordingly, the Respondent's costs in connection with these proceedings may be regarded as relevant costs to be taken into account in determining the amount of any service charge or administration charge payable by the Applicants, for the following reasons.

76. The Tribunal has found that the Respondent has won the case. The Respondents have been put to a considerable amount of work defending the application, much of which was withdrawn by the Applicants in the October 2022 Scott Schedule and/or at the hearing itself. This was not simply the result of late accounting by the Respondent. It was also clear that many of the Applicants' concerns were simple queries or questions of the Respondent, rather than her establishing a prima facie case that costs were not reasonably incurred or reasonable in amount.

77. It would not be just and equitable to prevent the Respondent recovering the costs of these proceedings from the Applicants through the service charges or by way of any relevant administration charge.

78. We do express hope, however, that the Respondent will aim to be more accurate in its service charge budgeting, so as to help the Applicants and other leaseholders in the future, particularly now that the accounts appear up to date.

Judge: S J Evans

Date:
8/12/22

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 20B

Limitation of service charges: time limit on making demands.

(1)If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then

(subject to subsection (2), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

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

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, a First-tier Tribunal, or the Lands 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) .....
(3) .....

(4) 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.

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.