FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/OOBL/LSC/2020/0043**
Property	**:**	**6 Riverbanks, Bolton, BL3 1RR**
Applicants	**:**	**Mr Denis McDonald**
Respondent	**:**	**Fairhold Holdings Number 3 (Houses) Limited**
Represented by		**J. B. Leitch, Solicitors**
Type of Application	**:**	**Service charges and dispensation from consultation, Section 27A of the Landlord and Tenant Act 1985.**
Tribunal Members	**:**	**Judge C. P. Tonge, LLB, BA.** **Ms S. D. Latham BSc, MRICS.**
Date of Decision	**:**	**15 April 2021**
Date of Determination :		**27 April 2021**

DECISION

Application and background

1. The Applicant in this case is Mr Denis McDonald, the long leaseholder of apartment 6 Riverbanks, Bolton, BL3 1RR, "the property". By an application dated 20 February 2020 the Applicant sought to have this Tribunal consider service charges demanded in service charge years 2017, 2018, 2019 and 2020, in respect of the property. The Tribunal will determine whether these service charges are payable under the terms of the lease and if so whether or not they are charged at a reasonable level. The Applicant has made it clear that he does not apply for orders to be made under section 20C of the Landlord and Tenant Act 1985, "the Act" and Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002, "the 2002 Act". Orders under these provisions might affect the manner in which the Respondent landlord seeks to recover the costs of conducting this case. The Applicant has chosen not to request such orders and the Respondent has acknowledged this stance in the Respondents case.

2. The Respondent freeholder of the property is Fairhold Holdings Number 3 (Houses) Limited. The Tribunal notes that in the original application the Applicant had mistakenly identified the management company, Block Property Management Limited as Respondent. This Tribunal gives permission for the application to be amended to identify the correct Respondent.

3. The basis of the application is that although the Applicant appears to agree that the heads of service charge that the Tribunal is considering are chargeable under the terms of the lease, the Applicant is of the view that the total service charge being demanded per service charge year is unreasonably high when compared with previous years. As such the Applicant has only paid the service charges demanded for these four years at the level demanded in 2016, namely £501.12 per year.

4. Directions were issued on 25 September 2020 indicating that Tribunal Judge Bennett took the view that this case should be determined on the papers, without an oral hearing or inspection of the property, unless a party to the case requested that these be conducted. Neither party requested an oral hearing or inspection of the property and as such the case is dealt with without these being arranged.

5. Further, Direction 10 states that "Submissions must include numbered pages and a list of contents". It is unfortunate that neither party has obeyed this Direction, the substantial evidential submissions are fastened together without the pages being numbered making

reference to any particular page much more difficult than it would otherwise have been.

6. Amended Directions were issued, again by Tribunal Judge Bennett, on 24 November 2020 in which the Respondent was correctly identified and confirming the above Directions.

7. The parties have served financial disclosure of accounting documents, statements of their respective cases with supporting evidence, a witness statement from Mr Mark Masoode Habib, the sole Director of Block Property Management Limited, two different Scott style schedules, one supplied by each party to the case, an Applicant's supplementary statement and a Respondent's Reply. There are several hundred pages of evidence. The Tribunal will not refer to them in any more detail now, but will do so in determination of the issues in the case where appropriate later.

8. It has not been necessary for the Tribunal to inspect the property. However, from the written evidence in the case it is clear that the property has a kitchen-living room, two bedrooms and a bathroom. The property stands within a block that contains a total of four apartments. Each apartment has its own private entrance. There are no internal common areas. There is no external lighting that could be subject to service charges. The service charges for the block and its surrounding block paving are apportioned equally between the four apartments.

The law

Section 18 of the Landlord and Tenant Act 1985. 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 purposes—
(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 20C "Limitation of service charges: costs of proceedings.
(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court or leasehold valuation tribunal (relevant tribunal), or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(c) in the case of proceedings before the Lands Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

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

Section 27A of the Landlord and Tenant Act 1985. 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 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.

(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.

The Commonhold and Leasehold Reform Act 2002
SCHEDULE 11
Limitation of administration charges: costs of proceedings

Paragraph 5A

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

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

(3)In this paragraph—

(a)“litigation costs” means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and

(b)“the relevant court or tribunal” means the court or tribunal mentioned in the table in relation to those proceedings.

Relevant Provisions of the lease

9. The Applicant holds the remainder of a lease with a term of 999 years commencing 1 February 2002. The service charge year commences on 1 January of each year. Service charges may be demanded on an estimated basis in advance with a balancing exercise at the end of the service charge year, at which point any short fall in the lessee's contributions shall be demanded and any over payment be "allowed", as the case may be (page 10 of the lease, clause 3.2). The Tribunal will return to word allowed later in the determinations.

10. The Respondent is under a duty to maintain, and the Applicant under a duty to pay service charges for, maintenance of the structure of the building and the block paved areas. This includes cleaning out the gutters of the building, maintaining the block paved areas, including gritting this area when required because of snow, repairs to the common exterior parts of the building and its curtilage, which does not include the doors and windows of the apartments, these being demised with the long leases to the apartments. This will clearly require some repairs to be carried out and charged for as service charge costs.

11. The lease includes a provision for the appointment of a management agent and payment of that agent's fees as a service charge. The Respondent is under a duty to insure the building against all usual risks and the lease provides for payment, as a service charge, of the costs incurred in that regard, this must include any valuations of the building that are made for insurance purposes.

12. The lease provides for service charges to be demanded to provide a sinking fund and a reserve fund in respect of the building that should be "progressive and cumulative rather than irregular". This fund to be run "in accordance with the principles of good estate management" (Page 10 of the lease, clause 5 of part 1 of the fourth Schedule). This will also be considered in the determination section of this Decision.

13. Risk assessments and bank charges can be charged as a service charge (page 12 of the lease, clause 4 of part 2 of schedule 4). Repairs to the building that fall within the responsibility of the respondent to repair form part of the service charge (page 12 of the lease, clause 1 or clause 4 of part 2 of schedule 4).

14. The Respondent is required to have accounts prepared which may be subject to audit (page 10 of the lease, clause 3 of part 1 of schedule 4). Accountancy fees are payable as a service charge by the Applicant (page 12 of the lease, clause 9.3 or clause 4 of part 1 of schedule 4).

15. The Applicants is responsible for payment of a quarter of the total service charges due in respect of the building (page 5 of the lease, clause 4 [y]).

16. The lease, under the head of "Lessor's protection provisions", purports to increase protections for the Respondent, whilst diminishing protections for the Applicant as provided by the Act (page 11, clause 7 of part 1 of the fourth schedule). This clause and its five sub clauses do not mention the jurisdiction or supervisory duties of this Tribunal, but for the avoidance of doubt this Tribunal will not

consider itself hindered in its duties by virtue of this clause of the lease.

The Deliberations

17. The Tribunal first considers the issue as to whether the charges that have been demanded as service charges over this four year period can be demanded under the terms of the lease. The Tribunal notes that the Applicant does not challenge the assertion made by the Respondent that they are charges that can be demanded as service charge costs. This view of the evidence is supported not just by the terms of the application and supporting statement of case, but also by the Scott style schedule prepared by the Applicant which challenges only the total cost of services as compared with prior years, seeking to challenge the cost of services over and above the £501.12 that the Applicant has paid.

18. Further, the Tribunal has considered the terms of the lease as summarised above and determines that the heads of service charge are all chargeable as service charges within the terms of the lease.

19. The Respondent challenges the basis upon which the Applicant has brought his case in that the Applicant in his statement of case has taken a broad brush approach without challenging the individual charges that make up the service charge and without adducing any evidence as to comparable expenses that the Applicant does consider to be reasonable.

20. In response the Applicant has sought to consider individual charges in his supplementary statement of 12 February 2020, by making comparisons with earlier charges made by this Respondent, in an attempt to establish that the challenged service charges are being charged at an unreasonable level. The Applicant still does not adduce evidence that, for example, the gutters could have cleaned at a cheaper cost by some other contractor.

21. The Tribunal, whilst noting that no alternative quotes have been supplied by the Applicant, determines that the Tribunal will never the less consider the case as put forward by the Applicant and examine not just the individual parts of the service charge for each year but also the increase in cost, if any, from prior years.

22. Having determined that the service charge costs are chargeable the Tribunal considers the Scott style schedule as prepared by the Respondent. This document is 63 pages in length and deals with each individual charge over three of the four year periods that have been

challenged, namely 2017, 2018 and 2019. Year 2020 remains on the basis of the estimated charge. The Scott style schedule deals with the actual figure spent on each individual part of the service charge calculation. Having considered this Scott style schedule the Tribunal is able to make the following observations.

23. In considering the individual actual costs as shown in the Respondent's Scott style schedule (not the estimated costs) for service charge years 2017, 2018 and 2019 the Tribunal has considered all the evidence adduced by both parties and the Tribunal determines that those costs are all charges that are within the range of costs that the Tribunal considers to be reasonable.

24. Service charge year 2017. The estimated figure demanded was £630.48, but in fact the Respondent only spent or charged in management fees £499.57. The Applicant having paid £501.12. On these figures the Applicant would be in credit to the sum of £1.55.

25. Service charge year 2018. The estimated figure demanded was £652.56, but in fact the Respondent only spent or charged in management fees £521.03. The Applicant having paid £501.12. On these figures the Applicant would be in debit to the sum of £19.91.

26. Service charge year 2019. The estimated figure demanded was £652.56, but in fact the Respondent spent or charged in management fees £679.34. The Applicant having paid £501.12. On these figures the Applicant would be in debit to the sum of £178.22.

27. It is not possible to make a similar calculation for service charge year 2020 because this year, in the evidence before the Tribunal, the years service charges remains on an estimated basis only. As such the Tribunal determines that it is not able to make any determination as to the reasonableness of service charges for service charge 2020 due to the fact that the actual figures of what was spent are not before the Tribunal.

28. The Respondent seeks to persuade the Tribunal that even though it is matter of simple arithmetic to calculate the credit and debit figures as shown in paragraphs 24, 25 and 26, above, the Tribunal should not act on those figures. This is because the Respondent contends that the Applicant should in fact be required to pay the full estimated charge, even though that money in service charge years 2017 and 2018 was not used for services provided in that service charge year. The certified accounts for those years show that at the end of the service charge year in question any service charge collected but not used was "allowed" (see paragraph 9, above) by paying it into the service charge reserves or sinking fund.

29. It is now necessary for the Tribunal to consider the sinking fund/reserve fund to determine whether or not it is fair, just and reasonable to "allow" for any overpayment of the actual service charges, out of the estimated service charge payments, by moving it into the sinking fund/reserve fund.

30. The Royal Institution of Charted Surveyors, Code of Practice, Service charges residential management Code, third edition, approved by statutory instrument (2016/518) replaced edition two on 1 June 2016, "the Code". The Code sets out the principles of good estate management and will be taken into account by tribunals when considering matters of estate management.

31. The Code at section 7.5 deals with reserve funds [sinking funds] in the following manner. "The intention of a reserve fund is to spread the costs of use and occupation as evenly as possible throughout the life of the lease..... ensuring monies are available when required for major works, cyclical works or replacing expensive plant". The Tribunal notes that there is no cyclical work required by this lease, nor is there any expensive plant. The only purpose therefore in collecting fees for a reserve fund is to protect leaseholders from the cost of major works over the life of the 999 year lease.

32. In the circumstances of this case it is entirely contrary to the Code (the Code section 7.5) and also contrary to the lease that requires the principles of good estate management be applied (the lease, page 10, clause 5 of part 1 of the fourth schedule) to dip into the sinking/ reserve fund to pay for anything other than major works (paragraph 31, above). In service charge year 2019 the Respondent took £107 out of the sinking/reserve fund despite there being under spends on minor repairs and risk assessments of £135 that were being credited into the sinking/reserve fund. There were no major works so the Respondent should not have done this. The Respondent appears to be using this reserve/sinking fund as some kind of float to dip into and top up where convenient.

33. The lease provides for service charges to be demanded to provide a sinking fund and a reserve fund in respect of the building that should be "progressive and cumulative rather than irregular". This fund to be run "in accordance with the principles of good estate management" (both the quoted provisions are contained in the lease, page 10, clause 5 of part 1 of the fourth schedule). The Tribunal determines that the lease therefore requires the sinking/reserve fund to built up by regular payments and not by adding whatever may be left over (if anything) at the end if a service charge year.

34. The Tribunal notes that in the certified accounts for service charge year 2017 (page 5 of the accounts) there is a statement to the effect that "Budgets for 2018 have been set with a view to adding £325 to reserves for future expenditure". The only reserve that is spoken about is the reserve/sinking fund. That being the case the Tribunal would expect a service charge to be present in service charge year 2018 for £325 for the reserve/sinking fund. In fact the Applicant was required to pay a service charge of £38.50 towards the reserve/sinking fund, making a total of £154 collected for that purpose from the four long leaseholders of the building. However, at the end of the year the accounts state that a total of £526 were added to the reserves, due to various under spends on other sections of the service charge. This figure being far in excess of that which the Respondent had decided was a reasonable figure at the start of that service charge year. The Tribunal determines that the reserve/sinking fund is being dealt within an unreasonable manner that is in contravention of the Code and not in accordance with the principles of good estate management.

35. The Code deals with overpayments of service charges as a result of estimated service charge demands (the Code, page 30, section 7.12). "...you must repay any excess paid, or deduct it from subsequent charges as the lease directs once the costs have been incurred". As such the Tribunal determines that under the terms of this lease and the requirements of the Code, where estimated service charges have been demanded at too high a level it is not fair, reasonable or just to move overpaid amounts into the reserve/sinking fund. Those amounts should instead be credited to the long leaseholders service charge account. The Tribunal will therefore determine the correct sum to be paid as a service charge based on the actual expenditure as shown in the Respondent's Scott style schedule.

36. The Tribunal therefore determines that the Applicant's service charge account be dealt with as follows :

- Service charge year 2017, credited with the sum of £1.55
- Service charge year 2018, debit with the sum of £19.91
- Service charge year 2019, debit with the sum of £178.22

Total owed £196.58

37. The Tribunal makes no determination as to the service charges demanded in 2020 as they were presented to the Tribunal on the basis of being estimated accounts only. and it in this case it is necessary to see the actual figures spent and what happened to any under spent amounts for the Tribunal to make any determinations.

38. There is an alleged underpayment of service charges of £4.31 carried forward to service charge year 2017. There is insufficient evidence before the Tribunal for the Tribunal to make any determination with regard to this sum.

39. The Applicant has made it clear that he does not apply for any order to be made pursuant to section 20C of the Act or paragraph 5A of schedule 11 of the 2002 Act. The Tribunal does not make any such order.

Decision

40. The Tribunal decides that the Applicant's service charge account must be dealt with as follows :

- Service charge year 2017, credited with the sum of £1.55
- Service charge year 2018, debit with the sum of £19.91
- Service charge year 2019, debit with the sum of £178.22

Total owed £196.58

41. The sum of £196.58 to be paid to the Respondent, via its new management agent, forthwith.

42. No decisions are made with regard to service charge year 2020 or the £4.31 carried forward to service charge year 2017. There is insufficient evidence before the Tribunal for these issues to be dealt with (see paragraphs 37 and 38, above).

43. This case has proceeded during the Covid-19 pandemic. In fact this case has not been in any way effected by the procedural alterations made as a result of the pandemic.

44. Appeal against this Decision is to the Upper Tribunal. Should either party wish to appeal against this Decision they must do so within 28 days of the Decision being sent to them, by delivering to this First-tier Tribunal an application asking for permission to appeal, stating the grounds for that appeal, particulars of the appeal and the result that the party seeks to achieve by bringing the appeal.

Judge C. P. Tonge

Date sent to the parties 27 April 2021