FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AJ/LSC/2020/0167**
HMCTS code (paper, video, audio)	**:**	**P: PAPERREMOTE**
Property	**:**	**85 Creffield Road, London W3 9PU**
Applicant	**:**	**Augustin Anyim**
Respondent	**:**	**London Borough of Ealing Council**
Type of application	**:**	**For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985**
Tribunal members	**:**	**Judge Nicola Rushton QC** **Mr Luis Jarero BSc, FRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**12 January 2021**

DECISION

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Covid-19 pandemic: description of hearing

This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was P:PAPERREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined on paper. The documents that we were referred to were in a joint bundle of 275 pages, together with a copy of the application dated 19 March 2020, the contents of all of which we have noted. The decisions and orders made are described at the start of these reasons.

Decisions of the tribunal

(1) The tribunal determines that, in respect of roof repairs said to have been carried out as major repairs in about 2013, nil is payable by the Applicant as service charges for the year 2020.

(2) The tribunal makes the further determinations as set out under the various headings in this Decision.

(3) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act") so that none of the Respondent landlord's costs of the tribunal proceedings may be passed to the Applicant tenant through any service charge.

(4) The tribunal further makes an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") extinguishing any liability which the Applicant might have to pay an administration charge in respect of the Respondent's litigation costs under the terms of the lease.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 as to the amount of certain service charges said to be payable by him in respect of "major works", for the service charge year 2020. His application is dated 19 March 2020.

The hearing

2. This application was considered on paper by the tribunal in accordance with paragraph 8 of the directions issued by Mr A. J. Rawlence MRICS dated 28 August 2020, and with the consent of the parties.

3. A joint bundle was submitted by the Respondent, intended to be in compliance with the revised directions given by Judge N. Carr on 4

December 2020. That bundle did not in fact include a copy of the application, but a copy was available to the tribunal from the file.

4. The bundle included signed witness statements from Ms Rehana Sheikh dated 9 September 2020 and Ms Deborah Gillespie dated 11 September 2020, both Home Ownership Officers at the Respondent, which the tribunal has considered.

5. The Applicant has not submitted a witness statement. However, the bundle includes a Scott Schedule completed by him, in which he disputes the service charge of £494.40 as having been incorrectly demanded. He also states that he objects to the service charge because he does not fully recall the works taking place; has no record of the notices being issued to him; that his service charge account was in credit such that he was given a refund of £554.46 on 29 November 2017; and that the charges cannot be validated as such an extended time has passed.

6. In further comments filed on 6 November 2020, the Applicant states that having received further correspondence from the Respondent, he is now familiar with the works that were undertaken and recalls why they were done. However he states he still does not recall receiving the section 20B service charge notice dated 7 May 2015.

The background

7. The property which is the subject of this application is the ground floor flat ("the Flat") in a semi-detached Edwardian house ("the Building") which has been converted into two flats. The Respondent is the freeholder. The Applicant resides abroad.

8. Neither party requested an inspection. The tribunal did not consider that one was necessary, nor proportionate to the issues in dispute, nor feasible given Covid-19 restrictions in force.

9. The Applicant holds a long lease of the Flat, dated 17th April 1989, which requires the Respondent landlord to provide services, and the Applicant tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease will be referred to below, where appropriate. The leasehold interest is registered at HM Land Registry under title AGL12847.

10. The dispute concerns a demand for a service charge of £494.40 made by the Respondent to the Applicant by a letter entitled "Invoice for Major Works", dated 27 January 2020. This stated: "*Further to the statutory consultation notice issued to you on 6th December 2013, I write to inform you that the final account for the major works has now been agreed.*"

11. The attached "Statement of Final Costs (Scheme 4401)" states that the total contract cost was £1,138.79; that the Applicant's liability by rateable value was 39.47% and that the Applicant's individual contribution (inclusive of the Respondent's 10% management fee) was £494.40. It is noted that this is in fact 43.41% of £1,138.79.

12. According to the bundle of documents, the 2020 demand was accompanied by a payment questionnaire; a Summary of Tenants Rights and Obligations (pursuant to s.21B of the 1985 Act); a blank "Quality of Works" feedback form and details of repayment options.

13. The bundle also includes what are said to be a Notice served under s.20 of the 1985 Act, dated 6 December 2013, and a Notice served under s.20B of that Act, dated 7 May 2015.

14. The tribunal notes from the Statement of Major Works account dated 9 September 2020 that the Applicant is recorded as having made two payments which have cleared the invoice for £494.20: £394.35 on 5 May 2020 and £100.05 on 13 May 2020. Both payments were therefore after the application was issued. Neither party has made any reference to these payments in their evidence. The tribunal has therefore proceeded on the basis that these are payments which have been made by the Applicant but without any admission as to liability.

15. Relevant extracts from the legislation are set out in an appendix to this decision.

The issues

16. The sole issue is whether the service charge of £494.40 demanded for "major works" in the invoice of 27 January 2020 is payable by the Applicant within the terms of s.27A of the 1985 Act. By s.19 of the same Act, relevant costs are to be taken into account in determining the amount of a service charge only to the extent that they have been reasonably incurred.

17. There is no dispute that the Applicant in principle has a liability for service charges under clause 7 of the lease, nor that costs incurred by the Respondent for building works on the Building could in principle be recoverable by such a service charge, if reasonably incurred.

The tribunal's decision

18. The tribunal determines that the amount payable in respect of that service charge demand is nil.

Reasons for the tribunal's decision

19. The notice dated 6 December 2013 ("the Notice") is entitled "Emergency Landlord's Proposal Notice" and states that the Respondent "***has been forced to take urgent action to carry out works to***" the Building. These are stated to have been: "*Urgent roof repair works which include the erection of scaffolding, renewal of defective masonry and missing ridge tiles*".

20. The Respondent has described this notice as a "Section 20" Notice. However, on its face it does not comply with s.20 of the 1985 Act; nor did the Respondent apply under s.20ZA for dispensation with the s.20 consultation requirements.

21. Section 20 applies where the relevant costs incurred in carrying out works to the property exceed an amount which would result in the tenant's service charge contribution exceeding £250 (if there is no Qualifying Long Term Agreement ("QLTA") in place) or £100 (if there is a QLTA). There is no dispute that the works described would be qualifying works under s.20.

22. There is a suggestion in an email from Mr Yemi Onabanjo, legal officer at the Respondent, dated 16 December 2020, that the works were carried out under "*our long term agreement*". However there is no other evidence that a QLTA was in place, and no evidence that the consultation process necessary for a valid QLTA was followed[1].

23. Section 20 and the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the 2003 Regulations") made under it require the consultation on the works to be carried out before the works are done. If there is a QLTA in place, the consultation required is much more truncated, but it still needs to be done before the work is started. However, here the notice states that the works have already been carried out, as an emergency. Therefore this cannot be a notice under s.20.

24. On any view, the maximum service charge which the Respondent might have been able to recover for the works described in that notice would therefore have been either £100 or £250 (depending on whether or not there was a QLTA in place). These limits are set by sub-section 20(1) of the 1985 Act and regulations 4 and 6 of the 2003 Regulations.

25. Furthermore, the Notice does not purport to initiate a consultation process under the 2003 Regulations. It merely states that MNM Contractors have been appointed to carry out the works; that their tender was £1,138.79; the Applicant's total estimated cost would be

[1] To put in place a QLTA, the Respondent would have had to have carried out a consultation process under Schedules 1 and 2 of the Service Charges (Consultation Requirements) (England) Regulations 2003 before commencing it. No evidence is before the tribunal of any such consultation process having been undertaken.

£449.46 and estimated contribution would be £494.40. (NB: the same figures ultimately included in the invoice of 27 January 2020.) Enclosed was a "Comments and Observations" form for the Applicant to complete.

26. It is clear the Applicant received the Notice because he completed and returned that form on 16 December 2013, stamped received by the Respondent on 18 December 2013. He observed that the price seemed high and asked how many quotes had been obtained; stated he would have expected a schedule of works including start and end date and asked about quality monitoring, and the extent of the damage to the roof. These would have been relevant questions if the works had not yet been done.

27. Ms Sheikh responded on 6 January 2014 that she had forwarded his queries to the project manager Mr Russell and that when she received his response, she would write again. There is no further correspondence in reply. However, since the work was said to have already been done, it is unclear how Mr Russell could have answered these questions anyway, and certainly there is no evidence he did.

28. Even more fundamentally however, the bundle before the tribunal contains no specification of any works; no copy of any estimate from MNM and no invoice or copy of any account rendered by MNM (interim or final).

29. In his email of 16 December 2020, Mr Onabanjo states that "*the works were completed by contractors appointed under our long term agreement on 13 March 2014.*" However, there is no evidence before the tribunal as to where that date comes from, and certainly no confirmation from the contractor that the works had been done, let alone evidence of any sum charged for them.

30. There is therefore no evidence before the tribunal that the alleged cost of £1,138.79 has actually been incurred by the Respondent at all, whether to MNM or anyone else. While various works may have been carried out by MNM in late 2013 (and the Applicant says he remembers some works), there is no evidence of costs of £1,138.79 or any sum having been incurred by the Respondent in relation to the particular works described in the Notice.

31. The Respondent also relies on a further notice dated 7 May 2015 which it sent to the Applicant, which is headed "*Section 20b Notice – Invoice Pending*". This repeats the same description of works as the Notice and states that costs have now been incurred for those works and that "*The total cost incurred so far, for the building is £1,138.79.*" The notice states that the Applicant's contribution is currently being calculated and he will shortly be sent an invoice for his share.

32. If relevant costs had been incurred during the 18 months prior to 7 May 2015, then this notice would have been effective as a notice extending time for the service of a demand for payment of the service charge, under section 20B(2) of the 1985 Act. However, this begs the question of whether any such costs had been incurred. “Incurred” means that the landlord has been presented with an invoice by the contractor for the works[2]. However, as noted, there is no evidence of this.

33. There is no further relevant correspondence between the notice of 7 May 2015 and the invoice dated 27 January 2020.

34. Notably, the invoice of 27 January 2020 includes the same figure of £1,138.79 which originated as an estimate in the Notice, and was repeated in the 7 May 2015 notice. The figure in the invoice therefore appears to be based on the contents of the Notice (itself said to be only an estimate), rather than on any invoice or final account from the contractor, MNM. As such it tends to undermine rather than support the conclusion that any costs of £1,138.79 have actually been incurred by the Respondent.

35. In the absence of any direct evidence at all that the sum of £1,138.79 has been incurred by the Respondent, the tribunal is unable to find that any part of those costs has been “reasonably incurred”, for the purposes of s.19 of the 1985 Act. Consequently, the tribunal is unable to find that any part of this service charge is payable, under s.27A of that Act.

36. Given these findings, there is no need for the tribunal to consider the Applicant’s further contention that the charge could not be due because he was given a refund on 29 November 2017, which would not have happened if there had been a sum due on his service charge account. However, it is apparent from the papers that the Respondent operates two separate service charge accounts for each tenant: one for regular expenditure and a separate account for “major works”. The refund was given on the account for regular expenditure and so is not relevant to the “major works” account.

37. Insofar as the Applicant has paid the sum of £494.40, it therefore appears this sum is repayable by the Respondent to him, and the tribunal so finds.

Application under s.20C

38. In his application form, the Applicant applied for an order under section 20C of the 1985 Act. Taking into account the determinations above, and in particular that the Applicant is the successful party, the tribunal determines that it is just and equitable in the circumstances to

[2] *Burr v. OM Property Management Ltd* [2013] EWCA Civ 479, as applied in *Ground Rent (Regisport) Ltd v. Dowlen* [2014] UKUT 0144 (LC)

make an order under section 20C of the 1985 Act, that the Respondent may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

Application under paragraph 5A

39. It does not appear to the tribunal that the lease includes any obligation on the Applicant to pay any administration charge to the Respondent in respect of its litigation costs of this application. His application under paragraph 5A of Schedule 11 to the 2002 Act to extinguish any liability to pay such an administration charge to the Respondent in respect of any such litigation costs is probably therefore unnecessary.

40. However, for the avoidance of doubt, the tribunal also makes an order extinguishing any liability as the Applicant may have to pay any such administration charge to the Respondent in respect of the costs of this Application.

Name: Judge N Rushton QC **Date:** 12 January 2021

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

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.

<u>Section 20</u>

(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;
  (a) 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).