10267

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

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| **Case References** | : | **LON/00BK/LAC/2014/0186 AND LON/00BK/LAC/2014/0011** |
| **Property** | : | **Apartments 86 and 94, 199-203 Buckingham Palace Road, London SW1W 9TB** |
| **Applicant** | : | **Ninfink Limited** |
| **Representative** | : | **Barker Gilette LLP, Solicitors** |
| **Respondent** | : | **199-203, Buckingham Palace Road Management Company Limited** |
| **Representative** | : | **Brown Turner Ross, Solicitors** |
| **Type of Application** | : | **For the determination of the reasonableness and of the liability to pay service charges** |
| **Tribunal Members** | : | **Judge Shaw**<br>**Mr A. Lewicki BSc(Hons)FRICS MBEng** |
| **Date and venue of Hearing** | : | **17th September 2014**<br>**10 Alfred Place, London WC1E 7LR** |
| **Date of Decision** | : | **24th September 2014** |

**DECISION**

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**Introduction**

1. This case involves two applications brought by Ninfink Limited ("the Applicant") in respect of the apartments numbered 86 and 94 Consort Rise House, 199-203 Buckingham Palace Road, London SW1W 9TB ("the Property"). The Applicant is the long leasehold owner of each of these apartments and the apartments are amongst a total of 96 apartments within the block known as Consort Rise House. The freehold of the property is owned by the company known as 199-203, Buckingham Palace Road Management Company Limited ("the Respondent"). The Respondent is a company wholly owned by the leasehold owners of the apartments in the development (of which the Applicant is one) and the Respondent, apart from being the freehold owner of the whole development, is also the management company, which in turn has devolved its management duties to managing agents.

2. The two applications before the Tribunal are dated 3rd April and 30th April 2014, and are in respect of disputed service charges and administration charges respectively. At the inception of the hearing which took place on 17th September 2014 before the Tribunal, the Tribunal was informed by the parties that in fact the sole issue for determination by the Tribunal was the question of reasonableness and payability of service charges during the disputed years in respect of the property, and that the second application dealing with administration charges (largely if not exclusively certain legal costs) would not be proceeded with before the Tribunal, and would be referred to the County

Court. This is a case in which there have been proceedings before the County Court and indeed some earlier proceedings before this Tribunal, concerned with the establishment of a breach of covenant – which in turn led to an application for forfeiture before the County Court.

3. This Tribunal accordingly does not concern itself with the second application, as referred to above, which as indicated, is not proceeded with by the parties, and this decision is devoted exclusively to the question of reasonableness of service charges during the disputed years.

4. The disputed years are four in number, that is to say 2011, 2012, 2013 and 2014. The service charge years run in accordance with the calendar years and will be dealt with separately in the context of this decision. At the hearing before the Tribunal, the Applicant was represented by Miss K. Grey (of Counsel) and the Respondent was represented by Mr R. Brown (of Counsel) who was attended by his Instructing Solicitor, Mr M. Kirkham, of Brown Turner Ross Solicitors. Both parties had prepared helpful Statements of Case, and the Tribunal had the assistance of a bundle of documents supplemented by a further supplementary bundle of documents presented, somewhat late in the day, on behalf of the Respondent.

5. So far as the service charge dispute is concerned, the dispute centres upon the charges levied for management fees and professional fees during the course of each of the disputed service charge years. To a significant degree, the

arguments in respect of each successive year replicate themselves, but in any event, the Tribunal proposes to deal with each service charge year separately, summarising the parties' submissions in respect of those years and indicating the Tribunal's decision in respect of the particular year concerned.

**Service Charge Year 2011**

6. The service charge accounts for the year 2011 can be found in the main bundle at page 132 and the expenditure account is at page 135. On behalf of the Applicant, Miss Grey dealt first with the challenge in respect of the management fees levied. These total £40,470. Miss Grey's contention was that "on any view" this was an unreasonably high sum of money to be charging for management charges and that there had been very little in the way of particularisation (if any) of the services being provided in order to justify such a high sum. She used as part of this argument and by way of authority, the decision of the Upper Tribunal (Lands Chamber) in **Wallace-Jarvis v Optima and Khazi [2013] UKUT 0328 (LC)** where it was said by the Learned Judge "*In all the circumstances of the present case, there is therefore prima facie evidence that the water consumption (and the consequent charges for water and sewerage) was unreasonably high. In such circumstances it is in my view for the Respondent s to show that the costs included by way of charges for water within the service charge are costs reasonably incurred by the Respondents. The Respondents have not produced any evidence in support of such a contention. The evidence submitted on behalf of the Applicant leads me to conclude that the amounts expended by the Respondents by way of payment*

*for water charges were not reasonably incurred during the relevant service charge years."*

7. By analogy, argued Miss Grey, similar observations could be made in the present case, because absent the presentation of the managing agents' invoice, there was nothing otherwise to explain what she contended was an unreasonably high charge in respect of management.

8. The Respondent in reply, through Mr Brown, contended that the Jarvis case was an entirely different and distinguishable scenario. His contention was that the first hurdle was not cleared in demonstrating that an unreasonably high charge had been made. He pointed out to the Tribunal that there are 94 units in this *"high end"* block in a desirable area of London, and that the annual charge computed to £359 plus VAT per unit. He urged upon the Tribunal that the Applicant had not brought any evidence before the Tribunal to suggest that such a charge was outside the ordinary range for a block of this kind, and that indeed his contention was that it was entirely within the range. He noted that the block had the facility of parking units for the apartments, a health club and a 24 hour concierge service. He told the Tribunal that this was not an *"every day block"* and that the high service provided to leaseholders naturally went with a corresponding management fee.

9. He also made the point that this is a case in which the Respondent freeholder is in fact the body of leaseholders within the block, simply wearing a different

hat. In those circumstances there would be no incentive at all for the Respondent company to do anything other than seek to drive down the service charges, because the leaseholders who owned the company would in fact be paying the relevant service charges, and even the directors of the Respondent company are unpaid and are themselves owners of leases within the block.

10. Having heard the submissions on both sides, the Tribunal is satisfied that the management charge made in respect of this block is within the acceptable range of reasonableness for the purposes of the Act. The Tribunal accepts what is said on behalf of the Respondent, that this is not a case analogous with the **Jarvis** decision. In that case there had been an extraordinarily high service charge inflated by a very high charge for water consumption. It was clear that something must have gone wrong in that case, because the charge levied was consistent with the consumption of almost 11,000 cubic metres of water per annum. Doing the necessary division, this would have been consistent with each unit using sufficient water to have 11,500 showers per year. 11,500 showers per year in turn computes to some 31 showers per day for each unit. Such consumption would certainly indicate a concern with personal hygiene going beyond the realm of reasonableness for the purposes of the Act.

11. No such comments can be made in the instant case. Neither party produced any independent evidence to the Tribunal to suggest the appropriate range of management charge for a block of this kind and in this area. It was the Applicant who was making the contention, and no evidence from other local

agents was produced to suggest, as indicated, that the charge was unreasonable. The Respondent urged upon the Tribunal that the charge was per unit at £359 plus VAT entirely reasonable and, indeed this is within the experience of the Tribunal for cases of this kind. The Tribunal was not satisfied that the Applicant who made the contention had demonstrated that the charge went outside the range of reasonableness and the Applicant's contention in this regard is rejected.

12. The second part of the challenge on behalf of the Applicant for the service charge year in question related to professional fees. Those professional fees were in the total sum of £5,439. The Respondent had produced the appropriate documentation in this regard at pages 2 to 8 of the supplementary bundle. They were all charges levied by Cook & Associates who are mechanical and electrical consultants. The charges were made in respect of various attendances at the property to look at and provide quotations for work to the air conditioning system and other mechanical or electrical appliances or installations at the block. The Applicant criticised those charges on the basis that they were not well explained in the invoices produced and, more generally, that the charges were duplicative of the management charges already being levied. As understood by the Tribunal, the contention was that since there were managing agents, it was unreasonable for those managing agents to have engaged the services of mechanical and electrical consultants to provide such services in respect of the technical installations at the block and

they should, presumably, in some way have carried out those duties directly themselves.

13. The Respondent contended, and the Tribunal accepts, that these plainly were specialised management duties, that it would be unreasonable to expect managing agents to have discharged themselves. They all relate to mechanical or electrical installations at the block and it was entirely reasonable to engage appropriate specialists to carry out this work. The Tribunal accepts this contention and again is not satisfied that the Applicant has demonstrated in any way that such charges are unreasonable. Again, the Tribunal finds for the Respondent in this regard.

**Service charge year 2012**

14. For this service charge year, again the challenge was twofold in respect of the management fees levied and the professional fees. The sum claimed for management fees went down somewhat for that year to an overall figure of £34,800, which reduction was brought about by having changed the managing agents for that year and successive years.

15. As understood by the Tribunal from the invoices supplied by the Respondent, the quarterly fee went down to £7,250 plus VAT which would compute to £308.50 approximately per unit per annum. The same arguments were both advanced by the Applicant and contested by the Respondent as in the previous year, and adopting the same reasoning, the Tribunal preferred the contentions

of the Respondent, and finds for the Respondent in respect of these management fees.

16. The challenge to the professional fees was in respect of a total sum of £6,508 for that year. The particular challenge brought by Miss Grey in respect of those charges appeared to be in respect of two invoices appearing at pages 16 and 17 in the supplementary bundle. Those were invoices for Counsel's fees during the course of the year, giving advice both in writing and in conference. As was indicated in this Decision, this case has been the subject of an earlier application to this Tribunal and also proceedings for forfeiture in the County Court. The thrust of Miss Grey's argument was that although the bills itemised the particular items of work for which the charge was made, there was no narrative as to exactly what advice was given or the reason for having to consult Counsel, and in general she said that the documentation was inadequate. She also made the point that under the terms of the lease governing the parties' contract with each other, there was no provision for Counsel's costs but only solicitors' fees.

17. The Respondent told the Tribunal through Mr Brown, that it was entirely reasonable for solicitors to consult Counsel, given that there had been some protracted litigation between the parties involving attendances before both the Tribunal and the County Court and the invoices or fee notes produced were satisfactory evidence that the charges had been incurred. He pointed out that the fee notes concerned had been addressed to his Instructing Solicitors

and therefore were a liability of the solicitors, and the fact that the liability related to Counsel's fees meant merely, as is always the case, that Counsel's fees were a disbursement of the solicitors concerned and therefore were squarely within the contractual provision within the lease. The Tribunal accepts the Respondent's contentions in this regard. It seems to the Tribunal that given the unhappy litigatory background to this case, there is no reason to be surprised at the fact that counsel was consulted on a few occasions. In the scheme of things the fees concerned are relatively modest, particularly shared amongst 94 separate leaseholders and once again, the Tribunal is not satisfied that the particular challenge mounted by the Applicant suggests unreasonableness on the part of the Respondent.

**Service Charge Year 2013**

18. The charge made in respect of the year 2013 was based upon a budget. At the time the charge was levied and the claim for service charges made, the final figures were not known to the Respondent. The budget for that year appears at page 142 in the bundle. The figures for the year are lined up in the usual way with those of the preceding year (2012) and have clearly been calculated by reference to the previous year's expenditure. The overall expenditure for 2012 was £409,185. For 2013 the budgeted figure was £415,890. The Applicant criticised this budget on the basis that there had been no proper support for it by documents produced to the Tribunal. It is correct that there are no documents for that year save for the document at page 23 in the bundle which is a further invoice presented by Cook & Associates for some inspections

of three lifts at the property. However in general, at the time of the preparation of the budget of course there would have been relatively little documentation available, since the budget by its nature, was a projected figure. The particular document to which reference has been made is dated 29th January 2013 and therefore came right at the beginning of the service charge year and was therefore no doubt available earlier in the year at the time that the budget was being finalised. Once again, the figures do bear a proper comparison to the previous year's expenditure with a marginal uplift, as would be expected. If and insofar as there has been an overcharge of some kind, then as is usual, there would have to be a rebate to the Applicant in respect of the excessive charging. However, this Tribunal is concerned not so much with whether or not the budget was absolutely accurate but with whether or not it was a reasonable estimate for the year in question. For the reasons indicated, the Tribunal is satisfied that the estimate is reasonable. This is with the one exception of a very tiny adjustment for some expenditure of £13 in respect of the submission of an annual return to Companies House which is documented at page 24 in the supplementary bundle. The parties were agreed that that figure ought to come out of the account and subject to this adjustment, the figure is otherwise approved.

**Service Charge Year 2014**

19. Similar criticisms were made by the Applicant in respect of the budget for this year which appears at page 143 in the main bundle. Again the expenditure for that year is largely estimated by reference to the previous year's expenditure

and in fact in this case is slightly lower than the previous year's expenditure of £415,890. The budgeted figure is £412,035. There was one particular challenge which the Applicant, through Miss Grey made of the fees for that year. This was in respect of the estimate for professional fees of £5,000. She made the point that although £3,000 had been estimated for 2013, it was clear that the actual figure for that year was £850 approximately and that this would have been known to the directors when making the budget for 2014. Accordingly, not only should there not have been an increase on the £3,000 estimated for the preceding year to £5,000 for 2014, but there should have been a reduction to bring the budgeted figure more in line with the actual expenditure for 2013 which, as has been indicated, was about £850.

20. In response to this, it was argued by and on behalf of the Respondent, that the budgeted figure was reasonable when put into the context of the level of professional fees for the preceding years. Mr Brown argued that in effect 2103 may have been a low year for expenditure and that the average fee, when looked at in the context of the earlier years of 2011 onwards would suggest a higher estimate of the kind indicated.

21. In this regard, the Tribunal accepts from the Applicant that the budgeted figure was high in all the circumstances. The previous years had been years involving significant litigation between the parties which has now to some degree, save for an argument about legal costs, drawn towards an end. The expenditure for 2013 was significantly lower than the £5,000 budgeted for 2014 and the

Tribunal considers that a more appropriate and reasonable figure for the budget for this year would be in the order of £1200. This is the figure which should be substituted within the budget and an overall adjustment made to the service charge accordingly.

**Section 20C Application**

22. At the end of the hearing, the application advanced an argument that the Tribunal should make a direction pursuant to the provisions of Section 20C of the 1985 Act. In other words, the Applicant contended that it would be wrong for the Respondent to seek to recover the costs of and incurred by the applications before the Tribunal as part of the overall service charge against the Applicants. Miss Grey pointed out to the Tribunal that there have been two applications made to the Tribunal. By way of general point, she told the Tribunal that the Respondent had failed to comply with the directions given by the Tribunal in a case management conference which took place on 25th April 2014. The Respondent had not submitted its Statement of Case within the period directed by the Tribunal nor had it provided the disclosure of documents directed at the case management conference until outside the period stipulated. The documents in question have been provided a matter of a few working days during the preceding week before the hearing, giving the Applicant inadequate time to consider them and also the disclosure was partial only. She also argued that a Statement of Case had not been supplied to the Applicant in sufficient time to enable a mediation which would have been arranged to proceed.

23. Further, she told the Tribunal that at the case management conference, it had been effectively agreed between the parties that the subject matter of the second application which in the event has not been dealt with by this Tribunal, that is to say the application dealing with the dispute as to legal costs, would in fact be dealt with by this Tribunal. For that reason, as was suggested at the case management conference by the Tribunal Judge, a separate application was taken out before this Tribunal to enable such determination to occur. However, when the matter came before the Tribunal at the hearing, the Respondent preferred (albeit with the agreement of the Applicant) to have that aspect of the dispute determined by the County Court, and it was in those circumstances that that second application did not proceed before this Tribunal. However, argued Miss Grey, that was a change in position from that adopted on behalf of the Respondent at the case management conference and the costs of the issuing and preparation of the second application before this Tribunal could have been avoided had a stance similar to that taken on the day of the hearing, been taken before the Tribunal at the case management conference.

24. So far as the main application, which was dealt with by the Tribunal is concerned, that is to say the application in respect of the determination of the reasonableness of the service charges, again Miss Grey contended that the application was necessary on the part of the Applicants because of the paucity of evidence supplied by the Respondent. Her overall contention was that the

Applicants had had to push all the way for some kind of explanation of how these charges had been incurred and even at the hearing, there had been late delivery of partial evidence only. Requests for such information had not been answered and there was no witness statement which had been presented on behalf of the Respondent.

25. So far as the Respondent was concerned, in relation to the application not proceeded with, Mr Brown argued that the Respondent's position was consistent with the terms of the Tomlin Order which had been agreed before the County Court. He also said that paragraph 6 of the Tribunal's directions merely indicated that the Respondent was content for the costs issues to be dealt with in this Tribunal but that there had been no effective binding agreement in this regard.

26. As to the service charge application, he argued that the failure to comply with the directions had been brought about by some ill health on the part of a member of personnel within the managing agents and that the breaches had been by a matter of days rather than significant periods. He did accept that it was to a degree regrettable that paperwork had been delivered during the week preceding the hearing but in effect argued that this had not been greatly prejudicial overall.

27. The Tribunal's view of the submissions in respect of the costs application not proceeded with before this Tribunal are that on the Tribunal's reading of

paragraph 6 there did indeed appear to be consent for the matter to be dealt with before this Tribunal, which specifically triggered the need for the application separately to be made. The application was made, incurring costs, and supported by a Statement of Case and prepared for on behalf of the Applicant. At the hearing the matter was not proceeded with by the parties by virtue of the desire on the part of the Respondent to have a detailed assessment for the County Court. The Respondent cannot be criticised for the desire in this regard, but the Tribunal accepts that the Applicant did incur costs on the basis that that desire was not expressed at an earlier stage, and indeed there was apparent consent to the matter being dealt with before this Tribunal. In all the circumstances, the Tribunal accepts what is said on behalf of the Applicant in this regard, as set out above and does give a direction that no costs incurred by the Applicant in the context of the application dated 30 April 2014 relating to the legal costs dispute should be added back into the service charge account.

28. So far as the service charge application is concerned, it seems to the Tribunal that the position is more nuanced. The Applicant for its part, has not succeeded on the greater part of the application and the Tribunal hears and has considered what has been said by the Respondent to the effect that the starting point should be the costs follow the event. On the other hand, it seems to the Tribunal that the Applicant could have been much better assisted by the Respondent in determining whether or not to proceed with the application at all. There has indeed been sparse disclosure by the Respondent

in respect of the documentation relevant for these service charge years and such disclosure as has taken place, has been late in the day and outside the period directed by the Tribunal. Having considered the matter, the Tribunal considers that justice is done by allowing the Respondent to add back into the service charge account only 50% of the costs incurred in respect of the application dated 3rd April 2014 relating to service charges.

**Conclusion**

29. For the reasons indicated above, the Tribunal makes the findings as set out above in respect of the service charge years. So far as the Section 20C application is concerned, the Tribunal grants a Section 20C Direction to the Applicant in respect of the entirety of the costs of the application dated 30th April 2014, and in respect of 50% of the costs of the application dated 3rd April 2014.

**Tribunal:** **Judge Shaw**

**Dated:** **24th September 2014**