10272

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

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| **Case Reference** | : | **LON/00AK/LSC/2014/0179** |
| **Property** | : | **Aberdeen Parade, Aberdeen Road, London N18 2EB** |
| **Applicant** | : | **Aberdeen Parade Management Company Limited** |
| **Representative** | : | **Mr P Sherreard, Head of Property at Sterling Estates, managing agents** |
| **Respondents** | : | **The leaseholders of the Property** |
| **Representative** | : | **Mr J McCafferty, Counsel** |
| **Type of Application** | : | **For the determination of the liability to pay a service charge** |
| **Also present** | : | **Mr A Ahmed (Property Manager at Sterling Estates), Mr P Hoare (leaseholder of Flat 3A), Mr D Campalans (leaseholder of Flat 7A), Ms E MaKrides (operations director of leaseholder of Flats 7B and 9B) and Mr M Ourris (director of leaseholder of Flats 7B and 9B)** |
| **Tribunal Members** | : | **Judge P Korn (chairman)**<br>**Mr M Cairns MCIEH** |
| **Date and venue of Hearing** | : | **11th August 2014 at 10 Alfred Place, London WC1E 7LR** |
| **Date of Decision** | : | **29th September 2014** |

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**DECISION**

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## Decisions of the tribunal

(1) The management company expenses for 2012 and 2013 and the estimated management company expenses for 2014 are not payable.

(2) Subject to the important points contained in (3) and (4) below, the remainder of the service charges for 2012 and 2013 and estimated service charges for 2014 are payable in full.

(3) The proportion of the service charge currently being charged to each Respondent is inconsistent with the terms of the relevant lease. Therefore, in relation to each actual or (in relation to 2014) estimated service charge item, whether categorised by the Applicant as an external or an internal item, the Applicant may not charge any Respondent (a) more than one-eighteenth of the total cost or (b) a higher proportion than any other Respondent.

(4) Specifically in relation to the management fee, in each of the years 2012 to 2014 the maximum amount payable by the Respondents is £265.00 per year per flat.

(5) No section 20C order is made and no other cost orders are made.

## 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 reasonableness and payability of certain service charges charged to the Respondents.

2. The application relates to the whole of the actual service charges for 2012 and 2013 and the whole of the estimated service charges for 2014.

3. The relevant statutory provisions are set out in the Appendix to this decision. The lease ("**the Lease**") in favour of the leaseholder of Flat 9A (one of the Respondents) is dated 9th January 1986 and was made between D. Crocker Developments Limited (1) the Applicant (2) and Wing Kwun Yau (3). Both parties confirmed that the provisions of all of the other leases are identical to those of the Lease for all purposes relevant to this application.

## Point of clarification at start of hearing

4. At the start of the hearing, Mr McCafferty explained that he was specifically instructed on behalf of the leaseholders of the following flats only ("**the Represented Respondents**"):-

Flat 3A, Flat 4A, Flat 6A, Flat 7A, Flat 7B, Flat 8B, Flat 9A and Flat 9B.

## Applicant's initial comments

5. Sterling Estates took over as managing agents in 2010/2011. They inherited some issues, including historic non-payment. Mr Sherreard said that the Property and surrounding area (together "**the Estate**") were in need of maintenance but there were insufficient funds. He believed the current service charge debts to amount to about £17,000.

6. Mr Sherreard referred the tribunal to the 2013 service charge accounts from which it could be seen that the service charge had been split into an external service charge and an internal service charge. The internal service charge related to the parts of the building housing the long leasehold flats (and was just charged to long leaseholders), whilst the external service charge related to the structure of the building and the external parts of the Estate.

7. Mr Sherreard also took the tribunal through the Lease. Clause 1(m) of the Lease stated that *"the service charge payable shall be one-eighteenth of the amount certified in accordance with the provisions of paragraph 10 of the Eighth Schedule hereto"*.

8. Mr Sherreard said that as there were 18 leaseholder-owned units this meant that between them the leaseholders were obliged to pay 100% of the service charge. However, this was felt to be unfair as within the building there were also some other residential units at ground floor level which were either held on short lets or currently vacant and had been converted from shop units.

9. As a result of the perceived unfairness of the long leaseholders bearing the whole 100%, the service charge percentages had been recalculated according to floor area. As part of this recalculation the split between external and internal service charge had been formulated, so that the external service charge was shared between all units whilst the internal service charge was just shared between those units benefiting from the internal services. The recalculation was based on a recommendation in a survey report commissioned by the Applicant.

## Respondents' initial comments

10. The leases had not been formally varied. Mr McCafferty's understanding or working assumption was that the service charge provisions in these leases were drafted just with the leaseholder units in mind and that the original shop units were completely separate and then later converted into residential units. The reason for each leaseholder being required to pay one-eighteenth of the service charge was that there were only 18 flats.

11. To the extent that costs could be identified which arose out of the behaviour of the Applicant's short-term tenants, Mr McCafferty felt that those tenants should bear those costs.

12. Those of the Respondents present at the hearing were in agreement that they had not been consulted by the Applicant in relation to the proposed variation of the service charge percentages and that this variation had simply been imposed on them.

## Respondents' position on specific issues and Applicant's response

*Building insurance - Respondents*

13. The Applicant had provided no proper evidence of market testing, although it was conceded that the Applicant did not simply have to select the cheapest option available. Mr McCafferty also referred the tribunal to an alternative quotation sourced by the Respondents. He accepted, when questioned, that the Applicant's insurance cover was superior to the alternative cover sourced by the Respondents but questioned whether it needed to be that good. He confirmed that when seeking quotations the Respondents had provided insurers with the full claims history but added that as a result of the claims history some insurers had declined to quote.

14. Specifically as regards the claims history, Mr McCafferty said that the Applicant should not have made so many small claims as this would have had the effect of increasing the insurance premiums. He also suggested that the number of short-term lets could have increased the premiums.

15. Mr McCafferty queried whether it was reasonable for the Applicant to have insured against terrorism and whether the cost of terrorism cover was proportionate. He also noted that the Lease did not list terrorism as an insured risk.

16. Mr McCafferty also referred the tribunal to a previous Tribunal decision (Ref: LON/00AK/LSC/2010/0177) ("**the 2010 Decision**") in respect of 7A Aberdeen Parade, one of the leasehold units forming part of the Property.

*Building insurance - Applicant*

17. Mr Sherreard submitted that the Respondents' alternative insurance quotation was not comparable to the insurance cover obtained by the Applicant. As shown by the table contained in the hearing bundle, the Respondents' alternative cover was inferior in the following areas: (a) additional fire extinguishment and intruder alarm costs, (b) unauthorised use of utilities, (c) trace and access costs, (d) loss of

metered utilities, (e) replacement of locks, (f) loss minimisation and prevention and (g) eviction of squatters.

18. As regards market testing, Mr Sherreard said that at each renewal the market is reviewed in order to obtain competitive terms. This was illustrated by the fact that in June 2013 a transfer of cover took place from RSA to NIG Insurance, as NIG offered more competitive terms and RSA required a higher premium to continue further cover.

19. Regarding terrorism cover, Mr Sherreard said that the world had changed and that London had become a more dangerous place, and he was satisfied that it was reasonable and prudent to insure against terrorism. Whilst he agreed that terrorism cover was a significant proportion of the whole premium, in his view this was because the cost of the rest of the cover was very low.

20. Regarding the claims made on the policy, there had in fact only been two, since the one listed as Trace & Access was actually part of the larger Accidental Damage claim.

21. As regards the Represented Respondents' reference to the 2010 Decision, it was clear that the reason for that decision was that the landlord at that time had simply failed to provide the insurance evidence requested. In addition, insurance costs had gone up since then.

22. Mr Sherreard also pointed out that all leaseholders were now charged less than before as it was no longer just the 18 leaseholders who contributed towards the insurance premiums.

*Management fees*

23. Mr McCafferty said that the amount of the management fee would be reasonable if the standard of management was good. However, the management was considered to be poor in the context of the standard of cleaning (the Represented Respondents' concerns about cleaning being summarised below under the heading "Cleaning").

24. Mr Sherreard maintained that the standard of management was good in the circumstances. Service charge arrears were currently running at £17,000 and it was inevitable for this to have some impact on the level of service provided. He also referred the tribunal to the speed and nature of the Applicant's response to various complaints made by Mr Campalans. The Applicant responded on 3rd March 2014 to a complaint dated 2nd March, and it provided a detailed response on 18th March 2014 to a complaint dated 12th March and a point by point response on 28th March 2014 to a complaint dated 25th March.

*Accountancy fees*

25. The Represented Respondents objected to the accountancy fees for 2012 being split so that half were charged to the internal service charge and half to the external service charge. Mr Sherreard for the Applicant accepted that all of the £500.00 could be put through the external service charge. On that basis the Represented Respondents had no further objections.

*Management company expenses*

26. The Represented Respondents objected to the fact that the management company expenses for both 2012 and 2013 had been charged entirely to the internal service charge and were therefore just being shared between the 18 Respondents. Mr McCafferty also argued that these expenses were not covered by the Lease.

27. There was also a specific point regarding a penalty charge of £200.00 due to HM Revenue & Customs. The Represented Respondents felt that it was the responsibility of the Applicant or its managing agents to ensure that no penalties were incurred and the Respondents should not bear the cost of a failure to comply with any requirements of HM Revenue & Customs.

28. The Applicant believed that management company expenses were impliedly covered by the Lease but was happy to leave it to the tribunal to make a determination on the management company expenses generally.

*Cleaning - Respondents*

29. It was the understanding of the Represented Respondents that cleaning was not being done according to a rota. The cleaning did not live on the Estate and only turned up sporadically. The Applicant had not provided evidence of reasonableness of cost and had not communicated to occupiers as to when cleaning was to be carried out or as to how quality was monitored.

30. The Represented Respondents felt that the standard of cleaning was low, and the lack of monitoring also made this partly an issue of poor management, and therefore the management fee should be reduced. Mr McCafferty referred the tribunal to an alternative quote for cleaning contained in the hearing bundle. The Represented Respondents felt that even if the cleaning service was good it should not cost more than £700.00 for the building.

31. Mr McCafferty also referred the tribunal to the witness statement of Mr Campalans (leaseholder of Flat 7A) which stated that there was little

cleaning of the communal areas. He also noted that in the 2010 Decision the Tribunal criticised the standard of cleaning and the lack of documentation (in particular no cleaning schedule, no set hours and no invoices from the cleaner). It was conceded that the cleaner did now produce invoices, but these were felt to be basic and amateur.

32. Mr McCafferty raised a specific query regarding the invoicing of external cleaning but this was answered by Mr Sherreard to the satisfaction of the Represented Respondents.

*Cleaning - Applicant*

33. Mr Sherreard said that cleaning was carried out at least twice a week. Prior to this application there had been no complaints from the Respondents in relation to the standard of cleaning. In addition, it was specifically recorded in the 2010 Decision that, according to Mr Spitz on behalf of Aberdeen Parade Management Company Limited, Mr Campalans (the Applicant in that case) had not complained about the quality and frequency of the cleaning before issuing his application. The criticisms contained in the 2010 Decision were based on a lack of documentation.

34. The cleaning charges were considered by the Applicant to be reasonable. Regarding the Respondents' alternative quote, the company providing the quote did not offer to supply its own cleaning materials and therefore the Applicant would have to purchase these and then find somewhere to store them, which would not be easy and risked creating a safety risk. The alternative contractor also only offered cleaning on a fortnightly basis.

35. Mr Sherreard also referred the tribunal to a copy letter dated 17th June 2014 from Sai Investments Limited, who hold the long leasehold interest in 8 of the 18 long leasehold units plus the 13 ground floor units. In that letter, Sai Investments Limited express support for the current level of service charge expenditure, the services performed and the actions of the managing agents, which they believe to be reasonable and fair. Their main concern is the failure of certain leaseholders to pay their service charges in full, which they believe is a major factor in the ability to provide services.

36. Mr Sherreard added that Sterling Estates staff go on site once every month and that a cleaning schedule does exist although it had not been included in the bundle. He also pointed out that the particular concerns referred to in the 2010 Decision were raised prior to the involvement of Sterling Estates, and he argued that if there were ongoing concerns the Respondents should have raised them with Sterling Estates.

37. Mr Sherreard confirmed that the cleaner no longer lives on site.

*Gardening*

38. The Represented Respondents did not feel that the gardening charges were value for money as there was only a small patch of grass to maintain plus a need periodically to pick up litter.

39. Mr Sherreard for the Applicant confirmed that the charges were for grass maintenance, litter collection and sweeping but believed the cost to be reasonable.

*Minor repairs - Respondents*

40. Mr McCafferty for the Represented Respondents said that the frequency with which the gutters were cleaned seemed strange. Equally, there was a lack of information as to why the roof needed to be patched up so often. He also referred to an invoice from a contractor for work to attend to trace and access in respect of Flats 12A and 13A, noting that flats with these numbers did not exist within the building.

41. Mr McCafferty said that a lot of the invoices for minor repairs were rather basic, with insufficient details being given. As a general point, he felt that the burden was on the Applicant to demonstrate that the costs incurred were reasonable and that in many cases it had failed to do this.

42. Mr McCafferty raised two points regarding possible duplication of costs, but Mr Sherreard provided an explanation with which the Represented Respondents were satisfied.

43. In written submissions the Represented Respondents identified a charge relating to the roof which had been charged just to the 18 leaseholder-owned flats but which they felt should have been apportioned amongst all 31 units. In response the Applicant accepted this point and accepted that the cost needed to be re-apportioned.

*Minor repairs - Applicant*

44. As regards the invoice apparently relating to Flats 12A and 13A, Mr Sherreard said that this anomaly would have been clarified at the time. Sterling Estates, on behalf of the Applicant, had a detailed process for checking and approving invoices. They only paid invoices once provided with, and satisfied with, a worksheet that provided details of the work carried out.

*Fire safety*

45. The Represented Respondents objected to the fire safety charges for 2012 and 2013 being charged to the internal service charge. Mr Sherreard for the Applicant said that it was happy to treat these charges as external service charge costs and Mr McCafferty said that the Represented Respondents were happy with this.

*Pest control*

46. In written submissions the Represented Respondents expressed concern that this cost had only been charged to the 18 long leasehold flats. They stated that the cost of pest control should either be charged to the relevant individual flat or be split amongst all units within the building.

47. In written submissions in response the Applicant stated that these costs related to the internal communal areas only and only applied to the 18 long leasehold flats as the other flats had their own individual entrances.

*Door entry costs and cost of surveyor*

48. Mr McCafferty said that the Represented Respondents were not challenging these items.

*Waste disposal*

49. Mr McCafferty said that these costs had arisen out of the actions of short-term tenants and that therefore the Represented Respondents should not have to contribute towards these costs at all. Also, the Applicant should be using the Council's free collection service where possible.

50. Mr Sherreard for the Applicant said that there was no proof that the problems were being caused by short-term tenants. In written submissions, the Applicant stated that the Council will not remove bulky items of waste and would only remove specific items. Also, there were instances when due to health and safety concerns or blocking of access routes urgent removal was required.

*Electricity*

51. The Represented Respondents objected to the fact that the electricity charges for both 2012 and 2013 had been charged entirely to the internal service charge and were therefore just being shared between the 18 Respondents. After some discussion between the parties it was

agreed that £200.00 should be charged to the external service charge in respect of 2012 and £200.00 in respect of 2013.

*2014 estimated service charge and distinction between 2012 and 2013 years*

52. In response to a question from the tribunal both parties said that there were no issues that they wished to raise that were specific to the calculation or reasonableness of the estimated service charge for 2014.

53. Mr McCafferty for the Represented Respondents also confirmed that, save where a specific point had been made at the hearing, the same challenges applied to 2012 and 2013.

## Inspection

54. The tribunal inspected the common parts of the Property and the Estate in the presence of Mr Campalans, one of the Respondents. The tribunal's factual findings are referred to below.

## Tribunal's analysis and determinations

*Building insurance*

55. We have considered the detailed insurance policy and the amount of the premium in the context of the nature and location of the building and the number of units. In our view, based on our experience, the total insurance premium for each of the years in dispute has been reasonably incurred.

56. As conceded by the Represented Respondents, the landlord is not obliged to obtain the cheapest quote; the cost merely needs to have been reasonably incurred. In assessing whether a premium has been reasonably incurred there are various factors to consider. The existence of a claims history for the building is likely to have had an effect on the level of premium, particularly as the evidence indicates that some insurers declined to quote as a result of the claims history. Even if we were to accept that it is relevant to the question of whether the insurance premium was reasonably incurred, the Respondents have failed to show that the Applicant was at fault in relation to the matters giving rise to the claims history, which in any event only amounts to two claims.

57. The change of insurer in 2013 does provide some evidence of – if not rigorous market testing – then at least the fact that Sterling Estates were unhappy with the premiums being requested by RSA for that year and therefore switched to NIG in order to reduce the cost. The

alternative cover put forward by the Respondents is significantly inferior in many respects to the cover actually obtained by the Applicant, and although one could argue that not all of the enhanced elements are crucial we consider it reasonable for the Applicant to have rejected the alternative policy sourced by the Represented Respondents in favour of the NIG policy.

58. Regarding the issue of terrorism insurance, whilst the Lease does not explicitly require terrorism cover its description of the risks to be covered is wide enough to include terrorism. In our view terrorism includes a range of scenarios, not all of which will involve the targeting of the particular building affected, and in a built-up area within London it is considered reasonable to take out terrorism cover, albeit that one still needs to consider the cost when sourcing the cover. We agree that the terrorism element in this case is a significant part of the overall premium but also agree with the Applicant that this is because the overall cost is relatively low.

59. We are satisfied that the overall premium for each year, taken as a whole, has been reasonably incurred and is fully payable. This is subject to the points made in paragraphs 83 to 90 below regarding service charge proportions.

*Cleaning*

60. As stated above, the tribunal inspected the common parts of the Property and the Estate. Despite having been led to understand by the Represented Respondents that the common parts and the Estate were in a dirty, poorly decorated and generally neglected condition, we actually found them to be in quite good condition. Some of the windows in the common parts were marked and/or had some condensation and there were one or two cobwebs on the walls/ceilings, but generally the state of cleanliness and the decorative state of the common parts were both good.

61. Although Mr Sherreard said that a cleaning schedule existed, a copy was not in the cleaning bundle. However, whilst ideally a cleaning bundle should have been available for the hearing, the fact remains that in our view the standard of cleaning is good and the amount being charged (on the basis of a satisfactory service) is reasonable. We do not accept that the Respondents' alternative quotation for cleaning services is genuinely comparable (for the reasons given by the Applicant) or all that helpful. We also note that the evidence indicates that the Respondents did not complain about the standard of cleaning until after the Applicant lodged its application.

62. As regards possible historic cleaning deficiencies, the Respondents have not provided any photographs as evidence of any deficiencies nor were the Respondents able to point to any letters of complaint regarding

cleaning in the hearing bundle nor was any evidence brought that the Respondents had complained recently about the quality of cleaning.

63. Therefore, the cleaning charges as a whole in respect of the years in dispute are payable in full. This is subject to the points made in paragraphs 83 to 90 below regarding service charge proportions.

*Management fees*

64. We note that the total management fees for the Estate were £8,060 in 2012 and £8,215 in 2013 and that the estimated management fees for the Estate for 2014 are £8,215. These are split amongst all 31 units within the Estate.

65. On the basis that these fees are indeed split between all 31 units the average cost per unit (albeit that not all units are charged the same) is £260.00 to £265.00, and we consider this to be a reasonable charge per unit for this type of Estate in this location in the context of the level of service that the managing agents need to provide. The amount is not cheap, but in our view neither is it outside the range of fees that it would be reasonable to charge.

66. Should the amount be reduced by reason of poor management? In our view it should not be, as the management has in our judgment been adequate overall and seems to have improved since the date of the 2010 Decision. The evidence indicates that the managing agents generally replied promptly to queries and complaints. As noted above, we do not accept that the current standard of cleaning is poor. As regards the condition of the Estate generally, whilst there is room for improvement we agree with the Applicant's managing agents that there is a limit to what can be expected of them where there are arrears of service charge totalling £17,000. We also note that, whilst they did not make themselves available to be cross-examined on their evidence, Sai Investments Limited have expressed themselves to be happy with the standard of management.

67. Therefore, the management charges as a whole in respect of the years in dispute are payable in full on the basis that none of the Respondents is charged more than £265.00 per year per flat. This is subject to the points made in paragraphs 83 to 90 below regarding service charge proportions.

*Management company expenses*

68. Mr McCafferty has argued that these are not payable as a matter of interpretation of the Lease. Mr Sherreard for the Applicant has commented that he believes management company expenses to be impliedly covered by the Lease, but he has not referred us to a

particular clause. On the basis of the Applicant's written submissions, it would seem that the management company expenses consist of the administering of the Applicant's internal company affairs, including dealing with filing documents at Companies House.

69. Having considered the service charge provisions of the Lease we cannot find any provision which is wide enough to cover these costs and do not consider that there is anything about the nature of these costs that means that an obligation on the part of leaseholders to pay them should be implied.

70. Therefore, these costs are not payable at all in any of the years of dispute.

*Gardening*

71. Our inspection of the external parts of the Estate revealed an abandoned head-board which had not yet been removed and there also appeared to be two abandoned cars (although they were not causing an obstruction). The garden area was very small but was in a satisfactory condition. There was very little litter.

72. In our view there is very little gardening work to be done on the Estate and therefore the charge for gardening should be proportionately small. The charge for 2012 and 2013 was £160.00 per year split between 31 units and the estimated charge for 2014 is £150.00. If (for the purposes of illustration) this was split equally between all 31 units the charge per unit would be between £4.84 and £5.16 per year or between 9 and 10 pence per week which is not considered even close to being unreasonable.

73. Therefore, the gardening charges as a whole in respect of the years in dispute are payable in full. This is subject to the points made in paragraphs 83 to 90 below regarding service charge proportions.

*Minor repairs*

74. The Represented Respondents have raised various points regarding minor repairs, including whether sufficient details have been provided as to the work done. Some of these points were dealt with to their satisfaction by the Applicant either in written submissions or at the hearing.

75. As regards the outstanding issues, whilst we accept that some of the information contained in some of the copy invoices in the hearing bundle was quite brief this does not by itself demonstrate that the relevant costs were not reasonably incurred. Mr Sherreard explained the process gone through by Sterling Estates when approving the

payment of invoices and in principle the process seems a reasonable one. Likewise, whilst there may be some possible merit in the points made on behalf of the Represented Respondents regarding the frequency of gutter and/or roof repair works, the points have not been made sufficiently effectively to justify a reduction in the charges.

76. It was open to the Respondents to query particular charges in a more forensic manner and/or to provide objective evidence to try to demonstrate lack of value for money or substandard or unnecessary work. However, in the absence of a more effective challenge by the Respondents, we consider that the Applicant has done sufficient to enable us to conclude, on the balance of probabilities, that the minor repair charges as a whole were reasonably incurred.

77. Therefore, the minor repair charges as a whole in respect of the years in dispute are payable in full. This is subject to the points made in paragraphs 83 to 90 below regarding service charge proportions.

*Pest control*

78. The dispute here centres on the method of apportionment, with the Applicant arguing that these costs related to the internal communal areas only and therefore should only be apportioned amongst the 18 long leasehold flats. Having inspected the Property we consider this to be a plausible argument and not one that the Respondents have offered any evidential reason to reject. In any event, the method of apportionment set out in the Lease (on which more later) makes it clear that these costs can be apportioned amongst the 18 long leasehold flats.

79. Therefore, in the absence of a more compelling challenge the pest control charges as a whole in respect of the years in dispute are payable in full. This is subject to the points made in paragraphs 83 to 90 below regarding service charge proportions.

*Waste disposal*

80. We note the points made on behalf of the Respondents but do not consider that there is a sufficient evidential basis for concluding that these costs have arisen out of the actions of short-term tenants of units other than the 18 long leaseholder units. Even if they have arisen out of the actions of short-term tenants, the Respondents have failed to show that it necessarily follows that the relevant costs should not have been put through the service charge. It is possible that more items could have been removed by the Council, but the Applicant's evidence on this point was plausible and we see no justification for reducing the charges on this ground.

81. Therefore, in the absence of a more compelling challenge the waste disposal charges as a whole in respect of the years in dispute are payable in full. This is subject to the points made in paragraphs 83 to 90 below regarding service charge proportions.

*Other charges*

82. We note the Applicant's general submissions as to the payability and reasonableness of the service charges, many of which were not challenged by the Represented Respondents or by the other Respondents. Indeed, as noted above, Sai Investments Limited (the leaseholder of 8 long leasehold flats and 13 others) is positively supportive as to the standard and cost of the services. Subject to the specific issues referred to above, we are satisfied on the basis of the evidence provided that the remainder of the service charges are payable in full. This is subject to the points made in paragraphs 83 to 90 below regarding service charge proportions.

*Proportion of service charge payable by each of the Respondents*

83. It is clear from clause 1(m) of the Lease that each Respondent is obliged under its lease to pay one-eighteenth of the service charge (see paragraph 7 above). The Lease does not distinguish between different types of service charge, and therefore in principle there seems to be no contractual basis for agreeing one percentage in respect of an "internal" service charge and a different percentage in respect of an "external" service charge.

84. Mr Sherreard for the Applicant states that the split between internal and external service charges was created in response to a perception that the original approach was – or had become – unfair.

85. The exact circumstances that gave rise to the original drafting of the service charge provisions are not entirely clear and to some extent are a matter of speculation for both parties. The evidence given on behalf of the Represented Respondents, not contradicted by the Applicant, is that the change in the method of calculation of the service charges, whatever the motivation, was imposed on the Respondents without their agreement.

86. As a result, neither the split between an internal service charge and an external service charge nor the actual percentage charged to each Respondent can be justified by the contractual terms of the relevant lease. The parties could have agreed a variation between them and then entered into a formal deed of variation of each lease, but this has not happened. Alternatively, in appropriate circumstances an application could have been made to the First-tier Tribunal under section 35 or

section 37 of the Landlord and Tenant Act 1987 for a variation of one or more of the leases.

87. It might be arguable – if the background were to be explored in more detail – that the originally drafting of the service charge provisions in the leases was based on a set of assumptions which are no longer valid. However, that still leaves a problem with the unilateral adoption by the Applicant of a new method of calculation of the service charge. This problem applies to the decision to treat certain elements of the service differently from other elements by charging leaseholders a different proportion depending on whether a service charge item was perceived to be "internal" or "external". It also applies to the decision to change the method of calculation as between leaseholders by moving from a situation in which all were paying the same proportion to one in which their percentages were calculated based on the net internal area of their respective flats. Arguably a method of calculation based on size of flat is a fair method in abstract, but it is not one supported by the wording of the leases.

88. As a consequence, we are unable to approve – or declare reasonable – a variation of the service charge proportions in the absence of a valid and persuasive formal application for a variation of the leases. If the Applicant chooses to charge all Respondents less than it is contractually entitled to charge them and it does so in a manner which does not discriminate between leaseholders, then it may do so in the sense that such service charge will have been reasonably incurred in the absence of any other valid ground for challenge. However, in our view a service charge item will not have been reasonably incurred if and to the extent that (a) the relevant Respondent has been charged more than one-eighteenth of the cost of the service charge item concerned and (b) the relevant Respondent has been charged more than any other Respondent.

89. In any event, the Applicant has not even been consistent in the way in which the service charge percentages have been calculated. For example, Flats 1A and 1B are charged the same percentage of the internal service charge, which might lead one to assume that these flats are the same size. However, in relation to the external service charge Flat 1A is charged 4.02% whilst Flat 1B is only charged 3.81%.

90. Looking at the actual percentages being charged by the Applicant, the consequences are as follows:-

- The Respondents are currently being charged between 4.83% and 6.13% of what is described as the internal service charge, depending on the size of their flats. The proportion of the service payable under each lease is one-eighteenth, which approximately equates to 5.55%. If the Applicant wishes to charge a smaller percentage than this to any of the Respondents

it must charge the same smaller percentage to all of the Respondents.

- In relation to what is described as the external service charge, the Respondents are currently charged between 3.17% and 4.02%, again depending on the size of their flats. The proportion of the service payable under each lease is one-eighteenth, which approximately equates to 5.55%. If the Applicant wishes to charge a smaller percentage than this to any of the Respondents it must charge the same smaller percentage to all of the Respondents.

- If the Applicant were now to choose to charge all Respondents one-eighteenth of what is described as the external service charge it would end up in a position whereby – assuming that it is contractually entitled to collect service charge from those flats not held on a long lease – it would be contractually entitled to recover more than 100% of the service charge.

91. The above analysis leads to a conclusion which, for obvious reasons, we do not consider satisfactory. However, in the absence of a valid formal application for a variation of the leases we do not consider that it is open to us to sanction the unilaterally imposed changes to the method of calculation of the service charge percentages. It is not our role to offer advice, but given the circumstances the parties may feel that it would be beneficial for them to enter into a constructive dialogue with a view either to agreeing a mutually acceptable method of varying the service charge percentages or at least crystallising their respective views on this issue.

## Cost Applications

92. The Represented Respondents applied for an order under section 20C of the 1985 Act that the Applicant should not be entitled to add its costs incurred in connection with these proceedings to the service charge. Although the Applicant has wrongly calculated the percentage payable by each leaseholder and there is one specific item which is not recoverable under the leases, the Applicant has in fact been successful on most issues. In addition, significant service charge arrears have built up and therefore it was reasonable for the Applicant to take steps to recover them. In the circumstances it would not be appropriate to make a section 20C order against the Applicant and we decline to do so.

93. The Applicant applied for an order under paragraph 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ordering the Respondents to reimburse the Applicant's application fee and hearing fee. As the Applicant has been unsuccessful on one point and has caused significant confusion by the erroneous way in which it has recalculated the service charge percentages, albeit

possibly with good intentions, it would not be appropriate to make such an order and we decline to do so.

94. No other cost applications were made.

**Name:** Judge P Korn **Date:** 29th September 2014

## 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.