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

Case Reference : **LON/00BG/LSC/2013/0612**

Property : **112 Berglen Court, 7 Branch Road,
London, E14 7JX**

Applicant : **Mr D Evans**

Representative : **In person**

Respondent : **Limehouse West Management Ltd**

Representative : **Lamberts Chartered Surveyors,
Managing Agents**

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

Tribunal Members : **Judge I Mohabir**

Date of Decision : **20 January 2014**

DECISION

Introduction

1. This is an application made by the Applicant under section 27A(3) of the Landlord and Tenant Act 1985 (as amended) (“the Act”) for a determination of his contractual liability to pay service charges in respect of “the building” under the terms of his lease.
2. The Applicant is the lessee of 112 Berglen Court, 7 Branch Road, London, E14 7JX (“the property”) pursuant to a lease granted to him by Bellway Homes Ltd dated 31 August 1999 for a term of 200 years from 24 June 1998 (“the lease”).
3. The property forms part of an estate comprised of two structurally detached buildings (Medland House and Berglen Court). Each building is sub-divided into several separate blocks, each of which contains a number of residential flats let on a long lease.
4. The property is situated in Berglen Court, which consists of six blocks and is located in Block B1.
5. The relevant service charge terms have been, helpfully, set out at paragraphs 6 to 11 in the Respondent’s statement of case dated 8 January 2014 and it is not necessary to repeat these here.
6. Essentially, the leases provide that the lessees shall pay a service contribution in relation to “the building” and “the estate”. These are described as the Part A and Part B proportion respectively. The leases also expressly provide that the lessees contribution in respect of the Part A and Part B costs shall be calculated at 3.6056% and 0.4992% respectively.
7. It is accepted by the Respondent that the method of apportionment of the Part A building costs is not consistent. The majority of the leases in Blocks B2-B6 in Berglen Court adopt a Part A apportionment in relation to all of the costs relating to all of the blocks that comprise

Berglen Court. However, it is also accepted that the definition of “building” in those lease varies considerably. In contrast, the leases of the flats in Block B1 limit the definition of “building” to that block alone.

8. It seems that the Respondent attempted to adopt the Part A approach taken the lessees of Blocks B2-B6 in Berglen Court for the year 2012/13, which resulted in the Applicant’s service charges increasing by 10%. The Applicant disagreed with the approach taken by the Respondent and made this application dated 20 August 2013. Essentially, the Applicant contends that he should only be liable for the building costs as provided for in his lease. The Respondent contends that there appears to be an obvious and manifest error in the drafting of the residential leases relating to Berglen Court. It was clearly intended that the Part A costs should relate to all of the blocks comprising Bergeln Court and that the method of apportionment it adopted rectified that error. It contends for an apportionment figure of 0.738759%.

9. The Tribunal’s Directions dated 15 October 2013 provided that the application be determined by paper without an oral hearing. In addition, the substantive issues identified were:
 - (a) the Applicant’s contractual liability for 2012/13 and future years for service charges in respect of the property, including the apportionment as between the blocks and buildings.
 - (b) whether the Respondent is entitled to vary the contractual service charge apportionment as provided for in the lease.

Relevant Law

10. This is set out in the Appendix to this decision.

Decision

11. The Tribunal's determination took place on 20 January 2014 and was based solely on the statements of case and documentary evidence filed by the parties.

Jurisdiction

12. The Respondent took a jurisdiction point that under section 27A(3) of the Act that the Tribunal could not determine the application because no costs were specified and no determination could be made in the abstract. The Respondent relied on *Mehra v Citywest Homes Ltd* [2010] UKUT 311 (LC) as authority for this proposition.
13. The Tribunal did not accept the Respondent's submission as being correct. It is quite clear that section 27A(3) permits a Tribunal to determine both the liability and the reasonableness of any prospective service charges. To determine the former, the Tribunal inherently must first of all determine how the lessee's contractual liability arises under a lease and at what rate it is expressly provided for in the lease. That is the central issue in this application. Indeed, this is not inconsistent with the reasoning in *Mehra*. That case can be distinguished on the basis that it concerned the reasonableness of unspecified service charges and not the contractual apportionment, which is the issue here.
14. Accordingly, the Tribunal concluded that it did have jurisdiction to determine this application.

Construction and Correcting Error

15. The Respondent submitted that the obvious error in the leases granted in respect of Berglen Court should be dealt with by construing "building" to mean all of the blocks. It made the most sense when the management of the estate was considered as a whole. Berglen Court is largely self-contained whereas Block B1 is not and it would be difficult to properly allocate all of the costs that relate solely to Block B1. In support of this

submission, the Respondent relied on the dicta of Brightman LJ in *East v Pantiles Plant Hire Ltd* [1982] 2 EGLR 111.

16. The Tribunal did not accept the Respondent's submission as to how the Applicant's lease should be construed. The lease expressly provides a contractual rate that has to be applied when calculating the Applicant's service charge liability for the building costs relating solely to Block B1. It is now settled law that a Court or Tribunal should rarely seek to interfere with the contractual bargain struck by the parties at the time the lease was granted even if one or more terms later proves to be unsatisfactory and/or onerous. A different construction cannot be adopted to achieve a different purpose than was intended by the contracting parties.

17. The lease here is both clear and unambiguous as to the Applicant's service charge liability for the Part A costs relating to Block B1. It is not open to the Tribunal to place a fundamentally different construction on the lease terms. It does not appear to be a "clear mistake" on the face of the lease. The fact that the lease terms present difficulties in the management of the estate does not, in the Tribunal's judgement, allow it to conclude that it was a mistake. For this reason, *East* does not provide any support for the Respondent's submission. What may be required is for the leases of Berglen Court be varied either by agreement or by formal application to the Tribunal.

Contractual Right to Adjust Service Charges

18. The Tribunal had little difficulty in concluding that paragraph 2, Part II of the Fourth Schedule does not provide the Respondent with a general discretion to recalculate the service charge liability. A proper reading of this provision reveals that the discretion only arises and is conditional upon "*any_re-planning of the layout of the Estate or Building*". This has

not occurred and, therefore, the Respondent is not entitled to exercise this discretion.

Section 20C & Fees

19. The Applicant made an application under section 20C of the Act for an order in relation to the Respondent's costs incurred in these proceedings. Given that he has succeeded entirely on the substantive issues raised in the application, the Tribunal considered it just and equitable to make an order under section 20C preventing the Respondent from recovering any of the costs it may have incurred in responding to this application.

20. For the same reasons, the Tribunal also orders the Respondent to reimburse the Applicant within 28 days the sum of £90 he paid to the Tribunal to have this application issued.

Judge I Mohabir

20 January 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 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.