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

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| **Case reference** | **:** | **LON/00/BJ/LSC/2013/0029** |
| **HMCTS code (paper, video, audio)** | **:** | **P: PAPERREMOTE** |
| **Property** | **:** | **Flat 7, 6 Chapel Yard, Wandsworth, London SW18 4LX** |
| **Applicant** | **:** | **Norman Cooley** |
| **Representative** | **:** | **In person** |
| **Respondent** | **:** | **Notting Hill Genesis ("NHG")** |
| **Representative** | **:** | **Briar Cunliffe** |
| **Type of application** | **:** | **For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985** |
| **Tribunal members** | **:** | **Mr Charles Norman FRICS**<br>**Valuer Chairman** |
| **Venue** | **:** | **10 Alfred Place, London WC1E 7LR** |
| **Date of decision** | **:** | **3 May 2021** |

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**DECISION**

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## Covid-19 pandemic: description of Determination

This has been a remote determination on the papers which has been not objected to by the parties. The form of remote hearing was P:PAPERREMOTE. A face-to-face hearing was not held because it was not practicable, and no-one requested the same. The documents to which the Tribunal were referred are in a bundle of 282 pages, the contents of which the Tribunal has noted.

## Decisions of the tribunal

(1) The Tribunal has no jurisdiction to reopen the decision of the Leasehold Valuation Tribunal ("LVT") dated 23 April 2013 ("the LVT Decision") which has not been the subject of an appeal.

(2) The Tribunal finds that the issue in dispute was not the subject of a final determination by the LVT because the point was wholly conceded by the respondent before the LVT and did not form part of the determinations by the LVT. Accordingly, the Tribunal retains jurisdiction to consider window cleaning charges arising in subsequent years.

(3) The Tribunal determines that the costs of window cleaning are irrecoverable from the tenant between the years of 2013 and 2019 inclusive, and prior to 10 October 2020 in that year.

(4) The Tribunal finds that communal window cleaning charges are payable by the tenant under his present lease from 10 October 2020 and thereafter, subject to the test of reasonableness as to amount.

(5) The Tribunal finds that the applicant is liable to make a payment on account of £18.41 for the service charge year 2020.

## The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of the service charge years 2013, 2014, 2015, 2016, 2017, 2018, 2019 and 2020 in respect of window cleaning costs.

2. An Appendix of relevant legislation is set out below.

## The background

3. The property which is the subject of this application is a 2 bedroom loft conversion in Wandsworth.

4. Neither party requested an inspection, and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute. Further the Tribunal is not currently carrying out inspections owing to the Coronavirus pandemic.

5. The Applicant holds a long shared ownership lease of the property, which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

6. The matter of window cleaning charges was the subject of an application to the LVT made on 11 January 2013. The decision was promulgated on 23 April 2013. Paragraph 10 of that decision is as follows:

> "The application also required a determination as to the liability to pay and the reasonableness of the window cleaning charges. Mr Hassall and Mr Flintoff on behalf of the respondent confirmed that the applicant should not have been charged for window cleaning (including any charges for communal window cleaning) and they undertook to ensure that any payments made by the applicant in respect of all window cleaning would be refunded and that the charge would be removed from all future service charge demands. The parties confirmed that this item was no longer in issue."

7. The respondent asserts that this was an inaccurate recording of what was conceded by the landlord.

## The issues

8. In directions dated 25 November 2019, the Tribunal identified the following issues for determination:

   (i) whether service charges are payable in respect of the window cleaning (communal parts or otherwise)

   (ii) whether the applicant is entitled to rely on the above (apparent) concession by the respondent that charges the window cleaning will be removed from current and future demands for payment of service charges

   (iii) whether the landlord is estopped from seeking to collect service charges window cleaning from the lessee

   (iv) whether if payable in 2013 (and beyond) the charges for window cleaning are reasonable.

(v) The Tribunal identified the following issues to be addressed by the Landlord:

- why the Tribunal has the jurisdiction to determine this issue when it appears to have been decided in 2013?
- On what basis can the apparent concession by the respondent be revisited by the Tribunal for 2013 or later years?
- If an issue of estoppel arises what powers does the Tribunal have in respect of such an issue.
- If whether a "mistake" by the Tribunal was made in its 2013 decision on what evidential basis does the landlord rely?

## The Leases

9. The tenant entered into an underlease from Notting Hill Home Ownership Ltd dated 20 August 2009 for a term of 125 years from 19 December 2008. This is described as Plot 132 of the third floor of the Headlease Premises. By virtue of clause 4.2.2 of the tenant's underlease, the tenant covenants to pay the service charge in accordance with clause 8 of that under lease. Clause 8.4 defines service provision to include "expenditure estimated by the authorised person is likely to be incurred in the account year by the landlord". The underlease therefore requires the tenant to make payments on account. The scope of the relevant expenditure includes, by clause 8.5.1, the costs of and incidental to the performance of the landlord's covenants contained in clauses 6.2 and 6.3 of the underlease. Those provisions oblige the landlord to comply with its obligations under the headlease(save in so far as they are the leaseholders responsibility under the underlease) and in particular pay the insurance rent and service charge due under the headlease.

10. On 19 December 2008, the respondent entered into a headlease of affordable housing known as block D for a term of 125 years. By virtue of clause 2.1.3, the headlease obliges the respondent to pay the service charge in accordance with schedule 6. Part 1 of schedule 6 sets out the service charge mechanism in the headlease and includes provision requiring payments of estimated expenditure in advance for each financial year, with subsequent balancing payments and credits. Part 2 of schedule 6 defines the estate services. Paragraph 10 states:

> "cleaning the exterior of the windows and louvres at the Property PROVIDED ALWAYS THAT where the windows at the Property are set back because of a balcony the Tenant is responsible for cleaning the exterior of those windows and louvers and PROVIDED FURTHER that in relation to that part of the property known as Plot 132 although the windows are not set back because of a balcony the Tenant (and not the

management company) will be responsible for cleaning the exterior of the windows and the louvers of the windows at Plot 132 and accordingly Plot 132 will not be liable to contribute towards any item of expenditure in the service charge relating to the cleaning of windows at the Property."

## The Landlords' Case

11. The summary of the landlord's case is as follows. Para 10 of the 2013 decision was inaccurate, but the terms of the lease require payment of communal window cleaning. In 2013 the managing agents were carrying out communal window cleaning but not window cleaning to individual flats for which lessees are responsible. The landlord was unclear as to whether the tenant was being charged for individual flat window cleaning or communal window cleaning and the concession made reflected this uncertainty. Estoppel has no application as the terms of the lease must be complied with. In what was described as a witness statement from Briar Cunliffe Property Management Officer dated 21 March 2021 (which did not contain a statement of truth) it was said that Houston Lawrence were carrying out communal cleaning but were not cleaning the windows of Mr Cooley's flat, Plot 132 and that this was consistent with the headlease.

12. The landlord did not cite any authorities.

## The Tenant's Case

13. The lessee's case may be summarised as follows. The opportunity to appeal is out of time by seven years. No evidence was produced showing that Para 10 was in error. The landlord can waive terms of the lease including all future payments. The commitment to waive all window cleaning costs was part of a legal settlement, although it would have been clearer if an addendum to the lease had been produced at the time signed by both parties before witnesses. In its absence the parties must rely on the transcription of the judgment to act as an addendum to any relevant contractual terms under the lease. The landlord's representatives knew full well what they were committing to in 2013.

14. The headlease was not given to the respondent nor was he informed of it at the time of signing his lease. Promissory estoppel supports the applicant's case. The applicant relied on the promise to his detriment. Since 2013 he has relied on the [LVT Decision] and the commitment made by NHG at the time and consequently has not ring-fenced monies for the provision of a communal window cleaning charge. The applicant lives by modest means as a self-employed drama teacher who has calculated his outgoings carefully. Details of the financials outlining the split between the charge for personal window cleaning and the charge for communal window cleaning have not been provided to the applicant notwithstanding the direction by the Tribunal in December 2020 and a

subsequent request from the applicant on 9 February 2021. There is no evidence of any mistake by the [LVT] in its paragraph 10. The applicant also complained about the absence of detailed accounts showing the actual expenditure for communal window cleaning. The applicant tenant did not cite any authorities.

**Authority raised by the Tribunal**

15. As neither party had cited authorities, the Tribunal referred the parties to *Emmanuel Ayodeji Ajayi v R T Briscoe (Nigeria) Ltd* [1964] 3 ALL E.R. in which the Judicial Committee of the Privy Council, stated

> "the equitable principle of promissory estoppel, viz, that when one party to a contract in the absence of fresh consideration agrees not to enforce is rights in equities raised in favour of the other party, is subject to the qualifications (a) that the other parties ought disposition, **(b) that the promisor can resile from his promise on giving reasonable notice, which need not be formal**, giving the promise the reasonable opportunity resuming his position, and (C) that the promise only becomes final and irreproachable if the promise C cannot resume his position." (emphasis added)

16. The Tribunal invited written submissions.

17. The applicant stated that this case can be distinguished from the present on various grounds. No concession had been made by NHG to Mr Cooley. Therefore, the absence of fresh consideration was irrelevant. The matter could have been dealt with quickly and satisfactorily through bilateral discussions. It was not necessary for Mr Cooley to have changed his position. The promise in question must be clear and unequivocal and that is not the case here. No notice has been made to Mr Cooley that NHG have the intention of reinterpreting the [LVT Decision] in their own favour. The involvement of the LVT has broken the contractual and equitable link between Mr Cooley and NHG over window cleaning charges.

18. The respondents' further submissions may be summarised as follows. The LVT had no jurisdiction to change the terms of the lease. Mr Cooley has not provided adequate evidence to support allegations that he has relied on the LVT Decision to his detriment. His account is in credit and he is making full payment including charges for communal window cleaning. On 10 July 2020 NHG advised Mr Cooley that there was an error in the determination made by the LVT in 2013 and that the communal window cleaning charge forms part of the service charge payable by Mr Cooley under his lease. On 25 August 2020, NHG sent a further letter to Mr Cooley in relation to this matter. This correspondence constitutes reasonable notice given by NHG to resile

from any perceived promise made by NHG at the 2013 tribunal hearing. The letters of 10 July 2020 and 25 July 2020 allowed Mr Cooley the reasonable opportunity to resume his position. Mr Cooley is capable of resuming his original position paying service charge due for the communal the window cleaning. This is an annual charge of under £200.

## Findings

19. The only decisions made by the LVT were as follows:

> "Decisions of the Tribunal
>
> (1) The Tribunal determines that the basis of apportionment of the service charge levied from August 2009 to the present day (and future charges) is reasonable.
>
> (2) 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 the lessees through any service charge.
>
> (3) The Tribunal determines that the Respondent shall pay the Applicant £250 within 28 days of this Decision, in respect of the reimbursement of the Tribunal fees paid by the Applicant."

20. There was no appeal against the LVT decision within the appeal period nor thereafter. Therefore, the wording of paragraph 10 cannot be directly impugned by this Tribunal. However, Para 10 was not an adjudication by the LVT but a recital of what the parties had agreed. This was a complete concession on the window cleaning point by the respondent and there was nothing on that point for the LVT to decide. This Tribunal therefore finds that it retains jurisdiction to consider window cleaning charges arising in subsequent years.

21. The Tribunal accepts that a promise was made by the respondent to the applicant as recorded in Para 10. It also finds that the lessee relied upon this and moved to his detriment in so doing, in view of his circumstances (see above). From *Canary Riverside Pte Ltd v Schilling* (Lands Tribunal LRX/65/2005) (para 45) the Tribunal has jurisdiction to consider estoppel where such determination is essential to determine whether a service charge is payable.

22. However, the Tribunal finds that the respondent was entitled to resile from the promise on reasonable notice, applying *Emmanuel Ayodeji Ajayi v R T Briscoe (Nigeria) Ltd*. (see above). There is a clear obligation on the lessee to pay the reasonable cost of communal window cleaning under the terms of his lease and the offer made to the applicant in 2013 was concessionary: there was no written settlement agreement between the parties with some consideration passing from tenant to landlord.

23. The Tribunal notes that the applicant was put on notice of the respondents' changed position in an email from Lauren Goldsmith on 24 July 2018. However, the Tribunal observes that the respondent is relying on later correspondence beginning on 10 July 2020. The Tribunal considers that 3 months' notice to the lessee is sufficient and that accordingly, the Tribunal finds that the applicant's liability recommenced on 10 October 2020.

24. The Tribunal accepts the evidence of Briar Cunliffe that at no time has NHG carried out window cleaning to windows within the subject flat, but only to communal windows.

25. Therefore, the Tribunal finds that the landlord became entitled to charge reasonable communal window cleaning costs pursuant to the lease with effect from 10 October 2020. Prior to that date, in respect of the years 2013-2020, the landlord is estopped from recovering such charges.

**The Amount Payable**

26. The Tribunal accepts that the respondent has not provided accounts of actual expenditure in respect of communal window cleaning. However, it has provided "budget calculations". For the year 2020, for which the Tribunal has found partial liability to pay, the allocated budget is £83.69. The applicant has not challenged the reasonableness of this amount. The Tribunal is satisfied that this amount is reasonably incurred as an estimated service charge and payable on that basis. The Tribunal calculates the proportion from 10 October 2020 - 31 December 2020 as 0.22 of the annual amount, £18.41.

**Name:** C Norman FRICS **Date:** 3 May 2020

## 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.

(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;
- (a) 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.