FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference : **CHI/00HN/LIS/2018/0060**

Property : **Flats 3 and 4, 15-17 Lansdowne Road, Bournemouth BH1 1RZ**

Applicant : **Mr Rishi Khosla**

Representative : **Mr Jonathan Wragg, counsel and PDC Law, solicitors**

Respondent : **Jordan Future Limited**

Representative : **Mr Mehson, Director**

Type of Application : **Service charges and administration charges**

Tribunal Members : **Judge D Agnew**
Mr D. Barnden FRICS

Date and venue of Hearing : **21st March 2019**
Bournemouth West Cliff Hotel

Date of decision : **4th April 2019**

DECISION

The Application and Background

1. The Applicant was at all material times until in or about August 2017 when he transferred the title to Rishi Estates Limited (a company of which he is a Director) the freehold owner of the property known as 15-17 Lansdowne Road, Bournemouth BH1 1RZ ("the Property"). The Respondent is the long lessee of Flats 3 and 4 within the Property under a lease dated 28th August 2009 which said lease incorporated the terms and covenants contained in an earlier lease dated 15th April 1986.

2. On 5th July 2017 the Applicant issued proceedings in the County Court claiming arrears of service charges for each of the Respondent's flats in the sum of £3391.01 plus administration charges of £180, costs in the sum of £840 and additional contractual costs. The cases were transferred to the County Court at Bournemouth and Poole and allocated Claim numbers D73YX702 and D72YX902, the latter being designated the lead case.

3. A Defence to each claim was entered and by an order of District Judge Powell of 22nd October 2018 the case was transferred to the Tribunal. As the claim includes a claim for costs not claimed as an administration charge in respect of which the Tribunal would not normally have jurisdiction it was made clear at a Case Management Hearing held by telephone on 8th November 2018 that a Tribunal Judge would determine that aspect of the claims sitting as a judge of the County Court under the judicial deployment project.

4. As the Respondent had raised a defence of res judicata or abuse of process it was Directed that this should be dealt with as a preliminary issue. Part of the evidence in respect of that issue was a witness statement of Mr Morgan Ebert who is a Director of the Applicant's managing agents. This statement will be referred to later in this determination.

5. The preliminary issue was determined on 3rd January 2019 in favour of the Applicant and so the case proceeded to a hearing on 21st March 2019.

Inspection

6. The Tribunal inspected the Property immediately prior to the hearing. Those present at the Inspection were Mr Khosla, Mr Ebert and Mr Mehson and Ms N. Mehson.

7. The Property comprises a section of a terrace of shops with flats over situated on a busy main road near to the centre of Bournemouth. At the time of the 2009 leases the freehold of the part of the terrace numbered 15-19 Lansdowne Road was comprised in two titles (owned by Mr Khosla and Jordan Future Limited) but at or about the same time Mr Khosla purchased only 15-17 Lansdowne Road and 19 Lansdowne Road was sold to Sorda Limited (of which Mr Mehson is a sole Director). This change of ownership has led to complications which will be set out in greater detail later in this decision not least of which is the fact that the Building which is referred to in the current leases of Flats 3 and 4 of 15-17 Lansdowne Road is the larger section of the terrace comprising 15-19 Lansdowne Road.

8. 15-17 Lansdowne Road has two commercial premises on the ground floor (one of which also has a basement) and, currently, eight flats above. Originally there were only 6 flats above 15-17 Lansdowne Road but in 2010 the roofspace above 15-19 Lansdowne Road was leased to developers who subsequently constructed additional flats on the top of the building with a new mansard roof. This provided an extra two flats in 15-17 Lansdowne Road (making now 8 flats in total) and an extra 4 flats in 19 Lansdowne Road. In addition a lift shaft and a metal staircase and walkway were constructed in the car park at the rear of the building on land within the title to 19 Lansdowne Road with a lift serving the third floors of number 15-17 as well as number 19.

The leases

9. The 2009 leases of 3 and 4 Lansdowne Road both show Mr Khosla and Jordan Future Limited as the landlord. With certain exceptions (one of which is important in this case) these leases incorporate the terms and covenants of a lease dated 17th January 1986 and made between Anglo-City Property Group Limited (1) and Gregory Stuart Feltham (2). Both this lease and the 2009 leases describe Flats 3 and 4 as being part of the building known as 15-19 Lansdowne Road.

10. By clause 4(ii) of the 1986 lease the lessee covenants to "contribute and pay to the lessor from time to time and in addition to the rent hereinbefore reserved one equal eighth part of the costs and expenses mentioned in the Fourth Schedule hereto….". One of the exceptions in the 2009 leases to the incorporation of the terms and covenants of the 1986 leases into the 2009 leases states as follows:
"In clause 4(ii) the words "one equal eighth part" shall be deleted and replaced with "a fair proportion".

The claim

11. At the start of the hearing the Tribunal asked Mr Wragg, counsel for the Applicant, to explain how the global figure for the claim in each of the two sets of proceedings was made up and to identify the demands upon which the claim was based. It became increasingly difficult to do so. The particulars of Claim stated that the service charge element of the claim amounted to £3391.01. This was said to comprise an invoice for £521.47 for 2013/14, an invoice for £865.69 for 2014/15, £785.22 for 2015/16 and £1213.63 for 2016/17. These invoices total £3396.01 and not £3391.01, an unexplained difference of £5. Furthermore, these were invoices addressed to Salmore Property and not Jordan Future Limited. The Applicant discovered some time after it had commenced proceedings that although it had commenced proceedings against the correct Defendant, it had never invoiced Jordan Future Limited. It was advised to discontinue proceedings and start afresh. Before doing so the Applicant's managing agent wrote to Jordan Future Limited on 7th February 2017 as follows:-
"Please find enclosed service charge invoices for the above properties dating back to 2014. **These invoices replace all previous invoices that have been issued.** (Tribunal's emphasis added).

The following invoices are enclosed:
Flat 3 reference 53432 for the period 27/8/14 to 26/8/15
Flat 3 reference 53432 for the period 27/8/15 to 26/8/16
Flat 3 reference 53432 for the period 27/8/16 to 26/8/17
Flat 4 reference 53433 for the period 27/8/14 to 26/8/15
Flat 4 reference 53433 for the period 27/8/15 to 26/8/16
Flat 4 reference 53433 for the period 27/8/16 to 26/8/17

Yours sincerely
Morgan Ebert
MARLA
Director"

This letter was contained in the evidence presented to the Tribunal for the determination of the preliminary issue causing the Tribunal to decide that the current proceedings were based on the invoices attached to that letter rather than the original invoices addressed to Salmore Properties. Unfortunately, only 4 invoices, not 6, were included with this evidence. They were an invoice for £531.47 for 2014/15 (one for each flat) and an invoice for each flat for £785.22 for 2016/16. There was no invoice for 2016/17 attached to that letter.

12. It will be seen that the invoice to Jordan Future Ltd for £531.47 is now said to be for 2014/15 whereas that addressed to Salmore properties for this amount was said to be for the period 2013/14. The invoice to Salmore Properties for 2014/15 in the sum of £865.69 is not replicated in an invoice to Jordan Future Limited at all.

13. The Tribunal indicated that the Applicant's case, to use the vernacular, was a mess. It was up to the Applicant to prove its case. As it stood it was unable to substantiate the amount claimed in each set of proceedings based on invoices addressed to the correct Defendant. The Tribunal was entitled to accept the evidence produced by Mr Ebert supported by a statement of truth that all invoices prior to his letter of 7th February 2017 had been cancelled and that those attached to his letter were correct. Although no invoice for 2016/17 was included with that letter the invoice produced at the hearing was the only one addressed to Jordan Future Limited for 2016/17 and as the arguments in respect of that invoice were the same as for previous years the Respondent fairly accepted that it was not prejudiced if the Tribunal admitted that invoice into evidence . The Tribunal therefore decided that it would base its decision on the invoices enclosed with Mr Ebert's letter of 7th February 2017 plus the invoice for 2016/17.

The issues

14. The Applicant claims service charges in respect of Flats 3 and 4 at the property for the period 2014 to 2017. The Respondent's statement of case states, first, that the service charges claimed are not payable because the flat leases have not been varied to change the definition of the Building to read 15-17 Lansdowne Road instead of 15-19 Lansdowne Road. The lessees of flats in 15-17 Lansdowne Road cannot possibly be liable to pay a contribution to the costs incurred in relation to number 19 when those are costs of a different landlord. The Respondent says that in this regard the leases are "defective". The Respondent

points to two previous decisions of this Tribunal in respect of flats in 19 Lansdowne Road. The Tribunal concluded that it was unable to apportion the landlord's costs between the lessees of flats within that building as the proportions stated in those leases for which each lessee was liable was stated to be "one equal eighth part of the costs and expenses mentioned in the fourth schedule". The fourth schedule referred to the landlord's costs in respect of "the building" which was defined as "15-19 Lansdowne Road". The Respondents claim that by analogy, until the leases of the flats within 15-17 are amended (as has been the case subsequently in respect of number 19) the service charges cannot be apportioned. If they cannot be apportioned and thus ascertained the charges are not payable.

15. The Applicant's response to this is that the charges that have been levied relate only to the costs incurred in respect of 15-17 Lansdown Road. Furthermore, there is a difference between the Respondent's leases of flats 3 and 4 in 15-17 Lansdowne Road and the flats in 19 Lansdowne Road in that under the 2009 leases of the subject flats the proportion of the costs payable by the lessees is "a fair proportion" of the costs incurred in respect of the building and not a fixed proportion of one-eighth.

The Tribunal's decision on the "defective lease" point

16. The Tribunal does not agree that the leases of Flats 3 and 4 are defective. It is not clear as to the precise timing between the grant of those 2009 leases and the sale of 15-17 to Mr Khosla and 19 to Sorda Limited but it is quite possible that the leases were correct at the time of execution. If they were incorrect and should have shown the landlord solely as Mr Khosla and/or the description of the building as 15-17 Lansdowne Road then it is clear that Jordan Future Limited was a party to the error as the leases are signed by Mr Mehson as Director and Ms N Mehson as Secretary of Jordan Future Limited and they would have been fully aware that the intention was that they would only be required by the leases to pay a proportion of the landlord's costs relating to 15-17 Lansdowne Road. It ill-behoves them to deny that any service charges are payable unless/until the leases are varied.

17. Ideally the leases of Flats 3 and 4 should be either rectified or varied to show the landlord as Rishi Estates Limited and the Building to be described as 15-17 Lansdowne Road. This will serve to avoid any confusion in the future, particularly if any of the affected leases (and the same probably affects 1, 1a, 2 and 2a as well but the leases of those flats were not before the Tribunal) come to be sold. But, even if they are not rectified or varied, the Tribunal finds that the wording of clause 4(ii) of the 1986 lease as altered by the 2009 lease is sufficiently appropriate for the Tribunal to construe "a fair proportion" of 15-19 Lansdowne Road as meaning that only the costs of part of number 15-19 (namely 15-17) shall be included in the costs to which these lessees must contribute. Indeed, that may have been the rationale behind the change of the wording of clause 4(ii) by the 2009 lease. This is the difference between this case and the previous Tribunal decisions concerning flats in number 19. There the stated proportion was the one-eighth part of the costs of the building 15-19 Lansdowne Road and thus the definition of the building was integral in the calculation of the total costs to be divided by one-eighth. In conclusion,

therefore, the Tribunal does not accept the Respondent's argument that no service charges are payable in respect of Flats 3 and 4 unless or until deeds of variation are executed.

Other challenges to the claim

18. The service charges claimed included a contribution to a sinking fund. The Respondents argued that the leases do not provide for such a fund and that this had been acknowledged by the landlord's managing agents. This point was conceded by the applicant.

19. The service charges claimed included a charge for Accountancy and Auditing. The Respondents said that there is no provision in the leases for such a charge and they had pointed this out to the managing agents but debt collectors had nevertheless been instructed to recover charges including such amounts. This point was also conceded by the Applicant

20. The Respondent challenged an item for the repair of the lift saying that the lessees of Flats 3 and 4 are not liable to pay any costs associated with the lift or lift shaft in their leases. Again, the Applicant conceded this.

21. The claim included bank charges for which the Respondent said it was not liable under the leases Yet again, the Applicant conceded the point.

22. The Applicant conceded a charge of £36 (inclusive of vat) for debt collection in the 2015/16 year.

23.For the year 2015/16 there was a charge of £60 (including vat) for communal cleaning. Although the Respondent at first sought to challenge that charge at the hearing it was pointed out that in neither its response to the County Court proceedings nor the Respondent's statement of case for the Tribunal proceedings was this charge challenged. The Tribunal was not prepared to allow this to be raised for the first time at the hearing and the respondent accepted this.

24. With regard to the charge for recovery of the cost of buildings insurance, the Respondent said that the lease required it to pay a "fair proportion" of the cost. Mr Mehson claimed that the Respondent was not being charged a fair proportion. He claimed that the premium should be split 40% to the commercial premises and 60% to the residential lessees. He asserted that this was not being done. He further sought to challenge the proportions charged as between residential lessees suggesting that rather than an equal division the proportions should vary according to number of bedrooms. In a witness statement Mr Khosla explained that the premiums were being split 40%/60% between the commercial units and the residential part of the building and that since the addition of the two new flats to the top of the building each flat had been charged 7.56% of the premium regardless of size or number of bedrooms. After a short adjournment, Mr Mehson accepted the landlord's apportionment and the amounts charged for buildings insurance and so it was not necessary for the Tribunal to determine the same.

25. This left a challenge to the amount of the managing agents' fees charged and five invoices, one in 2015/16 and four in 2016/17 for work done to a drain at the rear of the Property in a total sum of £268.08.

26. Mr Ebert told the Tribunal that his company's fees were to cover the fact that this is a challenging building to manage, annual accounts are prepared, buildings insurance arranged, tenants' queries dealt with and arrears monitored. He considered that the management fee of £250 plus vat for 2014/15, £300 plus vat for 2015/16 and the same for 2016/17 is a reasonable charge. The Respondent pointed to the fact that the Tribunal in 2015 had found that £150 per flat was a reasonable amount to charge for management charges for 19 Lansdowne Road and that that was a similar building to manage.

27. With regard to the drains repair Mr Ebert said that this was necessitated by a problem with the downpipe at the rear of the Property becoming blocked causing waste water to enter the lift shaft. No invoices had been included in the bundle. the Respondent did not consider that it should be responsible for any works to the lift shaft.

The Tribunal's decision on the remaining issues

28. Based on its own knowledge and experience as a specialist Tribunal and also on the previous decision of the Tribunal in respect of 19 Lansdowne Road, the Tribunal decided that a management fee of £150 plus vat per flat would be a reasonable charge for 2014/15 and 2015/16 increasing, due to inflation, to £165 plus vat for 2016/17.

29. With regard to the drain work, the Tribunal considered that a fee for pumping out the waste water from the lift shaft caused by blockage of the downpipe at the Property was a charge for which the lessees would be liable but not for the fitting of a pump to the lift shaft. Accordingly, the Tribunal finds that a total charge of £47.04 including vat is recoverable from the lessees.

Summary

30. The result of the foregoing is that the following service charges are payable in respect of each of the two flats owned by the Respondent:

2014/15	
Buildings insurance	£ 55.56
Management fee	£180.00
Total	£235.56

2015/16	
Buildings insurance	£ 62.02
Communal cleaning	£ 60.00
Management fee	£ 180.00
Drain repair	£ 15.60
Total	£ 317.62

2016/17	
Buildings insurance	£ 62.35

Management fee	£198.00
Drain work	£ 31.44
Total	£ 291.79

The total amount payable under the County Court claims is, therefore, £844.97

31. That completes the Tribunal's aspect of this case. The Chairman will now reconvene alone sitting as a County Court judge to issue Directions for the determination of costs which said Directions will be issued contemporaneously with this decision. Once the costs are determined a County Court Judgment and Order will be issued covering both the substantive claims and costs.

Dated the 4th day of April 2019

Judge D. Agnew (Chairman).

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking