FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AW/LSC/2021/0029** **CVP REMOTE**
Property	**:**	**Kelvin Court, 40-42 Kensington Park Road, London W11 3BT**
Applicant	**:**	**Mr C Marshall and others as listed on the schedule attached to the application**
Representatives	**:**	**Mr Philip Marshall QC**
Respondent	**:**	**Northumberland & Durham Property Trust Limited**
Representative	**:**	**Ms Kimberley Ziya of Counsel**
Type of Application	**:**	**For the determination of the liability to pay service charges (s.27A Landlord and Tenant Act 1985)**
Tribunal Members	**:**	**Judge Professor Robert Abbey** **Mr S. Johnson MRICS**
Date and venue of Hearing	**:**	**4 October 2021 by online video hearing**
Date of Decision	**:**	**12 October 2021**

DECISION

Decisions of the tribunal

(1) The tribunal determines that: -

(2) The respondent's application to strike out parts of the applicant's amended grounds for the application is allowed in part for the reasons set out in this decision. Specifically: -

a. Reserve fund demands from 2008 – struck out
b. Legal expenditure from 2008 – struck out
c. Asbestos removal from 2007 to 2009 – struck out
d. Boiler replacement from 2007-2010 – not struck out
e. Insurance claim costs from 2017, – not struck out
f. Roof damage works from 2014 – not struck out

The application

1. The applicant seeks a determination under section 27A of the Landlord and Tenant Act 1985 as to whether service charges are payable in respect of works and services provided at **Kelvin Court, 40-42 Kensington Park Road, London W11 3BT** (The property).

2. The applicant is made up of several lessees of flats at the property and the respondent is the freeholder that provides services to the all the lessees. The applicants hold long leases of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. Each lessee must pay a percentage of the cost of the services provided.

3. 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

4. The Tribunal had before it two preliminary issues the details of which are set out below. The Tribunal did not deal with the section 27A determination but did determine the two preliminary issues relating to the extent and scope of the 27A determination.

The hearing

5. The applicant was represented by Mr Marshall QC and the respondents were represented by Ms Ziya of Counsel.

6. The tribunal did not inspect the property as it considered the documentation and information before it in the trial bundle enabled the

tribunal to proceed with this determination and also because of the restrictions and regulations arising out of the Covid-19 pandemic.

7. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was coded as CVPREMOTE - use for a hearing that is held entirely on the Ministry of Justice CVP platform with all participants joining from outside the court. A face-to-face hearing was not held because it was not possible due to the COVID-19 pandemic restrictions and regulations and because all issues could be determined in a remote hearing. The documents that were referred to were in one bundle of many pages, the contents of which we have recorded and which were accessible by all the parties. Therefore, the tribunal had before it an electronic/digital trial bundle of documents agreed by the applicant and the respondent, in accordance with previous directions. Legal submissions/skeleton arguments were also made available to the tribunal.

The background and the two preliminary issues

8. The property which is the subject of this application comprises a purpose-built residential block of flats. As originally brought, the proceedings challenged various aspects of the service charges for the 2020 and 2021 years of account. However, on 17 May 2021 the Applicants applied to amend the proceedings to add additional grounds relating to earlier years ("the additional grounds"). On 7th June 2021, the Tribunal wrote to the parties to confirm that a procedural judge had reviewed the papers and ordered that the directions of 18th March 2021 be varied as detailed in the email.

9. Thereafter the Respondent served an application to strike out paragraphs 26 to 32 of the amended statement of case of the Applicants, containing the additional grounds. This application was grounded exclusively on the contention that because the additional grounds relate to "historical" service charges the Tribunal should infer that any objection to them has been waived and they were now "agreed or admitted" or should be treated as frivolous or vexatious or an abuse of process.

10. The first preliminary issue is based upon the assertion made by the applicant that it is not open to the Respondent to seek to go behind the consent order or directions already made, under which the additional grounds were to be addressed at the trial following the various steps provided for in the Tribunal's directions. The applicant therefore says that the strike out application should be dismissed as an abuse of process or as an application that is not otherwise open to the Respondent.

11. The respondent says that the varied directions issued by the Tribunal on 7th June 2021 were not akin to the Tribunal approving a "consent

order". In any event, the respondent is not by this application seeking to resile from the terms of those directions. The directions allowed the applicant to submit an amended statement of case, the respondent is not disputing their right to do so but challenging the substance of the additional grounds now that they have been fully pleaded.

12. To support the first preliminary application the applicant seeks to rely upon the case of *Chanel v Woolworth* [1981] 1 WLR 485. The case confirms that that where the court makes an interlocutory order the matter cannot be revisited again unless there is a material change of circumstances. It is this principle that the applicant relies upon. The respondent simply says that the case law referred to in the applicant's response is therefore not applicable to the circumstances of this application.

13. The respondent says that the correspondence between the parties related solely to an agreement to allow the applicant to amend their statement of case. No concessions were made as to the validity or merits of the additional claims; indeed, the respondent says its solicitor expressly reserved its position on that point.

14. While considering this point, the Tribunal took particular note of an email dated 28 May 2021 from the solicitor for the respondent to the Tribunal and the applicant in which the solicitor wrote about the agreed directions that "*The position adopted by the Respondent is that the amendments raise issues which date back over a decade and it is not possible at this stage to say what legal and evidential issues arise as a result of the same. This will only become apparent once the Respondent has submitted its statement of case*." The solicitor then went on to say that a two-day hearing would be required. The applicant says this email simply refers to the two-day requirement and it does not add anything to the understanding of the nature of the amended directions. The applicant takes the view that "the respondent is seeking to go behind an agreed order. To resile from an agreed order/consent order or an agreed process in this manner is impermissible as a matter of contract (see *Weston v Dayman* [2006] EWCA Civ 1165."

15. The Tribunal do not agree with this interpretation. As Counsel for the respondent put it the varied directions issued by the Tribunal on 7th June 2021 were not akin to the Tribunal approving a "consent order". In any event, the respondent says that it is not by this application seeking to resile from the terms of those directions. The directions allowed the applicant to submit an amended statement of case; the respondent is not disputing their right to do so but challenging the substance of the additional claims now that they have been fully pleaded.

16. Accordingly, the Tribunal take the view that this email from the solicitor clearly shows that the Order or directions about the additional

grounds did not preclude the strike out application before the Tribunal. The Tribunal is satisfied that the circumstances of the amended directions allow for the making of the strike out application and as such the first preliminary application must fail.

17. The Tribunal therefore turned to the substantive application. The respondent says that it is brought primarily on the ground that the Tribunal has no jurisdiction in respect of matters which have "been agreed or admitted by the tenant": see s.27A(4) of the Act. Reliance is placed on the decisions of the Upper Tribunal in *Cain v Islington BC* [2015] UKUT 542 (LC) [107] and *Marlborough Park Services Ltd v Leitner* [2018] UKUT 230 (LC) [121].

18. In the *Cain* case The Upper Tribunal found that this Tribunal was entitled to find that the applicant had admitted or agreed the service charge amounts purely by the series of payments made in respect of the demanded service charge "without reservation, qualification or other challenge or protest". That entitlement was strengthened by the length of time which had passed before a challenge was made to the charges. The Upper Tribunal found that this Tribunal was entitled to look at matters in the round "and find that where there has been substantial delay in making any challenges to the items now in dispute, and most if not all of which have long-since been paid, that the tenant has agreed or admitted the amounts claimed which, after all, have long-since lain dormant without challenge".

19. Accordingly, The Upper Tribunal held an agreement or admission for the purposes of s.27A(4) may be express, or implied or inferred from the facts and circumstances. An agreement or admission may be inferred by mere inaction on the part of the tenant over a long period of time. The effect of s.27A(5) is that the making of a single payment on its own, or without more, will never be sufficient; there must always be other circumstances from which agreement or admission can be implied or inferred. Those circumstances may be a series of unqualified payments over a period of time which, depending upon the circumstances, could be quite short. It is a question of fact and degree in every case. The *Marlborough* decision confirmed and approved the *Cain* style approach to contesting service charges from many years before.

20. To quote directly from the *Cain* case; -

> *"14. Before considering the facts of this case, it is necessary to consider the meaning and effect of section 27A(5). An agreement or admission may be express, or implied or inferred from the facts and circumstances. In either situation the agreement or admission must be clear, the finding being based upon the objectively ascertained intention of the tenant which may be express or implied or inferred from the conduct of the*

tenant – usually an act or a series of acts or inaction in the face of specific circumstances or even mere inaction over a long period of time or a combination of the two.

17. The effect of sub-section (5), however, is to preclude any such finding "by reason only of [the tenant] having made any payment" (italics supplied). The reference to the making of "any payment", and "only" such payment, indicates that whilst the making of a single payment on its own, or without more, will never be sufficient to found the finding of agreement or admission, the making of multiple payments even of different amounts necessarily over a period of time (because that is how service charges work) may suffice. Putting it another way, the making of a single payment on its own, or without more, will never be sufficient; there must always be other circumstances from which agreement or admission can be implied or inferred. And those circumstances may be a series of unqualified payments over a period of time which, depending upon the circumstances, could be quite short, it always being a question of fact and degree in every case. "

21. The applicant says that the principles that emerge from these cases are as follows: a. In *Cain* it was repeatedly emphasised that any agreement or admission would have to be shown to be "clear" (at [14] and [16])). b. The burden of proof in establishing this clear case is on the respondent landlord (see *Marlborough Park* at [30]). c. The passage of time and repeated payment of service charges in the intervening period cannot give rise to the inference of an agreement or admission where the applicant tenant is unaware of the grounds of challenge (compare *Cain* at [23]). d. Even where the applicant can be shown to have known of the grounds of challenge and a substantial period has passed in which payments of service charge demands have been made, this will not result in any inferred agreement or consent where there was some "reservation, qualification or other challenge or protest" (see *Cain* at [25]). All of these principles militate against any finding of agreement or consent in this case.

22. Notwithstanding the above, as has been noted, it is a question of fact and degree in every case. Therefore, the Tribunal took time to consider each additional ground in the context of the guidance in the *Cain* decision.

23. The additional grounds focused upon the following concerns for the applicants, namely: -

(i) Reserve fund demands from 2008
(ii) Legal expenditure from 2008
(iii) Asbestos removal from 2007 to 2009

(iv) Boiler replacement from 2007-2010
(v) Insurance claim costs from 2017, and
(vi) Roof damage works from 2014.

Each of these items will be considered in the light of the principles set out in the Cain decision.

24. Reserve fund demands from 2008. The applicant says that demands were made for a reserve fund in the period to 25 March 2008 of £175,000 but only 75% of the sum collected appears to have been credited in the ensuing accounts. Credit for the missing amount should have been given in subsequent years. The Tribunal was of the view that this was an item that would have been discoverable in the accounts for 2008. It also seems to the Tribunal that to try to object to this charge some thirteen years later is just the kind of payment caught by the principles set out in the *Cain* decision. There have been many service charge payments since then and there was no persuasive evidence of significant objections stretching through that period. In these circumstances the Tribunal determine that this particular additional ground should be struck out and as such the respondent's application is granted in this one respect.

25. Legal expenditure from 2008. The applicant says that legal expenditure of £5829 was recovered under service charge demands in respect of the period to 25 March 2008. The applicant asserts that these appear to relate to the costs of earlier Tribunal proceedings which were not to be claimed from leaseholders. In any event, under the terms of the lease no legal expenditure was claimable in any event. The respondent says there is no evidence of any attempt to conceal or obscure these charges, they would have been visible from an inspection of the accounts for the relevant periods. The Tribunal was of the view that again this was an item that would have been discoverable in the accounts. It also seems to the Tribunal that to try to object to this charge some thirteen years later is again just the kind of payment caught by the principles set out in the *Cain* decision. In the absence of any convincing evidence of continued objections and in the light of the many service charge payments made since then the recourse to s27a is lost. In these circumstances the Tribunal determine that this particular additional ground should be struck out and as such the respondent's strike out application is granted but limited to this one respect.

26. Asbestos removal 2007-2009. In this regard, the applicant says that "In previous Tribunal proceedings between leaseholders and the Respondent with references LON/OOAW/LSC/2007/0269 and LON/OOAW/LSC/2007/0386 the Leasehold Valuation Tribunal made an order that the leaseholders should pay only 90.8% of the costs of asbestos removal from the boiler room at the Property. Such costs were estimated to be £24,024.87 according to a notice of Capital Property Management dated 16 April 2007. But in the accounts for the years

from 2007 to 2009 the Respondent has recovered £79,558.29 in respect of such works. Such excess sum appears to be irrecoverable as a matter of law (no further notice justifying such expenditure having apparently been issued) and/or was excessive."

27. The respondent simply says "Again, there is no evidence of any attempt to conceal or obscure these charges, they would have been visible from an inspection of the accounts for the relevant periods.". The Tribunal was of the view that again this was an item that would have been discoverable in the accounts. It also seems to the Tribunal that to try to object to this charge some thirteen years later is again just the kind of payment caught by the principles set out in the *Cain* decision. There have been many service charge payments since then and there was no persuasive evidence of significant objections stretching through that period. In these circumstances the Tribunal determine that this particular additional ground should be struck out and as such the respondent's application is granted in this one respect.

28. Boiler replacement from 2007-2010. The applicant says that in this regard "accounts for the periods between 2007 to 2010 charged £166,918.46 for replacement of the boilers. It is now known, from the report of the Respondent's own engineering consultants, Integrated Design Associates Limited, of February 2019, that the boilers were installed contrary to manufacturer specifications. In particular the boilers were wrongly connected to an open vent system. As a result, the boilers were substantially less efficient (thereby increasing energy costs) and have had a much shorter operational life. A substantial credit should be given in respect of this charge given the defective work and loss resulting." The respondent seems to reply upon a suggestion that there was a payment on account in 2007-2010 and whether the charge could be properly justified by reference to the anticipated expenditure at that time, not on the quality of the works that were ultimately provided.

29. The Tribunal found the position adopted by the applicant to be persuasive in regard to this one additional ground. The Tribunal were mindful of their role which was to consider if this additional ground should be considered in due course by another Tribunal as to its reasonableness and payability. The task for the Tribunal was to consider if the *Cain* principles were applied to the facts of this dispute that the charge should be disallowed. The Tribunal decided that because the issues relating to the boiler only came to light comparatively recently, (the Integrated Design report is from February 2019), that as a consequence the additional ground should be allowed. In these circumstances the Tribunal determine that this particular additional ground should not be struck out and as such the respondent's application is not granted in this one respect.

30. Insurance claim costs from 2017. The applicant made the point that in the accounts to 23 June 2017 there is a charge for £44,925 in respect of "insurance claims costs in excess of recoveries". This is the applicant asserts unexplained and unjustified. The applicant says that it would appear to represent an amount payable by the neighbouring school and not to be the responsibility of leaseholders. On the other hand, the respondent asserts that this charge would have been apparent to leaseholders from the audited accounts from 2017.

31. At the hearing Counsel for the respondent conceded that this additional ground was perhaps her weakest issue. She conceded that an issue arising in 2017 would have a material difference to one arising in 2007. The Tribunal decided that because the issues relating to the insurance claim costs came to light comparatively recently, (from 2017 onward), as a consequence the additional ground should be allowed. In these circumstances the Tribunal determine that this particular additional ground should not be struck out and as such the respondent's application is not granted in this one respect.

32. Roof damage works from 2014. Finally, the applicant seeks to have an additional ground regarding an insurance outcome following a claim about roof damage in 2014. The applicant asserts that sums due from insurers in respect of roof damage of £19,548 in 2014 do not appear to have credited against service charge demands resulting in an excessive demand.

33. The respondent in reply asserted that "If (which is not admitted) A are correct that these sums ought to have been credited to the service charge accounts (as effectively having reduced the actual amount laid out by R in carrying out maintenance works to the roof), then an appropriate proportion of the service charge demand for the following year would not have been payable. It is accepted that this is something which the Tribunal could determine on a s.27A application. Nonetheless, any failure to credit for the returned insurance monies is something which ought to have been discoverable in the accounts for 2015, which is over six years ago"

34. The Tribunal decided that because the issues relating to the roof damage works came to light in 2014 it was on the cusp of what might fall foul of the *Cain* principles. However, on balance the Tribunal thought the additional ground should be allowed. This Tribunal is not considering the reasonableness of the charges on whether they should go forward to another Tribunal to be considered with the other service charge issue under scrutiny. In these circumstances the Tribunal determine that this particular additional ground should not be struck out and as such the respondent's application is not granted in this one respect.

35. Finally, the Tribunal also considered the other grounds advanced by the respondent in support of its application. In this regard the Tribunal find the arguments advanced by the applicant to be persuasive. The applicant says "The Respondent's alternative grounds for its application are misconceived. The Respondent suggests that certain of the Applicants only became leaseholders after the Additional Grounds arose and have no practical interest. This has no substance for a number of reasons: a. first it is clearly the case that several Applicants were in fact leaseholders at the relevant time; but, in any event b. the Additional Grounds raise matters that could result in credits to reserve funds and future service charge accounts which could be of benefit to all Applicants, including those who became leaseholders recently, such as Mr Cameron Marshall.

36. The other suggestion of the Respondent, that the Applicants are unlikely to be able to recover any overpayment in respect of the Additional Grounds because of limitation or laches, is equally misconceived: There would not be any barrier to recovery of sums overpaid, if any claims had to be made for restitution, having regard to the provisions of s.32 of the Limitation Act 1980 (which defers the date on which a cause of action accrues in cases of fraud, mistake and concealment). In this case it is the Applicants' contention that all of the Additional Grounds are matters which were not capable of being uncovered until relatively recently.

37. Further, and in any event, it is not accepted that any proceedings for recovery would be required. The leases of the Applicants provide for credit in later service charge accounts of sums wrongly charged or omitted by way of credit in earlier service charge demands. There is no reason why a credit or set-off should not be required. A defence of set-off cannot be barred by limitation and does not require any proceeding by the Applicants.

38. In so far as it may be suggested that such credit or set-off is not available to Applicants who only became leaseholders after some of the Additional Grounds arose, this is without foundation. Under the terms the new lease held by Cameron Marshall of his flat (following extension of the previous term), the rights of a predecessor in title are now held by him as the successor. This also applies to Mr Ezrati and Ms Oliver. As regards Mr Marshall further practical benefit would arise in any event, even if no set off or right of recovery arose for his benefit, as opposed to that of his predecessor in title. This is because he has claims against his predecessor in title for misrepresentation which can potentially be satisfied by the proceeds of any refund due for overpayments of service".

39. The Tribunal accepted these contentions of the applicant that addressed the other grounds advanced by the respondent and therefore rejected them.

Decision

40. The tribunal therefore allows the strike out application in part as more particularly set out above.

Directions

41. As a consequence of the above there is a need for further Directions to enable the matter to proceed to the earliest hearing date. Accordingly, the Tribunal makes the following **additional Directions**: -

(i) Within 21 days of the receipt of this Decision the respondent must file and serve upon the Tribunal and the applicant the amended Scott Schedule that includes its responses to the allowed additional grounds regarding Boiler replacement, the insurance claim and the roof damage along with witness statements in support

(ii) Within 14 days of the receipt of the Scott Schedule the applicant may send a brief supplementary reply to the respondent.

(iii) With a view to listing this matter as soon as possible Both parties must by no later than 1 November 2021 supply a list of dates to avoid during the period from 1 December 2021 to 4 March 2022

(iv) In accordance with the Directions dated 18 March 2021 made by Judge Silverman the tenant shall be responsible for the preparation of the hearing bundle and this must be with the Tribunal and the landlord no later than three weeks before the hearing date once ascertained and notified to the parties by the Tribunal.

Name: Judge Professor Robert Abbey **Date:** 12 October 2021

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.

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.