FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case References	**:**	**LON/00BK/LSC/2022/0215**
Property	**:**	**11 Albert Hall Mansions, Kensington Gore London SW7 2AL**
Applicant	**:**	**Blocks 1-3 Albert Hall Mansions RTM Company Limited**
Representative	**:**	**Mr Adam Rosenthal KC instructed by Comptons**
Respondent	**:**	**Hendaya Al Taybe** **Sayed Omar Othman Almurdhi**
Representative	**:**	**Ms Ellodie Gibbons of Counsel instructed by Charles Russell Speechlys LLP**
Type of Application	**:**	**Transfer from County Court Reasonableness and payability of Service charges under s27A of the Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Tribunal Judge Roger Cohen** **Tribunal Member Anthony Harris LLM FRICS FCIArb**
Date of hearing	**:**	**28 November 2022**
Date of Decision	**:**	**23 December 2022**

DECISION

Decision of the Tribunal

In this decision, the following terms have the following meanings:

the Blocks	Blocks 1-3 Albert Hall Mansions
CLRA	the Commonhold and Leasehold Reform Act 2002
the Estate	Blocks 1-3, 4 and 5 Albert Hall Mansions
the Flat	Flat 11, Albert Hall Mansions, Kensington Gore, London SW7 2AL
the Landlord	Albert Hall Mansions (Blocks 1 -3) Freehold Limited
the Lease	A lease dated 12 December 2008 of the Flat (being on the ground floor of the Blocks) and made between (1) the Landlord (2) the Management Company and (3) the Respondents
the Management Company	Albert Hall Mansions Management Limited
RTM	The right to manage under part 2 CLRA

Background

1 Since 2011, the Applicant has exercised the right to manage a building known as Blocks 1-3, Albert Hall Mansions, London SW7. Blocks 1-3 comprise one building. Flat 11 is one of the flats in Blocks 1-3. Blocks 1-3 are adjacent to two other buildings known respectively as Block 4 and Block 5. Thus, there are five blocks in three buildings.

2 The Landlord, being the owner of the reversion to the Lease (and the other leases of flats in the block) was and is the nominee purchaser through whom the leasehold owners of all the flats exercised their rights of collective enfranchisement of the freehold of each building.

3 The Respondents are the leasehold owners of the Flat pursuant to the Lease. The Lease is for a term of 999 years from 12 December

2008 at a peppercorn rent. The Lease reserves a service charge. The Lease as granted included a further party; the Management Company whose role was to provide the management services specified in clause 4 of the Lease. The administration of the service charge is governed by schedule 5 to the Lease.

4 On 12 August 2021, the Applicant issued proceedings against the Respondents in the County Court claiming service charge arrears of £30,855.47 for the period from 24 June 2019 to 23 June 2021 together with interest and associated administration charges. The Respondents defended the proceedings initially on the basis that:
1) the sums claimed were not reasonable and/or are not due; and
2) the apportionment of the service charge was incorrect.

5 On 26 May 2022, the County Court transferred the claim to this Tribunal for a determination under section 27A Landlord and Tenant Act 1985.

6 On 28 July 2022, this Tribunal listed the matter for a hearing stating that "the issues in the case are set out in the County Court pleadings".

7 As at 25 November 2022 when Ms Gibbons of Counsel settled the Respondent's skeleton argument, the Respondents challenged a number of individual items of service charge expenditure under four heads of challenge which the Tribunal summarises as follows:
1) reasonableness;
2) compliance with consultation requirements;
3) section 20B limitation; and
4) incorrectly addressed invoices.

8 The items in dispute were helpfully recorded in a schedule agreed between Counsel and provided to the Tribunal on the working day before the hearing.

9 At the outset of the hearing, Ms Gibbons requested and was given some time to take instructions. The upshot was that Ms Gibbons withdrew all grounds of challenge to all service charge items except for the following, which remained live issues for the determination of the Tribunal:
1) the apportionment of the service charge; and
2) the claim for electricity charges, challenged as a supply under a qualifying long term agreement on which the Applicant had not consulted with the Respondents.

10 The Tribunal heard helpful submissions from Ms Gibbons and from Mr Rosenthal KC for the Applicant.

11 The Applicant tendered the first witness statement of its director, Mr Dangoor. Ms Gibbons had no cross-examination for Mr Dangoor nor did the Tribunal have any questions for him. His

evidence was taken as read. His second witness statement was not considered as it related to issues withdrawn by the Respondents from the Tribunal's consideration.

12 The Second Respondent had made a short witness statement to which reference was made in closing submissions. The Second Respondent was not in attendance at the hearing. The First Respondent who had made a witness statement was called and cross-examined. The Tribunal found much of the First Respondent's evidence to be unsatisfactory with repeated failures to answer the question asked or to make what would have been realistic concessions.

13 In the course of his evidence the First Respondent, who has a legal qualification from Sudan, stated that his son, who attended the hearing, is a solicitor practising with the firm representing the First Respondent in the proceedings.

14 Originally, UAE Investment Limited had been the owner of the freehold of the entire Estate. However, following a collective enfranchisement process in 2008, the Landlord (as nominee purchaser) became the freehold owner of the Blocks with other companies (being the respective nominee purchasers) becoming the freehold owners of Block 4 and Block 5.

15 When the estate was in common ownership, services were provided by the Management Company to all the flats in the Estate who together paid all the service charge costs. Following the collective enfranchisements, all the flats in the estate contributed to the service charge costs for the estate. When the right to manage passed from the Management Company, the right to manage was obtained by a separate right to manage company for each of the three buildings. Instead of one company (the Management Company) providing the management services for all five blocks, separate companies provided the services for the Blocks and for Block 4 and Block 5. Thus, after the right to manage was achieved in respect of the three buildings, the service charges for the Blocks (not the Estate) became payable by the owners of the flats in the Blocks (but not the owners of all the flats in the estate), with the leasehold owners in Blocks 4 and 5 paying for the service charge costs attributable to their respective blocks. The first issue for the Tribunal concerns the implications of this change on the apportionment of service charges due from the Respondents as the leasehold owners of flat 11 in the block.

16 The Respondents were the leasehold owners of the Flat at the time of the collective enfranchisement.

The pre-lease correspondence

17 On 23 July 2008, John Stephenson, a partner with Bircham Dyson Bell LLP, the solicitors acting for the flat owners in connection with the collective enfranchisement at the Block, emailed the Respondent as follows:
"I shall shortly … send to you a draft of the new 999 year lease for the flat where you are … the lessee. If you are not a solicitor, then I must advise you to take independent advice on the terms of the document as it creates legal obligations.
The first figure at 1.3 on page 17 is your current service charge % … the second figure is that grossed-up by 100/47.509; Blocks 1-3 have 47.509% of the total service charge for Albert Hall Mansions and therefore if Blocks 1-3 ever had to manage themselves independently it would be that grossed-up % which would apply"

18 A table showing the higher and lower percentages for each flat in Blocks 1-3 was produced to the Tribunal.

19 On 12 December 2008, the Landlord as freehold owner granted the Lease of the Flat to the Respondents.

The provisions in the lease

20 The following provisions of the Lease are relevant

The Definitions

The Block means the block of flats in which the premises hereby demised are situate and known as Blocks 1-3 Albert Hall Mansions in the City of Westminster.

[NOTE: the Block as defined in the Lease is the same as the Blocks as defined in this decision].

The Estate means the five blocks (as defined and described in this decision)

Tenants means the owners lessees tenants and occupiers for the time being of the other flats in the Estate

Clause 2.3

A covenant by the Tenant with the Landlord and as a separate covenant with the Management Company and the (other) Tenants subject to the provisions of Clause 13 hereof to pay the Interim Charge and the Service Charge at the time and in the manner provided in Schedule 5

Clause 4 contains covenants by the Management Company with the Landlord and as a separate covenant with the Tenant to provide the services specified in detail in that clause.

Clause 7 contains covenants by the Landlord with the Tenant including

7.4 If the Management Company shall fail to perform any of its obligations hereunder the Landlord on the request in writing of the Tenant shall perform such obligation or obligations but limited only to such obligations in respect of the Block (and in such circumstances any references to "the Estate" in this Lease shall be deemed to refer only to the Block) and any obligations of the Tenant to the Management Company in respect of those obligations shall thereupon be owed by the Tenant to the Landlord instead of the Management Company

Schedule 5

Paragraph 1.1 … "the Total Service Cost" means the aggregate amount in each year running from 26 March ("the accounting period") reasonably and properly expended by the management Company in carrying out its obligations under Clause 4 of this Lease and the amount of such reserve(if any) as may be reasonably required …

Paragraph 1.3 "the Service Charge" means 0.941% of the Total Service Cost … PROVIDED THAT in the event of the Landlord being required to act in accordance with Clause 7.4 the Service Charge shall be 1.981% of the costs thereby incurred.

Post grant of lease events

21 The Management Company provided management services for all five blocks in the buildings. That is until the flat tenants in each building sought to acquire and did acquire the right to manage each building. In 2010, the tenants in Blocks 4 and 5 were the first to acquire the right to manage their respective blocks. The tenants of Blocks 1-3 were the last to do so, in 2011.

22 On 31 July 2013, the First Respondent wrote to the Applicant's agents, FifthStreet Management Limited querying an invoice dated 25 July 2013 for £25,748.80. The First Respondent requested details about the larger amount, how it was calculated, who authorised the works, the total amount and how it is shared among the owners.

23 On 5 August 2013, Maggie Baldwin of FifthStreet Management Limited replied to three enquiries stating that an external works contract was underway and they urgently needed funding in order to meet the stage payments for which the contractor had applied. Mr Baldwin confirmed that in the case of Flat 11 the calculations were levied on the Respondents' service charge percentage which was 1.9807%.

24 On this letter, the First Respondent wrote in manuscript the text of a reply that was typed up by his secretary. The reply stated:

> "In order for me to authorise full payment of your invoice can you please send me copy of the invoice you sent to my bank earlier as full due from Flat 11".

Impact of the RTM

25 The impact of the acquisition of the RTM of Blocks 1-3 on the parties to the Respondent's lease was as follows. The Landlord (the nominee purchaser) remained the landlord. The Respondents remained the tenants. However, the role of the Management Company was subject to the application of Section 96 CLRA 2002. This provides as follows:

"96 Management functions under leases

(1)This section and section 97 apply in relation to management functions relating to the whole or any part of the premises.

(2)Management functions which a person who is landlord under a lease of the whole or any part of the premises has under the lease are instead functions of the RTM company.

(3)And where a person is party to a lease of the whole or any part of the premises otherwise than as landlord or tenant, management functions of his under the lease are also instead functions of the RTM company.

(4)Accordingly, any provisions of the lease making provision about the relationship of—

(a) a person who is landlord under the lease, and

(b) a person who is party to the lease otherwise than as landlord or tenant,

in relation to such functions do not have effect.

(5)"Management functions" are functions with respect to services, repairs, maintenance, improvements, insurance and management.

(6)But this section does not apply in relation to—

(a)functions with respect to a matter concerning only a part of the premises consisting of a flat or other unit not held under a lease by a qualifying tenant, or

(b) functions relating to re-entry or forfeiture.

(7)An order amending subsection (5) or (6) may be made by the appropriate national authority."

26 By virtue of sub-section (3), as a party to the Lease otherwise than as landlord or tenant, the management functions of the Management Company under the Lease became instead functions of the RTM company, that is to say the Applicants. Therefore, the effect of section 96 is that the management functions of the Management Company were assumed by the Applicant as the RTM Company.

27 The first issue for the Tribunal is whether the Applicant has correctly claimed service charges being 1.981% of the Total Service Cost for the Blocks for the years in question or whether the claim should be for 0.941% of the Total Service Cost for the Estate for those years.

28 Mr Dangoor stated in his witness statement that because leases were granted out of the freehold estate prior to the blocks separating, the primary service charge apportionment on each lease was such that all of the leases in blocks 1-5 make up 100% of the total service charge for the estate. Once blocks 4 and 5 are removed from the equation, the total service provisions of the leases in the Blocks only add up to 47.509%, thus creating an obvious deficit of 52.5% (rounded up).

29 Mr Dangoor stated that since the Blocks acquired the right to manage in 2011, service charges had been pro-rated up to a cumulative total of 100%, to avoid such a deficit, consistently with clause 7.4. The Respondents had been charged at an apportionment of 1.981% being the pro-rated amount. Between 2011 and June 2019, the Respondents paid their service charge in full and on time, based on the 1.981% calculation. They had never, prior to these proceedings, questioned that calculation. During the same period, all other leaseholders in the building (Blocks 1-3)

paid a serviced charge based on the pro-rata calculation. As a result, the Applicant has continued to take all reasonable steps to comply with its obligations under the leases.

The evidence of the First Respondent

30 In his witness statement, the First Respondent stated that Mr Stephenson's email of 23 July 2008 was sent to him but not to his wife, the Second Respondent. He also stated that he did not receive any indication that "the service charges demanded would increase to 1.981%...

31 In cross-examination, the First Respondent stated that he qualified in law at the University of Khartoum, served as a judge in Sudan and as a partner in law firm he established in Saudi Arabia.

32 He specialised in commercial and international law and serves on the board of a number of companies. He did not instruct solicitors in relation to the grant of the lease in 2008. He signed the lease, knowing its purpose. His decision whether not to sign a document without advice would depend on his common sense.

33 The First Respondent accepted that although in his witness statement he said that he did not understand Mr Stephenson's 23 July 2008 email, he did understand now and did understand then what it meant. However, the First Respondent said that he was not given enough information as to how the service charge would work in practice.

34 Whilst he accepted that the Applicant needed to recover 100% of the service charge expenditure, he was concerned because his bank, who paid the service charges on his behalf, queried a demand for £25,000.

35 The First Respondent said he did not pay attention to the service charge percentages. He did not concentrate on the percentages. The service charge invoices went to Mr Turmaine at Coutts & Co.

36 The First Respondent complained that the level of the service charge is too high for what is provided. He accepted that if he did not pay the Applicant, maybe it would be liquidated. In those circumstances, he did not know what would happen. He stated that he did not care how much he lost in the proceedings as it was a matter of principle. Pressed as to what that referred to, the First Respondent said that he had noticed a conflict of interest. He was concerned about the integrity of the people who run the Applicant company. The Tribunal notes that these allegations did not appear in the First Respondent's witness statement or in the statements of case which define the issues for the Tribunal to decide.

The true meaning of the Lease

37 The Tribunal sets out the terms of clause 7.4 of the Lease which is the critical clause. It states (with the principal phrases in dispute highlighted):

> If the Management Company *shall fail to perform* any of its obligations hereunder the Landlord *on the request in writing of the Tenant* shall perform such obligation or obligations but limited only to such obligations in respect of the Block (and in such circumstances any references to "the Estate" in this Lease shall be deemed to refer only to the Block) and any obligations of the Tenant to the Management Company in respect of those obligations shall thereupon be owed by the Tenant to the Landlord instead of the Management Company (emphasis added).

38 On the first issue, Ms Gibbons submitted as follows. First, the relevant approach to construction is as set out by Lord Neuberger in *Arnold v Britton* [2015] AC 1619 at [15]-[23]. Secondly, Mr Stephenson's email is inadmissible on this issue being at most subjective evidence of the landlord's intentions. Thirdly, the Landlord is only required to act in accordance with clause 7.4 of the Lease if (a) the Management Company fails to perform any of its obligations; and (b) the Tenant requests in writing that the Landlord shall perform such obligation or obligations. These conditions have not been fulfilled and therefore the Landlord has not acted or been required to act under clause 7.4. Consequently, the service charge remains 0.941% of the Total Service Cost.

39 Ms Gibbons submitted in closing that Clause 7.4 had to be construed in accordance with commercial common sense. The Lease post-dated CLRA and could have expressly dealt with the consequences of the RTM being acquired pursuant to it. The Tribunal should not interpret Clause 7.4 to save the Applicants from a bad bargain by applying retrospective common sense.

40 Mr Rosenthal also took the Tribunal to *Arnold v Britton* and other recent authorities on the construction of contracts.

41 As to whether the Management Company failed to perform, Mr Rosenthal submitted that "fail" was not limited to "failure" in a culpable way. The Management Company had, he submitted, failed to perform its obligations when the responsibility for

services fell within the scope of the Applicant as the RTM company for the Blocks. "Fail" in clause 7.4 meant "cease".

42 As to the effect of the words "on the request in writing of the Tenant", Mr Rosenthal characterised the phrase as a requirement not mandatory to the operation of the clause.

43 Thus, in circumstances where the Management Company had failed to perform, a tenant could require the Landlord to step in under clause 7.4 or the Landlord could choose to step in absent a requirement in writing by the tenant. In any event, the absence of a written requirement by the Respondents did not preclude clause 7.4 from being engaged.

44 The Tribunal has borne in mind the guidance as to contractual interpretation in all the authorities cited by both counsel. The Tribunal does not find it necessary to rehearse all of that authority. The Tribunal has come to a clear conclusion.

45 The Tribunal notes that Clause 4 of the Lease first recorded that the Landlord and other owners of the Estate other than Blocks 1-3 had agreed to grant the Management Company the right to enter the Blocks 1-3 and the Estate to perform its functions. Secondly, it contained a covenant by the Management Company with the Landlord and separately with the Respondents as Tenants to perform the services listed in the following 15 sub-paragraphs most of which expressly provided for the provision of services by the Management Company to the Blocks 1-3 and to the Estate (emphasis added).

46 Thus, the drafter of the Lease recognised that the Management Company provided services to the Estate, not just the Blocks and considered what would happen if that role was curtailed so that the services were rendered only to the Blocks but not the Estate.

47 Having regard to that feature of the Lease, the Tribunal prefers the submissions of Mr Rosenthal. First, by reason of section 96(3) of CLRA the Management Company ceased to manage once the RTM was acquired by the Applicants. The Tribunal holds that ceasing to manage amounts to a failure to manage within the meaning of clause 7.4

48 X promises to Y to inspect the lighting in a corridor at regular intervals and to replace any lights that are not working. Subsequently, Y informs X that its services in this regard are no longer required as Z will be inspecting and replacing in future. Y may have transferred the responsibility from X to Z. It is an appropriate use of language to say that following the transfer of responsibility X "fails" to perform these works.

49 The Tribunal holds that in clause 7.4 "fail" does not connote fault.

50 The Tribunal prefers the submissions of Mr Rosenthal as to whether a request in writing from the tenant is necessary to invoke clause 7.4 of the Lease. The function of clause 7.4 is clearly to provide a mechanism for the due apportionment of the Total Service Cost in circumstances where, as on the facts of this case, the Management Company is no longer performing its obligations to manage the Estate and the Landlord steps in to manage the Blocks. The Landlord, or an RTM company in its stead would look to invoke clause 7.4 and trigger a new formula under Schedule 5. This formula would provide for a higher service charge percentage but applied to a lower amount of cost as the RTM company is managing the Blocks only and not the Estate.

51 Accordingly, the Tribunal finds in favour of the Applicant on the question of apportionment based on the true construction of the Lease.

Estoppel by convention

52 The Applicant had a secondary case, in the event that it lost on the first issue. That case was that by reason of an estoppel by convention, it is not now open to the Respondents to dispute the application of the service charge percentage of 1.981% on the costs of managing the Blocks for the years in question.

53 In *Jetha and another v Basildon Court Residents Company Limited* [2017] UKUT 58 (LC), Judge Behrens said

26. Estoppel by convention is described by Lord Steyn in *Republic of India v India Steam Ship Co Limited ("the Indian Endurance and The Indian Grace")* [1998] AC 878 at 913–914:

> "[A]n estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption. It is not enough that each of the two parties acts on an assumption not communicated to the other. But ... a concluded agreement is not a requirement."

54 Had the Tribunal found in favour of the Respondents on the true meaning of clause 7.4 it would have held that the Respondents were estopped by convention from disputing the claim having regard to:

(a) The correspondence with the First Respondent before the lease was granted;
(b) The correspondence in 2013;
(c) The demands made and paid on the basis for which the Applicant now contends

(d) The evidence of the First Respondent to the Tribunal suggesting that his true complaint was the amount of the service charges not a dispute as to apportionment.

Electricity

55 Apart from the dispute as to the correct apportionment, there was one specific item of cost that the Respondents challenged. They complained that electricity was supplied under a Qualifying Long Term Agreement within the meaning of the CLRA in respect of which there had been no consultation.

56 The Applicant accepted that the supply contract was a QLTA and that there had been no consultation. This is because a price had been obtained from a broker in the spot markets and there was no time for any meaningful consultation. The Applicant applied for dispensation from the consultation requirements. The Respondents' answer to the Applicant's claim for dispensation from consultation in relation to the contract for the supply of electricity to the block was that there was no evidence as to what enquiries had been made by a broker to find the best spot price available.

57 The Tribunal noted that there was no contention that the Respondents had been prejudiced by the failure to consult. Accordingly, the Tribunal grants dispensation

Conclusion

1 The case can now be returned to the County Court for disposal in accordance with the terms of this decision.

Name: Tribunal Judge Roger Cohen **Date:** 23 December 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.

Under present Covid 19 restrictions applications must be made by email to rplondon@justice.gov.uk.

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).