FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/00KF/LSC/2020/0001**
HMCTS code (paper, video, audio)	**:**	**P: PAPER REMOTE**
Property	**:**	**First Floor Flat, 92A Bellhouse Lane, Leigh on Sea, Essex SS9 4PQ**
Applicant	**:**	**Porterman Investments Limited**
Representative	**:**	**David Webb**
Respondent	**:**	**The Second Generation Company (1994) Limited**
Representative	**:**	**Balbinder Singh**
Type of application	**:**	**For the determination of the liability to pay service charges under S.27A Landlord and Tenant Act 1985.**
Tribunal members	**:**	**Judge Wayte**
Date of decision	**:**	**18 May 2020**

DECISION

Covid-19 pandemic: description of hearing

In accordance with Rule 31 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, this matter was set down for a determination on the papers in the directions and neither party requested a hearing. The applicant provided a bundle of documents in accordance with the directions and the respondent a further statement on 23 April 2020 which has also been taken into account.

Decisions of the tribunal

(1) The tribunal determines that the sum of £1,547.64 is payable by the applicant in respect of an interim charge for insurance costs for the years 2016/17 through to 2019/20;

(2) The tribunal determines that the insurance costs for 2013/14, 2014/15 and 2015/16 are not payable by virtue of section 20B (1) of the Landlord and Tenant Act 1985;

(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 and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessee through any service charge or claimed as an administration charge.

The application

1. The applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable in respect of the service charge years 2013/14 to 2019/20. For each year the disputed items were a £100 charge for management and a contribution towards the buildings insurance premium of £386.91.

2. Directions were given on 29 January 2020 for the parties to provide a schedule setting out comments on the items in dispute, although only the applicant appears to have complied with that direction. In her first written statement dated 5 March 2020 Mrs Singh, on behalf of the respondent, withdrew the management charge leaving the insurance premium for each year as the sole service charge item in dispute.

3. The directions set the matter down for a determination on the papers, unless either party requested a hearing. Neither did so. The applicant provided the hearing bundle on 20 April 2020. I requested further information from the respondent in relation to the insurance premium on 21 April 2020 and she replied by way of a further statement dated 23 April 2020.

The background

4. The property which is the subject of this dispute is described in the application form as a first floor flat above a shop within a two storey building. 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 will be referred to below, where appropriate.

The issues

6. The application form identified the relevant issues for determination as follows (excluding the management charge which has been withdrawn by the respondent):

   (i) The payability and/or reasonableness of the charge for insurance from 2013/14 to date;

   (ii) Whether section 20B of the Landlord and Tenant Act 1985 operated so as to prevent the landlord from being able to recover any service charge incurred more than 18 months before the demand for payment;

   (iii) Whether section 47 of the Landlord and Tenant Act 1987 operated in respect of a lack of the landlord's name and address on any demands so as to prevent the service charge from being due;

   (iv) Whether an order should be made under section 20C of the Landlord and Tenant Act 1985 limiting payment of the landlord's costs as part of the service charge and/or under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 limiting payment of the landlord's costs as an administration charge.

7. Having considered all of the documents provided, I have made determinations on the various issues as follows.

The lease

8. The lease is dated 19 May 1989, a copy was included in the bundle at pages 25-51. The service charge provisions are set out in the Fourth Schedule. They provide for a service charge year commencing the 24 June 1989 or such other date as the landlord may notify in writing. The lessee is responsible for 50% of the landlord's total expenditure incurred in compliance with the landlord's covenants in the lease and various costs of administration, including a sum not exceeding 15% of the other items of total expenditure for the landlord's administration costs.

Paragraph 1(3) provides for payment of a fair and reasonable interim service charge to be paid on account, with the usual rules for carrying forward any surplus. Paragraph 5 states that any deficit is due within 28 days of service upon the tenant of the certificate referred to in paragraph 6. That paragraph states that as soon as practicable after the end of each accounting period the landlord shall serve on the tenant a summary of the total expenditure certified by a qualified accountant and a certificate on behalf of the landlords setting out the amount of the service charge and any excess or deficiency over the interim charge.

9. In practice, it would appear that the landlord has nominated the 25 June as the commencement of the service charge year. The bundle only contains demands for advance payments from the landlord commencing 8 November 2016 but seeking to recover insurance contributions for the service charge years 2013/14 to 2016/17. There are further similar demands dated 24 January 2018 for the service charge year 2017/18 and 17 July 2019 for the service charge year 2019/20. There was no demand in the bundle for the service charge year 2018/19 which the respondent states was paid in full by the applicant (statement dated 5 March 2020).

Section 47 Landlord and Tenant Act 1987

10. Although this appears as issue number three, it makes sense to deal with it now. The applicant concedes in his statement of case dated 6 March 2020 that the respondent served a valid demand on 17 July 2019. Section 47 is set out in full in the Appendix to this decision, the salient point being that service charges will not be due before that information is provided to the tenant. There is ample authority, binding on this tribunal, that this means the section has a suspensory effect only. Once a valid demand has been provided the suspensory effect is lifted for all outstanding service charges: see for example *Tedla v Camerat Court Residents Association Ltd* [2015] UKUT 0221 at paragraph 38 where the Deputy President states: "*The effect of s.47(2) is 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 to the tenant"…all that is now required to satisfy the statutory requirements is for a notice to be given to the [tenant] informing her that the respondent is her landlord and of its address…It is not necessary for all the previous service charge demands to be re-issued. From the time at which such a notice has been given the service charges will be treated for all purposes as being due…".*

11. It follows that this ground falls away. I acknowledge that the respondent maintains an address was always given previously, although that address differs from the one in the demand dated 17 July 2019. That said, it makes no difference whether the earlier demands did in fact satisfy section 47 and therefore there is no need to examine this issue further.

Section 20B Landlord and Tenant Act 1985

12. It also makes sense to consider this argument before turning to the insurance costs as it may reduce the years in dispute. Again, the section is set out in full in the Appendix but in short section 20B (1) provides that costs are not recoverable if they were incurred more than 18 months before being demanded. However, if the tenant was informed in writing within 18 months of the costs being incurred that they had been incurred and they would be recoverable from the tenant Section 20B (2) states that the bar to recovery shall not apply.

13. The respondent does not dispute that the service charges i.e. insurance costs for 2013/14 - 2015/16 were not demanded until 8 November 2016. Her second statement confirms that the premium is paid in February of each year, supported by the copies of the Property Owners Schedule which confirms that the insurance is renewed on 5 February. Applying section 20B (1) to the demand means that the landlord is unable to recover any insurance costs incurred before 8 May 2015 and therefore nothing is payable for 2013/14 to 2015/16 as the insurance costs for those years were incurred more than 18 months before being demanded.

14. For the avoidance of doubt, the Upper Tribunal has also confirmed that any defect in the demand in terms of section 47 of the 1987 Act can be cured retrospectively by a valid notice included in a later demand (*Johnson v County Bideford Limited* [2012] UKUT 457 (LC) so that the earlier demands will count for the purposes of section 20B (1). Therefore, the demands dated 8 November 2016 and 24 January 2018 are valid for the purposes of the insurance costs for 2016/17 and 2017/18 which were incurred within 18 months of those demands. There is no demand in the bundle for 2018/19 which the respondent states was paid by the applicant. The latest demand dated 17 July 2019 is the one which the applicant admits complies with section 47 of the 1987 Act and again the insurance costs were incurred within 18 months of that demand.

15. In the circumstances, the tribunal determines that the insurance costs for 2013/14, 2014/15 and 2015/16 are not payable by virtue of section 20B (1). The applicant has not proven its case on this ground in respect of the insurance costs for 2016/17, 2017/18, 2018/19 and 2019/20.

Insurance costs

16. The application form raised five queries of relevance to the insurance:

- Can the landlord claim £100 in advance?
- Can the landlord claim service charge with no evidence of expenditure incurred?
- Is the buildings insurance sum reasonable?

- Should Porterman pay 50% of insurance premium when part covers commercial property?
- Can a landlord claim buildings insurance without proof of premium incurred?

17. Although the first query referenced the management charge, which has been withdrawn by the respondent, it is important to consider the nature of the demands which are all for payment in advance i.e. a request for an interim service charge permitted by paragraph 1(3) in the Fourth Schedule of the lease. The lease itself provides that such an amount must be fair and reasonable and this is also reflected in the statutory language in section 19(2) of the 1985 Act (see the Appendix below) which applies to payment made in advance of the end of year accounts.

18. This leads to the second (and fifth) queries. Obviously, a request for payment of an interim service charge would usually be made before the relevant costs were incurred and therefore there would be no proof of expenditure available. The lease provides for summaries of expenditure and landlord's certificates after each service charge year as a trigger for the payment of any excess due over and above the interim charge but there is no evidence that these have ever been prepared. In the event that nothing is due over and above the interim service charge there is also no need for the landlord to provide them, even though that is in breach of their obligation set out in the Fourth Schedule.

19. That said, the only information in the bundle is a copy of the insurance schedule for each year and nothing in terms of the premium paid. The tribunal requested further information about the premium from the respondent and this resulted in the second statement of Mrs Singh dated 23 April 2020. She confirmed that the property was one of several insured under a block policy and that the contribution for the property was based on its size and claims history as outlined in her original statement dated 5 March 2020. A letter dated 2 June 2017 from the respondent to the applicant in the bundle at page 69 refers to a letter from William Taylor Insurance Brokers which I assume was sent to the applicant but has not found its way into the bundle. It is unclear what information this letter provided as to how the premium was apportioned between the various properties.

20. The fourth query goes to the applicant's percentage contribution, with him challenging a 50% contribution on the basis that the ground floor is commercial property. The respondent addresses this issue at some length in her first statement, although that is unnecessary as the applicant's contribution is set out in the lease at paragraph 1(2) as 50% of the total expenditure.

21. That leads us back to the central query of relevance: is the sum of £386.91 claimed as an interim service charge for insurance reasonable? It would have been helpful if the respondent could have provided better information as to the actual premium paid and the other properties insured, although as the terms are set out in the policy schedule, I am able to assess the

reasonableness of the cost using my experience of insurance costs generally. As the respondent points out, the applicant has also failed to provide any evidence of cover being available at a lower cost to support his assertion in the schedule that a reasonable figure would be in the region of £250. His main objections were based on the challenge to 50% and the fact that he should pay nothing without evidence of the premium charged and proof of payment.

22. As set out above, both parties could have done more to assist the tribunal in terms of the evidence in support of their case. That said, the policy schedules are evidence that insurance was in place and I see no reason to doubt the evidence provided by Mrs Singh in this regard. There is no evidence in respect of 2018/19 which the respondent claims was paid by the applicant, who has not denied that assertion but included that year in his application to the tribunal. Given that the bundle was prepared by the applicant and the other demands and proof of insurance were available, I have considered this year on the same basis as the other three in contention. Taking into account the fact that the claims are for service charges on account, the lack of any evidence from the applicant to support his assertion that equivalent insurance was available at a lower cost and my own experience of deciding similar cases, I determine that £386.91 is a reasonable amount and is therefore payable for the service charge years 2016/17, 2017/18, 2018/19 and 2019/20.

Application under s.20C/paragraph 5A and refund of fees

23. In the application form the Applicant applied for an order under section 20C of the 1985 Act and paragraph 5A of the 2002 Act (see Appendix below) restricting the landlord's costs payable under the lease. It follows that the tribunal should first go to the lease to check what costs the landlord is able to recover by way of a service or administration charge. The definition of "total expenditure" in the Fourth Schedule of the lease refers to the landlord's obligations under clause 4(1)(b)(c) and (d). Those provisions are mainly about works to the property, although clause 4(1)(d) does contain a reference to solicitors' costs and therefore it is arguable that the landlord may include such costs as part of the service charge. There is also a clear provision in the tenant's covenants at clause 2(11) in respect of costs incurred in recovering any rent or service charge due which would be payable as an administration charge.

24. The next step is therefore to consider what order would be just and equitable to make in all the circumstances. The applicant challenged management fees of £700 and insurance contributions of £2,708.37, a total of £3,408.37. The respondent conceded the £700 in their first statement and has succeeded in justifying their insurance costs for 4 of the 7 years in dispute, a total of £1,547.64. In the circumstances I consider that the applicant is effectively the successful party in financial terms and it is therefore just and equitable for an order to be made preventing the respondent landlord from recovering any costs of these

proceedings either as a service charge or administration charge against the applicant.

25. That said, the applicant has not been totally successful and its challenge in respect of the landlord's ability to recover an interim service charge and liability for 50% of the insurance costs fails due to the wording of the lease. In the circumstances I have decided not to order the respondent to reimburse the application fee of £100.

26. For completeness, in the witness statements, the respondent indicated that it wished to claim costs and interest against the applicant. No details of that claim were ever provided and in any event such matters are for the County Court rather than this tribunal, which determines reasonableness once a charge has been levied. In any event, the order made at paragraph 24 above means that no claim for the costs of these proceedings can now be made by the respondent under the applicant's lease.

Name: Judge Wayte **Date:** 18 May 2020

Rights of appeal

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

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

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

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

Appendix of relevant legislation

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.

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(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 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.

(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to that tribunal;
(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
(c) in the case of proceedings before the Upper Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Section 47 Landlord and Tenant Act 1987

(1) Where any written demand is given to a tenant of premises to which this Part applies, the demand must contain the following information, namely—
(a) the name and address of the landlord, and
(b) if that address is not in England and Wales, an address in England and Wales at which notices (including notices in proceedings) may be served on the landlord by the tenant.

(2) Where—
(a) a tenant of any such premises is given such a demand, but
(b) it does not contain any information required to be contained in it by virtue of subsection (1), then (subject to subsection (3)) any part of the amount demanded which consists of a service charge or an administration charge ("the relevant amount") shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 5A

Limitation of administration charges: costs of proceedings

5A (1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.