FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AF/LSC/2021/0325**
HMCTS code (paper, video, audio)	:	**V: FVHREMOTE**
Property	:	**42 Tony Law House, 1 Betts Way, Penge, SE20 8TG**
Applicant	:	**Mr K Cox**
Representative	:	**In Person**
Respondent	:	**Anchor Hanover**
Representative	:	**Ms D Matusevicius FIRPM**
Type of application	:	**For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985**
Tribunal members	:	**Mr A Harris LLM FRICS FCIArb** **Ms S Phillips MRICS**
Venue	:	**6 June 2022 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**15 June 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote audio/video hearing which has not been objected to by the parties. The form of remote hearing was V: FVHREMOTE. A face-to-face hearing was not held because all issues could be determined in a remote hearing. The documents that I was referred to are in two bundles, the applicants bundle of 359 pages and a respondents bundle of 395 pages, the contents of which I have noted. The order made is described at the end of these reasons.

A face to face hearing was originally arranged which was changed to a video hearing. The respondents representative attended the tribunal offices for a hearing say she had not received details of the change. After discussion Ms Matusevicius agreed to participate by telephone from a tribunal hearing room and the case was heard on that basis.

Decisions of the tribunal

(1) The tribunal makes the determinations as set out under the various headings in this Decision

(2) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of the service charge years 2016 to date.

The hearing

2. The Applicant appeared in person at the hearing and the Respondent appeared in was represented by Ms D Matusevicius.

The background

3. The property which is the subject of this application is a purpose-built studio flat in a sheltered housing scheme of 51 flats comprising 38 studio flats 11 one-bedroom and one two-bedroom and one three-bedroom flat. The block is a purpose-built independent living retirement development for those aged 55 and over.

4. The applicant challenges the reasonableness of the service charge payable in respect of Tony Law House during the years 2016 to 2022.

The initial application also challenged years from 2010 to 2016 but the applicant accepts that these are time barred.

5. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

6. The Applicant holds an assured shorthold tenancy of the property the terms of which require the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

The issues

7. At the start of the hearing the parties identified the relevant issues for determination as follows:

   (i) whether lift repair and renewal charges are lawful under section 11 of the Landlord and Tenant Act 1985

   (ii) whether charges for tree surgery works are included in the service charge covering a garden contract and whether these are payable.

   (iii) Whether charges for carpets, surveillance/security equipment and door entry systems are payable.

   (iv) whether charges for the scheme manager are reasonable

   (v) whether head office staff costs are reasonable

8. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

Lift charges

	Lift replacement	lift service contract	lift inspection	lift repairs	Lift Insurance
Jan - Mar 2016	£ 315	£ 168		£ 94	
2016 - 2017	£ 1,635	£ 865		£ 120	£ 200
2017 -2018	£ 1,635	£ 879		£ 1,000	£ 300
2018 - 2019	£ 1,635	£ 879		£ 1,000	£ 181
2019 - 2020	£ 1,261	£ 947		£ 632	£ 181
2020 - 2021	£ 2,860	£ 758	£ 224	£ 446	

The Applicant's case

9. The Applicant challenges the charges for the lift as he is not a leaseholder and the lift is an intrinsic part of the infrastructure of the building for which he is not liable under section 11 of the Landlord and Tenant Act 1985. The act states that the landlord is responsible for keeping in repair the structure and exterior of the home, the roof, windows, external doors and boilers. These responsibilities cannot be passed on to a tenant under the Act.

10. Section 11(1A) extends the landlord's responsibility to the common areas of the building. The Applicant exhibited webpages produced by Shelter and the Citizens Advice Bureau (CAB).

11. The page produced by Shelter is entitled repairs and maintenance in council and housing association homes and states that the landlord is responsible for most repairs in your home including common areas such as lifts and communal entrances.

12. The CAB advises that for tenancies beginning on or after 15 January 1989 the section 11 responsibilities extend to the common parts of the building for example entrance holes stairs and lifts.

13. The Applicant also quotes from a report entitled introduction to service charges produced by Adrian Waite (Independent Consultancy Services) Ltd which states that tenants do not pay for repairs and maintenance or capital costs as these are met by the landlord and paid for through rents.

The Respondent's case

14. The Respondent is a not for profit organisation. The applicant challenges the reasonableness of service charge payments on the basis that various cost should not have been allocated to the service charge but should have been paid for by rent revenue.

15. Section 18 of the 1985 Act is entitled *"Meaning of service charge and relevant costs"*

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.

16. Rent is not defined in any of the Rent or Housing Acts but has been held by the courts to be a regular contractual payment which a landlord is entitled to receive from the tenant in return for the tenant's use and occupation of premises. The article from Shelter quoted by the Applicant confirms that rent can be defined as the total amount paid to a landlord by an occupier in return for use and occupation of accommodation. Therefore, rent revenue willing include any costs relating to the repair/works to an individual dwelling for which the landlord is responsible under the tenancy.

17. The service charge is payable for the upkeep of communal areas within the development and for other shared services and facilities.

18. Section 11 of the 1985 Act implies repairing obligations into a tenancy which includes

    a) keeping in repair the structure and exterior of the dwellinghouse…
    b) Keeping in repair and proper working order the installations in the dwellinghouse for the supply of water, gas and electricity and the sanitation… But not other fixtures fittings and appliances for making use of the supply of water gas or electricity

19. It is the Respondent's position that the lift does not form part of the structure of the dwelling and as such does not fall within the provisions of section 11.

20. The Respondent relies on advice from Walker Morris, solicitors who do not consider that repair/replacement of a lift falls within section 11 of the 1985 Act. Specific provision is made in the act in respect of flats and the obligation to keep in repair is extended to the structure and exterior of the building in which the flat is located provide the landlord has an

interest in it. In relation to installations the obligation is extended to installations which serve the flat provided that they are owned by the landlord or in his control.

21. Walker Morris advised that in considering whether or not a lift was part of the structure and exterior for the purposes of section 11, the application of the subsection is a question of fact and degree examined by the court in every case. The argument that a communal lift is part of the structure is not supported by case law.

22. Case law on the meaning of structure in the context of section 11 has not led to a comprehensive and exhaustive definition of that term by the courts. The Court of Appeal *in Marlborough Park Services Ltd v Rowe (2006)* held that a good working definition of structure was that given by the court in *Irvine v Moran [1991] 1 EGLR 261 which said, "structures consist of those essential elements of the dwellinghouse which are material to its overall construction, i.e. matters which gave it it's essential appearance, stability and shape but did not extend the way the property would be fitted out and equipped decorated and generally made habitable."*

23. Walker Morris go on to say that while items such as the staircase have been healthy part of the structure is essential to complete the intended appearance stability and the identity of the building in their view lift should be regarded as a mere fixture and therefore outside section 11. There may be certain situations dependent on the facts of the case where a lift shaft could be considered as part of the structure they should not arguably include the lift apparatus and mechanism itself.

24. The courts have frequently held that repair can include renewal of something which was there, but which has become dilapidated or worn out and a modern equivalent is necessary.

25. Lift insurance is not a repair and not covered by section 11.

The tribunal's decision

26. The tribunal determines that the amount payable in respect of lift replacement charges, lift service contract, lift inspection and lift repairs is nil. The lift insurance charges shown in the table above are payable.

Reasons for the tribunal's decision

27. Starting firstly with the tenancy agreement clause 3 sets out the landlords repairing responsibilities which include the structure and outside of the premises and which then goes on to list various items but does not include the lift.

28. Clause 4 is entitled repairing installations and states that the landlord will maintain and repair any systems they have provided in the premises for heating and removing waste water and supplying water gas and electricity but again under this section does not mention lifts.

29. Clause 5 of the tenancy agreement states the landlords will repair and maintain any communal (shared) areas at the scheme and repair maintain electric lighting in these areas.

30. The schedule of services in the agreement under the heading "Running costs of the scheme" includes lift insurance. Under "Equipment repairs" the schedule includes lifts and under "Maintenance contracts", lifts and "Charge for using major items of equipment" also includes lifts.

31. The first consideration is the provisions of section 11 of the 1985 Act the relevant parts follow with added emphasis.

11 *Repairing obligations in short leases.*

(1) In a lease to which this section applies (as to which, see sections 13 and 14) there is implied a covenant by the lessor—

(a) **to keep in repair the structure and exterior of the dwelling**-house (including drains, gutters and external pipes),

(b) **to keep in repair and proper working order the installations in the dwelling-house for the supply of water, gas and electricity and for sanitation (including basins, sinks, baths and sanitary conveniences, but not other fixtures, fittings and appliances for making use of the supply of water, gas or electricity),** and

(c) to keep in repair and proper working order the installations in the dwelling-house for space heating and heating water.

(1A) **If a lease to which this section applies is a lease of a dwelling-house which forms part only of a building, then, subject to subsection (1B), the covenant implied by subsection (1) shall have effect as if—**

(a) the reference in paragraph (a) of that subsection to the dwelling-house included a reference to any part of the building in which the lessor has an estate or interest; and

(b) any reference in paragraphs (b) and (c) of that subsection to an installation in the dwelling-house

included a reference to an installation which, directly or indirectly, serves the dwelling-house and which either—

(i) forms part of any part of a building in which the lessor has an estate or interest; or

(ii) is owned by the lessor or under his control.

(1B) Nothing in subsection (1A) shall be construed as requiring the lessor to carry out any works or repairs unless the disrepair (or failure to maintain in working order) is such as to affect the lessee's enjoyment of the dwelling-house or of any common parts, as defined in section 60(1) of the Landlord and Tenant Act 1987, which the lessee, as such, is entitled to use.

(2) The covenant implied by subsection (1) ("the lessor's repairing covenant") shall not be construed as requiring the lessor—

(a) to carry out works or repairs for which the lessee is liable by virtue of his duty to use the premises in a tenant-like manner, or would be so liable but for an express covenant on his part,

(b) to rebuild or reinstate the premises in the case of destruction or damage by fire, or by tempest, flood or other inevitable accident, or

(c) to keep in repair or maintain anything which the lessee is entitled to remove from the dwelling-house.

(3) In determining the standard of repair required by the lessor's repairing covenant, regard shall be had to the age, character and prospective life of the dwelling-house and the locality in which it is situated.

(3A) In any case where—

(a) the lessor's repairing covenant has effect as mentioned in subsection (1A), and

(b) in order to comply with the covenant the lessor needs to carry out works or repairs otherwise than in, or to an installation in, the dwelling-house, and

(c) the lessor does not have a sufficient right in the part of the building or the installation concerned to enable him to carry out the required works or repairs,

then, in any proceedings relating to a failure to comply with the lessor's repairing covenant, so far as it requires the lessor to carry out the works or repairs in question, it shall be a defence for the lessor to prove that he used all reasonable endeavours to obtain, but was unable to obtain, such rights as would be adequate to enable him to carry out the works or repairs.

(4) **A covenant by the lessee for the repair of the premises is of no effect so far as it relates to the matters mentioned in subsection (1)(a) to (c),** except so far as it imposes on the lessee any of the requirements mentioned in subsection (2)(a) or (c).

(5) **The reference in subsection (4) to a covenant by the lessee for the repair of the premises includes a covenant—**

(a) to put in repair or deliver up in repair,

(b) to paint, point or render,

(c) to pay money in lieu of repairs by the lessee, or

(d) to pay money on account of repairs by the lessor.

(6) In a lease in which the lessor's repairing covenant is implied there is also implied a covenant by the lessee that the lessor, or any person authorised by him in writing, may at reasonable times of the day and on giving 24 hours' notice in writing to the occupier, enter the premises comprised in the lease for the purpose of viewing their condition and state of repair.

Landlord and Tenant Act 1987

60 *General interpretation*.

(1)In this Act—

"the 1985 Act" means the Landlord and Tenant Act 1985;

"charitable purposes", in relation to a charity, means charitable purposes whether of that charity or of that charity and other charities;

"common parts", in relation to any building or part of a building, includes the structure and exterior of that building or part and any common facilities within it;

32. There is no doubt that either expressly under the terms of the tenancy agreement or impliedly under section 11, the landlord is responsible for repairing the structure and exterior. What is less clear is whether the lift counts as part of the structure.

33. Section 11 (b) deals with repair of certain essential installations and the supply of utilities to the dwelling but does not otherwise include fixtures fittings and appliances.

34. Clause 5 of the tenancy agreement states that the Respondent will repair the common parts but does not expressly mention the lift.

35. Section 11(1A) extends the repairing liability beyond the dwelling to any part of the building in which the lessor has an interest or estate and s11(1A)(b) extends this to say that any reference in paragraphs (b) and (c) of that subsection to any installation in the dwellinghouse includes a reference to an installation which directly or indirectly serves the dwellinghouse and is under the control of the lessor.

36. For section 11 to apply, the lifts must either be part of the structure or must be an installation which directly or indirectly serves the dwellinghouse. Section 60 of the Landlord and Tenant Act 1987 quoted above defines common parts in relation to any building or part of the building as including the structure and exterior of that building or part and any common facilities within it. There can be no doubt the lift is a common facility.

37. If the lift is part of the structure and section 11 clearly applies, by virtue of subsections (4) and (5) the tenant is not obliged to make any payment towards the cost of the repairs.

38. If the lift is not part of the structure then the question is whether it is part of the common parts which the landlord is obliged to repair under clause 5 of the tenancy agreement. If so, does that then come under ss11(1A) and (1B) as being something which the landlord is obliged to repair under the terms of the 1985 Act.

39. The tribunal is doubtful that the lift mechanism and car form part of the structure of the building.

40. There can be no doubt that the lift forms part of the common parts of the building as being a common facility for the purposes of section 60 of the 1987 Act. We further consider that the lift is an installation which indirectly serves the dwellinghouse and therefore comes within the scope of section 11.

41. We recognise that section 11(1)(b) refers to certain essential installations but not to other fixtures fittings or appliances. We consider that, in the

context of a sheltered housing scheme where the residents must be over 55, a lift is an essential installation and comes within S11(1)(b). In a sheltered housing scheme of 51 flats, it must be expected that at any time, a proportion of the residents will be of limited or impaired mobility. In a different context, as Lord Wilberforce said in Liverpool City Council v Irwin *"in relation inter alia to the stairs, the lifts and the chutes. All these are not just facilities, or conveniences provided at discretion: they are essentials of the tenancy without which life in the dwellings, as a tenant, is not possible."*

42. The tribunal concludes that the capital cost of lift replacement, the lift service contract, lift inspection costs and lift repairs are the responsibility of the landlord and not chargeable to the service charge. Lift insurance is self-evidently not a repair.

Other Common Services

	Surveillance / security	Warden Call and door entry	contract for door entry	repairs to TV aerial & CCTV	repairs to call system & door entry
2016 - 2017	£ 608	£ 779	£ 626	£ 360	£ 600
2017 -2018	£ 608	£ 1,874	£ 618	£ 200	£ 2,300
2018 - 2019	£ 608	£ 1,874	618	£ 200	£ 2,300
2019 - 2020	£ 608	£ 1,155	1151	£ 240	£ 1,155

The Applicants case

43. The applicant's case is essentially the same as for the previous item that common parts are not the liability of the tenant.

The respondents case

44. In addition to those items listed above the applicants have also previously queried charges relating to installation of a stair lift and the cost of replacing windows. The respondent confirms that neither of these items is chargeable to the service charge.

45. The cost of ceiling and carpet tiles, pictures and door entry systems is chargeable to the service charge.

The tribunal's decision

46. The tribunal determines that the amounts shown in the table above are payable.

Reasons for the tribunal's decision

47. As is clear from the previous section dealing with lifts, section 11 only applies to the structure and exterior and to essential services in the common parts. It does not extend to, anything and everything in common parts. The items listed are covered in the tenancy agreement schedule of services and are therefore contractually payable.

Gardening contract and tree surgery

	Garden Contract	Tree Surgery
2016 - 2017	£ 2,132	£ 32
2017 -2018	£ 2,300	£ 627
2018 - 2019	£ 2,300	£ 1,036
2019 - 2020	£ 2,300	£ 573
2020 - 2021	£ 2,300	£ 2,430
2021 - 2022 budget	£ 2,300	£ 1,670

The Applicant's case

48. The Applicant argues that cutting and felling of trees is a specialist activity which does not fall within normal gardening. For the landlord to introduce a charge for tree felling is illegal as no discussions have taken place between the Applicant and Respondent. Under clause 2 of part B of the general terms in the tenancy agreement the Landlord undertakes to provide the services set out in the schedule and goes on to state that they may, after consulting the tenants, increase ad to remove reduce or vary the services provided. The Applicant states that no consultation took place.

The Respondents case

49. The cost of upkeep of the communal grounds for example gardening and additional gardening services such as tree pruning is appropriately included in the service charge as this forms a service and benefit to the residents beyond the benefit of enjoying occupation of their own home. Prior to the tree works being carried out in 2017/2018 tenants were balloted to seek agreement. The majority including the Applicant agreed those works to be undertaken. The ballot paper completed by the Applicant is included in the papers and the handwritten note *states "the way I see it all trees need to be done every few years, if you like it or not, it's not a lot of money between 50 flats"*.

The tribunal's decision

50. The tribunal determines that the gardening costs and tree surgery costs are chargeable to the service charge

Reasons for the tribunal's decision

51. The tribunal considers that gardening costs can include relevant tree work. In his oral evidence the Applicant stated that some of the trees had become dangerous and branches were falling off. In his response to the consultation the Applicant agreed the works were necessary, accepted that a charge would be made and that it would not be a lot of money split between the flats. The schedule of services in the tenancy agreement includes gardening.

Scheme manager service, Overheads and management

	Scheme Manager Service	Overheads and Management
2016 - 2017	£ 26,907	£ 15,447
2017 -2018	£ 27,092	£ 16,150
2018 - 2019	£ 27,380	£ 16,555
2019 - 2020	£ 26,901	£ 17,099
2020 - 2021	£ 28,361	£ 17,564
2021 - 2022 budget	£ 2,300	£ 1,670

The Applicants case

52. The Applicant argues that all charges relating to scheme managers should be paid out of the rent and not service charges. This also applies to head office overheads and management charges.

53. The Applicant states that he and other tenants had campaigned for a reduction or abolition of the name for scheme managers at the building. He does not believe the scheme managers provide value for money and having two staff appearing on the same day with no staff available on other days appears to be a waste of money. It is claimed the scheme managers are not able to answer questions relating to issues stating that head office would have to have input or deal with a particular issue. An example is the minutes of meetings between scheme managers and tenants. During the Covid lockdown staff attendance must be questioned as well as the attitude to the specifics of the job.

54. On-site presence is not necessary as there is an anchor call emergency telephone line when issues arise. Schedules of staff attendance is said to be compiled from rotas were exhibited.

The Respondents case

55. Scheme managers provide an essential service as they are responsible for the day-to-day running of the location. Prospective tenants are fully aware at the time they take on a tenancy that the scheme managers services provided. While the scheme managers are employed by the Respondent the tenancy agreement makes it clear that the cost of providing the services payable by the tenant within the service charge. Although the schedule attached to the tenancy agreement refers to other costs besides salary costs, they are not there are none in fact paid. The scheme managers do not reside at the property so those costs are not incurred.

56. Head office management and overheads costs are computed at 15% of the service charge. This is common across all of the properties of Anchor.

Decision of the tribunal

57. The tribunal determines that the cost of the scheme managers is reasonable and chargeable to the service charge.

58. The tribunal determines that the charge for head office overheads and management is too high and reduces this to £12,750 per year.

Reasons for the tribunal's decision

59. The tenancy agreement provides for a scheme manager service to be provided. This is a contractual provision which the tribunal has no power to override. The tribunal has considered the evidence as to the cost of the service and determines that the cost is reasonable as charged.

60. In respect of head office overheads and management, the charge is not specific to this block and is a generalised average across a portfolio. Bearing in mind is knowledge and experience of management charges, the tribunal considers that the charges shown above are too high and reduces them to £12,750 per annum.

Variation of tenancy terms

61. The Applicant seeks a ruling that an increase in the service charge above the level of inflation in unreasonable and therefore illegal. The applicant states that one of the essential conditions for living in sheltered accommodation is that the tenant must be on a very low income and

either elderly or vulnerable. The Applicant states that charges have been levied with no regard to the tenant's ability to pay The Applicant seeks a ruling that service charge levels should rise by no more than the level of inflation.

Decision of the tribunal

62. The re-writing of tenancy terms in this way is not within the jurisdiction of the tribunal.

Application under s.20C and refund of fees

63. The Applicant successfully applied for help with fees so no tribunal fees were payable.

64. In the application form the Applicant applied for an order under section 20C of the 1985 Act. Considering the determinations above, the tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Respondent may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

Name: A Harris **Date:** 15 June 2022

Rights of appeal

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

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

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.

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.

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.

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