



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

<b>Case Reference:</b>	CHI/00HN/LSC/2020/0050
<b>Property:</b>	33B Carbery Avenue, Bournemouth, BH6 3LN
<b>Applicant:</b>	Henrikka Kempfi
<b>Respondent:</b>	Gary Levesconte
<b>Type of Application:</b>	Section 27A of the Landlord and Tenant Act 1985 (Liability to pay service charges) Tenant's application for the determination of reasonableness of service charges for the year 2020
<b>Tribunal Members:</b>	Judge A Cresswell
<b>Date and venue of Hearing:</b>	7 October 2020 on the Papers

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**DECISION**

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### **The Application**

1. This case arises out of the Applicant tenant's application, made on 4 June 2020, for the determination of liability to pay service charges for the year 2020.

### **Summary Decision**

2. Under Sections 19 and 27A of the Landlord and Tenant Act 1985 (as amended) service charges are payable only if they are reasonably incurred. The Tribunal has determined that the landlord has not demonstrated that the charges in question are payable by the Applicant.
3. None of the items included on the service charge demand for the year 25 March 2020 to 24 March 2021 has been shown by evidence to have already been the subject of expenditure. Most of the items cannot be demanded in any event.

### **Inspection and Description of Property**

4. The Tribunal did not inspect the property.
5. The property is described as the upper floor flat of a 3 floor dwelling split into 3 flats.

### **Directions**

6. Directions were issued on various dates. These directions provided for the matter to be heard on the basis of written representations only, without an oral hearing, under the provisions of Rule 31 of the Tribunal Procedure Rules 2013.
7. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration.
8. This determination is made in the light of the documentation submitted in response to those directions.
9. The Tribunal emphasises that, although the parties discussed other grievances, this Decision deals solely with the issues identified in the directions as being the only matters where it can exercise its jurisdiction.
10. The Tribunal has regard in how it has dealt with this case to its overriding objective: The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Rule 3(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes:

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it:

- . (a) exercises any power under these Rules; or
  - . (b) interprets any rule or practice direction.
- (4) Parties must:
- . (a) help the Tribunal to further the overriding objective; and
  - . (b) co-operate with the Tribunal generally.

### **The Law**

11. The relevant law is set out in sections 18, 19, and 27A of Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002
12. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord’s costs of management, under the terms of the lease (s18 Landlord and Tenant Act 1985 “the 1985 Act”). The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.
13. In reaching its Decision, the Tribunal also takes into account the Third Edition of the RICS Service Charge Residential Management Code (“the Code”) approved by the Secretary for State under section 87 of the Leasehold Reform Housing and Urban Development Act 1993. The Code contains a number of provisions relating to variable service charges and their collection. It gives advice and directions to all landlords and their managing agents of residential leasehold property as to their duties. In accordance with the Approval of Code of Management Practice (Residential Management) (Service Charges) (England) Order 2009 *Failure to comply with any provision of an approved code does not of itself render any person liable to any proceedings, but in any proceedings, the codes of practice shall be admissible as evidence and any provision that appears to be relevant to any question arising in the proceedings is taken into account.*
14. **Enterprise Home Developments LLP v Adam** (2020) UKUT 151 (LC):  
  27. *In Yorkbrook Investments Ltd v Batten (1986) 18 HLR 25 Wood J, giving the decision of the Court of Appeal, addressed the issue of the burden of proof on the reasonableness of service charges. At page 34 he said this:  
“Having examined the statutory provisions we can find no reason for suggesting that there is any presumption for or against a finding of reasonableness of standard or costs. The court will reach its conclusion on the whole of the evidence. If the normal rules of pleadings are met, there should be no difficulty. The landlord in making his claims for maintenance contributions will no doubt succeed, unless a defence is served saying that the standard or the costs are unreasonable. The tenant in such a pleading will need to specify the item complained of and the general nature – but not the evidence – of his case. No doubt discovery will need to be ordered at an early stage, but there should be no problem in each side knowing the case it has to meet, providing that the court maintains a firm hold over its procedures. If the tenant gives evidence establishing a prima facie case then it will be for the landlord to meet those*

*allegations and ultimately the court will reach its decisions.”*

28. *Much has changed since the Court of Appeal’s decision in Yorkbrook v Batten but one important principle remains applicable, namely that it is for the party disputing the reasonableness of sums claimed to establish a prima facie case. Where, as in this case, the sums claimed do not appear unreasonable and there is only very limited evidence that the same services could have been provided more cheaply, the FTT is not required to adopt a sceptical approach. In this case it might quite reasonably have taken the view that Mr Adam had failed to establish any ground for thinking the sums claimed had not been incurred or were not reasonable, which would have left only the question whether any item of expenditure was outside the charging provisions.*

15. *“Once a tenant establishes a prima facie case by identifying the item of expenditure complained of and the general nature (but not the evidence) of the case it will be for the landlord to establish the reasonableness of the charge. There is no presumption for or against the reasonableness of the standard or of the costs as regards service charges and the decision will be made on all the evidence made available: London Borough of Havering v Macdonald [2012] UKUT 154 (LC) Walden-Smith J at paragraph 28.*
16. The lessee is obliged to identify the costs which s/he disputes and to give reasons for his/her challenge. The landlord is expected to produce evidence which justifies the costs and answers the lessee’s challenge. If the lessee succeeds in persuading the Tribunal that the costs should be reduced, the Tribunal will expect him/her to produce evidence of the amount by which the landlord’s costs should be reduced. It is a key element of the section 27A determination process (**The Gateway (Leeds) Management Ltd v (1) Mrs Bahareh Naghash (2) Mr Iman Shamsizadeh [2015] UKUT 0333 (LC)**).
17. Where a party does bear the burden of proof:  
*“It is common for advocates to resort to [the burden of proof] when the factual case is finely balanced; but it is increasingly rare in modern litigation for the burden of proof to be critical. Much more commonly the task of the tribunal of fact begins and ends with its evaluation of as much of the evidence, whatever its source, as helps to answer the material questions of law... It is only rarely that the tribunal will need to resort to the adversarial notion of the burden of proof in order to decide whether an argument has been made out...: the burden of proof is a last, not a first, resort.”* (Sedley LJ in **Daejan Investments Ltd v Benson [2011] EWCA Civ 38** at paragraph 86).
18. The relevant statute law is set out in the annex below.

### **Ownership and Management**

19. The Respondent is the owner of the freehold. The property is managed for him by Initiative Property Management Limited.

### **The Lease**

20. The Applicant holds Flat 33B under the terms of a lease dated 9 June 1987, which was made between FE Stadden and Mrs EM Stadden as lessors and DAS MacColl and Miss CA Cameron as lessees (“the lease”). This is the only set of contractual terms between the Applicant and the Respondent lessor; a later contract/lease between the

lessor and a different lessee, to which the Applicant is not a party, cannot, of itself, alter the terms of the Lease.

21. The construction of a lease is a matter of law and imposes no evidential burden on either party: **((1) Redrow Regeneration (Barking) Ltd (2) Barking Central Management Company (No2) Ltd v (1) Ryan Edwards (2) Adewale Anibaba (3) Planimir Kostov Petkov (4) David Gill** [2012] UKUT 373 (LC)).
22. When considering the wording of the lease, the Tribunal adopts the guidance given to it by the Supreme Court:  
**Arnold v Britton and others** [2015] UKSC 36 Lord Neuberger:  
  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. In this connection, see *Prenn* at pp 1384-1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, *Bank of Credit and Commerce International SA (in liquidation) v Ali* [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in *Rainy Sky*, per Lord Clarke at paras 21-30.
23. In **Sinclair Gardens Investments (Kensington) Limited v Avon Estates (London) Limited** [2016] UKUT 317 (LC) the Upper Tribunal refused to allow legal costs in the absence of clear words. There Stuart Bridge said there is no need to construe service charge clauses restrictively (see Lord Neuberger at [23]). That said, *‘it is reasonable to expect that, if the parties to a lease intend that the lessor shall be entitled to receive payment from the tenant in addition to the rent, that obligation and its extent will be clearly spelled out in the lease’*: see *Francis v Philips* [2014] EWCA Civ 1395 at [74].
24. Clause 1 (v) of the Lease requires the Applicant to pay “*unto the Lessors by way of additional or further rent a sum or sums of money equal to one third of the amount which the Lessors shall expend in complying with the covenants by the Lessors contained in Clause 3 (ii) hereof such last mentioned rent to be paid on demand following the expenditure by the Lessors* “
25. Clause 3. *THE Lessors hereby jointly and severally covenant with the Lessee as follows:-*  
  - (ii) *The Lessors will (subject to contribution and payment by the Lessee as herein provided) maintain repair renew:-*

*(a) the boundary fence and wall indicated by the 'T' marks on the said plan together with the 'walls footings foundations exterior walls and general structure roof (including the roof timbers) chimney stacks gutters and rainwater pipes of the building*

*(b) the gas water pipes tanks drains and electric wires and cables in under or upon the building or the garden and curtilage thereof and enjoyed or used by the Lessee in common with the Lessors and any occupiers of the Lower Premises*

*(c) any other part or parts of the building or premises whatsoever used in common by' the Lessee and the Lessors and any lessee or owner for the time being of the Lower premises or any part thereof*

*(d) so often as reasonably required paint (in the same colours as at present or such other colour as may be agreed with the Lessee) with two coats of good quality paint in a proper and workmanlike manner all the exterior wood stone and ironwork of the building*

26. Clause 2(b) of the Lease requires the Applicant “*To contribute and pay one third of the costs expenses and outgoings and matters mentioned in the second Schedule hereto*”

27. “*THE SECOND SCHEDULE hereinbefore referred to Costs expenses and outgoings and matters in respect of which the Lessee is to contribute a One Third Share*

*1. The expense of maintaining repairing and renewing*

*(a) the boundary fence and wall indicated by 'T' marks on the said plan walls footings foundations exterior walls and general structure roof (including roof timbers) chimney stacks and rainwater pipes of the building*

*(b) the gas and water pipes tanks drains and electric cables and wires in under or upon the building or the gardens and curtilage thereof and enjoyed or used by the Lessee in common with the Lessors and any occupiers of the Lower Premises*

*(c) any other part or parts of the building or premises whatsoever used in common with the Lessee the Lessors or any Lessee or owner for the time being of the Lower Premises*

*2. The cost of painting the exterior wood stone and ironwork of the building”*

28. Clause 2 (q) requires the Applicant tenant to insure her flat in the joint names of herself and the Respondent. Clause 3 (iii) requires the Respondent to insure the Lower Premises in the joint names of himself, the Applicant and the Lessee of part of the Lower Premises.

### **Payment in Advance**

#### **The Applicant**

29. The Applicant asserts that the lease does not allow the Respondent to demand payment of a service charge in advance of expenditure by the Respondent.

#### **The Respondent**

30. The Respondent accepts this to be the case.

#### **The Tribunal**

31. The Tribunal finds on the basis of the Respondent's admission and on the basis of its own reading of the lease that the Respondent landlord is not entitled to make a demand for any payment in advance of expenditure.
32. The Tribunal finds it remarkable that both a professional managing agent and a solicitor would each insist upon such payment in the absence of any authority in the lease to do so. That the managing agent was so insistent and appears to have relied upon a lease to which the Applicant was not a party is indefensible.

### **General Management Charge**

#### **The Applicant**

33. The Applicant asserts that there is no authority in the lease to claim by way of service charge for the employment of a managing agent.
34. Even if there was such authority, the sum of £900 was too high for the nature of the property and too high for the extent of work performed.

#### **The Respondent**

35. The Respondent argues that, because of the issues at the property, it was necessary to engage a managing agent.

#### **The Tribunal**

36. The Tribunal finds that, whilst there is nothing to prevent a landlord from engaging a managing agent, the landlord remains responsible for the cost of doing so and can only pass on that cost to tenants by way of service charge where the lease allows him to do so.
37. The Respondent has not argued specifically that the lease allows him to reclaim the costs of a managing agent under the lease. The Tribunal finds that the lease does not allow the Respondent to reclaim the costs of engaging a managing agent through the service charge. In so concluding, it has had regard to the guidance of the Upper Tribunal in **Sinclair Gardens Investments (Kensington) Limited v Avon Estates (London) Limited** above. Nothing in the wording of the lease could lead *a reasonable person having all the background knowledge which would have been available to the parties* to understand *them* to be using the language in the contract to mean that anyone could be engaged as a managing agent as part of the service charge costs.
38. Nor does the Lease allow the Respondent to demand a contribution from the Applicant towards Health and Safety as there is no mention of this within the Lease.
39. Nor does the Lease allow the Respondent to demand from the Applicant a contribution towards the cost to him of insuring the Lower Premises. The obligation on the Applicant is to insure her own flat in accordance with Clause 2 (q).

### **Printing and Postage**

#### **The Applicant**

40. The Applicant asserts that this is not payable in accordance with the terms of the lease.

#### **The Respondent**

41. The Respondent does not respond specifically to this assertion.

#### **The Tribunal**

42. The Tribunal finds no reference to any form of landlord's administration costs in the terms of the lease and can see, therefore, no basis upon which this can be claimed as part of the service charge. The same applies if this is printing and postage claimed by the managing agent.
43. On that basis, the sum claimed is not payable.

## **Reserve Fund**

### **The Applicant**

44. The Applicant asserts that there is no provision in the lease for the payment of a reserve fund. She does, however, see the worth of such a fund and has been voluntarily paying £40 per month towards future payments.

### **The Respondent**

45. The Respondent makes no assertion that a reserve fund can be demanded under the terms of the lease but avers that the Applicant has not made regular monthly payments.

### **The Tribunal**

46. The Tribunal first makes the point that it is the terms of the lease which are paramount when determining the rights and duties of the Respondent in respect of a Reserve. The lease is the contractual agreement of the parties. Nowhere else is the term “Reserve Fund” defined specifically for these parties. Whilst the RICS Code gives guidance to landlords about Reserve Funds, it is guidance only and cannot alter the clear terms of a lease.
47. A Reserve Fund ensures that tenants effectively save for future costs so that there are no “nasty surprises”, but also that the costs of items are shared by those who use or have the benefit of them.
48. The Tribunal repeats what it recorded above in respect of Payment in Advance: “*The Tribunal finds on the basis of the Respondent’s admission and on the basis of its own reading of the lease that the Respondent landlord is not entitled to make a demand for any payment in advance of expenditure.*” That includes payments to a reserve fund. To be clear, there is no provision within the Lease which would allow the Respondent to demand any payment towards a reserve fund.
49. In so concluding, the Tribunal has had regard to the guidance of the Upper Tribunal in **Sinclair Gardens Investments (Kensington) Limited v Avon Estates (London) Limited** above. Nothing in the wording of the lease could lead a reasonable person having all the background knowledge which would have been available to the parties to understand them to be using the language in the contract to mean that a payment towards a reserve fund could be demanded as part of the service charge.
50. The Tribunal does not, however, criticise the informal arrangements to date as they would appear to meet the guidance relating to the good sense of avoiding “nasty surprises”, and ensuring that the costs of items are shared by those who use or have the benefit of them.

### **General**

51. The Tribunal finds it unfortunate that this matter should have had to be brought before it.
52. The Respondent appears to have placed his trust in others, but provided them with a lease that has no relevance whatsoever to this Applicant. Those whom he trusted appear to have had no regard to the obvious lack of relevance and to have pursued the Applicant regardless.
53. The Respondent makes reference to wanting a meeting with the Applicant and other tenant and that appears to the Tribunal to be the way forward.

A Cresswell (Judge)



## APPEAL

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.

## ANNEX

Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002

### **18 Meaning of “service charge” and “relevant costs”**

- (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.

### **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.

### **27A Liability to pay service charges: jurisdiction**

(1) An application may be made to a leasehold valuation 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 a leasehold valuation 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 postdispute 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration

agreement) is void in so far as it purports to provide for a determination—

- (a) in a particular manner, or
- (b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.