THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL

SOUTHERN LEASEHOLD VALUATION TRIBUNAL

In the matter of Applications under Sections 27A and 20C of the Landlord & Tenant Act 1985

Case No. CHI/21UD/LSC/2010/0128

Property: Basement Flat, 67 Warrior Square, St. Leonards-on-Sea, East Sussex, TN37 6BG

Between:

Malcolm Richard Perrior

("the Applicant/Tenant")

and

Embassy House Limited

("the Respondent/Landlord")

Members of the Tribunal: Mr J.B. Tarling, MCMI, Lawyer/Chairman

Date of the Decision: 29th October 2010

THE DECISION
OF THE LEASEHOLD VALUATION TRIBUNAL

1. **The Tribunal determines under Section 27A (1) and (3) of the Landlord and Tenant Act 1985 ("the 1985 Act") that:**
   - **(a) if costs were incurred for services, repairs, maintenance, improvements, insurance or management of the common ways on the ground and upper floors of the building, a service charge would not be payable by the Applicant**
   - **(b) if costs were incurred for the supply of electricity to the common ways on the ground floor and upper parts of the Building a service charge would not be payable by the Applicant**
   - **(c) the sum of £2.59 in respect of a contribution to the electricity supplied to the common parts for the calendar year 2009 is not legally payable by Applicant to the Respondent**

2. **The Tribunal makes an Order under Section 20C of the 1985 Act that any costs or expenses incurred or to be incurred by the Landlord in connection with these proceedings shall not be chargeable through the Service Charge Account.**

REASONS FOR THE TRIBUNAL'S DECISION

1. **The Applications**

There are Two Applications to the Tribunal:

(a) One Application under Section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for a determination of the liability of the Applicant/Tenant to pay to the Respondent/Landlord certain Service Charges incurred in the calendar year 2009 under the terms of the Flat Lease.

(b) Under Section 20C of the 1985 Act for an Order that any costs of expenses incurred by the Landlord in connection with these proceedings shall not be chargeable through the Service Charge Account.

2. **The matters in dispute**

At the date of the determination the following matters remained in dispute:

(a) Whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of the common ways on the ground and upper floors of the building, a service charge would be payable and , if it would, the person(s) by whom it would be payable

(b) Whether, if costs were incurred for the supply of electricity to the common ways on the ground floor and upper parts of the Building a service charge would be payable for the costs and, if it would, the person(s) by whom it would be payable

(c) Whether the Applicant is liable to pay a contribution in the sum of £2.59 towards the cost of electricity to the common parts of the Building during the calendar year 2009. The Applicant does not challenge the amount of the contribution, but purely the liability to make payment.

3. **The Documents before the Tribunal**

The Tribunal had before it the Bundles of documents which had been produced by the parties in accordance with the Tribunal's Directions. In its Directions the Tribunal had given notice to the parties that it intended to make its determination as a paper determination without an oral hearing unless either party requested an oral hearing. Neither party requested an oral Hearing, and the Tribunal makes its determination as a paper determination.

4. **<u>The Relevant Law</u>**

<u>Section 27A of the 1985 Act</u>.

(1) An application may be made to a leasehold valuation 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.

(3) An application may also be made to a leasehold valuation 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 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 would be payable.

Section 20C of the 1985 Act. This is an application by a tenant for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charges payable by the tenant.

5. Consideration of the matters in dispute

The Tribunal commenced by reviewing the matters in dispute as set out in Paragraph 2 above.

Applicants written submissions

In paragaraph 2 of his Statement of Case the Applicant says "I accept as tenant of the demised premises, I am obliged to bear and pay a fair proportion for or towards the making, supporting, repairing, cleansing and mending of the structure and roof of the building. I also accept that I am obliged to bear and pay a fair proportion for and towards the making, supporting, repairing, cleansing and mending of all party walls, fences, gutters, sewers, drains, passageways, roads, pavements, forecourts, gardens, yards and other things the use of which is common to the demised Premises and to any neighbouring property. I deny that the common ways in respect of the ground floor and upper floors of the Building are common to the Demised Premises... and to any neighbouring property and that, in consequence, I am not legally liable to contribute towards the costs of their upkeep." The Applicant goes on to contrast the definition of "neighbouring property" with "the building". He says "neighbouring property" cannot include "the Building". He agrees that all Lessees, including him, contribute to the repair and maintenance of the structure and roof of the Building. He takes the view that "neighbouring property" means for example the next building in the street, or the property which backs on to the subject property. He maintains that "neighbouring property" does not include the common parts of the ground floor and upper parts of the Building.

Respondents written submissions

In Paragraph 6 of its Statement of Case the Respondent refers to clause 2(5) of the Lease. This is a covenant by the Tenant:

"To bear and pay a fair proportion (to be settled in the case of dispute by the Surveyor for the time being of the Landlord whose decision shall be final and binding on the Tenant) for or towards the making supporting repairing cleansing and mending of the structure and roof of the building

and of all party walls fences gutters sewers drains passageways roads pavements forecourts gardens yards *and other things the use of which is common to the Demised Premises* or any additions thereto *and to any neighbouring property* provided that such charge shall not include the costs of decorating or cleansing the common parts not accessible to the Purchaser *(presumably the Tenant)*" The italics are those of the Tribunal. The Respondent submits that this Clause in the Lease requires the Applicant to contribute to the cleansing and decorating of the ground floor and upper floor common parts.

The Tribunals determination

(a) The Tribunal is effectively being asked to give an interpretation to the wording of the Lease. The question being asked of it is whether the wording of this Clause in the Lease includes the common parts of the ground floor and upper floors of the Building to which the Applicants claims not to have any rights to use. The Tribunal considered the words in italics above, namely "*and other things the use of which is common to the Demised Premises.*" First of all it is necessary to define what common parts are "used in common to the Demised Premises". Secondly the proviso which follows specifically *excludes any common parts which are not accessible to the Tenant.* The italics are those of the Tribunal. The definition of the Demised Premises is not in dispute. It is the Basement Flat which has no need to have access to the ground floor (or upper floor) common parts as it has its own self-contained entrance. Indeed there is nothing in the Second Schedule of the Lease which includes any specific right of way over the ground floor or upper floor common parts. That is where a specific right to way should have been included if it had been intended to give the Tenant of the Basement Flat a specific right to use those common parts. As such right of way is absent, and there is an ambiguity, the Lease is to be interpreted "*Contra Proferentem*" against the landlord as he should have included such a right of way in the Lease when it was granted if he had intended the Tenant of the Basement Flat to have such rights of way and be required to contribute towards their upkeep. The Tribunal also takes the view that the proviso to that Clause which excludes liability to contribute to the decoration and cleaning of any common parts which are not accessible to the Tenant, supports this view.

(b) The Tribunal has reviewed all the arguments put forward by the Respondents in its written submissions. Whilst it is true that the Applicant has a key to the ground floor front door to gain access to his meter cupboard in outer lobby of the ground floor, the Tribunal takes the view that as there is no specific right of way granted in Schedule 2 of the Lease, then the Applicant is not liable to contribute to the costs of repair and maintenance of the whole of the ground floor and upper floor common parts. There would need to be a clear and unambiguous specific provision in the Lease to enable the landlord to recover such costs from the tenant. As such a provision does not exist the Applicant is not liable to make such contribution.

(c) The Tribunal also notes the history of this matter and it is noted that prior to the Freehold reversion being acquired by the current landlord, the Applicant had not been asked to contribute to the cleaning repair or

maintenance or electricity for the ground floor or upper floor common parts. Whilst the issue of estoppel or waiver has not been raised by either party (and the Tribunal makes no determination on the points) the Tribunal considers that the evidence of what the previous landlord viewed as correct is good and persuasive evidence on which to support the Tribunal's current determination.

(d) The Tribunal has also seen the helpful letter from LEASE (The Leasehold Advisory Service) dated 27th July 2010 which appears to confirm the Tribunal's view as to the correct interpretation of the Lease.

(e) For the avoidance of doubt, the Tribunal exercises its jurisdiction under both sub-sections (1) and (3) of Section 27A of the 1985 Act and makes its determination in respect of both past and future liability to pay contributions to the maintenance repair and electricity for the ground floor and upper floor common parts.

(f) For the above reasons the Applicant is not liable to pay to the Respondent the amount of £2.59 in respect of a contribution to the electricity of the ground floor and upper floor common parts during the calendar year 2009 and any future years.

6. **Who is liable to pay?**

In the questions which the Applicant asks the Tribunal determine, he asks "if a service charge is payable, by whom would it be payable." The Tribunal is aware that the remaining tenants appear to have joined together to form a Company (Embassy House Limited) to acquire the Freehold and the Applicant is not one of the participating tenants in such enfranchisement. The Freehold reversion now appears to be under the control of the other tenants. It is not known if the Leases of the remaining flats still exist or whether they have been surrendered or varied. As there is evidence that the Company now appears to be registered as dormant at Companies House and presumably is able to certify that it has no income which enables it to quality as a dormant Company, it is not known if the remaining tenants continue to pay any ground rent to the Company. In addition, as the other tenants have not been made parties to these proceedings in their capacities as individual Lessees (as opposed to being shareholders or Directors of the Company), they have not had an opportunity to make any representations to the Tribunal as to their own personal liability to pay. For these reasons the Tribunal declines to make a determination as to who is liable to pay the contributions towards the maintenance and repair and electricity of the ground floor and upper floor common parts. It would need a separate application under Section 27A of the 1985 Act for the Tribunal to receive representations from all relevant parties before it could make such a determination. The Tribunal notes in passing the comments made by LEASE it its said letter dated 27th July 2010 and the Tribunal does not disagree with those comments, although it makes no determination in respect of the matter.

7. **Section 20C Application**

The Applicant/Tenant had made an Application under Section 20C of the 1985 Act for an Order that the Landlord's costs of these proceedings are not to be

taken into account in determining the amount of any service charge payable by the tenant. The Tribunal concluded that Applicant has been entirely right to make the Application and the proceedings had been inevitable following the unwillingness of the Respondent to concede the position. Under item 7 of the Respondent's "Defence notes" it says "in the light of the reply from LEASE, the Freeholder may have to concede that the charge of £2.59 may not be recoverable from the Applicant." That letter is dated 27th July 2010 which is before the date on which the Applicant made his Application to the Tribunal (20th August 2010). It would have been possible for the Respondent to agree matters at that stage which would have saved the time and expense which the Respondent has gone to in contesting the matter. For these reasons the Tribunal decided to make an Order under Section 20C of the 1985 Act.

8. In making the above determinations the Tribunal has considered all of the various items of correspondence and all written representations it has received from the parties even though each and every item is not specifically referred to in the above narrative.

Dated this 29th day of October 2010

J.B. Tarling

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John B. Tarling,MCMI Lawyer/Chairman
A member of the Panel appointed by the Lord Chancellor