FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case references	**:**	**LON/00AF/LSC/2020/0384** **VIDEO REMOTE**
Property	**:**	**31 Cornish Grove, Penge, London SE20 8RB**
Applicant	**:**	**Paulo R Colaco Dias**
Representative	**:**	**In Person**
Respondent	**:**	**Clarion Housing Association Ltd**
Representative	**:**	**Sian Evans of Weightmans, solicitors**
Type of application	**:**	**Liability to pay service charges**
Tribunal	**:**	**Tribunal Judge Adrian Jack, Tribunal Member Richard Waterhouse BSc LLM FRICS**
Date of Decision	**:**	**10 May 2021**

DECISION

Covid-19 pandemic

This has been a remote determination which has been not objected to by the parties. The form of remote hearing was V: VIDEO REMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined without one. The documents that the tribunal was referred to were contained in various electronic documents from the parties. The order made is described at the end of these reasons.

Background and Procedural

1. These are applications by the tenant under section 27A of the Landlord and Tenant Act 1985 as to whether certain service charges are payable in respect of the service charge years. The service charge year runs to 31st March.

2. The number of issues has been very substantially reduced. Originally the tenant challenged all the service charge years from 2006-07 to then current year 2020-21. In his statement of case, the tenant set out the position as at the date of service of it:

> "After a very large amount of time and effort spent communicating with the Respondents in writing and phone over the past many years since 2007, the Respondents have now refunded the Applicant with a large number of items disputed and provided clarifications on a number of other items. Some items are not yet clear to the Tenant. Here is a summary of the correspondence exchanged and remaining questions not yet answered.
>
> - Bin Hire has been refunded from 2006/07 to 2019/20 but not yet for 2020/21.
> - Communal Electricity has been refunded from 2006/07 to 2017/18 but not yet for 2018/19, 2019/20 and 2020/21.
> - Communal Window Cleaning has been refunded from 2006/07 to 2017/18 but not yet for 2018/19, 2019/20 and 2020/21.
> - Block Caretaking has been refunded from 2006/07 to 2017/18 but not yet for 2018/19, 2019/20 and 2020/21.
> - Block Repairs has been refunded from 2006/07 to 2014/15 but not yet fully for 2015/16, 2016/17, 2017/18, 2019/20.
> - Block Door Entry has been fully refunded from 2006/07 to 2020/2021.
> - Block Rubbish Collection and Block Refuse Collection remains in dispute for the following years: 2006/07, 2007/08, 2008/09, 2009/10, 2010/11, 2011/12. Not refunded yet.
> - For 2012/13 and 2013/14, Mobile Team has been identified as Refuse Collection from communications received from the Landlord. However, the Tenant still does not know if this is

Block Refuse Collection or Estate Refuse Collection. Moreover, in 2013/14, there was another item with the name 'Refuse Collection'. So, it looks like a duplication and it is still unknown if this is Block or Estate Refuse.

- For 2013/14, 2014/15, 2015/16, 2016/17, 2017/18, 2018/19, 2019/20 and 2021/22, the Tenant seeks clarification about what is 'Bulk Refuse' or 'Refuse Collection'. Does it apply to Block or Estate?
- For 2014/15, 2017/18 and 2018/19 the Tenant seeks clarification about what area was Fire Protection applied to? Does the Tenant have access to that area? Is Fire Protection an allowable service charge if the Tenant does not have access to that area of the building?
- For 2015/16, 2016/17, 2017/18, 2018/19, 2019/20, the Tenant seeks clarification about what area was applied for Day-to-Day Repairs. Does the Tenant have access to that area? Is Day-to-Day Repairs an allowable service charge if the Tenant does not have access to that area of the building?
- For 2016/17, the Tenant seeks clarification about what area was applied for Pest Control. Does the Tenant have access to that area? Is Pest Control an allowable service charge if the Tenant does not have access to that area of the building?"

3. Before us, the issues had narrowed still further. Live issues comprise: the fifth bullet point (Block repairs); the seventh, eighth and nineth points (Block rubbish collection, Block refuse collection, "Mobile Team" and bulk refuse collection); the tenth point (fire protection); the eleventh point (day-to-day repairs) and the last point (pest control).

The lease

4. The lease was originally granted under the right to buy legislation on 21st January 1985 by the London Borough of Bromley. By a deed of surrender and regrant made on 17th November 2003 between the then landlord and then tenant, a fresh lease was granted but, so far as material, on exactly the same terms as the 1985 lease. The freehold as since passed to the current landlord, Clarion.

5. 31 Cornish Grove is a ground floor flat with both a front and a back garden. There are five ground floor flats, 31 to 35. Above them are five upstairs flats. Access to these is gained through a communal doorway leading on to a stairway used solely by these upstairs flats. There is an open balcony running the length of the block which allows access to the upstairs flats. The roof is an ordinary tiled roof. The roof space is not in anyone's demise.

6. Leases granted under the original right-to-buy legislation were often not well drafted. Local authorities had a tendency to use standard form leases for all properties in their boroughs which were then only superficially adopted to the particular premises being sold. Often (as in the current lease) there was no

plan of "the estate", so that division of expenses between block expenses and estate expenses could be problematic. Further there was often no coherent treatment of what constituted the common parts.

7. The current lease defines "the Estate" as meaning "the Building and the out-buildings gardens and grounds thereof (if any) and any other neighbouring building or land for the time being managed by or on behalf of the council as a single administrative unit together with the Building." Ms Bateman of Clarion says that they treat the "Estate" as being some 52 units.

8. Clause 6 of the lease contains the landlord's covenants. The cost of performing these obligations were recoverable through the service charge account. The covenants included:

> "(b) That the Council will keep in repair the structure and exterior of the Flat and the Building including the drains gutters and external pipes thereof and will make good any defects affecting the structure…
> (c) that the Council will keep in good repair and condition all other property over or in respect of which the Lessee has been granted rights under the Second Schedule hereto
> (d) That the Council will so far as practicable provide the Services…"

9. The seventh schedule to the lease defines the Services. Para 1 of this schedule dealt with the "supply of the following facilities to or at the Flat", but all entries, like hot water, were stricken through. Para 2 included in the Services:

> "The supply of the following facilities elsewhere in the Building or at the Estate
> ~~(a) lift~~
> ~~(b) covered space available for pram storage~~
> (c) lighting cleaning and maintenance of all internal parts of the Building used in common with other occupants
> (d) lighting cleaning and maintenance of all recreation areas gardens and other external parts of the Estate used in common with other occupants including maintenance and repair of walls fences gates and doors adjoining and giving access to the same
> (e) maintenance and repair of all private roads paths and ways comprised in the estate
> ~~(f) laundry~~
> ~~(g) controlled door entry system~~
> The employment of gardeners caretakers cleans porters and any other persons necessary for the continued supply of any of the said services"

10. The tenant, Mr Dias, argued that, because he had no access to the upstairs balcony, it did not form a part of the building which he used "in common with other occupants." Ms Evans, who appeared for Clarion, argued that the upstairs balcony fell within the definition of common parts in para 2(c). Mr Dias' construction, she argued, would need words added, so as to "part of the Building used *by the tenant* in common with other occupants." Such additional words should not be implied, she submitted.

11. In our judgment Mr Dias has the better of this argument. What is required is that the relevant part of the Building be "*used* in common with other occupants." In other words, there must be *someone* using that part of the Building in common with other occupants if that part is to be a common part. Who might that someone be? The only reasonably identifiable person must in our judgment be the tenant. Accordingly in our judgment Mr Dias is not liable under para 2(c) of the Seventh Schedule to contribute to the expenses associated with the balcony.

Block repairs; day-to-day repairs

12. Before us, the tenant conceded the major works sums claimed in 2008 and 2013. This left only the day-to-day repairs. In 2015-16, these comprised water leaking into the building, for which he was charged £4.50; trace and repair leak on a different occasion, again £4.50; repair leaking roof, £2.80; and an item described in terms that the "brick wall has a large crack and is unstable", for which he was charged £3.46. In our judgment these works fell within clause 6(b) and properly recoverable. There is no evidence the leaks were internal to a flat. Mr Dias did not challenge the amount of the sums charged, which on any view are extremely modest. We disallow nothing.

13. In 2016-17, the day-to-day repairs comprised: reglazing a pane of glass and taking off and refixed the lead flashing; replacing some roof tiles; cleaning the gutter; erecting and striking scaffolding to effect the above; "paving slab and wall cracked"; scaffolding to the rear; and "guttering — coming away from the wall and water is overflowing." Although the reglazing is described as a balcony work in fact it is likely to be in the roof. These works are all part of the exterior. Guttering as well falls within clause 6(b). The paving slab is part of the curtilage and is accordingly part of the exterior. We disallow nothing.

14. In 2017-18, the day-to-day repairs comprised: removing and replacing a paving slab, for which £3.50 was claimed; rotten boundary fence, £2.22; and communal fencing, three posts and panels to be replaced, £18.08. For the reasons given we allow the paving slab. As regards the fencing, each ground-floor leaseholder was responsible for their own fence. The communal fencing in our judgment was part of the expenses of the common parts which, as we have held, falls only on the upstairs flat-owners. Accordingly we disallow £22.30.

Rubbish collection

15. This head appears variously in the service charge accounts as "Block rubbish collection, Block refuse collection, 'Mobile Team' and bulk refuse collection." "Mobile Team" is simply the term used by one of the housing associations for its estate refuse team. From the accounts, all refuse collection was either allocated as a block expense or as an estate expense.

16. The landlord has produced the record of what was collected. The amount claimed against the tenant for individual items dumped is trivial. Mr Dias complained that the detail given was too little to allow a proper audit of whether the items were properly estate or block expenses. In our judgment, there has to

be some consideration of proportionality here. Whether an expense is allocated as a block or an estate expense is unlikely to make a great difference to what Mr Dias is actually called to pay. (Allocating fewer items to block expenses would mean Mr Dias would be paying by way of estate expenses for items which previously would have been for the other block's account.) Unless there was some systematic wrongful allocation of items to Mr Dias' block from other parts of the estate (and there is no evidence of this), the allocation will even out. Requiring a landlord to provide the amount of detail Mr Dias demands in our judgment is unreasonable.

17. We disallow nothing.

Fire protection

18. Mr Dias' complaints in respect of fire protection were two. First he said that there had been no inspection of his flat, so he did not benefit. Second he said that any fire protection measures were solely for the benefit of the upstairs. We disagree. Fire protection is generally for the exterior of a building. A fire upstairs in a building will affect those lower down in the building. A landlord does not generally have a right of access to inspect internal fire protection measures taken by long lessees, so the fact that Mr Dias' flat was not inspected is not material. There is no evidence any work or services exclusively for the benefit of the upstairs tenants was undertaken.

19. In our judgment the fire protection measures were part of the maintenance of the exterior and structure of the building. We disallow nothing.

Pest control

20. It is common ground that there was an infestation of mice in the block in 2016. The landlord employed pest exterminators to visit three times to poison mice in the loft at a total cost of £105 plus VAT. Mr Dias' case was that he laid bait himself in his flat; he did not benefit from the work in the loft; the mice would not have come downstairs.

21. We disagree. Mice, like other pests, are liable to go everywhere in a building once they are established. Mr Dias benefited from the landlord's work as much as any other tenants in the block. Nonetheless, we can find no provision in the lease which would allow the landlord to charge back this item. Accordingly (and somewhat to our regret), Mr Dias gains a windfall. We disallow the sum of £6.18.

Costs

22. We turn then to costs. As regards the fees payable to the Tribunal, we have a discretion as to which party should pay these. The fees comprise an issue fee of £100 and a hearing fee of £200. Before us, Mr Dias has had a very modest degree of success in reducing his service charges. However, he has established (in his favour) an important point on what constitutes the common parts under his lease. He has also obtained (prior to the hearing before us, but after issuance

of the application to this Tribunal) a refund of various other service charges which were originally disputed.

23. In our judgment the honours are roughly even. Accordingly we shall order that the landlord reimburses the tenant with half the fees payable to the Tribunal, in other words £150.

24. As regards making an order under section 20C, the landlord has indicated that it does not intend to recover the legal and other costs associated with this application through the service charge. In these circumstances we make no order under section 20C.

DECISION

(a) We disallow £22.30 in respect of repairs to the fencing and £6.18 in respect of pest control. We otherwise disallow none of the service charges remaining in dispute.
(b) We order the landlord to reimburse the tenant with £150 in respect of the fees payable to the Tribunal.
(c) The Tribunal refuses to make an order under section 20C of the Landlord and Tenant Act 1985.

Name: Judge Adrian Jack **Date:** 10 May 2021

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 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
   (a) complied with in relation to the works or agreement, or
   (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
   (a) if relevant costs incurred under the agreement exceed an appropriate amount, or

(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

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 21B

(1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.

(2) The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.

(3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.

(4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

(5) Regulations under subsection (2) may make different provision for different purposes.

(6) Regulations under subsection (2) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.