



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

Case reference : **LON/00BK/LSC/2018/0439**

Property : **Flat 4, 37 Panton Street, London Sw1
4EA**

Applicants : **Mr and Mrs T R Linton**

Representative : **None**

Respondent : **Jointcater Limited**

Representative : **NPH & B Ltd**

Type of application : **For the determination of the
reasonableness and the liability to
pay a service charge**

Tribunal members : **Simon Brilliant
Ian B Holdsworth FRICS MCI Arb**

Venue : **10 Alfred Place, London WC1E 7LR**

Date of decision : **16 April 2019**

DECISION

1. The tribunal determines that the applicants should pay **16%** of the total service charges payable for the period 1 October 2011-22 July 2018.
2. The service charge deemed reasonable and payable by the applicants during this period amounts to **£45,764.90**.
3. The sum of **£6,198.46** has been overpaid by the applicants. This is the difference between the agreed and undisputed paid service charge sums submitted to the tribunal (**£51,963.35**) and the deemed payable service charge.

The Application

1. The applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 (“the Act”) as to the amount of service charges payable by them in respect of the service charges over the period 1 October 2011 to 22 July 2018. The respondent ceased to be the freeholder on 23 July 2018 and these proceedings are not concerned with any dispute between the applicants and the new freeholder.
2. This dispute is over the allocation of service charges between commercial and residential leaseholders of the property. At present the 5 residential leaseholders pay 90.84% of the service charges and the commercial premises leaseholder on the ground and basement floors the balance.
3. On 3 December 2018 the tribunal gave Directions:
 - (i) The applicants’ statement is at section 1, page 1-2 of the Bundle.
 - (ii) Copies of relevant service charge demands are at pages C1-C8.
 - (iii) A copy of the lease of the commercial premises is at pages J1-J5.
 - (iv) A copy of the respondent’s statement is at section 4, pages 1-5.
 - (v) A copy of the text lease of the applicants’ property is submitted with the application.
4. The parties were asked whether they would like an oral hearing. They both agreed that this matter could be determined by written submissions.

The Background

5. Jointcater Limited acquired the freehold of the 6 storey property in 2003. The property comprises a basement, ground floor commercial premises, 5 flats and storage space on the 6th floor. There is a ground floor access to the residential premises and a lift that services all floors. As we have said, Jointcater Limited ceased to be the freeholder on 23 July 2018.
6. The tribunal are told that since 2011 the applicant has paid 20% of the total service charges levied on the residential properties. The total charge levied on the residential leaseholders is £259,816.79 according to the applicants (we take this figure rather than the £262,093.05 submitted by the respondent). Of that total, the applicant paid £51,963.35.
7. The residential leaseholders paid 90.84% of the total service charge over this period (the total being £286,030.60). The leaseholders of the ground and basement premises which has been used as a restaurant since 1985 paid the outstanding balance. The residential leaseholders submit that this is not fair or reasonable given the extent of use of the premises enjoyed by the commercial leaseholders.
8. The applicants contend for an allocation of the service charge costs in accordance with the floor usage. They argue the commercial leaseholders occupy and use the basement, ground floor and storage room on the sixth floor. On this basis they claim 37.5% of the costs should be met by the commercial tenant.
9. The respondent argues it adheres to all the relevant lease provisions on service charges and pays appropriate sums. They claim no monies are due to the applicants.
10. The applicants claim a service charge reimbursement for the period 2011-2017 in the total sum of £31,983.00 equivalent to £6,396.71 per leaseholder.

Leases

11. The tribunal are provided with two leases. A lease dated 18 March 1999 of the basement and ground floor premises, (the “Commercial Lease”). A lease of Flat 4 dated 17 September 1998. (the “Residential lease”).
12. At clause 2(6) of the Commercial Lease, the leaseholder is obliged to pay “a fair proportion” of {the service charge} “*this to be reasonably determined by the surveyor for the time being of the Lessor*”.

13. The demised premises are specified at **First Schedule, First Part** as “All That the premises known as the Ground Floor and Basement 37 Panton Street London”. At paragraph (g) (a) it states, “*TOGETHER WITH...Full Right and liberty for the Lessee...for the purpose only of escape in case of fire or other such emergency to pass over and through and along the ground floor passage and main entrance and the staircase leading to the demised premises (except the lift*”
14. The Third Schedule details the expenditure “chargeable by way of the service charge.” At paragraph **2(6) Service Charges** the commercial lease limits any contribution to service charge by the leaseholder to 35.52% of the total charge.
15. The residential lease service charge provisions match those in the commercial lease except for the provision at the **Second Schedule paragraph 2(a)** which states the leaseholder is to pay a proportionate part by way of service charge of “*The maintenance repair renewal replacement improvement and inspection of the lift shafts and lift plant from time to time*”. The commercial lease makes no provision for such charges.

The Law

16. The relevant legal provisions are set out in the Appendix to this decision.
17. It is not uncommon for parties to seek to adjust the apportionment between properties as part of the Landlord and Tenant Act 1985 s19(1) process. Where the lease does not specify a percentage payable but provides that the tenant should pay a fair or reasonable proportion of the service charge the Upper Tribunal has ruled that a tribunal can determine what a reasonable apportionment should be. It can substitute a different method of apportionment if it considers it necessary to achieve a fair allocation of charges between properties.
18. In *Gater v Wellington Real Estate Ltd* the Upper Tribunal said that the exercise to be undertaken by the tribunal is not to ask whether the landlord’s surveyor’s method of apportionment was fair but what the fair apportionment was. This decision was approved by the Court of Appeal in *Oliver v Sheffield City Council*.

Tribunal Decision

19. The tribunal has considered the Bundle submitted by both parties. It notes the revision to the apportionment of costs sought by the applicants is intended to reflect the costs of maintenance of the lift since 2011. The applicants contend the respondent should contribute to this sum and seek reimbursement of service charge monies paid from

the respondent. Any revision to the charge's allocation would require the costs of maintenance to be payable by the lessee of the basement and ground floor premises.

20. The review of the commercial and residential lease service provisions has revealed that the leaseholder of the commercial lease has no liability to pay the costs of lift maintenance.
21. The law permits the tribunal to revise the allocation of service charges between properties if they consider the current allocation to be unfair. The tribunal has concluded the current allocation of 91.84% versus 9.14% is not reasonable given the benefit of rights enjoyed by the occupier of the commercial premises.
22. The tribunal has identified 7 discrete units, within the building {basement, ground floor plus 5 flats}. The storage space on the 6th floor is not in any lease presented to the tribunal. Two of the units are occupied by the commercial leaseholder. The tribunal initially determines the residential leaseholders should pay 14.25% each but be subject to a supplement to reflect the costs of maintaining the lift. This is assessed as a 1.75% supplement of the share of total service costs. The tribunal rely upon their knowledge and experience of similar lift charges to apply this supplement.
23. The standard percentage charge plus the lift supplement takes the burden of cost to be borne by each residential leaseholder to 16% with the balance to be met by the commercial leaseholder. The total share of the costs to be met by the residential properties is deemed to be 80%. We have no power to vary the service charge paid by the commercial leaseholder. However, the landlord is entitled to charge the shortfall of 20% to the commercial leaseholder. If the landlord does this, it will not be out of pocket.
24. The application of this revised allocation to the service charges paid since 2011 results in the following outcomes:
 - Service charges paid according to the applicants since 2011 are £286,030.60;
 - The proportion deemed payable by the residential leaseholders (80%) is £228,824.48 on the revised share basis;
 - The revised applicants' contribution deemed reasonable and payable over the period 2011-2017 is therefore £45,764.90 (16%).
25. We are told the applicant over this same period paid £51,963.35. The tribunal determines the leaseholder should receive reimbursement of £6,198.46.

26. The revised service charge allocation is deemed fair and reasonable. It is based upon the extents of leaseholder occupation within the building. These extents are used as a proxy indicator of the use of the building and associated liability for service charges. The tribunal has applied the appropriate law and followed relevant authorities in reaching this decision.

Application under s.20C

27. The applicants applied for an order under s.20C of the 1985 Act. The applicants argued that the respondent had failed to have regard for their concerns about the charges currently being charged despite their repeated efforts to secure a more equitable allocation of the service charges for this property.

28. Having considered the written submissions from both parties and taking into account the determinations above, the tribunal has decided to make such an order for the following reasons:

29. The tribunal has found that the previous charging basis was not equitable or fair given the use of the premises; and

30. The respondent had failed to have due regard for the legitimate concerns of the leaseholders about the allocation of service charges expressed over a number of years.

31. This failure to address the valid concerns of the leaseholders is the primary reason for these proceedings. The finding of the tribunal is that an order is made.

Ian Holdsworth

16 April 2019

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 Tribunal 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 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.
4. 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.

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.