FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00MWL/LSC/2023/0016
Property	:	36 Osborne Court, The Parade, Cowes, Isle of Wight, PO31 7QS
Applicant	:	Peter Scholes Mark Scholes
Representative	:	-
Respondent	:	Osborne Court Right to Manage Company Limited
Representative	:	-
Type of Application	:	Determination of Service charges. Section 27A of the Landlord and Tenant Act 1985
Tribunal Members	:	Judge Cohen
Date and venue of Hearing	:	17 May 2023 at Havant Justice Centre Paper determination
Date of Decision	:	25 May 2023

DECISION

Decisions of the Tribunal

(1) The tribunal determines that the service charges payable by the Applicants for the service charge year 2022-23 are to be assessed using a percentage of 2.08% of the total expenditure.

(2) The tribunal does not make orders either under section 20C of the Landlord and Tenant Act 1985 or under Schedule 11 of the Commonhold and Leasehold Reform Act.

The application

1. The Applicants seek a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("**the 1985 Act**") and also relief under section 20C of the 1985 Act and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("**the 2002 Act**") as to the service charges and (where applicable) administration charges payable by the Applicants in respect of the service charge years 2022-23.

2. The relevant legal provisions are set out in the Appendix to this decision

The Property

3. The property, flat 36 Osborne Court, The Parade, Cowes, Isle of Wight, is a two-bedroom flat in a purpose-built block of about 55 flats. The Applicants are the leaseholders of the property. The Respondent is the right to manage company with responsibility for managing the block since 1 April 2013.

4. In 2019, there was a collective enfranchisement of the block

5. The Respondent continues to manage the block.

Directions and the issue

6. On 2 and then 20 March 2023, the tribunal gave directions for these proceedings. The background recited in the latter records that this is a dispute as to whether the apportionment of the service charge is being undertaken correctly. Both parties agree that the provisions of the Building Safety Act 2022 are not engaged. The years in dispute have been narrowed to the current year of 2022-23 over which the tribunal has jurisdiction.

7. The tribunal has not inspected the property and neither party contended that an external inspection of the property is necessary.

8. Since the Respondent took over the management of the block, the service charge expenditure has been allocated between the lessees liable to contribute to it according to a percentage for each lessee as stated in a schedule of the percentages for all lessees liable to contribute.

9. The issue is whether the allocation of service charge expenditure according to the percentages in the schedule complies with the lease of the property, so that the service charge expenditure allocated to the Applicants is recoverable by the Respondent from the Applicants. If the tribunal is not satisfied that, on balance, the percentages in the schedule comply with the lease, the Applicants will not be liable for the service charges so allocated.

10. The Tribunal will first refer to the lease and then review the schedule of service charge percentages for the lettable parts of the block.

The lease

11. The lease of flat 36 dated is 13th February 1975. The lease recited that it was the intention of the lessor on the sale or grant of leases of each of the flats at Osbourne Court to demise them upon terms and conditions substantially similar in all respects to the lease of flat 36. The lease was for a term of 99 years from 29th September 1970 and reserved a service charge.

12. By clause 2(ii) the lessee covenanted to pay a proportionate part of the expenses and outgoings incurred by the lessor in the repair maintenance and renewal of the building and the insurance of Osborne Court and the provision of services to the block and the other heads of expenditure as are set out in the Fourth Schedule to the lease such further rent (hereinafter called "the service charge").

13. By sub clause 2(iii)(e) "the annual amount of the Service Charge payable by the Lessee shall be calculated by dividing the aggregate of the said expenses and outgoings incurred by the Lessor in the year to which the certificate relates by the aggregate of the rateable values (in force at the end of such year) of all the flats in Osborne Court the repair maintenance renewal insurance or servicing whereof is charged in such calculation as aforesaid and then multiplying the resultant amount by the rateable value in force at the same date) of the Flat".

The schedule

14. The tribunal reviewed the schedule of service charge apportionments. 22 flats had a service charge percentage (or proportion) of 1.55 and four flats had a percentage of 1.56

15. 15 flats had a service percentage greater than 1.56 and 10 flats had a percentage lower than 1.55. The range of percentages for individual flats went from 3.51 at the highest to 1.37 at the lowest end of the range. Two flats had a zero percentage.The penthouse east and the penthouse west each had a percentage of 1.25. There was no evidence as to the specification of either penthouse but the designation as a "penthouse" may suggest that 1.25% was a lower percentage than might otherwise have been expected.

16. The percentage for the property was 2.08%.

17. On 27 April 2023 the tribunal emailed the parties to say that a procedural judge had examined the bundle submitted and noticed that clause 2(iii) (e) of the lease referred to a calculation based on rateable values. The tribunal asked if the parties wished to submit evidence of rateable values. In an e-mail to the tribunal dated 2 May 2023 the first Applicant stated that he had spoken to the Respondent about the rateable values and that the Applicants did not wish to submit such evidence.

The Applicants' case

18. In their application, the Applicants stated that there were a number of anomalies in the service charge of the building resulting from actions of a previous freeholder who also owned leases in the building and "manipulated" service charges to his own benefit. No evidence of manipulation was presented to the tribunal.

19. The Applicants compared flat 36 with two other flats in the block, being flats 43 and 28. Having performed that comparison, they contended that the service charges percentage charged to them is too high and should be reduced.

20. The Applicants comparison exercise is summarised as follows

(a) **Flat 36**

Situated on the 5th floor of the East wing; service charge proportion 2.08 per cent

(b) **Flat 43**

Situated on the 5th floor of the West wing; service charge proportion 1.385 per cent

(c) **Flat 28**

Situated on the 4th floor of the East wing; and includes a large private terrace; service charge proportion 1.951 per cent.

21. The photographs produced to the tribunal show the substantial roof terrace which is part of flat 28 and which seems to be an attractive feature. Also flats 36 and 43 appear to be broadly equivalent in terms of their size and location in their respective wings.

22. The Applicants' case is that:

(a) flat 36 (service Charge proportion2.08%) is equivalent to flat 43(1.35 percent and should bear the same proportion rather than 0.73% more); and

(b) flat 36(2.08%) pays too much given the value that would be attributed to the large private terrace enjoyed by flat 28 (1.951%)

23. The Applicants are raising this issue now as major works are required to replace flammable cladding which are intended to be carried out in summer 2023 and understandably, the Applicants do not wish, in their words, to "shoulder an unfair burden".

The Respondent's case

24. Trevor Sims made a witness statement on behalf of the Respondent which stated that the allocation of service charge was inherited from the previous landlord and has continued to be charged. The rate applied to flat 36 is at a higher level than is applied to flat 43, which is identical. Mr Simms added that any reduction in the rate applied to flat 36 to bring it in line with identical flat 43 would mean an increase in the charge to the other leaseholders, who will object.

Discussion

25. In order to decide the issue as stated above the tribunal considered whether the Respondent's approach to allocating the service charge expenditure complies with the lease and whether the Applicants' arguments concerning the fairness of their percentage are relevant.

26. The Respondent's evidence, which was not challenged was that the schedule, which was used by the then freehold owner, was passed to (or adopted by) the Respondent when it took over the management of the block.

27. There was no evidence as to how the apportionments of service charges, flat by flat, in that schedule were calculated. The Tribunal does not have the workings which led to the results shown in the schedule. Nor was any evidence was supplied of any basis other than rateable values by which the schedule was compiled nor was there evidence of any earlier challenge to the schedule.

28. Doing the best that it can, the tribunal finds that the distribution of percentages in the schedule is consistent with the percentages for each flat having been calculated having regard to the rateable value for each individual lease and the total of all rateable values of the premises in the block.

29. In the absence of evidence to the contrary, the content of that schedule is the best guide to how the service charges should be apportioned by reference to the rateable values of the flats, the rateable values being beyond dispute by now.

30. The tribunal is therefore satisfied that the percentages in the schedule comply with the requirements of the lease.

31. A rateable value is a hypothetical rental value of a rateable unit. The rateable value needs to be assessed even where, in the real world, no letting transactions take place. The valuer must do the best that she can to assess the rental value using the evidence available.

32. Whilst the proportions in the schedule may seem, in some instances, to be anomalous, there may be an explanation rooted in the valuation exercise for the apparent anomaly. It is perfectly possible that two identical flats have different rateable values (for example if one lessee successfully appealed against their rateable value but the other did not appeal).

33. The Applicants dissatisfaction with its percentage is not based on any understanding or information concerning the rateable value of flat 36 and other flats. Rather it was based on anomalies perceived by the Applicants as described above. There may be some force in the Applicants' case that their service charge percentage is too high having regard to the comparisons with flats 43 and 28. However, the lease does not provide for the service charge expenditure to be allocated according to a comparison of perceived fair value. That complaint does not relate to the mechanism required by the lease. The lease requires allocation by reference to rateable values.

34. The tribunal notes that under the Local Government Finance Act 1988 domestic premises were, until 1 April 1990, assessed for rating. Thus, at the date of the Applicants' lease, it would have been expected that each flat would have a rateable value. The last revaluation had come into effect on 1 April 1973. Since 1 April 1990, domestic premises have not been assessed for general rating but have been assessed for council tax. So the valuation list current prior to 1 April 1990 came into force on 1 April 1973.Appeals outstanding at 1 April 1990 would have been resolved by 2013 and from 1 April 1990, the flats would have been subject to the council tax regime

35. The tribunal does not have any evidence neither as to (1) the rateable values when the flats in the block were assessed for general rates due from 1 April 1973 (2) when individual assessments were made; nor (3) the methodology of the valuation officers undertaking those valuations. After 1 April 1973 there may have been appeals by interested parties against rateable values assessed for units in the block which led to the rateable value being altered.

36. The tribunal notes that details of the rateable values for the premises in the block might be obtainable either from the Isle of Wight Council, as the rating authority responsible, or from the Valuation Office Agency, which is responsible for valuation for rating.

Conclusion

37. The lease at clause 2(iii)(e) provides that the service charges be allocated to lessees according to the proportions based on rateable values. A comparison of the flats and the rateable values attributed to them may contain anomalies. Nevertheless, the proportions based on the rateable values are the proportions as directed by the lease. The tribunal understands the point made by the Applicants that the comparison of the allocation to flat 36 with the allocations to flats 43 and 28 are difficult to reconcile. That is the consequence of the reliance on the rateable value-based allocations in the schedule. The tribunal accepts the schedule as the best evidence of the rateable values pending inquiries of the Council and the VOA. The Applicants comparison does not reflect the terms of the lease which require allocation by rateable values.

38. The tribunal is satisfied that the percentage amounts set out in the schedule were calculated in accordance with rateable values as required by the lease.

Decision

39. Service charge demands for 2022-23 which adopt the percentage of 2.08 for flat 36, correctly allocate whatever service charge amounts are recoverable under the lease.

40. The applications by the Applicants as to costs and administration expenses under section 20C Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 therefore fail.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk 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.

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

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.