



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

Case Reference : **CHI/29UN/LSC/2022/0044**

Property : **11B, 10H & others Arlington House
All Saints Avenue Margate Kent CT9 1XR**

Applicants :

John Moss	Flat 11B
Juliet Whiting	Flat 12C
Brian Cooper	Flat 2B
James & Sandra Glynn	Flat 5H
John Macallan	Flat 6F
Sue & Keith Line	Flat 18D
Sue Kenten & Karl Jastrzebski	Flat 10H
Magdalena Korczak	Flat 2B

Representative : **In person**

Respondent : **Metropolitan Property Realizations
Ltd**

Representative : **Memery Crystal LLP**

Type of Application : **s27A and s20C Landlord and Tenant
Act 1985; Schedule 11 paras 1 and 5
Commonhold and Leasehold Reform
Act 2002**

Tribunal : **Judge F J Silverman MA LLM**

Date of Consideration : **24 October 2022.**

Date of Decision : **31 October 2022**

DECISION AND ORDER

- 1 The Tribunal finds that the service charge accounts for the year 2019 are valid and sums claimed under them are potentially recoverable by the Respondent in so far as they remain outstanding.**
- 2 The Tribunal has no jurisdiction to deal with the Applicants' application because the challenged expenditure does not form part of the service charge or alternatively, the application is barred by reason of s27A(4)(a) Landlord and Tenant Act 1985.**
- 3 No order is made under either s20C Landlord and Tenant Act 1985 or Schedule 11 para 5 Commonhold and Leasehold Reform Act 2002.**

This has been a remote consideration on the papers which has been consented to by the parties. The form of remote hearing was P:REMOTE. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents to which the Tribunal was referred are contained in an electronic bundle the contents of which are referred to below. The orders made in these proceedings are described above.

REASONS

- 1 The lead Applicants are the leaseholders of 11B Arlington House All Saints Avenue Margate Kent CT9 1XR London N7 6EJ (the property) which is an apartment forming part of a purpose built tower block in Margate containing 142 self-contained flats. The other named Applicants have joined in this application and are the leaseholders of the flat numbers typed beside their respective names. The Respondent is the current freeholder of the property.
- 2 The hearing took place as a paper consideration to which the parties had previously consented.
- 3 In accordance with current Practice Directions relating to Covid 19 the Tribunal did not make a physical inspection of the property but was able to obtain an overview of its exterior and location via GPS software.
- 4 The lead Applicants hold the property under a lease dated 12 July 1979 for a term of 114 years from 01 October 1961 and made between the Respondent as landlord and Norman and Mary Pett as tenants. The other Applicants are the leaseholders under similarly termed leases and, like the lead Applicants, are each responsible for a proportion of the service charge demanded by the landlord through its agent.
- 5 Directions in this case were issued on 30 June 2022 and 18 July 2022.
- 6 An electronic bundle of documents was prepared for the hearing and was read by the Tribunal during its consideration of the applications. Various documents from that bundle are referred to below.

- 7 The Applicants challenge the service charges demanded in respect of the year 2019 and maintain that no sums at all are payable by them because the accounts were not certified as required by the lease. Alternatively, they challenge 71 separate items of the service charge on the grounds set out in a schedule (page 23 et seq).
- 8 The service charge year runs in sequence with the calendar year (page 178) i.e. January 1-December 31.
- 9 The Applicants aver that since the accounts under challenge are not certified in accordance with the lease the Tribunal should follow the case of Powell & Co Investments Ltd v Alexandrova [2021] UKUT 10 (LC) which held that the tenants in that case had no liability to pay their service charge because the landlord had failed to have the accounts certified in accordance with the terms of the lease (page 160 et seq).
- 10 The relevant provision in the Applicants' lease is found in clause b(i) (page 178) which states as follows: '*the amount of the service charges and other charges hereinbefore covenanted to be paid shall be ascertained and certified by a certificate (hereinafter called 'the certificate') signed by the Lessor's auditors (**at the discretion of the Lessor**) acting as experts and not as arbitrators annually and so soon after the end of the Lessor's financial year as may be practicable and shall relate to such year in manner hereinafter mentioned*'.
- 11 It is common ground between the parties that the accounts in question have not been certified by an auditor. A limited certificate appears on the accounts, the reason given for the qualified certificate being that the management of the block had changed during the financial year and there was a lack of certainty that all of the relevant paperwork had been made available to the accountants. It is nevertheless a valid certificate by qualified accountants which states that they have verified all expenditure against the documentation supplied to the accountants and is in a form of wording commonly used in service charge accounts.
- 12 The provision requiring certification in the Alexandrova case is differently worded from that cited above in that it contains a mandatory requirement for the accounts to be audited (not just certified or prepared by an accountant) ('*shall be certified by a Chartered Accountant to be appointed by the Lessor*' page 163).
- 13 The present case can therefore be distinguished from the Alexandrova case because the latter makes certification obligatory (use of the word 'shall') whereas the Arlington lease allows the Lessor discretion to choose whether or not to have the accounts certified (use of phrase: 'at the discretion of the Lessor') and in the present case it appears that the Lessor chose not to do so.
- 14 The subsequent sub-clauses of the lease which refer to certification (see eg b(iii) and b(iv) page 178) would only be relevant in a case where the landlord had chosen to have the accounts certified and have no application to the present situation.
- 15 For the above reason the Applicants' argument that no money is payable under the service charge demands for 2019 because the accounts were not properly certified is mistaken and cannot succeed.
- 16 Turning now to the alternative arguments:

- 17 The Respondent has taken the view that the individual items which have been challenged by the Applicants are de minimis in relation to the overall sums incurred. They have therefore removed all of the disputed charges from the service charge and had at the time of submitting their statement of case repaid all the disputed charges to all but two of the tenants. They say that the missing two tenants had since sold their properties and their current addresses were being sought.
- 18 That being so, the disputed items no longer form part of the service charge and thus do not fall within the Tribunal's jurisdiction under s27A Landlord and Tenant Act 1985.
- 19 Alternatively, it could be argued that, having accepted the repayment each Applicant/tenant has made a separate agreement with the Respondent in respect of the disputed sum(s) and their action is therefore barred by the application of s27A(4)(a) which states that: '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'.
- 20 The Tribunal notes that the Applicants dispute the Respondent's statement that the amounts re-paid are de minimis and say that the total sum refunded would amount to some £50,000 and that the refund was a tactical move by the Respondent to avoid litigation. It is however, the Respondent's decision whether to not to refund the sums and that decision is not open to challenge by the Applicants.
- 21 The Applicants asked the Tribunal to make an order under both s20C Landlord and Tenant Act 1985 and Schedule 11 paragraph 5 of the Commonhold and Leasehold Reform Act 2002 which prevents the Respondent from adding the litigation costs of this application to a future service charge bill.
- 22 The Applicants have failed in both aspects of their claim and although there is a history of previous litigation between the parties and some suggestion that the Respondent had failed to deal as expeditiously as it might have done with this matter the Tribunal does not consider that an order under either of the above sections could be justified in the present case. Similarly, the Tribunal declines to order the repayment to the Applicants of their application fee.

23 **The Law**
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 20C

- (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, residential property tribunal or the Upper 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;
 - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
 - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
 - (c) in the case of proceedings before the Upper 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.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

- (1) In this Part of this Schedule “administration charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
 - (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
 - (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
 - (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
 - (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.
- (2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.
- (3) In this Part of this Schedule “variable administration charge” means an administration charge payable by a tenant which is neither—
 - (a) specified in his lease, nor
 - (b) calculated in accordance with a formula specified in his lease.
- (4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

- (1) An application may be made to the appropriate tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.
- (3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
- (4) No application under sub-paragraph (1) 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 matter of an application under sub-paragraph (1).

Section 47 Landlord and Tenant Act 1987

(1) Where any written demand is given to a tenant of premises to which this Part applies, the demand must contain the following information, namely—

(a) the name and address of the landlord, and

(b) if that address is not in England and Wales, an address in England and Wales at which notices (including notices in proceedings) may be served on the landlord by the tenant.

(2) Where—

(a) a tenant of any such premises is given such a demand, but

(b) it does not contain any information required to be contained in it by virtue of subsection (1),

then (subject to subsection (3)) any part of the amount demanded which consists of a service charge [F1 or an administration charge] (“the relevant amount”) shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant.

(3) The relevant amount shall not be so treated in relation to any time when, by virtue of an order of any court [F2 or tribunal], there is in force an appointment of a receiver or manager whose functions include the receiving of service charges [F3 or (as the case may be) administration charges] from the tenant.

(4) In this section “demand” means a demand for rent or other sums payable to the landlord under the terms of the tenancy.

Withholding of service charges Landlord and Tenant Act 1985 s21

21 (1) A tenant may withhold payment of a service charge if—

(a) the landlord has not provided him with information or a report—

(i) at the time at which, or

(ii) (as the case may be) by the time by which,

he is required to provide it by virtue of section 21, or

(b) the form or content of information or a report which the landlord has provided him with by virtue of that section (at any time) does not conform exactly or substantially with the requirements prescribed by regulations under that section.

(2) The maximum amount which the tenant may withhold is an amount equal to the aggregate of—

(a) the service charges paid by him in the period to which the information or report concerned would or does relate, and

(b) amounts standing to the tenant's credit in relation to the service charges at the beginning of that period.

(3) An amount may not be withheld under this section—

(a) in a case within paragraph (a) of subsection (1), after the information or report concerned has been provided to the tenant by the landlord, or

(b)in a case within paragraph (b) of that subsection, after information or a report conforming exactly or substantially with requirements prescribed by regulations under section 21 has been provided to the tenant by the landlord by way of replacement of that previously provided.

(4)If, on an application made by the landlord to the appropriate tribunal, the tribunal determines that the landlord has a reasonable excuse for a failure giving rise to the right of a tenant to withhold an amount under this section, the tenant may not withhold the amount after the determination is made.

(5)Where a tenant withholds a service charge under this section, any provisions of the tenancy 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.

21B Notice to accompany demands for service charges

(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.

S22 Landlord and Tenant Act 1985

22 Request to inspect supporting accounts &c.

(1) This section applies where a tenant, or the secretary of a recognised tenants' association, has obtained such a summary as is referred to in section 21(1) (summary of relevant costs), whether in pursuance of that section or otherwise.

(2) The tenant, or the secretary with the consent of the tenant, may within six months of obtaining the summary require the landlord in writing to afford him reasonable facilities—

(a) for inspecting the accounts, receipts and other documents supporting the summary, and

(b) for taking copies or extracts from them.

(3) A request under this section is duly served on the landlord if it is served on—

(a) an agent of the landlord named as such in the rent book or similar document, or

(b) the person who receives the rent of behalf of the landlord;

and a person on whom a request is so served shall forward it as soon as may be to the landlord.

(4) The landlord shall make such facilities available to the tenant or secretary for a period of two months beginning not later than one month after the request is made.

(5) The landlord shall—

(a) where such facilities are for the inspection of any documents, make them so available free of charge;

(b) where such facilities are for the taking of copies or extracts, be entitled to make them so available on payment of such reasonable charge as he may determine.

(6) The requirement imposed on the landlord by subsection (5)(a) to make any facilities available to a person free of charge shall not be construed as precluding the landlord from treating as part of his costs of management any costs incurred by him in connection with making those facilities so available.

Judge F J Silverman

Date 31 October 2022

Note:

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.