12880

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AR/LSC/2018/0018**
Property	:	**39 Holly Court, Dolphin Approach, Romford, Essex, RM1 3AP**
Applicant	:	**Mr Daniel Daly**
Representative	:	**In Person**
Respondent	:	**Swan Housing Association**
Representative	:	**Ms Sally Turner (Leasehold Management Officer)**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Judge Robert Latham** **Mr John Barlow FRICS**
Date of Hearing and Venue	:	**31 May 2018 at** **10 Alfred Place, London WC1E 7LR**
Date of decision	:	**6 July 2018**

DECISION

Decision of the Tribunal

(1) The Tribunal has determined the interim service charges demanded by Vision for the accounting period 1 August 2016 to 31 July and which Swan are entitled to pass onto Mr Daly pursuant to Clause 7.2 of his lease:

(a) the sums which are both payable and reasonable are discussed at paragraphs 55 to 60 and 62 to 70.

(b) The sums which are disallowed are discussed at paragraphs 54 and 61.

(2) The Tribunal has disallowed all the expenses incurred by Swan for the period 1 April 2016 to 31 March 2017. The Tribunal is satisfied that none of these sums are payable pursuant to the terms of Mr Daly's lease.

(3) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to Mr Daly through any service charge.

(4) The Tribunal determines that the Swan shall pay Mr Daly £250 within 28 days of this decision in respect of the reimbursement of the tribunal fees which he has paid.

Introduction

1. By an application issued on 9 January 2018, Mr Daly, the tenant, seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the Act") as to the amount of service charges payable by him in respect of the service charge years 2015/6; 2016/7; and 2017/8.

2. Mr Daly is the leaseholder of a one bedroom flat at Holly Court, Dolphin Approach, Romford, Essex, RM1 3AP ("the flat"). His landlord is Swan Housing Association ("Swan"). On 19 December 2007, Mr Daly acquired his interest under a shared ownership scheme. He has a 35% interest in the equity of his flat, but pays 100% of the service charge. He also pays a significant rent.

3. Holly Court is an eight storey purpose built block of social housing which was constructed in 2006. There are 40 flats: 20 one-bedroom flats are occupied under the shared ownership scheme; 20 two-bedroom flats are occupied by assured tenants under social tenancies. Swan is a "registered social landlord". Swan was formed in 1994 and manages over 11,000 homes in Essex and East London.

4. There have been three previous tribunal determinations involving these parties, namely:

(i) LON/00AR/LSC/2010/0025 (21 July 2010) ("2010/0025");
(ii) LON/00AR/LSC/2013/0069 (24 May 2013) ("2013/0069"); and
(iii) LON/00AR/LSC/2017/0269 (24 September 2017) ("2017/0269").

5. This litigation has arisen because Swan has not had any adequate regard to the terms of the lease under which Mr Daly occupies his flat in determining the service charges that they have demanded from him. It is trite law that a landlord can only demand payment for services which it has covenanted to provide under a lease and in accordance with the terms of that lease. Any landlord must also have regard to the statutory protection which Parliament has provided for the protection of tenants such as Mr Daly. This latest application is yet a further example of Swan's failure to have regard to these basic principles.

6. The contractual situation is complex and derives from a Section 106 Planning Agreement, dated 3 December 2003, agreed between the London Borough of Havering and the developers in respect of a mixed development. Holly Court is one of seven residential blocks now known as "The Axis, Mercury Gardens, Romford". Holly Court is the only block of social housing. The other residential accommodation consists of 189 luxury flats in six private blocks, namely Maxim, Exon, Lexicon, Axiom, Zetex, and Index. These lessees have the benefit of a gym, a concierge reception office and a communal post box area.

7. The residential blocks are built upon a podium below which there is a large ASDA supermarket. There are a number of different leases, including:

(i) The Superior Lease: Barratt Homes Limited ("Barratt") developed the residential units and derived their title under a lease, dated 19 January 2006, granted by Liberty One Limited and Liberty Two Limited.

(ii) The Head Lease: Swan derives their title from a lease dated 24 February 2006. This is a tripartite lease between Barratt ("the Lessor"), Swan ("the Lessee") and Peverel OM Limited ("the "Manager"). The Manager is responsible for keeping in repair the structure and exterior of Holly Court and maintaining the external common parts. The Manager is also responsible for maintaining a lift from Dolphin Approach to the podium and for the domestic cold water supply.

(iii) The Applicant's Lease: Mr Daly derives his title under a lease dated 19 December 2007 granted by Swan. The Manager is not a party to this lease. There is no covenant by Swan, as "landlord", either to repair Holly Court or to maintain the common parts. The landlord rather covenants to enforce the Head Landlord's covenants. The "service charge" which Mr Daly, as "leaseholder", is required to pay are not the costs incurred by Swan, but rather a reasonable proportion of the "maintenance expenses" incurred by the Manager as defined by the Head Lease. Swan is restricted to recovering specified "administrative costs" and "maintenance expenses".

8. Rather than grapple with these complexities, Swan have chosen to manage this block as they manage their other properties let on long leases. Thus they operate their service charge year from 1 August to 31 July, albeit that the Manger operates on the basis of a service charge year from 1 April to 31 March. They arrange for their in-house team to maintain the common parts and lifts as they would on any other estate. They purport to levy a "service charge" albeit that the lease makes no provision for this.

9. Given the approach that Swan has adopted, it is unsurprising that Mr Daly has had to turn to this Tribunal on a fourth occasion. On each occasion, Swan has made concessions to Mr Daly to settle his claims. The other shared ownership lessees have not been party to these applications and have not, apparently, derived any benefit from them. Swan has failed to address the fundamental problem, namely that it is not managing Swan Court in accordance with the terms of the shared ownership leases. The current application again only involves Mr Daly. Swan will need to consider the consequences of this determination for their other lessees. At the end of this determination, we consider the next steps.

Preparations for the Hearing

10. On 11 February 2018, the case was listed for a Case Management Hearing ("CMH") before Judge Carr. Ms Turner described this to us as a mediation. It was not. It was rather an opportunity for the Tribunal to explore with the parties the issues in dispute and to agree a proportionate procedure to determine these.

11. Judge Carr adjourned the CMH to 27 March to enable Swan to take the steps which had been required by the Tribunal in its determination of 24 September 2017 in 2017/0269:

(i) The Tribunal had determined that no service charges were payable for the year 2015/6 as there had been no lawful demand for payment accompanied by the requisite Summary of Rights and Obligations. Over the subsequent five months, Swan had taken no steps to make a lawful demand for any service charges payable in 2015/6; 2016/7; 2017/8 or 2018/9. On 27 March 2018, Swan prepared revised service charge demands for the years 2016/7; 2017/8 and 2018/9. On 29 March, Swan e-mailed these to Mr Daly.

(ii) The Tribunal had noted that Swan had apportioned any service charge equally between all 40 tenants (i.e. 2.5% each) albeit that the flats differed in size, there being an equal number of both one-bedroom and two-bedroom flats. Judge Carr observed that "it appeared that neither party had given this proportion much thought". Swan has now reviewed this and is proposing to apportion any service charge according to the floor area of each flat, thereby reducing Mr Daly's liability from 2.5% to 2.0465%.

12. Mr Daly complained forcefully about Swan's failure to comply with the previous Tribunal's decision. He had had to take time off work to attend the hearing. Judge Carr alerted him to his right to seek costs pursuant to Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules"). Judge Carr indicated that Mr Daly need not attend the adjourned CMH.

13. On 27 March, the Tribunal issued Directions, pursuant to which:

(i) On 10 April, Mr Daly served his Statement of Case (at p.141-6).

(ii) On 24 April, Swan served its Statement of Case (at p.149-52). The Directions required the landlord to set out the relevant service charge provisions in the lease and any legal submissions in support of the service charges claimed where liability is in issue. Swan overlooked this important Direction.

(iii) Both parties have completed a Schedule setting out their respective cases (at p.153-9).

(iv) Swan has prepared a Bundle of Documents. The Directions had originally placed this obligation on Mr Daly, but he obtained a further Direction transferring this task to Swan. The Directions provided that the Bundle should include (a) the application; (b) all relevant invoices in relation to the disputed costs; (c) all relevant accounts; and (d) the leases.

The Hearing

14. The Applicant appeared in person. He is a trainee accountant with Pearl and Coutts, commercial property specialists. The Respondent was represented by Ms Sally Turner, a Leasehold Management Officer. She was accompanied by Ms Gill MacDonald, a Senior Leasehold Management Officer. The Tribunal heard evidence from the three of them. The Tribunal did not consider that an inspection was necessary.

15. It was unfortunate that Swan was not legally represented. Ms MacDonald had been present at the hearings in 2010/0025 and 2013/0069; Ms Turner at the hearing in 2017/0269. Both Ms Turner and Ms MacDonald had been present at the Directions hearings. Both did their best to assist the Tribunal. However, it was apparent that neither had the training nor the experience to grapple with the complexities of this case. It is regrettable that the senior management at Swan put them in this invidious position given the background to this litigation.

16. This Tribunal is used to dealing with litigants in person and seeks to ensure that they are able to put forward their best case. However, there are limits as to the extent to which a Tribunal is able to step into the arena. Mr Daly proved himself adept at identifying the weaknesses in the Respondent's case, points to

which Ms Turner was ill-equipped to respond. At the commencement of the hearing, Mr Daly showed little concern for the fact that he had avoided paying service charges for a number of years. He later sought to play this down.

17. At the commencement of the hearing, the Tribunal raised the following concerns with Ms Turner:

(i) The Bundle did not include the application form, the three previous Tribunal decisions or a complete set of Mr Daly's lease. The Tribunal were able to extract these documents from the Tribunal file.

(ii) The Bundle only included an undated working draft (with track changes) of the Head Lease. Mr Daly stated that he had never been provided with a copy of the executed lease, albeit that his lease makes express reference to its terms and can only be construed by reference to it. In 2010/0025, the Tribunal discusses the terms of the Head Lease and records that it is dated 24 February 2006. In 2013/0069, the Tribunal in 2013/0069 makes no reference to it, but refers to "the paucity of evidence presented" by both parties. In 2017/0269, the Tribunal was only provided with the draft copy.

(iii) The revised service charge demand for 2016/7, together with the appropriate Summary Rights and Obligations, is at p.232-238. It is dated 24 April 2018. It was apparent to the Tribunal that this document was computer generated on 24 April 2018 and that Swan had e-mailed the demand to Mr Daly on 29 March 2018. Ms Turner was adamant that it was correctly dated "24/04/2018". She maintained this position, despite being referred to the Respondent's Statement of Case (at p.151) in which Swan refer to the relevant demands being issued "via e-mail on 29 March".

18. The Tribunal adjourned the hearing for 30 minutes to give Swan the opportunity to review its position. The Tribunal suggested that Swan might wish to arrange for a legal advisor to attend and would adjourn the hearing until 14.00 to enable the advisor to attend.

19. When the Tribunal resumed, Ms Turner asked the Tribunal to proceed with the hearing. The Tribunal ensured that all parties had a full copy of Mr Daly's lease. Ms Turner provided the Tribunal with a copy of the service charge demand for 2016/7, dated 27 September 2017, which is attached to the application form and upon which she contended that the Schedule was based. She only conceded towards the end of the hearing that the Schedule was rather based on the demand at p.233 of the Bundle.

20. At the end of the hearing, the Tribunal gave further directions in respect of the following:

(i) The parties were directed to clarify the date of the relevant service charge demands. After the hearing, Mr Daly forwarded Swan's e-mail dated 29 March

which attached the relevant service charges demands for 2016/7 (at p.231-8); 2017/8 (at 241-6) and 2018/9 (at p.149-152). All are dated "26/03/2018".

(ii) Swan was directed to provide a copy of the executed Head Lease, dated 24 February 2016 and a chart of the chain of the current property ownership. On 6 June, Swan provided these.

(iii) Mr Daly indicated that he intended to make an application for penal costs pursuant to Rule 13(1)(b) of the Tribunal Rules. Mr Daly was required to file any written submissions in support of his application by 7 June. No such submissions have been filed.

On 25 June, the Tribunal reconvened to consider its decision.

The Issues in Dispute

21. Ms Turner confirmed that Swan is no longer seeking to recover any service charges for the year 2015/6 as the Respondent accepts that these are statute barred by Section 20B of the Act. Swan has agreed to waive the sum of £1,675.92. Secondly, Swan has also recomputed the service charges payable for the years 2007/8 to 2014/5 on the basis that Mr Daly's contribution should only be 2.0465%, rather than 2.5%. Thirdly, Swan has removed the Estate Management Fee and Vision's end of year actual for 2014/5. These result in adjustments totalling £3,833.22 (see p.139).

22. The parties confirmed that the only issue which the Tribunal is required to determine is the service charges payable for 2016/17 as set out in the Schedule at p.153. In the light of our findings, the parties will review the service charges payable for 2017/8 and 2018/9.

The Leases

The Superior Lease

23. The Superior Lease, dated 19 January 2006, is between the freeholder, Liberty One Limited and Liberty Two Limited (described as "the Landlord"), and Barratt ("the Tenant"). The lease relates to the "Residential Premises, Dolphin Approach, Romford, Essex".

24. On 19 June 2008, Fairhold Properties No.5 Limited acquired Barratt's interest as tenant for £600,960. It would seem that Barratt disposed of their interest shortly after the development was completed and subleases had been granted in respect of all the private residential flats. We understand that these would have been tripartite leases between Barratt (Lessor), Peverel OM Limited (Manager) and the individual lessees.

25. On 27 April 2015, LSREF3 Tiger Romford S.A.R.L. acquired the freehold interest for £55.5m. This is a company which is incorporated in Luxembourg.

26. There are two separate leases between Liberty One Limited and Liberty Two Limited to (i) ASDA in respect of the retail premises (dated 31 October 2008) and (ii) EDF Energy Networks (EPN) Plc in respect of an electrical sub-station chamber. These are not relevant to the current application.

The Head Lease

27. The Head Lease, dated 24 February 2006, is a tripartite agreement between Barratt (described as "the Lessor"), Swan ("the Lessee") and Peverel OM Limited ("the Manager"). Since 19 June 2008, the Lessor's interest has been held by Fairhold Properties No.5 Ltd. Since December 2013, the interest of the Manager has been held by Vision Property and Estate Management ("Vision").

28. The lease relates to "Plots 190-299 (inclusive), The Axis, Dolphin Approach, Romford". The lease was granted in anticipation that Swan would construct the residential units at Holly Court. The term granted is 155 years and the lessee pays a rent of £8,400 per annum.

29. The "Estate" is defined as "the land described in the First Schedule known for development purposes as The Axis, Dolphin Approach, Romford".

30. The "Block" is defined as "the Building to be constructed in which the demised Premises are situate or are to be situate".

31. The "Demised Premises" are defined as "Plot Numbers 190-229 (inclusive) and all areas within the Block not comprised within the Dwellings as more particularly described in the Third Schedule".

32. The "Maintained Property" is defined as "those parts of the Estate which are more particularly described in the Second Schedule and the maintenance of which is the responsibility of the Manager". This includes the structure and exterior of the "Building" which in turn is defined as the building "to be constructed, or in the course of construction".

33. The "Maintenance Expenses" are defined as the moneys actually expended or reserved to periodical expenditure by or on behalf of the Manager or the Lessor in carrying out the obligations specified in the Sixth Schedule. The Lessee's contribution towards the Manager's "maintenance expenses" varies depending upon whether these are Part A "Estate Costs" – 17.47%; Part B "Block Costs" – 100%; Part C "Passenger Lift Costs": 100% or Part D "Domestic Cold Water Costs" – 100%.

34. The nature of these maintenance expenses are set out in Parts A to E of the Sixth Schedule. Part B "Block Costs" imposes a wide ranging covenant by the

Manager to keep in repair the structure and exterior of the Block and to maintain the external common parts of the Block.

35. The Seventh Schedule relates to the Lessee's proportion of the various maintenance expenses. Paragraph 5 requires the Manager to serve certified accounts on the Lessee of the maintenance expenses. The Manager currently prepares accounts for the year to 31 July. Paragraph 6 permits the Manager to demand an interim service charge on 1 February and 1 August of each year in respect of the estimated expenditure for the year. At the end of the year, there is to be a reconciliation between the actual and the estimated expenditure. If there is a surplus, this is to be credited against future payments or transferred to the reserve fund. If there is a shortfall, the Lessee is obliged to pay the balance.

The Applicant's Lease

36. On 19 December 2007, Swan (described as "the Landlord") granted Mr Daly ("the Leaseholder") a lease for a term of 125 years. Neither the Head Lessor nor the Manager is a party to this lease albeit that it refers to the Head Lease and incorporates terms used therein. It is impossible to construe the respective rights and obligations arising from the lease without sight of the Head Lease. Mr Daly stated that when he was granted his lease, he was not provided with a copy of the Head Lease.

37. Mr Daly has a shared ownership lease and has a 35% interest in the equity. The Leaseholder is required to pay a "ground rent" to the Head Landlord (defined as "Barratt Homes Limited"). It seems that this has neither been demanded nor paid. He is further to pay a "specified rent" to Swan which is calculated in accordance with the Fourth Schedule. The specified rent is currently £366.77 per month.

38. The preamble of the lease contemplates that the Landlord intends to grant shared ownership leases in respect of all the flats in the block. This has not occurred in practice. The 20 one-bedroom units are let under shared ownership leases, the 20 two-bedroom flats are let under assured tenancies at social rents. Ms Turner was unable to help us with the social rents which are payable by the assured tenants in Holly Court.

39. Clause 3 sets out the extensive covenants imposed on the Leaseholder. This includes a covenant to keep the interior of the flat in repair including the glass in the windows and the doors.

40. Clause 5 sets out the covenants imposed on the Landlord. These are very limited. The Landlord covenants to enforce the Head Landlord's covenants in the Head Lease to keep the Building and Estate insured and in repair. There is no obligation on the Landlord to repair or maintain the common parts of the Building, namely "the property as defined as the Block under the Head Lease".

41. Clause 7 relates to the "Service Charge". This includes the following:

"7.1 In this clause "Service Charge" shall mean a reasonable proportion (as the Landlord shall determine unilaterally) of the Maintenance Expenses as defined in the Head Lease.

7.2 The Leaseholder covenants to pay the Service Charge and shall be subject to the service charge provisions contained in the Head Lease as if those provisions had been set out in full herein save that the Landlord shall decide what proportion of the total charge payable under the Head Lease shall be applicable to the Premises.

...

7.6 If in the opinion of the Landlord it shall at any time become necessary or equitable to do so the Landlord may increase or decrease by written notice to the Leaseholder the proportion payable pursuant to clause 7.1 so that the amount payable by the Leaseholder shall be proportionate to the number and type of dwellings the owners or lessees of which are obliged to pay monies towards the Service Charge."

42. Clause 7.3 makes separate provision for the Leaseholder to pay the Landlord "Administrative Costs":

"7.3 In addition to the proportion of the Service Charge under the Head Lease the leaseholder covenants to pay all reasonable fees charges and expenses payable to the Surveyor any solicitor accountant surveyor valuer architect or other person whom the Landlord may from time to time reasonably employ in connection with the management or maintenance of the shared ownership leases in the Building including the computation and collection of rent (but not including fees charges or expenses in connection with the effecting of any letting or sale of any premises) including the cost of preparation of the account of the Service Charge and if any such work shall be undertaken by an employee of the Landlord then a reasonable allowance for the Landlord for such work."

43. By Clause 3(2)(c), the Leaseholder also covenants to pay a "Management Charge" which is defined as:

"the reasonable costs of the Landlord in relation to the collection computation and review of rent and the maintenance of proper rent records and the production of proper rent accounts divided by the number of Leases granted by the Landlord out of its reversion (but excluding those Leases where the relevant percentage has been reduced to nil) The certificate of the Landlord's Surveyor as to the number of Leases granted net of those where the relevant percentage has been reduced to nil shall be conclusive."

44. As is expressly stated in Clause 7.5, any such "Administrative Costs" or "Management Charge" are service charges for the purposes sections 18 to 30 of the Act.

The Service Charge Demand for 2016/7

45. The Tribunal is required to determine the payability and reasonableness of the "Service Charge Actual 2016-7". The demand is at p.231-234. The relevant Summary of Rights and Obligations is at p.237-288. The Tribunal makes the following observations on this demand:

> (i) The demand purports to be dated "24/04/2018". The Tribunal is satisfied that the document in the Bundle is computer generated and that the correct date is "26/03/2018". On 29 March 2018, Ms Turner e-mailed this to Mr Daly.
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> (ii) A demand was originally sent, dated "27/09/2017", a copy of which is annexed to the application form. This was not accompanied by the requisite Summary of Rights and Obligations. This was premised on Mr Daly's contribution being 2.50%.
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> (iii) The significant change to the service charge demand which we are asked to consider is that it is computed on the basis that Mr Daly's share is 2.0465% rather than 2.5%. However, there are a number of other changes in the demand which are not relevant to the issues which this Tribunal is required to determine.
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> (iv) The letter (at p.231) states that this is a formal demand for payment and sets out the estimated costs of providing services. However, the demand is headed "Revised 2016/7 Actual Spend".

46. Ms Turner informed the Tribunal that the service charge demand is made up of two elements:

> (i) The "MA" items: Whilst the service charge demand refers to these being "actual spend", they are rather interim service charges for the financial year 1 August 2016 to 31 July 2017, which Vision had demanded from Swan in respect of two six monthly interim service charge payments of £16,712.50. These demands were dated 1 August 2016 (at p.259-260) and 5 January 2017 (at p.269-273), albeit that the demands were sent some days in advance of these dates. On 18 July 2016 (at p.261-7), Vision had sent Swan the Service Charge Budget on which these estimates had been based.
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> (b) The "SWA" items: These are service charge expenses which had been incurred by Swan in the period 1 April 2016 to 31 March 2017.

47. Mr Daly suggested that the documents at p.231-238 are not a formal demand. He noted that Swan do not demand payment of a specific sum by a specific date and suggested that it was no more than notification of a service charge estimate. The Tribunal does not accept this contention. It is described as "a formal demand for payment". The sum due is stated to be £1,360.97 (at

p.234). This sum is payable on demand. The demand specifies the name and address of the landlord as required by Section 47 of the Landlord and Tenant Act 1987. It is accompanied by the relevant Summary of Rights and Obligations as required by Section 21B of the Act (at p.237).

48. However, the Tribunal does accept that the document attached to the demand is extremely confusing. It fails to specify whether the sums demanded are (a) a "Service Charge" (Clause 7.2 of the lease); (b) an "Administrative Costs" (Clause 7.3); or (c) a "Management Charge" (Clause 3(2)(c)). It was apparent that Swan had not applied its mind to this as it has not operated the service charge account in accordance with the terms of Mr Daly's lease. At the hearing, Ms Turner was unable to provide the Tribunal with any assistance as to how this demand related to the service charge mechanism in the lease.

49. Given the background of this litigation, it would not assist either party for this Tribunal to allow this application on the basis that the service charges have not been demanded in accordance with the terms of the lease, giving the landlord the opportunity to issue a further demand. The Tribunal is satisfied that Mr Daly's lease and the Head Lease merely provide the machinery for the recovery of any service charge. The Tribunal should have regard to the substances of the dispute. The fact that Swan has not demanded these sums as two six monthly interim service charges is not fatal.

The Tribunal's Determination

50. The Schedule completed by the parties has not been prepared in any logical order. We rather deal with the items as they appear in the service charge demand at p.233, addressing first the "Service Charges" passed on by Vision (Clause 7.2), and secondly the "service charges" demanded by Swan and which can only be recoverable as "Administrative Costs" (Clause 7.3) or a "Management Charge" (Clause 3(2)(c)).

Vision Interim Service Charges for the period 1 August 2016 to 1 July 2017 – the "MA" items

51. Swan seeks to recover these as "Service Charges" pursuant to Clauses 7.1 and 7.2 of Mr Daly's lease. Clause 7.2 provides that these are subject to the service charge provisions contained in the Head Lease (see [41] above). These provisions are to be found in Schedule 7 of the Head Lease (see [35] above).

52. In a schedule at p.257, Vision has broken down the various "maintenance expenses" (as defined by the Sixth Schedule of the Head Lease) which have been apportioned to Holly Court based on the service charge budget for the Estate (at p.262-8). These are recoverable as:

> (i) Part A "Estate Costs", Swan's liability being 17.47%. The tenants at Holly Court do not benefit from all the Estate Services, for example the

Concierge service or the gym. Vision does not seek to pass any of these costs onto Swan.

(ii) Part B "Block Costs, Swan's liability being 100%;

(iii) Part C "Passenger Lift Costs", Swan's liability being 100%;

(iv) Part D "Domestic Cold Water Cost's, Swans liability being 100% of the costs attributable to Holly Court.

53. We have been provided with Vision's Service Charge Accounts for 2014/5 (at p.163-203). These were approved on 21 January 2016. The accounts for 2015/6 and 2016/7 should now be available, but have not been made available to us. The Bundle includes a number of invoices. Mr Daly suggested that Swan had been a "soft touch" for Vision and that it had readily paid any sums demanded without subjecting these to any adequate scrutiny.

Part A "Estate Costs" (17.47%)

54. Adjustment from previous financial year: £6,228.00 – the tenant's 2.0465% share is £127.46. Swan no longer seeks to make Mr Daly liable for this sum.

55. Accountancy and Audit Fees: £503.06 (17.47% of £2,880) - the tenant's share is £10.30. Mr Daly argued that this charge is unreasonable. We disagree and allow it.

56. Communal Electricity: £1,746.72 (17.47% of £10,000) - the tenant's share is £35.75. Particulars are provided at p.315. There are a number of invoices at p.207-21. Mr Daly queried why this sum had more than doubled since 2014/5. Ms Turned explained that Vision had carried out an audit and now include part of the cost of operating the water pump. We allow this sum.

57. Communal Grounds Maintenance: £1,310.04 (17.47% of £7,500) - the tenant's share is £26.81. Vision maintains the pot plants, sweep leaves and grit in winter. Mr Daly agreed that this charge is "fair" and we allow it.

58. Refuse Disposal (Communal Area Cleaning – Bin Store/Recycle Bins): £1,135.38 (17.47% of £6,500) - the tenant's share is £23.24. Mr Daly complains that Swan is also making a separate charge for this service and that there is unnecessary duplication. We disallow Swan's charge (see [73] below). We are satisfied that the charge levied by Vision is reasonable.

59. Water Pump Maintenance: £1,310.04 (17.47% of £7,500) - the tenant's share is £26.81. Vision has explained that there are water boost pumps at the Axis which serve Holly Court. These need to be operated, maintained and serviced. There are invoices at p.307-313. Mr Daly agreed to this sum and we allow it.

60. Window Cleaning: £1,777.46 (17.47% of £10.176) - the tenant's share is £36.38. Ms Turner told us that Swan is responsible for cleaning the external glazed surfaces of the common parts. Mr Daly suggested that the windows had not been cleaned. We accept that they were. We allow this sum.

61. Management Fee: £2,445.42 - the tenant's share is £50.05. Swan have now discovered that Vision do not charge them an estate management fee. Swan no longer seeks to recover this sum against Mr Daly.

Part B "Block Costs" (100%)

62. Communal Door Entry Maintenance: £500 - the tenant's share is £10.23. There are two communal doors: (i) that to the Podium lift for which Vision is responsible; and (ii) that to Holly Court which is the responsibility of Swan. We disallow the separate sum claimed by Swan (see below). Vision is addressing the issue of the other residents who are currently using the Podium lift. We accept that it is difficult to identify the perpetrator and charge them for any damage. Mr Daly agreed and we allow it.

63. Fire Equipment Provision & Maintenance: £1,500 - the tenant's share is £30.70. Vision is responsible for the fire equipment and maintenance for the whole development. We are satisfied that this charge is payable and reasonable. We disallow the separate sum claimed by Swan.

64. Communal Repairs: £500 - the tenant's share is £10.23. Mr Daly makes two points: (i) the cost should be charged to the person who causes the damage who may be a resident from one of the other blocks; and (ii) there is duplication as Swan also charge for this service. We accept that it is difficult to identify the perpetrator of any damage. We disallow Swan's charge so there is no element of duplication. Mr Daly agreed to this and we allow it.

65. Communal Grounds Maintenance: £720 - the tenant's share is £14.73. Mr Daly queries why Vision charges a separate Block charge. Ms Turner explained that Vision clear and disinfect the bin store area which is shared by Holly Court and the Index. The cost is shared by the two blocks. We allow this sum. There is a separate charge by Swan which we disallow.

66. Buildings Insurance: £1,800 - the tenant's share is £56.84. This item is not challenged.

67. Sinking Fund Charge: £2,987 - the tenant's share is £61.13. There is a reserve fund for future major repairs. There is currently £23,147.93 in this fund. External decorations are programmed for 2019/20. We are satisfied that this charge is payable and reasonable.

68. Management Fee: £3,840 - the tenant's share is £75.80. Vision have a range of responsibilities in relation to the block which includes fire maintenance, weekly testing of the alarms, lighting, the Podium lift, ground maintenance,

the door entry system, window cleaning, etc. Mr Daly argues that this sum is too high. We disagree and allow it.

Part C "Passenger Lift Costs" (100%)

69. Lift/Hoist Maintenance: £1,750 - the tenant's share is £35.81. This relates to the Podium lift, rather than the lift with Holly Court which is maintained by Swan. The tenants in the other private blocks have their own lift with a concierge system. It was initially contemplated that they would only use this lift in an emergency (i.e. a lift failure). Vision has advised that the other tenants currently contribute 50% of the maintenance of this lift. Vision has agreed to write to the other residents to advise them that in future they will have no access, save in an emergency. Vision will remove access via the Pax programme. We are satisfied that this charge is reasonable. Mr Daly's complaint is the use made of the lift by residents of the other blocks. This is a management issue which Vision is now addressing.

Part D "Domestic Cold Water Costs" (100%)

70. Personal Water/Sewerage: £9,600 - the tenant's share is £196.46. In 2015, the total water charges for the estate were £45,000 (see p.193). Vision has estimated that the charges for Holly Court will be £9,600 (see p.267). There is a landlord's meter which is read at the end of the financial year and an adjustment is made on actual estate usage. Vision apportions it to individual blocks according to the number of bedrooms. We are satisfied that this charge is reasonable. The manner in which it is apportioned is not manifestly unreasonable.

Actual Service Charges incurred by Swan for the period 1 April 2016 to 31 March 2017 – the "SWA" items

71. These are service charge expenses which have been incurred by Swan in the period 1 April 2016 to 31 March 2017. Swan claim the following sums: (i) Communal electricity: £4,624.68 (tenant's share is £94.64); (ii) Communal lighting maintenance: £1,036.60 (£21.21); (iii) Communal cleaning: £11,985.15 (£245.27); (iv) Communal decoration: £99.40 (£2.03); (v) Communal Door Entry Maintenance: £3,011.78 (£61.64); (vi) Communal Repairs: £338.13 (£6.92); (vii) Communal Equipment/Furniture: £14.93 (£0.31); (viii) Communal Ground Maintenance: £442.88 (£9.06); (ix) Lift/Hoist Maintenance: £5,551.27 (£113.61); (x) Bulk Rubbish Removal: £782.43 (£16.01); (xi) Audit Fee: £28.81 (£28.81).

72. Mr Daly complained that there was an unnecessary duplication of services provided respectively by Vision and Swan. However, it seems that the main distinction is that Swan repairs and maintains the common parts within Holly Court, whilst Vision is responsible for the common parts outside Holly Court. Thus Vision maintains the Podium lift, whilst Swan maintains the lift within

Holly Court. However, there may have been some overlap in respect of some services such as refuse disposal.

73. Swan can only recover any of these expenses if it is able to satisfy the Tribunal that these are recoverable as either "Administrative Costs" or a "Management Charge" within Clauses 7.3 or 3(2)(c) of Mr Daly's lease (see [42] and [43] above). Ms Turner was unable to explain how these sums are recoverable under the terms of his lease. Clause 7.3 relates to the management and maintenance of the shared ownership leases in the Building, rather than the Building itself. Clause 3(2)(c) is restricted to costs relating to rent reviews and rent accounts.

74. Whilst Clause 7.3 would permit Swan to recover the cost of preparing Service Charge accounts in respect of the costs of managing and maintaining the shared ownership leases, the charge of £28.81 does not relate to such costs. The accounts rather relate to services, the cost of which Swan is not entitled to recover.

75. It seems that there may be a lacuna in Mr Daly's lease in that no obligation is imposed on either Vision or Swan to repair and maintain the common parts within Holly Court. Neither is there any provision in the lease for the landlord to recover such costs from the tenant. In the other "private" blocks it may be that this is the responsibility of Vision who retains possession of the common parts within the blocks. Mr Daly rather occupies his flat under a shared ownership lease with Swan as his landlord. He pays not only 100% of the service charge relating to his flat, but also a substantial rent. It is unclear as to what service or repairs, if any, this rent is intended to cover.

Application under s.20C and refund of fees

76. At the end of the hearing, the Applicant made an application for a refund of the fees that he had paid in respect of his application which total £250 pursuant to Rule 13(2) of the Tribunal Rules. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal orders the Respondent to refund the fees paid by the Applicant within 28 days of the date of this decision.

77. In the application form, the Applicant applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Respondent may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

78. The Applicant has not pursued his application for penal costs pursuant to Rule 13(1)(b) of the Tribunal Rules.

The Next Steps

79. The Tribunal have found this a difficult case. We have been required to navigate the complex provisions of both Mr Daly's lease and the Head Lease with limited assistance from the parties. Our finding that Mr Daly's lease does not permit Swan to recover its repair and maintenance costs of Holly Court will have significant implications for Swan. If either party consider that it is arguable that we have made any error of law in construing the leases, it is open to them to seek permission to appeal. On any such application, Rule 55 gives the Tribunal the discretion to review our decision.

80. After this application was issued, Swan decided to revisit the manner in which they apportion the service charge between the two and one bedroom flats within Holly Court. Swan had apportioned it equally between all 40 tenants (i.e. 2.5% each). They have now decided to apportion the service charge according to the floor area of each flat, thereby reducing Mr Daly's contribution from 2.5% to 2.0465%. They have also backdated this to 2007, the commencement of Mr Daly's lease. They have agreed to credit Mr Daly with the sum of £3,833.22 (see p.139).

81. Normally, there would be winners and losers in any such reapportionment. In the current case, all the leaseholders benefit as they occupy the one-bedroom flats. The loser is Swan who let the two-bedroom flats under assured tenancies; Swan will have to bear a higher proportion of the service charge. We were told that Swan has not yet given written notice to the other leaseholders of their decision to decrease the proportion payable by them or to refund any overpayment.

82. This decision only relates to Mr Daly. However, it would be open to any other leaseholder at Holly Court to make a separate application to this Tribunal and to rely upon this determination. It is important for Swan to consider the implications of this determination and their decision to change the method of apportionment. Having decided how to proceed, Swan must notify all their leaseholders.

83. This application, and the three previous applications, has only been necessary because Swan has failed to collect service charges in accordance with the terms of the leases which it granted to its shared-ownership tenants. In future, Swan must ensure that it does so.

Judge Robert Latham
6 July 2018

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,
   (d) the date at or by which it is payable, and
   (e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -

(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -

(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(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) the appropriate 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 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 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.