FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference		**LON/00AN/LSC/2020/0224 (CVP Hearing)**
Property	:	**68B Bramber Road, London, W14 9PB**
Applicant	:	**Northumberland & Durham Property Trust Limited**
Representative	:	**Montague Palfrey of Counsel**
Respondent	:	**Triplerose Limited**
Representative	:	**Richard Granby of Counsel**
Type of Application	:	**s.27A Landlord and Tenant Act 1985 application for a determination to liability to pay and reasonableness of service charges**
Tribunal Members	:	**Judge Professor Robert Abbey John Naylor (Valuer Chair)**
Date and venue of Hearing	:	**20 April 2023**
Date of Decision	:	**2nd May 2023**

DECISION

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Decisions of the tribunal

1. The Tribunal determines that the total service charges claimed in the sums for £29,972.51 are, for the reasons set out below, both reasonable and payable by the respondent to the applicant.

2. The applications pursuant to Section 20C of the Landlord and Tenant Act 1985 and Schedule paragraph 5A of the Commonhold and Leasehold Reform Act 2002 are dismissed.

The application

3. The applicant seeks and the tribunal is required to make a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") regarding the service charge payable by the respondent in respect of services provided for **68B Bramber Road, London, W14 9PB** (the property) and the liability to pay such service charge. Specifically, this is a matter which was originally heard by the First-tier Tribunal on 24th February 2021. Its decision, dated 19th March 2021, was then the subject of an appeal by the respondent to the Upper Tribunal. Following the grant of permission to appeal by the Upper Tribunal on two of the three grounds advanced, the parties entered in a consent order whereby the appeal was allowed on limited grounds and under its terms part of the original decision was set aside and the matter remitted to this Tribunal for determination on three identified issues on the basis that the original Tribunal failed to deal with these adequately in its decision.

4. The three issues falling to be determined are:

   (i) the dispute as to the amount payable by the Respondent in respect of the major works programme,

   (ii) whether the Respondent was entitled to all or any part of the credit applied by the Applicant to the leaseholder of Flat A in respect of that leaseholder's share of the major works, and

   (iii) the calculation of the total amount payable by the Respondent in respect of the service charge years 2014 to 2019, inclusive.

5. The respondent is the lessee of the property pursuant to a long lease granted in respect of the flat in the property and registered at the Land Registry and which is dated 16 March 2005 and made between the applicant and the respondent for a term of 125 years from 1983. The applicant held the reversion immediately expectant on the lease until 3 September 2020. This interest was the freehold of the building known as 68 Bramber Road, London, W14 9PB. This is a two flat converted house consisting of flat A and flat B. The respondent and the other leaseholder of flat A acquired the freehold of the building by way of a collective enfranchisement on that date.

6. The service charge mechanism is contained in the fifth schedule to the Lease. By paragraph 1 (3) "the Interim Charge" is defined as "such sum to be paid on account of the Service Charge in respect of each Accounting Period as the Lessors or their Managing Agents shall specify at their discretion to be a fair and reasonable proportion. By paragraph 3 the Interim Charge is payable in equal instalments in advance on 24 June and 25 December in each year. Paragraph 4 provides:

   (i) " *In the event that the costs to the Lessors of performing the obligations of the Lessors hereunder (to the extent that the same are ultimately recoverable from the Tenant) shall at any time during the Accounting Period exceed the Interim Charge then the Lessor shall be entitled by notice in writing served upon the Tenant to require payment by the Tenant to the Lessors within seven days thereafter of a further Interim Charge ("The Further Interim Charge") in an amount not exceeding One Hundred and Twenty Five per centum of the deficiency in question.*"

7. The relevant legal provisions are set out in the Appendix to this decision. Additionally, rights of appeal are set out below in an annex to this decision.

The hearing

8. The tribunal had before it an electronic trial bundle of documents prepared by the parties, in accordance with previous directions.

9. This has been a video hearing on the papers which has been consented to or not objected to by the parties. The form of remote hearing was classified as CVP (Cloud Video Platform). A face-to-face hearing was not held given that all issues could be determined in a remote hearing on video. The documents that the Tribunal was referred to are in the electronic bundle described above and supplied by the parties to this dispute.

10. The Tribunal did not consider that an inspection necessary. However, the Tribunal was able to access the detailed and extensive paperwork in the trial bundle that informed their determination along with relevant photographs. In these circumstances it would not have been proportionate to make an inspection given the quite specific issues in dispute.

11. The applicants were represented by Mr Palfrey of Counsel and the respondents were represented by Mr Granby of Counsel. Mr Palfrey called as a witness Patricia Johnson who was cross examined by Mr Granby. It seemed to the Tribunal that she was a very experienced bookkeeper/accountant who was very familiar with this account. However, it was also true to say she had limited knowledge of the decisions that drove forward many of the repairs issues. For example, she accepted she didn't deal with the major works, she didn't deal with the tender and had no involvement in that aspect of the service charges. What she did know was how the expenditure was shown in the ledgers/accounts maintained by the applicant. Accordingly, her evidence was to that extent of limited help to the Tribunal.

12. Mr Granby called Mr Moscovitz as a witness who was then cross examined by Mr Palfrey. As was noted in the original decision, Mr Moscovitz was not a particularly convincing witness. He was asked to draw attention to evidence to support his various assertions but failed to do so. For example, he said that he had not seen anything from the managing agents Eddisons. Mr Palfrey took him to copies of service charge demands in the trial bundle, (for example, see pages 251 and 252 in the trial bundle), whereupon the witness said that "he hadn't looked at everything in the bundle". However, Mr Palfrey told him that this was his exhibit. Mr Moscovitz did say that he had paid all the ground rent and insurance demands that he had received, and this was not disputed by the applicant.

Decision

13. The tribunal is required to consider the reasonableness and payability of the disputed service charges. In that regard the Tribunal

was mindful that in the case of *ASP Independent Living Ltd v Godfrey* [2021] UKUT 313 (LC) Judge Elizabeth Cooke affirmed at [7] that:

> *"It is well-established that where a lessee seeks to challenge the reasonableness of a service charge, they must put forward some evidence that the charges are unreasonable; they cannot simply put the landlord to proof of reasonableness. "*

14. Accordingly, those service charges that have already been determined (and are therefore not subject to further determination) are as follows:

    (i) The major works programme is reasonable, and the costs are payable by the Respondent save that the amount payable needs to be determined in accordance with the consent order.

    (ii) The management fee of £250 per unit per annum is reasonable and payable by the Respondent.

    (iii) The audit fees are reasonable and payable by the Respondent.

    (iv) The legal fees of £5,116.51 are reasonable and payable by the Respondent.

15. Dealing with the first specific matter remitted by the Upper Tribunal, the dispute as to the amount payable by the respondent in respect of the major works program, this Tribunal therefore considered all the evidence both written and oral in this regard.

16. The amount sought by the applicant was set out in their statement of case at page 79 of the Trial Bundle in the sum of £23412.00. As the applicant stated, the issue for consideration is “how much is the Respondent required to pay in respect of the works” which will depend upon the finding made by this Tribunal as to how much did the works actually cost. The total cost of the works was said to be £46,824.00 inclusive of VAT. The Respondent is liable for 50% of these costs (totalling £23,412), (although an amount of £5,003.32 had been incorrectly applied to the credit of the Respondent’s account described in the Statement of Account as “SF Refund” but that error has since been corrected). The applicant therefore asserts that the Respondent consequently owes £23,412 in respect of these costs.

17. The sum of £5003.32 related to a sinking or reserve fund that had been advanced by the applicant in the absence of any contributions from the respondent. So, with regard to the contribution made by the applicant, this was credited to Triplerose's service charge account incorrectly and so resulted in a £5,003.24 erroneous credit. Ms Johnson confirmed that a correction has since been made and the erroneous credit has been reversed. The Tribunal accepted this evidence as an appropriate explanation for the entry in the ledger. In essence the sum was not invoiced to the respondent and thus the credit was incorrect and had to be reversed.

18. Ms Johnson for the applicant stated that the total cost of the major external works programme was £46,824 (inclusive of VAT) invoiced by WD Building who undertook the works. This was paid in full on 21 August 2019 as evidenced by a remittance slip copied for the Tribunal in the Trial Bundle. Also, there is an email confirmation from WD Building confirming receipt of that amount also copied in the Trial Bundle. Taking all of these items of evidence together the Tribunal was satisfied that the building contract existed and that the work was done by the building company mentioned and paid for by the Applicant. (A series of photos in the Trial bundle showing the property before and after the major works were completed also helped the Tribunal come to this conclusion).

19. In the light of the above the Tribunal finds that the amount payable for the major works is £23,412.00 and that this sum is reasonable and payable. We also find that there are no deductions that we can accept as being appropriate or legitimate reductions in this sum. The Tribunal is also satisfied that the sum was properly demanded within the terms of the lease including in particular paragraph 4 of the lease that is quoted above.

20. Issue two, whether the Respondent was entitled to all, or any part of the credit applied by the Applicant to the leaseholder of Flat A in respect of that leaseholder's share of the major works, will be considered next. In this regard, the applicant says that the respondent's Statement of Case fails to give any reason as to why it should get the benefit of all, or part of the credit applied to the Leaseholder of Flat A. This assertion is simply based upon the applicant's failure to provide full disclosure of the settlement agreement.

21. However, this question of the limited disclosure has already been considered by the Tribunal in its decision dated 23rd November 2022. Judge Martynski at page 9 of his determination made it clear that he considered "It seems to me that, although the settlement agreement

between the Applicant and Flat A is very heavily redacted, those parts that remain sufficiently explain the credit given to Flat A."

22. All parties agree that the settlement agreement between the Applicant, its parent company and Mr Marshall is indeed extensively redacted. The respondent says that simply from context it might be assumed to be a disrepair settlement (although if any disrepair related to the building that would be a concern to the Respondent) but observes that this is speculation. Indeed, it is, merely speculation with no evidence to back up this assertion. The respondent goes on to say that "the real point is that the settlement agreement is so heavily redacted that that Respondent cannot really address the second remitted question, as it is the Applicant that has created this ambiguity (bluntly, it should have formulated an agreement that did not require it to attempt to maintain confidentiality in Tribunal proceedings and/or obtained a release). The ambiguity created ought to be assumed against the Applicant." The Tribunal does not agree with this assumption as it can find no good reason or evidence in support to make it.

23. The Tribunal accepts that the applicant and Mr Marshall (the leaseholder of Flat A) were engaged in a dispute, unrelated to the respondent or its flat, which was settled on confidential terms pursuant to a Settlement Deed dated 7 June 2019. The Settlement deed is subject to a confidentiality clause, but a redacted version was disclosed which clearly shows a settlement payment to Mr Marshall in an unspecified amount with the cost of the major works being set off against that unspecified settlement payment and allocated towards his service charge account to discharge the cost of the major works. This was nothing to do with the respondent and was an agreement about a dissimilar dispute and as such the respondent is not entitled to all or any part of the credit applied by the Applicant to the leaseholder of Flat A in respect of that leaseholder's share of the major works.

24. Issue three covers the calculation of the total amount payable by the Respondent in respect of the service charge years 2014 to 2019, inclusive. Putting the major works costs to one side as they have been dealt with in issue one, the Tribunal to begin with considered balancing charges. They also considered legal costs but were of the view that these had been determined due and payable by the original Tribunal. This left the hearing fee and if there was any doubt as to whether or not this was covered by the previous decision, this Tribunal determines that there should be a refund of these fees by the payment of £200 by the respondent to the applicant. Furthermore, Rule 13 allows for the refund of Tribunal fees. Rule 13(2) states that

"*The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor*."

25. There is no requirement of unreasonableness in this regard. Therefore, in this case the Tribunal considers it appropriate that the Respondent refund the Applicant's fee payment of £200. So, in the circumstances the tribunal determines that there be an order for the refund of the application fee in the sum of £100 pursuant to Rule 13(2).

26. As to balancing charges they were reviewed by the Tribunal and found to be reasonable and appropriate given the accounting processes involved with the service charges for this property. The Tribunal also noted that at the hearing the respondent rendered little or no opposition to these charges. The Tribunal find them reasonable and payable.

27. In a final analysis, the total amounts that remain outstanding and due from the respondent as outlined by the applicant are as follows:

a. Major works costs £23,412. These are now confirmed by this Tribunal for the reasons set out above.

b. Balancing charge for service charges 2017/18 which incorporates accountancy fees and management fees - £745. This is now confirmed by this Tribunal and was not opposed to any degree by the respondent at the hearing. The Tribunal noted that this incorporated Audit and Accountancy fees and Management Fees already determined due and payable by the original Tribunal.

c. Balancing charge for service charges 2018/19 which incorporates accountancy fees, management fees and fire risk assessment costs - £499. This is now confirmed by this Tribunal and was not opposed to any degree by the respondent at the hearing. The Tribunal noted that this incorporated Audit and Accountancy Fees, Management Fees and Fire Risk Assessment Costs already determined due and payable by the original Tribunal)

d. Legal costs - £5,116.51 – already approved and resolved by the previous decision.

e. Tribunal hearing fee - £200. This Tribunal considers appropriate and proportionate that there be a refund of these fees.

28. Therefore, the Tribunal determines that the service charges claimed in the sum for £29,972.51 are both reasonable and payable by the respondent to the applicant.

29. As the applicant has not had any legal interest in this building since the collective enfranchisement completed, any applications pursuant to Section 20C of the Landlord and Tenant Act 1985 and Schedule paragraph 5A of the Commonhold and Leasehold Reform Act 2002 are dismissed.

Name:	Judge Professor Robert Abbey	**Date:**	2nd May 2023

Appendix of relevant legislation and rules

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.

<u>Landlord and Tenant Act 1985</u>

<u>20C Limitation of service charges: costs of proceedings.</u>

(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 leasehold valuation tribunal or the First-tier 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

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 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.