

9376

DECISION



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

Case Reference : **LON/00AW/LSC/2013/0722**

Property : **NELL GWYNN HOUSE
SLOANE AVENUE
LONDON SW3 3AZ**

Applicant : **CRABTREE PM LIMITED
(Maintenance Trustee)**

Representative : **CRABTREE LAW LLP**

Respondent : **THE OWNERS OF THE 431 FLATS
AS LISTED IN THE SCHEDULE TO
THE APPLICATION**

Representative : **No attendances**

Date of Application : **16th October 2013**

Date of Directions : **24th October 2013**

Type of Application : **An Application for a determination
as to the manner in which service
charges are payable**

Tribunal Members : **Tribunal Judge S SHAW
Mr S A Manson FRICS**

Date and of Hearing : **18th November 2013**

Date of Decision : **20th November 2013**

Introduction

- (1) This case involves an Application made pursuant to the provisions of Section 27A of the Landlord and Tenant Act 1985 (“the Act”) and is an application for a determination as to the manner in which service charges are payable. The application is made by Crabtree PM Limited (“the Applicant”) which is a party to the various leases to be referred to below, and is named as the Maintenance Trustee in those leases. In fact its role is analogous to that of a maintenance or management company in the usual form of tripartite lease. The other parties to the leases to be referred to are the freehold owning company and the various leasehold owners of the flats in issue.
- (2) The property is a large development comprising 431 flats. The issue which has arisen in the case is the manner in which the service charge contributions of the various leaseholders should be calculated.
- (3) Directions were given in this matter by the Tribunal on 24th October 2013; those Directions can be found at tab 7 of the hearing bundle prepared by the Applicant. The Respondents were directed to respond to a Statement of Case to be prepared by the Applicant and served upon them by the 11th November 2013. The Respondent leaseholders case was to be received by 15th November 2013. In the event there has been no Statement of Case in response from any of the Respondents with the exception of the leaseholder of flat 821, a Ms Pishdad. Indeed out of the 431 flats there have been only 8 objections to the relief sought by the Applicant and of those 8 objections only the objection by Ms Pishdad is supported by any explanation for the objection.
- (4) A hearing of the matter took place on 18th November 2013. Mr Naylor, a partner in Crabtree Law LLP, the solicitors acting for the Applicant appeared together with Ms Jacquot, a trainee solicitor at his firm. The hearing was also attended by Mrs E Thatcher a property manager for the Applicant (who also prepared a witness statement) and Mr G Armes a

building manager again on behalf of the Applicant. Mr C Cone, a chartered surveyor to whom reference will be made later in this Decision also attended. No Respondents attended the hearing.

- (5) The Application was supported by a Statement of Case which appears at page 222-226 in the bundle and, as indicated, the witness statement of Mrs Thatcher which appears at page 251-257 in the bundle. In addition there was a full expert's report prepared by Mr Cone of Congreve Horner which is dated 8th November 2013 and appears at tab 14 in the bundle.
- (6) The Applicant's case was outlined by Mr Naylor on behalf of the Applicant. Mr Naylor explained that the flats in the building are governed by four types of long residential lease. Those leases have been referred to in the documents as a 1974 lease, a 2002 lease, a 2012 lease and a 2013 lease. This last lease, that is to say the 2013 lease, applies to one flat only being a newly constructed penthouse apartment.
- (7) The provisions of the 1974 lease were designed to cover the situation in which there were 435 leases in the building. At page 31 and 32 in the bundle there are relevant provisions in the 1974 lease which provide, particularly at clause 3(3) for payment of the maintenance contribution by the leaseholder. The definition of the maintenance contribution (which is effectively the service charge) can be found in the definitions section of the lease at clause 1(o) and this contribution is defined as "*a sum equal to one 435th of the aggregate annual maintenance provisions for the whole of the building for each maintenance year*".
- (8) That definition is subject to the qualification which appears at clause 5(F) of the lease which appears at page 43 in the bundle. That provision, which is important, is to the following effect:

"If by virtue of an increase or decrease in the number of the flats in the building or the number of flats which are habitable or for any other reason it shall at any time become

necessary or equitable so to do the maintenance trustee may recalculate on a fair and equitable basis the proportion of the annual maintenance provision and of the maintenance adjustment payable in respect of the flat and the other flats in the building ... and shall notify the tenant and the tenants of the other flats in the building and the lessor of the revised proportion which shall be substituted for the proportion previously applicable hereunder for all the purposes of this lease as from the maintenance year or date nominated by the maintenance trustee.”

- (9) As outlined in the Statement of Case of the Applicant and in the supporting evidence of Mrs Thatcher, the position at the property has changed significantly since the drafting of this 1974 lease. Some of the units in the building have been combined into one flat and new units have been built. The 1974 lease, as just indicated, does allow for recalculation in these circumstances.
- (10) The remainder of the flats in the property are governed by the three other types of leases, that is to say the 2002, 2012 and 2013 leases. Those leases do not make any reference to any particular fraction by way of contribution to service charges but instead use the formula:

“A sum equal to a fair and reasonable proportion of the aggregate annual maintenance provisions for the whole of the building for each maintenance year ... as properly determined by the maintenance Trustee having regard to the proportion of the floor area of the flat in relation to the floor areas of the other flats in the building, such determination by the maintenance trustee is final and binding save in respect of manifest error.”

- (11) The particular clauses in these three other leases are as identified at paragraph 12 of the Applicant's witness statement made by Mrs Thatcher and appearing at page 254 in the bundle.
- (12) This Application is essentially made because the Applicant together with the freeholder, has come to the view that the fraction of 1/435, is now effectively obsolete in relation to the building as it now exists. It is, on the Applicant's case, inequitable that those flats governed by that lease should continue to pay that rigid fixed proportion, where the flats vary in size significantly and it would not be equitable for a fraction of that kind to apply across the board. It means in effect that there is not a fair and equitable sharing as between the various leaseholders of the overall cost of providing services to the property. Historically the holders of those leases have in fact up until the making of this Application been charged that fixed 1/435th of the service charge bill. However it is now recognised, for the reasons indicated, that that no longer produces an equitable result (if indeed it ever did).
- (13) At first sight it appeared to the Tribunal that possibly this was an Application more appropriate for a variation of lease application. However as has been demonstrated above, there is no need for a variation of the 1974 lease in this case, because there is already provision within it (see the terms as indicated above) for moving to an alternative basis for calculation of the service charge contribution where it is reasonable to do so. In effect, in advance of the 2014 service charge demand, the Applicant is now seeking a determination from the Tribunal that moving from that fixed contribution of 1/435th in relation to those flats governed by the 1974 lease, is reasonable, and that the manner in which service charges have hitherto been raised should now be changed to take into account the fact that there are no longer 435 flats in the building, and that in any event this fixed contribution does not reflect a proper and equitable sharing of the service charge bill.

- (14) In order to rationalise and make more appropriate the service charges, the Applicant has undertaken the task of obtaining measurements of the internal areas of each of the flats in the building. That has been a significant task, but it has been achieved and encapsulated in the report of Mr Coan FRICS referred to above and dated 8th November 2013. There were three flats to which he did not obtain access and those further flats have been measured by Mr Vance Thompson of V T Design. Mr Thompson is a qualified architectural draftsman with over 25 years experience in the industry and who has had occasion to measure the dimensions of approximately 100 apartments and houses in the London area. The particular flats which he measured were numbers 839, 904 and 921. The results of his measurements are as contained in a very detailed schedule in a spreadsheet at tab 12 of the hearing bundle together with the new measurements in relation to all the other flats in the building. That schedule usefully sets out what the previous percentage contribution was in relation to each flat together with the new proposed adjusted percentage and the effect of the variation in the charge for the last calculated service charge demand. In many cases the service charge demand will go down and in some cases the charge will increase – sometimes significantly.
- (15) The Applicants overall contention is, as already indicated, that the 1974 lease approach has now become anachronistic in relation to the building as it stands, and that the fairer and more equitable approach would be to use the internal floor area of each flat, an approach widely used in calculating the appropriate percentage of service charge.
- (16) As indicated, of the 431 flats now in the building objections have been received from only 8 leaseholders. Of those 8 leaseholders only one has condescended to give an explanation for the opposition to the variation in approach. That leaseholder is Ms Pishdad of Flat 821. In a letter dated 11th November 2013 to the Tribunal, and copied to the Applicant's solicitors she records that her flat is a studio flat of 375 square feet and

the result of the proposed recalculation of service charges will involve her in having to pay £224 per annum more than previously.

- (17) Her argument is that a large proportion of her flat is a bathroom which she contends cannot be considered as a living area. She then goes on to say that there is only one radiator in the flat and she is required to supplement the heating by using an additional radiator. She also makes mention of the fact that the design of her flat does not easily lend itself to the installation of a washing machine and therefore she has had to pay laundry charges for washing her clothes. She therefore wishes to retain the fraction of service charge which was previously applied in accordance with her 1974 lease.

Analysis of the Tribunal and Conclusion

- (18) The argument put forward on behalf of the Applicant in this case seems to the Tribunal to be a cogent and compelling one. All of these leases in their own way provide for the Applicant to adjust and calculate the contribution towards the service charge so as to produce a fair and reasonable result. It seems clear to the Tribunal, for the reasons indicated above that the old approach used in relation to the 1974 leases, that is to say the application of a rigid $1/435^{\text{th}}$ fraction of the service charge bill is now redundant. There are no longer 435 flats in the building and in any event the flats vary in size so that it is questionable whether that approach ever produced a fair and equitable result. Of all the 431 leasehold owners in the building there have only been 8 objections to the relief sought by the Applicant and, as already indicated only one such objection has been supported by any reasons. With respect to the leaseholder, namely Ms Pishdad, of Flat 821, it does not seem to the Tribunal that the fact that the bathroom in question is a large bathroom is any particular reason for not applying the internal area approach. In all cases where the internal area is the basis upon which the service charge contribution is made, there will be certain rooms which are used more often than others but this in the experience of the Tribunal has never been a reason for departing from the approach of

taking into account the entirety of the internal area, and the Tribunal sees no reason to do so in this case.

- (19) The statutory provisions in question in this case entitle the Tribunal to make a finding as to the manner in which the service charge is to be paid. The Tribunal is satisfied in respect of the background set out above and for the reasons therein indicated that the revised manner of calculating the service charge by reference to the square footage floor area of each individual flat is indeed reasonable within the meaning of Section 27A of the Landlord and Tenant Act 1985. The determination of the Tribunal is that the manner in which the service charge is payable and should be calculated is by reference to the floor areas and consequent percentage contributions as set out in the schedule appearing at tab 12 of the hearing bundle. For these reasons the determination sought by the Applicant is granted as indicated. It should be emphasised, as already appearing in the Directions of the Tribunal, that no determination of any kind is made as to the quantum of costs to be raised in the forthcoming service charge year and the leaseholders are entirely entitled to challenge the costs if so advised or desired. This Determination relates exclusively to the proposed revised manner of apportioning the service charges which, as already indicated the Tribunal determines is reasonable.

TRIBUNAL JUDGE S SHAW

Dated: 20th November 20113