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

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| **Case Reference** | : | **CHIOOML/LSC/2015/0049** |
| **Property** | : | **13 & 14 Sherbourne Way, Hove, East Sussex, BN3 8BH** |
| **Applicant** | : | **Brighton & Hove City Council** |
| **Representative** | : | **Mr Allinson of Counsel** |
| **Respondents** | : | **(1) Mr T I Evans**<br>**(2) Mrs J M Evans**<br>**(3) Mr J R Mercer**<br>**(4) Mrs S P Mercer** |
| **Representatives** | : | **Mr Evans and Mr Mercer** |
| **Type of Application** | : | **For the determination of the reasonableness of and the liability to pay a service charges** |
| **Tribunal Members** | : | **Judge I Mohabir**<br>**Mr R A Wilkey FRICS** |
| **Date and venue of Hearing** | : | **26 November 2015**<br>**City Gate House, Brighton, East Sussex, BN3 1TL** |
| **Date of Decision** | : | **4 February 2016** |

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**DECISION**

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*Introduction*

1. This is an application made by the Applicant under section 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") for a determination of the Respondent's liability to pay and/or the reasonableness of estimated service charges for repair works for the years 2015 to 2018.

2. The First and Second and the Third and Fourth Respondents are respectively the leaseholders of Flats 13 and 14, Sherbourne Way, Hove, East Sussex, BN3 8BH. Both purpose built flats comprise a two-storey dwelling house. Flat 13 is located on the ground floor and Flat 14 is located on the first floor. The Applicant is the freeholder.

3. The factual background that gives rise to this application is as follows. In 2009, a leak occurred in Flat 14. In July 2011, the First and Second Respondents complained to the Applicant about the noise levels emanating from Flat 14. The Applicant carried out an inspection of the building and concluded that the noise was a function of the natural ageing process of the property.

4. In August 2013, the Applicant received further complaints from the First and Second Respondents about increasing levels of noise from Flat 14. Following an initial survey in December 2013, the Applicant's expert, Mr Goacher BSc (Hons), C.Eng, MICE, M I Struct E, carried out a more intrusive inspection to ascertain the cause of the noise nuisance.

5. In his report dated 12 May 2014, he stated that he had exposed 3 areas of flooring in Flat 14. These were 2 areas in the lounge and 1 area in the rear bedroom. He noted that when the floor battens were stepped upon they clearly moved up and down and were not straight. Mr Goacher also undertook a comparative sound test with Flats 9 and 10. This was done by a builder walking around the first floor of both properties whilst he listened on the ground floor. Mr Goacher noted that the floors in both

sets of flats were noisy, however, he considered the noise in Flat 13 to be excessive.

6. At paragraph 7.1 of his report, Mr Goacher concluded that there is a problem with the floor of Flat 14, which had probably been caused by the escape of water incident in 2009. The reasons he gives, at paragraph 7.5, are that *"...the first floor construction may have suffered from a change in moisture content sufficient to cause twisting of the floor battens. It is this possible twisting that could be the cause of the increase in sound transmission through the floor into Flat 13 below. The floor being uneven and, when walked upon, deflects, squeaks and transmits impact sounds to the flat below."*

7. At paragraph 8.3 of his report, Mr Goacher recommended that the current uneven and squeaky floor in Flat 14 should be removed and replaced with a new floating floor system incorporating suitable sound insulating materials ("the proposed works").

8. Based on Mr Goacher's recommendation, the Applicant obtained an estimate for the proposed works from contractors known as "Mears" who are employed by it under a qualifying long-term agreement to carry out repairs to its housing stock when required. The estimate placed the cost of the proposed works at £12,000.41.

9. On 19 November 2014, the Applicant served Notices of Intention of the Respondents to carry out the proposed repairs. Apparently, the Respondents indicated that they intended to dispute their liability for the proposed works. Therefore, by an application dated 9 July 2015, the Applicant seeking a determination as to the Respondents' liability to pay for the proposed works and the reasonableness of the estimated cost.

***Lease Terms***

10. The leases held by the Respondents were granted on the same terms and the covenants given are materially the same. It is not necessary to set out

the relevant terms of leases because the Respondents did not contend that the proposed works fell outside the Applicant's repairing obligations in the lease nor that they were not contractually liable to pay a service charge contribution of one half for the estimated cost of those works. It is sufficient to note that Applicant's repairing obligations arise under clause 5(5)(a) of the leases and the Respondents' liability to pay a service charge contribution arises under clause 4(4).

***Relevant Law***

11. This is set out in the Appendix annexed hereto.

***Decision***

12. The hearing in this case took place on 26 November 2015, following an earlier two-day hearing of a service charge application made by a number of lessees at Sherbourne Way. The Applicant was represented by Mr Allinson of Counsel. The First and Third Respondents appeared in person. The First Respondent confirmed to the Tribunal that he supported the application. The Tribunal explained to him that as neither he nor the Second Respondent had filed or served any evidence, he could not give evidence at the hearing. Moreover, as he supported the application, it would assist him by simply allowing the Applicant to prove its case.

13. The Tribunal's inspection on 24 November 2015 was limited to standing in the front lounge of Flat 13 to observe the level of noise emanating when Mr Diplock, an employee of the Applicant, walked on the lounge floor of Flat 14 directly above who was accompanied by the Third Respondent. The Tribunal was not invited to carry out an internal inspection of Flat 14.

***Procedural***

14. After the hearing, the Third and Fourth Respondents, by a letter dated 14 December 2015 sent by their solicitors, made a application that the Tribunal carry out a re-inspection on the basis that the original inspection had been carried unfairly for the following main reasons:

(a) that they did not have legal representation at the inspection.

(b) that they had not been invited into the premises of the First and Second Respondents.

(c) that the Applicants were present at the inspection and had one of their witnesses "jump up and down" on the floorboards upstairs to demonstrate the noise that was made.

(d) that a local councillor who supported the application was 'presumably' able to voice comments to the Tribunal of which the Third and Fourth Respondents had not been made aware.

(e) that the Tribunal did not enter the premises of the Third and Fourth Respondents and had they done so they would have been able to assess the flooring in the premises and should have informed them that they were not going to do so.

(f) By reason of the above matters, the Tribunal limited the evidence they had seen and would thereby place reliance on the expert evidence relied upon by the Applicant.

15. The Tribunal dismisses the application to carry out a re-inspection primarily because, as will become apparent, the evidence revealed by the inspection had little or no evidential weight. For this reason, a further inspection would not have assisted the Tribunal in deciding this application. The mere observation of covered flooring in the flat of the Third and Fourth Respondents would not have provided the Tribunal with any evidence in relation to the disrepair identified in Mr Goacher's report. Similarly, the mere walking on floorboards would not reveal any underlying disrepair.

16. As a general point, over the course of a 3 day hearing at which they were present throughout, neither the Third or Fourth Respondents raised any objection as to the fairness of the Tribunal's inspection or made a request for a re-inspection.

17. As to the procedural unfairness points raised in the letter dated 14 December 2015 from the Solicitor for the Third and Fourth Respondents, the Tribunal comments as follows:

(a) at all material times, the Third and Fourth Respondents stated they would not be represented by their Solicitor whether at the inspection or the hearing. Indeed, this was confirmed by the Third Respondent in answer to a specific question by the Tribunal at the commencement of the hearing.

(b) the Tribunal was invited into the premises of the First and Second Respondents and it did so for no other reason. Neither the Third nor Fourth Respondents complained at the time about not being invited into the premises of the other Respondents.

(c) for the reasons set out above, this exercise had little or no evidential value.

(d) the Tribunal took no evidence from any of the parties during the inspection and made it clear at the outset that it would not do so.

(e) for the reasons set out above, this exercise would have had little or no evidential value.

18. The Tribunal heard evidence from Mr Goacher in relation to the disrepair identified in his report. He was cross-examined by the Third Respondent and the Tribunal. Materially, in answer to question by the Tribunal he said there was a causal link between the disrepair he had identified in the floor battens in Flat 14 to the noise experienced in Flat 13 below. He explained that, as a comparison, he had carried out an inspection of the adjacent Flats 9 and 10 to see whether there was any noise variance. Based on his experience and knowledge, he concluded that the noise experienced in Flat 13 was greater and that his recommended works would alleviate the problem.

19. The Tribunal also heard evidence from Mr Diplock who is a Contract Monitoring Manager employed by the Applicant. He simply confirmed that he had prepared the specification for the proposed works and that the

cost of replacing the flooring to Flat 14 was approximately 25% of the overall estimated cost.

20. The Third Respondent also gave evidence to the Tribunal. In cross-examination, he confirmed that the flooring, especially in the front lounge of his flat did 'squeak'. However, he did not accept the recommendation made by Mr Goacher that all of the battens had to be replaced or were twisted and there was in fact no disrepair to the floor structure. He said that the First and Second Respondents simply had a lower tolerance to noise and had been complaining about this since 2009.

21. In the context of this case, it is important to emphasise the issues the Tribunal had to decide. These are:

    (a) the presence and extent of any disrepair to the floor structure of Flat 14; and
    (b) whether the disrepair fell within the Applicant's repairing obligation in the Respondents' leases; and
    (c) whether the proposed works and estimated costs are reasonable.

22. It is also important to note that this case is not about the noise nuisance *per se* suffered by the First and Second Respondents. The Applicant had to establish a causal link between the disrepair identified to the floor structure of Flat 14 and the noise encountered in Flat 13. In the absence of this, the only remedy available to the First and Second Respondents would be a private law one.

23. The only expert evidence before the Tribunal on the issue of disrepair was that of Mr Goacher. It found him to be a credible and experienced Surveyor. The Tribunal accepted his evidence that disrepair was found to the floor battens in the areas of Flat 14 exposed by him and that was the cause of or a contributory factor to the noise suffered in Flat 13 below. The Tribunal accepted the submission made by Mr Allinson that the noise nuisance informs the test of reasonableness to be applied under section 19

of the Act. As stated earlier, the Tribunal placed no reliance on the evidence revealed by the inspection.

24. It follows that the Tribunal did not accept the Third Respondent's assertion that the floor battens in his flat were not in disrepair. He does not have any professional expertise in matters of structural disrepair and did not hold himself out as doing so. His assertions, therefore, had little or no evidential weight. If he was going to maintain this stance, it is perhaps surprising that he did not instruct his own expert to comment on the findings made by Mr Goacher in his report and he did not do so.

25. However, the Tribunal did not accept the evidence of Mr Goacher that all of the floor battens in Flat 14 should be replaced. His evidence was that there was a causal link between the disrepair and the noise created below. The evidence before the Tribunal was that the noise was limited to those areas in Flat 13 below the lounge and kitchen in Flat 14. Accordingly, the Tribunal limits its finding of disrepair to the floor battens in those areas of flat 14 as being reasonable. It is common ground between the parties that the proposed remedial works fall with the Applicant's repairing obligation in the leases.

26. In relation to the reduced scope of the proposed works, the Tribunal directed the Applicant to provide an amended cost estimate. This provides an estimated cost of £6,508.12 including VAT and this is the amount the Tribunal finds to be reasonable.

***Section 20C & Costs***

27. No application had been made by the Respondents under section 20C of the Act in relation to the Applicant's costs and, therefore, it was not necessary for the Tribunal to hear submissions on this matter. The Respondents are not prevented from making such an application separately. Alternatively, in the event that the Applicant later seeks to recover the costs it has incurred in these proceedings through the service charge account, the Respondents can make an application under section

27A of the Act for a determination of their liability to pay and/or the reasonableness of such costs.

28. Given that the application has succeeded, albeit in part, the Tribunal was satisfied that the issue of disrepair could not have been resolved informally by the Applicant without seeking a determination from the Tribunal. Accordingly, it orders that the First and Second and the Third and Fourth Respondents reimburse an equal half share of the issue fee of £250 paid by Applicant.

Judge I Mohabir
4 February 2016

## Appendix of relevant legislation

### Landlord and Tenant Act 1985

### 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 a leasehold valuation 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 a leasehold valuation 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.

**Leasehold Valuation Tribunals (Fees)(England) Regulations 2003**

**Regulation 9**

(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).