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

Case Reference : **LON/00BA/LSC/2013/0286**

Property : **Flat 22 Batsford House 35
Durnsford Road London SW19 8GS**

Applicant : **Mr Conrad Jr Villamar**

Representative : **In Person**

Respondent : **Thames Valley Housing Association
Limited**

Representative : **Ms Lina Mattsson – Counsel
Ms Sophie Henderson – Acting
Home Ownership Manager**

Type of Application : **For the determination of the
reasonableness of and the liability
to pay a service charge**

Tribunal Members : **Judge: N Haria LLB(Hons)
Professional Member: H Geddes JP
RIBA MRTPI
Lay Member: O N Miller BSc**

**Date and venue of
Hearing** : **10 Alfred Place, London WC1E 7LR**

Date of Decision : **23.10.2013**

DECISION

Decisions of the tribunal

- (1) The tribunal determines that apportionment of the service charge for the years in question is in accordance with the provisions of the Applicant's Lease.
- (2) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.
- (3) The tribunal determines that the Respondent shall pay the Applicant £350.00 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicant.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to whether he has been charged the correct proportion of service charges under the terms of the Lease in respect of the service charge years:
 - (i) 2009/10,
 - (ii) 2010/11,
 - (iii) 2011/12,
 - (iv) 2012/13, and
 - (v) 2013/14
2. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

3. The Applicant appeared in person at the hearing. The Respondent was represented by Ms Mattsson of Counsel and Ms Henderson the Acting Home Ownership Manager employed by the Applicant.
4. Immediately prior to the hearing the Respondents handed in a Skeleton Argument. The day before the hearing the tribunal clerk received the Respondent's witness statement together with 328 pages of supporting documents. The start of the hearing was delayed while the tribunal considered these new documents.

5. The tribunal was mindful of there being a potential for prejudice to the Applicant because of having inadequate time to consider and take advice due to the documents submitted late by the Respondent. The tribunal was particularly concerned due to the Applicant being an unrepresented litigant in person. The tribunal informed the Applicant that in the interests of justice it was minded to consider an application for an adjournment of the hearing or a short recess to allow the Applicant the chance to consider the Respondent's submissions and seek advice. The Applicant informed the tribunal that he had received the witness statement a few days prior to the hearing and so he had considered it. The Applicant stated that the Skeleton Argument was handed the on the morning of the hearing. He stated that he did not require time to seek advice, and although he would have preferred to have had more time to consider the documents, he did not wish the matter to be delayed any further. The Applicant was adamant that he wanted to proceed with the hearing. The Applicant stated that he did not require a short recess or an adjournment and he was ready to proceed with the hearing. Ms Mattsson agreed to go through the Respondent's submissions in detail during the hearing in an effort to ensure that the Applicant was not prejudiced either by the lack of representation or the late submission of the documents. The tribunal having considered the Overriding Objective¹ was satisfied that it was fair and just under the circumstances to proceed with the hearing.

The background

6. The property which is the subject of this application is a second floor flat known as Flat 22 Batsford House and forms part of the Plough Lane Estate.
7. The Plough Lane Estate is situated at Plough Lane and 55, 57 and 59 Durnsford Road Wimboldon. The Estate comprises a total of 572 units divided into a number of blocks.
8. The Respondent was originally the leaseholder of 59 units within the Estate. The 59 units comprised all the 20 units in Batsford House and a further 39 units within Reed House. The 59 units were demised by the Respondent on shared ownership leases. One of the leaseholders had staircased to 100% ownership and so the Respondent now holds the headleases of 58 units.
9. Batsford House comprises 20 residential units with commercial units on the ground floor. The Respondent is the headlessee of all 20 residential units at Batsford House. The freeholder granted the

¹ Rule 3 The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

Respondent five separate headleases, in respect of the residential units at Batsford House, a separate headlease for every four units.

10. The Headlease relating to Flat 22, is dated 28 December 2008 made between David Wilson Homes Limited, Kamario Limited (“the Company”) and the Respondent (“the Headlease”).
11. The freehold title was originally owned by David Wilson Homes, and it is now owned by Kamario Limited.
12. The Applicant holds a 30% share in a shared ownership lease granted as an underlease of the property. The underlease is dated 18 June 2008 and made between the Applicant and the Respondent (“the Lease”).
13. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.
14. The specific provisions of the Lease and Headlease will be referred to below, where appropriate.

The issues

15. At the start of the hearing the parties identified the relevant issues for determination as follows:
 - (i) whether the Respondent has incorrectly apportioned the service charge under the Lease,
 - (ii) whether the “adjustment” to the service charge for year 2011/2012 of about £130 is payable by the Applicant,
 - (iii) whether any of the service charges in issue is not payable as it falls foul of the provisions of Section 20B of the 1985 Act,
 - (iv) whether the Respondent is entitled to recover the costs of these proceedings from the service charge, and
 - (v) whether the Applicant should be granted an order for the reimbursement of the application and hearing fees paid by him in relation to this case.
16. During the course of the hearing the Applicant confirmed that having heard the submissions made on behalf of the Respondent the following points were no longer in issue:

- (i) whether the adjustment to the service charge for the year 2011/2012 is payable by the Applicant, and
 - (ii) whether any of the service charge falls foul of the 18 month period set out under the provisions of Section 20B of the 1985 Act.
17. Ms Henderson confirmed that the Respondent will not seek to recover the costs of the proceedings by way of service charge from the leaseholders.
18. The written submissions and oral evidence are not repeated here except where specifically relevant.
19. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

The tribunal's decision

20. The tribunal determines that the apportionment of the service charge charged to the Applicant for the years in question is in accordance with the provisions of the Lease.

Reasons for the tribunal's decision

21. The Applicant is of the view that he should be charged 1/59th of the total service charge costs for the block and not 1/20th. The Applicant relies on the provisions of the Lease and referred to in the Particulars of the Lease which states:

“SPECIFIED PROPORTION of service charge provision: 1/59th”.

22. The tribunal having considered the provisions of the Lease and the Headlease and the submissions made by the parties finds that the provisions of the Lease are clear and unambiguous albeit somewhat convoluted by reference to provisions of the Headlease. It is unfortunate that the Applicant was not advised that the service charge payable under his Lease is calculated by reference to the service charge payable by the Respondent under the Headlease. There is clear reference to the Headlease in the Lease and that the service charge payable is dependent on the service charge payable under the Headlease. The Applicant has misinterpreted the Lease.
23. Although the Particulars of the Lease specifies that the service charge proportion is 1/59th, the Lease does not provide that the Applicant should pay 1/59th of the service charge. The Lease does not specify

which costs the 1/59th proportion should be applied to. The tribunal accepted the explanation given by Ms Henderson under Paragraphs 16 and 17 of her Witness Statement that the Applicant's Lease is incomplete. She states that when the Lease is compared to the lease of a neighbouring, flat 21, the definition of the specified proportion of the service charge provisions provides that it is 1/59th of the Estate; 1/20th of Block A2; and 1/30th of Block D2. These definitions are missing from the Applicant's Lease.

24. The Applicant under Clause 2 of the Lease covenants to pay the Respondent the rent as well as:

"SECONDLY.....the service charge and any other payment reserved under the Headlease such sums to be payable to the Landlord at the times and in the manner specified in the Headlease and THIRDLY a sum equal to the amount expended by the Landlord in complying with the covenants in Clause 5 to be payable to the Landlord on demand and FOURTHLY such sum as may from time to time be payable by the Leaseholder to the Landlord pursuant to Clause 3(2)(b) hereof to be payable on demand."

25. Clause 1.8 of the Headlease defines the service charge as :

".. a sum calculated by reference to the Service Charge Proportions set out in paragraph 12 of the Particulars (or such other proportions as may be determined pursuant to Part 1 of the Fourth Schedule) of the aggregate Annual Maintenance Provision for the whole of the Block and the Estate Amenity Areas for each Maintenance Year (computed in accordance with Part II of the Fourth Schedule)".

26. Paragraph 5 of the Particulars of the Headlease defines "The Block" by reference to Plan 2 annexed to the Headlease. This defines "The Block" as Batsford House A2.

27. Clause 1.14 of the Headlease defines the "Estate Amenity Areas" by reference to Plan 3 annexed to the Headlease which shows the whole Estate.

28. Paragraph 12 of the Particulars to the Headlease defines the "Service Charge Proportions" as:

"(a)(14.744%) of the Annual Maintenance provision attributable to the Block for Block services set out in Part 1 of the Fifth Schedule

(b)(0.68376%)of the aggregate Annual Maintenance Provision attributable to the Estate Amenity Areas for the Estate Amenity Areas services set out in Part II of the Fifth Schedule."

29. Part I of the Fifth Schedule of the Headlease sets out the services attributable to the Block and Part II of the Fifth Schedule sets out the services attributable to the Estate Amenity Areas.
30. The Fourth Schedule of the Headlease sets out the method for calculating the Annual Maintenance Provision.
31. The provisions of Part I of the Fourth Schedule permit Kamario Limited at anytime to recalculate the service charge proportions relating to the residential units, the Block and the Estate Amenity Areas and notify the Respondent accordingly. The provision states that the revised service charge proportions will apply from the date specified in the notice and this date can be a date prior to the date of the notice.
32. The Applicant under the Lease has therefore covenanted to pay:
- (i) the service charge under the Headlease (i.e the service charge that the Respondent is liable to pay to Kamario under the Headlease),
 - (ii) the Respondent's costs in complying with the Landlord's covenants under Clause 5 of the Lease eg to provide quiet enjoyment, and to insure the premises, and
 - (iii) the Respondent's reasonable costs and expenses incurred in respect of any surveyor, accountant or other person employed by the Respondent in relation to the calculation and collection of the rent and also in relation to any of the Respondent's covenants under Clause 5 of the Lease.
33. The Applicant is charged 1/20th of the costs specified in paragraph 32(iii) above. The Applicant has covenanted under Clause 3(2)(b) of the Lease to pay the "...reasonable charges and expenses..." of the surveyors etc. There is no requirement that these costs are apportioned at a particular percentage. The Tribunal finds the apportionment to be reasonable and in accordance with the Lease.
34. The tribunal accepted the explanation given in Ms Henderson's Witness Statement at paragraphs 16-28 as to the basis on which Kamario (through its managing agent) invoices the service charge to the Respondent. She states that the apportionments are in accordance with those specified under Paragraph 12 of the Particulars of the Headlease. Basically the Respondent is charged:
- (i) 3.6860% of the costs known as "Schedule 1" costs for each of the 20 residential units. The Schedule 1 costs relate to the management of the structure of the Block as set out under Part I of the Fifth Schedule to the Headlease. The

Respondent is charged a total of 14.744% of Schedule 1 costs, under each of the four Headleases i.e 3.686% x 4. In total the 20 residential units pay 73.72% of the "Schedule 1" costs. The "Schedule 1" costs relate to services which benefit both the commercial and residential units so the commercial units pay a contribution towards these costs.

- (ii) 0.1701% of the Estate costs which relate to the Estate Amenity Areas as specified under Part II of the Fifth Schedule to the Headlease. The Respondent is therefore charged a total of 0.68% in respect of Estate costs.

35. In addition the Respondent is also charged 5% (1/20th) per residential unit for what is called "Schedule 2 costs". These costs relate to the maintenance of the internal parts of the block such as Lift Maintenance and repairs and the Door Entry System Maintenance. The Respondent admitted that these costs are not charged in accordance with the 3.6860% proportion specified in Paragraph 12 of the Particulars to the Headlease.

36. Ms Henderson in her Witness Statement explained that the reason for this is that the commercial units do not derive any benefit from these services. The tribunal accepted the explanation given and accepted that by paying an apportionment of 5%(1/20th) the Applicant and other leaseholder are merely paying an equal proportion of the costs incurred in respect of services that are for their exclusive benefit in the Block and as such the apportionment is equitable.

37. Ms Mattsson submitted that the charge is nevertheless in accordance with the provisions of Part 1 of the Fourth Schedule to the Headlease, under which Kamario Limited is entitled to vary the apportionment specified in Paragraph 12 by simply serving a notice on the Respondent to that effect.

38. Although Ms Henderson had not been able to locate a copy of any notice served by Kamario Limited varying service charge apportionment, Ms Mattsson stated that the "Schedule 2" costs apportionment have been in force since at least 1 February 2010 as shown on the invoice from County Estates [323] and accordingly she invited the tribunal to find that:

- (i) it is more likely than not that a notice pursuant to Part I of the Fourth Schedule of the Headlease has been served on the Respondent although the Respondent is unable to locate the notice; and/or
- (ii) the invoices are themselves notices for the purpose of Part I of the Fourth Schedule and that Kamario Limited intended

to change the apportionment under paragraph 12 to 5% per unit in the Block for the Schedule 2 costs.

39. Ms Mattsson having taken instructions from the Respondent and having spoken to the managing agent confirmed that they will arrange for Kamario Limited to serve a notice in accordance with Part I of the Fourth Schedule changing the apportionment of service charges from 2008 onwards. The tribunal considered this to be a pragmatic solution to the problem and finds that provided Kamario Limited serves a notice on the Respondent in accordance with Part I of the Fourth Schedule, it can alter the service charge proportions relating to the individual residential or other units in the Block and the Estate Amenity Areas payable by the Respondent. This will in turn result in an equivalent change to the service charge proportion payable by the Applicant under his Lease.
40. Accordingly the tribunal finds that the service charge proportions charged to the Applicant are in accordance with the provisions of his Lease.

Application under s.20C and refund of fees

41. At the end of the hearing, the Applicant made an application for a refund of the fees that he had paid in respect of the application hearing². The Respondent admitted that the Lease is defective and perhaps if the Applicant had been informed this sooner and given a clear explanation as to the methods of apportioning the service charge it may have prevented the need for an Application to the Tribunal. The Respondent's bundle was submitted very late and the Applicant had no alternative but to attend the hearing and pursue his Application. The Tribunal is of the view that the Applicant has been put to unnecessary expense and inconvenience in this matter. Accordingly, having heard the submissions from the parties and taking into account the determinations above, the tribunal orders the Respondent to refund the application and hearing fees in the sum of £350 paid by the Applicant within 28 days of the date of this decision.
42. In the application form, the Applicant applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the tribunal determines (although the landlord indicated that no costs would be passed through the service charge, for the avoidance of doubt, the tribunal nonetheless determines) that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Respondent may not pass any of its costs incurred in

² The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

connection with the proceedings before the tribunal through the service charge.

Name: N Haria

Date: 23.10.2013

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

- (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
 - (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
 - (b) the whole or part of which varies or may vary according to the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose -
 - (a) "costs" includes overheads, and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
 - (a) only to the extent that they are reasonably incurred, and
 - (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

- (1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
 - (a) the person by whom it is payable,
 - (b) the person to whom it is payable,
 - (c) the amount which is payable,

- (d) the date at or by which it is payable, and
 - (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
- (a) the person by whom it would be payable,
 - (b) the person to whom it would be payable,
 - (c) the amount which would be payable,
 - (d) the date at or by which it would be payable, and
 - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
- (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

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 20B

- (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
- (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

- (2) The application shall be made—
 - (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
 - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
 - (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
 - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

- (1) In this Part of this Schedule “administration charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
 - (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
 - (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
 - (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
 - (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.
- (2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

- (3) In this Part of this Schedule “variable administration charge” means an administration charge payable by a tenant which is neither—
 - (a) specified in his lease, nor
 - (b) calculated in accordance with a formula specified in his lease.
- (4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

- (1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
 - (a) the person by whom it is payable,
 - (b) the person to whom it is payable,
 - (c) the amount which is payable,
 - (d) the date at or by which it is payable, and
 - (e) the manner in which it is payable.
- (2) Sub-paragraph (1) applies whether or not any payment has been made.
- (3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
- (4) No application under sub-paragraph (1) may be made in respect of a matter which—
 - (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.
- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
 - (a) in a particular manner, or

(b) on particular evidence,
of any question which may be the subject matter of an application
under sub-paragraph (1).