9543

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AU/LSC/2013/0423**
Property	:	**First Floor Flat, 7a Caledonian Road N1 9DX**
Applicant	:	**Albert and Ivan Rogove**
Representative	:	**In person**
Respondent	:	**Regent Quarter Investments (4) Limited**
Representative	:	**Mr Robert Brown Counsel** **Mr Craig Bluer Jones Lang La Salle** **Mr Eric Lowe } D E & J Levy** **Mr Ravi Vyas } D E & J Levy**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Mr P M J Casey MRICS** **Mr A Lewicki MRICS** **Ms S Wilby**
Date and venue of Hearing	:	**21 October 2013** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**18 December 2013**

DECISION

Decisions of the tribunal

(1) The tribunal determines that all of the sums demanded of the Applicants by the Respondents in the service charge years ending 28 September 2007 to 2012 are reasonable and reasonably incurred save for the common parts electricity charges in 2007, 2008 and 2009 which are limited to £300 pa in each of those years and the charge in 2007 for the video entry system which is disallowed in its entirety.

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

The application

1. The Applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of the service charge years ended 28 September 2007-2012 inclusive and in respect of the estimated services charges for the years ended 28 September 2013 and 2014. Illustrative of the amounts involved the Applicants' service charges for the year ending 28 September 2012 were £1,708.55 in respect of the Building Charge and £1,128.97 in respect of the Property Charge (estate charges).

2. The application to the Tribunal is dated 14 June 2013. Following a pre-trial review attended by the Applicants and representatives of the Respondent directions for the future conduct of the application were issued on 9 July 2013.

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

The hearing

4. The Applicants appeared in person at the hearing and the Respondent was represented by Mr Robert Brown.

5. Immediately prior to the hearing Mr Brown handed in a skeleton argument, a copy of which had been given to the Applicants. On 17 October 2013 the Respondent's solicitors, Guillaumes LLP, had requested an adjournment which was opposed by the Applicants and refused by a procedural judge. Mr Brown declined to renew the application at the hearing. He also conceded the Applicants' contention that the service charge demands sent to them failed to comply with the requirements of S47(1) Landlord and Tenant Act 1987 (The 1987 Act) in respect of supplying the address of the landlord but as this could be

corrected retrospectively he asked that the hearing continue as, indeed, did the Applicants. In their statement of case the Applicants asserted that the Estate Charges had not been properly certified in accordance with the terms of their lease in respect of some of the years in issue but they did not raise or develop this point at the hearing.

The background

6. The property which is the subject of this application is said to be a first floor purpose built one bedroom flat. It is in a terrace fronting directly onto the pavement with a commercial unit on the ground floor and a flat on the second and third floors above it with which it shares a communal entrance from the street to a small entrance lobby and staircase. The building forms part of a much larger block of mixed commercial and residential units, one of three such blocks comprising the estate. There are gated entrances giving access to interiors of the blocks which apparently contain walkways and planted open areas. We were told that there are 89 flats in total in the three blocks and that the only others with direct access from the surrounding streets were those on York Way. The whole estate is known as Regent Quarter.

7. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

8. The Applicants hold a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The lease dated 17 February 2006, is for a term of 150 years (less 10 days) from 25 December 2003 and is an underlease granted out of a headlease dated 18 July 2005 which is of both the flats at 7a Caledonian Road. The Interpretation provisions of the lease of the subject property provides that the lessee shall pay 31.3126% of the service charge which, as there is no Car Park Charge payable in this case, means the Building Charge which includes the appropriate proportion of the Property Charge both as therein defined. The latter is the sum charged to the landlord by the headlesses in respect of what is defined in the headlease as Building Service Charge. Paragraph 2 of Part 2 "Building Service Charge" of the Building Service Charge Schedule provides that the amount payable "shall be assessed by the Landlord or its surveyor according to a reasonable and proper basis for apportionment applicable from time to time to the Premises (ie 7a).

The issues

9. The PTR and subsequent directions identified the relevant issues for determination as follows:

(i) The payability and reasonableness of service charges for the years referred to in paragraph 1;

(ii) Whether the landlord had complied with the provisions of the 1985 and 1987 Acts in its service charge demands; and

(iii) Whether an order under Section 20C of the 1985 Act should be made.

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

The parties cases

11. The Applicants in their statement of case and at the hearing described at some length the difficulties they had experienced in getting information about the service charges from the managing agents, D E & J Levy. There had they said been repeated failures to comply with Ss21 and 22 of the 1985 Act and it was only after repeated delays and much chasing on their part that the requisite information had been supplied and arrangements made for them to inspect documents particularly in respect of property charge element of the service charge.

12. For the Respondent Mr Brown rightly pointed out that none of these alleged failing invalidated the service charge demands and as the Applicants raised no other validity questions save the already conceded S47(1) point there is no validity of service charge issue for the Tribunal to determine.

13. So far as The Property Charge, referred to in the application as "Estate Charges" are concerned, the Applicants challenged these for each year in issue. They had by the hearing date received summaries of these costs and had been able to inspect vouchers, etc. The largest part of these costs related to security especially the employment of security personnel though maintenance of the planted areas and cleaning also cost significant amounts. The Applicants did not, however, challenge any of the sums shown under the various expenditure headings as being unreasonably incurred nor did they claim that the standard of service provided was of less than a reasonable standard. Their case was that this was a lot to pay for what to them amounted to little benefit as the property fronts directly onto the pavement to the public highway. The security cost and the maintenance and cleaning of the common, open areas within the blocks provided no direct benefit to the property. They did not, however, dispute the Respondent's method of apportionment of the Property Charge on the basis of floor areas; they could not suggest anything else but in their view the apportionment should be more nuanced.

14. For the Respondent Mr Brown said that the Applicants had not produced any evidence to support their assertions and were asking the tribunal to make arbitrary adjustments to their share of the estate management costs. This was a high class development with well maintained common areas to which the lessees or their tenants had rights of access if they chose to use them and a high level of security provided for the benefit of all. Not all the heads of expenditure comprised in the estate costs (the Property Charge) were recharged to every lessee and commercial occupier as it was recognized that some of the services provided were for the benefit of only some of them. Those contract costs were met only by those who thus benefitted. The Respondent's system for dealing with the estate costs had operated since the completion of Regent Quarter and this was the only challenge made to it. This element of the Applicants' service charges was dealt with by Jones Lang La Salle who were the managing agents for the whole of Regent Quarter but who subcontracted the management of the residential units to D E & J Levy who were invoiced for the residential elements share of the estate costs which they in turn passed on to the individual residential leaseholders. At the very least the Applicants would benefit from the effect of these services on the capital value of the property. There was no challenge to the cost or quality of those services which must therefore be accepted as reasonable and no suggestion of any other method of apportionment.

15. In respect of disputed costs charged solely to the two flats at 7a the Applicants had, as directed, completed a schedule of these which the Respondent had added its comments to. The schedule challenged a large number of invoices rather than heads of expenditure as shown on the summary of service charge costs. However the items challenged can be related to those heads of expenditure and in each year in issue relate to general repairs and maintainance, fire alarm and equipment maintenance and replacement of lamps grouped together as hard services, cleaning, common parts electricity and health and safety. There was also an issue as to whether they had been billed wrongly as the address shown on some of the invoices was No 7, the commercial unit, not 7a, the two flats.

16. The hard services were principally supplied by a firm called IML in relation to fire alarm and emergency lighting and the replacement of light bulbs. The Applicants could not understand why so many visits were necessary and why separate visits had to be made to test alarms and replace bulbs which themselves were charged for at far more than was reasonable and seemed to need replacing with astonishing frequency. They also dispute the cost of fire extinguisher testing, Eyebolt testing and the health and safety fee paid to William Martin.

17. Their case on cleaning was that weekly was too much; a fortnightly clean would suffice but again they did not challenge the actual cost and standard of the work. On common parts electricity they said it was too high and produced a calculation by their electrician as to what running

the lights should cost. In particular they queried the very high electricity charges incurred in the earlier years. In the service charge summary of costs of the year ending 28 September 2007 it was £676 (against a budget of £250), in 2008 £1,485.16, in 2009 £498.62, in 2010 £181.37, in 2011 £283.75 and in 2012 £300.87. Clearly something was very wrong and it could not be explained by catching up on estimated bills. If the last two years had ben round about £300 (which they thought too much) how can those earlier costs be justified.

18. The one other major concern the Applicants had related to a video entry system which was billed to the service charge in the year ending 28 September 2007 in the sum of £2,396. When they bought the flat in February 2006 the purchase documentation stated that a video entry system was already installed which they believed was reflected in the purchase price and they thought they were being asked to pay twice for this. In any event there was never any consultation in respect of the expenditure.

19. For the Respondent Mr Brown said that this large mixed development required a high level of fire safety. The managing agents regime represented best practice and was in line with British Standards recommendations. IML's invoices were submitted monthly but were in respect of work done over a twelve month period. The services provided were weekly fire alarm testing, quarterly fire alarm panel maintainance, monthly emergency light testing, six monthly escape light maintainance and a weekly inspection for defective bulbs. In addition all bulbs were replaced every six months. They also checked that fire extinguishers were operating properly. The "Eyebolt" was a "man safe" installation that required annual certification to allow its continued use. William Martin are a firm employed by the managing agents to conduct an annual health and safety audit of the agents' procedure and the fee was apportioned across all properties in the development. No evidence had been provided that the costs of supplying these services were unreasonable or that the performance of them was to an unreasonable standard.

20. So far as the cleaning was concerned the managing agent's view was that a weekly clean was required for a development of this quality but were prepared to discuss a reduced frequency with the Applicants if other leaseholders agreed. Again no evidence was presented as to reasonableness of the cost or standard of work.

21. The common parts had in addition to lighting an electric heater which had not been accounted for in the Applicants' calculation, he was unable, however, to offer any explanation for the very high bills in 2007, 2008 and 2009.

22. The question of the address on some invoices being 7 and not 7a was answered by the fact that D E & J Levy only managed the residential

elements of the development. They would not receive or pay invoices relating to the commercial units; it was clearly a typographical error.

23. So far as the video entry system was concerned this had been billed to the service charge under a previous management agency and D E & J Levy had been unable to trace any documents relating to this.

The tribunal's decision

24. As Mr Brown pointed out the Applicants' case is short of evidence; there are no witness statements no quotations from alternative contractors as to what they might charge to provide the disputed services and no details of service providers' contracts setting out the duties to be undertaken. He quoted in his skeleton argument from the decision of H H J Mole QC in Regent Management Ltd V Jones [2010] UKUT 369 (LC) "the test is whether the service charge that was made was a reasonable one; not whether there were other possible ways of charging that might have been thought better or more reasonable. There may ... another. The LVT may have its own view. If the choice had been left to the LVT it might not have chosen what the management company chose but that does not necessarily make what the management company chose unreasonable". We accept that that is correct.

25. So far as the estate charges are concerned there is no evidence before us as to which contracts encompassed by that charge do not benefit the Applicants and why this is so. On the security costs they merely assert that as their properties entrance is on the outside of the block they get no benefit from this and ask us to make some sort of arbitrary adjustment but if they pay a lesser share of those costs other leaseholders and commercial occupiers will have to pay more. Their situation is not unique in the development. It is true that the share of those costs is assessed by the landlord on "a reasonable and proper basis for apportionment" and that the landlord has decided which costs they benefit from and which they don't and that that decision can be challenged. It may be that the difficulties the Applicants faced in obtaining information about the estate charges prevented them investigating further but without evidence and with their acceptance of the reasonableness of the cost and quality of those services and indeed the method of apportionment we can do no other than say that the estate charges are reasonable and reasonably incurred.

26. Similarly with the services provided by IML there is no evidence before us that the Respondent's, largely fire, safety regime is unreasonable given the nature of the development, statutory requirements and British Standards Institute Recommendations. All that is effectively said is that too many visits are made and light bulb costs are excessive. Without persuasive evidence we can only say that the costs as charged are reasonable and reasonably incurred. The same is true of the

cleaning costs where the only argument advanced is that cleaning should be fortnightly not weekly.

27. The electricity in the common parts challenge had some evidence, from the Applicants' electrician, but he did not appear to give evidence and had omitted the electricity that would have been used by the heater in the common parts from his calculation. We are not persuaded that the sums charged for electricity in 2010-2012 are unreasonable but clearly something was amiss in 2007-2009. If electricity consumption in 2011/2012 was in the region of £300 pa the charges for those earlier years need explaining and the Respondent was unable to provide any. It is the managing agents' role to investigate out of line expenditure and rectify any underlying problems; it is not enough to say this is what we were billed you must pay your share of it. The electricity cost for the year ending 28 September 2007, 2008 and 2009 should be capped at £300 pa in each year.

28. The video entry system charged for in 2007 again could not be explained by the Respondent and we accept the Applicants' case that this was included in the price they paid for the flat. It is not reasonable to charge this sum to the service charge account.

29. Mr Brown had suggested that, although we clearly had jurisdiction to deal with them, we should leave consideration of the estimated service charge costs for 2013 and 2014 on the basis of which the Applicants made payments in advance to another day. The 2013 service charge had now ended and the accounts would soon be available to allow actual costs to be considered and, along with our decision in respect of the completed years, allow the 2014 budget to be better considered. We agree with him for the reasons he gave but also because we think that the Applicants having obtained the information relating to the makeup of the estate charges are now in a better position, if they wish, to pursue an evidence based challenge to the share they pay of those charges and any decision of ours on those budget estimates would in such circumstances be meaningless.

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

31. The reasons we do so is that it is clear from the Applicants' statement of case that the managing agents had failed on many occasions through the years to supply information requested or make inspection facilities available in a timely and transparent manner. Despite these breaches the Applicants have not sought to challenge the managing agents' fees

even when asked by us if they wished to do so but they have clearly been hampered in their case preparation not least in obtaining a clear understanding of the nature of the estate charges and how their share was calculated. We do not believe the managing agents have been deliberately obstructive but the division of responsibilities between the two firms managing the scheme has led to a lack of clarity in the presentation of information to the Applicants who have despite this achieved some measure of success in that we have disallowed £5055.78 of service charge costs in respect of the electricity and video entry system of which the Applicants share is 31.3126%.

Name:  **Date:** 18 December 2013

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).