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

**Case reference** : **LON/00BK/LSC/2016/0153**

**Property** : **Flat 49 and Flat 81A, Block 5, Albert Hall Mansions, London SW7 2AG**

**Applicant** : **AHM Block 5 RTM Company Ltd**

**Representative** : **Niraj Modha, counsel**

**Respondent** : **Dr Abdullah Al-Anizi**

**Representative** : **Timothy Polli, counsel**

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

**Tribunal members** : **Ruth Wayte (Tribunal Judge)  
Stephen Mason FRICS**

**Venue** : **10 Alfred Place, London WC1E 7LR**

**Date of decision** : **20 September 2016**

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**DECISION**

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### **Decisions of the tribunal**

- (1) The tribunal determines that the Applicant is entitled to recover from the Respondent the service charge costs in respect of maintenance of the lifts and the communal boiler and heating apparatus.
- (2) The tribunal determines that the Applicant is not entitled to recover from the Respondent the service charge costs in respect of the supply of heating and hot water.
- (3) There having been no other challenge to the service charge demanded for 2015 and 2016, those costs are reasonable (other than in respect of the supply of heating and hot water).
- (4) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

### **The application**

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 (“the 1985 Act”) as to the amount of service charges payable by the Respondent in respect of the service charge years 2015 and 2016.
2. The relevant legal provisions are set out in the Appendix to this decision.

### **The hearing**

3. The Applicant was represented at the hearing by Mr Modhi of counsel and their witness Mr Peter Merriman. The Respondent was represented by Mr Polli and attended to give evidence on his own behalf.
4. The parties had exchanged skeleton arguments and both sought to introduce photographs, which the tribunal accepted. The Applicant also made an application to introduce a transcript of a hearing involving the Respondent as evidence of character. The case was wholly unrelated to the property and given that the Respondent, who objected to the introduction of the transcript, was available to give evidence and be cross-examined, that application was refused.

### **The background**

5. The Respondent is the leaseholder of two flats in a block: Flat 49, a duplex on the ground and basement level and Flat 81A, a basement flat

which is connected to Flat 49 by an internal opening on that level. Both flats are occupied by the Respondent's family. The block is part of a larger estate but is now managed and run separately.

6. Photographs of the building were provided at the hearing. 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.
7. The Applicant is a Right to Manage company but its rights to collect service charges and the Respondent's obligation to pay them remain as set out in the relevant leases, granted in 2008 for Flat 81A and 2009 for Flat 49. The specific provisions will be referred to below, where appropriate.

### **The issues**

8. At the start of the hearing the parties identified the relevant issues for determination as follows:
  - (i) Whether or not on a proper construction of the provisions of the lease the landlord is entitled to recover the service charge costs in respect of the lifts and communal heating and hot water;
  - (ii) If so, whether the service charge demanded for 2015 and 2016 is reasonable;
  - (iii) Whether an order should be made under section 20C of the 1985 Act, preventing the Applicant from passing any costs of these proceedings through the service charge.
9. The Respondent's statement of claim raised the prospect of a retrospective challenge to all the service charge years postdating his leases, should any part of his case be successful. It was agreed that any such claim would be for another day, depending not only on the outcome of this application but also any other evidence as to the basis on which those charges had been paid by the Respondent at the time.
10. 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 Lifts**

11. It was agreed by the parties that the relevant clauses of the leases were identical, the clauses set out in this decision are from the lease to Flat 81A, dated 22 May 2008. The service charge is calculated as a

proportion of the total cost of the services incurred by the Applicant when complying with its obligations which are mainly set out in clause 4 of the lease. In so far as the lifts were concerned, the relevant parts are:

*4.2.4 To maintain and keep in good and substantial repair and condition and (where necessary) renew: the lifts lift shafts and machinery the service hoists (if any) their supporting structure and machinery and the passages landings and staircases and others parts of the Block and the Estate enjoyed or used by the Tenant in common with others;*

*4.9 To maintain and where necessary renew or replace any existing lift service hoist and ancillary equipment relating thereto and maintain insurance in respect thereof in such amounts and on such terms as the Landlord shall from time to time think fit.*

12. The Respondent's challenge was based on the fact that his flats were on the ground and/or basement floors of the building. The passenger lift did not go to the basement and therefore Flat 81A had no access to that lift at all. The service lift did go to the basement but was not convenient for use by Flat 81A which was accessed from outside the building via a door to the external basement walkway. Flat 49 was accessed from the ground floor, near the main entrance to the building. There was no conceivable reason why a tenant or visitor to that flat would use either the passenger or service lift.
13. The relevance of the location of the flats depended on reading clause 4.2.4 as an obligation to maintain the lifts "enjoyed or used by the Tenant in common with others", the Respondent's argument being that he did not and in fact could not enjoy or use the lifts and therefore was not liable under clause 4.2.4 to contribute towards their maintenance.
14. That left clause 4.9, which had no such caveat in terms of use and enjoyment. The Respondent maintained that 4.2.4 was clearly the main repairing covenant and any inconsistency in 4.9 was a mistake and should be deleted, leaving the provision relating to insurance, for which presumably the Respondent accepted liability.
15. The Applicant argued that the Respondent's interpretation sought to re-write the lease and was unwarranted. The Applicant pointed to other parts of the lease which supported its argument that no exception was intended for the Respondent's flats. In particular, Schedule 5 of the lease made exceptions from liability under paragraphs 4.2.4 and 4.9 for flats which had their own separate street level access, namely flats 79, 79A, 80, 80A and 81. If the intention of the parties had been to exclude flats 49 or 81A from that liability, they would have been included in Schedule 5.

16. The Applicant also argued that the phrase “enjoyed or used by the Tenant in common with others” was really a reference to the common parts. He relied on its use elsewhere in clause 4, for example:

*4.2.1 ...to keep clean and reasonably lighted the passages landings staircases and other parts of the Block and the Estate enjoyed or used by the Tenant in common with others.*

The Respondent had not challenged his liability to contribute to the costs of maintaining the common parts as described in the above clause, despite the fact that he would have no cause to use them given the location of his flats.

17. Both parties relied on *Arnold v Britton [2015] UKSC 36* as the principal authority on the construction of leases. In particular, the judgment of Lord Neuberger where he set out seven factors at paragraphs 18-23. The first five are the most relevant for this case, which can be summarised as follows:

- (i) The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader. Save in a very unusual case, that meaning was most obviously to be gleaned from the language of the provision.
- (ii) Although the less clear the relevant words were, the more the court could properly depart from their natural meaning, it was not to embark on an exercise of searching for drafting infelicities in order to facilitate a departure from the natural meaning.
- (iii) Commercial common sense was relevant only to the extent of how matters would or could have been perceived by the parties, acting reasonably, at the date the contract was made.
- (iv) The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed.
- (v) The court can only take into account facts or circumstances known to both parties at the time the contract was made.

### **The tribunal’s decision**

18. Applying the principles in *Arnold v Britton* and in the light of the lease as a whole, including analysis of other parts of clause 4 and the exceptions in Schedule 5, the tribunal determines that the natural meaning of the words used in paragraph 4.2.4 is clear: the lifts etc, and the passages, landings and staircases are all to be maintained in good and substantial repair. The reference to “other parts of the Block and

the Estate enjoyed or used by the Tenant in common with others” is a reference to “common parts”, as illustrated by its use in paragraph 4.2.1 and not a limitation on the Applicant’s right to recover the maintenance costs.

19. The fact that clause 4.9 repeats some of those obligations in respect of the lifts does not provide any reason to redraft that clause. Again, the meaning is clear and the fact that there is no limitation in respect of usage in common adds support to the interpretation of 4.2.4 as set out above.
20. In the circumstances the tribunal determines that the leases do entitle the Applicant to recover from the Respondent his share of the service charge costs in respect of the lifts.

### **The boiler, heating and hot water**

21. The relevant parts of Clause 4 (the Applicant’s obligations) are as follows:

*4.2.3 To maintain and keep in good and substantial repair and condition and (where necessary) renew: the boilers and heating and hot water apparatus (if any) in or serving the Block and the Estate save and except such (if any) heating apparatus as may now or hereafter be installed in the Demised Premises service exclusively the Demised Premises and not comprising part of a general heating system serving the entirety of the Block and the Estate;*

*4.5.3 Subject always as provided in Clause 5 hereof: provided only that the amenities hereafter in this sub-clause mentioned are in operation in the Block at the date hereof and serve the demised premises but not otherwise (and subject also to Clause 5 hereof) to maintain at all reasonable times an adequate supply of hot water and heating to the Demised Premises by means of a boiler and heating installations serving the Block and the Estate.*

22. By the time of the hearing the Respondent had accepted that he is obliged to contribute to the maintenance of the apparatus of the communal heating and hot water system as set out in clause 4.2.3. There was also no dispute that there was a communal heating and hot water supply in relation to the Block and that the reference to “*the date hereof*” in clause 4.5.3 must be the date of the lease: being 3 April 2009 for Flat 49 and 22 May 2008 for Flat 81A. The dispute was in respect of the Respondent’s claim that as at those dates, the communal heating and hot water did not “serve” the flats.

23. The Respondent's evidence confirmed his witness statement filed in accordance with the directions. In particular, he first occupied Flat 49 in 1993 by way of an underlease. At that time, the property was used as offices rather than a residence and the Respondent produced a Licence to Alter dated 15 September 1993 and building regulations approval dated 16 May 1994 confirming the conversion of the flat back into residential use. Unfortunately there was no documentary evidence to confirm the extent of the works but the Respondent gave evidence that they included the installation of an independent heating and hot water system at that time. At the start of the hearing the Respondent presented some photographs of a gas meter which bore a date in 1994. The Respondent was unclear whether Flat 49 had originally been served by the communal heating and hot water system.
24. The Respondent's interest in Flat 81A dated back to 6 May 2008. It was created out of what became redundant or vacant boiler or plant rooms in the basement. The Respondent's evidence was that prior to its conversion those rooms were not residential or habitable and did not have heating or hot water. It was unclear when the flat's system was installed but the Respondent had provided a letter from the Landlord's representatives dated 1 November 2012 giving retrospective consent to the "general refurbishment works". Again, no further written details were available of what those works entailed.
25. In the circumstances Mr Polli argued on behalf of the Respondent that as at the date of the relevant lease for each flat they were not "served" by the communal hot water supply. Flat 49 had had its own supply since at least 1993/4 and Flat 81A had never been supplied with heating and hot water from the communal system. The natural meaning of "serve" was "provide", the fact that if there had been a connection to the communal system hot water and heating was capable of being provided was irrelevant. If the premises were not "served" with communal heating or hot water, the natural meaning of clause 4.5.3 was that there was no obligation on the part of the Applicant to provide heating or hot water to those flats and therefore there could be no liability on the part of the Respondent to contribute towards the cost of supplying heating and hot water, presumably in fuel.
26. While the Applicant did not deny that each flat currently had its own heating and hot water system, its case was that the works to Flat 49 were only carried out recently and after the lease granted in respect of that property. In particular, they claimed the works were carried out as part of the "general refurbishment works" described in paragraph 24 above. The Applicant could not say whether Flat 81A was ever connected to the communal system. Mr Merriman was only appointed as managing agent in 2002 and had no direct knowledge of anything which had happened beforehand. His main reason for doubting the Respondent's account was that he had only recently raised an objection to the heating and hot water costs, which seemed odd if he had never had the benefit of heating and hot water from the communal system.

27. Mr Modha for the Applicant cross-examined the Respondent about the works and maintained that he was vague about the extent of the works in 2010. He also queried the value of the Licence to Alter dating back to the 1993, given the absence of any description of the works carried out at that time. In the absence of any documentary evidence, he submitted that the tribunal could refuse to accept the Respondent's evidence and make a finding taking into account the fact that he had only recently objected to contributing to the charge for the supply of heating and hot water.
28. The Respondent also argued that "serve" in clause 4.5.3 did not mean supply or provide. He sought to draw an analogy to the use of the same words in clause 4.2.3, namely "*the boilers and heating and hot water apparatus (if any) in or serving the Block and the Estate...*". His argument was that in this context "serving" meant the provision of the apparatus rather than the actual supply or provision of heating and that as there was the ability for the Respondent to connect to the communal heating apparatus, there was a supply to the relevant properties so as to incur liability for the cost of providing heating and hot water.

### **The tribunal's decision**

29. The Respondent has accepted that he is responsible for a share of the service charge costs which fall under clause 4.2.3. Applying *Arnold v Britton* as before, the tribunal determines that the natural meaning of "serve" in clause 4.5.3 is provide or supply. The Applicant was unable to provide any evidence to contradict that of the Respondent that he had installed a separate heating and hot water system in Flat 49 in 1993/4 and that Flat 81A was never served by the communal heating and hot water system. The fact that the Respondent had paid the service charges previously may be a relevant factor in any subsequent proceedings to recover those payments but in the view of the Tribunal does not provide sufficient reason to disregard the actual evidence given.
30. In the circumstances, the tribunal determines that the Applicant is not entitled to recover the service charge costs incurred under clause 4.5.3 from the Respondent in relation to Flats 49 and 81A.
31. No other challenge was made by the Respondent to the service charges demanded for 2015 and 2016, although he conceded that he had failed to make any payment. In the circumstances and excepting the service charge costs incurred under clause 4.5.3, the tribunal determines that those costs are reasonable.

### **Application under s.20C**



32. At the hearing, the Respondent applied for an order under section 20C of the 1985 Act. That claim was made on the basis that the Applicant had contributed to the costs of what was a legal challenge by unnecessarily disputing the facts, adding to the cost and length of the proceedings. In response, the Applicant stated there was no reason to exercise the discretion to make an order, in particular the Respondent had withheld all of his service charge contribution for 2015 and 2016, not only the items in dispute.
33. Having heard the submissions from the parties and taking into account the determinations above, the Respondent's application is refused. In view of his failure to pay any service charge costs the Applicant was right to apply for a determination. The lift costs are by far the more substantial item for the years in question and the evidence in respect of the installation of individual heating and hot water systems was only provided relatively recently.

**Name:** Ruth Wayte

**Date:** 20 September 2016

### **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).

## **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 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.