RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/00HB/LSC/2009/0120

In the matter of: Flat 7, Crusader House, 12 St. Stephen's Street, Bristol, BS1 1EL

And in the matter of: an application to determine liability to pay service charges under Sections 27A of the Landlord and Tenant Act 1985 (as amended) and an application under Section 20C of that act.

BETWEEN:

1. Mr. Matthew West-Taylor and
Mrs. Linda West-Taylor
2. Mr. Simon Rogers Applicants

and

Dauber Homes Management Limited Respondent

Date of Application: 21 August 2009
Date of hearing: 2 February 2010
Members of the Tribunal: Mr. J G Orme (lawyer chairman)
Mr. J Reichel BSc MRICS (valuer member)
Mr. M R Jenkinson (lay member)
Date of decision: 10 February 2010

Decision of the Leasehold Valuation Tribunal

For the reasons set out below, the Tribunal determines that:

1. **The sums which the Respondent seeks to recover in the service charge accounts for the year ended 31 December 2008 in respect of cleaning (£1,586) and for rental and maintenance of the entry phone (£5,017) were reasonably incurred but that the amount for electricity should be reduced from £13,540 to £2,297.37.**

2. **The sums which the Respondent seeks to recover in the service charge estimates for the year ended 31 December 2009 in respect of cleaning (£2,000) and for rental and maintenance of the entry phone (£5,200) are reasonable but that the amount for electricity should be reduced from £11,000 to £4,000.**

3. **The Tribunal makes no order pursuant to Section 20C of the Landlord and Tenant Act 1985 (as amended).**

Reasons

The Application

1. This application relates to a property known as Crusader House, 12 St. Stephen's Street, Bristol ("the Property"). The Property is built on 4 floors with a basement. Part of the ground and the basement floors are commercial premises, currently occupied as a bar. The upper floors have been converted into 18 residential flats. Dauber Homes Management Limited ("the Respondent") owns the freehold of the Property. Mr. and Mrs. West-Taylor ("the 1st Applicants") are the leasehold owners of Flat 7. Mr. Rogers ("the 2nd Applicant") is the leasehold owner of Flats 11 and 12.

2. On 21 August 2009, the 1st Applicants applied to the Tribunal for a determination as to the reasonableness of certain service charges demanded by the Respondent for 2008, 2009, 2010 and 2011 in respect of Flat 7. The application included an application under section 20C of the Landlord and Tenant Act 1985 (as amended) ("the Act").

3. In the particulars of the application, the 1st Applicants alleged that the service charges for 2008 and 2009 were too high. They said that this was preventing them from selling Flat 7. They also complained that the service charge included the cost of electricity used within the flats. They gave no particulars of their complaints in relation to 2010 and 2011.

4. A pre-trial review was held on 24 September 2009 when directions were given for the Applicants to provide full details of the disputed items of service charge by 15 October 2009, for the Respondent to provide a written response by 1 November 2009 and for the matter to be listed for hearing. The Applicants did not attend the pre-trial review.

5. On 21 November 2009, Mr. James Rogers applied on behalf of his son, Mr. Simon Rogers, to join Mr. Simon Rogers as an applicant to the application. By letter dated 3 January 2010, Mr. Simon Rogers confirmed his authority for his father to act on his behalf.

6. By letters dated 13 October and 23 November 2009, the 1st Applicants filed their written statement of case in which they disputed 3 items in the service charge account for 2008 and in the estimated service charge for 2009, namely the cost of the entry phone system, the cost of cleaning, particularly the state of the carpet in the entrance hall, and the fact that the service charge includes the cost of electricity supplied to the flats at the Property.

7. On 2 December 2009, the Respondent filed a written statement of case in reply accompanied by copies of the service charge accounts for the years ended 31 December 2007 and 2008, service charge estimates for the year ended 31 December 2009 and copies of relevant invoices.

The Law

8. The statutory provisions primarily relevant to matters of this nature are set out in sections 18, 19, 27A and 20C of the Act, the relevant parts of which read as follows:

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 to which the service charge is payable or in an earlier or later period.

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 provision 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.

27A (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.
(2) Subsection (1) applies whether or not any payment has been made.

Subsections (3) to (7) are not relevant to this application.

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 ... leasehold valuation tribunal ... 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) ...
(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.

The Lease

9. The lease of flat 7 is dated 4 May 2005. It was made between The Imperial Property Company (Bristol 5) Limited as lessor and the 1st Applicants as lessees. The lease demised flat 7 for a term of 125 years from 25 March 2005 at an initial rent of £200 per year.

10. In the lease the 1st Applicants agreed to pay *"by way of further or additional rent the Interim Charge and the Service Charge at the times and in the manner provided in the Fourth Schedule free of all deductions whatsoever".* The 4th schedule defines *"the Service Charge"* as a percentage of the *"Total Expenditure"*. The *"Total Expenditure"* is defined as *"the aggregate of the expenditure incurred ... by the Lessor in any Accounting Period in carrying out its obligations under clause 5(5) of this Lease comprising the Category A expenditure and the Category B expenditure ...."*

11. Paragraph 4 of the 4th schedule provides *"The parties to this Lease acknowledge that the object of the Service Charge provisions is to enable the Lessor to recover all the monies the Lessor may be liable to incur in respect of outgoings of the Property or the Demised Premises so that there shall be no residual liability upon the Lessor for any such matters".*

12. Clause 5 of the lease sets out the lessor's covenants. The following parts are relevant:

    a. Clause 5(5)(B) is a covenant by the lessor to maintain and keep in good and substantial repair and condition the structure of the Property and the common parts.

    b. Clause 5(5)(E) is a covenant by the lessor *"To keep those parts of the Common Parts of the Property that comprise the entrance hall, staircases and landings clean and properly lighted and to replace the*

carpeting or other covering of the same as and when the Lessor shall consider the same to be necessary".

c. Clause 5(5)(F) is a covenant by the lessor *"to pay and discharge any rates taxes duties assessments charges impositions and outgoings assessed charged or imposed in respect of the Property as distinct from any assessments made in respect of any residential unit in the Property included in this demise or in the demise of any Other Flat Owner".*

d. Clause 5(5)(I) is a covenant by the lessor *"to pay the hire charge or other expenses payable in respect of any video entry phone system any internal intercom system any communal refuse bins any communal TV aerial and closed-circuit television cameras and consoles or other security equipment or machinery used in the Property or such other facilities as the Lessor shall in its discretion consider desirable to provide".*

e. Clause 5(5)(O) is a covenant by the lessor *"to pay all legal costs and other proper costs incurred by the Lessor."*

f. Clause 5(5)(T) is a covenant by the lessor *"to provide any other services or undertake any other matters that the Lessor may reasonably decide necessary in the interests of good estate management".*

13. Clause 3(2) of the lease contains a covenant by the 1st Applicants *"Throughout the Term to pay for all gas electric light and power consumed on the Demised Premises and all rates taxes duties assessments charges impositions and outgoings which may now or at any time be assessed ... **PROVIDED THAT** if any part of the Demised Premises is not separately assessed then any apportionment between that part of the Demised Premises not so assessed and any similar premises forming part of the Property shall be made by the Lessor whose decision shall be conclusive and binding on the Lessee".*

The Inspection

14. The Tribunal inspected the Property on 2 February 2010 in the presence of Mr. G Faiman, a director of the Respondent company. The Applicants were not present at the inspection.

15. The Property appears to have been built in late Victorian times. The Tribunal was informed that it was converted into its present use in about 2005. The basement and part of the ground floor are commercial premises, presently used as a bar. Above the ground floor there are three floors which have been

converted into 18 flats. Part of the ground floor forms the entrance lobby to the flats.

16. The main entrance to the flats is through a secure door operated by an entry phone system which allows the lock on the main door to be released remotely from within the flats. The main door leads into an entrance lobby which gives access to a lift and the main staircase. At the time of the inspection, the carpet in the lobby area appeared to be new but was covered with plaster dust. Decorators were present at the Property. They appeared to be decorating the 1st floor corridor, the staircase leading to it and the entrance hall. Mr Faiman informed the Tribunal that the decorators were not working on the instructions of the Respondent.

17. Immediately inside the main door is a cupboard containing electricity distribution panels and a meter. There was a further cupboard with a further electricity meter adjoining the stairs.

18. The Tribunal noted that there was a sign above the entry phone call pad indicating that it was out of order. The Tribunal also noted a quantity of post piled up in the entrance lobby.

19. The Tribunal inspected the communal parts of the Property. The entrance lobby, the main staircase and the corridors leading to the flats appeared to be in good decorative order and well lit. They were clean apart from the dust caused by the decorators. The carpets appeared to be in good order apart from some stains in one of the corridors. There is a second staircase at the far end of the Property which serves as a fire escape as well as access to Flat 17. That staircase did not appear to be in good decorative order and the carpet on the stairs was worn.

The Hearing and the Issues

20. A hearing took place at Whitefriars, Lewin's Mead, Bristol on 2 February 2010. Mr. Faiman represented the Respondent. None of the Applicants appeared. The Tribunal received an e-mail from Mrs. West-Taylor dated 1 February 2010 in which she indicated that she was unable to attend the Tribunal hearing. She said that she was happy for the Tribunal to deal with the case in her absence based on the information before the Tribunal. No representations and no evidence were received on behalf of the 2nd Applicant and no one appeared on his behalf.

21. The Tribunal satisfied itself that notice of the hearing had been given to the Applicants in accordance with the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 and determined to proceed with the hearing in their absence in accordance with Regulation 14(8) of those regulations.

22. The following issues were raised by the 1st Applicants' statement of case:
    a. whether the rental for the entry phone system was reasonable;
    b. whether the charge for cleaning services was reasonable and, in particular, whether the carpet in the entrance lobby was of a sufficient standard;
    c. whether the charge for electricity was reasonable.

23. The 1st Applicants gave no details of their complaints in respect of service charges for 2010 and 2011. In the circumstances, the Tribunal did not consider the service charges for the years 2010 and 2011.

The Evidence

24. With their statement of case, the 1st Applicants sent to the Tribunal copies of a number of e-mails from their agent showing that a number of interested parties had been put off purchasing Flat 7 by the size of the service charge. They filed copies of the service charge accounts for the years ended 31 December 2007 and 31 December 2008 and service charge estimates for the year ended 31 December 2009.

25. The Respondent filed a written statement of case supported by copies of the service charge accounts for the years ended 31 December 2007, 31 December 2008 and service charge estimates for the year ended 31 December 2009. They were accompanied by copies of relevant invoices. Mr. Faiman gave oral evidence at the hearing.

26. Mr. Faiman said that the Respondent had purchased the freehold of the Property on 22 September 2006 from the developer. All 18 flats were owned by investors who sublet to tenants. There were 2 managing agents who managed the subletting of the flats on behalf of the leaseholders. 12 of the flats are owned by overseas investors. Mr. Faiman produced a schedule showing that as at 19 November 2009 arrears of service charge payments amounted to £30,118 spread over 11 flats and the commercial premises. He said that as a result of the poor payment record, the Respondent was subsidising the Property. He produced a schedule showing that loans had been made by the Respondent amounting to £16,886.

27. **Cleaning.** Mrs. West-Taylor's complaint appeared to be mainly about the state of the carpet in the entrance hall and litter.

28. Mr. Faiman said that the Respondent employs a cleaner to attend at the Property on a weekly basis to clean the lobby, the lift, the landings and the corridors and to put out the rubbish bins for collection. He thought that the cleaner attended for about one hour per week. The weekly charge is £25 plus VAT. He produced copies of invoices for 2008 and 2009. The total cleaning charges claimed in the accounts for 2008 were £1,586 but the invoices

totalled £1,774.23 which included some cleaning charges carried over from 2007 as well as some additional cleaning tasks. The total of the invoices for cleaning charges for 2009 up to 31 October amounted to £1,351.25. £2,000 was set aside for cleaning charges in the service charge estimates for 2009.

29. Mr. Faiman said that the carpet in the entrance lobby had been replaced in October 2009. He produced an invoice for the new carpet for £563.50. The remainder of the carpet on the stairs and landings had not been replaced and was probably the carpet installed by the developer. He accepted that there were some oil stains on the carpet caused by tenants storing bicycles. There were no immediate plans to replace the carpet due to cash flow problems. He accepted that the carpet on the 2nd staircase was in poor condition. That served purely as a fire escape and was not used on a regular basis.

30. **The entry phone system**. Mrs. West-Taylor's complaint was that the rent for the system was too high and she suggested that it might be cheaper to buy a system.

31. Mr. Faiman said that the system had been installed at the time of the conversion and was rented from Octopus Multi-Systems Ltd. He said that the developer had entered into a contract with that company whereby the system was installed at no charge but subject to a rental agreement for a fixed period of time. Mr. Faiman did not produce a copy of the agreement and was not able to provide details of it. He did not know if there were cancellation charges if the agreement was terminated. The rental fee includes callouts for maintenance purposes for which there was no extra charge. The rental charge rises by inflation each year. Mr. Faiman acknowledged that it would be possible to purchase or rent a system at a cheaper price but said that, in that case, callout charges would be an additional cost. He said that as the Respondent inherited the contract from the developer, the Respondent was bound by it and could not terminate it. He said that the Respondent was willing to investigate the possibility of purchasing the existing system but in view of the level of service charge arrears, that was not a viable option at present. He produced invoices showing that the rental charge for 2008 was £4,960.30. An invoice relating to the lift telephone had been included under this heading in the accounts making the total of £5,016.67. The charge for 2009 was estimated at £5,200.

32. **Electricity**. Mrs. West-Taylor's complaint was that the cost of all electricity used in the residential part of the Property is included in the service charge. She was told when purchasing Flat 7 that separate meters would be installed in the flats but that had not been done. Her investigations revealed that the appropriate wiring had not been provided to allow separate metering. This

results in a high charge for electricity regardless of use by individual flat owners.

33. Mr Faiman produced a letter from the Respondent's electrical contractor in which he gave details of the electricity meters at the Property. That letter records that meter number D04D00337 supplies electricity only to the lift. Charges for that meter are raised on account number 14219829. The other meter K04D02116 supplies electricity to the common parts of the Property and to the individual flats. Charges for that meter are raised on account number 14941456.

34. Mr Faiman said that the Property had originally been a warehouse with one electricity supply. When the developer converted it to flats, the developer took the supply of electricity for the flats from the existing main rather than installing separate supplies and meters in each flat. The electrical contractor says that the wiring in the flats is not adequate for the installation of mains meters. He thought that some of the flats do have a means of reading consumption of electricity but he did not know how accurate they are. There would be difficulties in obtaining access to each flat to take meter readings. There had been a separate meter in flat 4 and the owner of that flat had been paying for electricity direct to the supplier. When the owner raised the issue, the electricity supplier condemned the meter connection and removed it. Mr. Faiman had not investigated the cost of installing separate meters. In any event, the Respondent did not have sufficient funds to consider doing that.

35. Mr. Faiman said that the total electricity consumption for the common parts and the flats was divided by the relevant percentage and charged to individual leaseholders by means of the service charge. The total charge for electricity in the year ended 31 December 2008 was £13,540 the estimated charge for electricity in the year ended 31 December 2009 was £11,000. Mr. Faiman produced copies of invoices for electricity for the relevant periods. The Tribunal identified the invoices for account number 14219829 which relates to the lift.

36. Mr Faiman relied on clauses 5(5)(F) and (T) and paragraph 4 of the 4th schedule to justify the charging of electricity through the service charge.

37. **Section 20C**: The 1st Applicants rely on the existing high level of service charge in support of their application under Section 20C. Mr. Faiman relied on clause 5(5)(O) of the lease as giving power to the Respondent to recover its legal costs through the service charge. He said that the Respondent's costs consisted of preparation of the bundles for the hearing and he left a decision to the discretion of the Tribunal.

Conclusions

38. **Cleaning**. The Tribunal was unable to determine from its inspection whether or not cleaning has been carried out to a satisfactory level as there was considerable dust and mess caused by the current redecoration works. The Tribunal observed staining on the carpet in one of the landings and noted that the 2nd staircase was not decorated and had a carpet of poor quality. The Tribunal accepts the evidence of Mr. Faiman that a new carpet was installed in the lobby in October 2009. The Tribunal considers that the remainder of the carpet is in reasonable condition except that attempts could be made to clean the oil spill. Having inspected the invoices provided by the cleaner, the Tribunal is satisfied that the Property is cleaned on a regular basis. It considers that the charge of £25 per week is reasonable. On the basis of the evidence which it is seen, it concludes that the Property is cleaned to a reasonable standard and at a reasonable cost. It finds that the charges for cleaning of £1,586 in 2008 and the estimate of £2,000 for 2009 are reasonable.

39. **The entry phone system**. On the face of it, the cost of renting the system appears high. However, the Tribunal accepts the evidence of Mr. Faiman that the Respondent is bound by a fixed term contract which was entered into by the developer for rental and maintenance. The Tribunal accepts that there is no alternative available to the Respondent at present. The Tribunal notes that Mr. Faiman had not investigated the possibility of an early termination of the contract. The Tribunal draws the Respondent's attention to clause 5(5)(L) of the lease (which contains an obligation to use reasonable endeavours to keep the service charge at the lowest reasonable figure consistent with proper performance of the lessor's obligations). The Tribunal recommends that the Respondent should investigate the possibility of early termination. On the basis of the evidence before it, the Tribunal accepts that the charges made in 2008 and 2009 are reasonable.

40. **Electricity**. Having considered the terms of the lease, the Tribunal finds that the Respondent is not entitled to charge for consumption of electricity in the flats through the service charge. The 4th schedule of the lease provides that the Respondent may charge only the expenditure incurred in carrying out its obligations under clause 5(5). There is no obligation on the Respondent to provide electricity to the flats. That view is reinforced by clause 3(2) of the lease which contains a direct covenant by the 1st Applicants to pay for all electricity consumed on the demised premises.

41. The definition of a service charge in section 18 of the Act would include a charge for variable electricity costs but the provisions of this lease do not allow the Respondent to recover the cost of electricity supplied to the flats through the service charge.

42. Sub-clauses 5(5)(F) and (T) do not assist the Respondent. Charges for electricity are not assessments such as are referred to in sub-clause F.5. In any event, the charges relate to individual flats and are specifically excluded. In the opinion of the Tribunal, the Respondent cannot rely on sub-clause T because the supply of electricity to the flats is not something that would reasonably be done in the interests of good estate management.

43. The Tribunal has sympathy with the Respondent's position because it would be inequitable if the leaseholders were able to consume electricity in their flats without payment. However, it is important that the Respondent charges through the service charge only those items for which it is entitled to charge. Both the Respondent and the leaseholders find themselves in the unfortunate position where the developer has failed to provide an adequate means of measuring the consumption of electricity in each individual flat.

44. Clause 3(2) of the lease obliges the Applicants to pay for electricity consumed in their flats. That clause provides assistance to the Respondent in the circumstances such as these where there is no means for measuring that consumption. The proviso in the clause allows the Respondent to make an apportionment of the cost of electricity used in the Property. The Respondent should estimate the amount of electricity consumed in the common parts and charge that portion through the service charge. The remainder of the electricity consumed should be apportioned between the flats and charged under clause 3(2) according to usage. It may be that the proportion in which the service charge is divided provides a reasonable basis for apportionment or it may be that some other method needs to be adopted to take account of flats which are not occupied. The onus would be on the Respondent to show that the apportionment is reasonable. It is not for this Tribunal to determine what is reasonable on this occasion. If the Respondent adopts this solution, the net effect will be the same as the Respondent should be able to recover the cost of electricity from the leaseholders but it will be doing so under clause 3(2) and not through the service charge

45. There is no evidence before the Tribunal as to the amount of electricity consumed in lighting and heating the common parts of the Property and therefore no allowance can be made for that expenditure. The Tribunal is satisfied that the Respondent is entitled to recover the cost of electricity consumed by the lift through the service charge.

46. For 2008, the Respondent produced copies of invoices for account number 14219829 covering the period from 1 March to 30 November. The total of those invoices (including credits) is £2,297.37. For 2009, the Respondent produced copies of invoices for the same account covering the period from 1 December 2008 to 30 June 2009. The invoice for February is missing but it

may have been a credit note. The total of the invoices for that period is £2,383.47. If that sum covers 7 months, a reasonable estimate for 12 months would be £4,000. On the basis of those figures, the Tribunal determines that the proper charge for communal electricity in 2008 was £2,297.37 and that a reasonable estimate for the communal electricity in 2009 was £4,000.

47. **Section 20C**. It is not for the Tribunal to determine in this application whether or not the lease entitles the Respondent to recover its legal costs through the service charge. In so far as the Respondent is relying on clause 5(5)(O), it may be in difficulty as that is a covenant by the lessor and not the lessee.

48. What the Tribunal does have to determine is whether or not it is just and equitable to make an order under Section 20C of the Act. The main issue in this application has been the charges for electricity. In their written statement of case, the 1st Applicants accepted that there is a problem with the wiring. The Tribunal considers that this is an issue which has been caused by the actions or defaults of the developer rather than by the parties. There is no evidence to show that the Respondent has acted unreasonably in connection with this application. In all the circumstances, the Tribunal does not consider that it is just and equitable to make an order.

Dated 10 February 2010

J G Orme
Chairman