



**Case Number:** CHI/00HG/LSC/2010/0090

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE  
SOUTHERN LEASEHOLD VALUATION TRIBUNAL**

**PROPERTY:** Discovery Wharf, 15 North Quay, Plymouth, Devon PL4 0RB

**Applicant:** Wykeham Land Limited

**and**

**Respondents:** Edmond Davari  
Edwin Arakelians

**In The Matter Of**

**Section 27A and 20C of the Landlord and Tenant Act 1985  
(Liability to pay service charges)**

**Landlord's application for the determination of liability to pay a  
service charge**

**Tribunal**

Mr A Cresswell (Chairman)  
Mr M C Woodrow MRICS  
Mr D Agnew BA LLB LLM

**Date of Hearing:** 17 September 2010

**Appearances:** Mr M C Postle-Hacon for the Applicant  
Mr C Knapper, solicitor, for the Respondents

## DETERMINATION

### The Application

1. On 30 June 2010 (received on 2 July 2010), PHC Management Limited as Managing Agent for the landlord, the owner of the freehold interest in Apartment 50 Discovery Wharf, made an application to the Leasehold Valuation Tribunal for the determination of the liability to pay a service charge. The application referred to a dispute as to who has responsibility under the relevant lease for repairs to fire dampers "contained within the individual extractions from the apartments. There are fire dampers at the points in the extraction system where they intersect floors above."

### Preliminary Issues

2. Mr Postle-Hacon informed the Tribunal that the purpose of the application was to determine who had responsibility for the repair of fire damper(s) within the conduit taking damp air from the property. The Tribunal indicated that its determination could be based only upon the provisions of 27A(3)(a) and (b) of the Landlord and Tenant Act 1985 (as amended).
3. The parties agreed that the lease which accompanied the application, and which is described more fully below, contains the relevant terms of agreement between the parties.

### Inspection and Description of Property

4. The Tribunal inspected the property on 17 September 2010 at 1000. Present at that time were Mr Postle-Hacon, Mr Knapper (accompanied by Ms M Creek) and Mr Arakelians. The property in question consists of an apartment within a purpose-built block of 59 apartments and 3 commercial units. A conduit was seen to have the purpose of extracting damp air from the 2 bathrooms and boiler room of Apartment 50. It was apparent from an inspection of the loft area of the building, and was agreed by the parties, that each Apartment has an individual conduit for the extraction of air into the atmosphere via a roof cowl. The extraction system consisted of plastic ceiling outlets in the 2 bathrooms and the boiler room connected by flexible hose to a metal conduit, and the extraction was effected by a fan attached to the conduit above the property's boiler room. The parties agreed during the hearing that there is a series of fire dampers at each level of the building. The fire dampers could not be seen, but the Tribunal accepts the agreement of the parties, and is strengthened in that view by the evidence at the hearing by Mr Postle-Hacon to the effect that there have been problems with fire dampers associated with other properties within the building, when the difficulties of extraction have been similar to the instant case.

### Summary Decision

5. This case arises out of the landlord's application, made on 30 June 2010, for the determination of liability to pay a service charge for the repair of fire dampers. Under Section 27A(3)(a) and (b) of the Landlord and Tenant Act 1985 (as amended), an application can be made to the 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 the person by" and to whom "it is payable." The Tribunal determines that the lease does not make the tenant liable to repair any fire dampers and that in the event that the landlord was to repair a damper, the reasonable costs of that repair would be recoverable as a service charge levied upon the tenants of the building.
6. The Tribunal allows the tenant's application under Section 20c of the Landlord and Tenant Act 1985, which application was agreed by Mr Postle-Hacon, thus precluding the landlord from recovering its cost in relation to the application by way of service charge. The Tribunal orders the Applicant to pay to the Respondents the sum of £250 towards their costs.

### **Directions**

7. Directions were issued on 6 July 2010.
8. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration. Unfortunately, the preparation of papers appears to have been ignored completely by the Applicant. The Applicant ignored the directions despite further written reminders, making no written communication whatsoever with the Tribunal, with the result that the Respondents were able only able to submit a response at a late date and in ignorance of technical details held by the Applicant. The Applicant produced only after the inspection technical drawings, which had apparently been readily available to it.
9. This determination is made in the light of the inspection, the documentation submitted in response to the directions, the oral evidence of Mr Postle-Hacon and the oral submissions made by the parties' representatives.

### **The Law**

10. The relevant law is set out in sections 18 and 27A of Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002.
11. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord's costs of management, under the terms of the lease (s18 Landlord and Tenant Act 1985 "the 1985 Act"). The Tribunal can decide by whom, to whom, how much and when service charge is payable.

12. The relevant law is set out below:  
Landlord and Tenant Act 1985 as amended by Housing Act 1996 and  
Commonhold and Leasehold Reform Act 2002

**18 Meaning of "service charge" and "relevant costs"**

(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.

**27A Liability to pay service charges: jurisdiction**

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

- (a) the person by whom it 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.

## **Ownership and Management**

13. The parties agree that Wykeham Land Limited is the landlord of the property, Apartment 50 Discovery Wharf. The premises are managed by PHC Management Limited on behalf of the landlord.

## **Messrs Davri's and Arakelians' Lease**

14. The Respondents hold Apartment 50 under the terms of a lease dated 2001, which was made between Vine Developments Limited as lessor and Roy Victor Piper as lessee; the lessee's interest was assigned to the Respondents on 4 October 2006 (a deed of covenant refers to the original lease to Mr Piper as being dated 21 March 2002). The Respondents accept that the lease of 2001 contains the relevant terms of their lease with the Applicant by virtue of the assignment of 4 October 2006 and in accordance with clause 4(7)(b) of the lease.
15. Clause 1 of the lease defines various terms within the lease:

(7) "*Common Parts*" means all main entrances passages landings staircases walkways (internal and external) roof voids gates access yards roads and footpaths passenger lifts car parking areas means of refuse disposal meter rooms landscaped areas and other

areas included in the Building or Development provided or available for the common use of the Building Tenants and their visitors and not subject to any lease or tenancy to which the Landlord is entitled to the reversion and including the Leisure Facilities

(8) "Conduits" means all sewers drains pipes gulleys gutters ducts wires flues cables watercourses channels subways and other conducting media of whatsoever nature"

(9) "Demised Premises" means the Property referred to in paragraph 2 of the Particulars and more fully described in the First Schedule hereto"

16. Clause 4 sets out the covenant by the tenant to pay a service charge. The service charge is more particularly defined in the Fifth Schedule and includes expenditure by the landlord "in performing its obligations under clause 6(4)" of the lease.

17. Clause 5 sets out the tenant's covenants with the landlord, which include

"(1)(a) repair maintain renew uphold and keep the Apartment comprised in the Demised Premises and all parts thereof in good and substantial repair and condition...."

and clause 6 provides:

LANDLORD'S COVENANTS

Expenditure of Service Charge

(4) (a) To maintain

To repair maintain renew uphold and keep in good and substantial repair and condition:-

(ii) all such Conduits as may be enjoyed by virtue of the terms of this Lease or used in common by the Building Tenants or any of them (other than those included in the demise or in the demise of any other apartment in the Building)

(iii) the Common Parts

(vi) all other parts of the Building and the Development not included in the foregoing sub-paragraphs (i) to (v) and not included in this demise or the demise of any other apartment or part of the Development

(f) Installations

(ii) To maintain repair renew and replace any existing fire extinguishers and install such further extinguishers as the Landlord may from time to time consider necessary and pay all charges in connection with the installation and maintenance (and if applicable rental) thereof

(iii) Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as in the absolute discretion of the Landlord may be necessary or advisable for the proper maintenance benefit safety and administration of the Building and the Development or for the benefit or safety of the Tenant including the provision of any further or additional facilities for the Building Tenants

**THE FIRST SCHEDULE**  
**THE DEMISED PREMISES**

The Apartment specified in paragraph 2(1) of the Particulars as the same is shown edged red on the Lease Plan including:-

- (d) All conduits which are laid in any part of the Building and serve the Apartment exclusively;
- (f) All fixtures and fittings in or about the Apartment and not hereafter expressly excluded from this demise BUT excluding:
  - (i) any part or parts of the Building (other than any conduits expressly included in this demise) lying above the said surface of the ceilings or below the said floor surfaces
  - (iii) any conduits in the Building which do not serve the Apartment exclusively

**THE FIFTH SCHEDULE**  
**THE SERVICE CHARGE**

**1(4) Expenditure**

- (a) The Expenditure comprises the total cost reasonably and properly incurred by the Landlord (including contributions which the Landlord is liable to make to expenditure incurred by others) in respect of the Development and the Building on the following items (or such of them as are applicable from time to time):
  - (i) In performing its obligations under clause 6(4) of this Lease
  - (ii) In providing other services
  - (iii) In the interest of good estate management
  - (iv) For the proper enjoyment of the Building by the occupiers
- (b) In particular the Expenditure will include (but shall not be limited to) the cost reasonably and properly incurred or where relevant deemed to be incurred by the Landlord on the following items or such of them as are applicable from time to time including a reasonable fee for the Landlord where the Landlord's employees carry out the work:
  - (iv) Repair and maintenance including:
    - repairing maintaining renewing (as reasonably necessary) decorating cleaning and altering the Common Parts
  - (viii) providing repairing maintaining renewing cleaning and altering the following in the Common Parts:
    - lighting heating cooling ventilation and other equipment and systems
    - fire alarms and ancillary apparatus fire prevention and fire fighting equipment and apparatus

**The Applicant's Case**

- 18. Mr Postle-Hacon explained that he had been approached by one of the Respondents about a year ago with the information that the extraction

system for the property was inoperative. Mr Postle-Hacon identified a failed fire damper as the probable cause and advised the Respondent that it was a tenant's liability to effect a repair with the assistance of the landlord in securing entry to the above apartments to identify and make good the closed damper. It was because the Respondent tenant was unwilling to accept responsibility that Mr Postle-Hacon had decided to make the current application.

19. His view is that the fire dampers are a constituent part of the conduits serving only the property in question and, therefore, the responsibility of the tenants.

### **The Respondent's Case**

20. Mr Knapper amplified his skeleton argument. Put simply, he submitted that the fire dampers were fire extinguishers and, therefore, the responsibility of the landlord, and that they were, in any event, the responsibility of the landlord because they were not a constituent or integral part of the conduits serving the property.

### **Consideration and Determination**

21. The Tribunal finds it clear from its inspection of the property, examination of the plans that the Applicant produced at the hearing and from the evidence of Mr Postle-Hacon and the submissions of Mr Knapper that there is an extraction system connected to and for the sole use of the property. That extraction system consists of a number of elements. There are 3 plastic ceiling apertures, which are connected by flexible hose to a metal conduit. Also connected to the conduit is an electric fan, which has the purpose of drawing damp air from the property and expelling it via the conduit to the air above the roof of the building. Within the conduit, the builder has placed a series of fire dampers at each floor level. It is within the knowledge of the Tribunal that fire dampers are normally metal frames containing metal slats, which slats will close when there is a presence of fire/heat so as to impede the progress of fire up the conduit with the risk of such progress to the rest of the building.
22. It was clear from the plans submitted at the hearing by Mr Postle-Hacon that fans, ducts and fire dampers are separately described thereon; that the plans envisaged "fire dampers to be fitted where d'work passes thru slab at each level." Mr Knapper invited us to find that the fire dampers are not an integral part of the conduits and Mr Postle-Hacon invited us to find to the contrary. The Tribunal has no hesitation in finding that the fire dampers are not an integral or constituent part of the conduits. As explained above, the fire dampers are a part of the extraction system, just as is the electric pump, the ceiling apertures, flexible hose and metal conduits. The separate nature of the elements of the extraction system is shown also by what we have detailed from the plans above. It is clear that the conduits can operate without fire dampers and lose none of their character without fire dampers. The fire dampers are fitted to the conduit so as to impede the progress of a fire; they are a method of fire prevention, a safety measure. The Tribunal did not accept Mr Knapper's argument that they are fire extinguishers; if we

apply the normal meaning to the word "extinguisher", we find that the dampers do not put out a fire, but rather that they impede its progress.

23. Having then found that the fire dampers are not a constituent part of the conduits rising from and serving the property, the Tribunal then examined the lease so as to ascertain first whether the responsibility for repair of fire dampers fell upon the tenants of the property. The Tribunal concluded that it did not. The liability of the tenants is detailed within clause 4 and the First Schedule partly detailed above; the description of the demised premises cannot include the fire dampers above the ceilings of the property within the building.
24. It was clear to the Tribunal that the fire dampers are a safety feature, which must be maintained for the safety of all within the building and beyond. It was also clear both that the landlord has authority to repair the fire dampers (see clause 6(4)(f)(iii) above) and is able to reclaim the reasonable costs of such repair from the tenants of the building as part of the Service Charge (see the Fifth Schedule 1(4) above).

### **Section 20c Application**

25. The Respondents have made an application under Section 20C Landlord and Tenant Act 1985 in respect of the Applicant's costs incurred in these proceedings. The relevant law is detailed below:

#### ***Section 20C Landlord and Tenant Act 1985: Limitation of service charges: costs of proceedings***

*(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.*

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

26. Mr Postle-Hacon agreed that the Tribunal should order that all of landlord's costs in relation to this application are not to be regarded as relevant costs to be taken into account in determining the amount of the service charge for the current or any future year. Even had he not agreed, the Tribunal would have so ordered. The conduct by the landlord of this case has been far from what the Tribunal would have expected of a diligent landlord. It is clear that the Applicant failed completely to comply with the Tribunal's directions or to answer any of the subsequent correspondence sent to it by the Tribunal. It is equally clear that the Respondents had for some time been met by a similar stance, and that the detailed plans of the building were not produced until after the inspection on the very day of the hearing.



27. In those circumstances, the Tribunal directs that the landlord's costs in relation to this application are not to be regarded as relevant costs to be taken into account in determining the amount of the service charge for the current or any future year.

## **COSTS**

Schedule 12, paragraph 10.-(1) of Commonhold and Leasehold Reform Act 2002: *A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).*

*(2) The circumstances are where -*

*(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or*  
*(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.*

*(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed -*

*(a) £500, or*  
*(b) such other amount as may be specified in procedure regulations.*

28. Mr Knapper applied to the Tribunal for an order for a contribution towards the costs of the Respondents and we heard from Mr Postle-Hacon in response. Having heard the submissions, we concluded that the Applicant had acted unreasonably in connection with these proceedings for all of the reasons we have detailed above, being simply the failure to comply with directions, to respond to correspondence, to give the detail of the application before the hearing, and to provide detailed plans before the hearing. This all led, apart from the inconvenience to the Tribunal itself, to extra work by Mr Knapper on behalf of the Respondents. Specifically, there was a need to "prepare wider" because he could not focus upon the exact nature of the application as it was not made clear until the hearing, the inspection lasted longer than would have been needed had plans been produced in advance, and the hearing lasted longer because there was no written statement produced by Mr Postle-Hacon, in breach of the directions, and it was necessary to take detailed oral evidence. We believe that there was likely to be an oral hearing in this case and that the proper award of costs in all of these circumstances is one of £250. Accordingly, we order the Applicant to pay to the Respondents the sum of £250 towards their costs.

**Signed**

**Andrew Cresswell (Chairman)**

**Date 27 September 2010**

**A member of the Southern Leasehold Valuation Tribunal  
Appointed by the Lord Chancellor**