FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BK/LSC/2022/0111**
Property	**:**	**Flat 2, 43 Wimpole Street, London W1 8AE**
Applicant	**:**	**Shenfield Limited**
Representatives	**:**	**Jonathan Upton of Counsel**
Respondent	**:**	**Mr Mark Saunders**
Representative	**:**	**Mr Tom Morris of Counsel**
Type of Application	**:**	**For the determination of the liability to pay and reasonableness of service charges (s.27A Landlord and Tenant Act 1985)**
Tribunal Members	**:**	**Judge Professor Robert Abbey** **Mr Kevin Ridgeway MRICS** **Mr Alan Ring (Lay Member)**
Date and venue of Hearing	**:**	**5 December 2022 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**20 December 2022**

DECISION

Decisions of the tribunal

(1) The tribunal determines that: -

(2) The tribunal determines that the service charges in dispute and found to be reasonable and payable are those more particularly confirmed and set out below. This is by reference to the Scott Schedule contained within the trial bundle and following the same item numbers listed in that schedule

(3) Otherwise, if service charge items are not specifically mentioned under this heading, then the tribunal has found them to be reasonable.

The applications and background

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 charge payable by the respondent in respect of service charges payable for services provided for **Flat 2, 43 Wimpole Street, London W1 8AE**, (the property) and the liability to pay such service charge.

2. The applicant is the head lessee of the building known as 43 Wimpole Street, London W1 8AE which comprises 15 flats above commercial premises on the ground floor. The flats have their own common entrance hall and staircase.

3. The respondent is the lessee of Flat 2, 43 Wimpole Street, London W1 8AE. The Flat is demised by a lease dated 10th April 1987 ("the Lease") made between (1) Berkely House Estates Limited and (2) Dr D B A and Mrs H E Silk for term of 125 years (less 10 days) from 29 September 1985.

4. The applications to the tribunal were concerned with the reasonableness and payability of service charges for the years ending 2020, 2021 and 2022. The first is for a Landlord and Tenant Act 1985 s.27A determination in respect of service charges arising in the several years mentioned above. In the second application the respondent seeks a determination pursuant to s.20C of the 1985 Act.

5. The relevant legal provisions are set out in the Appendix to this decision. Additionally, rights of appeal are set out below in an annex to this decision

The hearing

6. The face-to-face hearing took place on 5 December 2022 when the applicant was represented by Mr Upton of Counsel and the respondent was represented by Mr Morris of Counsel.

7. The tribunal did not inspect the property as it considered the documentation and information before it in the trial bundle enabled the tribunal to proceed with this determination and also because of the restrictions arising out of the Covid-19 pandemic.

8. The tribunal had before it an electronic/digital trial bundle of documents prepared by the parties, in accordance with previous directions. The documents that were referred to are in a bundle of many pages, the contents of which we have recorded and which were accessible by all the parties.

Decision

9. The tribunal is required to consider whether the services were reasonably incurred and were they of a reasonable standard. To do this the tribunal considered in detail written and oral evidence and the surrounding documentation as well as the oral submissions provided by both the parties at the time of the face-to-face hearing.

10. A preliminary issue regarding compliance with Section 47 of the 1987 Act was considered. The Section 47 legislation requires that every demand for rent/payment carries the address of the landlord and if that address is outside England and Wales, the demand for rent must also carry an address in England and Wales where notices in proceedings can be served on the landlord. Initially this was not done by the applicant.

11. However, as Counsel for the applicant stated "The effect of the language in s.47(2) is that a failure to comply with the requirements of s.47(1) is one that can be corrected with retrospective effect: see *Johnson v County Bideford Ltd* [2012] UKUT 457 (LC); [2013] L. & T.R. 18 at [10]; approved in *No. 1 West India Quay (Residential) Ltd v East Tower Apartments Ltd* [2021] EWCA Civ 1119 at [33]. Thus, the effect of s. 47(2) has been described as "suspensory only" in that any service charge or administration charge is treated as not being due from the tenant to the landlord "at any time before the information is furnished by the landlord by notice given to the tenant": *Tedla v Cameret Court Residents Association Limited* [2015] UKUT 0221 (LC) at [38]. In this case, the tribunal was advised that demands have been re-served with the information required by ss.47 and 48 clearly set out in those re-served demands. It follows that this is no longer a live issue [for the respondent] and no further point on it was pursued by the respondent.

12. At the start of the hearing the respondent made an application to revisit an application made previously on 10 November 2022. At that time the respondent sought further disclosure/directions and an adjournment

and to hold the hearing remotely. Judge Tagliavini decided that the amended directions dated 30th August 2022 were sufficiently clear for the parties to know and understand what is required from them with sufficient time allowed in which to comply. The Judge reminded the parties that failure to comply with the directions could lead to an adverse outcome for the defaulting party. Therefore, the request for further amendments was refused by Judge Tagliavini who confirmed the face-to-face hearing that was dealt with by this tribunal. In the light of this decision and the fact that time was extended by the amended directions this tribunal did not feel it appropriate or proportionate to detract from the decision of Judge Tagliavini.

13. The tribunal noted that the applicant had provided a breakdown of costs, a narrative explanation and copies of invoices in support as its submissions to the tribunal but the respondent has not filed a supplementary reply in accordance with the directions. Indeed, neither party filed any witness evidence. The issues therefore fall to be determined based on the comments and explanations made by both parties in the Scott Schedule and the documentary evidence before this tribunal.

14. The tribunal were required to consider service charges and administration charges arising in service charge years 2019 and 2020 and 2021 and charges for 2021-2022. The tribunal will consider each in turn or by subject matter but by reference to the Scott Schedule.

15. The tribunal is required to consider which argument they prefer in their interpretation of the lease and service charge provisions and the payability of service charges for items in dispute. The tribunal therefore sought precedent guidance to support their decision-making process. The Supreme Court case of *Arnold v Britton and Others* [2015] UKSC 36 is extremely helpful in this regard. This case was about judicial interpretation of contractual provisions analogous to the dispute before the tribunal. The court held-

> *"that the interpretation of a contractual provision, including one as to service charges, involved identifying what the parties had meant through the eyes of a reasonable reader, and, save in a very unusual case, that meaning was most obviously to be gleaned from the language of the provision; that, although the less clear the relevant words were, the more the court could properly depart from their natural meaning, it was not to embark on an exercise of searching for drafting infelicities in order to facilitate departure from the natural meaning; that commercial common sense was relevant only to the extent of how matters would or*

> *could have been perceived by the parties, or by reasonable people in the position of the parties as at the date on which the contract was made….it was not the function of a court to relieve a party from the consequences of imprudence or poor advice".*

16. Accordingly, the tribunal turned to the lease to try to identify what the parties had meant through the eyes of a reasonable reader.

17. There now follows below, a detailed examination by the tribunal of all the service charges items that are in dispute by reference to the form of Scott Schedule utilised and reviewed by both the parties to this service charge dispute. The same item numbers will be used as appear in the Scott Schedule from the Trial bundle.

18. On many of the items listed below, the respondent does not advance any positive case at all but simply reserves his position to object. Further, although the reasonableness of some items of expenditure are challenged, the respondent has adduced no evidence of alternative costs. In *32 St John's Road (Eastbourne) Management Co Ltd v Gell* [2021] EWCA Civ 789; [2021] 1 W.L.R. 6094 the Court of Appeal cited with approval the Deputy President's observations in *Enterprise Home Developments LLP v Adam* [2020] UKUT 151 (LC) it was stated that:

> *"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…."*

19. The tribunal therefore considered each item in the context of this judicial guidance.

20. Items 1, 6, 16 and 18 Building – Staff Costs. The respondent accepts these costs are chargeable pursuant to the lease but the respondent disputes that this item is reasonable in amount. The respondent's position in this regard in relation to the first item is that "Care Management Limited charges a fee to leaseholders equivalent to 10% of the salaries of its staff (which are also charged to leaseholders) and this makes up the staff costs. During the Covid-19 pandemic, Care Management Limited claimed money through the government furlough scheme and therefore Care Management Limited only paid a limited amount towards staff costs. However, Care Management Limited

appear to have continued to charge leaseholders a fee equivalent to 10% of the full staff costs and therefore appear to be attempting to profit from the use of the government furlough scheme. It is the respondent's position is that this is unreasonable. By way of evidence, the respondent said that this issue was raised in the 2020 service charge year and, consequently, the 10% fee was removed for the 2020 service charge year.

21. On the other hand, the applicant says "There are two porters (Eddie and Steve). Eddie works Tuesdays and Fridays, Steve works Mondays, Wednesdays and Thursdays. Eddie continued to attend throughout the pandemic period (he lives locally) so that there was some attendance. Steve was put on furlough during which time Care Management paid Steve 80% of his wage which was recovered and no charge made for January through to August. Care Management have only charged 10% on the wages paid for work undertaken and have not charged on wages recovered through the Furlough Scheme." Having looked at all four similar items the tribunal has decided to deal with them all together as the charge and objection are very similar for all four items. A copy of the full cost breakdown was disclosed to the tribunal. Having perused the evidence in the Trial bundle the tribunal is satisfied that these charges are reasonable and payable.

22. Items 2, 7, 17 and 19 Building Facilities Management. The applicant stated that this is a charge of £1,000 plus VAT for the Facilities Management and invoices were disclosed by way of four quarterly invoices for the supply of a manager. No substantive objection could be discerned from the respondent other than a suggestion that the charge was for other work. Having looked at all four similar items the tribunal has decided to deal with them all together as the charge and objection are very similar for all four items. Having perused the evidence in the Trial bundle the tribunal is satisfied that these charges are reasonable and payable.

23. Item 3 Building Health and Safety, £3738. Of this the applicant said that it had supplied an analysis showing the date, narrative, supplier, net amount, VAT amount and gross amount adding up to £3,738. The applicant further confirmed that there was a fire door survey relating to an annual inspection. The building is 220 years old and occasional adjustments to doors are required most years. The respondent believes this item includes costs relating to surveying fire doors installed as part of the refurbishment works. This survey was required after residents raised serious concerns over standard of the installation of the fire doors. Given the defect identified in the fire doors, it is the respondent's view that the cost of this survey (together with any remedial works required) should be payable by the company responsible for sourcing and installing the first doors. Having perused the evidence in the Trial

bundle the tribunal is satisfied that these charges are reasonable and payable.

24. Item 4 Building – Life Safety Systems, £2119. The applicant asserted that prior to the major works, the fire alarm had been installed in the common parts only in the mid-1980s. To comply with Part L3 of the Building Regulations, a heat detector had to be provided in each flat. Trojan were the installers, EST is the service company, £522 is the annual maintenance fee and, during the year, there were nine call-outs not for installation faults but for one-off causes. The reason why EST were preferred is because they have a 24-hour call-out service, CBGA Robson has experience of Trojan at another building which is not on a 24-hour call-out (£280 + VAT is £336 for the comparable figure).

25. On the other hand, the respondent disputes that this item is reasonable in amount. The respondent believes that the fire alarms were installed as part of the internal refurbishment works and therefore should be guaranteed and costs relating to faults should therefore be claimed by the landlord from the contractor responsible for the supply and installation of the fire alarm system. Further, Trojan provided a quote for a service and maintenance contract comprising of six-monthly visits for a price of £280. It is unclear whether a servicing contract was put in place however leaseholders have been required to pay £2,119 in call out charges due to faults with the current fire alarm system. It is the respondent's position that the majority, if not all of these charges could have been avoided had the system been properly installed and maintained. Having perused the evidence in the Trial bundle the Tribunal is satisfied that these charges are reasonable and payable.

26. Item 5 Building internal repairs. Of this charge the applicant says that in this case, there was a weekend call-out to the managing agent from the occupier of Flat 14 concerning water entering his flat. Emergency contractor was sent to secure building and stop water ingress as an emergency measure. That was treated as service chargeable. All other corrective works were paid for by the lessees concerned, or by insurance company, and not on the service charge account. The applicant pointed out that Flat 16 is a top-floor flat with a roof terrace and, at the time of receiving the emergency call from Flat 14, it could not be known whether the escape of water was related to the structure, common pipework or individual pipework. Emergency action was necessary. The applicant considers that for a weekend call-out charge to secure the building from any further water damage, the charge is considered to be reasonable.

27. The respondent believes the majority of the invoices which fall under this section relate to invoices from Voltix regarding a leak from Flat 16. The respondent's position is that the applicant should claim payment of

these invoices from the leaseholder of Flat 16 pursuant to the indemnity in clause 3(1) of the lease and, accordingly, do not fall within the scope of Schedule 7, paragraph 1 as these are costs which are the liability of a lessee in the building.

28. The Tribunal agrees with this in part. One service charge/fee in the sum of £303 seemed to the Tribunal to be unreasonable. Otherwise, having perused the evidence in the Trial bundle the Tribunal is satisfied that these charges are reasonable and payable.

29. Item 8 Common Parts – Health and Safety £660 The applicant stated that this relates to a request from Mr Saunders and some of the other lessees for the new fire doors to be checked by Capital Fire Doors Limited and for a further report from them. There was no substantive objection to this in the Scott Schedule from the respondent other than to say that the respondent wanted further information. Having perused the evidence in the Trial bundle the tribunal is satisfied that these charges are reasonable and payable.

30. Item 9 Common Parts Electricity £1994.47 The respondent disputes that this is reasonable in amount. The respondent said has only been provided with evidence of the electricity costs totalling £993.39 and therefore required further evidence that the electricity costs for the common parts total £1,994.47. The applicant asserted that he was able to produce to the tribunal one estimated account and five invoices aggregating to £1,740.90, the balance being accounted for by accrual and the estimate. Accruals are expenses incurred but not yet paid while prepayments are payments for expenses for that are not yet incurred. Accruals and prepayments give rise to current liabilities and current assets respectively. This being so, having perused the evidence in the Trial bundle the tribunal is satisfied that these charges are reasonable and payable.

31. Item 10 Common Parts – Security equipment £4753.30 The respondent disputed that this item is reasonable in amount. The respondent believes that part of this items is costs relating to door entry system works as part of the refurbishment works carried out. However he believes these invoices were included in the 2020 service charge year and therefore payment has been demanded twice. The applicant denied that the invoices had been charged twice and produced copy invoices to confirm. Having perused the evidence in the Trial bundle the tribunal is satisfied that these charges are reasonable and payable.

32. Item 11 Common areas – cleaning £11,728.43 The respondent in the Scott Schedule simply stated that he disputed that the charge was reasonable. The applicant produced supporting invoices particularising the expenditure. Therefore, having perused the evidence in the Trial

bundle the tribunal is satisfied that these charges are reasonable and payable.

33. Item 12 Common areas – M&E repairs £4042.52 The respondent believes that part of these costs relate to a flood in Flat 15 and which have been passed to the insurers. The respondent's position is that the applicant should claim payment of these invoices from the leaseholder of Flat 15 pursuant to the indemnity in clause 3(1) of the lease and, accordingly, do not fall within the scope of Schedule 7, paragraph 1 as these are costs which are the liability of a lessee in the building. Therefore, the respondent disputes these costs are reasonable in amount for the reasons identified above.

34. The applicant says that it is correct that there was a flood in Flat 15. It went through the building. An insurance claim has been made in the order of £150,000 and there was damage to the common parts and the electrical intake room. The cost of the works within Flat 15 have been recovered from the insurance company. There is a £5,000 excess for water damage, which was repaid by the flat owner during 2022. In the 2022 accounts, there will be a credit coming back into the service charge account of £2,794.78. The applicant contends that it is reasonable to pay for damage to the common parts and common services from the service charge account pending reimbursement from the result of any insurance claim. The tribunal disagrees with the applicant. On the assumption that monies will flow from the insurance claim it is not appropriate, proportionate or reasonable to make a charge and then recover the money. Therefore, this amount is disallowed in full.

35. Item 13 Common areas – Life safety systems maintenance £2373.58 The respondent accepts that maintenance costs for life safety systems may be chargeable pursuant to the lease but believes that part of the costs claimed in this item are also claimed under staff costs and are therefore being charged twice. The respondent also disputes that this item is reasonable in amount. The respondent believes that part of this item relates to invoices from Care Management Limited for emergency lighting testing which was carried out by concierge during normal working hours. Leaseholders already pay towards a salary for concierge to be on site during these hours, together with an annual fee for facilities management, and therefore believe this cost has been charged twice.

36. On the other hand, the applicant says that it denies that costs have been charged twice. The applicant maintains that two people are required to test the lighting: the concierge whose cost is already covered by site staff plus one other. Two persons are necessary because one is to stand at the fire alarm panel and one to select and test from a call point. They

use different call points for every test and rotate. Having perused the evidence in the Trial bundle the tribunal is satisfied that these charges are reasonable and payable.

37. Item 14 Common areas – internal repair and maintenance £53,348.20 and Item 20 Common Parts – Internal repairs and maintenance £271,189.14. With regard to item 14 the respondent simply reserved his right to object. The applicant provided full details of the sums expended by way of supporting invoices. Having perused the evidence in the Trial bundle the tribunal is satisfied that these charges are reasonable and payable.

38. With regard to item 20, once again the respondent simply reserved his right to object. The applicant provided full details of the sums expended by way of supporting invoices. Additionally, one further invoice from Voltix for an investigation and remedy of water supply failure to one flat was also supplied. Having perused the evidence in the Trial bundle the tribunal is satisfied that these charges are reasonable and payable.

39. Item 15 Building – Accounting and certification fees £606.60 In this regard, the applicant contends that £606.60 is within the brackets of reasonableness for the accounting and certification fees. The respondent's view is that these charges appear to have increased in the restated 2020 accounts, presumably due to the need for the accounts to be restated. This was only required as the landlord failed to include the cost of the refurbishment works in the service charge originally and should not be borne by leaseholders.

40. The Tribunal from its own knowledge and expertise took the view that these charges are well within the range of encountered charges. The amount will of course depend on the block size as economies of scale will inevitably apply. The Tribunal was satisfied with the level of these charges which they found to be reasonable and also noted that the respondents failed to provide any convincing evidence to the contrary. In these circumstances the tribunal was again satisfied as to the reasonableness of these accountancy and certification charges.

Application for a S.20C order

41. The respondent also made an application under section 20C of the Act, i.e., preventing the applicant from adding the legal costs of these proceedings to subsequent service charge demands/ accounts. No formal submissions were made at the end of the hearing. Therefore, the tribunal **DIRECTS** that within 21 days from the date of the receipt of this Decision the respondent will file and serve his reasons why he

thinks a 20C Order should be made. Thereafter, within 21 days of the receipt of the respondent's reasons the applicant will file and serve its reasons for opposing any order pursuant to section 20C. Thereafter the tribunal will make its determination on the S.20c application.

Name:	Judge Professor Robert Abbey	**Date:**	20 December 2022

Appendix of relevant legislation and rules

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,

(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

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 Tribunal 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 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.

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.