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

Case Reference : **CAM/00ME/LSC/2013/0049**

Property : **5 Meryton House, Longbourn,
Windsor, Berks, SL4 3TW**

Applicant : **Michael Handley**

Respondent : **Imperial Park (Clewer)
Management Co. Limited**

Unrepresented

Date of Application : **22nd March 2013**

Type of Application : **Section 27A Landlord and Tenant Act
1985 ("the 1985 Act") for a
determination of the reasonableness
of service charges**

Tribunal : **Judge J. Oxlade
M. Henington MRICS
M. Bhatti MBE**

**Date and venue of
Hearing** : **31st July 2013
Holiday Inn Slough/Windsor
Chalvey, Slough, Berkshire**

DECISION

For the following reasons, the Tribunal ¹ finds as reasonable and payable:

¹ The Decision recorded in this document was made by the First-tier Tribunal (Property Chamber) rather than the leasehold valuation tribunal, to whom the application had been made, because by virtue of The Transfer of Tribunals Function Order (2013 No1036) ('the Transfer Order') the functions of leasehold valuation tribunals were, on 1st July 2013, transferred to the First-tier Tribunal (Property Chamber). In this Decision the expression 'the Tribunal' means the First-tier Tribunal (Property Chamber).

- (i) **estimated service charges for internal and external decoration in the sum of £234.05, demanded in the service charge year 2012,**
 - (ii) **service charges for roof repairs in the sum of £865.37, demanded in the service charge year 2013,**
 - (iii) **service charges for lighting the car park beneath Pemberley Lodge in the sum of £158.26 demanded in the service charge year 2013**
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REASONS

Background

1. The Applicant is the lessee of the property. The Respondent is the company responsible under the lease for discharging the freeholder's liability to maintain the property, the building, and the estate in which it is situated, and further, to recover costs expended by way of service charges. The lease imposes on the Applicant a corresponding obligation to make payment of service charges to meet a proportionate part of the costs incurred by the Respondent in meeting its obligations.

2. The Applicant issued an application pursuant to section 27A of the 1985 Act, being discontent with the following service charge items charged, or to be charged, to the service charge account, in the following service years:

- (i) internal and external decoration: 2012,
- (ii) roof: 2013,
- (iii) car park lighting: 2013.

3. In the application form, the Applicant provided the following additional information:

- (i) in respect of *internal and external decoration* he made several points:
 - (a) the monies were demanded on account of work to be carried out in 3 and 7 year cycles, and he sought confirmation that the funds would be kept in a separate bank account and would accrue interest; further that there would be protection from the risk of future insolvency,
 - (b) he expressed a preference for paying sums in the year that they were to be incurred,
 - (c) he had requested a split of the costs demanded on account as between internal and external costs, as he had objected to paying a contribution towards internal decorating (to which he made no

contribution to the last internal costs in 2010), as he did not have access to those parts of the building;

- (ii) in respect of *roof costs*, he made one point, namely that the apportionment to him of 21.21% of these costs was not reasonable, because this was done to reflect the percentage of the floor area of his flat as against the total square footage of all of the 10 flats, but the Respondent had failed to include the common parts in this calculation, which were quite large (and to which he had no access); his view was that the aggregate failed to reflect the true costs;
- (iii) in respect of *car park lighting*, he said that there was no meter to assess the electricity usage in the car park as it was “lumped in” with the costs of lighting the halls, stairwells, and lifts for Pemberley Lodge.

Directions

4. The Tribunal issued Directions on 22nd March 2013, noting:

- (i) the limited nature of the dispute,
- (ii) that the Tribunal did not have declaratory powers.

5. In accordance with those Directions the Respondent filed a statement of case in response to Applicant’s application, but neither party filed witness statements and the Applicant did not file a statement in response to the Respondent’s statement of case.

Inspection

6. On the morning of the hearing, the Tribunal inspected the entrances and common parts to flats 1-3 and flats 4, 7, 8, 9, 10, and noted the separate entrances to flats 6 and 5 Meryton House. Further, the Tribunal inspected the ground floor entrance to Pemberley Lodge, and the internal route to the car park below it.

7. Meryton House is a Grade II listed building, converted into 10 flats in or about 2000, set in a gated development, together with modern apartment blocks and houses, all set in grounds of approximately 2 acres. There are allocated parking spaces to the front of Meryton House.

Hearing

8. The hearing was attended by the Applicant, who was represented by Mr. Berry. On behalf of the Respondent, Mr. John Andrews (Director of the Respondent, and lessee of 14 Longbourn) attended to represent the Company, with the assistance of Mr. Nevzat Ekrem (a fellow Director), and Jane Birchmore from the Managing Agent, John Mortimer.

Preliminary Points

9. At the commencement of the hearing the Tribunal identified the issues which the Tribunal would need to consider, as set out in paragraphs 2 and 3 herein. The Tribunal indicated that it did not have power to undertake a general review of service charges, which appeared to be the request of the lessees of flats 6 Meryton House and 11 Pemberley Lodge who had written letters in support of the Applicant.

10. Further, that as no evidence had been filed in the form of witness statements, the Tribunal would receive submissions only. In the event, there was little in the way of factual dispute, on which nothing material turned.

Applicant's Submissions

Internal and External Decorating Costs

11. Mr. Berry made submissions on the issue of advanced payment of internal and external decorations demanded on account. Initially the Applicant did not dispute that payment could be demanded on account, but towards the end of the hearing queried recoverability under the lease. He did not dispute that he was liable to pay a "due proportion" as provided under the terms of the lease; the issue was what could be properly and fairly demanded by the management company as a "due proportion". By way of background, in 2010 (when internal decorations were last considered) no demand was made of flats 5 and 6 Meryton House for a contribution to internal decorating costs, which reflected a recognition that flats 5 and 6 have no access to those common parts which serve flats 1-3 and 4,7,8,9, and 10. He accepted that the Applicant had a right of way reserved in the lease to pass and re-pass over the common parts, but that he did not do so as he had no need to do so, and in practical terms could not do so as he had not been issued with a key to those two entrances. Mr. Berry considered that the definition in the lease of "common areas" was defective, and should not include flats 5 and 6. Mr. Berry accepted that the lease provided that "due proportion" was by reference to what the management company had "fairly and properly determined", but said that by including these common parts in what the Applicant could be required to pay was not fair and proper.

12. Mr. Handley said that in 2012 the Respondent introduced a change to the existing practice, namely to make demands on account; this was done without consultation; he would not mind paying on account if he could be satisfied that the funds were ring-fenced, and protected. In essence he wanted a measure of protection. He had not received a response to his question about how the sum was split between internal and external decorations.

Roof Costs

13. Mr. Handley did not object to paying to repair the roof, but it was the proportion of costs with which he took issue: it had been 4.97685% in previous years and was changed in 2013 to 21.21%. He did not see the need for a change, as there was no problem with the old method, and no one had complained. The

new method did not amount to a “fair and proper determination” by the management company. His view was that there was nothing wrong with using square footage but that in doing the calculation the Respondent had left out the measurements of the common parts to flats 1-3, and flats 4,7,8,9, and 10, which meant that the percentage he was left with was artificially high. There was a meeting, but they were told that if 85% did not oppose it, it would be introduced, which is what happened.

14. Mr. Berry emphasised the unique nature of the block, and that the division was not fair and reasonable in the circumstances. He accepted that the lease was poorly drafted, but that the failure to take into account the floor area of the common parts created an artificially high percentage, and so an artificially high cost to the Applicant.

Car Parking Costs

15. The Applicant’s point is a simple one, namely that the costs are nothing more than a best “guesstimate”; further, the whole arrangement should be better managed and run more appropriately. Lights were on permanently, and the costs were not metered. The Applicant had some Board experience, and recalled that estimates were obtained for doing works to the existing lights to which PIR’s could be fitted, which would cost less (approximately £2500) than a wholesale replacement of which the Respondent speaks and has obtained quotes (approximately £10,000).

Costs

16. No written application had been made under section 20C of the 1985 Act, and Mr. Berry did not seek to make one. He did not oppose the Respondent’s claim to be able to add the costs to the service charge account. Neither did he make an application for reimbursement of the fees paid by the Applicant to the Tribunal to issue the application and list for hearing.

Respondent’s Submissions

Internal and External Decorating Costs

17. Mr. Andrews said that a new management board came in, in 2012. They introduced a number of changes, one of which was to add an additional section in the accounts headed “NARE” which was an acronym for non-annual recurring expenditure. This had various headings, one of which was external decoration and two were internal decoration. The idea was that to comply with the lease which provided that the external decorations had to be done every 3 years, and the internals every 7 years, they would seek payments on account to smooth out the costs over that time, as opposed to having “spiked” bills. The costs of redecoration were estimated to be £10,020 and £4,056 respectively. There had also been some difficulty in getting fees in for Meyton House, and there was a deficit of about £1,500, which needed to be eradicated, and the budget included an item of £418.20 per year to eliminate the debt after 4 years or so. There had

been consultation, and 3 out of 10 from Meryton House objected, and 2 out of 12 from Pemberley House.

18. In response to the specific points made by the Applicant, Mr. Andrews said that in 2012 the cost to the Applicant of maintaining Meryton House was £881.20, using the percentage which the Board had inherited, of 4.97685%. This meant that the Applicant was paying a small contribution to external and internal decorating. It acknowledged that flats 5 and 6 had their own private entrances, and that the Applicant does not use the common parts, and it was not disputed that he did not have a key. However, the position is maintainable, as that is what the lease provides. He said that the large glass doors at the entrance to flat 6 are regarded as part of the building and costs met by all, though in reality provide an private entrance to flat 6, and are maintained by all flats. In the same way the mullioned stone windows surrounds for flats 5 and 6 would be maintainable by all, though in reality service flats 5 and 6.

19. Mr. Andrews said that when funds are paid in, they are paid into the Respondent's bank account, but at the moment they are not paid into a separate bank account for Merton House as the funds are in debit not credit. As and when that changes, they would use the separate bank account. He took the point that the individual lessees should have on their service charge statements a record of the monies that have been paid to them as advanced payments.

20. In respect of payments on account the lease provided for them at clause 6(1)(b) for both building expenditure and estate expenditure. This was to set aside funds from time to time to provide for anticipated expenditure based on budgets. The lease provides for a reckoning at the end of the year and if there was insufficient then more could be demanded from the lessee 6(4)(a). The lease provided that if there was an excess then the "overpayment shall be allowed to the Lessee" which the Respondent interpreted as giving an option to either return it to the Applicant or to hold in reserves with a credit made to the lessees account. In respect of estate costs they had returned £5 to the Appellant in 2012.

21. It was confirmed that if works were to be done, then the section 20 consultation requirements would be complied with, in accordance with earlier practice.

Roof Costs

22. In respect of the roof costs, this was work done in 2013 in the sum of £4080, and was subject to section 20 consultation.

23. The Appellant's percentage of service charge contributions has changed for 2013 onwards, following on from the Management Board's review of the methodology of calculation contributions, there having been dissatisfaction expressed by residents at the methodology used. In the past the amounts paid by flats 5 and 6 had been disproportionately small, in comparison to the size of the flats. The Board asked for suggestions as to how to go about changing this, and the Applicant accepted that square footage was an acceptable method of

division. The Respondent has listened to all views and so is now surprised that the Applicant takes this point.

24. The new methodology means that flats contribute a due proportion to the costs of maintaining the fabric of the building i.e. external repairs, insurance, fire risk, window cleaning. The remaining costs are grouped and attributed to those flats which can be directly seen to have a benefit, and this is shown in a document entitled "Meryton House Budget and Invoice Summary". The approach means that those costs referable to flats 1-3 are billed to those flats; those costs referable to flats 4,7,8,9,10 are billed to those flats; as flats 5 and 6 have their own entrances, they have no further costs. The Respondent had particular regard to the Applicant's points about contributing service charges towards maintaining common parts, over which he makes no use, and so he makes no contribution to the costs of maintaining the lifts or the electricity for the lifts, internal decoration of common parts and cleaning of common parts. The Respondent recognised that there were a number of different ways of calculation a due proportion, and had adopted this method which brought it into line with other buildings on the estate.

Car Parking Costs

25. The underground car park has 16 spaces, which are owned by flats in Pemberley Lodge, save two, one of which is leased to the Applicant, who therefore has an obligation to contribute to costs. When the Board inherited the brief, there was no meter to separately measure the costs of electricity supply for the underground car park, and so it was part and parcel of the communal lighting for Pemberley Lodge. It was not ideal, but the costs of installing a meter and installing new lights (so that they were not on 24/7, but movement activated) were £10,000-£12,000. However, there were no excess funds to do the work, and they calculated that payback would be after 5-7 years. A report had been commissioned by Bounds Electrical Services, who had done a calculation of the wattage used in the garage, and calculated the costs to be £2,032.08 applying the unit costs of electricity as they were then. They have then added the costs of the shutter door to this, so giving a total of £2,532.08. The Applicant's contribution was £158.26. The lights were on permanently as there had been problems with drug-taking in the car park, which point was accepted by all.

Costs

26. As to costs, the Respondent had not incurred legal costs, but as the managing agents had prepared the bundle, there would be some costs to add to the service charge account.

Jurisdiction

27. The Tribunal has jurisdiction by virtue of section 27A of the 1985 Act, which is set out in annex A, along with the other statutory provisions which have been considered in this application.

Tribunal's Findings

28. The Tribunal has carefully considered all of the evidence submitted and submissions made by the parties.

Internal and External Decorating Costs

29. The starting point is to consider the terms of the lease.

30. The lease provides that every third year after 2004 the Respondent will undertake external decorations of the building known as Meryton House, and every seventh year after 2008 the Respondent will undertake internal decorations to the "common areas" in Meryton House (clauses 4(1) and (3)). The lease defines "common areas" as "including (but not limited to) any entrance doors halls lifts stairways stairwells landings and all other areas within the building intended for common use" (Particulars, page 1).

31. The Applicant's corresponding obligation is set out in a covenant to pay to the Respondent on account of estimated "building expenditure" advanced payment, by equal half yearly payments (clause 6(3)), of which the Applicant must pay a "due proportion" which is a proportion "fairly and properly determined by the Management Company having regard to the numbers of premises within the Building and Estate Respectively" (clause 6(3)). Clause 6(1) defines "building expenditure" as costs incurred by the Respondent in complying with its obligations in relation to the Building, and sums which the Respondent shall in its reasonable discretion set aside from time to time for the purpose of providing anticipated expenditure and for periodically recurring items of expenditure. There is a mechanism for reckoning up: if the demands made of the lessee create a shortfall, he shall be obliged to pay the balance; if there is a credit, "the overpayment shall be allowed to the lessee" (clause 6(4)).

32. The Tribunal finds that the terms of the lease provide that the Respondent is obliged to redecorate externally every 3 years and internally every 7 years (clauses 4(1) and(3)), that the obligation to decorate the common parts is established where the area is intended for common usage. The Respondent is entitled to demand and the Applicant is obliged to make payments on account of works to be done, so that the Respondent can set the money aside to do the works by way of reserve. The lease does not prescribe how the funds shall be held, although the Respondent accepted that funds should be held in a separate bank account where paid as reserves, and that it would institute a practice of specifying on the accounts issued to the lessees, a statement of what had been paid on account.

33. The Tribunal does not find the Applicant's argument against being required to pay for internal decoration as persuasive, argued on the basis that (a) he does not have access to it and so it is not fairly and properly determined by the Respondent as payable, and (b) it has not been demanded as payable as before, and so changing the basis of calculation is not reasonable.

34. Firstly, clause 1(1) of the lease grants the Applicant a right of way along and through common areas, which are defined by reference to whether the area is "intended for common use". The Tribunal interprets this to mean an area used by two or more lessees - as opposed to an area used exclusively by one lessee. The configuration of Merton House means that in practice flats 1-3 make use of the glass entrance sandwiched between Pemberley Lodge and Meryton House, and in practice flats 4,7,8,9, and 10 make use of the bow fronted entrance. Accordingly, as these two areas are each used by two or more lessees, the Tribunal finds that these fall within the definition of "common areas" and the Applicant has a right of way over them.

35. Secondly, the Respondent has an obligation to maintain the common areas and can demand service charges on account. Though the mechanism for holding funds set out in clause 6(4) was not as clear as it could have been, the Tribunal accepts that the wide interpretation given to it, is the correct interpretation bearing in mind that the whole point of the reserve funds is to put money aside. The Tribunal finds that the Respondent has the option of either returning funds or holding them in reserve.

36. Thirdly, the Applicant's obligation to pay service charges is not payable by reference to whether or not he achieves any benefit either directly or indirectly. The reference to "due proportion" does not implicitly import a requirement of benefit. Though it was argued that "fairly and properly determined by the Management Company" imported such a requirement of benefit, the Tribunal does not find that is the meaning of the lease. The definition continues with the words "having regard to the numbers of premises within the building and estate respectively". The definition does not imply that items can be stripped out on the basis that the lessee does not have a direct or indirect benefit.

37. Finally, the due proportion is that which is decided upon by the Respondent. The requirement is that this be determined "fairly and properly", as opposed to in a personal or fickle way. The Tribunal finds that provided the Respondent can show that there is a logical basis for the manner of dividing the proportions of payment, that this is not subject to effective challenge. In respect of this item the Respondent has said that the past Board decided to introduce payment on account towards future costs as permitted under the lease, and that the Respondent was entitled to rely on the terms of the lease which oblige the Applicant to make a contribution towards it. Further, the fact of the Respondent subsequently listening to the Applicant's points about lack of access to the common areas and so not deriving benefit, does not invalidate the earlier demand. The Tribunal finds that the Respondent's position is entirely maintainable, and that the due proportion for external and internal decoration has been correctly demanded.

38. At the hearing the Tribunal made the point that in the event of insolvency, it was crucial that a lessee be able to identify payments made on account to the reserve fund; this Mr. Andrew said would be attended to by adding to the service charge records supplied to the lessee, a statement as to what was paid on account. As for ring-fencing money, and safeguarding it, the Tribunal has no

powers to intervene. The parties would do well to look at the provisions in section 42 of the 1985 Act, which ensure that monies are put in trust, and including specific provisions as to how the funds are held (though not all of the section has yet been implemented. The Tribunal has no jurisdiction over this, but it is as well to flag it up at this point.

Roof Levy

39. The Applicant has not disputed the need for the works, the quality of the works, or the costs. The Applicant's argument rests on the interpretation of "due proportion".

40. The Applicant's point is that although some costs have been "stripped out" of the bill - to reflect the use and benefit argument - the decision to use just the square footage of the internal parts of the flats, but to exclude the square footage of the common areas, gives an artificially high percentage as his flat is the largest of all of the flats. The argument is that this is not "fairly and properly" determined by the Respondent. The Respondent's case is that it went to consultation, and that this was a proposal made by the Applicant, that square footage be the method of determination. Further, that it has listened to the Applicant's benefit and usage argument and so devised a detailed system, to charge common costs to all, and then other costs to those who can be seen to directly benefit. The analysis is set out at page 3 and 4 of the Respondent's statement in reply and the document headed "Meryton House Budget and Invoice Summary".

41. The Tribunal has largely covered this point in paragraphs 36 and 37 above, but should add that it is apparent from the documents filed that the Respondent has sought to consult, to listen, and to devise a system which seeks to accommodate the use and benefit argument. It is true to say that a different basis could have been adopted, namely to include the square footage of the common parts; this would have the effect of lowering the Appellant's overall percentage and increasing the percentages of others. However, the question is not whether or not the Tribunal would have done anything differently, but whether the Respondent is making a demand in accordance with the terms of the lease. As long as the Tribunal is satisfied that the Respondent has sought a logical and fair basis, as opposed to fickle, capricious or personal, then the demand is lawful and payable.

42. On the evidence adduced the Tribunal is satisfied that the basis of calculation by the Respondent resulting in a demand for the roof levy, is reasonable and payable.

Electricity Costs

43. The Applicant did not dispute the recoverability of electricity costs under the lease, nor that he should pay 1/16th towards them. His point was that the costs were not reasonably incurred (lights being left on 24/7) and that it was not metered. The Respondent concedes the position is far from ideal, and wishes to

make changes, but that none are without cost implications. They had commissioned a report to make an assessment of costs.

44. The Tribunal accepts that the sum is reasonable and payable. The Respondent has done the best it can in difficult circumstances to assess the electricity costs and produced a report from Bounds Electrical Contractors, to show the basis of calculation. Inevitably this question will arise again in future, and the Respondent recognises the power to claim service charges on account by way of reserve to meet these costs.

Costs and Fees

45. There were no applications before the Tribunal in respect of costs and fees, and accordingly, no Orders were made.

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Joanne Oxlade

Judge First-Tier Tribunal, Property Chamber

8th August 2013

Appendix A

The 1985 Act as amended by the Housing Act 1996 and the Commonhold and Leasehold Reform Act 2002 provides as follows:

Section 18

“(1) In the following provisions of this Act “service charge” means an amount payable by a tenant of a dwelling house as part of or in addition to the rent –

- (a) which is payable directly or indirectly for services, repairs, maintenance, improvement or insurance or in the landlord’s cost 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 of which the service charge is payable.

(3) For this purpose

- (a) costs include 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 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 27 A

(1) “ An application may be made to a leasehold valuation 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 a leasehold valuation tribunal for a determination whether it costs were incurred for service, repairs, maintenance, improvements, insurance, or management of any specified description, a service charges would be payable for the costs and if it would 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.

In respect of Costs

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 the proceedings before .. the LVT.. are not 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.

(3) The ...Tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.”

In respect of Fees

Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003

Regulation 9 (1) provides:

“Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a Tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings”.