1202

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

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| **Case Reference** | : | **LON/OOAN/LSC/2016/0359** |
| **Property** | : | **Flat 2, 49 Coningham Road London W12 8BS** |
| **Applicant** | : | **Ms Eugenia Villarosa** |
| **Representatives** | : | **Mr Stan Gallagher of Counsel** |
| **Respondent** | : | **Mr Robert James Ryan** |
| **Representative** | : | **Mr Justin Bates of Counsel** |
| **Type of Application** | : | **For the determination of the liability to pay and reasonableness of service charges (s.27A Landlord and Tenant Act 1985)** |
| **Tribunal Members** | : | **Prof Robert M. Abbey (Solicitor)**<br>**Mr Duncan Jagger (MRICS)** |
| **Date and venue of Hearing** | : | **23 February 2017 at 10 Alfred Place, London WC1E 7LR** |
| **Date of Decision** | : | **01 March 2017** |

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**DECISION**

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## Decisions of the tribunal

(1) The tribunal determines that:-

2016

The surveyor's fees as charged are fair and reasonable.

(2) The demise of the property includes the roof and roof space or void. (The tribunal makes no determination regarding air space as this is not within the limits of this s. 27A application.)

(3) The tribunal makes a s.20C order limited to 50% of the relevant costs incurred.

## The application

1. The applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charge payable by the respondent in respect of service charges payable for services provided for flat 2, 49 Coningham Road London W12 8BS, (the property) and the liability to pay such service charge.

2. The relevant legal provisions are set out in the Appendix to this decision. Additionally, rights of appeal are set out below in an annex to this decision

## The hearing

3. The applicant was represented by Mr Gallagher of counsel and the respondent was represented by Mr Bates of Counsel.

4. The tribunal had before it a trial bundle of documents prepared by the one of the parties in accordance with previous directions. Additional copy paperwork was made available to the tribunal on the day of the hearing that was seen and approved by all parties and therefore added to the trial bundle. Legal precedents were also made available to the tribunal

## The background and the issues

5. The property which is the subject of this application comprises a converted flat in a Victorian four floor terraced property. The basement or lower ground floor is excluded from the property so effectively the property comprises the ground first and second floors. However, the

full extent of the property is an important issue that came before the tribunal and discussed at length below.

6. Neither party requested an inspection and the tribunal did not consider that an inspection was necessary in the light of the detailed and extensive paperwork in the trial bundle; nor would it have been proportionate to the issues in dispute.

7. The applicant tenant holds a long lease within the terraced property which requires the landlord to provide services and the tenant to contribute towards their cost by way of a service charge. The applicant tenant must pay a percentage stipulated in their lease for the services provided. (The actual percentage is expressed to be 75%). The issues the applicant raised covered the reasonableness of the charges demanded for the several items listed by the respondent and carried out by the respondent for the period from 4 April 2016 when the applicant purchased the leasehold interest of flat 2. The applicant considers that the items are either excessive, not payable or unreasonable.

8. The applicant also sought an order under s.20C of the Landlord and Tenant Act 1985 seeking to debar the respondent from recovering his costs of the proceedings as a service charge.

**The Demise**

9. The preliminary and main issue that came before the tribunal was on the extent of the demised premises as defined in the lease of the property, (the lease). The tribunal needed to be sure of the extent of the demise to then be able to make decisions about the nature and extent and cost of the service charges. The applicant wanted the tribunal to consider, first, if the roof and roof space (above the second floor ceiling) are included in the demise; and secondly whether the costs of proposed structural works to the roof are to be apportioned 50/50 between flat 1 and flat 2 and not apportioned on 75/25 basis pursuant to the general service charge apportionment provision in the lease.

10. The demise in the lease is set out in the first schedule and provides:-

> *All that the whole of the building excepting the basement floor at 49 Coningham Road London W12 such flat to be known as flat number 2 in the Country of London including the floorboards and joists on which the floors thereof are laid and the ceiling plaster of the said flat and (including also the door door frames windows and window frames) as the same is delineated and shown edged red (hereinafter called the Demised Premises") together with.....*

The reference to a plan is unhelpful as none is said to exist and no such lease plan was disclosed to the tribunal although there was a plan of the excluded floor in the basement but were there was a side note on it saying "upper flat flat 2". It should be noted at the outset that the lease is very poorly drafted and constructed. It is an example of bad drafting in leasehold conveyancing that has given rise to this dispute. It seemed to the tribunal that when made in 1991 a lease template was selected and amendments made to try to suit the circumstances but that the changes made were imperfect and incomplete and have given rise to the inconsistencies that underpin this dispute.

**Other relevant lease terms**

11. The first description of the property can be found at the start of the lease where the property for land registry purposes is described as the "Remainder of the Building at 59 Coningham Road London W12". The tribunal found this to be a significant description as it would seem to support the wording in the demise namely that the whole of the building less the basement flat (including front and rear gardens) was to be leased to the tenant.

12. The tribunal then turned to consider the repairing obligations. Lease clause 2(3) requires the applicant to well and substantially repair the property in good and substantial repair. The clause refers to the demised premises, (see paragraph 10 above for the definition of demised premises) as well as all sewers drains roads and walls (including the doors door frames windows and window frames fitted in such walls which may be found upon any part of the demised premises. This clause is silent about the roof or indeed the foundations. To that extent is unhelpful in the context of this dispute. However, the clause is said to be subject to the provisions of clause 2(9) of the lease.

13. Turning to clause 2(9) this is the service charge provision requiring the tenant to reimburse the lessor for 75% of the expenses and outgoings incurred by the lessor in the repair maintenance and renewal and insurance "of the said building". Sadly the lease does not contain a satisfactory definition of the said building. The clause refers to the third schedule for further details of the extent of the service charges.

14. Turning to the third schedule to the lease, this purports to describe the lessor's expenses and outgoings in respect of which the lessee is to pay a proportionate amount by way of a service charge. As well as describing the insurance requirements and the common parts maintenance at clause one it describes the maintaining and repairing etc. of "the said building" and all parts thereof as more particularly described in clause 5(5) and 5(6) of the lease.

15. Therefore, turning to clauses 5(5) and 5(6) and the subsequent clause 6(1), these three highlight the inconsistencies caused by the poor

drafting of this lease. Clause 5(5) is a landlords covenant requiring the lessor (subject to payment of the tenant's contributions) "to repair cleanse maintain resurface and renew the roofs structure walls foundations and main structure of the building of which the demised premises form part....". This is then followed by more wording that perhaps clarifies the first part; "and the chimney stacks gutters and rainwater pipes service pipes and other cables and drains not comprised within this demise and any other walls used or to be used in common by the occupiers of the demised premises and the occupiers of the remainder of the building". So the first part of this clause purports to cover works to parts of the demised premises while the second part purports to cover shared items such as gutters and rainwater pipes. Clause 5(6) is a cyclical exterior painting clause.

16. The problem comes when 5(5) is read in conjunction with clause 6(1). This clause is in the form of a declaration. Consequently, the parties declare that:-

> *"The roof of the building of which the demised premises form part and the foundations thereof shall be deemed to be party matters to be maintained and repaired at the joint expense of the lessee and the lessee or the tenants of the lessors or the occupier or occupiers for the time being of the remainder of the building of which the demised premises form part."*

The tribunal noted the inconsistency between 5(5) and 6(1) and appreciated that this is in all probability, at the very core of this dispute. It highlights the failure of the lease draftsperson to adjust the lease to take account of the somewhat unusual arrangement between the two residential units in this terraced property.

**Summary of the applicant's argument**

17. The applicant says that the main roof of the building is included within the demised premises and she relies upon the demise in the first schedule to support this contention. She then asserts that as a result of 6(1) the roof is deemed to be a party structure to be maintained and repaired at the joint expense of the two parties. The applicant therefore also maintains that as a result of this interpretation of the lease she is also claiming the roof space or void to be part of the demise of the property. The applicant says that joint expense means a 50/50 split between the parties.

**Summary of the respondent's argument**

18. The respondent says that the lease must be read as a whole and that when one does so it is clear that the roof and roof space is retained by the freeholder, the respondent. To support this view the respondent

initially relies upon the terms of clause 5(5). Here he says the freeholder is required to repair and renew the roofs structure walls foundations and main structures of the building of which the demised premises form part. The express reference to the roof as being the responsibility of the landlord is he says is a very strong indication that he has retained the same. Secondly the repairing covenants imposed on the leaseholder do not include the roof. Indeed there is no mention in clause 2(3) of the roof. The respondent also asserts that reference to clause 2(9) supports this as it is of course the service charge provision at 75/25.

## Decision

19. The tribunal is required to consider which argument they prefer in their interpretation of this poorly constructed lease. The tribunal therefore sought precedent guidance to support their decision making process. The recent Supreme Court case of *Arnold v Britton and Others* [2015] UKSC 36 is extremely helpful in this regard. This case was about judicial interpretation of contractual provisions analogous to the dispute before the tribunal. The court held

> *"that the interpretation of a contractual provision, including one as to service charges, involved identifying what the parties had meant through the eyes of a reasonable reader, and ,save in a very unusual case, that meaning was most obviously to be gleaned from the language of the provision; that, although the less clear the relevant words were, the more the court could properly depart from their natural meaning, it was not to embark on an exercise of searching for drafting infelicities in order to facilitate departure from the natural meaning; that commercial common sense was relevant only to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties as at the date on which the contract was made....it was not the function of a court to relieve a party from the consequences of imprudence or poor advice".*

20. Accordingly the tribunal turned to the lease to try to identify what the parties had meant through the eyes of a reasonable reader. Starting at the very top of the lease the tribunal noted that the lease registration details described the property as the "Remainder of the Building at 59 Coningham Road London W12". Taking this in conjunction with the demise it was straight forward for the tribunal to conclude that the demise did indeed cover the whole of the building excluding the basement flat. The tribunal then considered clause 6(1) to be of material consequence for the parties when considering what the parties meant when the lease was granted. The declaration stated that "the roof of the building of which the demised premises form part" seemed to the tribunal to clearly show that it was intended that the roof be part of the

demised premises. This was supported by further words in the clause whereby there was separate reference to the foundations. This seemed to the tribunal to show that the foundations did not form part of the demised premises and hence its exclusion for the previous phrase, referring to the roof. The tribunal took this clause to mean that it was the intention of the parties back in 1991 to mean that the roof would be demised to the property and the foundations should remain with the freeholder who retained the basement. But, that as both structures benefited both parties that they shall be deemed to be party matters to be maintained and repaired at the joint expense of the lessee and the lessee or the tenants of the lessors or the occupier or occupiers for the time being of the remainder of the building.

21. If that is the case the tribunal needs to reflect upon what was meant by joint expense. Clause 6(1) only talks of joint expense. It could have re-iterated the service charge split of 75/25 but did not. The tribunal therefore took the view that a reasonable reader would have understood this to mean a 50/50 split as being joint between the parties. The tribunal was mindful of the specific nature of this clause in that the tribunal considered that it effectively apportioned the roof to the upper property and the foundations to the lower property. But as each benefitted the other then it was reasonable to assume that the split would be equal between the two parties when it came to expenditure on either structure.

22. If this interpretation applies then clause 5(5) will apply to the roof and foundations. It remained in the lease the tribunal believes as a result of an over slavish use of a template that was not properly edited to make it better fit the division in the terraced house. The effect is that the lessor is bound by a covenant to repair and maintain these items but where the costs are to be split 50/50. Moreover the 75/25 split will still apply to other structures and of course to the insurance so that the applicant will have to pay the greater part for insuring the building at the higher level of 75%.

23. Accordingly the tribunal take the view and find that a reasonable reader of this lease would conclude that both the roof and the roof space (or roof void) forms part of the property. The tribunal is also of the view and finds that the meaning of joint expense is a 50/50 split between the parties.

24. The tribunal then turned to the actual service charges. These were effectively surveyor's fees at an hourly rate of £120. The tribunal was able to see invoices in support of the relatively small amounts claimed and it was apparent that the work covered items including measuring up and drawing so that the tribunal was of the view that these charges were entirely reasonable. The charges were not by way of a management fee but represented actual work done for three hours of activity and a gross charge of £360 plus vat.

25. For all the reasons set out above the tribunal is of the view that the service charges are reasonable and that the amount is approved as set out above.

## Application for a S.20c order and for costs

26. The applicant also made an application under section 20c of the Act, i.e. preventing the landlord from adding the legal costs of these proceedings to subsequent service charge accounts. Having read the submissions from the parties and listened to their oral submissions at the hearing and taking into account the determination set out above the tribunal determines that an order should be made as to 50% of the costs. It is the tribunal's view that it is just and equitable to make an order pursuant to S. 20c of the Landlord and Tenant Act 1985 as to 50% of the costs incurred by the lessor. With regard to the decision relating to s.20C, the Tribunal relied upon the guidance made by HHJ Rich *in Tenants of Langford Court v Doren Ltd* (LRX/37/2000) in that it was decided that the decision taken was to be just and equitable in all the circumstances. The tribunal thought it would be just to allow the right to claim 50% of the landlord's costs as part of the service charge. The s.20C decision in this dispute gave the tribunal an opportunity "to ensure fair treatment as between landlord and tenant in circumstances where even although costs have been reasonably incurred by the landlord, it would be unjust that the tenant or some particular tenant should have to pay" (all of) "them."

27. As was clarified in the *Church Commissioners v Derdabi* LRX/29/2011 the tribunal took a robust, broad-brush approach based upon the material before it. The tribunal took into account all relevant factors and circumstances including the complexity of the matters in issue and the evidence presented and decided that the order should extend to no more than 50% of the costs.

**Name:** Judge Professor Robert M. Abbey **Date:** 01 March 2017

## Appendix of relevant legislation and rules

### 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.

**20B Limitation of service charges: time limit on making demands.**

(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.

**The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 [2013 No. 1169 (L. 8)]**

**Orders for costs, reimbursement of fees and interest on costs**

13.—(1) The Tribunal may make an order in respect of costs only—

(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—
(i) an agricultural land and drainage case,
(ii) a residential property case, or
(iii) a leasehold case; or
(c) in a land registration case.
or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.

(4) A person making an application for an order for costs—

(a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and
(b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.

(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
(b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.

(6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.

(7) The amount of costs to be paid under an order under this rule may be determined by—

(a) summary assessment by the Tribunal;
(b) agreement of a specified sum by the paying person and the person entitled to receive the costs (the "receiving person");
(c) detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.

(8) The Civil Procedure Rules 1998(a), section 74 (interest on judgment debts, etc.) of the County Courts Act 1984(b) and the County Court (Interest on Judgment Debts) Order 1991(c) shall apply, with necessary modifications, to a detailed assessment carried out under paragraph

(7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.

(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.

## ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.