9503

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

| | | |
|---|---|---|
| **Case Reference** | : | **LON/00AW/LAC/2012/0689** |
| **Property** | : | **182-188 Kensington Church Street London W8 4DP** |
| **Applicants** | : | **Dr Susan Ruth Makin Flat 3, Wong Ham Kwan Flat 7 and Dr Kerry Hickson Flat 11** |
| **Representative** | : | **Mr J Fieldsend (10 June only)** |
| **Respondent** | : | **Grachten Continental Corporation** |
| **Representatives** | : | **Mr A Harding Assoc RICS MIRPMA Qube Management Ltd Mr S Weston MRICS Motcomb Estates Ltd** |
| **Type of Application** | : | **For the determination of the reasonableness of and the liability to pay a service charge and the appointment of a manager** |
| **Tribunal Members** | : | **Mrs E Flint DMS FRICS IRRV Mr K M Cartwright JP FRICS Mrs L West MBA** |
| **Date and venue of Hearing** | : | **10 June and 21 October 2013 10 Alfred Place, London WC1E 7LR** |
| **Date of Decision** | : | **3 December 2013** |

---

**DECISION**

---

## Decisions of the tribunal

(1) The tribunal determines that the sum of £27,139.60 was properly incurred and is payable in respect of service charges for 2011 and 2012 (see schedule attached).

(2) The tribunal determines that it would not be just and convenient to appoint a manager.

(3) The tribunal makes the determinations as set out under the various headings in this Decision.

(4) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

## The application

1. The applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the applicants in respect of the service charge years 2011 and the budget for 2012. The applicants have also made an application for the appointment of a manager. The applicants are the only individual flat owners in the building; 4 flats are owned by the previous freeholder, Sino Plan Investments Ltd, and the remaining 5 flats are owned by overseas companies.

2. Directions were issued on 11 December 2012. On 24 December 2012 the applicants served a notice under S22 Landlord and Tenant Act 1987 setting out the grounds on which the application for appointment of Annie H Booth of JMW Barnard Management Ltd as manager was made. The grounds included that the freehold had been transferred twice within the first accounting year; the current managers are based in Hitchin, Hertfordshire; the managing agents have failed to look after the block effectively; the common parts have not been cleaned or maintained to an appropriate standard; access to the block is not secure and information regarding emergency contact numbers has not been provided.

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

## The property and the lease

4. The property which is the subject of this application is a mixed use block completed in 2011 with a commercial unit on the ground floor

and 12 flats on the four upper floors. Covered car parking spaces on a rolling stacking system are available at lower ground floor level if approached from within the block or from street level if approached from the rear of the building as the block is on a sloping site.

5. The tribunal inspected the exterior of the block, the internal common parts and car park after the hearing on 10 June. The entrance area was clean and tidy, the porter's desk was uncluttered; the lift and corridors to the flats on the upper floors were carpeted and clean. The premises were well presented, however there was evidence of flood damage to the plasterwork and also a small area of damage to the painted concrete floor in the basement locker room.

6. The lease for each flat is for a term of 999 years from 1 January 2011. The tenant is to pay the ground rent on 1 January each year and all other money payable to the landlord is to be paid on demand.

7. The service charge year runs from 1 January to 31 December. A service charge budget is to be prepared in advance of each year. The lessee's share is to be paid by two equal instalments on 1 January and 1 July. After the end of each year the accounts are to be certified and a certificate issued of the actual costs incurred. Any balancing debit is to be paid on demand and any balancing credit is to be credited to the lessee's account.

8. The Company may establish a reserve fund, the amount of which is to be fixed annually by the landlord as being "*reasonably necessary in the general interest of the tenants of the building ....for items of anticipated future expenditure*". In accordance with Sch7 para 7 the landlord is required to keep the reserve fund in a separate account.

9. The landlord's obligations are set out in Schedule 4. The landlord is required to keep the structure and external common parts and the communal areas in good and substantial repair and condition; redecorate the exterior and communal areas; furnish, light and clean the communal areas; provide, maintain and renew fire fighting appliances and provide other services in the general interest of the tenants and keep the building insured.

10. Under schedule 5 the tenant's share of the building expenses is "*a fair and reasonable proportion to be calculated ...in accordance with the principles of good estate management*".

## The hearing

11. Mr J Fieldsend of counsel appeared on behalf of the applicants on 10 June and Dr Makin appeared in person on both 10 June and 21 October. The respondent was represented by Mr A Harding of Qube

Management, and Mr S Weston, an asset manager with Motcomb Estates Ltd which represents the freeholder in the UK.

12. During the hearing further documents were handed in on behalf of the applicants, namely a summary of closing arguments and the respondent handed in a copy of the current management agreement for the block, managing agent's inspection notes, door repair notes, incident log re loss of electricity and letter from bank re client accounts.

## The issues

13. At the start of the hearing the parties identified the relevant issues for determination as follows:

14. The payability and/or reasonableness of service charges for 2011 and 2012 relating to electricity charges, security fob charges, fire alarm, legal and professional fees, cleaning, insurance, management fees, car park access and reserves; the method of apportioning the individual charges; the appointment of a manager.

15. Having heard the evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

## Cleaning

16. Dr Makin gave evidence regarding the standard of the cleaning. She explained that the building was often dirty, spillages were left unattended for days, open refuse bags were left in the common parts, cigarette butts were left lying around, the cleaners did not appear to have been properly instructed; this evidence was supported by a series of photographs.

17. Miss J Birtles, a friend of Dr Makin, visited the flat when Dr Makin was not in residence to pick up mail etc. As there were so few residents, Miss Birtles regarded that the common parts should be spotless but this was often not the case. She had been able to gain entry to the building via the door to the car park.

18. Mr Harding explained that the building is perceived as being a high end building but has a low end service charge budget. He accepted that there have been lots of problems with the developers and also the contractors working on the retail unit on the ground floor. The tenant of the shop now understands his obligations regarding the shared use of the corridor leading to the rear entrance.

19. There were no funds to pay the cleaners at the beginning of 2012. The cleaning contract is on a month to month basis at £9.50 per hour. The contract was initially for 2 hours per day, the hours were extended to allow the postman to gain access to the building as there were no post boxes until the summer of 2012 when the freeholder agreed to provide them. The cleaners are now employed 4 hours per day, Monday to Friday plus an extra hour on the 2 days when the rubbish is removed.

20. Mr Harding said that he had visited the block on approximately 20 occasions during the past year. His visits were unannounced; the only problems he had seen were when the shop-fitting was taking place.

## The Tribunal's decision

21. The tribunal accepts that during the early months of occupation the hours of cleaning were insufficient to maintain a high standard. However the cost in 2011 of £10,123 represented value for money. The estimate for 2012-3 of £23,400 was also reasonable, considering that the service had been considerably extended.

## Reasons for the Tribunal's decision

22. The tribunal accepted that there was no QLTA upon which there ought to have been statutory consultation. A charge of £9.50 per hour is a reasonable one for this part of central London. The standard of cleaning at the time of the tribunal's inspection was good. The increased cost in the budget reflected the higher number of hours of work and consequent improved standard.

## Legal and professional fees

23. The applicants queried legal and professional fees totalling £700. The lease did not allow for the charging of legal fees; there was no information regarding what the professional fees related to.

24. Mr Harding explained that the legal fees were subject to a contra entry as they should have been charged to an individual lessee. The professional charges were in respect of lift servicing. The lift had broken down on several occasions: the lift service was free for 1 year until 30 September 2012.

## The Tribunal's decision

25. The fees relating to the lift were reasonably incurred.

## Reasons for the Tribunal's decision

26. The parties accepted that legal fees should not be charged to the service charge account and were the subject of a contra entry in the accounts; the tribunal therefore has no jurisdiction over these fees. There was an invoice in respect of the lift in the sum of £639.60 which apparently related to an annual inspection.

## Electricity charges

27. The applicants were concerned that the shop may have been connected to the electrical supply for the common parts of the building. It was confirmed that there are 13 inlets: 12 for the flats and one for the common parts. The retail unit has its own supply which is not part of the supply serving the flats and their common parts. Initially the apportionment of the cost from January 2011 to May 2012 was challenged however after an explanation the challenge was withdrawn.

## The Tribunal's decision

28. The electricity supply for the common parts, on the balance of probabilities, is not connected to the retail unit.

## Reasons for the Tribunal's decision

29. The cost of the electricity would be much higher if it included the cost of running all the lighting and equipment in the retail unit.

## Fire alarm

30. The applicants queried why it was necessary to use someone in Essex to reset the alarm and why the cost was not charged to an individual flat.

31. The respondent confirmed that no one knew who had set off the alarm. It was believed that someone had left a lighted cigarette which had triggered the alarm.

## Tribunal's decision

32. It was reasonable to charge the cost to the service charge account because there was no information available as to who had set off the alarm. Irrespective of the location of the supplier used, the cost was reasonable.

## Reasons for the Tribunal's decision

33. The alarm system benefits the whole building. Unless it could be shown that a specific individual had set off the alarm without due cause it was reasonable for the cost of resetting the alarm to be charged to the service charge account.

## Insurance

34. The applicants' query related to whether the building was insured for the whole of the period of ownership.

35. Mr Harding explained that the first landlord had cancelled the building insurance without advising either the new landlord or Qube of its actions. Qube were asked to place cover immediately that this information came to light. He agreed that it was unsatisfactory that the building had been uninsured for a period of time.

## The tribunal's decision

36. The charge was reasonable and payable.

## Reasons for the Tribunal's decision

37. The applicants had not been charged for the period when the building was uninsured. There had been no challenge to the amount of the premium.

## Reserve fund

38. Dr Makin stated that for 2011-2012 over 10% of the overall service charges had been allocated to the reserve fund, this was excessive. The fund was not held in a separate account in breach of the lease.

## The Tribunal's decision

39. The Tribunal determines that the contribution to the reserve fund in 2012 is not reasonable and not payable.

## Reasons for the Tribunal's decision

40. The lease allows for contributions to be made but no evidence was produced to show how the amount of the contributions had been calculated. There was no plan regarding future works or expenditure on which the reserve fund was based, there was no sufficient explanation or justification as to how the quantum of the fund had been arrived at.

## Security fob charges

41. Dr Makin explained that she had had problems with the security fob which allows holders access to the various areas of the common parts. It was an unresolved area of dispute with the managing agents.

42. Mr Harding undertook on the first day of the hearing to deal with the problem.

## The Tribunal's decision

43. The tribunal do not have jurisdiction to deal with charges which are not included in the service charge account.

## Apportionment of service charges

44. The service charges are apportioned as follows: building 4.89%, flats 5.6% and parking 9.09%. The allocation is based on the proportions attributable to each unit. For example there are 11 car parking spaces, costs relating to the car park are divided equally between the owners of the individual spaces.

45. The applicant did not pursue any objection to the apportionment following this explanation.

## Management fees

46. Mr Fieldsend said that the level of the management fees was challenged on the following grounds: the management agreement had not been provided, it was understood to be a 3 year agreement but there had been no consultation, the standard of management had not been reasonable. The cleaning contract had not been disclosed although the same company had carried out the cleaning for over a year, it was inferred that the cleaning contract was a Qualifying Long Term Agreement (QLTA) and that there should have been consultation moreover the standard of cleaning was not reasonable. The amount of the reserve fund was unreasonable for a new build of this nature and the fund was not held in a separate account in accordance with the terms of the lease. Legal expenditure had been charged to the service charge account despite there being no provision in the lease for such a charge being added to the service charge account. There was a query regarding the electricity charges. Finally the position regarding insurance of the building was unclear: it seems that the building was uninsured for some time (not specified) and that Qube had insured the building in the name of the developer despite the building having been sold on.

47. Mr Harding agreed that there had been problems at the outset: there had been no money available despite interim service charges being paid on completion of the sale of the individual flats; these sums had not been paid across by the freeholder's solicitors until April 2012. The development was completed towards the end of 2011. The first year's service charge was for 13 months rather than dealt with separately in December 2011. Demands for the service charge could not be issued until July 2012 because the relevant information had not been provided by the developer or its solicitor. It was his opinion that a better service would be provided if there was a full time porter but his instructions from the developer were to keep the service charges very low. The management fee had been agreed with the freeholder and the subsequent sale had been subject to the management agreement remaining in place. The fee is £6,400 per annum. The amount in the service charge account is more because the accounts cover 13 months. The fee does not cover placing insurance however a brokerage fee would be received for such work.

## The tribunal's decision

48. The tribunal determines that the management fee of £6400 + VAT is excessive. The management fee is limited to £400 + VAT per unit.

## Reasons for the tribunal's decision

49. The fee does not represent value for money. There had been incidences of incorrect charges to the service charge account, there was no signed, written contract, the building had not been insured throughout the period although dealing with claims under the building insurance was a specific duty within the draft agreement, the reserve fund had not been kept in a separate account in accordance with the terms of the lease. The proposed manager, who was based in the locality and was very familiar with the block offered to undertake the management of the block for £395 + VAT per unit. On the basis of the evidence before it and the general knowledge and experience of the tribunal, it determines the reasonable cost of management at £400 + VAT per unit for 2011 and 2012.

## Appointment of a manager

50. In support of the application for the tribunal to appoint Ms Booth in the place of the current manager, Dr Makin referred to the various matters in dispute under the S27a application; the security key fobs had not been resolved despite the undertaking given at the first day of the hearing; the current management fees are the equivalent of 26.7% of the service charge, the lease allows the landlord to charge 15% if a managing agent is not appointed. There has been a failure to disclose documents relating to Qube's own contract and that of the cleaning company. There was a lack of transparency in dealing with Qube. Mr

Harding had offered to tender his resignation at the end of the first day of the hearing (this had been on the basis that the applicant accepted the service charges to date; the offer on that basis had not been accepted by the applicant).

51. Dr Makin introduced Ms Booth of J M W Barnard, a local firm of property managers which is regulated by the RICS. Miss Booth told the tribunal about her own management expertise, her approach to the work, the work of the firm and the back-up team. The firm's business was mainly obtained by recommendation. She considered that it was important to be based locally. Two references were handed in from existing clients.

52. Mr Harding contended that this was an unnecessary application. The building was well presented at the time of the tribunal's inspection and had not changed since. The records show that when there has been a failure it has been dealt with in a timely manner. The accounts have been audited and signed off. Qube had provided facilities to allow the applicant's accountant to view all the relevant paperwork and had even offered to send it electronically to save a visit to Qube's office. There was a proper management agreement in place. It was difficult to see what JMWB would do differently.

## The tribunal's decision

53. The tribunal determines that it would not be just and convenient to appoint a manager.

## Reasons for the tribunal's decision

54. The tribunal is satisfied that the service charges, despite some adjustments having been made, were not wholly unreasonable. The building is generally reasonably well managed although the tribunal noted with some concern that there had been a failure to deal with the reserve fund in accordance with both the lease and the RICS management code. In these circumstances the case for removing the managing agents appointed by the freeholder and replacing them with a manager appointed by the tribunal has not been made out.

## Application under s.20C

55. The applicants applied for an order under section 20C of the 1985 Act. Mr Weston, on behalf of the landlord, said that no costs relating to the hearing before this Tribunal would be passed through the service charge and that his client had no objection to the order sought being made. However, for the avoidance of doubt, the tribunal nonetheless determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the

respondent may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

**Name:** Evelyn Flint
Chairman

**Date:** 3 December 2013

## Schedule of service charge costs determined by the tribunal

**1.12.2011-31.12.2012**

| | |
|---|---|
| Insurance | £ 7500.00 |
| Electricity | £ 2637.00 |
| Cleaning | £10123.00 |
| Professional fees | £ 639.60 |
| Management fees | £ 6240.00 |
| Reserves | £nil |
| Total | £27,139.60 |

## 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.

**Section 20**

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

**Section 20B**

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

**Section 20C**

(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 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.

(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to that tribunal;
(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
(c) in the case of proceedings before the Upper Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

**Landlord & Tenant Act 1987 Section 24**

(1) A leasehold valuation tribunal may, on an application for an order under this section, by order (whether interlocutory or final) appoint a manager to carry out in relation to any premises to which this Part applies-
a) such functions in connection with the management of the premises, or
b) such functions of a receiver,
or both, as the tribunal thinks fit.

(2) A leasehold valuation tribunal may only make an order under this section in the following circumstances, namely-
a) where the tribunal is satisfied-
(i) that any relevant person either is in breach of any obligation owed by him to the tenant under his tenancy and relating to the management of the premises in question or any part of them or (in the case of an obligation dependent on notice) would be in breach of any such obligation but for the fact that it has not been reasonably practicable for the tenant to give him the appropriate notice, and
(ii) ...
(iii) that it is just and convenient to make the order in all the circumstances of the case
ab) where the tribunal is satisfied-

(i) that unreasonable service charges have been made, or are proposed to be made...

....

ac) where the tribunal is satisfied-

(i) that any relevant person has failed to comply with any provision of a code of practice approved by the Secretary of State under Section 87 of the Leasehold Reform, Housing and Urban Development Act 1993 (codes of management practice), and

(ii) that it is just and convenient to make the order in all the circumstances of the case; or

b) where the tribunal is satisfied that other circumstances exist which make it just and convenient for the order to be made.