FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/43UL/LSC/2022/0091
Property	**:**	Beacon Crescent, Hindhead, Surrey, GU26 6UG
Applicant	**:**	Mr Ian George (40 Beacon Crescent) Mrs F Alonso (5 Beacon Crescent) Mrs P Barney (11 Beacon Crescent) Mr P Berry (24 Beacon Crescent) Dr R Barlow (27 Beacon Crescent) Prof D Marks-Maran (30 Beacon Crescent); and Mr Malcolm Elliott (39 Beacon Crescent)
Representative	**:**	In person
Respondent	**:**	The Beacon (Hindhead) Block Management Company Limited
Representative	**:**	Itsyourplace Ltd
Type of Application	**:**	Landlord and Tenant Act 1985 s.27A (service charges)
Tribunal Members	**:**	Judge Mark Loveday Mr Bruce Bourne MRICS Mr Peter Gammon MBE
Date and venue of hearing	**:**	Determination without a hearing
Date of Decision	**:**	17 February 2023

DETERMINATION

Introduction

1. By an application dated 1 August 2022, the applicants sought a determination of liability to pay service charges under s.27A Landlord and Tenant Act 1985 ("the 1985 Act") in relation to a development at The Beacon, Beacon Crescent, Hindhead in Surrey. The applicants are lessees of 7 flats within the block, and the respondent is the lessee-owned Management Company responsible for collecting the service charges.

2. Directions were given on 1 November 2022, when it was decided the matter should be determined on the papers without a hearing under r.31 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The tribunal met to determine the matter on 13 February 2023, and this is its decision.

3. The Application itself contained detailed submissions from the applicants. In accordance with the Directions, the respondent submitted a Statement of Case, to which the applicants replied on 3 December 2022.

Facts

4. The Beacon is located in a semi-rural setting close to the town of Hindhead in Surrey. The gated development was constructed by Crest Nicholson c.2007 on the site of a former conference centre. The main building is set within landscaped gardens and comprises some 50 flats laid out in a main block with two wings. The two building entrances are in the East and West Wings and each has controlled access. Beneath all three is a communal garage contained parking spaces, a bicycle store and the usual services. Vehicular access to the garage is via a ramp leading to a 5.5x2.4m opening in the side of the West Wing.

5. The dispute concerns two proposed items of cost, namely advice about new electrical vehicle charging ("EV Charging") points in the parking area and security upgrades. As to the EV Charging, suffice it to say there is no dedicated provision for charging electric and hybrid cars in the garage area. As far as security is concerned, there is no gate across the foot of the ramp, which permits unlimited access from the grounds into the parking area. The two entrances have controlled access systems attached to the outer doors with video monitors in each flat.

6. The respondent suggests there have been various security issues in the block for some time, including mail and bicycle thefts. A bicycle theft in late 2021 resulted in the Directors consulting the police. A police security advisor attended site 16 December 2021 and report recommended a gate should be installed across the foot of the ramp. Proposals also emerged for other security measures, including the installation of "inner lobby door security", effectively a second line of controlled access behind the outer doors of the building. This would limit access to the internal parts of the building from the back of the lobby by attaching new locks to the inner lobby doors connected to an extended controlled access system. The idea was to allow the outer lobbies to

be open 24/7 for parcel deliveries etc., while preventing access beyond the inner lobby doors. It was also suggested dummy CCTV cameras be installed.

7. On 11 December 2021, the managing agents circulated residents with annual service budgets for 2022 with the interim service charge demands, and copies for 40 Beacon Crescent were included in the hearing bundle. The budget included a figure of £35,000 for "Security, includes Door intercom" and £1,000 for "EV Charging". The notes to the budget suggest the police had recommended that a "roller grill" should be installed at the garage entrance with a number plate recognition system to operate the doors, and a CCTV camera. The police also apparently recommended 7 improvements to the cycle store and repairs to the store cupboard in the east wing. There is then a description of the works to the lobby access, before the following note:
   > "We estimate a budget needed of circa £35,000 subject to the receipt of reports/estimates and will discuss priorities with you through a community meeting."

8. These proposals were apparently discussed and agreed at a residents meeting on 5 July 2022.

9. There is a helpful quotation from Harrisons Security Services dated 18 July 2022 showing the following proposed costs:
   a. Repairs to an existing "Fermax" outdoor controlled access panel: £195 + VAT.
   b. Installation of two new secondary internal panels to control access through the inner lobby doors, new locks for the inner lobby doors etc., £4,092 + VAT.
   c. Replacement of missing and faulty video monitors within the flats £1,280 + VAT.
   d. Secure fabricated steel gates at the garage entrance with automated control: £9,707 + VAT.
   e. Total: £18,094.80.

10. The only other material point is that the 2022 budget included no provision for reserve fund contributions. Part-way through the 2022 service charge year, the respondent's directors decided to reallocate £33,370 to reserves, a figure apparently based on the disputed costs less a figure of £2,270 "agreed deduction for east Wing Door Entry System"): see respondent's Statement of Case section 7. The intention was that most of the security costs would be met from reserves. Moreover, the respondent did not incur the £1,000 for EV charging in 2022. The provision was for the preliminary costs of a consultant, but in the event the work was undertaken for nothing by a respondent's director with appropriate expertise.

The Lease

11. A copy of the lease for 40 The Beacon was included in the bundle, which was said to be typical of the rest. The lease is a tripartite lease, with the respondent responsible for maintenance of the premises. By para 5 of Sch.7, the lessee covenants to pay the respondent a Block Service Charge and an Interim Block Service Charge. The Interim Block Service Charge is defined by para 1.4 of

Sch.7 as the Lessee's Proportion of the Block Maintenance Provision, which is to be computed in accordance with para 6 of Sch.7. In turn, para 6 of Sch.7 refers to the "expenditure estimated as likely to be incurred … for the purposes mentioned in the Sixth Schedule and Eighth Schedule". In short, the relevant costs that can properly be recovered by the management company from the applicants are those which are incurred under these two schedules.

12. The material provisions of Sch.6 are:

> "1. To keep in a good state of repair and condition the Block Management Land and all Service Installations within the Block Management Land and within the Property which do not serve it exclusively.
> …
> 4. To energise and maintain in proper working order any lamps sockets and other working facilities comprised in the Block Management Land."

13. The material provisions of Sch.8 are:

> "5. All sums paid by the Block Management Company in and about the repair maintenance decoration cleaning lighting energising mowing running and management of the Block Management Land whether or not the Block Management Company is liable to incur the same under its obligations pursuant to this Lease."

Contractual recoverability

14. Neither party is legally represented. Nevertheless, the statements of case identify a clear issue of interpretation under the Lease.

The parties' submissions

15. Para 1 of the application submits that "the Applicants consider that security work costs … and EV charging are not legitimate maintenance and repair costs, but improvements, and thus fall outside the Block Management Company's covenants pursuant to the Sixth Schedule of the lease." This was further expanded upon as follows:

> "The Applicants contend that works proposed represented improvements which are not covered by the Lease. Language in the lease refers to maintenance and repair work to maintain the Beacon property. Specific reference is made to the Sixth Schedule (Block Management Company's Covenants) and Seventh Schedule (Covenants in respect of the Block Maintenance Charge). As such, the Applicants contend that as the security works proposed are new installations and thus represent improvements over what currently exists at the Beacon already, so cannot fall under any maintenance or repair covenants, and therefore the owners are not obliged to pay such costs."

Para 4 of the applicants' Reply repeats "that neither of these costs are legitimate costs payable under the lease as part of the service charge".

16. The respondent's statement of case runs to four pages, but apparently fails to appreciate that the main ground for the application contends that the relevant costs of professional advice about the new EV Charging facilities and the security costs are not recoverable under the Lease. The respondent does not therefore attempt to identify any specific provision of the lease which it might rely upon or respond to the argument that Sch.6 and Sch. 7 do not include EV Charging costs or additional security costs. The only comment relates to the argument about improvements:

> "The Directors, as part of their fiduciary duty to take professional advice in such situations, consulted with the Police and a Senior Police Crime Prevention Officer attended the site and subsequently produced a report which we issued to the Residents. Based on this report we deem the recommendations to be maintaining the level of Security in 2008 as opposed to an improvement."

The law

17. This is an issue of interpretation. The general principles were succinctly summarised by Lord Neuberger in Arnold v Britton [2015] EWSC 36; [2015] A.C. 1619 at [15]:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of
> (i) the natural and ordinary meaning of the clause,
> (ii) any other relevant provisions of the lease,
> (iii) the overall purpose of the clause and the lease,
> (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and
> (v) commercial common sense, but
> (vi) disregarding subjective evidence of any party's intentions.

18. Arnold v Britton was a case which involved service charges, and Lord Neuberger (with whom Lords Sumption and Hughes agreed) said this at [23]:

> "… [R]eference was made in argument to service charge clauses being construed 'restrictively'. I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant's contribution. The origin of the adverb was in a judgment of Rix LJ in McHale v Earl Cadogan [2010] HLR 412, para 17. What he was saying, quite correctly, was that the court should not 'bring within the general words of a service charge clause anything which does not clearly belong there'."

Accordingly, service charge provisions are not subject to any special rule of interpretation, but the court should not "bring within the general words of a service charge clause anything which does not clearly belong there". These words of qualification were stressed by the Court of Appeal in the recent case of Kensquare Ltd v Boakye [2021] EWCA Civ 1725, although the precise scope of the qualification is open to some debate.

19. There is also a great deal of case law in relation to the question whether a covenant to repair may include the carrying out of 'improvements'. The general position is summarised in Woodfall at 13.055, which states that:

> "a covenant to repair does not involve a duty to improve the property by the introduction of something different in kind from that which was demised, however beneficial or even necessary that improvement may be by modern standards."

This general statement is of course subject to numerous exceptions, and ultimately it will very much depend on the precise words of an individual covenant and the nature of the works involved. It is always a question of degree whether works are a repair, or whether they go beyond the repairing obligation: Ravenseft Ltd v Davstone Ltd [1980] 1 QB at 21C.

Discussion

20. The tribunal starts with the main submission by the applicants. They do not specifically identify the covenant they rely on in Sch.6 or Sch.7 of the Lease, but it is not hard to see what they are referring to. The only place where the word appears in either schedule is in para 1 of Sch.6. Would the provision of EV Charging points and additional security fall within this covenant?

21. Starting with the natural and ordinary meaning of the words of para 1, the word "keep" suggests maintenance of something which exists, not the provision of something new. That would tend to suggest that any new facilities fall outside the scope of the covenant. That is also, of course, consistent with the general statement in Woodfall above, which is at the heart of the applicants' submissions.

22. This is further supported by at least one other relevant provision of the lease, namely para 1 of Sch.4, which is one of the lessee's covenants with the respondent and others. Para 1 requires the lessee "to keep the Property with all erections and improvements now or later in a good state of repair" (our emphasis). This suggests that the draftsman was well aware that the land might be added to during the term of the lease and used the term "improvement" to refer to this. Failure to mention "improvements" in para 1 of Sch.6 suggests a deliberate omission.

23. The tribunal does not believe any of the other considerations in Arnold v Britten are of assistance in ascertaining the meaning of the covenant.

24. Applying the above to the facts of this application, the result in relation to the EV Charging points is clear. There are no EV Charging points in the garage at present. Neither is there anything of a similar nature (such as a petrol pump) in the garage, which the EV Charging points can be said to replace. The

proposed EV Charging points therefore plainly fall outside para 1 of Sch.6. As to the security features, essentially the same can be said for the large steel gate to be erected across the garage entrance. There is no evidence there was a gate in this position at the date of the lease, or even a less substantial barrier or other means of securing the garage area. The proposals for the alarm system involve a small element of work to replace or improve parts of the existing door access system, namely the external panel and the video monitors mentioned in the estimate above. But the bulk of the cost involves the installation of something new and additional to the existing controlled access system, which is to be retained. It involves the provision of new locks and access panels to a different part of the building, namely the rear lobby doors. In the tribunal's view, it is an "improvement" not simply a repair.

25. Neither party addressed the tribunal on other provisions of the lease. But for the sake of completeness, and bearing in mind that neither party is represented, the tribunal will briefly mention other possibly relevant terms of the lease. Para 4 of Sch.6 requires the Respondent to "energise" the premises, but this does not impose any right or obligation to install completely new electrical installations. The purpose of this provision is to cover the supply of electricity and gas to the premises. It is also notable that the Lease includes no widely worded "sweeper" provision. The nearest to a 'sweeper' provision is para 5 of Sch.8. But none of the words used in para 5 suggest the provision of new facilities, or (once again) any improvements.

26. It follows that (save for the video screens and the repairs to the external controlled access panel) none of the costs in issue are recoverable as part of the interim service charges for 2022. These relevant costs fall to be deducted from the interim service charges for each flat.

27. As far as the two exceptions are concerned, namely replacement of any missing or faulty monitors in the flats and the outside Fermax controlled access panel, the best evidence of a reasonable provision for such costs is set out in the estimate from the contractors given on 18 July 2022. These amount to £195 + VAT (Fermax panels) and £1,280 + VAT (video screens) = £1,770. The tribunal therefore allows this in place of the provision in the interim service charges of £36,000 for EV Charging and security. The apportioned interim service charges for 2022 payable by the applicants should reflect that reduction.

Landlord and Tenant Act 1985 s.19(2)

28. Para 4 of the directions identified the second issue as whether "the proposed costs were reasonable in all the circumstances". Although neither the directions nor the parties specifically refer to any statutory provisions, the tribunal takes it that the issue is whether the interim service charges are limited by s.19(2) of the 1985 Act.

The Law

29. Section 19 of the 1985 Act provides as follows:

"19 Limitation of service charges: reasonableness

(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 provision 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.

The leading case on s.19(1)(a) is Waaller v LB Hounslow [2017] EWCA Civ 45; [2017] 1 W.L.R. 2817. In essence there is a two-stage test. The first consideration is whether the landlord's decision-making process was objectively reasonable (in Wednesbury terms), and the second is whether the outcome was a reasonable one or excessive. In this case, the interim service charges fall within s.19(2), rather than s.19(1)(a). But for present purposes similar principles apply: Carey-Morgan v De Walden [2013] UKUT 134 (LC); [2013] 2 P.& C.R. DG3.

The parties' submissions

30. The application submits that "a 33% increase in the service fund for the 2022 calendar year is a significant increase. The Applicants contend that the directors failed to account for affordability in its demands and have not been transparent in advising the owners of near and mid-term mandatory costs that owners will have to pay towards the upkeep of the Beacon e.g. increased electricity costs; reinstatement of the reserve fund which has been depleting over several years; and other mandatory capital costs and both mandatory and discretionary projects. that will need exceptional funding for from residents in the near and mid-term that makes it impossible to assess the affordability of what is essentially an entirely discretionary security and EV charges. Further, no proposals to spread the cost over several years has been forthcoming or consideration of a staged security project that involves incremental improvements to keep the service charge at reasonable levels. The Applicants argue that the security proposals are disproportionate as they do not reflect actual crime at the Beacon which is below the national average but are based on a Police report which, by its very nature, will always be favoured towards increased security but without any consideration of cost or any consideration of the history of crime at the Beacon or in the local area. The Applicants therefore contend that the security arrangements are disproportionate to the actual risk of bicycle theft (in 14 years only 2 occasions occuring in late 2022); catalytic converter theft (never happened in 14 years); apartment break-ins and resident assaults (never happened in 14 years); fly tipping in the garage (1 genuine occasion in 14 years does not reasonably justify the introduction of gates at a cost of circa £12K). As such, a more reasonable position would be to maintain current security arrangements and leave residents to have appropriate personal insurance against theft and damage which can be reviewed, subject to considerations of cost, affordability and proportionality, if

any such hypothetical risks ever become reality. In that regard, the Applicants consider that a proportionate response to bike theft would be improved security of the bike store only, an option that has not been considered as an option and to which is covered by our property insurance." As to the £1,000 for EV Charging, this was not in fact incurred in 2022, because the work was undertaken by one of the respondent's directors.

31. The respondent's statement of case contends that the increase in charges generally was not due to the security and EV Charging proposals, but down to necessary maintenance. The respondent acted upon police advice after comparing the cost/benefit of the gate, as opposed to other alternatives.

32. In the light of the above finding in relation to payability, the tribunal need only summarise its findings on reasonableness. They are:
    (a) Whether service charges are generally higher or lower than in previous years is irrelevant to questions under s.19.
    (b) Similarly, affordability is only rarely of relevance: Waaller at [45].
    (c) Whether a landlord has acted on professional advice is highly material to the s.19 test. In this case the security costs were based on proper advice (in this case from the police). Even if that advice was based on a misunderstanding of historic crime levels in the premises, the respondent still acted reasonably in reliance upon that advice: Assethold v Adam and others [2022] UKUT 282 (LC).
    (d) All the above point to a finding that the amount of the disputed service charges was reasonable under s.19(2) under the first limb in Waaler.
    (e) However, the tribunal has seen little evidence of the respondent's budgetary process, so as to understand how the respondent and the managing agent arrived at their estimated 2022 expenditure figures, particularly the £35,000 provision for security. The tribunal notes that the estimate from Harrisons Security Services dated 18 July 2022 gave a much lower figure for estimated security costs, namely £18,094.80. Plainly, this estimate was obtained several months after the budget, and following the residents' meeting a few days before. But it is the only evidence of what reasonable provision should have been made for the works that were to be carried out in 2022. The "outcome", under the second limb of Waaler, is that the estimated costs were excessive. Absent any other evidence about what a reasonable provision would be, the tribunal limits any recoverable security costs to £18,094.80 under s.19(2) of the 1985 Act.
    (f) As to the £1,000 pre-estimate for consultancy fees for the EV Charging, the only challenge to this under s.19(2) is that the cost was not in fact incurred in mid-2022. But that does not make it unreasonable to have made provision for some consultancy costs at the start of the 2022 service charge year. The sum of £1,000 was therefore a reasonable provision under s.19(2) of the Act.

33. Had the costs been recoverable, the tribunal would therefore have found that a reasonable provision for costs relating to the EV Charging points in 2022

would have been £1,000, and a reasonable provision for security works would have been £18,094.80.

Other matters

34. Although not strictly material to the issues in this application, the tribunal was not impressed with the transfer of the bulk of the disputed sums to the reserve fund part-way through the 2022 service charge year. That transfer does not mean the reserve fund money can nevertheless still be spent on the EV Charging points or the security enhancements which are the subject of this application. Neither does the allocation of the disputed sums to the reserve remedy the essential mischief found above, namely that the interim service charges demanded for 2022 included impermissible items of cost. The allocation of the disputed sums to the reserve simply makes accounting for this decision at year end much more complex. But that is now a matter for the respondent and its advisers.

Section 20C

35. The applicants sought orders under s.20C of the 1985 Act and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

36. Section 20C provides:

> "20C.— Limitation of service charges: costs of proceedings.
> (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, residential property tribunal or leasehold valuation tribunal, or the Upper 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.

37. The Tribunal is conscious this is not a conventional costs jurisdiction, in that it is assumed the respondent has a contractual right to its costs of the proceedings under the terms of the flat leases. But it considers it is nevertheless just and equitable to make an order under s.20C. The applicants have largely succeeded in their application and there is nothing in their conduct of the proceedings which can reasonably be criticised. It would not be just and equitable for them to incur any of the respondent's costs of the application.

38. The applicants ticked the box on the application form for making an application under para 5A of Sch.11 to the Commonhold and Leasehold Reform Act 2002. But the tribunal was not addressed on this issue or provided with any figures. It follows that it makes no determination under para 5A of Sch.11 to the 2002 Act.

Conclusions

39. The tribunal finds that the elements of the 2022 interim service charges relating to EV Charging points (£1,000) and security costs (£35,000) are not generally recoverable under the leases of the flats. But it allows contributions to the relevant cost of repairs to the Fermax panel (£195 + VAT) and video screens (£1,280 + VAT) as being contractually payable.

40. Alternatively, under s.19(2) of the 1985 Act, a reasonable provision for the costs of EV Charging points and security enhancements in 2022 would have been £19,094.80.

41. The tribunal orders under s.20C of the 1985 Act that none of the costs incurred by the respondent in connection with proceedings before the tribunal in connection with the proceedings are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the applicants.

42. The tribunal makes no determination under para 5A of Sch.11 to the 2002 Act.

Judge Mark Loveday

17 February 2023

Appeals

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

2 The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3 If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4 The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.