FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/00KA/LIS/2019/0023**
Property	**:**	**78 The Ridings Luton Bedfordshire LU3 1BY**
Applicant	**:**	**Michael Clarke and Patricia Clarke**
Representatives	**:**	**In person**
Respondent	**:**	**Meridian Retirement Housing Services Limited**
Representative		**J B Leitch Solicitors**
Type of Application	**:**	**For the determination of the liability to pay and reasonableness of service charges (s.27A Landlord and Tenant Act 1985)**
Tribunal Members	**:**	**Judge Professor Robert Abbey**
Date of Paper Based Decision	**:**	**11 December 2019**

DECISION

Decisions of the tribunal

(1) The tribunal determines that:-

Percentage amount for service charge payments under the terms of the lease

The service charge percentage of 2.27% is considered to be fair and reasonable and furthermore authorised by the terms of the lease of the property and therefore payable at that percentage rate by the applicant.

(2) It is the Tribunal's decision that it is both just and equitable to make an order pursuant to paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002. Therefore, the tribunal makes an order pursuant to the terms of paragraph 5A the details of which appear at the end of this determination.

The application

1. The applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charge payable to the respondent for services provided for **78 The Ridings Luton Bedfordshire LU3 1BY**, (the property) and the liability to pay such service charge.

2. The relevant legal provisions are set out in the Appendix to this decision. Additionally, rights of appeal are set out below in an annex to this decision

The paper based decision

3. The parties confirmed to the Tribunal that they would like the matter to be determined on the papers.

4. The tribunal had before it two trial bundles of documents and submissions prepared by both of the parties.

The background and the issues

5. The property is a one bedroom flat at ground floor level within a terraced row. The part of the development the flat is situate within has ground floor and first floor flats. The flat is also part of a larger development of mixed housing.

6. The tribunal did not consider that an inspection was necessary in the light of the detailed and extensive paperwork in the trial bundles; nor would it have been proportionate to the issues and service charge amounts that are in dispute.

7. The lease of the property is dated 2 August 1991 granted for a term of 125 years from 1 January 1990 and made between Homehurst Limited of the first part, Meridian Retirement Housing Services Limited of the second part of Elaine Ann Gault of the third part and is registered at the Land Registry under title number BD166944. The applicants are the former owners of the property, the current owner being Mahmoud Chayeb. The respondent says that the applicants purchased the property on or around 30 June 2008 and then disposed of their leasehold interest on or around 16 August 2018. The application to the Tribunal was dated 10 August 2019.

8. The applicant tenant held a long lease of the property which requires the management company/respondent to provide services and the tenant to contribute towards their cost by way of a service charge. The applicant tenant must pay a contribution stipulated in their lease for the services provided. The actual appropriate contribution is expressed to be a particular percentage for each flat. The amount of the percentage is the core issue in this matter. By clause 1(p) of the lease the service charge percentage is expressed to be 1.5625% of the service costs as defined in the lease (or 1.56% to two decimal points).

9. The issues the applicant raised covered the reasonableness of the percentage fee service charges demanded by the respondent for various years being 2010-2011, 2012-13, 2013-14, 2014-15, 2015-16 2016-17 and 2017-18.

10. The applicant also sought an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 seeking to debar the respondent from recovering an administration charge in respect of litigation costs.

Summary of the applicant's argument

11. In essence the applicant says in the application to the tribunal that the fundamental question relates to the percentage of 1.5625 across the total service charge for the years 2008 to 2018.The applicant seeks to contest the overall level of service charges at the actual percentage charged. The applicant asserts that the charge actually levied is at 2.27% rather than the charge stated in the lease at 1.56%. The applicant does not accept that the respondent had a legitimate right to increase the percentage to 2.27 without informing the leaseholder. The applicants do not believe that the respondents have afforded them their protection under natural justice. The applicant asserts that the first time 2.27% was raised was in a late submission by way of a spreadsheet

supplied by the respondent in November. The applicant also complains that the respondent has been slow in responding to enquiries about the service charge.

Summary of the respondent's argument

12. The respondent relies upon the provisions in the lease to support the level of service charges demanded. In particular they rely upon clause 8(d) and the Tribunal will refer to this clause in detail in the decision set out below. However, in essence the respondent says the clause allows it amend the service charge percentage. It is this part of the application that the Tribunal will focus upon. In the respondent's statement of case the respondent confirms that for the service charge years from and including 2008 to and including 2018-19 the service charge proportion charged to the applicant was for each and every year consistently 2.27%. The respondent believes that the lease terms and the conduct of the parties means that this level of charge is correct and appropriate.

Decision

13. The tribunal is required to consider if the percentage charge of 2.27% is correct and allowed by the lease terms and in particular clause8(d) which provides that the management company/respondent –

> *"reserves the right to amend the service charge percentage specified in Clause 1 (p) to the effect that the percentage shall always represent the proportion of the Total Service Costs which the lessee shall bear in proportion to the number of apartments referred to within the First Schedule (or such other number of Apartments as the lessor shall eventually construct) now constructed or intended by the lessor to be constructed for sale by way of a lease or similar hereby created upon the estate."*

14. To enable a greater understanding of the nature and effect of this lease provision the Tribunal sought assistance from a recent Supreme Court decision. The Supreme Court case of *Arnold v Britton and Others* [2015] UKSC 36 is extremely helpful in this regard. This case was about judicial interpretation of contractual provisions analogous to the dispute before the tribunal. The court held : -

> *"that the interpretation of a contractual provision, including one as to service charges, involved identifying what the parties had meant through the eyes of a reasonable reader, and ,save in a very unusual case, that meaning was most obviously to be gleaned from the language of the provision; that, although the less clear the relevant words were, the more the court could*

properly depart from their natural meaning, it was not to embark on an exercise of searching for drafting infelicities in order to facilitate departure from the natural meaning; that commercial common sense was relevant only to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties as at the date on which the contract was made….it was not the function of a court to relieve a party from the consequences of imprudence or poor advice".

15. Accordingly the tribunal turned to the lease to try to identify what the lease parties had meant through the eyes of a reasonable reader. The Tribunal therefore took the view that a reasonable interpretation of the wording of 8(d) by a reasonable reader would lead to the inescapable conclusion that the provision is unilateral to the intent that the lessees do not need to be consulted or agree to any amendment made thereunder. Furthermore there is no requirement to confirm that any change in the percentage has been made and that the right of amendment is not conditional upon the giving of any notice thereof to the tenants.

16. The Tribunal also took the view that the clause was in the lease because the final number of units on the development was likely to vary as time progressed. However, the service charge proportions can only be amended so as to reflect the number of leasehold properties within the development. Thus the service charge total should simply amount to 100% and that this charge should be split up equally amongst the leaseholders on the estate.

17. The lease was completed in 1991. The respondent confirmed that there are 44 leasehold properties on the development and if the rate of 1.56% was applied then only 68.64% would be recoverable at this percentage. This would simply not accord with the terms of the lease whereby the total service charges were to be split in total equally amongst the leaseholders. The percentage has clearly been charged historically up to the figure of 2.27% and if you multiply that figure by 44 you reach almost 100%, (99.88%). The respondent confirmed that the percentage of 2.27% has been applied to each and every service charge year under scrutiny namely from 2008 up until 2018-19. Indeed the respondent confirmed that this rate has applied since their records began in 2004 although they could not confirm when the actual change of percentage was actually made.

18. As the respondent says in its statement of case all the service charge documentation has been at the higher percentage and this must in itself be notice of the amount each time the accounts, demands and other service charge documentation was so issued by the management company. Indeed when the applicant purchased the property these figures would have been before their solicitor who acted on the

purchase and who should have clarified and indeed explained these details for the purchaser.

19. If the percentage had remained as originally stated in the lease it was clear to the Tribunal that this would give rise to a somewhat perverse outcome i.e. a service charge collection rate of circa 68%. This would be plainly against the service charge scheme contemplated by the lease. By the same token to allow the percentage of 2.27 % is the reverse, it is a proper and appropriate division of the service charge costs amongst all the leaseholders on the estate. Accordingly the Tribunal is satisfied that the applicant has been correctly reasonably and justifiably charged at the rate of 2.27% and so the application is refused.

Application for a paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 order

20. It is the tribunal's view that it is both just and equitable to make an order pursuant to paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002. Having considered the conduct of the parties, their written submissions and taking into account the determination set out in the decision set out above, the Tribunal determines that it is just and equitable that there be no liability on the part of the applicant to pay an "administration charge in respect of litigation costs" i.e. contractual costs in the tenants' leases. Accordingly, an order is therefore made pursuant to paragraph 5A of Schedule 11 of the 2002 Act preventing such litigation costs being claimed as an administration charge.

21. With regard to the decision relating to paragraph 5A the Tribunal has looked at decision analogous and which relate to s.20c of the Landlord and Tenant Act 1985. So the Tribunal relied upon the guidance made by HHJ Rich in *Tenants of Langford Court v Doren Limited* (LRX/37/2000) in that it was decided that the decision to be taken was to be just and equitable in all the circumstances. The tribunal thought it would not be just to allow the right to claim litigation costs as part of the service charge. The s.20C decision in this dispute gave the tribunal an opportunity to ensure fair treatment as between landlord and tenant in circumstances where costs have been incurred by the landlord and that it would be just that the tenant should not have to pay them.

22. As was clarified in *The Church Commissioners v Derdabi* LRX/29/2011 the tribunal took a robust, broad-brush approach based upon the material before it. The tribunal took into account all relevant factors and circumstances including the complexity of the matters in issue and all the evidence presented. The Tribunal also took into account all written submissions before it at the time of the determination.

23. It was apparent to the tribunal that there had been some delay in the supplying of information requested by the applicant. For example with

the respondent's statement of case was produced a spreadsheet which compiled service charge information for all the years relevant to this dispute. The applicant says of this "This took the respondents 2 years to produce this we originally asked for this information in 2017." Similarly the applicant went on to say "the applicants have been asking since 2017 for copies of all the invoices since ownership and it has taken until this hearing for them to produce this information". The tribunal also noted the accounts that took some explaining and that the applicant was clearly not happy with the information or response from the respondents.

24. Accordingly it can be seen that the tribunal did take issue with elements of the conduct of the respondents and could see where the applicant was able to take issue with the conduct of the accounting process. The tribunal took careful note of the respondents' submissions but in the end felt that in the light of the above comments it would be just and equitable to proceed as set out above. For all these reasons the tribunal has made this decision in regard to the Paragraph 5A application.

Name: Judge Professor Robert M. Abbey **Date:** 11 December 2019

Appendix of relevant legislation and rules

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.

20B Limitation of service charges: time limit on making demands.

(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.

SCHEDULE 11

Administration charges

Part 1 Reasonableness of administration charges

Meaning of "administration charge"

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.
....

Liability to pay administration charges

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).

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.