



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference : **LON/00AM/LSC/2021/0363**

HMCTS code (paper, video, audio) : **V: CVPREMOTE**

Property : **9 Saw Mill Way, London N16 6AN.**

Applicant : **Claire Shomade.**

Representative : **In person.**

Respondent : **Peabody Trust and Peabody Southeast Limited.**

Representative : **Home Ownership**

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 : **Judge H Carr**
Mr A Fonka
M C Piarroux

Venue : **10 Alfred Place, London WC1E 7LR**

Date of decision : **20 April 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: SKYPEREMOTE]. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 254 pages, the contents of which I have noted. The order made is described at the end of these reasons

Decisions of the tribunal

- (1) The tribunal determines that 3.3481% of the total block charges is payable by the Applicant for the years April 2018 - March 2022 inclusive.
- (2) The tribunal determines that the block cleaning costs for the service charge years April 2018 -March 2022 inclusive be reduced by 50%.
- (3) The tribunal makes the determinations as set out under the various headings in this Decision
- (4) 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
- (5) The tribunal determines that the Respondent shall pay the Applicant £300 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicant.

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 April 2018 – March 2022 inclusive in the sum of £32,746.87 .

The hearing

2. The Applicant appeared in person at the hearing and the Respondent was represented by Mr Robert Shaw, Senior Home Ownership Manager. Mr Wing, Service Charge Officer with the Respondent also attended for the Respondent.

The background

3. The property which is the subject of this application is a one bedroom flat in a purpose built block of 5 flats. There are ten maisonettes alongside the block. The block that includes the applicant's flat adjoins a larger block with which it shares a roof. The larger block comprises 35 units.
4. 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.
5. The Applicant holds a long lease of the property which requires 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

6. At the start of the hearing the parties identified the relevant issues for determination as follows:
 - (i) Whether the landlord acted reasonably and in accordance with the lease in removing the access to the block common parts in for maisonettes 1-5 and 11-15 and reappportioning the service charge relating to block costs for flats 6 – 10?
 - (ii) Whether the leaseholders of the Applicant's block are liable to pay the weekly cleaning costs incurred by the Respondent when an agreement was reached in April 2017 to reduce the frequency of visits to fortnightly and therefore reducing the cost of communal cleaning by 50%?
 - (iii) Should the tribunal make an order under s.20C of the Landlord and Tenant Act 1985
 - (iv) Should the tribunal order the reimbursement of the applicant's application and hearing fees?
7. The Applicant raised no issues about the standard of service provision. The dispute between the parties focuses on two matters:
 - (i) The change in computation of the service charge from 2018 to date. From April 2018 access to the block communal areas was reduced from 1 – 15 Saw Mill Way to 6 – 10 Saw Mill Way.
 - (ii) The frequency of the cleaning delivered to the block. The applicant says that it was agreed in April 2017 that the

frequency of the communal cleaning would be reduced from weekly to fortnightly but that agreement was never acted upon.

Relevant terms of the lease

8. The relevant terms of the lease are as follows:

Service Charge Provisions (at clause 7 of the lease)

Clause 7.4 The relevant expenditure to be include in the Service Provision shall comprise all expenditure reasonably incurred by the Landlord in respect of and/or in connection with the repair management improvement renewal (including without limitation the investigation and repair of any defect (whether latent or patent) and any damage resulting therefrom) redecoration maintenance and provision of services for the Building and shall include (without prejudice to the generality of the foregoing): ...

- (d) Any Outgoings assessed charged imposed or payable on or in respect of the whole of the Building or in the whole or any part of the Common Parts:

Definition of the Building

Building means the building of which the Premises form part and each and every part of the Building and the car part service or loading area service road and any other areas the use and enjoyment of which is appurtenant to the Building whether or not within the structure of the Building

Definition of Common Part (Schedule 9 of the Lease)

‘Common Parts’ means those parts of the Building (whether or not within the structure of the Building) to be used in common by any of the Leaseholder other tenants and occupiers of the Building the Landlord and those properly authorised or permitted by them to do so and ‘Common Parts’ includes (but without limitation) the atrium and entrance hall corridors balconies lobbies staircases bin and cycle store lavatories access ways passages lifts escalators turntables courtyards external pavements car part and its ramp service and loading areas service road gardens door entry system rain water harvesting systems photovoltaic panels or other renewable or alternative energy systems and other such amenities but excluding any such parts as may be within the Premises (save for the door entry system)

Power to alter Common parts 6.4

The Landlord shall have power at its discretion to alter the arrangement of the Common Parts provided that after such alteration the access to and amenities of the Premises are not substantially less convenient than before.

The Apportionment of the Service Charge (The Particulars)

A fair proportion

The Determination

- 10 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.

Rearrangement of access to common parts and a consequent re-apportionment of service charges

9. The Respondent explained the background to the dispute. From the time of the handover of the development in 2013/14 the maisonettes (1 – 5 and 11- 15) on the development and flats 6 – 10 Saw Mill Way were all contributing towards service charges equally based on bedroom split for the block and estate services. Because the Applicant owned a 1 bedroom flat that meant that she paid 3.4% of the block charges.
10. A decision was taken by Peabody as landlord in 2018 – 19 following complaints from the maisonettes to remove them from the service charge for costs attributed to the block 6 – 10 Saw Mill Way. As a result of this change, flats 6 – 10 (which includes the Applicant) saw their contributions increased each year, whilst the maisonettes no longer paid for block services and therefore had a decrease in their contributions. The consequence was that the Applicant paid 16.4% of the block charge.
11. The Respondent told the tribunal that the original apportionment included the maisonettes because the maisonettes had access to the block by way of a fob-based system to use a cycle store connected to the block. Following consultation with the owners of the maisonettes in 2017-2018 the maisonette owners opted to relinquish their use of this cycle store and pay reduced costs. Subsequently the fobs were reprogrammed to ensure that the maisonette owners no longer had access to the block (and of course the cycle store) that they were no longer contributing towards.
- 11 The Applicant's argument is that the Respondent should not have excluded the owners of the maisonettes from the block communal areas including the bike store. This decision, despite the clear

detrimental impact upon the leaseholders of the flats, was arrived at with no consultation with them.

12 The Applicant's argument is that it is not reasonable or rational for the Respondent to allow leaseholders to cherry pick which facilities they have access to, particularly when such decisions have an adverse effect on other leaseholders.

13 The Applicant also points out that the consequence of the change is that her service charges are very high. She produced some evidence to show that her annual service charges were above other similar properties in London.

14 The Respondent pointed to the strength of feeling of the maisonette owners and that the decision to exclude them from the use of the cycle store had some logic. The owners of the maisonettes were much more likely to have space to store cycles in the grounds of their own properties.

15 The Respondent says that it understands that the current arrangement might create the impression that the leaseholders of flats 6 – 10 were subsidising the maisonettes. However, the Respondent says that there is an argument to say that the maisonettes should never have contributed in the first place and certainly not at an equal rate in any event and that during the years the maisonettes were included, flats 6 -10 received a relatively modest service charge.

16 The Respondent argues that the maisonettes are completely separate from the block and with the removal of cycle store use there is no basis for charging them a share of the costs of block services. The Respondent also told the tribunal that it had no specific right to charge the maisonettes a share of the block charges.

17 The Respondent agrees that it did not consult with leaseholders of the flats before the change. As an acknowledgement of the failure to consult Peabody adjusted the charges of the flats for the first year of the change. Basically what was done was to write off the balancing charges levied against the accounts for flats 6 – 10 for the year ending 18/19. It therefore rejects the applicant's argument that the charges for that year should be reduced and asks the tribunal to decide that it had properly compensated the Applicant for its failure to consult. It therefore argues that any failure in process has been compensated for.

18 The Respondent also argues that it has the right to alter the arrangements of the communal parts which was what in effect it did when it removed the cycle store and access of communal parts from the maisonettes. This did not make the amenities less convenient to the

flats of 6 – 10 Saw Mill Way and therefore it had the right to make the changes that it did.

19 In reply the Applicant says that she would welcome elaboration on the Respondent's assertion that the maisonettes should never have contributed to the block costs. They had access to the cycle store and it was on that basis that they, and she, bought their properties.

20 There is conflicting information on how the maisonettes access to the bike store was relinquished.

The tribunal's decision

21 The tribunal determines that the amount payable by the Applicant in respect of block charges for the years in dispute is 3.3481%.

Reasons for the tribunal's decision

22 The starting point for the decision of the tribunal is the terms of the lease.

23 The Applicant's lease is not clear on service charge apportionment, nor on the process for changing that apportionment. The tribunal notes that the only reference to the apportionment of service charges is the requirement set out in the particulars of the lease, that the apportionment is 'a fair proportion'. There is nothing in the lease to indicate how that is to be arrived at and nothing that indicates how it can be changed.

24 In these circumstances the tribunal considers that extraneous information has to be relied upon to decide what the Applicant understood a fair proportion to be at the time of the purchase.

25 The tribunal asked what information would have been given to the Applicant about the payment of service charges prior to purchase. The Applicant did not have a memory of this. The Respondent said that it was likely that she would have been given development accounts and that those accounts would have indicated an apportionment of block service charges that included the maisonettes and levied on a bedroom basis.

26 The tribunal also notes that for the first three years of the Applicant's ownership the maisonettes were included in the apportionment of the block charges. . On that basis the tribunal determined that the original 'fair' apportionment was that the

maisonettes contributed to the block charges based on the number of bedrooms. This was the basis upon which the Applicant, and indeed the other owners purchased their properties.

27 The tribunal draws in support on the fact that the cycle store was clearly not designed solely for the five leaseholders of the block. The photographs indicate it is quite spacious and Mr Shaw agreed that the cycle store was probably designed for the maisonettes to use as well as the block.

28 The next point for the tribunal to consider is whether the original apportionment can be changed by the landlord if circumstances change so that the apportionment is no longer fair.

29 On one view, as there is nothing in the lease which provides a system which enables the Respondent to change what a fair proportion is, the original position cannot be changed.

30 The other view is that the use of the word 'fair' implies that the apportionment can be changed. Although there is no evidence before it of the intention of the parties at the time the contract was entered into, it inclines to the view that the apportionment can be changed. However the tribunal does not consider that there can be an arbitrary change in the apportionment. The word fair implies that, in the absence of a procedure laid down in the lease, any process for changing the apportionment of the charges must be transparent, must involve consulting all parties, and must involve a reasoned decision making process.

31 The approach that the Respondent used, of talking only to those residents who would benefit from a change, must be flawed and cannot operate to change the original understanding of fair proportion. The failure to provide any clear and reasoned decision about the re-apportionment of the charges and its fairness must also be fatal to the Respondent's case. It does not correct the position to pay the Applicant and the other Leaseholders of the block compensation for one year of increased charges.

32 Nor does the tribunal accept the Respondent's argument on the meaning of clause 6.4 of the lease. In the tribunal's opinion this refers to the physical arrangement of the common parts and not changes in access arrangements which result in a re-apportionment of the service charge. For the clause to mean anything other than change in physical arrangements the tribunal consider that explicit words would have to be used.

33 The tribunal realises that its decision leaves the Respondent in some difficulty. However that difficulty has not been caused by the

Applicant. It is the consequence of a poorly drafted lease and unilateral action by the Respondent to appease some of its leaseholders at the expense of others.

34 The Applicant gave some indication that she would be prepared to negotiate on what a fair proportion would be.

Cleaning charges

35 The Applicant argues that it was agreed in 2017 that cleaning frequency should be reduced at the block. She produced email trails which supported her position. She says that cleaning the common parts of the block on a weekly basis is unnecessary as there are only five units.

36 The Respondent agrees that informal discussions were had relating to the frequency of cleaning dating back to 2017 /2018. He could not explain why the discussions were not acted upon as they preceded his employment with the Respondent. He suggested there may be emails missing from the evidence provided but had no evidence to suggest that a decision had not been reached.

37 Since the time of the Application the Respondent has acted to consult all the leaseholders in the block and has now initiated the change in the frequency of cleaning because all the contributors to the block service charge agreed to this reduction. The decision will be kept under review.

38 However the Respondent argues that the decision on the delivery of this service is with the Respondent and Peabody are fulfilling its obligation to keep the communal parts suitably cleaned under the terms of the lease. As cleaning has been provided on a weekly basis the charges incurred are reasonable and payable. The Applicant should pay for the services which have been provided.

The tribunal's decision

39 The tribunal determines that the amount payable in respect of communal cleaning since 2017 be reduced by 50%.

Reasons for the tribunal's decision

40 The tribunal determines as a matter of fact that an agreement was reached that the cleaning be reduced from weekly to fortnightly. It is clear that the Respondent did not act on that decision.

41 The tribunal notes what the Respondent says and agrees that its usual starting point is that the Applicant has to pay for the services provided. However in this instance as there was an agreement to reduce the frequency of cleaning of the communal areas by 50% the tribunal considers that the normal starting point does not apply.

42 The Respondent was not able to explain why the agreement had not been operationalised nor why more frequent cleaning than fortnightly was required. The tribunal noted that the adjacent social block which comprises 35 units also has the common parts cleaned on a weekly basis. If that block requires weekly cleaning it is difficult to understand why a block occupied by only five leaseholders requires the same frequency of cleaning. Indeed the fact that the Respondent has now reduced the frequency of cleaning is indicative of the reasonableness of reducing the frequency of cleaning.

43 In these circumstances, where an agreement was reached, and the agreement appears appropriate, the tribunal does not consider it reasonable to require that the Applicant pay for weekly cleaning and should only pay cleaning charges at the level which the Applicant agreed with the Respondent.

Application under s.20C and refund of fees

44 In the application, the Applicant made an application for a refund of the fees that she had paid in respect of the application/hearing¹. Having heard the submissions from the parties and taking into account the determinations above, the tribunal orders the Respondent to refund any fees paid by the Applicant.

45 In the application form the Applicant applied for an order under section 20C of the 1985 Act. Taking into account 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: Judge H Carr

Date: 20th April 2022

Rights of appeal

¹ The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

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).