12319

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)
Formerly the Leasehold Valuation Tribunal

Case Reference	:	**LON/00AC/LSC/2016/0441**
Property	:	**18, 19, 48, 53, 54, 58, 61, 68, 76, 77 Lockes Field Place and 455a Westferry Road, London E14**
Applicants	:	**Dr A. Mata and Others**
Representative	:	**Dr Mata**
Respondent	:	**Lockes Field Management Co Ltd**
Representative	:	**Ms G. Crawford (Flat 453b Westferry Road)**
Type of Application	:	**Reasonableness of Service Charges – Section 27A Landlord and Tenant Act 1985**
Tribunal Members	:	**Judge Lancelot Robson** **Mr P. S. Roberts DipArch RIBA**
Hearing Date	:	**24th and 25th April 2017**
Decision Date	:	**7th August 2017**

DECISION

DECISION SUMMARY

Relating to all service charge years in dispute (2013 - 2015, and estimated charges for 2016);

A. Service Charges relating to professional advice relating to proposed high rise development on adjacent site - Charges unreasonably incurred under the terms of the Lease. The Tribunal declined to decide if they were reasonable in amount. The amount is a matter to be decided by the Respondent's shareholders in discussion with its professional advisers.

B. Service Charges relating to professional advice relating to Rights to Light concerning 5 properties affected by the adjacent development Charges unreasonably incurred under the terms of the Lease. The Tribunal again declined to decide if they were reasonable in amount. The amount is a matter to be decided by the Respondent's shareholders in discussion with its professional advisers.

C. Service charges relating to legal fees of the Respondent incurred in connection with litigation against the leaseholder of Nos 51 and 73 Lockes Field Place and his application to buy the freeholds of his properties - charges reasonably incurred but unreasonable in amount . The Tribunal decided that a reasonable sum was £12,000 inclusive of VAT.

D. Service Charges for advice in connection with litigation against the leaseholder of No 37 Lockes Field Place relating to breach of covenant -charges reasonably incurred but unreasonable in amount. The Tribunal decided that a reasonable sum was £24,375 inclusive of VAT

E. Whether charges of the Respondent's professional advisers were pursuant to qualifying long term agreements requiring service of Section 20 notices - No

F. The Tribunal made the other decisions noted below.

Preliminary

1. On 11th November 2016 the Applicants applied to the Tribunal pursuant to Section 27A and 20C of the Landlord and Tenant Act 1985 for determination of the liability to pay, and the amount of service charges reserved by a (specimen) lease dated 8th January 1988 (the Lease) in the service charge years commencing on 1st January 2013, 2014, and 2015, and estimated charges for the service charge year commencing on 1st January 2016.

2. Directions for hearing were given by the Tribunal on 14th December 2016 for the hearing on 24th and 25th April 2017. Both parties made written

statements of cases supplemented by oral submissions and evidence at the hearing. Witness statements in support of the parties' respective cases were made by a total of 7 witnesses, 4 of whom were formally examined at the hearing. One witness for the Applicants (Mrs Gunc) was unable to attend. Mr Patel and Mrs Savani (for the Applicants) were examined on their statements. Mr Cosgrove and Mr Davies (for the Respondents) were also examined on their statements. The Tribunal noted at the hearing that the evidence of Mrs Gunc and Ms McLachlan (for the Applicant and Respondent respectively) was essentially hearsay and opinion, and thus of limited assistance to the Tribunal. The Applicants did not call Ms McLachlan for examination. There was insufficient time to examine Mrs Crawford (the Respondent's representative) on her statement. Mr C. Robinson of Sproules (the Respondent's accountants) was not formally called as a witness but assembled and produced evidence relating to financial matters at the hearing, and answered questions, which were of assistance to the Tribunal. The parties (who were not legally represented at the hearing) took considerably more time to present their respective cases than had been envisaged by the Tribunal Judge giving Directions. The case had been set down for 1 ½ days. At the end of 2 days the parties had still not presented all their evidence, and the Tribunal gave directions for further written statements to be made relating to outstanding issues.

3. After the hearing, the Applicants applied for further hearing time to cross-examine the Respondent's representative as a witness of fact. However The Tribunal refused this request after deciding that the additional cost and inconvenience to all parties and the Tribunal of allowing the cross-examination would be disproportionate to any potentially useful additional evidence likely to be discovered. It also decided that it had already heard enough evidence to decide the case fairly. The Tribunal notes that Mrs Crawford's evidence statement was essentially in support of the Respondent's statement of case as she was the Company Secretary and its representative. The documents in the bundle and evidence from the Respondent's other witnesses were effectively the most cogent evidence of the Respondent's case. Dr Mata for the Applicants did not make a witness statement, but her participation in events and the conduct of Applicants' case was similar to that of Mrs Crawford. No objection to the lack of a witness statement from her was made by the Respondent.

4. Because of the large number of witnesses, the Tribunal agreed to allow examination of some of the professional witnesses part way through the Applicant's case at the end of the first day, in order to release them and allow the parties to keep costs down. The Tribunal also had to explain to the Respondent's representative on the first day of the hearing that deciding not to produce documents ordered by the Tribunal, particularly invoices payable from the service charge, was likely to adversely affect the Respondent's case. However the Tribunal did agree to allow redaction of certain invoices relating to debts and breaches of covenant to protect persons who were not taking part in these proceedings. The invoices were then produced later in the second day.

5. The Appendix to this decision contains extracts of relevant legislation, for ease of reference.

Hearing

6. The parties agreed that the development was an estate of 91 units, 89 of which were held on long leases, and two of which (Nos 51 and 73) were freehold. There were 26 flats in four blocks, 46 two storey terrace houses, 18 three storey houses and one bungalow, with some garages and stores.

Applicant's case

7. The Applicants agreed at the start of the hearing that they would not argue the estimated service charge for 2016, as the issues remaining in dispute would be clarified for that year also. Also the Tribunal explained that Professional fees were not "works" as defined under the Act, (and more particularly in Schedule 4 (Part 1) of the Service Charges (Consultation etc.)(England) Regulations 2003). Qualifying works relate to physical works done to property. Thus the Applicants did not argue further on the Section 20 notice issue.

8. The Applicants submitted that the liability for leaseholders to pay service charge was governed by the Lease, and the Landlord and Tenant Act 1985. Schedule I, Part I paragraph 1(c) of the Lease defined the service charge expenditure as:

"The Total Expenditure" means the total expenditure incurred by the Company (i.e. the Respondent) in any accounting period:

(i) in carrying out its obligations under this Lease

(ii) on the wages of any employees

(iii) on administrative matters and other incidental expenses in undertaking the management of the Estate"

(iv) on the fees of any accountants managing agents or other professional fees

(v) on any reserves which are in the opinion of the Company or its Managing Agents properly and reasonably required for the management of the Estate (including the provision of a reserve on account of anticipated or future expenditure) and in connection with the performance and observance during the whole of the term of the covenants on the part of the Company herein contained

(vi) any expenses necessary for the proper carrying out of the maintenance duties by the Company which shall have been approved in its Annual General Meeting."

Dr Mata referred briefly to 3 cases she was aware of relating to the interpretation of similar words in other leases where the liability to contribute to legal costs was in issue. The decisions had gone against the landlord. However she did not produce copies, and it was difficult for the Tribunal to properly follow her argument. The Tribunal will

refer to the legal position relating to interpretation in its decision, below.

Adjacent Development and Rights of Light

9. The items of expenditure being challenged related to solicitors', planning consultants' and surveyors fees. The fees in issue related neither to administrative matters nor incidental expenses. The sums concerned were not specifically budgeted for in the accounts 2014/2015, although the Respondent was aware of these matters at that time. Thus the sums were effectively spent from the reserve funds noted at 1(c)(v) above as sums properly and reasonably required for the management of the Estate. The fees specifically challenged were professional fees relating to the proposed development of Island Point on Westferry Road, adjacent to Lockes Field Place and relating to rights of light. In the Applicants' view the Respondent's interest in the Estate was negligible as the Leases were 999 years long therefore it had no interest to protect. The Applicants' view was that the Respondent's intervention in these matters seemed to have been the result of Mrs Crawford's personal dislike of the proposed development.

10. The Applicants doubted that it was necessary to appoint professionals to act for the Respondent's interests, in the light of their own research into the background and events. In the event Rights of Light notices were served on only 5 leaseholders (including Mr Patel), apparently as long ago as 2007/8. Another 3 properties were possibly affected. However, from November 2013 the Developer's surveyor had attempted to contact these leaseholders, and subsequently made offers to pay compensation and costs to five only. To the date of the statement of case, only 3 properties had received compensation. Negotiations still continued on other properties. The then Developer had formed the view that the Respondent's attempts to co-ordinate the lessees' response and negotiate on their behalf, were in fact obstructive. The original offers of compensation were made before Anstey Horne became involved. Anstey Horne are chartered surveyors specialising in Rights of Light, employed by the Respondents. Anstey Horne had sent two invoices to the Developer in June and July 2015 for surveys in the sums of £9,260.40, and £11,938.62 respectively, but had given insufficient detail of the properties concerned, and had not clarified this point, so the invoices were not paid. The Developer was only prepared to pay £10,000 plus VAT towards these costs. Also the Applicants could find no reason at all for the Respondent to be incurring professional costs after the end of 2013, as the Rights of Light negotiations should have been paid for by the individual lessees concerned. Nevertheless, circulars continued to be sent to all lessees giving the impression that all lessees' interests were being protected. Further it appeared that a letter dated 30th September 2014 from the Developer's surveyor to Anstey Horne had not been shared with the

lessees who had appointed them. The charges were not covered by the terms of the Lease, and were unreasonable.

Legal Fees relating to Purchase of the freehold (nos 51 and 73)

11. The Applicants drew attention to a decision of this Tribunal dated 25th November 2016, assessing costs under Section 33 of the Leasehold Reform Housing and Urban Development Act 1993 (the 1993 Act), LON/00BG/OC6/2016/0002. The Respondent had applied for legal costs of £40,115. The Tribunal decided that only £7,906 plus VAT was reasonable (£9,748.20). The Tribunal described the balance of the costs incurred as "wholly excessive", and were costs mostly unrelated to the case or were related to negotiations, rather than the actual transfer of the freehold. That Tribunal had noted that the landlord had failed to have regard to the issue of proportionality considering that the right to enfranchise had not been opposed and that a consideration of £100 had been agreed. Only the terms of the transfer had to be agreed and were not particularly complex. It noted that if those terms could not be easily agreed, the Respondent could have referred them to the Tribunal to minimise the costs. In the Applicants' view, the solicitors did not have the necessary expertise to deal with the case. It was unreasonable for the Respondent to have two firms of solicitors representing them in the matter. The Applicants also considered that Mr Jaque's cost indication of £8,000 relating to this matter given orally at a General Meeting on 22nd August 2016, suggested that the Respondent would recover 20% of the costs. However the costs were in fact double that figure and the recovery percentage was much smaller.

12. The Applicants considered that the lessees' liability for these costs should be limited to £9,100 per accounting year, and thus £18,200 was a reasonable sum (based on a charge of £100 per unit per year since a Section 20 notice had not been served). Deducting the sum of £9,487.20 (i.e 7,906 plus VAT) recoverable from Mr Patel, the Applicants considered that the reasonable charge for this work should be £8,713.

Legal Fees for the breach of covenant case (No 37)

13. The Respondent had commenced proceedings in the County Court [for a declaration that the property was let in multiple occupation, orders to provide details of sub-lettings, terminate the sub-lettings, an injunction against further sub-lettings, damages, interest and costs]

14. The Applicants considered that there had been no grounds to bring the County Court case, and that there had been a number of misleading statements made to the shareholders by the Directors of the Respondent to defend their position in this case. Mrs H. Savani and her daughter Mrs K. Savani purchased the [long leasehold] interest in 2003. The property had been

rented as a shared house, as was the case with most sublet properties on the Estate, as the Respondent was well aware. Until 2013 Mrs K. Savani was one of the occupants. On 30th July 2013, there was a small fire caused by cotton wool covered in an oil-based lotion igniting in a bin. The smoke alarm went off and the occupants called the fire brigade. The fire had been extinguished before the fire brigade arrived. Some Directors (including Mrs Crawford) also arrived. The fire brigade notified the local authority of the fire. At the time, there were four tenants in the house, a 5th occupant having left. The Respondent had argued for 12 months that Mrs H. Savani was running an illegal (i.e. unlicensed) House in Multiple Occupation. The Applicants submitted that this was untrue. There were only 4 occupants and a licence was not required. Also there was no breach of the terms of the Lease.

15. The insurers sent a loss adjuster to inspect, and agreed the claim was covered by the Estate policy. The claim was for approximately £6,500. The policy was renewed on 9th September 2013 without major changes and again on 9th September 2014, without any restrictions on No 37. The policy did not exclude cover for houses in multiple occupation, only to unoccupied properties, and to a notification requirement in respect of alterations. The policy was not invalidated for any reasons that the landlord was unaware of. Thus the Respondent's claim that the Estate policy was jeapordised by the fire was not supported by the insurance documentation, nor by the fact that the insurance claim was paid after an inspection on behalf of the insurer. The Applicants also disputed the Respondent's claim that the insurer imposed a £50,000 deductible on No 37. The only evidence of this was an email dated 31st October 2013 from Mr Davies of the Respondent's brokers to Mrs Crawford in which he referred to (undisclosed) emails suggesting a"Franchise Deductible". He mentioned a figure of £50,000 but requested confirmation of the figure, and made it clear the deductible (if any) could be any amount decided by the Respondent. The deductible was imposed a year and one month after the fire (i.e in September 2015) and was, it was submitted, chosen by the Respondent, not the insurer. Dr Mata, who worked in the insurance industry, suggested that the "deductible" was grossly disproportionate to the risk. There was no evidence of it being based on any risk assessment carried out at the property by an independent surveyor, and the liability for the deductible would fall on the Respondent and all its shareholders, not the lessee of No 37. It was absurd. There were more appropriate ways of ensuring that any additional risk fell on No 37. Also Mrs Savani complained that although Mrs Crawford had mentioned that No 37 was now only insured for "catastrophic events" during the period of the dispute, despite repeated requests from Mrs Savani for details, none were ever sent. Mrs Savani, in desperation, had taken out insurance of her own, but she had never received any confirmation of the terms supposedly imposed. Dr Mata submitted evidence of the insurance of several other properties of which she was aware suggesting that the premium for this Estate was too high, however the Tribunal informed her that they were not useful comparables, as they related to different risks.

16. In September 2013 representatives of Tower Hamlets Council inspected the property and advised Mrs Savani to apply for an HMO licence if she intended to have 5 tenants in the property. There was no evidence that the Council proposed to issue a £20,000 fine to either Mrs Savani or the Respondent as alleged by the Respondent. This was confirmed by the Council on 2nd February 2017 in an email to Dr Mata.

17. Mrs Savani applied for an HMO licence. It was opposed by the Respondent which went as far as issuing an application to this Tribunal; LON/00BG/HML/2015/0001 naming the Council as the First Respondent. The Respondent sent a circular to the lessees stating that the Respondent had been successful against the Council. However this was untrue, as Mrs Liu (the relevant officer at Tower Hamlets) and Mrs Savani had confirmed to Dr Mata. They stated that the Respondent had withdrawn the application after discussions with the Council. Mrs Savani carried out works which were approved by the Council on 16th June 2014, (notified to Hendersons and Mrs Crawford at that time) and it issued an HMO licence on 8th October 2014. This was a public record.

18. The Respondent had started the proceedings on 7th November 2014, and had contested them until June 24th 2016, shortly before the substantive hearing. The parties had then agreed to a consent judgement with no order for costs in the case based on an interpretation of clause 3(i)(i) similar to one suggested by Mrs Savani shortly after sending her original Defence in the claim. The Respondent's legal fees were reported at a General meeting of the Respondent on 22nd August 2016 to be about £110,000. The costs Judge considering the case in January 2016, had decided that the Respondent's costs estimates (over £106,000 at that time) were disproportionate in his decision dated 25th January 2016. He imposed a costs estimate of £32,376 on the Respondent. By contrast he had decided that the costs estimate of Mrs Savani's solicitors of £23,337.50 was proportionate. Mrs Savani stated at the hearing that her solicitors had charged her only about £9,500 in total for the case.

19. The Applicants submitted that the long, expensive and complex case against No 37 could have been avoided by an application to this Tribunal for an interpretation of the relevant clauses in the Lease. The Respondent and its representatives failed to exercise reasonable judgement in considering the issue of proportionality between the legal costs and the demands made of the lessees at No 37.

20. The Applicants referred to a number of other matters relating to the running of the Respondent company which are not within the jurisdiction of this Tribunal.

Respondents' case

21. On behalf of the Respondent it was submitted that the costs incurred were reasonable and reasonably incurred.

Adjacent Development 2013 - (Fees paid £22,026)

22. The development originally proposed on the western boundary of the Estate was dense and 12 storeys high with ensuing loss of privacy and right of light. The Respondent instructed planning consultants and rights of light surveyors to protect the interests of leaseholders for loss of daylight amenity. The Respondent could not make any claim for compensation itself, this could only be done by individual leaseholders, however the solicitors could make representations for the leaseholders' surveyors and legal costs to be paid by the Developer in the event of a compensation claim. It was thought that representations made by the Respondent's rights of light solicitors would be more effective than if individual leaseholders made such representations themselves. However before the negotiations were finalised the Developer went into administration. The property was then sold to Charlegrove, which made a further planning application. The Respondent was one of the objectors in 2012 supported by its planning consultants and rights of light surveyors. In 2013 planning meetings held at Tower Hamlets were attended by the Respondent, local councillors and the Respondent's professionals, all of whom spoke on behalf of Lockes Field Place leaseholders. In the autumn of 2013 planning permission was granted for a revised scheme which was generally lower, and not exceeding 6 storeys in height. This was a significant improvement. No challenge had been made by leaseholders to the service charges used for this purpose in the period from 2007 - 2012. During that time the same professionals had been engaged. The Respondent maintained that the use of service charge money for this purpose was well spent as the adjacent development had generally been reduced to 3-5 storeys, and the number of units to 173.

23. The company had made similar objection to another site on the Eastern boundary in 2006-7, using the same specialists. That had resulted in a payment from the Developer to the Respondent of £15,000 for the erection of gates at the front of Lockes Field Place, at no cost to the leaseholders.

Rights of Light 2014 (£11,194)

24. After the grant of planning permission in 2013, the issue of rights to light still remained. Even with the lower development approximately a quarter of leaseholders on the boundary with Island Point were vulnerable. The Respondent instructed its right of light surveyors to carry out their own survey, and discovered discrepancies with the Developer's technical report. The Respondent's surveyors were

instructed to assist leaseholders up to the stage where they could make a direct compensation claim if they wished to do so. During this period the Developer proposed that the Council should acquire the site, which would have resulted in no compensation being paid for rights of light. The Respondent challenged this proposal with the assistance of local councillors, and eventually it was not pursued. Leaseholders were kept informed throughout this process, and it was made clear that any compensation claim made was for their decision only. The Respondent would play no part in the negotiations, and would not be made aware of any compensation award.

Rights of Light 2015 - (£5,487)

25. The rights of light solicitors attended meeting with the Respondent and its surveyors relating to advice received from councillors that compensation awards might be reduced due to the Developer making changes to the planning permission to reduce their potential liability to compensation payments to Lockes Field Place leaseholders.

Legal Fees relating to Freehold purchase and Breach of Covenant claim over No 37.

Other professional fees 2013 - £24,800

26. These fees were incurred by legal costs relating to the freehold purchase and No 37 Lockes Field Place (discussed below)

Other professional fees 2014 - £28,312

27. These fees were incurred relating to the above issues,and relating to a Licence for major structural alterations to one other Estate property

Other professional fees 2015 - £75,538

28. The Respondent submitted that it was faced with several unprecedented legal cases, some from earlier years, and others dealt during 2015.

29. Freehold Purchase - The Respondent, once a valid enfranchisement notice had been received, was entitled to take legal advice and immediately thereafter accepted the claim. The Respondent instructed its solicitors to prepare a draft Transfer deed containing all the covenant in the Lease, including the covenant to pay the appropriate proportion of the service charge. The purchaser refused to accept these covenants. The purchaser applied to this Tribunal, and from then on the work carried out was "directed" by the purchaser who insisted on lengthy correspondence and meetings in an attempt to persuade the Respondent to reduce their demands. The Respondent stood firm as it would have been inequitable for other leaseholders to bear the cost of services for the purchaser's properties, if he had continued to refuse to pay expenses for which he obtained benefit. The purchaser continued to persist with his claim until 2-3 days before the trial was due to take place. The Respondent had to prepare for the trial. The purchaser agreed to accept all the covenants. Transfer was eventually signed

on terms containing terms consistent with the Lease terms and for payment of service charges, thus protecting the remaining leaseholders.

30. The Respondent applied to the purchaser for its costs of the negotiation for the freehold purchase. The purchaser made a derisory offer and the matter had to be referred to this Tribunal. An order for these costs was made and the purchaser paid those costs. The Respondent's solicitors' hourly rate was accepted. It submitted that "The fact that the Tribunal allowed the [Respondent] to claim only a proportion of the total expenses involved was the result of an arbitrary assessment relating to liability of the freehold applicant under the terms of the legislation and was not an indication of the amount of time actually spent on the matter". In the Respondent's view a precedent had been set for any other leaseholder wishing to purchase their freehold.

31. 37 Lockes Field Place - The property was subject to a fire. The fire brigade reported to Tower Hamlets that the property was operating as an unlicensed house in multiple occupation. The leaseholders did not reside at the property. The fire brigade report detailed substantial work required to bring the property up to a safe standard under the HMO regulations. The Respondent received a letter from Tower Hamlets Council advising that the Respondent could face a penalty of £20,000 for permitting the property to be unsafe and operating it as an unlicensed HMO. The conversion to an HMO was in breach of the Lease terms and the insurance terms. The leaseholders consistently denied converting the property to an HMO and that they were not entitled to sublet the property in multiple occupation. They were obstructive in allowing the Respondent's surveyor access. The Respondent had no choice but to commence proceedings against them for a declaration as to the limitation for subletting as provided in the Lease. The Leaseholders maintained in their Defence that they had the right to sublet the property in multiple occupation. Several applications had to be made against them for information. The leaseholders applied for an HMO licence which was granted. The leaseholder had implicated the Respondent in the granting of the licence so the Respondent's solicitors applied for it to be removed as a party to the licence. The leaseholders' conduct caused the substantial expense involved. They admitted they had changed their letting policy a week before proceedings were issued and agreed to let by a method acceptable to the Company and its insurers. If they had done this before proceedings had been issued there would have been no necessity to expend the legal costs. The Respondent only agreed to no order for costs, because it faced the cost of a four day trial. The order made set a precedent for lettings on the estate in future.

32. The Respondent submitted that conversion to an HMO was against the Lease terms because the Lease date preceded the introduction of HMO Regulations thus the existence of HMO does not come within the Lease subletting terms. The existence of an HMO licence does not supersede the Lease terms, the lease terms prevail, as evidenced by the Court Order dated June 24th 2016.

33. The breach of the insurance terms seriously affected the Respondent's building insurance which resulted in the insurer eventually imposing a franchise on this property of £50,000. A copy of the Order dated 24th June 2016 was sent to the insurer which resulted in confirmation of the insurance cover at standard rates with no restriction.

34. Flat on Westferry Road - this property had been converted into an HMO. On inspection it was discovered that unsatisfactory alterations had been made making the property unsafe. The alterations breached the lease terms and insurance terms. The leaseholder evicted all the occupiers and the property was restored to its original design. The Respondent was able to negotiate for repayment of most of its legal costs. This was done to protect all the other leaseholders' properties in the block.

35. House in Front Courtyard - this property had been sublet for many years. The occupiers were frequently changing. The leaseholder's tenant was discovered to be illegally subletting rooms on short term holiday lets in breach of the lease and insurance terms. The leaseholder evicted their tenant and provided evidence of new sub-letting terms which satisfied the Respondent and the insurer. Again this was to protect neighbouring leaseholders.

Other matters

36. The Respondent referred to advising shareholders of the costs in the freehold purchase and No 37 cases, as these had been brought into the public domain by the leaseholders concerned. It also referred to its policy on privacy and data protection, which it considered entitled it to withhold invoices from discovery, which were personal to the Respondent and the leaseholder concerned.

37. The Respondent referred to having disclosed the costs in the first two cases to shareholders in 2015, as they were unprecedented, and sought support for its actions. It considered it had the support of more than 41 leaseholders. It doubted that Mrs Gunc was a leaseholder. The Respondent considered that a decision against it would be against the wishes of the vast majority of leaseholders who had expressed an opinion. Also it submittedd that if a finding was made against it, it was likely that the Respondent would become insolvent resulting in the Estate being unmaintained, to the leaseholders' detriment.

Decision

38. The Tribunal considered the extensive evidence and submissions of the parties. However the crucial issue in this case is the interpretation of the Lease relating to several points. Lease interpretation is based on the following general principles; firstly, the words must be given their plain natural meaning so only if there is ambiguity should the Tribunal look to other rules of construction. Secondly the Lease must be read as a whole so that words are considered in their proper context. Thirdly, in cases of ambiguity the Lease is

construed against the Landlord (in this case the Respondent). It is also worth noting that case law should be considered with caution, as the words considered may be similar, but sit within a different context. Thus a very careful reading of the case report is necessary before relying upon the authority of any case. Copies of the decisions in the cases mentioned by Dr Mata should have been copied to the Respondent and the Tribunal if she wished to use them as authorities. However this point does not appear to be material to the Tribunal's decision.

The Lease

39. Mrs Crawford gave evidence of discussions she had had with a gentleman who had been concerned with the original development, which she understood to have been intended as a family development. However the Lease itself nowhere mentions the concept of a "family development". Thus the reader is left with the relevant terms of the Lease itself when trying to understand what it means. The Lease is slightly unusual in its terms, but for its time (1988) the Tribunal considered that it was quite well drafted. It is a tripartite lease where the Lessor has delegated its obligations to repair and maintain the property to a management company set up for the purpose, and whose shareholders are the Lessees for the time being. Effectively the Lessees collectively control the management. There is also an express obligation for the Lessees to come together and manage the Estate if the Company fails to do so for any reason. To properly understand the intentions of the draftsperson it is necessary to consider those terms which deal with the objectives of the Company, its rights and obligations. The relevant leaseholder's obligations are also set out for ease of reference. The relevant Lease terms provide:

Preamble

(2) The Company has been formed to undertake the future maintenance repair and upkeep of certain parts of the Estate shown edged orange on the Plan annexed hereto (hereinafter called "the Plan")

Clause 1

(e) ..... EXCEPTING AND RESERVING unto the Lessor the Company and all persons authorised by them their assignees and the Lessees for the time being of the remainder of the Buildings:

a) the right to enter upon the Demised Premises ....

b) all rights of support and protection enjoyed by the remainder of the Buildings ...;.

c) the free ... right of passage and running of soil gas and electricity telephone and television reception ... through the Service Media ...

d) all rights easements quasi-easements or reputed easements belonging to or enjoyed by the remainder of the Buildings...

e) the right to erect scaffolding.....

f) the right for the Lessor to alter build or rebuild other parts of the Estate or otherwise deal therewith.....

Clause 3 (the Lessee's covenants)

(d) to obtain all licences permissions and consents and execute and do all works and things and bear and pay all expenses required or imposed by any existing or future legislation in respect of any works carried out by the Lessee on the Demised Premises or any part thereof during the said term and to pay the reasonable fees costs and charges of the solicitor and of the surveyor for the time being of the Lessor in relation to any planning application or approval or otherwise in connection therewith and to keep the Lessor indemnified in respect of any breach or non-observance thereof.

(i) (i) Not to use or permit to be used the demised Premises for any purpose other than as a private residence and private garage for the parking of private vehicles (such term to exclude commercial vehicles and caravans)
(ii)....

(j) not to do or permit to be done in or upon the Demised Premises anything which may be or become a nuisance or annoyance or cause damage or inconvenience to the Lessor and its successors in title to the Estate or occupiers for the time being thereof or any part thereof

(k) not without the consent in writing of the Lessor to make any structural alterations or additions to the Demised Premises or to make any alterations in the external appearance of the Demised Premises

(o) not to do or permit to be done any act or thing which may render void or voidable any policy of insurance effected by the Company in accordance with its covenants in that behalf hereinafter contained or which may cause the premium payable in respect thereof to be increased

(t) to pay all expenses (including solicitors costs and surveyors fees) incurred by the Lessor incidental to the Preparation and service of any notice under Section 146 of the Law of Property Act 1925 notwithstanding forfeiture is avoided otherwise than b[y] relief granted by the Court

4. [Lessee's covenants]
(c) as from the date hereof to pay to the Company the Interim Charge and the Service Charge in the Manner specified in the Schedule hereto

6. The Company hereby covenants with the Lessee henceforth to observe and perform the covenants and other conditions set out in Part II of the Schedule hereto

7. It is hereby agreed and declared as follows:-
(a) in the terms set out in Part I of the Schedule hereto
(b) .....

Schedule I, Part I

paragraph 1

(c) *"The Total Expenditure" means the total expenditure incurred by the Company (i.e. the Respondent) in any accounting period:*

(i) in carrying out its obligations under this Lease

(ii) on the wages of any employees

(iii) on administrative matters and other incidental expenses in undertaking the management of the Estate"

(iv) on the fees of any accountants managing agents or other professional fees

(v) on any reserves which are in the opinion of the Company or its Managing Agents properly and reasonably required for the management of the Estate (including the provision of a reserve on account of anticipated or future expenditure) and in connection with the performance and observance during the whole of the term of the covenants on the part of the Company herein contained

(vi) any expenses necessary for the proper carrying out of the maintenance duties by the Company which shall have been approved in its Annual General Meeting."

Part II [Company covenants to repair and maintain the Estate]

3. To insure and (unless such insurance shall be vitiated by any actor default of the Lessee) to keep insured at all times during the said term the Buildings and such other areas as the Company decides to insure for such sum as shall from time to time represent the full reinstatement value of the Buildings against loss or damage by fire and such other normal household risks including public liability in some insurance office of repute....

15. (a) To employ such staff (if any) whether whole or part time as the Company may consider reasonably necessary to carry out any of the Company's obligations

(b) To employ from time to time such contractors or workmen as the Company may consider reasonably necessary to enable the Company to meet its obligations hereunder

(c) To enter into such service or maintenance contracts as may be necessary with regard to maintenance and repair of any apparatus or equipment now or hereafter within the Buildings for which the Company may be responsible

16. To maintain at all times with such insurance company insurance against third party claims resulting from the use of any Buildings on the Estate by the Lessee his friends visitors workmen employees and any other Lessee or persons whatsoever"

40. Fees incurred relating to adjacent development, and Rights to Light

The Tribunal decided that taken together in their proper context, the service charge provisions in Parts I and II of the Schedule restrict the items within the

Respondent's obligation, and for which it can charge, to items relating to the physical repair, maintenance, insurance, and security of the Estate. There appeared to be no "sweeping up" clause allowing for other matters to be pursued. The Lease is not defective in that respect, since Paragraph 1 (vi) defining the Total Expenditure gives specific power to charge for maintenance functions (presumably not dealt with elsewhere) approved by the Company in General Meeting. Also, and unfortunately for the Respondent, the Company's obligations under the Lease are consistently restricted to items of maintenance and repair. Preamble (2) makes this very clear, and that scheme is consistently referred to in the rest of the Lease. The Tribunal understands that the Respondent is now also the Lessor, but the Lease just does not provide for expenditure on non-maintenance items. While it is highly likely that the Respondent's Articles of Association give it power to do other things, the costs of doing so must be dealt with separately from the Total Expenditure allowed by the Lease. Thus the expenditure on protecting the Company's and Lessees' wider interests relating to the nearby development (while it might have been well meant) cannot be charged to the service charge.

41. The Tribunal decided that the charges for professional fees and other expenses in connection with the adjacent development and the Rights to Light advice were unreasonably incurred and thus totally unreasonable in amount.

42. The Respondent was concerned that any finding that if any charges in dispute were not chargeable to the service charge, it might become insolvent. There are two points the Tribunal should make; firstly that is a "personal circumstance" which the Tribunal is not entitled to take into account in a Section 27A application; secondly the Respondent is almost certainly entitled to make up any shortfall if it resolves to make a call on its shareholders, in accordance with the Company's Articles of Association. Individual shareholders would be ill-advised to refuse, especially since they should be well aware of the reasons for the expenditure by now, although some may be inclined to enquire further into how the Respondent fell into error, particularly since it had access to legal advice. The Tribunal notes that it brought up the matter of a call with Dr Mata at the start of the hearing. Dr Mata accepted that was a likely result, and indicated that if it was properly made the Applicants would have to accept it. Her point was that it was not properly chargeable through the service charge and the Tribunal has found that Dr Mata was correct. The point is not one of mere detail; the consultation procedure before making the charge is quite different, and is intended to protect the interests of the shareholders and officers of the Company.

Legal Fees relating to the Freehold Purchase

43. The Tribunal considered the evidence and submissions. One of the Applicants submissions was essentially that the Respondent should not have concerned itself with the terms of the Transfer. However that does not stand up to reasonable consideration. The Freehold Applicant and the Respondent were obliged to use a statutory procedure, which is reasonably familiar to

most experienced leasehold conveyancing solicitors, and is quite common in London. The procedure allows the Landlord to have its reasonable costs of investigating validity of the claim, and the conveyancing costs necessary for completing the Transfer. A brief reference to Woodfall on Landlord and Tenant, (and most other leading textbooks on leasehold conveyancing) would alert the reader to the fact that extensive negotiation of the terms of the Transfer is not chargeable to the Freehold Applicant. The reader would also discover that there are well-established principles for deciding what terms are appropriate for inclusion in the Transfer. The Landlord is not entitled to demand that all the lease covenants be inserted, but only those which are genuinely required to protect the Landlord's estate and interests. The Freehold Applicant must accept some covenants, but only if they are reasonably required by the landlord. If the parties cannot agree, then they are entitled to make an application to this Tribunal to determine the matter. It is not difficult, and relatively cost-effective.

44. The evidence before the Tribunal was that the Respondent (with legal advice) quickly admitted the claim. Initially it asked for a premium of approximately £145,000, but quickly agreed a nominal premium of £100 (which is a consequence of the statutory valuation imposed by the 1993 Act). Then things went wrong. The evidence was that the Respondent wanted all the lease covenants to be inserted in the draft Transfer, and the Freehold Applicant would accept none. After a lengthy negotiation involving face to face meetings, the Freehold Applicant applied to the Tribunal for a determination. The Transfer terms were finally agreed shortly before the hearing. The legal costs statutorily payable to the Respondent could also not be agreed despite complex negotiations, and the Tribunal determined those costs in a decision dated 24th November 2016 after a costs hearing. The Tribunal's comments on the Respondent's proposed costs (of £40,115 including VAT) speak for themselves at para. 16 of the decision;

"....It is our view that in incurring this level of costs, the landlord has failed to have regard to the issue of proportionality. In reaching this decision we had regard to the fact that the right to enfranchise had not been opposed, that a consideration of only £100 was agreed at the outset, that the only matters in dispute were the terme of transfer as to insurance and service charge and the fact that this matter was not particularly complex. Also there has to be some element of commerciality in the consideration of how to proceed. If matters could not easily be resolved by the usual course of negotiations, then the Applicant could have availed themselves of the services of the Tribunal to consider the substantial issues."

45. The Tribunal also noted that some of the costs related to other issues and did not concern the validity of the notices. There was also over-reliance on Counsel and experts. It described the costs claimed as "wholly excessive". The Tribunal fixed the Respondent's costs at £7,906 plus VAT, i.e £9,487.20 inclusive of VAT. In that connection, this Tribunal deprecates the remark by the Respondent (at para.29 above) that the Tribunal making the costs decision

made an "arbitrary assessment". Its fully reasoned decision was made after a hearing where the Respondent was represented by two solicitors and the Freehold Applicant was represented by Counsel. Such a remark was unhelpful, inaccurate, and tends to damage the Respondent's credibility.

46. The Tribunal decided that there was no entirely satisfactory way of calculating a reasonable charge to the service charge account for the work done. It thus adopted a broad brush approach. The Tribunal fixing the costs decided on a figure totalling £9,487.20. It considered £40,115 wholly excessive. Nevertheless, this Tribunal recognises that, as with all costs decisions, the costs are fixed by the relevant judicial body with the benefit of hindsight. This advantage the professionals doing the work at the time do not have. The Tribunal decided that a reasonable fee on a solicitor and own client basis for the work was £12,000 inclusive of VAT, which in practice represents a 25% uplift on the costs fixed by the previous Tribunal.

Sublettings at No 37

Is letting as an HMO a breach of the Lease?

47. There were many claims and counter-claims in the evidence. Again, however, the Tribunal decided that it was reasonable, and within the Company's obligations under the Lease to manage the Estate (see Para 1 (c) (iii) of the Schedule), to investigate and take action over matters which might increase or invalidate the insurance. Both parties appeared to believe that the concept of HMOs post-dated the Lease. In fact the concept dates to at least 1970, and probably earlier. In any event, the Respondent's submission that letting a property as an HMO breached the Lease is not supported by the terms of the Lease itself. The relevant words in Clause 3(i) (i) state; *"not to use or permit to be used the demised Premises for any other purpose than as a private residence"*. Residence, used in the singular is important. One family living at the property would certainly fulfil this covenant. In the Tribunal's view a loose group of unrelated people who occupied and left the property at different times would not do so, as each of the group might constitute a different household for the purposes of identifying a House in Multiple Occupation. However a group of unrelated people who sign a single joint tenancy agreement probably would fall within the terms of sub-clause (i), although the criteria used in legislation relating to HMOs might well identify such a group, or some of them, as living in different households, rather than a single household. It is a matter of fact and degree. The parties in the No 37 litigation finally settled their differences by agreeing a formula which they consider to be within the terms of the Lease. The Tribunal agreed with that formula.

Insurance

48. The parties differed on whether the use of the property prior to the fire, and up to the time when the Insurers agent inspected and was satisfied, was in breach of the Lease. It was not clear to the Tribunal from the submissions whether an independent point was being made that the HMO use increased

the premium or in some other way prejudiced the Estate. However the Tribunal decided that the Respondent must insure for all uses of the premises which are permitted under the Lease. Mr Davies stated in evidence that use as HMOs significantly reduced the pool of insurers prepared to quote, but if such a use is permitted by the Lease, then it must be insured, otherwise the Respondent would be derogating from the Lease terms. To the prejudice of any lessee affected. Clause 3(o) refers to acts which render the insurance void or voidable, or increase the premium. This must be read as conditional upon the landlord insuring for all uses permitted by the Lease. The insurance in place in 2013, 2014 and 2015 may or may not have covered use as what might be described as an HMO authorised by the Lease. Mr Davies thought that it did not, but the insurance company met the claim made by Mrs Savani after the fire in 2013. In the Tribunal's view, there were some curious aspects to the history of the insurance dispute. The fire occurred in August 2013. The insurers were informed in September 2013, and the insurance was renewed by AVIVA in October 2013. The Council approved the HMO works on 16th June 2014, and issued HMO licence on 8th October 2014. The Respondent commenced its proceedings on 7th November 2014. The insurance deductible of £50,000 was imposed in October 2014, (although the Tribunal was not entirely certain it had ever been imposed from a comment made by Mr Davies). He said the deductible had been removed after an inspection of the property on 12th August 2015. He was clear that the deductible was not removed because the property had a single HMO in operation, but because of the inspection. Although Mr Davies was adamant that the £50,000 deductible was not Mrs Crawford's idea, there was an email in the bundle where he suggested it to Mrs Crawford, and asked the Respondent to decide the amount, or whether it wanted the deductible.

49. The parties channelled much energy into trying to blame each other for the delays and resulting escalation of costs in the litigation, but again a court has already ruled on the question of reasonable costs in this case. On 25th January 2016 the Respondent estimated that its costs for a full hearing of this case would be £125,967.45, which District Judge Langley considered disproportionate, and reduced the estimate to £32,376. By contrast, he approved Mrs Savani's solicitors' estimated costs for trial at £23,337.50. Mrs Savani stated in evidence that her final bill was approximately £9,500.

50. The Respondent submitted in this case that the professional fees charged to the service charge in 2014 totalled £28,312, spent on the Freehold purchase and the No 37 litigations plus solicitors fees for an unrelated Licence for Alterations. The invoices seen by the Tribunal for No 37 totalled £28,408.60 in 2014, and £37,115 in 2015. The Applicants understood from a Company communication that the total costs expected in this case are £110,000.

51. Whatever the rights and wrongs of the parties in this case, the Respondent's costs are disproportionate. The result was a consent judgement which binds no one except the parties to it. As noted above, a client should

reasonably expect a larger bill than the one approved by the Court. Again using a broad brush approach, the Tribunal noted that without a full hearing, the costs would be significantly less than the court estimate, perhaps half of £32,376, say £16,250 and then add back 25%, say £24,375. The Tribunal decided that the sum of £24,375 was a reasonable charge under the Lease.

Section 20c Application

52. The Applicants had applied for a Section 20C order to limit the landlord's costs incurred in connection with this application. In the circumstances of this case where the landlord had been unsuccessful to a greater or lesser degree , the Tribunal decided that none of the landlord's costs of this application should be considered relevant costs chargeable to the service charge.

Tribunal Judge: Lancelot Robson 7th August 2017

Appendix

Landlord & 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.

20 Limitation of service charges: consultation requirements

(1)Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—

(a)complied with in relation to the works or agreement, or

(b)dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.

(2)In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3)This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4)The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a)if relevant costs incurred under the agreement exceed an appropriate amount, or

(b)if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5)An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6)Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7)Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.

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 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.

(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

---