FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/00MC/LIS/2019/0033**
Property	**:**	**Bear Wharf, Fobney Street, Reading RG1 6BT**
Applicant	**:**	**Paul Stanger and Nicole Otigbah**
Representative	**:**	**Mr Stanger and Miss Otigbah**
Respondent	**:**	**Holybrook House Management Company Limited**
Representative	**:**	**Mr B Kaffka, Director of Holybrook**
Type of Application	**:**	**Application for the determination of the reasonableness and pay ability of service charges**
Tribunal Members	**:**	**Tribunal Judge Dutton** **Mrs S Redmond BSc Econ MRICS** **Tribunal Judge Evans**
Date and venue of Hearing	**:**	**Reading Tribunal Centre, Reading on 2nd May 2019**
Date of Decision	**:**	**5th June 2019**

DECISION

DECISION

1. **The Tribunal determines on the evidence before it that there has been overcharging of the Applicants by the Respondents in respect of their car parking spaces, details of which are set out below.**
2. **The Tribunal orders the Respondents to reimburse the Applicants their fees payable to Tribunal of £300.**
3. **The Tribunal makes orders under section 20C of the Landlord and Tenant Act 1985 (the Act) and under schedule 11 paragraph 5A of the Commonhold and Leasehold Reform Act 2002 so that the costs of these proceedings cannot be claimed from the Applicants.**

BACKGROUND

1. The Applicants are the owners of Flat 1, Simmonds Malthouse, Fobney Street, Reading. Their landlord is Holybrook House Management Company Limited for the purpose of these proceedings. In addition to the flat at Simmonds Malthouse, the Applicants also have the right to two car parking spaces at the property known as Bear Wharf, Fobney Street which is a neighbouring block. Their car parking spaces are what are known as tandem spaces which means one car parks in front of the other, effectively blocking it in. The parking spaces are in a covered car park beneath Bear Wharf. It is the service charges levied in respect of these car parking spaces, under the control of the Respondent which brings the matter before us.

2. The Applicants have been questioning the apportionment of the car parking costs since 2015 without, it would appear, a satisfactory response being provided by the Respondents or their appointed managing agents J M Estates (JME). As a result of this apparent impasse on 18th December 2018 the Applicants applied to this Tribunal for a determination of the reasonableness and payability of the service charges associated with the car parking. These were for the years 2012 through to 2019. The Applicants acquired their interest in the lease on 27th July 2012.

3. The lease, a copy of which was within the papers before us, is dated 31st October 2002 and made between Bewley Homes PLC (1), Simmonds Brewery Building Management Company Limited (2), Holybrook House Management Company Limited (3) and a Mr Wilson the original lessee (4). The lease is for a term of 125 years from 1st March 2001 and contains certain definitions. These are as follows:

   - The building is that comprising four apartments, two retail units and a restaurant in which the Applicant's flat is situated. This is Simmonds Malthouse, Fobney Street.
   - The car park building is the building at Bear Wharf comprising 12 apartments, parking access and car parking spaces and other parking spaces.
   - The car parking spaces are marked on the plan annexed to the lease.
   - The maintenance year is 12 months ending 31st December.
   - The maintenance charge is by reference to schedule 4 of the lease.
   - There is provision for an interim maintenance charge and the tenants' contribution to the maintenance charge is to be *"a fair and reasonable proportion of the total cost referred to schedule seven provided always such*

proportion shall be subject to the terms of part 1 of the sixth schedule hereto." As a matter of comment, part 1 of the sixth schedule allows the management companies referred to above to vary the proportion as appropriate and equitable.

4. This is a somewhat unusual lease in that it seeks to cover two buildings. The first building is at Simmonds Brewery which houses the apartment belonging to the Applicants and the second building is at Bear Wharf where the car parking spaces are to be found. The seventh schedule sets out the obligations on behalf of Simmonds Brewery Building Management Company in part 1 and in part 2 of the schedule the obligations on behalf of the Respondent are set out. The wordings are not dissimilar.

5. On the face of it, it would appear that the Applicants are to contribute not only to the total maintenance charges for the building in which their flat is to be found, but also the car park building, which as we have indicated above includes the 12 flats. However, this has been resolved by the Respondents agreeing during the period in dispute that the percentage liability which is charged to the Applicants should be 5.9957% of those costs which appear to directly relate to the car park. One item of dispute is that other lessees who have a tandem car parking arrangement such as the Applicants', appear to be charged 5.9579% of the car parking costs. That is one element of the dispute.

6. The main area of dispute is how the car parking charges have been assessed and extrapolated from the costs of the car park building as a whole.

7. Before the hearing we were provided with a bundle of papers which included the application, the directions given by the Tribunal on 2nd January 2019, a copy of the Applicants' lease and copies of correspondence and accounting documentation. In a letter dated 5th February 2019 to the Respondents (c/o JME) and also copied to the Tribunal, the Applicants set out the nub of the dispute:-

"The lease states that the service charge be "fair and reasonable" but the charges are not and neither are they proportionate, or in some cases, do not seem to be relevant. The sums charged appear to be excessive most exceptionally so and generally unrealistic. Despite ongoing requests you have not provided details as to how the service charge is calculated.

As there are some leaseholders to the car park spaces that are not property owners of Bear Wharf it appears that the manner in which the service charge is designed and then apportioned is to subsidise the service charges to the property owners. By allocating a large percentage of the entire estate budget to the car park well in excess of any reasonable proportion of the relevant costs, the car park only leaseholders are paying an excessive percentage of the estate budget and so reducing the property owners overall service charges."

8. The letter went on to set out some specific issues which are noted and contained a spreadsheet. A comparison was prepared by the Applicants in respect of the service charges for 2014, 15, 16 and 17.

9. Also contained in the papers before us we had copies of the accounts for the periods 2012 through to December 2015. There were no accounts available for 2016. The 2017 year ending accounts for the first time a split between the estate costs and the car parking costs, showing actual expenditure items. In earlier years there had just been a single profit and loss account with no apportionment between the residential units and the car parking.

10. During the period of the Applicants' ownership the Respondent through JME have charged a flat rate of £667.14. It is noted that in the year ending December 2017 where there has been a split of the costs, on an anticipated service charge expenditure it shows total costs of £11,127 for the car park. With the percentage of 5.9957 being applied giving the figure of £667.14. Interestingly, in the year to December 2018 this sum has varied slightly and the amount demanded by way of interim service charge was £687.17, this based on the anticipated expenditure for 2018 which came to £11,461 but which included major works provisions of £8,161 whereas in the previous year ending December 2017 those major works provisions were estimated at £1,910, also included, to produce the £667.41 share.

11. Not long before the hearing the Respondents filed a statement of reply to the application. This was supposed to have been lodged with us by 25th January 2019. The statement sets out the terms of the lease and the provisions of the 1985 Act appropriate to this case. It is said that the letter from the Applicants dated 5th February 2019, which we referred to above did not disclose any complaint as to the amount of the service charges but a complaint as to the proportion of the overall costs attributed to the car park as opposed to the residential units at Bear Wharf. It was submitted therefore that the only question the Tribunal had to consider was what amount of service charge was payable under provisions of section 27A. The statement of case went on to deal with each of the separate headings explaining how those came about which we have noted.

12. An explanation as to how the percentage of 5.9957 had been calculated was given. It is said there were 30 car parking spaces which if 100% of the costs attributable to the spaces were divided would give an allocation of 3.333%. Two car parking spaces were therefore on the face of it give a contribution of £6.66%. However, the proportion has been lowered by reason of the fact that the second space the Applicants have can only be accessed by passing over the first space. This was considered to be a slightly reduced benefit and the 5.9957% came into existence as a result.

13. One major area of concern from the Applicants' point of view was the major works monies that were being claimed on an annual basis. In the Respondent's statement it is said that the provision for major works is assessed by reference to what major works are expected to be carried out to the car park as opposed to Bear Wharf. They cite an example of the garage shutter which benefits the car park only, which appeared to work on an intermittent basis and needed attention/replacement. At the conclusion of the statement, it is drawn to our attention that the Applicants are only entitled for a determination in respect of the 2012 service charges from the date that they acquired and further, it is suggested that the service charge has a six-year statute under the Limitation Act.

INSPECTION

14. Before the hearing we inspected the car parking area in the company of the Applicants and Mr Kaffka, a Director of the Respondent Company. The car park comprises some 17 external car parking spaces and 13 car parking spaces which are situated at the ground floor level beneath the residential units above, which take up a further four storeys. In the covered car parking area were to be found the Applicants' spaces which are indeed what has been termed as tandem spaces, that is to say one car must park behind the other.

15. At the time of our inspection the car parking area was in a clean condition. We noted that a number of the external spaces had had bollards fitted. Entrance to the covered area was by an electric shutter which worked but was somewhat noisy. It was pointed out to us that there had been some repair works carried out to the covered area which involved the installation of Perspex and grilles as apparently there had been some recent break-ins. There was evidence of some water outflow onto the floor of the car park but at the time of our inspection it was essentially dry.

HEARING

16. The hearing which was held at the Reading Tribunal Centre was attended by the Applicants and Mr Kaffka on behalf of the Respondent Holybrooks.

17. Mr Stanger opened his case indicating that he felt that the service charge was not proportionate and that some costs were not relevant. He was unhappy with the method by which the costs were apparently apportioned between the car park and residential units and he believed that they had been subsidising the residents for some time. He confirmed that it was the accounts for December 2017 which for the first time showed a split. He was nonetheless unhappy with the apportionments of various items of expenditure. He did, however, draw to our attention the contrast between the anticipated expenditure for December 2017 which was £11,127 and the actual expenditure for that year which was £7,926. Somewhat surprisingly, an addition of a major works contribution of £3,201, as opposed to the estimated figure of £1,910, had been added which then resulted in the same total liability giving the share of £667.14. He told us that no invoices had been produced to support any of these costs over the years in dispute. He also told us that at no time had he been asked to make any additional contributions towards the service charges for the years that they had owned property, those being limited to the £667.14 through out the period.

18. Of concern to the Applicants was what had happened to the reserve monies and he did not understand how his contributions to the service charge expenditure had remained at £667.14 throughout.

19. Mr Kaffka for the Respondent accepted that the Applicants had been overcharged. Initially this appeared to be by reference to the percentage. It appears that each other owner of tandem spaces had been charged 5.9579% and he did not know why the Applicants had been charged 5.9957%. He told us that he had been appointed as a director in 2016 to try and resolve these issues. Apparently JME had been managing the development since 2002. He was told

by JME that they had two sets of accounts showing the difference between charges to the flats and car parks. But when he had asked those to be produced nothing had been made available.

20. He was not able to comment on the major works and the funds that had been claimed on an annual basis or how those had been apportioned. It appears that there is no ongoing planned maintenance programme in existence.

21. The Applicants indicated that they accepted the estimated expenditure for the year ending December 2018, ignoring the major works provisions, of £3,300 as being a figure that they would accept going forward.

22. At this point it is interesting to refer to certain items of correspondence that were given to us at the hearing and a letter that the Applicants had written dated 22nd April 2019. We noted all that was said in that letter and in particular the comments made by the Applicants relating to their period of ownership. The register of title appears to show that the property was purchased on 27th July 2012 but that registration did not take place until September of 2012.

23. At paragraph 16 of the letter, they seek to challenge the percentage attributable to their spaces and a suggestion that higher percentage charges are levied against non-Bear Wharf leaseholders. The letter went into some detail as to the various heads of expenditure and challenged various items but no alternative quotes were obtained, although to be fair to the Applicants no supporting invoices were produced by the Respondent.

24. The email chain that we were provided with passing between Mr Kaffka and JME is interesting. It starts with an email from Jordan Lane, the Chairman of the Respondents asking that information be provided and requesting who from JME will be attending the hearing. Thereafter on the day before the hearing, Mr Kaffka contacted JME asking who will be attending indicating that JME have the answers and will need to be there. This appears to elicit a response at 16.19 the same day from Mr Gwynn of JME indicating that they will not be attending the Tribunal as they have not been called as a witness and that the Respondents should continue to use the services of solicitors who it appears have been disinstructed. After that email Mr Kaffka wrote to JME at 20.31 raising various points and indicating his views on the matter as follows: *"The reason we don't need a solicitor is that we have already lost as the claimant has a valid claim that JM should have dealt with in 2015 when it was raised. No amount of money we spend on the solicitor will change these facts."* The email then sets out the apportionments for the service charge costs with the actual and proposed changes in particular bringing into line the percentages charged to the tandem spaces at 5.9579%. The email goes on to seek an explanation as to why information was not passed to the Applicants and again asking if someone from JME would attend.

25. At the conclusion of the hearing, the Applicants sought reimbursement of the fees that they had incurred and that there should be an order made under section 20C and schedule 11 paragraph 5A. Mr Kaffka objected to both. Insofar as the fees were concerned, that would have to come out of the reserved fund as the Respondents had no other monies and he thought it would be appropriate to be

able to recover the costs of these proceedings either through the service charge or as an administration charge.

THE LAW

26. The law applicable to this application is set out below.

FINDINGS

27. This is an unhappy case. Mr Kaffka attended to do his best but he was unsupported by anybody from JME, had no knowledge of the accounts and no papers had been produced which justified any of the charges being made. However, and to their credit, the Applicants were prepared to view this matter on a pragmatic basis. The accounts for December 2017, which were provided and showed a breakdown indicated that the percentage between the costs attributable to the car park and those to the estate generally, was 38% liability, when the major works contributions are ignored. Mr Stanger had done his own calculations and prepared various spreadsheets which lead him to the conclusion that the ratio between the car park and the building was perhaps nearer to 19%.

28. These were of course his own assessments as to what was chargeable and what was not. What we have are the accounts for the years in dispute except for 2016. What we are unable to fathom is how these accounts have been dealt with to give the contribution of £667.14, which seems to have been charged each year and which is not the subject of any balancing charge. It would appear, on the face of it, that the matter has been dealt with by increasing the reserve fund contribution annually so that the sum of £667.14 paid by the Applicants and other leaseholders is shown as the actual cost for car parking each year.

29. However, one major concern from our point of view, and indeed the Applicants, is the treatment of the reserve fund monies. In the year ending December 2012 these appear to be £16,736. In 2013 this rises to £25,326, rising again in 2014 to £32,660. The fund then drops in the year ending December 2015 to £28,783, it appearing that £1,319 had been taken from the major works fund although it is unclear as to what liability this contributed. There are no accounts for 2016 but in the balance sheet for 2017 the reserved fund is recorded as being £38,286 and at the end of the 31st December 2017 has risen to £42,461.

30. As we indicated above (see para 17), only £3,201 is allocated to the car park, the remainder being allocated to the estate. We then find that in the budget for the year ending December 2018 the major works provisions is £8,161 which when added to the £3,300 that the Applicants accept is reasonable, leads to the contribution of £687.17. No evidence was given to us as to the allocation of the service charge reserve funds in previous years, nor was Mr Kaffka able to produce any form of planned maintenance programme to show how this was to be spent. This is unacceptable.

31. Accordingly, we order that the reserve fund contributions for 2018 should not be made by the Applicants until such time as the Respondents are able to produce accounts to show where the reserve fund monies have been allocated and what they have been spent on. Whether this can be done going back to 2012 is possibly

a difficult task as it is unclear to us whether the papers are still available for those earlier years. However, the use of the reserve fund to round up the total expenditure for the car park to justify the interim maintenance charge which is sought is inappropriate and should not be a practice which continues.

32. The question of limitation was raised in the respondents statement. It does not appear that the service charge, defined as the "Maintenance Charge", is regarded as rent. The lease is a Deed, which we consider would have a 12 year limitation period. In any event the applications only acquired the flat in 2012 and there is, nor is there cited to us, any authority of the limitation period applicable to proceedings of this nature. We do not consider this is an issue in this case.

33. This is a case that requires a solution. We will have to do the best we can with the information that is available to us. We find that the appropriate way of dealing with this is to look at the 2017 accounts and to assess the percentage liability for the car parking to the actual estate expenditure. We ignore the major works contributions because in 2017 only £974 is sought for the estate against a figure of £3,201 for the car park with no evidence before us whatsoever to justify this amount other than as attempted balancing charge. Accordingly taking those figures from 2017 we, as we indicated above, find that these represent 38% of the total expenditure. Accordingly, for each year from 2012 onwards we conclude that the appropriate contribution to be made by the Applicants to the profit and loss expenditure is 38% of the total. We have, on the schedule annexed, shown the account figures for each year and the 38% contribution that we believe is appropriate for the Applicants to make. We adopt the respondent's suggested percentage share for the car parking spaces of 5.9579. (see paragraph 24 above)

34. This will result in monies being payable to the Applicants. We accept that the Respondent probably does not have the funds to do this and instead it may well be that it could be resolved by offsetting the overpayments made against the Applicants future liabilities in respect of service charges. This should happen for the year ending December 2019 and continue until such time as the monies owed to the Applicants have been subsumed into their liabilities for ongoing service charge costs. Hopefully in the years going forward, now that there is a division between the car park and the estate, there should be no issues. Whether there is the need to review the percentages so that the Applicants pay the same as other leaseholders who have two tandem spaces is something that should be addressed and it would seem to us it would be simple enough to resolve that given the Respondent's ability to vary the service charge proportions as is provided for in the terms of the lease.

35. Finally, we order that the Respondents should reimburse the Applicants with the Tribunal fees in the sum of £300 to be paid within 28 days. We also make orders under section 20C of the Act and under paragraph 5A of schedule 11 to the Commonhold and Leasehold Reform Act 2002 to prevent the Respondents from recovering the costs of these proceedings either as a service charge or as an administration charge, considering it just and equitable so to do.

Judge: Andrew Dutton

A A Dutton

Date: 5th June 2019

SCHEDULE AS PER PARAGRAPH 33 ABOVE

Bear Wharf, Reading

Schedule of payments utilising 5.9579% as per Mr Kaffka's email of 1st May 2019 to J M Estates, 27th July 2012 to 31st December 2018

YEAR	£ (1)	£(2)	£(3)
Dec 2012	19,481	7,402.78	189.97 *
Dec 2013	17,171	6,524.98	388.75
Dec 2014	18,313	6,958.94	414.61
Dec 2015	23,212	8,820.56	525.52
Dec 2016 (4)	17,420	6619.60	394.40
Dec 2017 (5)	7,926	7,926.00	472.22
Dec 2018 (6)	3,300	3,300	196.61

Notes

* Total for the year would be £441.05. For the period 27th July 2012 to 31st December 2012 - 157 days @ 1.21/day = 189.97

(1) Amounts claimed in the accounts for this year as the service charge for the property Bear Wharf
(2) The share @ 38% of the total
(3) The liability of the Applicants following our decision (5.9579%)
(4) Figure to December 2016 taken from 2017 accounts
(5) & (6) Takes the actual/anticipated expenditure for the car park

ANNEX – RIGHTS OF APPEAL

1. 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 at the Regional Office which has been dealing with the case.
2. 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.
3. If the application is not made within the 28-day time limit, such application must include a request to 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.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (ie 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.

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

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

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

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

Section 19

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

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

Section 27A

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,

(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

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

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to that tribunal;
(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.