FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**: BIR/00CW/LIS/2021/0021**
Property	**: 52 Field Street, Heath Town, Wolverhampton, WV10 0JH**
Applicant	**: Miss Sharon McKellar**
Respondent Limited	**: Nehemiah United Churches Housing Association Ltd**
Representative	**: Trowers and Hamlins LLP**
Type of Application	**: Payability and reasonableness of service charges under section 27A Landlord and Tenant Act 1985**
Tribunal Members	**: Judge T N Jackson** **Mr D Satchwell FRICS**
Date and venue of Hearing	**: 20th October 2021** **Remote hearing via Midland Residential Property Tribunal, Centre City Tower, Birmingham.**
Date of Decision	**: 10th December 2021**

DECISION

Decision

We determine that the weekly service charges set out below are payable and reasonable:

a) 2015/6 0.94
b) 2016/7 0.87
c) 2017/8 0.67
d) 2018/9 1.18
e) 2019/20 0.22
f) 2020/21 0.97
g) 2021/22 1.87 (budgeted)

h) We order that the Respondent's costs in connection with these 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 Applicant.

i) We order that the Applicant's liability to pay an 'administrative charge in respect of litigation costs' is extinguished.

Reasons for decision

Introduction

1. The Applicant has applied under section 27A of the Landlord and Tenant Act 1985 ('the 1985 Act') for a determination of the payability and reasonableness of service charges for service charge years 2012 to 2021 inclusive and what a reasonable charge would be for 2021/22.

2. The Applicant has also applied for an Order under section 20C of the 1985 Act (Limitation of service charges: costs of proceedings) and an Order under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act') (Limitation of administration charges: costs of proceedings).

3. The Respondent accepts that the service charges are variable for the purposes of section 18 of the 1985 Act.

Background

4. The Property is within an Estate consisting of 83 properties, (namely 12 flats which are contained within 3 separate blocks and 71 houses).

5. The Respondent owns the Estate and is the Landlord of the Property.

6. The Applicant occupies the Property under an assured non-shorthold tenancy which commenced on 5th November 2012 for a weekly period until brought to an end. The current terms of the tenancy agreement were agreed in 2014.

The Tenancy Agreement

7. Clause 1(1)(ii) states the weekly service charge at the start of the tenancy and Clause 1(2) provides that it is due in advance each week.

8. Clause 1(3)(i) provides for the Respondent to provide the services set out in an attached Schedule for which a tenant shall pay a service charge. The Schedule referred to is the breakdown for that accounting year which listed the services provided on the Estate as at 2014 (page 154 of the hearing bundle).

9. Clause 1(3)(ii) provides that the Respondent may, after consulting the tenants affected, increase, add to, remove, reduce or vary the services to be provided.

10. Clause 1(3)(iii) provides that the Respondent may charge the service charge on the basis of an estimate and that the difference between the estimate charged and the actual cost of the services can be recovered from the Applicant.

11. Clause 1(3)(v) provides that the costs are split equally between all the properties concerned.

12. Under the heading 'The Association's obligations' Clause 2 provides:

> *'The Association agrees:-*
> *...*
> *(4) To keep in repair the structure and exterior of the Premises including-*
> *...*
> *(ix) boundary walls and fences.'*

13. The service charge year runs from April to March. The costs for the **disputed** items are split equally between all residents of the scheme be they tenants of houses or flats.

14. The **weekly** service charges for the relevant service charge years are set out below:

	£
2012/3	0.34
2013/4	0.34
2014/5	0.97
2015/6	0.94
2016/7	0.87
2017/8	1.12
2018/9	1.18
2019/20	0.62
2020/21	0.97
2021/22	1.87 (budgeted)

15. All costs referred to in this Decision include VAT where applicable.

Inspection

16. An external inspection of the Estate and Property was carried out on 19th October 2021. The Applicant was present. Mr K Fearon, Operations Director and Mr S Rahman, Property Services Officer, attended on behalf of the Respondent.

17. Field Street is a residential development to the north east of Wolverhampton, accessed via Culwell Street and adjacent to Wednesfield Road to the southern boundary. The development comprises 71 houses and 12 maisonettes (contained within 3 separate blocks). Field Street is a 'no through road' with most properties having off road parking but on-street parking is also available. The houses have private gardens, there is some communal landscaping. There are a number of private pedestrian access ways to individual properties.

Hearing

18. An oral hearing was held via Cloud Video Platform on 20th October 2021. The Applicant attended the hearing and was unrepresented. The Respondent was represented by Ms L James, Solicitor and Mr K Fearon, Mr S Rahman and Ms B Kennedy, Reporting Accountant, attended on behalf of the Respondent.

Submissions

Preliminary point

19. The Respondent submits that section 5 of the Limitation Act 1980 limits the Tribunal's consideration of disputed service charges to those demanded and payable 6 years before the date of the application to the Tribunal, namely 28th May 2021. The Applicant accepted this at the hearing.

20. Section 52(db) Law of Property Act 1925 provides that an assured tenancy granted by a registered provider of social housing does not constitute a deed. Therefore, section 8 Limitation Act 1980 which relates to time limits on a speciality (a deed) and provides a limitation period of 12 years does not apply.

21. Section 5 of the 1980 Act provides that the time limit for actions founded on simple contract is 6 years. We therefore cannot consider any disputed service charges demanded and payable 6 years before the date of the Tribunal application. We have therefore only considered invoices and disputed service charges demanded and payable from 29th May 2015.

Matters not in dispute

22. At the hearing the Applicant accepted the Respondent's statement that items charged to service charge headings Depreciation Sinking Fund; Maintenance of Fire alarms; Other Communal repairs; Communal heating and lighting; Aerials and Communal water are not charged to the Applicant, as the costs relate only to the tenants of flats whereas the Applicant occupies a house.

Payability

23. The Applicant says Clause 2(4)(ix) of the tenancy agreement states that it is the Respondent's obligation to keep fencing in repair and therefore the costs should not be charged to the tenants.

24. The Respondent's representative accepts that Clause 2(4)(ix) of the tenancy agreement provides that the Respondent has an obligation to keep boundary fences in repair. However, she submits that there is a distinction between an obligation to do something and the separate issue of who is responsible to pay for it. She submits that fencing is included within

the Schedule of Services under the heading *'Gardening and Ground Maintenance'*. She submits that the previous tenancy agreement included 'hard and soft landscaping' within the list of services to be provided and that the new tenancy agreement should be interpreted in that light. She states that the cost of maintaining fencing between two tenanted properties would not be recovered through the service charge but that the costs of the communal fencing around the Estate, which benefits all residents, are recovered through the service charge.

25. Invoice 29536 (page 217) dated 22nd December 2017 in the sum of £1842 includes £1692 relating to the renewal of communal fencing. The balance of the invoice relates to flytipping and the supply of a concrete post to the side of number 109 but the items are not charged separately.

26. Invoice 29884 (page 398) dated 30th September 2019 in the sum of £1512 relates, includes fitting communal fencing to car park boundary outside flats 61-63.

Reasonableness

27. The Applicant says that the total amount of service charges charged to tenants from November 2012 to 5th April 2021 is in excess of £30,000 and is unreasonable. The Applicant queries why tenants pay a service charge when they pay rent to a social housing landlord.

28. The Applicant raises whether it is fair to charge more than £10,000 in a 5 year period when they are tenants not leaseholders. The Applicant queries whether tenants are liable for service charges as they do not share communal space. The Applicant queries whether tenants should pay for the upkeep of the Estate, grass verges, the areas outside the flats and parking notices. The Applicant has queried invoices 29356; 29884; 29779 and 9914.

29. The Respondent submits that the Applicant has failed to make her case sufficiently in that she has failed to give sufficient details of the challenge for the disputed items nor provided comparable evidence or alternative costs. The Respondent believes that the costs levied are reasonable and no evidence to the contrary has been provided. Copies of supporting evidence of actual costs have been provided in the hearing bundle.

Pest control

30. The Applicant considers it to be unreasonable for all properties to be charged for pest control where only the specific tenant benefits from the service.

31. Costs for pest control were as follows:

2017/8	£80
2021/22	£50

32. The Respondent accepts that the cost of £80 incurred in 2017/8 regarding ant treatment at 52 Field Street, the subject Property, should not have been charged to the service account as it relates to an individual property. The Respondent stated that the £80 had been refunded the service charge account. The charge in 2021/22 relates to the removal of a wasps' nest at 107 Field Street on an invoice dated 24th July 2020. The Respondent submits that it is reasonable to charge such costs to the service charge account rather than to the individual tenant as it protects the Estate as a whole. If a tenant failed to remove such a nest, then it could impact on the whole Estate with bees/ wasps' renesting elsewhere on the Estate.

Gardening and Ground Maintenance

33. The Applicant considers the cost to be unreasonable and says it is difficult to see where the monies are spent on the Estate. She says that the costs are substantial when considering the area included and that work is carried out on a fortnightly basis during summer months.

34. The Respondent says that where property numbers are shown on invoices for ground maintenance, this does not denote gardening at these specific properties but are used as identifying locators for the external gardening contractors.

35. The Respondent has provided the ground maintenance specification for communal areas (pages 200-201) and a plan which shows the communal areas which are maintained (page 203). The grassed areas behind the flats are not demised to any of the flats and the areas are therefore communal areas.

36. A new ground maintenance contractor was procured in July 2014 and the Estate's ground maintenance was part of a large gardening procurement. The costs for Field Street were £2419.20 per annum, equating to £201.60 per month. The Respondent's contractors signed a Code of Conduct for Maintenance Contractors provided by the Respondent (pages 207-210) and comply with professional ethics to ensure a good standard of workmanship. The Respondent submits that the costs have been reasonably incurred and are reasonable.

Trees

37. The Applicant says that she has not received any direct benefit from tree surgery and she should not therefore have to pay towards the costs. She also says that the Council owns the trees on the boundary of the Estate with Wednesfield Road and therefore the Council should be responsible for the cost of their maintenance.

38. The Respondent says that the ground maintenance specification requires the contractors to carry out minor pruning as required. It further states that "*All trees adjacent to roads, paths and drying areas are to have branches kept above ground by a minimum 2 metres*". The contractors are required to report any expected or recommended future work on trees.

39. Specialist work such as tree surgery and fencing are not carried out as part of the Ground Maintenance Contract. Where such works are requested, the work is inspected and, if required, are placed in the planned works programme and competitive quotes are obtained. The Respondent's practice is to maintain any mature trees on the Estate regardless of whether the tree is situated within the boundary of the tenanted premises. However, they do not maintain what they describe as 'ornamental trees' within the tenants' boundary. They also cut off overhanging branches from the mature trees which are on the boundary of the Estate with Wednesfield Road. The Respondent provided a plan showing the location of the trees they maintain with each tree or group of trees having identifiers.

40. Invoice 9914 (pages 339- 340) dated 30th June 2019 in the sum of £2538 relates to tree surgery work in relation to groups of and individual trees. It also includes the cutting back of overhanging trees. The Respondent submits that the costs have been reasonably incurred and are reasonable.

Fly tipping

41. Invoice 29536 (page 217) dated 22nd December 2017 includes £145 for the costs of removing rubbish to the rear of 111 and the supply of a concrete post to the side of 109 but the items are not charged separately. We considered whether to split the sum by 50% to represent the cost of flytipping only but determined that the amount involved to be deminimis once calculated as a weekly charge for one property. Invoice 29779 (page 333) dated 30th April 2019 in the sum of £96 relates to the removal and disposal of rubbish from rear communal alleyway at 45 Field Street.

42. The Applicant says that she pays Council tax so why does she have to pay twice for the removal of fly tipping on the Estate. She also queries why she should have to pay for the removal of fly tipping in alleyways to the rear of houses as they are not communal and also in relation to the communal areas at the back of the flats.

43. The Respondent submits that the above services are included within the services of Ground and Garden Maintenance. The ground maintenance specification requires the contractors to photograph the item and provide a quote for removal for approval.

44. The Respondent submits that fly tipping removal is essential to ensure that the Estate is maintained to a reasonable standard. Fly tipping affects the aesthetics of the Estate and has potential to attract pests. Failure to promptly remove fly tipping tends to attract further fly tipping at the same location. Whilst the fly tipping in the first case was at the rear of a block of flats, and in the second case was in a rear communal alleyway, they are communal areas and therefore accessible to all on the Estate. Unless there is specific evidence that items have been fly tipped by a particular resident, who would then be charged accordingly, costs of removing fly tipping are split equally across the Estate as it benefits all residents. If costs were to be charged based only on where the items were located, then it would likely encourage residents on the Estate to fly tip within the curtilage of another resident in order for the fly tipper to avoid the cost of removal.

45. Officers from the Respondent's Housing Management team carry out Estate walkabouts and the Respondent's Property Services Officers carry out post inspections of one- off items of work. Notes are kept of the walkabouts.

Management Charge

46. The Applicant queries whether it is fair to charge tenants for work carried out by management when the work which benefits their Estate is carried out by the Respondent's own staff and is not outsourced and the tenants already pay for the services. The Applicant does not dispute the rate of 15% but rather the principle of the charge for in house staff.

47. The Respondent submits that a management fee is charged at 15% on all service costs. The charge covers the cost of essential activities required to manage and provide services on the Estate including procurement costs, contract management, service delivery reviews, invoice checking and authorization and calculating and billing service charges.

Parking Notices

48. Invoice 29884 (page 398) refers to the supply and fit of 'resident only' parking signs but there is no itemized cost as it was included within several items of work including fencing

and disposing of rubbish. The Applicant says that as the parking notices are ignored then the tenants should not have to pay for them as they are a waste of money.

49. The Respondent says that notices are required and are part of the management of the Estate. Whether or not they are ignored is irrelevant to whether the costs should be charged under the service charge provisions. The cost is nominal.

Deliberations

Payability

50. We are not persuaded by the Respondent's submission that boundary fencing is included within the 'Gardening and Ground Maintenance' item of the services listed in the Services Schedule. Whilst we accept that the previous agreement included the phrase 'soft and hard landscaping', this phrase is not repeated within the list of services and could have been specifically included if that was the intention. Further, Clause 2(4)(ix) of the 2014 tenancy agreement is quite clear as to the Respondent's obligations regarding fencing. In addition to the clause being clear, it also reflects usual practice for a landlord to be responsible for boundary fences. Our view is further supported by the fact that the Respondent accepts that it does not charge the costs of replacing fencing between properties to the service charge account. We therefore determine that the costs related to works to the boundary fence are not payable as a service charge but should rather be charged to the rent account as a cost of maintaining the Estate under landlord's obligations. We therefore deduct £1692, and £1512 from the costs charged to the service charge account and this reduces the weekly service charge by 0.39 and 0.35 respectively. There is a discrepancy in the Respondent's paperwork as to in which years these charges were made, for example page 187 which refers to Invoice 29536 refers to 'service charge year ended 2018' and yet page 380, in which the charge appears is headed 'service charge breakdown 2018/19'. We have therefore made the deduction from the year in which the costs were incurred, namely 2017/8 and 2019/20 respectively.

Reasonableness

51. In determining the question of reasonableness, the burden of proof is on the Applicant to demonstrate either that the cost incurred or the standard of the work/service was unreasonable. Whilst querying the basis of the charges, with the exception of the cost of ground maintenance, the Applicant has not suggested that the costs themselves are unreasonable. In relation to garden and ground maintenance, whilst the Applicant seems to suggest that the cost is high considering the amount of gardening and ground maintenance required and the frequency with which it is carried out, she has not provided any comparable information or indicated what charge she does consider to be reasonable. The Applicant has therefore failed to demonstrate either that the costs incurred or the standard of work/service is unreasonable

Pest control

52. We find that the removal of bees/wasps' nest is for the benefit of the Estate rather than the individual tenant where the nest is located, as the removal will prevent renesting in other areas and spreading through the Estate. This is distinct from ants nests which are more likely to affect an individual property only and which should therefore be charged to the individual tenant, as is the intended action in relation to the ants nest at the subject Property in 2017/8. As the cost of £80 incurred in 2017/8 is to be refunded to the service

charge account we have not therefore made an adjustment to reflect this. We determine that the costs of bees/wasps' nest removal in 2021/22 are therefore properly charged to the service charge account and we find the costs to be reasonably incurred and reasonable.

Gardening and Ground Maintenance

53. The list of services in the tenancy agreement specifically includes an item 'Gardening and Ground Maintenance'. We do not accept the Applicant's assertion that there should be a split of the costs of gardening and ground maintenance between the houses and the flats. On our inspection we noted the areas that were maintained under the Ground Maintenance Contract including the areas in front of and behind the 3 blocks of flats. This was confirmed by the plan provided. The Respondent's officers said that the areas behind the flats are not demised to any individual flat and were communal and open to access by any occupier of the Estate, although that was not apparent from our inspection, nor did it appear that the Applicant was aware. However, the tenancy agreement is clear that costs are shared equally between all the properties on the Estate. As on any Estate, there will be 'swings and round abouts' in relation to the exact location of the grassed areas which benefit from the Ground Maintenance Contract, for example the Property itself has a large grassed area adjacent to it which falls under the Ground Maintenance Contract. It would be disproportionate to attempt to charge each individual occupier for the square footage of communal grassed area in the immediate vicinity of their property. Further, some areas of the Estate may require more attention in relation to other aspects of the ground maintenance specification for example litter picking and trimming, shaping and pruning hedges.

54. On the morning of the hearing the Applicant submitted an email from a neighbour stating that on a particular occasion they had maintained the communal area opposite their house at their own cost. However, as the quality of the provision of gardening maintenance had not previously been raised by the Applicant, the Respondent had not been given the opportunity to investigate the matter and the person was not available to be questioned, we did not accept the late evidence which was hearsay. If the residents consider that works are not being carried out under the Ground Maintenance Contract or are not being carried out to an appropriate standard then they should report the matter to the Respondent.

55. The Ground Maintenance Contract arose as a result of a procurement contract. The Applicant has not provided any comparator evidence to demonstrate that the costs are unreasonable. Having inspected the Estate and having had regard to the ground maintenance specification, as an expert Tribunal we determine that the costs of the contract are reasonable and have been reasonably incurred.

<u>Trees</u>

56. In relation to the costs of tree surgery referred to in Invoice 9914, we find that tree surgery falls within 'Gardening and Ground Maintenance' in the Schedule of Services. We consider there to be a lack of clarity as to the ownership of the trees on the boundary of the Estate by Wednesfield Road where the Respondent arranged for the overhanging trees to be cut back. However, as this specific item on this invoice cost £36, any deduction would amount to less than 1 pence per week on the Applicant's service charge and we therefore consider it to be de minimis. However, we recommend that the Respondent clarifies the ownership prior to any future works being required. In the absence of any comparator evidence from the Applicant, and in our expert opinion, we determine that the costs are reasonable and reasonably incurred.

Fly tipping

57. Whilst the Council has responsibility to remove fly tipping from adopted roads and its own land, it does not have a responsibility to remove it from private land such as the Estate. We accept that fly tipping is included within the 'Garden and Ground Maintenance' heading of the Schedule of Services. We also accept the Respondent's arguments as to the need to remove fly tipping. We consider that, in the absence of knowing who has fly tipped, it is reasonable to share the costs equally across the Estate. From our inspection, we understand the Applicant's point that the alleyways to the rear of houses 43-49 only give access to the houses themselves and therefore cannot be described as a communal area. On our inspection, the access to the alleyways appeared locked which supports that view. However, there is nothing to prevent a fly tipper from throwing items over the fence into the rear alley, which, if not disposed of, could attract pests which may then affect the Estate as a whole. The Applicant has not disputed the amount of the charge but rather the principle. Whilst we note that Invoice In the absence of any comparative costs, and in our expert opinion, we find the costs to be reasonably incurred and reasonable.

Management Charge

58. It is normal business practice for a management charge to be charged in relation to the services described by the Respondent. It is irrelevant whether the work is carried out by the Respondent's in house staff or by external providers as the work is required to be done. Tenants sometimes do not appreciate that 'back office 'functions have to be carried out from which they may not necessarily see any direct benefit. However, such services are necessary in order to effectively manage the Estate. In our experience, a charge of 15% of the service costs is common and we consider it to be reasonable. As we have deducted the costs of fencing in years 2017/8 and 2019/20, this consequentially reduces the costs against which the 15% is charged and results in amended management charges for those 2 years of £0.09 and £0.03 respectively. With those two amendments for years 2017/8 and 2019/20, we find that the management charges are reasonable and reasonably incurred.

Parking Notices

59. We agree with the Respondent that it irrelevant whether or not the parking notices are complied with for the purpose of determining whether or not the cost of provision should be charged to the service charge. There is no itemized cost for the parking signs. We agree that the cost would be minimal and is reasonable and reasonably incurred.

Decision

60. Following the deductions for the cost of fencing which we find not to be payable and the adjustment to the management charge to reflect those deductions, we determine that the weekly service charges below are payable and reasonable.

	£
2015/6	0.94
2016/7	0.87
2017/8	0.67
2018/9	1.18
2019/20	0.22
2020/21	0.97
2021/22	1.87 (budgeted)

Section 20C Landlord and Tenant Act 1985
Paragraph 5(A) of Schedule 11 Commonhold and Leasehold Reform Act 2002

61. The Applicant applied for an order under the 1985 Act that the Respondent's costs in connection with these 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 Applicant.

62. The Applicant also applied for an order under the 2002 Act to reduce or extinguish the Applicant's liability to pay an 'administrative charge in respect of litigation costs' i.e. contractual costs in a tenancy agreement.

63. The Respondent's representative advised us that the Respondent would not be seeking to recover the costs of the proceedings from the service charge or as an administrative charge and had no objection to the orders being made. Within that context, we order that the Respondent's costs in connection with these 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 Applicant. We further order that the Applicant's liability to pay an administration charge in respect of litigation costs is extinguished.

Appeal

64. If either party is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties and must state the grounds on which they intend to rely in the appeal.

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Judge T N Jackson