FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LSC/2020/0132**
HMCTS code (paper, video, audio)	**:**	**P: PAPER REMOTE**
Property	**:**	**Romney House, 47 Marsham Street London SW1P 3DS**
Applicant	**:**	**Abacus Land 4 Limited (incorporated in Guernsey)**
Representative	**:**	**J B Leitch Solicitors**
Respondents	**:**	**The lessees listed in the schedule to the application**
Representative	**:**	**Mr Luder represented himself**
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 N Hawkes** **Mr L Jarero FRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**24 September 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote determination on the papers which has not been objected 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 no-one requested the same. The documents that we were referred to are contained in a bundle of 582 pages, the contents of which we have noted. The order made is described below.

Decision of the Tribunal

In respect of the service charge years 2014 to 2020 inclusive, the Tribunal is satisfied that the determination made by the Applicant as to the apportionment of the VRV system costs is reasonable and finds that the sums which have been demanded by the Applicant from certain of the Respondents in respect of the costs associated with the VRV system at Romney House are payable.

The application

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Respondents in respect of the service charge years 2014 to 2020 for costs associated with a Variable Refrigerant Volume ("VRV") system.

2. Directions were given on 19 June 2020 which included provision for this application to be determined on the papers, unless a hearing was requested by 24 July 2020. No party requested an oral hearing and the Tribunal is satisfied that this application, which primarily concerns the correct interpretation of the Respondents' leases, is suitable for a paper determination.

The background

3. The Tribunal has been informed that Romney House is a former office building which has been converted and extended. Romney House currently comprises a block containing 168 residential units with commercial units on the ground floor and basement parking bays.

4. No party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been practicable to carry out an inspection in light of restrictions related to the coronavirus pandemic.

The issues

5. The Applicant seeks a determination as to the payability of costs associated with the VRV system at Romeny House for the period 2014 to 2020 inclusive. The Applicant contends that the costs associated with the VRV system are payable solely by the leaseholders of seven flats which directly benefit from this system

and that the relevant costs should be apportioned with reference to the square footage of these apartments ("the VRV apartments").

6. The Tribunal has been provided with two Respondents' Statements of Case:

   (i) A Statement of Case submitted by the Romney House Owners' and Residents' Association ("the RHORA"). The Tribunal has been informed that the RHORA is an unrecognised tenants' association representing 39 Respondents (the lessees of 41 flats). These Respondents, none of whom are lessees of VRV Apartments, support the Applicant's application.

   (ii) A Statement of Case submitted by Mr Owen Luder, one of two joint lessees of Apartment 703. Mr Luder is the sole lessee who has served a Statement of Case opposing the Applicant's application.

7. The only issue in dispute between Mr Luder and the Applicant concerns the apportionment of the VRV costs. Mr Luder does not dispute that the charges associated with the maintenance and repair of the VRV system are service charge items but rather he disputes that they should be payable solely by the lessees of the seven VRV Apartments and argues that the costs should be shared between all flats at Romney House.

8. In determining this application, the Tribunal has solely considered the terms of lease of Apartment 703 ("the Lease"), having been informed by the Applicant that the leases of the flats at Romney House are, so far as is material, in identical terms.

The submissions and determination

9. The Applicant states that:

   (i) A VRV System is a cooling and heating system which uses refrigerant as the cooling and heating medium.

   (ii) The VRV system at Romney House forms part of the building and, save for those parts of the VRV system which constitute conduits which exclusively serve any one apartment, the system is intended for the communal use of Apartments 509, 701, 702, 703, 704, 801 and 802.

   (iii) The remaining residential apartments at Romney House do not have the benefit of the VRV system and are heated using electric convection/panel heaters and cooled by open

windows or fans, personal air conditioning units or similar chattels purchased by the relevant leaseholder. The relevant costs are met by the relevant leaseholder and any costs associated with heating and cooling non-VRV apartments are not a service charge item of expenditure.

(iv) The VRV system does not heat or cool the common walkways or passages of Romney House.

10. Mr Luder states that he does not know whether all of the Applicant's assertions of fact are correct. However, he confirms that his apartment is served by the VRV system and that this system does not serve his apartment exclusively.

11. The Tribunal accepts Mr Luder's submission that the Applicant's right to recover service charges is governed by the terms of the relevant Lease and we also accept his submission that the VRV expenditure which forms the subject matter of this Application is in the nature of maintenance and repair costs, as opposed to energy costs.

12. Mr Luder says that the VRV system is not the only equipment at Romney House that is not for the benefit of all the apartments in the building but that the Applicant is only seeking to treat the VRV costs differently. Whilst the Tribunal notes the arguments put forward concerning the apportionment of the costs relating to the lifts and the courtyard at Romney House, the only issue currently before the Tribunal concerns the apportionment of the costs associated with the maintenance and repair of the VRV system during the period under consideration.

13. It is common ground that the Tribunal has jurisdiction to determine how the service charge should be apportioned and that the Tribunal must consider the natural meaning of the Lease.

14. The general approach to the construction of documents, including leases, is now well settled. Per Lord Neuberger in *Arnold v. Britton* [2015] AC 1619 at [15]:

"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] A.C. 1101, para 14. And it does so by focusing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's

intentions." (The Tribunal has also considered paragraphs [16] to [23] of Arnold v Britton, Wood v. Capita Insurance Services [2017] UKSC 24 at [10] to [13] and Rainy Sky SA v. Kookmin Bank [2011] 1 WLR 2900)

15. The Lease includes the following provisions.

16. The "Building" is defined as:

"the building constructed (or to be constructed) on the Estate Provided that the Landlord may from time to time vary the extent of the Building by the exclusion of any part or parts thereof or the addition thereto of adjoining or neighbouring building"

17. The "Estate" is defined as:

"the property situate and known as Romney House Marsham Street London registered with freehold title 425323 Provided that the extent of the Estate may from time to time be varied by the Landlord by the exclusion of any part or parts thereof or the addition thereto of adjoining or neighbouring land and buildings."

18. "Building Service charge Item":

"means an item of expenditure which is (or is intended) to be chargeable (in whole or in part) to the lessees of the Building (both residential and commercial)"

19. "Building Service charge Proportion":

"means such fair proportion as the Landlord acting reasonably shall from time to time determine"

20. "Parking Area":

"means the area(s) within the Estate from time to time designated by the Landlord for the parking of private motor cars and within which the Parking Space is to be situated"

21. "Parking Service Charge Item":

"means an item of expenditure which is (or is intended) to be chargeable (in whole or in part) to the lessees who have a right to use one or more parking spaces in the Parking Area"

22. "Parking Service Charge Proportion":

"means the fraction of the costs charges and expenses referred to in paragraph 10(c) of the Fourth Schedule hereto of which the numerator is the number of parking spaces to be allocated to the Tenant and the denominator is the total number of parking spaces in the Parking Area"

23. "Parking Space":

"means the parking space within the Parking Area from time to time to be allocated by the Landlord to the Tenant for parking one private motor car or motor cycle"

24. "Residential Service Charge Item"

"means an item of expenditure which is (or is intended) to be chargeable (in whole or in part) to the residential lessees of the Building."

25. "Residential Service Charge Proportion":

"means such fair proportion as the Landlord Acting reasonably shall from time to time determine."

26. "Service Charge Proportions":

"means the Residential Service Charge Proportion and the Building Service Charge Proportion and the Parking Service Charge Proportion (or any one of them as appropriate or any combination of them as appropriate)"

27. By clause 8(w) of the Lease:

"the singular shall include the plural and vice versa where the context so admits"

28. By Paragraph 10(a) of the Fourth Schedule to the Lease, the Tenant covenants:

"(a) to pay to the Landlord within seven days of demand the Residential Service Charge Proportion of:

(i) Such of the costs charges and expenses which the Landlord shall incur in complying with its obligations set out in Part 1 of the Sixth Schedule hereto which the Landlord (acting reasonably) designates as being a Residential Service Charge Item

(ii) The costs charges and expenses which the Landlord shall incur in doing any works or things to those parts of the Building utilised by the residential flat owners and/or occupiers for the maintenance and/or improvement thereof and

(iii) Any other costs charges or expenses incurred by the Landlord which the Landlord designates a Residential Service Charge Item.

29. The Fourth Schedule to the Lease also contains provisions concerning the payment of the Building Service Charge Proportion and, "if the Tenant has an exclusive right under this Lease to use a Parking Space", the Parking Service Charge Proportion.

30. Mr Luder submits that the VRV costs should be treated as a Residential Service Charge item. The Tribunal accepts this submission, which is not disputed by the Applicant. Mr Luder contends that it follows that he should pay the same proportion of the VRV costs that is applied to the other Residential Service Charge items when calculating his service charge.

31. At [27] to [29] of his Statement of Case, Mr Luder states:

"27. Paragraph 10(a) of Schedule 4 of the lease requires me to pay the Landlord "the Residential Service Charge Proportion of … A Residential Service Charge Item". Both of these terms are clearly defined in the lease. In particular, "Residential Service Charge Proportion" is defined as "such fair proportion as the Landlord acting reasonably shall from time to time determine". It is therefore a single proportion. There is no scope for applying different proportions to different Residential Service Charge Items.

28.There are equivalent provisions in paragraph 10(b) and 10(c) dealing with the Building Service Charge and the Parking Service Charge. Each of these has a separate proportion respectively the "Building Service Charge Proportion" and the "Parking Service Charge Proportion", enabling the Landlord to apply a different proportion to each basket of costs. Again, it should be noted that, whilst the Landlord chose to provide separately for the costs of the car park, for example, the lease does not provide for a special VRV Service Charge Proportion.

29.The lease does not allow the Applicant to apply a different Residential Service Charge Proportion to different Residential Service Charge Items. Indeed, if this were the intention of the lease, there would be no need for the lease to provide for different "baskets" of expenditure, as the only purpose of these "baskets" is to allow different proportions to be applied to the different "baskets".

32. Mr Luder relies upon *Solarbeta Management Co Ltd v Akindele* [2014] UKUT 416 (LC) in support of the proposition that costs may be shared irrespective of who benefits from the underlying service. However, he accepts that that decision in that case turned on the wording of the relevant lease. As is noted by the Applicant, *Solarbeta* was a case in which the tenant's obligation was to pay a fixed contribution to the relevant costs.

33. The Applicant relies upon *PAS Property Services Limited v Hayes [2014] UKUT 0026 (LC),* as authority for the proposition that a single proportion does not have to be used for all heads of expenditure. The lessee in that case covenanted:

"2.2. To pay forthwith on demand a fair and proper proportion (to be determined by the Landlord's Surveyors acting reasonably) of any outgoings expenses or assessments which may be imposed or assessed on the Apartment (or any part thereof) together with any part or parts of the Building and/or the Estate (such sum to be deemed to be additional rent and to recoverable as such)

2.3 (Without prejudice the generality of the foregoing) to pay and discharge the cost of all water electricity gas and telephone (including all meter rents) used or consumed in the Apartment."

34. At [51] and [52] of the judgment, the Upper Tribunal stated:

51. The dispute between the parties was as to how the amount charged should be calculated. The covenant in paragraph 2.3 is to pay 'the cost of all gas used or consumed in the Apartment.' As a matter of language, that is not apt to embrace the cost of gas used or consumed in other apartments. Not only does paragraph 2.3 refer to meters but as a matter of fact each apartment in the new building has, and at the time the Lease was granted had, a meter through which it is possible to calculate precisely how much heat and therefore gas has been used or consumed in that apartment. Although identification of a fair and proper proportion of the gas used or consumed in each apartment is a matter for the Landlord's Surveyor, acting reasonably, as things stand at the moment there is no means of calculating such a fair and proper proportion other than by monitoring consumption through the meters. That is because there has been no attempt to date to assess how much heat each apartment uses, whether through monitoring of meters or otherwise. Simply apportioning the cost by floor area would not be a fair and proper proportion because it would not necessarily bear any relation to the amount of gas used or consumed in an individual apartment. This will relate to matters such as the number of occupants (more people use more hot water), whether an apartment is occupied all of the time and personal choice as to the level of heating required. Therefore, on the basis of the evidence before me, the only reasonable decision which the Landlord and his Surveyor could take is that a fair and proper proportion of the gas used or consumed in each apartment is the amount of heat measured by the meters.

52. However, it is important to note that the decision under the Lease as to what is a fair and proper proportion is one for the Landlord's Surveyor, acting reasonably and not the court. Provided the decision is reasonable, it does not matter that other reasonable decisions could have been taken, see Westminster City Council v Fleury [2010] UKUT 136 (LC) at paragraph 10. The fact that, on the basis of the evidence before me, the only reasonable decision would be to charge on the basis of consumption measured by the meters does not

necessarily mean that will always be the case. For example, it may be that after monitoring consumption through meters for a while, it appears that fluctuations in use even themselves out over time or can be related to other factors so that dividing the total cost by some other factor, such as per person in occupation, provides a reasonable assessment of the heat used in each apartment. It would plainly be in the interests of the lessees for a fair method of dividing the cost to be identified which does not require use of the meters because of the additional cost entailed."

35. In submitting that the same Residential Service Charge Proportion does not have to be used for all heads of Residential Service Charge expenditure, Applicant relies upon the fact that the Upper Tribunal in *PAS Property Services* found that the proper apportionment in respect of the gas supply was based on metered usage when the other services on the development, such as repairs and alterations, could not be calculated on this basis because they are not metered supplies.

36. In the present case, as was the case in *PAS Property Services,* the Lease contains no express words preventing the Applicant from applying a different Residential Service Charge Proportion to different Residential Service Charge Items. The Tribunal does not accept Mr Luder's submission that such a prohibition is to be inferred from the fact that the Lease has provided for different "baskets" of expenditure. This ensures that certain categories of service charge expenditure are given separate consideration. It does not follow from the fact that the Applicant is required to consider certain categories of service charge costs separately, that further distinctions cannot be made.

37. The Applicant submits that its method of apportionment is reasonable:

"as the VRV costs have been apportioned (so far as is possible) on the basis of usage, namely by allocating the VRV costs to those 7 VRV Apartments that have the right and ability to utilise the VRV system, and then dividing those costs among those 7 VRV Apartments on a square footage basis; this latter step is needed because the costs associated with the VRV system (including the costs of maintaining the VRV system) cannot be computed by reference to actual usage, unlike the metered supply of gas there is no means of calculating such a basis. Therefore a fair and reasonable allocation of the VRV costs among the 7 VRV apartments is based upon the respective square footage of each of those Apartments. Paragraph 14 of the RHORA Statement confirms that the 39 members of RHORA, as named in the Statement, agree that the applicant's current approach to the recovery of VRV costs is fair and reasonable."

38. Save that the Tribunal has placed no weight on the statement that 39 lessees of non-VRV Apartments consider the Applicant's method of apportionment to be fair and reasonable, the Tribunal accepts this submission. Further, we note that the only challenge to the Applicant's method of apportionment was the assertion, which the Tribunal has not accepted, that it contravenes the terms of the Lease.

39. The Tribunal finds that the determination made by the Applicant as regards the apportionment of the VRV costs is reasonable and that the sums demanded by the Applicant in respect of the costs associated with the VRV system at Romney House are therefore payable. For the avoidance of doubt, as stated by Mr Luder, the VRV costs do not include the energy costs of the lessees of the VRV Apartments.

Name: Judge N Hawkes **Date:** 24 September 2020

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).