FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case references	**:**	**LON/00AH/LSC/2020/0292** **LON/00AH/LSC/2020/0084** **VIDEO REMOTE**
Property	**:**	**52B Clyde Road, Croydon, Surrey CR0 6SU**
Applicant	**:**	**Alastair Martin Gordon Beattie**
Representative	**:**	**Tristram Salter of counsel instructed by Devonshires Solicitors**
Respondent	**:**	**Abacus Land 4 Limited**
Representative	**:**	**Rebecca Ackerley of counsel instructed by J B Leitch**
Type of application	**:**	**Liability to pay service charges**
Tribunal	**:**	**Tribunal Judge Adrian Jack, Tribunal Member Anthony Harris LLM FRICS FCIArb**
Date of Decision	**:**	**12 January 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 documents from the parties including an electronic bundle of 363 pages and skeleton arguments on behalf of both parties, the contents of all of which the tribunal has noted. 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 2016-17, 2019-20 and 2020-21. The service charge year runs to 23rd June. The issue in relation to 2016-17 is ostensibly whether £4,332.48 is payable in respect of major works, but it also raises an issue as to the treatment of the reserve fund. The issues in relation to 2019-20 and 2020-21 are in relation to £20,000 sought or to be sought in each of those years as a contribution to the reserve fund and the audit fee of £540 claimed in each year.

2. The applicant also seeks an order for the limitation of the landlord's costs in the proceedings under section 20C of the Landlord and Tenant Act 1985. At the hearing it was clarified that the tenant was not seeking any orders in respect administration charges under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

3. Directions in application LON/00AH/LSC/2020/0084 were given on 25 February 2020. However, the hearing date was vacated due to the coronavirus pandemic. Application LON/00AH/LSC/2020/0292, which is in respect of the service charge year 2020/2021, is dated 29 September 2020. This application has been consolidated with the first application.

The facts

4. The lease was originally granted on 30th November 1983 for a term expiring on 23rd June 2082. A fresh lease was granted on 23rd March 2007 to the current tenant for a term of 100 years from Christmas 2006. 52 Clyde Road is a house converted into three flats. The building is probably over 100 years old. The leases for each of the flats are in similar terms. The landlord is responsible for the repairs to and maintenance of the exterior and common parts. There are standard provisions for the payment of service charges on account with a balancing payment after the end of the service charge years. The leases permit the creation of a reserve fund and for the landlord to demand contributions from the tenants to it. Each flat contributes one third of the totals due.

5. The current landlord is the respondent. It acquired the freehold on 6th June 2017 from Almond Land Ltd. After the handover, the respondent changed the managing agents to SDL Property Management and to Craig Sheen Block Management Ltd. Mr Philip Thomas of the former and Mr Nicholas Sheehan of the latter gave evidence to us. SDL dealt with the finance side, whilst Craig Sheen dealt with the physical side of the management.

6. The tenant explained the facts in relation to the £4,332.48 as follows:

> "17. This sum was originally demanded by the managing agent at the time, South-East Property Services Limited, following a Fire Risk Assessment carried out on 13 September 2012…
>
> 18, They said that this was for fire alarm and fire safety works and I paid my contribution. They then, however, didn't carry out any of the works and I requested a refund of the money I had paid. In 2015 I had to resort to instructing the services of a solicitor to get this back and following correspondence between my solicitor, Nicholas Goldreich at Comptons, and Houston Lawrence, the managing agents at the time, the sum of £4,332.48 was refunded to me.
>
> 19. Houston Lawrence then carried out a further tender exercise in 2015 for the same fire safety works. They instructed a number of companies to produce reports regarding the works required. At the time this seemed completely unnecessary given that the Building is nothing more than a converted house with just small communal corridors on each floor…
>
> 20. Having eventually managed to get a refund in 2015 only after having instructed solicitors who had to threaten legal proceedings to obtain this, the exact same sum for the same works was then demanded again in 2016…
>
> 21. I can confirm that I paid this sum again on 30 July 2016 and yet to date still no fire safety works as per the sum demanded or the schedule of works produced have ever been carried out in the Building."

7. That evidence was not disputed and is supported by contemporaneous documentation. We accept it in its entirety as between the current parties.

8. On the handover of monies to the new managing agents only £4,034 was handed over. The accounts to 23rd June 2017 show that this comprised a "general reserve fund of £1,988" and a "major works reserve fund" of £2,046. What is astonishing about this latter fund is that the balance brought forward from 2015-16 was £10,866. There was then an "adjustment by previous agent" writing down that figure by £8,820 so as to give the £2,046 figure.

9. The only evidence to explain that £8,820 figure was given by Mr Philips. He said that the figure was provided by the previous agent. There were

payments shown on the bank statements amounting to that amount, but the only narrative explanation for the payments was that they were made to "a supplier". The payments all predated the transfer to the current landlord, so he could not give evidence himself as to what the payment was in respect of. We accept Mr Phillips' evidence that this was the explanation provided to him. There is, however, no evidence that the payments out totalling £8,820 were genuine payments to a supplier. There is no obvious expenditure in the service charge account which matches these payments. We discuss our legal conclusions on this below.

10. In relation to the two demands for £20,000 contributions to the major works reserve fund, Mr Sheehan explained that these were demanded in respect of proposed works of external repair and decoration and works to the internal common parts. The internal common parts were quite small, but they needed to be redecorated, he said, and a fire alarm and emergency lighting needed to be installed. The demands of £20,000 were for the whole block, so the applicant's contribution would be a third of that.

11. Mr Sheehan explained that in 2016 the then agents had obtained a report from the firm of Hallas & Co Ltd, chartered surveyors. They had obtained tenders for the external works. Based on the lowest tender, they calculated the cost of the works (including supervision and overheads) at just over £30,000. He had calculated that £40,000 was a reasonable figure for major works. First, the £30,000 had to be adjusted upwards to reflect increased building costs from 2016. Second, there was the decoration work to the common parts. Third, the cost of the fire alarm and emergency lighting, he knew from his general experience as a property manager, would be £3,000 to £4,000.

12. Mr Sheehan had had some email correspondence with one of the other tenants, a Ms Doyle, but had not otherwise carried out any consultation, either formal or informal, with the tenants about the proposed £20,000 demand. However, there is no evidence that any of the tenants were particularly poverty-stricken. No doubt a demand for £6,667 as a contribution to the reserve fund was unwelcome to the tenants, but we do not find that paying that sum would cause the applicant any great financial hardship.

13. The evidence is that the building was extremely tired. We have seen photographs attached to a report from 2012 which already shows that the external rendering and paint was in a poor condition. By 2019, the works needed doing. Indeed, Mr Sheehan said (and we accept) that there had been an incident of water ingress from outside which had caused damage to one of the flats. This was down to the poor state of repair.

14. We shall deal with our conclusions on this below. The issue of the audit fee is bound up with the amount demanded for the reserve fund, so we discuss this under the same head.

The £4,332.48

15. The difficulty facing the tenant in respect of the £4,332.48 he paid in 2016-17 is that the landlord was different then. The Tribunal has jurisdiction

to determine service charges in that year, but only between the tenant and Almond Property Ltd. The Tribunal has no jurisdiction to determine issues of breach of trust: *Solitaire Property Management Co Ltd v Holden* [2012] UKUT 86 (LC), *Eshraghi v 7/9 Avenue Road (London House) Ltd* [2020] UKUT 208 (LC).

16. We have not heard from Almond Property Ltd or the then agents. Accordingly, we can make no determinations in respect of any claims which the tenant might have against them. The facts outlined by the tenant on their face show that the monies were not properly claimed through the service charge, because the works for which they were collected were never carried out. Further there is a *prima facie* case that the £8,820 paid out of the major works reserve fund were paid in breach of trust. The issue for us is whether the tenant has any claims against the current landlord in respect of these monies.

17. Section 19(1) of the Landlord and Tenant (Covenants) Act 1995 provides:

> "Where as a result of an assignment a person becomes, by virtue of this Act, bound by or entitled to the benefit of a covenant, he shall not by virtue of this Act have any liability or rights under the covenant in relation to any time falling before the assignment."

18. Section 3 of the Act provides for the transfer of the benefit and burden of both the tenant's and the landlord's covenants on any assignment.

19. Mr Salter argues that there would have been an assignment of the rights and liabilities on the assignment of the reversion from Almond Properties Ltd to the current landlord. We agree that normally the vendor of a reversion would assign, as a term of the transfer, the right to claim any outstanding rent or service charges to the purchaser. We do not agree that the same can be inferred in relation to any liabilities which the vendor owed to a tenant. There is simply no evidence that any such term was included in the transfer of the freehold to the current landlord.

20. It follows in our judgment that the tenant's rights are solely against Almond Property Ltd, or possibly South East Property Management Ltd or Houston Lawrence. Insofar as the tenant seeks an adjustment of the service charge account for 2016-17, that is not a claim he can make against the current landlord. Insofar as the tenant complains of breach of trust, that is not a claim over which this Tribunal has any jurisdiction.

21. Accordingly we make no order in respect of the £4,332.48, but this is without prejudice to any claim which the tenant may bring against persons other than the current respondent.

The £20,000 contribution

22. The tenant accepted that in principle the landlord was entitled to ask for contributions to the reserve fund in respect of the proposed major works to the exterior and interior. He took three points. The first was that the contributions should take into account the £4,332.48 he had already contributed in 2016-17.

The second is that £40,000 was an excessive estimate for the works. The third was that the contributions should have been spread over a longer period. He suggested £5,000 per annum between all the tenants instead of £20,000 per annum.

23. In our judgment none of these points succeed. As to the first point, we have already held that the current landlord bears no responsibility for the missing monies. The landlord, in deciding what contribution to demand in respect of future works, has to approach the matter on the basis of the actual facts. Whether there should or should not have been £8,820 more in the reserve fund, the fact is that the money was not there. The landlord had in our judgment no alternative but to proceed on the basis that all the monies for the works would need to be got in afresh.

24. As to the second point, we cannot fault the reasoning of Mr Sheehan. He started with the Hallam & Co figures and adjusted them for inflation in the construction field. He added a reasonable amount for the fire alarm and for the internal decorations. It was reasonable for him to want £40,000 in hand for the major works.

25. As to the third point, we agree with the tenant's submission that the consultation which Mr Sheehan carried out was poor. In a small block such as this, it would not be onerous to invite views from all three tenants. It would be in accordance with RICS guidance. However, no issue is raised in respect of the management fees. The real question is whether the £20,000 is reasonable in accordance with section 19(2) of the Landlord and Tenant Act 1985.

26. Ms Ackerley submits that the £5,000 proposed by the tenant is simply a figure plucked out of the air. We agree. Eight years is an excessively long time to wait to carry out the works proposed in this case. There is a degree of urgency given how long the works have been outstanding and the one incident already of water ingress.

27. It is true, as Mr Salter reminds us, that clause 5(ix) provides:

> "The Lessor will use its best endeavours to maintain the Annual Maintenance Cost at the lowest reasonable figure consistent with the due performance and observance of its obligations herein…"

28. However, waiting two years in our judgment balances the obligations which the landlord has on the one hand to keep the contributions low and on the other to ensure the proper repair and maintenance of the property.

29. If there were evidence of financial hardship to the tenants, then that would have been a relevant consideration in determining the time frame over which the monies stood to be got in, but there is no evidence that the £20,000 demanded from the three tenants would have caused any particular financial hardship.

30. In our judgment the payment of £20,000 on account is reasonable. The tenant owes his one third share in each of the 2019-20 and 2020-21 service charge years.

The audit fee

31. We can deal with the audit fee very briefly. The managing agents canvassed the market before instructing the current accountants. The tenant has adduced no evidence that a firm could have been instructed more cheaply. The tenant's main point was that if the £20,000 contribution was disallowed, then the firm would have charged at a lower band. Since we have rejected the challenge to the £20,000 this point therefore fails as well.

Costs

32. We turn then to costs. As regards the fees payable to the Tribunal, we have a discretion as to which party should pay these. In our judgment, since the tenant has lost on all his challenges, we should make no order for costs, thereby leaving the burden of these fees on him.

33. As regards making an order under section 20C, again since the tenant has lost there is no sufficient ground in our judgment on which to make such order. We note, however, that we make no determination that the landlord is entitled to recover the legal fees incurred in the current case either through the service charge account or against the tenant directly.

DECISION

(a) The current landlord is not liable to refund or give credit for the £4,332.46 paid by the tenant to the former landlord in 2016-17. This is without prejudice to any claims which the tenant may have against any other person or persons.
(b) The sums claimed as a contribution to the major works reserve fund in 2019-20 and 2020-21 are reasonable in amount. The tenant is obliged to pay his one third share.
(c) The Tribunal disallows nothing in respect of the audit fee.
(d) The Tribunal makes no order for costs in respect of the fees payable to the Tribunal.
(e) The Tribunal refuses to make an order under section 20C of the Landlord and Tenant Act 1985.

Name: Judge Adrian Jack **Date:** `12 January 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.