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

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| **Case reference** | : | **LON/00BG/LSC/2014/0511** |
| **Property** | : | **Flat 14 Fairlie Court, 14 Stroudley Walk, London E3 3HG** |
| **Applicants** | : | **Alexander Dehayen** |
| **Representative** | : | **None** |
| **Respondents** | : | **Poplar HARCA** |
| **Representative** | : | **Michael Paget, Counsel** |
| **Type of application** | : | **For the determination of the reasonableness of and the liability to pay a service charge** |
| **Tribunal members** | : | **Judge T Cowen**<br>**Mrs A Flynn MRICS**<br>**Mrs J Hawkins MSc** |
| **Venue of hearing** | : | **10 Alfred Place, London WC1E 7LR** |
| **Date of hearing** | : | **26 January 2015 and 31 March 2015** |

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**DECISION**

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## The application

1. By his application dated 7 October 2014, The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the reasonableness of the level of service

charges estimated by the Applicant in respect of major works being carried out on the estate of which the property is a part. The estimate in question is contained in a consultation notice under section 20 of the 1985 Act ("the section 20 notice") which was served on the Applicant in April 2014. The works commenced on 30 June 2014 and were continuing as at the date of the hearings of this matter.

2. The relevant statutory provisions are set out in full in the appendix to this decision. In this case, sections 19, 20 and 27A(1) of the 1985 Act are particularly relevant.

3. The Applicant also seeks an order, under section 20C of the 1985 Act, restraining the Respondent from adding the costs of these proceedings to future service charge bills.

## The background

4. The Property is a three bedroom flat in a 4-storey purpose built mixed-use block built in about 1982. The block contains about 20 flats and is part of the Bow Bridge Estate in East London. There are shops beneath the flats. The flats are accessed from a first floor walkway deck which is reached via stairs from ground level. The proposal for the refurbishment works in question follows a stock condition appraisal carried out for the Respondent by Pellings in April 2013. Pellings estimated the cost of works to be about £2 million. The extent of the need for the works can be appreciated from the fact that the Respondent was considering demolition and reconstruction of the block as a possible alternative to refurbishment.

5. A proportion of the overall scheme involves internal works to the 5 flats retained by the Respondent and occupied by secure tenants. The Respondent claims to have excluded those costs from the estimated amount apportioned to the Applicant, who is a long leaseholder.

6. The section 20 notice, which is the subject of this application, is dated 30 April 2014.

7. The key information from the contents of that notice are as follows:

   a. The total estimated cost of works by the selected contractor is £1,242,417.

   b. The proportion of that which is attributable to the block in which the Property is located is £606,058.45 ("the Block Cost")

c. This is made up of works at £541,123.61 and 12% management fees at £64,934.83.

d. The estimated cost to be charged to the Applicant is £34,349.90 ("the Property Cost").

e. The Property Cost is worked out as a proportion of the Block Cost. The proportion is (i) floor area of the Property (87 $m^2$) as a proportion of (ii) floor area of the Block (1,535 $m^2$). When that proportion is applied to the Block Cost, it produces the Property Cost.

8. The Applicant is the registered proprietor of the remainder of the term of a long lease of the Property. The lease is dated 25 March 1991 and is or a term of 125 years from 3 April 1989. The original landlord was the London Borough of Tower Hamlets. The lease imposes at clause 4(4) an obligation on the lessee to pay service charges (interim and final) and Schedule 5 to the lease provides the mechanism for the calculation and payment of the service charge. The service charge is defined in Schedule 5 as "such reasonable proportion of Total Expenditure as is attributable to the Demised Premises". The "Total Expenditure" is defined as the total expenditure incurred by the lessor in complying with its obligations under the lease.

## The issues

9. This Tribunal has a jurisdiction under section 27A(3) of the 1985 Act to consider the reasonableness of proposed charges even before the works have been done and before the costs have been incurred, such as in a case like this. This specific jurisdiction is most useful where there are points of principle between the parties (such as an argument as to the correct interpretation of the lease or a dispute as to whether a large item of works should be carried out at all) which can be sorted out in advance of works.

10. Where there is simply a dispute as to the proposed cost of items and/or the method of apportionment, then this jurisdiction is of limited value. This is because a further application can be made for a determination of the payability and reasonableness of the charges after the service charge invoices have been raised against the Applicant. The Tribunal will consider that application afresh. See *Re Compton Court Victoria Crescent* LVTP/SC/008/091/01.

11. The Tribunal explained to the parties the limited value of exercising the jurisdiction at this stage and the Applicant decided to proceed with the application in any event.

12. The Applicant has raised a number of questions in his application. The only issues listed there which the Tribunal has jurisdiction to determine are as follows:

    a. Is the estimated cost of the works reasonable?

    b. Is the nature and extent of the works necessary and reasonable?

    c. Have the estimated costs been apportioned fairly to the Applicant?

13. The Applicant has also asked the Tribunal (i) to infer from the nature of the works that the Respondent has failed to carry out ongoing maintenance in the past and also (ii) to deal with the question whether the payment options offered to the leaseholders is reasonable. This Tribunal does not have jurisdiction to determine those questions.

**The Application**

14. In his application, the Applicant made the following specific points about the estimated cost of the works:

    a. The estimated cost of £34,349.90 allocated to the Property is disproportionately high when compared with the reinstatement value of the Property of £128,000. It is also higher than the cost of refurbishment schemes in other estates carried out by the same contractor.

    b. The works should not all be carried out at the same time as that places an undue burden on the leaseholders. The works not requiring scaffolding should be carried out in future years.

    c. Flat 14 does not have a satellite dish and should not be charged £3,020.76 which includes removal of satellite dishes.

    d. Estimated window replacement of which £7,594.13 is apportioned to Flat 14 is too high when measured against comparable quotes obtained by the Applicant for the replacement of the windows in Flat 14 only. Other work costs may therefore also be too high.

    e. Estimate cost to the Applicant of £367.99 for communal door repair is too high.

    f. Estimate cost to the Applicant of £594.30 for refuse chute hopper replacement is too high.

g. Estimate cost to the Applicant of £1,697.96 for new TV system is too high because the work is unnecessary.

h. the Applicant should not be asked to contribute towards the cost of internal works to secure tenancy flats.

i. 12% management fees are too high and represent profit rather than overheads.

15. The tribunal heard the evidence and submissions of the parties and considered all of the documents. During the course of the hearing, the Applicant raised other challenges all of which are dealt with below.

**The Respondent's Case**

16. Mr Dooley, the Respondent's Director of Estate Regeneration, gave evidence. He explained that there was a difference between the successful tender submission for the works which was provided by Fairhurst Ward Abbotts ("FWA"), which was more than £1.4 million, and the amount quoted as the total cost of works on the section 20 notice (£1,242,417). This is because the Respondent carried out a value engineering exercise as part of which they removed a number of items which were considered non-essential improvements. This meant that some of the items to which the Applicant was objecting were not actually part of the section 20 estimate.

17. According to Mr Dooley, works which were not within the responsibility of leaseholders were also stripped out before arriving at the overall Block Cost. The Respondent is therefore denying that it is seeking to charge the Applicant for internal bathroom/kitchen works in secure tenancy flats under the Decent Homes scheme. All of the above helps to explain why the FWA quote of about £1.4 million was reduced to reach the Block Cost of about £600,000.

18. The Respondent points out that the Applicant has not been able to identify any specific item being charged to him which is a Decent Homes item.

19. Mr Dooley also explained that for the purposes of the apportionment of service charges, the block was divided into 29 units of which 9 were commercial units and 20 were flats. The Respondent was therefore proposing to allocate 20/29 of the cost of the works among the flats. Mr Dooley stated that the allocation would be reconsidered before the works are finally invoiced. In particular, the Respondent will carry out a review of the measurements upon which the square-metre system is based. This Tribunal can only consider the reasonableness of the allocation set out in the section 20 notice, but the fact that the

allocation will be reconsidered in any event highlights again the limited value of this exercise.

20. As a further illustration of that point, Mr Dooley explained that, since the works are now underway, it is clear that the £15,000 asbestos removal allowance was too high and so actual service charge demands will allow for a lower amount in that regard.

21. At the hearing, the Respondent produced a new schedule which was not served with the section 20 notice and which showed for the first time exactly how the figure of £34,349.90 was calculated.

22. On the question of management fees, the Respondent claims that the figure of 12% is reasonable within the terms of the lease, reflects the overheads which it has notionally allocated to the project and is within the range of the industry standard.

## The tribunal's decision and reasons

23. The tribunal has reached the following conclusions on the challenges made by the Applicant against the estimated costs set out in the section 20 notice:

    a. We do not agree with the challenge to the overall cost based either on (i) the reinstatement cost of the Property or (ii) the suggested comparable FWA schemes. The proper test under the 1985 Act is whether the service charge is reasonable. This relates to the necessity and level of cost of the individual items of work proposed. A flat under the terms of a lease such as this one is not like a car which can be written off if its repair cost is too high as a proportion of its resale value. The block in which the Property is situated has to be repaired under the terms of the lease, even if the costs are large in relation to the estimated reinstatement value. Also, we have decided that the other schemes offered as comparables are not sufficiently similar in scope to be useful comparisons.

    b. As noted above, we do not have the evidence available to form a conclusion that the estimated costs of the works have been increased by historical neglect. Even if we were to be able to make that inference, which we do not, there is no evidence to indicate the level of cost increase caused by the alleged neglect.

    c. We have considered whether it would have been reasonable for the Respondent to phase the works rather than doing them all at once. This is a relevant consideration for the Tribunal. In *Garside & Anor v RFYC Ltd & Anor* [2011] UKUT 367 (LC) , Her Honour Judge Alice Robinson said in the Upper Tribunal:

"the financial impact of major works on lessees through service charges and whether as a consequence works should be phased is capable of being a material consideration when considering whether the costs are reasonably incurred for the purpose of section 19(1)(a)". In this case, we are satisfied that the larger items of works are all of a nature which would make it uneconomical to phase the works. It makes more sense to set up the contractor's infrastructure (such as scaffolding and site offices) and get them done in one go. In other words, it would be likely to cost the lessees more in the long run to phase the works. We also note that the Respondent has offered generous terms for paying off the proposed service charge interest free over a period of up to 10 years. So the financial impact on the lessees can be spread (as if the works were phased in any event).

d. Having considered the submissions of the parties and looked at the documents supplied, we have reached the conclusion that the 5.7% apportionment for the Property is a reasonable estimate. We note that a full review of the area measurements will be conducted before final invoicing. We have seen no evidence to suggest that 5.7% is not a reasonable estimate at this stage.

e. The Lease permits the lessor to charge a management fee in paragraph 1(1) of the 5th Schedule to the Lease as follows: "a sum equal to the Lessors reasonable costs and charges in affecting[1] the administration and management of the Building and of the Common Parts". The Applicant claims that there is already an element in the cost estimate for profit and supervision and so the Respondent is not entitled to a management fee as well. We disagree. The profit belongs to the contractor FWA and the supervision costs are also paid to a third party professional. The management fee is designed to compensate the Respondent itself for time and other overheads spent by its employees in dealing with the works programme. We therefore will not dispense with the management fee altogether as claimed by the Applicant. We have however come to the view that the management fee is too high. It is right that, at 12%, it falls within the industry standard range of approximately 10-15%. We consider that 10% would be a more appropriate level, because there is evidence that the management of the works programme during the section 20 consultation has not been of a reasonable standard. For example, we heard evidence that insufficient efforts were made to serve the notices on the Applicant's true address. We also think that the level of information provided to the Applicant to enable him to assess the works programme has been

[1] presumably this should read "effecting"

inadequate. This inadequate level of service was further demonstrated by the fact that the Respondent came to hearing unprepared to be able to deal with the reasonable and foreseeable queries of the Applicant and the Tribunal, necessitating further delay for the production of further papers. **A reduction of the management fee from 12% to 10% of the estimated cost of works.**

f. On individual items of work which the Applicant challenges:

(a) We agree that the Applicant should not be charged for the removal of satellite dishes as this is not necessary in the circumstances. This amounts to £540 of the Block Cost. The Applicant's estimate should therefore be reduced by 5.7% of £540 (ie £30.78) to reflect this. **A reduction of £30.78**

(b) We agree that £7,594 the Applicant's estimated share of the estimated cost of replacing windows is unreasonably high. The Applicant has asked us to reduce that figure to £5,500 based on estimates he has obtained. In trying to arrive at a more reasonable figure, we are guided by the fact that FWA have estimated that the direct cost of replacing the windows to flat 14 is £6,148, which we determine to be a more reasonable estimate for the proportion payable by the Applicant for this item. **A reduction of £1,446.**

(c) A provisional sum has been set aside for survey and repairs to communal entrance doors and screens. The sum is £6,492.63 of the estimated Block Cost. The Applicant's estimated share is £367.99. We agree with the Applicant that it seems very high, but we note that it is a provisional allowance and we have no evidence to suggest that it is unreasonable to make allowance for such an amount nor what a more appropriate provisional sum should be. A better assessment of the reasonableness of this item can be carried out once the actual cost (if any) is known and invoiced. **No reduction**

(d) The Applicant challenges the £10,485 estimated Block Cost which includes the replacement of refuse chute hoppers. He submits that £1,000 would be a more reasonable estimate. We have no evidence to suggest that the cost of that work is unreasonably high. **No reduction**

(e) In relation to the estimated Block Cost of £7,300 (item 35.1) to provide a new satellite TV system, we agree with the Applicant that (i) it is not covered by the service charge provision in the lease and is therefore not recoverable and in any event (ii) a new system had been put in relatively recently and does not need replacing. The Property Cost of 5.7% of £7,300 should be removed from the estimated cost. **A reduction of £416.10**

(f) The Applicant also challenged the cost of works to the private gardens guardrails. He claimed that he had no access to the private gardens and made no use of them. We disagree. Paragraph 1(d) of the Second Schedule to the Lease gives the lessee the express right to use the gardens and clause 5(5) of the Lease imposes an obligation upon the lessor to keep the gardens in repair - an obligation the cost of which the lessor is entitled to collect from the lessee as service charge under the Fifth Schedule. There is no evidence that the Respondent has unlawfully restricted the Applicant's access to the garden. **No reduction.**

24. As a result of the determination made above, the Tribunal would reduce the estimate of £34,349 to a more reasonable estimate of **£31,654.34**.

**Application under s.20C**

25. In the application form, the Applicants applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the tribunal 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 Respondents may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

26. The tribunal has decided not to make any costs order under rule 13 of the 2013 Procedural Rules because no party has behaved so unreasonably as to warrant such an order.

Judge T Cowen,
Mrs A Flynn MA MRICS
Mrs J A Hawkins MSc

**Dated this 22nd day of May 2015**

# 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.

**Commonhold and Leasehold Reform Act 2002**

**Schedule 11, paragraph 1**

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—

(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—

(a) specified in his lease, nor

(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

**Schedule 11, paragraph 2**

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

**Schedule 11, paragraph 5**

(1) An application may be made to the appropriate tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject matter of an application under sub-paragraph (1).