10739

FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOBK/LSC/2014/0519 and LON/00BK/LSC/2014/0543**
Property	:	**Flats 1, 6, 10, 18, 22 and 26 Neville House, 105 Marsham Street, London SW1P 4JT**
Applicants	:	**Mr N. Palumbo, Ms S. Grosso, Mr M. Plant, Mr R. Cardenas, Ms I. Cardenas, Mr M. Winterton and Ms M. Bekhait (leaseholders)**
Representative	:	**Not represented**
Respondents	:	**London and Quadrant Housing Trust (first respondent) and Fairhold Athena (second respondent**
Representatives	:	**Mr S. Strelitz, barrister of Clarke Willmott LLP solicitors for the first respondent; Ms A. Gourley of counsel instructed by Ms M. Khan, solicitor of Peverals (managing agents)**
Type of Application	:	**Application under section 27A of the Landlord and Tenant Act 1985 to determine the liability to pay a service charge**
Tribunal Members	:	**Professor James Driscoll (Judge), Stephen Mason BSc, FRICS, FCIArb and Mr John Francis**
Dates of Hearing	:	**12 and 13 February, 2015**
Date of Decision	:	**113 April, 2015**

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DECISION

The Decisions summarised

1. Paragraphs 2 to 4 below summarise our decisions on the applications against the first respondents.

2. We determine that the fraction used for the apportionment of the service charges made of the applicants by the first respondents is fair and reasonable.

3. We determine that the management costs of the first respondent should be reduced to £ 150 per flat held on a shared ownership lease.

4. No order is made under section 20C of the Landlord and Tenant Act in relation to the first respondent's costs in resisting the leaseholder's application for a determination.

5. The concierge service is being delivered and monitored. As the first and the second respondents reached agreement on the insurance and issues relating to whether notices were given under section 20B of the Act we did not need to make determinations of those issues.

6. No order is made in relation to the costs of the second respondent under section 20C of the Act.

Introduction

7. This claim was started by leaseholders of flats in the premises seeking determinations of service charges for the years 2010-2011, 2011-2012, 2012-2013 and 2013-2014. The tribunal was told that under their leases they are charged in relation to each financial year (that is to say March to April in the year following). They are given estimates each year and a final bill in the year following. They have paid the charges but they challenge their reasonableness and the accuracy of the

accounting. The claims are made under section 27A of the Landlord and Tenant Act 1985 (and the application has been allocated a case number LON/00BK/LSC/2014/0519).

8. The applicant leaseholders have 'shared ownership leases' of their respective units all of which are one bedroomed flats. These flats are situated in a building which is in two parts. Their part contains what was described to us as 'social housing' and it consists of nine flats held on shared ownership leases and twenty-one flats held on tenancies. The tenanted flats have either two or three bedrooms and this is a factor which, in the view of the applicants, should be reflected in the calculation of the service charges, which in their view currently operates unfairly. Of the shared ownership flats, seven of the leaseholders are involved in this application. In addition to the social housing, there is one commercial unit in that part of the building and this is let direct by the freeholder.

9. The other part of the building consists of seventy-one flats which all held on long leases and they are known as the 'private flats'. There are also two commercial units in that part of the building. All of the units are leased by the freeholder that is the second respondent.

10. There is a concierge service which is located in this second part of the building. The applicant leaseholders complain that they do not benefit from this service even though they contribute its costs through their service charges.

11. The whole development was completed in 2006. It may be described as a predominately residential building with some commercial units. The owner of the freehold is Fairhold Athena Limited ('Fairhold'). They have granted a head lease of the social housing to London and Quadrant Housing Trust (L & Q). This means that L & Q are the landlords of both the shared ownership and the rented units and that these units are therefore subleases, or subtenancies as the case may be. It appears that Fairhold are the direct landlords of the private leaseholds and the commercial units in that part of the building.

12. Under the terms of the head lease, L&Q covenant to pay 21.4316% of Fairhold's costs of insuring, repairing and maintaining the building. In turn, they can recover a contribution from the shared leaseholders. They currently recover 2.615 % from each of those leaseholders, that is a total of some 23.49% of their costs. As the other units are let, the tribunal assumes under assured tenancies (or possibly secure tenancies, in some cases) they cannot pass on these costs directly to the tenants. This is because under section 11 of the Landlord and Tenant Act 1985 landlords who let for less than seven years are under a number of important obligations to repair the property. The landlord and the tenant may not opt out of these statutory obligations without the sanction of a court order.

The case management conference

13. Following the application, a case management conference was held on 30 October 2014. At the hearing the tribunal was given a copy of an application which made by L & Q seeking a determination of the charges made by Fairhold. They wish to challenge the insurance costs and the costs of the concierge service. They also claim that for some of the service charge years (which under the head lease is the calendar year) 2005-2009 that they were not given notices under section 20B of the Landlord and Tenant Act 1985, as a result, they contend of which the charges are not recoverable. The case number for this second application is LON/00BK/LSC/2014/0543).

14. After a preliminary discussion at the case management conference, the parties agreed that the application by L & Q had many common features with the application by the shared leaseholders. It was agreed and the tribunal directed that the two applications should be consolidated and heard together. Extensive directions were given at the case management conference.

15. In this decision we will refer to the applicants as the 'social leaseholders', to the first respondents as the 'head leaseholder' and to the second respondent as the 'freeholder'.

The hearing

16. Following the directions the solicitors for the head leaseholder prepared three full bundles of documents. The first included various statements and a copy of a specimen lease. The second and third bundles included various invoices and receipts. As to the statements in the first bundle they appear in the following order: a statement of case made on behalf of the head leaseholder (responding to the case set out in the social leaseholders application to the tribunal), the leaseholder's response and witness statements of a Ms Tash who is employed by the head leaseholder as a resident services officer and Ms Hughes also employed by the head leaseholder to deal with service charges. As to the freeholder they have appointed OM Property Management (also known as 'Consort') to manage the building on their behalf.

17. The hearing took place on 12 and 13 February, 2015. We inspected the premises at the end of the hearing on 13 February 2015. At this inspection we were accompanied by Mr Winterton and another leaseholder. The building is situated in prime central London. It is smart and modern in its external appearance. We were met at the entrance which is used by the social leaseholders and the tenants and shown around the internal corridors and lifts. The interior seemed to us to be well maintained though our attention was drawn to some as yet un-repaired defects by a lift that services the social leaseholders and the social tenants. We viewed the garden areas and it became apparent that neither the social leaseholders or the tenants have access to these facilities. We viewed the main entrance which we understand is used by the private leaseholders and we met with the staff at the concierge desk.

18. The leaseholders have not taken legal advice and they were not represented at either the the case management conference or the hearing.

19. Four of the leaseholders attended the hearing. They were Mr Winterton, Ms Grosso, Mr Plant and Ms Cardenas. They told us that Mr Winterton would address the tribunal. The lead social leaseholder

is a Mr Palumbo but he was unable to attend the hearing because of work commitments.

20. The head leaseholder was represented by Mr Strelitz a barrister employed by Clarke Wilmott LLP, solicitors. Ms Gourley of counsel who is instructed by Ms Khan a solicitor employed by Peverals (managing agents). They were accompanied by their witnesses. Ms Gourley counsel told us that she would call a Mr Betterson who advises them on insuring the building and Ms Samantha Steer who manages the building on their behalf. She would also call a Mr S Doherty to give evidence on the accounting.

21. These representatives started by outlining their respective positions. Mr Winterton told us that the leaseholders have the following six concerns. First, they are very concerned at the increase in service charges in the past four years. Second, they are critical of the discrepancy as they see it between the estimated charges and the actual service charge bills. A third concern it they do not believe that they are getting value for the charges they pay. Their fourth concern is over how the head leaseholder has apportioned the costs between the rented units (the costs of which the head leaseholder largely bears) and the shared ownership leases. They consider that it would be fairer if the apportionment would be based on the net internal area of their flats by comparison to to that of the tenanted properties. Fifth, the leaseholders consider that the management fees charged by the head landlord are too high for the minimal services they receive. Finally, they criticise the accounting practices of the head leaseholder.

22. Mr Winterton told us that he would not be calling any witnesses but that he was instructed by nine of the eleven social leaseholders to represent their interests.

23. Mr Winterton told us that the leaseholders have other specific complaints. A so-called 'concierge' service is provided by the freeholder but the leaseholders hardly ever receive any benefit of this service which they suspect is designed to favour the private leaseholders. On management they consider that the head leaseholder provides minimal services and there is also some

duplication as the head leaseholder uses another employee to deal with leaseholder and tenant complaints.

24. For the head leaseholder Mr Strelitz told us that in a sense they act as a 'conduit' for the freeholder. This is why they have applied for a determination of the charges made of them by the freeholder. Under their head lease with the freeholder they are to pay 21.4316% of its charges. They do not believe that they are receiving value for money. Like the leaseholders they do not believe that their leaseholders (and their other tenants) are able to benefit from the concierge service which is provided. Mr Strelitz also told us that the head leaseholder questions the costs of the insurance which they believe could have been arranged more cheaply. We were also told that the head leaseholder employs a Ms Tash who is responsible for liaising with all of the tenants and the leaseholders in the block.

25. As to the various complaints made by the leaseholders Mr Strelitz stated first, that the complaint of discrepancies between the estimates given for a particular service charge accounting period and the final charges, is misconceived. It is the nature of estimates, he contended, that they may not be actually correct. They might be an underestimate or an overestimate. The whole picture only emerges once the landlord is able to work out what costs have been incurred during the particular service charge period. Once that has been calculated the landlord can then notify the contributing leaseholders of the expenditure. If this exceeds the contributions already paid for that period an additional demand is made. In the converse situation the excess of the contributions over the actual expenditure is credited to the leaseholder's accounts.

26. Second, he addressed the complaint that the leaseholders are being overcharged for their management charges. We were told that they charge on the basis that they are social landlords. They own and manage some 60,000 properties and they apply a standard management charge of £161 per unit. Currently they charge a fee based on 10% of their costs for this development.

27. Ms Tash, one of the head landlord's employees, gave evidence on which she was cross-examined and she also answered questions. She

works as a property manager and she has been involved with Neville House since November 2014. Her role is to liaise with all of the occupiers, tenants and social leaseholders alike. She described how she has dealt with various complaints made by the social leaseholders. It also includes liaising with Ms Steer who manages the whole of the building on behalf of the freeholders. She has attended meetings with the leaseholders when the solicitors for the head leaseholders were also present.

28. The relevant service charge manager is Ms Hughes who told us of her role in dealing with complaints made by leaseholders. We were also told that whilst the head leaseholders service charge period is the same as the financial year, the charges levied by the freeholders are calculated annually. Each year the head landlord is sent first a budget prepared on behalf of the freeholder and a later statement in a particular calendar year.

29. Turning to the apportionment she points out the shared ownership leases require the leaseholder to pay a reasonable amount of the landlord's costs of insuring and managing the block. She told us that the head landlord has about 3,000 blocks of flats where there is a mixture of leaseholders and tenants. To work out the appropriate contribution from the leaseholders the head leaseholder usually splits the costs equally between the two groups of residents (with the landlord paying the tenant's portion, the leaseholders theirs). In her view this is a reasonable way of apportioning the costs.

30. However, to take account of the fact that the leaseholders have just one bedroom whilst the tenanted flats have two or three bedrooms they have adjusted this general approach. The current position is that the tenants pay 3.6% and the leaseholders pay 2.61% which she submits is reasonable. As to the suggestion that the apportionment should be based on a comparison of the floor areas of all of the flats she told us that the head leaseholder does not have this information.

31. She described in considerable detail the various meetings she has had with the leaseholders in order to address their concerns. These meetings were arranged early evening at the end of normal office hours.

32. As to their management fee she told us that she considered it reasonable to base it on a fixed percentage of their costs. This is why they now add 10% to their costs as a reflection their management fee.

33. We also heard evidence from Ms Steer the manager appointed for Neville House. She describes how they are always members of staff on duty. There are rooms for them and they have CCTV. Their duties include regular patrols of the interior of Neville House. She recently had a time and motion study of the functions which she contends shows that they are properly preforming their duties including regular patrols of the whole building.

34. During the hearing we were informed by Ms Gourley, counsel for the freeholder that following discussions the head leaseholder and the freeholder had reached agreement on the claim that some of the service charges made by the freeholder of the head leaseholder were irrecoverable. Consequently, there is no need for the tribunal to make a determination of this issue.

35. Mr C Bettison was called to give his evidence. He works for the freeholder and he is responsible for the arranging of the insurance for Neville House and other properties they own. Each year he tests the market by seeking quotations from other companies. The premiums charged and their recent increase reflected a number of claims made under the insurance policy. There is also a substantial increase in the premium due to cover for damage caused by terrorism. He reminded us that Neville House is close to the Home Office with the attendant greater dangers of a terrorist attack.

36. As a result of the explanation given on the insurance arrangements we were told that the head leaseholder no longer challenges the costs of the insurance.

37. The other witness to give evidence was Mr S Doherty who works as an accountant responsible for keeping and maintaining the papers and the accounts. He reminded us that one of the complexities of interpreting the figures is that the service charge provisions in the

head lease and the shared ownership sub leases have a different accounting period.

Reasons for our decisions

38. We start with some general comments. As we noted earlier in this decision the subject premises are located in a prime site in central London. The development consists of a modern block of flats with some commercial use. Both the external and the interior are in good working order and overall gives the appearance of a being a prestigious building.

39. The structure of the leasing arrangements for the building is complicated in certain respects but it is in our experience quite a common way of developing modern developments when planning policies and other policies require an element of the development to be devoted to social housing.

40. Turning to the reasons for our decisions we will first summarise the issues which the parties agreed during the hearing, matters that will not require a determination as they are agreed (see section 27A(4)(a) of the Act). These are the issues the head leaseholder sought a determination of. First, the costs of the insurance were agreed. Second, following an an agreement between those two parties the challenge to the charges made by the freeholder based on section 20B of the Act has been settled and as a result are no longer disputed. This disposes of the application made by the head leaseholder. We also find that (relying on the evidence of Ms Steer) that the concierge system appears to be functioning.

41. We turn to the challenges made by the shared leaseholders. In light of the agreement reached between the head leaseholder and the freeholder the leaseholders present told us that they accepted that the costs of the insurance are reasonable.

42. We deal next with the apportionment of the service charge. There is considerable merit in the leaseholder's contention that their share should be based on the internal floor areas of all of the flats. Their leases state that a reasonable amount must be paid. In our

experience different social landlords approach this issue in different ways. Some such landlords use internal floor areas; others use the number of bedrooms. It is possible for the head leaseholder to switch to a different method, that is one based on a formula based on the internal areas of the flats. However, we have concluded that by having already switched from an apportionment based on sharing the costs equally between all residents to one that uses a smaller percentage for the shared ownership flats to reflect the fact that they have only one bedroom, was a reasonable decision for the head leaseholder to take.

43. The next issue relates to the costs of management. The leaseholders expressed their dissatisfaction with the current arrangements very clearly. However, having heard the evidence and having had the advantage of carrying out an inspection of Neville House we have concluded that the building has the appearance of a well run and well managed building. We were impressed by the evidence of both Ms Hughes and Ms Steer and it was clear that the leaseholders have a good working relationship with Ms Steer. Whilst Ms Tash described her work at Neville House in some detail we formed the view that much of it was directed to the tenants rather than the leaseholders.

44. As to the complaint made about the concierge services and on the balance of probabilities we conclude that this service does include the regular patrolling of the premises.

45. It is clear from the minutes of meetings and the copies of the email exchanges that the managers and their legal advisors have spent a good deal of time trying to deal with the leaseholder's complaints. But it is also apparent that there is overlap between what seems to be three levels of management: Ms Tash, Ms Hughes and Ms Steer, with the attendant duplication of costs, that is the costs of two member of staff from the head leaseholder and one acting on behalf of the freeholder.

46. Ms Hughes told us that a fixed management charge of some £160 per unit was charged but this has been replaced by charging at 10% of the landlords actual costs. As she told us that the current annual service charge is £2,352. 72 the current management charge

appears to be in the order of £213.88. We accept that this is line with management charges made for properties in locations such as this.

47. The leaseholders have made several complaints about the quality of management. It is clear to the tribunal that the current managers have spent a good deal of time trying to deal with the complaints. However, we have concluded that the head leaseholder could and should have made greater efforts to clarify the position on insurance and the service charge demands made by the freeholders, where part of the cost is simply passed onto the shared leaseholders. It also seems to us that not only should the head leaseholder have taken the lead in pursuing these issues, as the immediate landlord of the shared leaseholders who are ultimately bearing the costs of managing the building, it need not have been left to them to challenge the costs. Throughout the hearing Mr Strelitz made much of his comment that the head leaseholder has acted as little more than a 'conduit' for the shared leaseholder's complaints.

48. On the basis of our calculations charging 10% of the overall charge approximates to over £220 per unit. Although we make no criticism of Ms Hughes we determine that the costs of managing the social housing should be reduced for the service charge periods in dispute to £150 per flat.

Costs

49. Finally each of the parties asked us to consider the position on the costs of this application under section 20C of the Act. We have not found this an easy question to decide on. The easier part of this concerns the position of the freeholder and the challenge made by the head landlord. As this challenge was made and largely settled during the hearing we cannot criticise the decision of the freeholder to arrange representation to defend their position. In that case no order is made under section 20C of the Act limiting recovery of their costs in future service charge demands.

50. The position with the social leaseholders and the head landlord is more difficult in our view. We have already made the decision to reduce the management charges but so far as these proceedings are concerned those advising the head leaseholder took on the responsibility of organising the extensive bundles of documents. In light of these comments and on balance we have decided not to make an order under section 20C. However, this is limited to their reasonable costs of preparing and participating in the hearing of the challenges made by the leaseholders and not to their costs in challenging the charges levied on them by the freeholders.

51. For the sake of clarity we would emphasise the following points. The first applies to both of the orders made under section 20C; we make no finding as to whether the lease makes provision for the recovery of these costs and we would remind the parties that as with any charge made by a landlord it must be reasonable. Second, in view of our criticisms of the head leaseholder they should consider as a matter of good management not to seek to recover any of their costs payable to the freeholder connected to this litigation. In any event, any costs they may consider passing onto the service charge to be paid by the shared leaseholders must be allowed under the leases and must be reasonable in terms of the cost.

James Driscoll, Stephen Mason and John Francis
13 April 2015

Appendix of the 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
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.
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.
But the Tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20B

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

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation 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 a leasehold valuation tribunal;
(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation 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.
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.