FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/OOBJ/LSC/2022/0118**
Property	**:**	**7 Thirsk Road, SW115SU**
Applicants	**:**	**(1) Ms A Petrie** **(2) Ms C E Rae**
Representative	**:**	**Ms Petrie**
Respondent	**:**	**Steloheath Ltd**
Representative	**:**	**Justin Greaves**
Type of Application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	**:**	**Judge Prof R Percival** **Ms A Flynn MA MRICS**
Date and venue of Hearing	**:**	**29 September 2022** **10 Alfred Square**
Date of Decision	**:**	**30 September 2022**

DECISION

The application

1. The Applicants seek determinations pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicants in respect of the service charge years from 2009 to 2020.

2. The relevant legal provisions are set out in the Appendix to this decision.

The property

3. 7 Thirsk Road is a late Victorian or Edwardian terraced house which has been converted into two flats. The first Applicant was the leaseholder of the garden flat from November 1986 to 23 April 2021. The second Applicant is the leaseholder of the upper flat, on the first and second floors.

The leases

4. The leases are in similar terms.

5. The original lease for the garden flat was dated 1978, and was for a term of 99 years from that year. By a deed dated 18 September 2020 made under provisions in the Leasehold Reform, Housing and Urban Development Ac 1993, the lease was extended for a term of 189 years from 1978, the substantive terms being the same as those set out in the original lease (and, accordingly, the lease for the other flat).

6. Those terms provide for the lessee to pay "one half of the premium which the Lessor will expend in keeping the Building insured against loss or damage from comprehensive risk" (clause 1). The corresponding insurance obligation on the lessor to insure is contained in clause 3(b). Although in practice charged at different times to the service charge reserved as rent, the insurance charge is a service charge for the purposes of the 1985 Act.

7. The lessee also covenants "to contribute and pay one half of the costs expenses and outgoings specified in the Third Schedule", charged as additional rent (clause 2(f)), and also a service charge. The third schedule, and clause 2(d), contain a repairing etc covenant. The schedule also provides for the division of the responsibilities between the two flats as to the ceiling/floor between them.

8. At clause 2(q)(ii), the lessee covenants

> to pay all costs charges and expenses (including Solicitors costs and Surveyors fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 as amended requiring the Lessee to remedy a breach of any of the covenants herein contained notwithstanding forfeiture for such breach shall be avoided otherwise than by relief granted by the Court.

9. The leases are old, short and simple.

The issues and the hearing

10. Ms Petrie represented herself and Ms Rae. Ms Rae was not able to attend the hearing as a result of illness. Mr Stanbrook accompanied Ms Petrie. Mr Graves, a director, represented the Respondent. Mr Greaves also explained that he had been the managing director of the managing agent until November 2020.

11. Both parties were accordingly, in effect, representing themselves as litigants in person. As a result, we allowed both parties some latitude during the hearing in terms of procedure and evidence.

12. At the start of the hearing the parties identified the relevant issues for determination as follows:

    (i) Whether the Tribunal had jurisdiction to hear the applications (section 27A(4) and (5) of the 1985 Act);

    (ii) Whether the lease made provision for the tenants to be charged for the fees of a managing agent;

    (iii) Whether the service charges for insurance were reasonable in amount;

    (iv) Whether the cost of a desktop assessment of rebuilding costs for insurance purposes was payable; and

    (v) Whether the tribunal should make orders under section 20C of the 1985 Act and paragraph 5A of schedule 11 to the Commonhold and Leasehold Reform Act 2002.

Jurisdiction

13. For the Respondent, Mr Greaves submitted that the Applicants had agreed or admitted their liability for the service charges, and thus, as a result of section 27A(4), the Tribunal was deprived of jurisdiction. He argued that this was so notwithstanding section 27A(5), citing

Marlborough Park Services Ltd v Leitner [2018] UKUT 230 (LC), [2019] HLR 10. The Tribunal also considered *Cain v Islington Borough Council* [2015] UKUT 542 (LC), [2016] L&TR 13. At least until 2019, Mr Greaves submitted, the Applicants had, for an unbroken period, paid their service charge demands without protest, from which the Tribunal should infer that the charges were agreed or admitted.

14. Ms Petrie, first, drew our attention to a letter dated 12 March 1997, provided in the bundle. That letter, from Ms Petrie, asked why the building insurance was so high, in terms that clearly indicated dissatisfaction with the sum demanded.

15. Secondly, Ms Petrie produced a letter dated 7 August 2020, which, she said, was in response to a meeting between the Applicants and a Mr K Elias of the managing agents (who wrote the letter) in, she thought, 2019. While it is not immediately obvious that the letter is in response to a meeting, our understanding is that Mr Greaves did not contest that there was a meeting in 2019, and that it did constitute a protest by the Applicants to the service charge.

16. Finally, and most importantly, Ms Petrie said that throughout the relevant time, she had, periodically, orally protested to the managing agents about the insurance costs and the management fees. She said that she had no documentary evidence to support these oral objections, but they were made on a number of occasions, over the telephone to employees of the managing agents, as a result of receiving invoices for insurance costs and the costs of management.

17. Ms Petrie owned that she had only been alerted to the question of whether the management fee could be charged to the leaseholders under the leases when she was engaged, through solicitors, in negotiating the deed extending the lease (see paragraph 5 above), and that the previous objections had been in respect of the *amount* of both insurance costs and management fees.

18. We conclude that the Tribunal does have jurisdiction to consider the substantive issues raised by the Applicants.

19. We note that the relevant period is bookended by the protest (outside the period itself) in the 1997 letter; and by the meeting in 2019. We see no reason to doubt Ms Petrie's evidence before us that she did telephone the managing agents from time to time – no doubt not every year – to object to the costs referred to above. Ms Petrie impressed the Tribunal as a reasonable and honest witness, and it was inherently likely that such objections would not be confined to the 1997 letter and 2019 meeting, when the same issues were live between those dates.

20. This finding of fact is sufficient to distinguish this case from those in the two cases referred to above. There was no sustained period of unprotested payment.

21. The nature of the protests were not exactly the same as the nature of the Applicants' case before us. We do not consider that that undermines our conclusion.

22. In the first place, the question for us is not whether the Applicants were making exactly the same point when protesting about paying the service charge as they make now. The question is whether we should infer that, by virtue of paying the service charge, the Applicants were agreeing, or admitting, that the service charges were due or reasonable. The fact that the contestation was as to the reasonableness, not the payability, of the managing agents' fees does not mean that the applicants must be deemed to be agreeing payability but not reasonableness.

23. Secondly, were it otherwise, absurd consequences would follow. In this case, if the Applicants were limited to a reasonableness challenge to a charge that is not payable under the lease, the Tribunal would be placed in the absurd position of assessing the reasonableness of a charge that a freeholder is not entitled make up to a certain point (say, 2019), and thereafter declaring the charge not one that can be made under the lease.

24. *Decision*: The Tribunal has jurisdiction to consider the substantive issues.

Charging of management fees

25. Mr Greave accepted that there was no express term in the lease referring to the payment of the fees of a managing agent. However, he argued that such fees could be recovered under clause 2(b) of the lease. By that clause, the lessee covenants

> "to pay all existing and future rates taxes assessments and outgoings of whatsoever nature imposed or charged upon the demised premises or any part thereof whether parliamentary parochial or of any other description".

26. A managing agent's fees, he submitted, were a charge against the property, and properly fell within the broad terms of a charge "of any other description."

27. We reject this submission. Clause 2(b) is a clause in familiar terms, a version of which almost universally appears in long leases. It is clearly aimed at external imposts on the premises by authorities other than the parties to the lease. The description of the charges to paid makes this clear, referring as it does to "rates", "taxes" and assessments". The

broader expression "outgoings of whatsoever nature" must be read as being of the same kind (ejusdem generis) those that immediately precede it. Similarly, "any other description" must be read in the context of "parliamentary" and "parochial".

28. As *Woodfall, Landlord and Tenant*, sets out in paragraph 7.170, "[a]s a general rule the costs of employing managing agents will not be recoverable by way of service charge unless the lease expressly so provides", citing *Embassy Court Residents' Association v Lipman* [1984] 2 EGLR 60. Woodfall goes on to describe a number of possible exceptions to this rule, but none apply here.

29. *Decision*: The costs of a managing agent are not recoverable as a service charge by the Respondent.

The reasonableness of the insurance costs

30. The Applicants argue that the costs of insurance were excessive, and beyond the reasonable range.

31. The Respondent's case is that the costs are reasonable. They were ascertained each year by a broker, who tested the market and recommended the appropriate policy to the managing agents. The insurance was considered on the basis of this property alone, not in the context of a portfolio block policy.

32. The Applicants had provided some alternative quotations. These compare with the actual costs as follows:

2021: Applicants' quotation: £489 and £636; actual cost: £650

2019: Applicants' quotation: £475; actual cost: £631

2014: Applicants' quotation: £774; actual cost: £1,167

33. Of the two quotations given by the broker approached by the Applicants in 2021, the broker recommended that for £636. Given that, Ms Petrie acknowledged that the figures for 2021 did not assist her case.

34. In respect of the quotation for 2014, the Applicants had not produced a schedule summarising the cover provided. Accordingly, it was not possible to ascertain whether the two quotations were truly comparable.

35. This left us with the 2019 figures. In respect of these, we did have the schedules. The two policies were broadly similar (there were minor variations in excess sums), except in one significant respect. The cost of rebuilding in the Applicants' schedule was given as £300,000, that in the Respondent's as £593,511.

36. The Respondent's figure for rebuilding costs came from the rebuild cost assessment carried out in that year. Mr Petrie said that their figure had been provided by the broker, she presumed as a result of using some method to assess building costs based on the information she had given the broker (we assume, a general description of the building).

37. We conclude that the Respondent's rebuilding cost is more accurate, based as it is on a surveyor's (desktop) report, using recognised methodology.

38. We asked Mr Greaves what his view was as to the difference in premium that such a difference in rebuilding cost would make. He said that in his experience, it would make some significant difference, but that would not necessarily be of a very large magnitude. This accords with the experience of the Tribunal. Nonetheless, we have no way of assessing what the difference attributable to the rebuilding cost would be in this particular case.

39. A freeholder is not required to accept the lowest possible price for any service. The task for the Tribunal, when addressing a reasonableness challenge to some expenditure put through the service charge, is to construct a reasonable range of costs, and then determine whether that expended by the freeholder falls within that range. The onus is on the leaseholder to provide the evidence to allow us to do that, in order to prove their case.

40. Here, we really only have one instance which we can properly compare. There is a difference of some, but indeterminate, significance between the cover offered under the two policies under consideration. In these circumstances, we do not consider that the Applicants have proven their case that the charge made in 2019 was unreasonable, let alone that we can come to conclusions, on the basis of that year alone, as to what would be reasonable in other years.

41. *Decision*: The charges for insurance cover made by the Respondent have not been proven to be unreasonable in amount.

The costs of the rebuild costs assessment

42. The sum of £150 was charged for a desktop rebuild assessment in 2019. The Applicants' argued that there was no provision for such expenditure in the lease.

43. We reject that submission. The Respondent is obliged to insure the building. To do so, the Respondent must necessarily provide an accurate assessment of the cost of rebuilding, in order to secure the required insurance. The use of a desktop rebuild assessment to come to such a conclusion is clearly in itself a reasonable method to adopt to generate such a figure. Establishing a cost for rebuilding is a necessary

incident of insuring the building, and is recoverable as part of the cost of insurance.

44. *Decision*: The cost of the rebuild assessment in 2019 can be recovered through the service charge.

Application for orders under Section 20C of the 1985 Act/Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A

45. We asked Mr Greaves what his intentions were in respect of seeking to recover his costs of these proceedings either through the service charge or as an administration charge. He said that he did not intend to seek to recover the costs by either means.

46. With Mr Greaves' consent, we secure those undertakings by making the relevant orders.

47. *Decision*: The Tribunal orders

(1) under section 20C of the 1985 Act, that the costs incurred by the Respondent in proceedings before the Tribunal are not to be taken into account in determining the amount of any service charge payable by the Applicant; and

(2) under Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A, that any liability of the Applicant to pay litigation costs as defined in that paragraph be extinguished.

Rights of appeal

48. 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 London regional office.

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

50. If the application is not made within the 28 day time limit, the 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 these reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

51. The application for permission to appeal must identify the decision of the Tribunal to which it relates, 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.

Name: Judge Professor Richard Percival **Date**: 30 September 2022

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 provision 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

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 20ZA

(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

(2) In section 20 and this section—

"qualifying works" means works on a building or any other premises, and

"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

(a) if it is an agreement of a description prescribed by the regulations, or

(b) in any circumstances so prescribed.

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—

(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,

(b) to obtain estimates for proposed works or agreements,

(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) Regulations under section 20 or this section—

(a) may make provision generally or only in relation to specific cases, and

(b) may make different provision for different purposes.

(7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

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 tribunal2 or leasehold valuation tribunal or the First-tier Tribunal3 , or the Upper Tribunal4 , 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 the county court ;

(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

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

(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal;

(c) in the case of proceedings before the Upper Tribunal4 , 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 the 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]1 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).