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

Case Reference : **CHI/00MS/LSC/2013/0024 (and others)**

Property : **Provincial House, 84 Canute Road, Southampton, SO14 3GX (and others)**

Applicant : **Miss Lavina Vas (and others)**

Representative : **Miss Vas**

Respondent : **1520 Management Co Ltd**

Representative : **Mr T Talbot-Ponsonby, Counsel**

Type of Application : **Service charges : sections 27A and 20C of the Landlord and Tenant Act 1985 ("the 1985 Act")**

Tribunal Members : **Judge P R Boardman (Chairman), Mr B H R Simms FRICS MCI Arb, and Ms T Wong**

Date and venue of Hearing : **29 August 2013
Holiday Inn Southampton Eastleigh,
Leigh Road, Eastleigh, Hampshire,
SO50 9PG**

Date of Decision : **13 September 2013**

DECISION

Introduction

1. The Property forms part of an estate called the 1520 Development (the Development”), comprising a total of 133 Flats, namely Provincial House (5 Flats), Maritime Chambers (18 Flats), Neptune House (27 Flats), Charter House (79 Flats), and Wight House (4 Flats)
2. The Tribunal recorded in its directions dated 28 May 2013 that it had received separate applications from Miss Vas of Flat 3 Provincial House, Peter Spooner of Flat 16 Maritime Chambers, John James of Flat 20 Neptune House, and Matthew Karnecki of Flat 59 Charter House, but that the parties had agreed that, with one exception, the leases were all in materially the same terms, and that the issues in each application were sufficiently similar for the applications to be consolidated and heard at the same time
3. The one exception was that it was believed, at the directions hearing, that the lease of Flat 11 Maritime Chambers, whose leaseholders had not applied to join in the proceedings, provided for their service charge proportion to be a fixed percentage
4. Other leaseholders, whose names were listed in the Appendix to the Tribunal’s directions dated 28 May 2013, had been joined as applicants. The parties also indicated at the directions hearing that there would be no objection to any additional leaseholders applying to join in

Issues

5. The following matters were identified at the directions hearing as issues for the Tribunal to determine at the substantive hearing of this application :
 - a. whether the service charge proportion payable by each leaseholder is “a fair and proper proportion of the estimated service charge or the service charge adjustment as determined by the [Respondent/Management Company] acting reasonably and having regard to the services and facilities within the Development enjoyed by the [flat] as defined in the Particulars of the leases, in the context of :
 - the size of each Flat
 - the facilities enjoyed by each Flat, such as lifts and laundry services
 - the manner in which water charges are payable in relation to each Flat
 - the insurance claims records in relation to each of the Buildings, and the allocation of insurance premiums for the respective Buildings within the service charges
 - b. whether the service charge estimate dated 16 December 2011 and the service charge on account demand 16 January 2013 complied with the provisions of paragraph 1 of the fourth schedule of the

leases, namely “The estimated Service Charge in respect of each Maintenance Year shall be assessed not later than the beginning of December immediately preceding the commencement of the Maintenance Year.....”

- c. if so, whether the amount of the service charge on account demanded by Merlin Estates Ltd on 16 January 2013 for the period 1 January 2013 to 31 December 2013, is payable by way of service charge, including whether the estimated sums for the following items are reasonable :
 - roof repairs
 - reserve fund
 - minor repairs
 - electricity
 - insurance premium
 - d. whether each of the Buildings is insured separately, or whether the insurance of the Buildings complies with the requirements of paragraph 7.1 of the fifth schedule to the leases, namely “To keep the Development.....insured.....”
 - e. whether, and, if so, to what extent, the costs incurred by the Respondent/Management Company in relation to these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant/Leaseholders
6. The Applicant/Leaseholders indicated at the directions hearing that the amount of the service charge estimate dated 16 December 2011 for the period ended 31 December 2012 was not in issue before the Tribunal

Documents

7. The parties have submitted witness statements and bundles of documents. References in this decision to page numbers are to page numbers in the bundles

Inspection

8. The Tribunal inspected the Development at 10.00 on the morning of the hearing on 29 August 2013. Also present were Miss Vas and Mr John Lewalski (both of Flat 3 Provincial House), Ms Carla Martin (Flat 46 Charter House), Mr Mark Wingrove (until 10.40) and (from 10.30) Mr Andrew Walker (Flats 5 and 15 Maritime Chambers respectively), Mr Clive Risbridger (Director of the Respondent/Management Company), Mr Graham Fielder (of Merlin Estates), and (from 10.30) Mr Talbot-Ponsonby
9. Charter House was an “L-shaped” building to the west of Neptune Way. The other buildings were to the east of Neptune Way, namely Provincial House, Neptune House, Wight House, and Maritime Chambers respectively

10. A front door and stairs led to Flats 1 and 3 Provincial House. There was no lift. The front door also led to a hall which in turn led to a door and stairs leading to a cellar with electricity meters for Flats 1 and 3 Provincial House and the water supply for all 5 flats at Provincial House, and a vault, apparently unused
11. A door led to a hall in Neptune House, which had its own front door. A lift and stairs led to all the flats in Neptune House, and, through doors on three of the floors, to Flats 2, 4, and 5 Provincial House, respectively
12. A door on the ground floor led to a car park, partly under the building and partly in the open, with one space each, the parties said, for flats in Provincial House, Neptune House and Maritime Chambers, and one flat in Wight House. An electric gate at the western end of the car park led to Neptune Way. A gate at the eastern end was, the parties said, for emergency access only. There were two small shrub borders
13. A rear door led from the car park to a hall in Maritime Chambers, with, at the other end, a front door, and with doors to six ground floor flats, a lift and stairs to the other flats. The other front door of Maritime Chambers led to a hall with stairs down to a basement with an electric meter cupboard with 18 meters for the flats at Maritime Chambers and a separate meter for the Respondent/Management Company. Other doors led to a contractor's toilet, which the parties said was the only one in the Development, a laundry, which the parties said was used exclusively by the residents of Maritime Chambers, rooms with storage cages for the residents of Maritime Chambers, a lobby with a lift, and a room with water meters for the 18 flats in Maritime Chambers and a communal water meter, which the parties said was the only communal water meter for the Development
14. Charter House had six "cores", two with seven floors and four with eight floors, each with a lift. The Tribunal inspected core 5, which had seven floors, each accessible by stairs and a lift. There were doors to two flats on each floor, although the flats on the sixth and seventh floors were duplexes
15. The car park at the rear was partly underground and partly overground. There was a very small lawn and some shrub borders. At the south eastern corner was an electric gate leading to Neptune Way
16. The Tribunal was not given access to Wight House

The hearing on 29 August 2013

17. Present were Miss Vas, Mr Lewalski, Ms Martin, Mr Walker and Mr Matthew Karnecki (Flat 59 Charter House), Mr Talbot-Ponsonby, Mrs Ginny Allaway of Merlin Estates, Mr Risbridger, Mr Tim Wells, Chartered Accountant, and Mr Chris Allaway
18. The Tribunal noted that there was a reference in the bundles (at page

65) to Mr Nick Jutton of Scott Bailey Solicitors who had in the past acted for the Respondent/Management Company in connection with a dispute with Southern Water, and who was a Southern Leasehold Valuation Tribunal chairman. The Tribunal indicated that none of its panel members had discussed the current application with Mr Jutton, and that, according to the papers in the bundles, Mr Jutton had had only limited involvement with the Respondent/Management Company which did not impact on the issues in the current application. Accordingly, the Tribunal had not identified any actual conflict of interest in the current panel members of the Tribunal continuing to hear the case, but the Tribunal was also concerned to ensure that there was no perception of conflict

19. Ms Vas said that she had already noted Mr Jutton's involvement from her reading of the papers and had no concerns with the current Tribunal panel members continuing to deal with the application. Mr Talbot-Ponsonby also had no concerns. The Tribunal accordingly decided to continue to hear the application with its current panel members

The issues before the Tribunal

20. The parties' respective cases about each of the issues identified at the directions hearing, and the Tribunal's decision in each respect, are as follows

The service charge proportion

21. The parties agreed that each of the leases for the 133 flats in the Development was in materially the same terms. The concern expressed at the directions hearing that the lease of Flat 11 Maritime Chambers might have provided for their service charge proportion to be a fixed percentage had been based on advice apparently given by a solicitor on a purchase of the flat, whereas it now appeared that the lease was in fact in the same terms as the other leases in the Development
22. Miss Vas referred to the following provisions in the lease of Flat 3 (not Flat 2 as indexed in the bundle) Provincial House :

Particulars (pages 78 to 80)

Flat : [Flat 82 - now known as Flat 3 Provincial House]

Parking Space : [parking space 82]

Property : "The Flat and the Parking Space"

Development : [the Development]

Building : "Provincial House comprising the block of flats numbered 80 – 84 and the Communal Areas within the

Building”

Service Charge Proportion : “a fair and proper proportion of the estimated Service Charge or the Service Charge Adjustment as determined by the Company acting reasonably and having regard to the services and facilities within the Development enjoyed by the Property”

23. Miss Vas submitted that :

- a. it was not reasonable, nor was it in accordance with the provisions in the lease, to adopt, as Merlin Estates had done in their demand for service charges on account dated 16 January 2013, an equal 1/133 service charge proportion for each flat for each category of expense
- b. the service charge proportion for each flat should have “regard to the services and facilities within the Development enjoyed by” the flat
- c. the service charge proportion would therefore vary according to different kinds of expense, different sizes of flat, and different amenities enjoyed by different flats
- d. expenses which were not affected by those factors should be shared equally, so that the service charge proportion for each flat would be 1/133 of those expenses
- e. expenses which were affected by the sizes of the flats should be shared in proportion to the relative sizes of the flats, so that the service charge proportion for each flat should be the square footage of the flat divided by the total square footage of all 133 flats
- f. expenses for amenities which were enjoyed only by some flats should be shared only by those flats enjoying the amenities in proportion to the relative sizes of those flats
- g. water charges should be shared only by the flats in buildings with no water meters, in proportion to the relative sizes of those flats

24. Mr Talbot-Ponsonby, after a short adjournment of the hearing to enable him to take instructions, submitted that :

- a. it was accepted in principle that expenses should be shared either equally or by floor area of each flat, according to the type of expense
- b. however, the latter type of expense should be shared amongst the flats in the building or buildings in respect of which the expense had been incurred, not amongst all the flats in the Development
- c. this would accord with the definition of service charge proportion in the leases, because, by definition, the buildings were within the Development, so that the enjoyment of a service or facility within a building was the enjoyment of a service or facility within the Development
- d. there were no practical reasons why this should cause any difficulties, in that it was possible in practice to allocate

expenses to the relevant building; indeed that was what Merlin Estates had been doing since their appointment

25. Miss Vas submitted that this would not be fair, in that :
- a. some kinds of repairs would be more expensive for some buildings (for example, roof repairs at Charter House would be considerably more expensive than for her own building, Provincial House) and those expenses should therefore be shared across the whole Development
 - b. this was what had always been done in the past; for example, the redecorations at Maritime Chambers two years ago had been paid out of the reserve fund for the whole Development; if each building were now to have its own reserve fund than this would not be fair in that there would then be a disparity between the treatment of Maritime and the other buildings
26. However, the Tribunal referred the parties to the reserve fund provisions in paragraph 2.1 of the fourth schedule to the lease (page 94):
- “2 The estimated Service Charge shall consist of a sum comprising the expenditure estimated as likely to be incurred in the Maintenance Year by the Company for the purposes mentioned in the Fifth Schedule together with :
- 2.1 an appropriate amount as a reserve for or towards those of the matters mentioned in the Fifth Schedule as are likely to give rise to expenditure after such Maintenance Year being matters which are likely to arise either only once during the then unexpired Term of this Lease or at intervals of more than one year during such unexpired Term including (without prejudice to the generality of the foregoing) such matters as the decorating of the exterior of the Building the repair of the structure thereof and the repair of drains.....”
27. In answer to questions from the Tribunal, Miss Vas very fairly and properly accepted that :
- a. the wording of paragraph 2.1 of the fourth schedule implied that the reserve fund would be for one-off large expenses such as exterior decorations and roof repairs on a building by building basis
 - b. the question whether the reserve fund had been administered properly in accordance with the lease in the past was an accounting matter for the court in the event of dispute, and was not a matter which the Tribunal could take into account when construing the wording of the lease
 - c. in relation to the question whether a service or facility was enjoyed by a flat, there was no difference in principle between the lift at Provincial House (which Miss Vas had submitted was not a service or facility which Flat 3 enjoyed) and the roof of one of the other Buildings (which Flat 3 also did not enjoy)

28. The Tribunal's decision

29. After an adjournment to consider its decision, the Tribunal announced its findings about the construction of the service charge proportion definition in the leases as follows
30. The Tribunal's decision was based on the parties' submissions that the service charge proportion definition in each lease throughout the Development was the same as that for Flat 3 Provincial House (at page 80)
31. The parties had agreed that a fair service charge proportion of certain items of expense would be an equal 1/133 proportion and that a fair service charge proportion of other items of expense should be on a square footage basis, but could not agree whether the service charge proportion for those items should be calculated for a particular flat by reference to the total square footage of the building in which the flat was situated or by reference to the total square footage of the 133 flats in the Development
32. The Tribunal had taken account of Miss Vas's submissions that the latter was the way in which the lease should be construed, whereas Mr Talbot-Ponsonby had submitted that it should be on a Building basis
33. The Tribunal found that the service charge proportion for those items of expense which should be on a square footage basis should, broadly, be calculated for a particular flat by reference to the total square footage of the flats in the building rather than by reference to the total square footage of the 133 flats in the Development, because:
 - a. in relation to the question whether a service or facility was enjoyed by a flat, there was no difference in principle between the lift at Provincial House (which Miss Vas had submitted was not a service or facility which Flat 3 enjoyed) and, for example, the roof of one of the other buildings (which Flat 3 also did not enjoy)
 - b. the wording of paragraph 2.1 of the fourth schedule implied that the reserve fund would be for one-off large expenses such as exterior decorations and roof repairs on a building by building basis, however the reserve fund might actually have been administered in the past
 - c. the construction of the service charge proportion definition by reference to buildings accorded with the definition of service charge proportion in the leases, because, by definition, the buildings were within the Development, so that the enjoyment of a service or facility within a building was the enjoyment of a service or facility within the Development
34. In relation to those items of expense where the service charge proportion should in principle be on a square footage basis but which were shared between more than one building, the service charge proportion should be by reference to the total square footage of the flats in the buildings enjoying the service or facility involved, so that,

for example, in relation to expenses relating to the lift and shared access to Flats 2, 4, and 5 Provincial House, the service charge proportion payable by Flats 1 and 3 Provincial House would be nil, whereas the service charge proportion payable by each of Flats 2, 4, and 5 Provincial House would be the square footage of that flat divided by the total square footage of Flats 2, 4 and 5 Provincial House plus the total square footage of the flats in Neptune House

35. The categorisation of expenses for the purposes of the service charge proportion

36. The Tribunal adjourned the hearing on two occasions, both before and after the announcement of the Tribunal's decision about the service charge proportion, to enable the parties to try to reach agreement on how the various types of expense should be categorised for the purposes of the service charge proportion

37. In that respect the result of the parties' discussions was as follows :

- a. the items of expense which could be included in the service charge were those listed on page 760 of the bundles
- b. cleaning : square footage
- c. window cleaning : square footage
- d. gardening and sweeping of car parks and pathways : not agreed
- e. Building buildings insurance and public liability : square footage
- f. directors and officers insurance : equal
- g. lift insurance : not agreed
- h. management fees : equal
- i. audit and accountancy : equal
- j. company secretary : equal
- k. bank charges : equal
- l. sundries : equal
- m. lift telephones : not agreed
- n. minor repairs : square footage
- o. electrical repairs/lightbulbs : square footage
- p. drain repairs/cleaning : square footage
- q. roof repairs : square footage
- r. door entry system : equal within Building
- s. TV and satellite : equal within Building
- t. lift maintenance : not agreed
- u. electric gates : not agreed, although agreed to be the same as the car parks
- v. fire alarm/smoke detectors : square footage
- w. lightning conductor : equal within Building (Charter House)
- x. electric periodic checks : equal within Building
- y. man safe system : equal within Building (Charter House)
- z. dry riser testing : equal within Buildings (Neptune House and Charter House)
- aa. generator, pump, water tank : square footage
- bb. CCTV : equal
- cc. electricity common parts : square footage
- dd. health and safety inspection : equal

- ee. water rates : square footage
- ff. water rates common parts : square footage
- gg. water hygiene : square footage
- hh. harbour charge : equal
- ii. pest control : equal
- jj. reserve fund : square footage
- kk. internal and external major works : square footage
- ll. contingencies laundry room : square footage (Maritime Chambers)

38. In light of the parties' agreement that the items of expense which could be included in the service charge were those listed on page 760 of the bundles, the Tribunal finds that it is unnecessary for the Tribunal to decide whether or not the lease provides for each of those items to be payable by way of service charge

39. The Tribunal then adjourned the hearing until 10.00 am on 6 November 2013 at the same venue, at which time the Tribunal would hear submissions on the remaining matters in issue, namely :

- a. the categorisation of those items of expense listed on page 760 of the bundles which has not so far been agreed by the parties
- b. whether the items for roof repairs, reserve fund, minor repairs and insurance premium in the on-account service charge demand dated 16 January 2013 were payable
- c. whether each of the Buildings is insured separately, or whether the insurance of the Buildings complies with the requirements of paragraph 7.1 of the fifth schedule to the leases, namely "To keep the Development.....insured....."
- d. whether, and, if so, to what extent, the costs incurred by the Respondent/Management Company in relation to these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant/Leaseholders

40. Miss Vas very fairly and properly agreed that the other two items listed as issues in the Tribunal's directions dated 28 May 2013 were no longer in issue, namely :

- a. whether the service charge estimates complied with the provisions in the lease relating to the timing of the assessment of the estimates
- b. whether the electricity item in the on-account service charge demand dated 16 January 2013 was payable

Appeals

41. A person wishing to appeal against this decision must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case

42. 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

43. 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 admit the application for permission to appeal
44. 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 which the person is seeking

Dated 13 September 2013

Judge P R Boardman
(Chairman)