FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	**BIR/00CS/LIS/2018/0011**
Property:	**Flat 14 Oak Close, Gospel Oak, Tipton, DY4 0AY**
Applicants:	**David, Paula, Alan & Steven Mattey**
Representative:	**Mr. A. Beaumont instructed by Blue Property Management UK Limited**
Respondent:	**T Price**
Representative:	**Mr. S. J. Bradshaw, Direct Access Counsel.**
Type of Application:	**Application for a determination of liability to pay and reasonableness of service charges pursuant to s27A Landlord & Tenant Act 1985; and an application that the Applicant is prevented from recovering its costs pursuant to s20C of the Act of 1985.**
Date & Venue of Hearing:	**8 August 2018. The Tribunal reconvened on 2 further occasions, namely 15 October and 23 November 2018**
Tribunal Members:	**Judge A McNamara** **Mr R P Cammidge FRICS**
Date of Decision:	**24 January 2019**

DECISION

Introduction

1. This is an application for a determination of liability to pay and/or the reasonableness of service charges sought by the Applicant in relation to Flat 14, Oak Close, Gospel Oak, Tipton, DY4 0AY.
2. In addition the Respondent seeks an order that the Applicant should be prevented from seeking to recover the costs of this application via the service charge.
3. In its application dated 23 February 2018, the Applicant invited the Tribunal to consider the service charges for the periods 2009-10 to 2017 inclusive. The total amount in dispute was said to be £29,958.76 (this is the figure from the application and appears to apply to flats 9/10/14/24 in total)
4. This case is to be treated as a sample application since there are other applications relating to Flats 9, 10 and 24 Oak Close which have been stayed pending this decision.
5. The case was heard on 8 August 2018: the Tribunal heard from Counsel and, given the volume of information provided, the Tribunal reconvened on a further two subsequent occasions, on 15 October and 23 November 2018, to consider the material. In particular three volumes consisting principally of invoices.

The Lease

6. A lease for a term of 99 years was created between the parties' predecessors in title on 25 March 1974 and appeared at pages 11 to 33 of the hearing bundle.
7. For the purposes of this decision, the relevant provisions of the lease are as follows:

> *(1)…*
>
> *(iv) "The said development" shall mean the lessor's development at Oak Close Tipton…which includes the Mansion as hereinafter described…*

(vi) "The Mansion" shall mean the property described in the First Schedule hereto…

(viii) "The Flat" means the property hereby demised and described in the Second Schedule hereto.

(ix) "The Lessor's Expenses" means money actually expended and reserved for periodical expenditure by or on behalf of the Lessor during the term…in carrying out in respect of the Mansion the obligations specified in the Sixth Schedule hereto for the period ending on the Thirtieth day of June 1977 and for each and every subsequent year ending on the thirtieth day of June.

8. After dealing with the purchase price and ground rent, the document continued as follows:

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AND ALSO YIELDING AND PAYING during the said term:-

…(ii) The Lessee's proportion of the Lessor's Expenses on the days and in manner…provided…

(iii) Such other sum or sums in respect of the Flat which the Lessor from time to time during the said term properly shall be called upon to pay…

9. The Mansion was defined in the First schedule as follows:

ALL THAT land at Oak Close, Tipton

TOGETHER with the building flats garages driveways pathways gardens and grounds…shown for the purpose of identification only on the plan and…edged in green

10. The Flat was defined in the Second Schedule (not set out here).

11. Part II of the Second Schedule set out the Covenants by Lessee with Lessor and provided, amongst other things, as follows:

2. (i) To contribute and pay one equal 1/8th part of the costs expenses outgoings and matters mentioned in the First Part of the Eighth Schedule [EXPENSES OF THE BUILDING] and one equal 1/31st part of those mentioned in the Second Part of the Eighth Schedule [EXPENSES OF THE MANSION] together with Value Added Tax.

12. The succeeding subparagraphs identify that the service charge would be estimated by the Lessor by the service charge year end, that year ending on 30 June (iii); that the Lessee would pay in two instalments on 1 January and 1 July; and that a balancing payment was due every third year subject to any credit held by the Lessor (iv).

The Respondent's case

13. It is the Respondent's case that:
    a. *The service charge demands do not comply with the lease*
    b. *Elements of the charges are invalid as the Respondent is not liable under the lease*
    c. *'Many' are unreasonable*
    d. *That the Applicants are not entitled to recover costs by way of service charge*
    e. *Alternatively section 20C applies.*
14. Those bullet points were fleshed out by Mr. Bradshaw in §13 of his Skeleton argument and orally and were encapsulated in §s 14 to 16 of the Skeleton:
    a. *The Applicants failed until the end of 2017 to comply with the requirements of the lease in respect of the obligation to serve estimates of expenditure;*
    b. *The basis of the calculation is unclear: for example the increase in proportion from 1/31st to 1/24th and more recently 1/20th; and*

c. *There is no evidence that the certified statements of income and expenditure served upon the Respondent within 18 months of that expenditure being incurred; and, even if they were to be so interpreted, there is no statement to the effect that the Respondent would be required to contribute. It is said that they are defective notices under s20B(2) of the Act of 1985.*

15. Following the adjournment in part necessitated by the need for the production of further documents, Mr. Bradshaw prepared further written submissions on behalf of the Respondent.

16. In its supplementary written submissions, the Applicant objected in part to those submissions and suggested that where they amounted to the introduction of new evidence they should be excluded.

17. Since the Tribunal gave to each party the opportunity to deal with the additional disclosure it would be illogical to ignore the Respondent's submissions by way of response. To the extent that the Respondent sought to introduce additional material for the first time then the Tribunal will exclude it since there has to come a point at which the evidence is complete: it was not anticipated that any new material would be forthcoming.

18. In the Respondent's supplementary submissions it appears that:

    a. The Respondent is now content that the '*service charge budget calculations…correspond with the relevant service charge demands*'. There is still an issue with the proportion sought.

    b. The fire and health and safety risk assessments are said to be carried out by a company virtually indistinguishable from the Applicant;

    c. The appearance of the assessments is said to be repetitive and in any event excessive;

d. The principle of the cost of installation of emergency lighting is no longer in issue but is presented in an anomalous way;
e. Emergency lighting was not installed prior to August 2015 and so there should be no charge to the respondent prior to that time;
f. The cost of lighting checks is unreasonable and ought to be dealt with as caretaking;
g. Management fees are unreasonable (the Tribunal will rely upon its own expertise in this respect since the information provided by both parties is far too late); and
h. Elizabeth Walk is better maintained than Oak Close. Again this is based upon the additional evidence purported to be introduced late and so the Tribunal will exclude it. In any event the Tribunal did not carry out a comparative exercise as part of the discharge of its function in visiting the site.

The Applicant's case

19. In the document entitled '*Statement of Case in Response'* the Applicant dealt with the case as it then understood it, namely that the Respondent '*queried whether revised service charges were due and payable, as per Section 20B requirements'*. In short, the Applicant's case is that '*all invoices and demands have been served on time, and are payable and due from the Defendant in full*'.
20. Mr Beaumont, on behalf of the Applicant, submitted that the increase in the Respondent's share from 1/31st to 1/24th and now 1/20th was a logical reflection of the reduction in the size of the Applicant's freehold interest in the light of, amongst other things, a recent right to manage decision by the residents of one block.

21. It was also submitted that the Respondent had, prior to the involvement of Counsel, not made it clear that part of her complaint was that the Applicant had failed to accompany demands with budget or estimated figures in accordance with the lease. It was submitted that had the Applicant appreciated that that was part of the Respondent's case, then it would have produced appropriate copies. The Applicant required time to produce the purportedly absent documents, which, in part, explained the need for the Tribunal to reconvene.
22. Accordingly, at the conclusion of the hearing on 8 August 2018, the Tribunal directed that the relevant information should be provided by 22 August 2018.
23. The Applicant sought extra time for the serving and filing of the information as a result of which the directions were varied. Although the Respondent objected to the late service the Tribunal took the view that it was material to an issue which it had to resolve and so should be admissible.
24. Both parties had an opportunity to enter further written submissions.
25. The Applicant's response combined parts of the Respondent's submissions and also purported to introduce additional material. For the reasons set out above the Tribunal will exclude any additional material in the interests of finality.
26. As an aside it is surprising that comparator evidence, often informative in forming a view about the reasonableness of service charges, was not forthcoming until after the evidential clock had stopped. Nonetheless, the Tribunal has the know-how to resolve that issue.
27. In short the Applicant takes the view that the charges sought are both evidenced and reasonable.

The Law

28. Section 27A of the Landlord and Tenant Act 1985 provides as follows:

> *27A Liability to pay service charges: jurisdiction*
> *(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.*

(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 of an application under subsection (1) or (3).
(7) The jurisdiction conferred on [F4 the appropriate tribunal] in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.]

29. Further, section 20C is also of relevance:

20C Limitation of service charges: costs of proceedings.
(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court [residential property tribunal] or leasehold valuation tribunal [or the First-tier 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)…
(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.]

30. Additionally, section 35 Landlord and Tenant Act 1987 is also relevant:

35 Application by party to lease for variation of lease.

(1) Any party to a long lease of a flat may make an application to [the appropriate tribunal] for an order varying the lease in such manner as is specified in the application.

(2) The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely—

…

(f) the computation of a service charge payable under the lease.

31. Mr. Bradshaw, in his written submissions, also drew the Tribunal's attention to the cases of:

    a. **Brent LBC v Shulem B Association Ltd[1];**

    b. **Freeholders of 69 Marina v Oram[2];**

    c. **Barrett v Robinson[3]; and**

    d. **Bretby Hall Management Company Ltd v Pratt[4].**

32. Although there was some argument in respect of interpretation of the authorities, broadly, the law is not in issue between the parties.

The validity of the service charge demands

33. The Respondent initially submitted that the demands were invalid for a number of reasons. In the light of the additional disclosure concerning the service charge budget calculations it was accepted by the Respondent that these correspond with the relevant service charge demands.

34. However, the thrust of the submission at the hearing and maintained in the supplementary submissions from Mr. Bradshaw was to the effect that the demands were invalidated by reason of the Applicant's decision to alter the proportion required under the lease.

[1] [2011] EWHC 1663 (Ch)
[2] [2011] EWCA Civ1258
[3] [2014] UKUT 322 (LC)
[4] [2017] UKUT 70 (LC)

35. The lease is explicit in its use of the word '*proportion*' and the calculation of those proportions dependent upon whether expenses related to the various blocks or the 'Mansion'. The principal difference being buildings and grounds related costs respectively.

36. The Tribunal was urged by the Applicant to take what Mr Beaumont referred to as a '*practical approach*' to the reducing numbers of flats and increase the share payable by the Respondent.

37. It is right to say that there is an attractive logic about such an approach. However, what Mr. Beaumont is actually asking the Tribunal to do is sanction a unilateral variation of the lease which has an inevitable impact upon the monetary liabilities of the leaseholders including the Respondent. No formal application pursuant to section 35 of the Act of 1987 was before the Tribunal.

38. The ability of a freeholder to incur expenditure that a leaseholder is expected to pay is, for good reason, extensively regulated and can only be authorised in accordance with the terms of the lease or if statute and/or regulation provide. Scrutiny of the lease in this case reveals no mechanism for that to be done and certainly not unilaterally by the Applicant.

39. As already pointed out, the lease carefully made reference to appropriate proportions and that the Respondent's liabilities were defined by reference to those proportions. Nowhere within the lease is there a provision for the modification of that proportion.

40. The Tribunal finds that there is no evidence of any lawful variation of the terms of the lease to reflect the increase in share of the Respondent; and, in the absence of an application pursuant to section 35 Landlord and Tenant Act 1987, the Tribunal is unable to adopt the practical course suggested by Mr Beaumont. Accordingly it is clear that the Applicant had no entitlement to seek the increased

share it did, either by the historical increase to 1/24th or, more recently, 1/20th in respect of the 'Mansion'.

41. In respect of the 1/8 share concerning the building, the Tribunal finds that the Applicant's approach to identifying sums said to be owed by the Respondent are wholly unclear and are not recoverable by reason of that lack of clarity.
42. Although necessary for the purposes of the consideration of matters of principle, in the interests of proportionality the Tribunal does not propose to engage in a page by page analysis of the documents set out in the three files provided by the Applicant. However, consideration of those documents reveals no compelling basis for the Tribunal to rely upon the evidence and/or submissions made by the Applicant in support of its case.
43. By way of an example, the Respondent's Counsel identified pages 553, 559, 561 and 562 as referring to 'odd' numbered flats. Clearly they were of no relevance to Flat 14. They are not the only documents which do not relate to the Respondent's flat.
44. This point was in part conceded by the Applicant: a concession which must be fatal to the argument that the Applicant accurately communicated outstanding sums to the Respondent.
45. In relation to repairs and maintenance, the documents were largely non-specific by reference to a block. The following are but a sample of the numerous documents from which it was impossible to identify whether the Respondent's flat was referred to: pages 118, 173, 355-365 and 407-426.
46. The Tribunal struggled to understand the basis upon which the Applicant sought to recover electricity payments for common areas. For example the reference to '*Landlord's lighting*' as set out on 443 is hopelessly vague; and the account numbers ending in 40 and 60 appear to have no relevance to flat 14

47. A further example is that the Applicant insisted it was entitled to be paid for emergency lighting in the Respondent's block in the period after 2011 despite the fact that it was not installed until 2016. Such demands for payment were incompetent at best and misleading at worst.
48. In any event the Applicant also conceded that invoices have been charged equally rather than being related to the individual blocks as per the requirements of the lease. Yet again the Applicant appears to have failed to apply the appropriate proportion as required by the lease and has failed adequately to render meaningful requests for payment in accordance with the lease.
49. It was also submitted that the Applicant was not obliged to present to the Respondent a break down in costs reflecting only her share. The Tribunal finds that that is not a true reflection of the wording of the lease. The Lease specifically refers to the Lessee's obligation to pay by reference to proportions of expenditure. Accordingly the Tribunal rejects the Applicant's supplementary submission to the contrary. That is, the notices are defective by failing to specify the Respondent's contribution.
50. In the light of the above, the Tribunal finds that the demands made by the Applicant were defective.
51. In the light of those findings the Application is dismissed.
52. Further, and in the light of the findings above, the Tribunal also concludes that it would be appropriate to direct, pursuant to section 20C of the Act of 1985, that the costs shall not be added to the service charge.

53. A party seeking permission to appeal this decision must make a written application to the Tribunal for permission to appeal. This application must be received by the Tribunal no later than 28 days after the date this decision is sent to the parties. Further information is contained within Part 6 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (S.I. 2013 No. 1169).

Judge Andrew McNamara

24 January 2019

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14. Those bullet points were fleshed out by Mr. Bradshaw in §13 of his Skeleton argument and orally and were encapsulated in §s 14 to 16 of the Skeleton:
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(1) Any party to a long lease of a flat may make an application to [the appropriate tribunal] for an order varying the lease in such manner as is specified in the application.

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The validity of the service charge demands

33. The Respondent initially submitted that the demands were invalid for a number of reasons. In the light of the additional disclosure concerning the service charge budget calculations it was accepted by the Respondent that these correspond with the relevant service charge demands.

34. However, the thrust of the submission at the hearing and maintained in the supplementary submissions from Mr. Bradshaw was to the effect that the demands were invalidated by reason of the Applicant's decision to alter the proportion required under the lease.

[1] [2011] EWHC 1663 (Ch)
[2] [2011] EWCA Civ1258
[3] [2014] UKUT 322 (LC)
[4] [2017] UKUT 70 (LC)

35. The lease is explicit in its use of the word '*proportion*' and the calculation of those proportions dependent upon whether expenses related to the various blocks or the 'Mansion'. The principal difference being buildings and grounds related costs respectively.

36. The Tribunal was urged by the Applicant to take what Mr Beaumont referred to as a '*practical approach*' to the reducing numbers of flats and increase the share payable by the Respondent.

37. It is right to say that there is an attractive logic about such an approach. However, what Mr. Beaumont is actually asking the Tribunal to do is sanction a unilateral variation of the lease which has an inevitable impact upon the monetary liabilities of the leaseholders including the Respondent. No formal application pursuant to section 35 of the Act of 1987 was before the Tribunal.

38. The ability of a freeholder to incur expenditure that a leaseholder is expected to pay is, for good reason, extensively regulated and can only be authorised in accordance with the terms of the lease or if statute and/or regulation provide. Scrutiny of the lease in this case reveals no mechanism for that to be done and certainly not unilaterally by the Applicant.

39. As already pointed out, the lease carefully made reference to appropriate proportions and that the Respondent's liabilities were defined by reference to those proportions. Nowhere within the lease is there a provision for the modification of that proportion.

40. The Tribunal finds that there is no evidence of any lawful variation of the terms of the lease to reflect the increase in share of the Respondent; and, in the absence of an application pursuant to section 35 Landlord and Tenant Act 1987, the Tribunal is unable to adopt the practical course suggested by Mr Beaumont. Accordingly it is clear that the Applicant had no entitlement to seek the increased

share it did, either by the historical increase to 1/24th or, more recently, 1/20th in respect of the 'Mansion'.

41. In respect of the 1/8 share concerning the building, the Tribunal finds that the Applicant's approach to identifying sums said to be owed by the Respondent are wholly unclear and are not recoverable by reason of that lack of clarity.
42. Although necessary for the purposes of the consideration of matters of principle, in the interests of proportionality the Tribunal does not propose to engage in a page by page analysis of the documents set out in the three files provided by the Applicant. However, consideration of those documents reveals no compelling basis for the Tribunal to rely upon the evidence and/or submissions made by the Applicant in support of its case.
43. By way of an example, the Respondent's Counsel identified pages 553, 559, 561 and 562 as referring to 'odd' numbered flats. Clearly they were of no relevance to Flat 14. They are not the only documents which do not relate to the Respondent's flat.
44. This point was in part conceded by the Applicant: a concession which must be fatal to the argument that the Applicant accurately communicated outstanding sums to the Respondent.
45. In relation to repairs and maintenance, the documents were largely non-specific by reference to a block. The following are but a sample of the numerous documents from which it was impossible to identify whether the Respondent's flat was referred to: pages 118, 173, 355-365 and 407-426.
46. The Tribunal struggled to understand the basis upon which the Applicant sought to recover electricity payments for common areas. For example the reference to '*Landlord's lighting*' as set out on 443 is hopelessly vague; and the account numbers ending in 40 and 60 appear to have no relevance to flat 14

47. A further example is that the Applicant insisted it was entitled to be paid for emergency lighting in the Respondent's block in the period after 2011 despite the fact that it was not installed until 2016. Such demands for payment were incompetent at best and misleading at worst.
48. In any event the Applicant also conceded that invoices have been charged equally rather than being related to the individual blocks as per the requirements of the lease. Yet again the Applicant appears to have failed to apply the appropriate proportion as required by the lease and has failed adequately to render meaningful requests for payment in accordance with the lease.
49. It was also submitted that the Applicant was not obliged to present to the Respondent a break down in costs reflecting only her share. The Tribunal finds that that is not a true reflection of the wording of the lease. The Lease specifically refers to the Lessee's obligation to pay by reference to proportions of expenditure. Accordingly the Tribunal rejects the Applicant's supplementary submission to the contrary. That is, the notices are defective by failing to specify the Respondent's contribution.
50. In the light of the above, the Tribunal finds that the demands made by the Applicant were defective.
51. In the light of those findings the Application is dismissed.
52. Further, and in the light of the findings above, the Tribunal also concludes that it would be appropriate to direct, pursuant to section 20C of the Act of 1985, that the costs shall not be added to the service charge.

53. A party seeking permission to appeal this decision must make a written application to the Tribunal for permission to appeal. This application must be received by the Tribunal no later than 28 days after the date this decision is sent to the parties. Further information is contained within Part 6 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (S.I. 2013 No. 1169).

Judge Andrew McNamara

24 January 2019

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	**BIR/00CS/LIS/2018/0011**
Property:	**Flat 14 Oak Close, Gospel Oak, Tipton, DY4 0AY**
Applicants:	**David, Paula, Alan & Steven Mattey**
Representative:	**Mr. A. Beaumont instructed by Blue Property Management UK Limited**
Respondent:	**T Price**
Representative:	**Mr. S. J. Bradshaw, Direct Access Counsel.**
Type of Application:	**Application for a determination of liability to pay and reasonableness of service charges pursuant to s27A Landlord & Tenant Act 1985; and an application that the Applicant is prevented from recovering its costs pursuant to s20C of the Act of 1985.**
Date & Venue of Hearing:	**8 August 2018. The Tribunal reconvened on 2 further occasions, namely 15 October and 23 November 2018**
Tribunal Members:	**Judge A McNamara** **Mr R P Cammidge FRICS**
Date of Decision:	**24 January 2019**

DECISION

Introduction

1. This is an application for a determination of liability to pay and/or the reasonableness of service charges sought by the Applicant in relation to Flat 14, Oak Close, Gospel Oak, Tipton, DY4 0AY.
2. In addition the Respondent seeks an order that the Applicant should be prevented from seeking to recover the costs of this application via the service charge.
3. In its application dated 23 February 2018, the Applicant invited the Tribunal to consider the service charges for the periods 2009-10 to 2017 inclusive. The total amount in dispute was said to be £29,958.76 (this is the figure from the application and appears to apply to flats 9/10/14/24 in total)
4. This case is to be treated as a sample application since there are other applications relating to Flats 9, 10 and 24 Oak Close which have been stayed pending this decision.
5. The case was heard on 8 August 2018: the Tribunal heard from Counsel and, given the volume of information provided, the Tribunal reconvened on a further two subsequent occasions, on 15 October and 23 November 2018, to consider the material. In particular three volumes consisting principally of invoices.

The Lease

6. A lease for a term of 99 years was created between the parties' predecessors in title on 25 March 1974 and appeared at pages 11 to 33 of the hearing bundle.
7. For the purposes of this decision, the relevant provisions of the lease are as follows:

> *(1)…*
>
> *(iv) "The said development" shall mean the lessor's development at Oak Close Tipton…which includes the Mansion as hereinafter described…*

(vi) "The Mansion" shall mean the property described in the First Schedule hereto…

(viii) "The Flat" means the property hereby demised and described in the Second Schedule hereto.

(ix) "The Lessor's Expenses" means money actually expended and reserved for periodical expenditure by or on behalf of the Lessor during the term…in carrying out in respect of the Mansion the obligations specified in the Sixth Schedule hereto for the period ending on the Thirtieth day of June 1977 and for each and every subsequent year ending on the thirtieth day of June.

8. After dealing with the purchase price and ground rent, the document continued as follows:

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AND ALSO YIELDING AND PAYING during the said term:-

…(ii) The Lessee's proportion of the Lessor's Expenses on the days and in manner…provided…

(iii) Such other sum or sums in respect of the Flat which the Lessor from time to time during the said term properly shall be called upon to pay…

9. The Mansion was defined in the First schedule as follows:

ALL THAT land at Oak Close, Tipton

TOGETHER with the building flats garages driveways pathways gardens and grounds…shown for the purpose of identification only on the plan and…edged in green

10. The Flat was defined in the Second Schedule (not set out here).

11. Part II of the Second Schedule set out the Covenants by Lessee with Lessor and provided, amongst other things, as follows:

2. (i) To contribute and pay one equal 1/8th part of the costs expenses outgoings and matters mentioned in the First Part of the Eighth Schedule [EXPENSES OF THE BUILDING] and one equal 1/31st part of those mentioned in the Second Part of the Eighth Schedule [EXPENSES OF THE MANSION] together with Value Added Tax.

12. The succeeding subparagraphs identify that the service charge would be estimated by the Lessor by the service charge year end, that year ending on 30 June (iii); that the Lessee would pay in two instalments on 1 January and 1 July; and that a balancing payment was due every third year subject to any credit held by the Lessor (iv).

The Respondent's case

13. It is the Respondent's case that:
    a. *The service charge demands do not comply with the lease*
    b. *Elements of the charges are invalid as the Respondent is not liable under the lease*
    c. *'Many' are unreasonable*
    d. *That the Applicants are not entitled to recover costs by way of service charge*
    e. *Alternatively section 20C applies.*
14. Those bullet points were fleshed out by Mr. Bradshaw in §13 of his Skeleton argument and orally and were encapsulated in §s 14 to 16 of the Skeleton:
    a. *The Applicants failed until the end of 2017 to comply with the requirements of the lease in respect of the obligation to serve estimates of expenditure;*
    b. *The basis of the calculation is unclear: for example the increase in proportion from 1/31st to 1/24th and more recently 1/20th; and*

c. *There is no evidence that the certified statements of income and expenditure served upon the Respondent within 18 months of that expenditure being incurred; and, even if they were to be so interpreted, there is no statement to the effect that the Respondent would be required to contribute. It is said that they are defective notices under s20B(2) of the Act of 1985.*

15. Following the adjournment in part necessitated by the need for the production of further documents, Mr. Bradshaw prepared further written submissions on behalf of the Respondent.

16. In its supplementary written submissions, the Applicant objected in part to those submissions and suggested that where they amounted to the introduction of new evidence they should be excluded.

17. Since the Tribunal gave to each party the opportunity to deal with the additional disclosure it would be illogical to ignore the Respondent's submissions by way of response. To the extent that the Respondent sought to introduce additional material for the first time then the Tribunal will exclude it since there has to come a point at which the evidence is complete: it was not anticipated that any new material would be forthcoming.

18. In the Respondent's supplementary submissions it appears that:

    a. The Respondent is now content that the '*service charge budget calculations…correspond with the relevant service charge demands*'. There is still an issue with the proportion sought.

    b. The fire and health and safety risk assessments are said to be carried out by a company virtually indistinguishable from the Applicant;

    c. The appearance of the assessments is said to be repetitive and in any event excessive;

d. The principle of the cost of installation of emergency lighting is no longer in issue but is presented in an anomalous way;
e. Emergency lighting was not installed prior to August 2015 and so there should be no charge to the respondent prior to that time;
f. The cost of lighting checks is unreasonable and ought to be dealt with as caretaking;
g. Management fees are unreasonable (the Tribunal will rely upon its own expertise in this respect since the information provided by both parties is far too late); and
h. Elizabeth Walk is better maintained than Oak Close. Again this is based upon the additional evidence purported to be introduced late and so the Tribunal will exclude it. In any event the Tribunal did not carry out a comparative exercise as part of the discharge of its function in visiting the site.

The Applicant's case

19. In the document entitled '*Statement of Case in Response'* the Applicant dealt with the case as it then understood it, namely that the Respondent '*queried whether revised service charges were due and payable, as per Section 20B requirements'*. In short, the Applicant's case is that '*all invoices and demands have been served on time, and are payable and due from the Defendant in full*'.
20. Mr Beaumont, on behalf of the Applicant, submitted that the increase in the Respondent's share from 1/31st to 1/24th and now 1/20th was a logical reflection of the reduction in the size of the Applicant's freehold interest in the light of, amongst other things, a recent right to manage decision by the residents of one block.

21. It was also submitted that the Respondent had, prior to the involvement of Counsel, not made it clear that part of her complaint was that the Applicant had failed to accompany demands with budget or estimated figures in accordance with the lease. It was submitted that had the Applicant appreciated that that was part of the Respondent's case, then it would have produced appropriate copies. The Applicant required time to produce the purportedly absent documents, which, in part, explained the need for the Tribunal to reconvene.
22. Accordingly, at the conclusion of the hearing on 8 August 2018, the Tribunal directed that the relevant information should be provided by 22 August 2018.
23. The Applicant sought extra time for the serving and filing of the information as a result of which the directions were varied. Although the Respondent objected to the late service the Tribunal took the view that it was material to an issue which it had to resolve and so should be admissible.
24. Both parties had an opportunity to enter further written submissions.
25. The Applicant's response combined parts of the Respondent's submissions and also purported to introduce additional material. For the reasons set out above the Tribunal will exclude any additional material in the interests of finality.
26. As an aside it is surprising that comparator evidence, often informative in forming a view about the reasonableness of service charges, was not forthcoming until after the evidential clock had stopped. Nonetheless, the Tribunal has the know-how to resolve that issue.
27. In short the Applicant takes the view that the charges sought are both evidenced and reasonable.

The Law

28. Section 27A of the Landlord and Tenant Act 1985 provides as follows:

> *27A Liability to pay service charges: jurisdiction*
> *(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.*

(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 of an application under subsection (1) or (3).
(7) The jurisdiction conferred on [F4 the appropriate tribunal] in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.]

29. Further, section 20C is also of relevance:

20C Limitation of service charges: costs of proceedings.
(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court [residential property tribunal] or leasehold valuation tribunal [or the First-tier 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)…
(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.]

30. Additionally, section 35 Landlord and Tenant Act 1987 is also relevant:

35 Application by party to lease for variation of lease.

(1) Any party to a long lease of a flat may make an application to [the appropriate tribunal] for an order varying the lease in such manner as is specified in the application.

(2) The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely—

…

(f) the computation of a service charge payable under the lease.

31. Mr. Bradshaw, in his written submissions, also drew the Tribunal's attention to the cases of:

    a. **Brent LBC v Shulem B Association Ltd[1];**

    b. **Freeholders of 69 Marina v Oram[2];**

    c. **Barrett v Robinson[3]; and**

    d. **Bretby Hall Management Company Ltd v Pratt[4].**

32. Although there was some argument in respect of interpretation of the authorities, broadly, the law is not in issue between the parties.

The validity of the service charge demands

33. The Respondent initially submitted that the demands were invalid for a number of reasons. In the light of the additional disclosure concerning the service charge budget calculations it was accepted by the Respondent that these correspond with the relevant service charge demands.

34. However, the thrust of the submission at the hearing and maintained in the supplementary submissions from Mr. Bradshaw was to the effect that the demands were invalidated by reason of the Applicant's decision to alter the proportion required under the lease.

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35. The lease is explicit in its use of the word '*proportion*' and the calculation of those proportions dependent upon whether expenses related to the various blocks or the 'Mansion'. The principal difference being buildings and grounds related costs respectively.

36. The Tribunal was urged by the Applicant to take what Mr Beaumont referred to as a '*practical approach*' to the reducing numbers of flats and increase the share payable by the Respondent.

37. It is right to say that there is an attractive logic about such an approach. However, what Mr. Beaumont is actually asking the Tribunal to do is sanction a unilateral variation of the lease which has an inevitable impact upon the monetary liabilities of the leaseholders including the Respondent. No formal application pursuant to section 35 of the Act of 1987 was before the Tribunal.

38. The ability of a freeholder to incur expenditure that a leaseholder is expected to pay is, for good reason, extensively regulated and can only be authorised in accordance with the terms of the lease or if statute and/or regulation provide. Scrutiny of the lease in this case reveals no mechanism for that to be done and certainly not unilaterally by the Applicant.

39. As already pointed out, the lease carefully made reference to appropriate proportions and that the Respondent's liabilities were defined by reference to those proportions. Nowhere within the lease is there a provision for the modification of that proportion.

40. The Tribunal finds that there is no evidence of any lawful variation of the terms of the lease to reflect the increase in share of the Respondent; and, in the absence of an application pursuant to section 35 Landlord and Tenant Act 1987, the Tribunal is unable to adopt the practical course suggested by Mr Beaumont. Accordingly it is clear that the Applicant had no entitlement to seek the increased

share it did, either by the historical increase to 1/24th or, more recently, 1/20th in respect of the 'Mansion'.

41. In respect of the 1/8 share concerning the building, the Tribunal finds that the Applicant's approach to identifying sums said to be owed by the Respondent are wholly unclear and are not recoverable by reason of that lack of clarity.
42. Although necessary for the purposes of the consideration of matters of principle, in the interests of proportionality the Tribunal does not propose to engage in a page by page analysis of the documents set out in the three files provided by the Applicant. However, consideration of those documents reveals no compelling basis for the Tribunal to rely upon the evidence and/or submissions made by the Applicant in support of its case.
43. By way of an example, the Respondent's Counsel identified pages 553, 559, 561 and 562 as referring to 'odd' numbered flats. Clearly they were of no relevance to Flat 14. They are not the only documents which do not relate to the Respondent's flat.
44. This point was in part conceded by the Applicant: a concession which must be fatal to the argument that the Applicant accurately communicated outstanding sums to the Respondent.
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47. A further example is that the Applicant insisted it was entitled to be paid for emergency lighting in the Respondent's block in the period after 2011 despite the fact that it was not installed until 2016. Such demands for payment were incompetent at best and misleading at worst.
48. In any event the Applicant also conceded that invoices have been charged equally rather than being related to the individual blocks as per the requirements of the lease. Yet again the Applicant appears to have failed to apply the appropriate proportion as required by the lease and has failed adequately to render meaningful requests for payment in accordance with the lease.
49. It was also submitted that the Applicant was not obliged to present to the Respondent a break down in costs reflecting only her share. The Tribunal finds that that is not a true reflection of the wording of the lease. The Lease specifically refers to the Lessee's obligation to pay by reference to proportions of expenditure. Accordingly the Tribunal rejects the Applicant's supplementary submission to the contrary. That is, the notices are defective by failing to specify the Respondent's contribution.
50. In the light of the above, the Tribunal finds that the demands made by the Applicant were defective.
51. In the light of those findings the Application is dismissed.
52. Further, and in the light of the findings above, the Tribunal also concludes that it would be appropriate to direct, pursuant to section 20C of the Act of 1985, that the costs shall not be added to the service charge.

53. A party seeking permission to appeal this decision must make a written application to the Tribunal for permission to appeal. This application must be received by the Tribunal no later than 28 days after the date this decision is sent to the parties. Further information is contained within Part 6 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (S.I. 2013 No. 1169).

Judge Andrew McNamara

24 January 2019

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	**BIR/00CS/LIS/2018/0011**
Property:	**Flat 14 Oak Close, Gospel Oak, Tipton, DY4 0AY**
Applicants:	**David, Paula, Alan & Steven Mattey**
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19. In the document entitled '*Statement of Case in Response'* the Applicant dealt with the case as it then understood it, namely that the Respondent '*queried whether revised service charges were due and payable, as per Section 20B requirements'*. In short, the Applicant's case is that '*all invoices and demands have been served on time, and are payable and due from the Defendant in full*'.
20. Mr Beaumont, on behalf of the Applicant, submitted that the increase in the Respondent's share from 1/31st to 1/24th and now 1/20th was a logical reflection of the reduction in the size of the Applicant's freehold interest in the light of, amongst other things, a recent right to manage decision by the residents of one block.

21. It was also submitted that the Respondent had, prior to the involvement of Counsel, not made it clear that part of her complaint was that the Applicant had failed to accompany demands with budget or estimated figures in accordance with the lease. It was submitted that had the Applicant appreciated that that was part of the Respondent's case, then it would have produced appropriate copies. The Applicant required time to produce the purportedly absent documents, which, in part, explained the need for the Tribunal to reconvene.
22. Accordingly, at the conclusion of the hearing on 8 August 2018, the Tribunal directed that the relevant information should be provided by 22 August 2018.
23. The Applicant sought extra time for the serving and filing of the information as a result of which the directions were varied. Although the Respondent objected to the late service the Tribunal took the view that it was material to an issue which it had to resolve and so should be admissible.
24. Both parties had an opportunity to enter further written submissions.
25. The Applicant's response combined parts of the Respondent's submissions and also purported to introduce additional material. For the reasons set out above the Tribunal will exclude any additional material in the interests of finality.
26. As an aside it is surprising that comparator evidence, often informative in forming a view about the reasonableness of service charges, was not forthcoming until after the evidential clock had stopped. Nonetheless, the Tribunal has the know-how to resolve that issue.
27. In short the Applicant takes the view that the charges sought are both evidenced and reasonable.

The Law

28. Section 27A of the Landlord and Tenant Act 1985 provides as follows:

> *27A Liability to pay service charges: jurisdiction*
> *(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*
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> *(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.*

(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 of an application under subsection (1) or (3).
(7) The jurisdiction conferred on [F4 the appropriate tribunal] in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.]

29. Further, section 20C is also of relevance:

20C Limitation of service charges: costs of proceedings.
(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court [residential property tribunal] or leasehold valuation tribunal [or the First-tier 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)…
(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.]

30. Additionally, section 35 Landlord and Tenant Act 1987 is also relevant:

35 Application by party to lease for variation of lease.

(1) Any party to a long lease of a flat may make an application to [the appropriate tribunal] for an order varying the lease in such manner as is specified in the application.

(2) The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely—

…

(f) the computation of a service charge payable under the lease.

31. Mr. Bradshaw, in his written submissions, also drew the Tribunal's attention to the cases of:

    a. **Brent LBC v Shulem B Association Ltd[1];**

    b. **Freeholders of 69 Marina v Oram[2];**

    c. **Barrett v Robinson[3]; and**

    d. **Bretby Hall Management Company Ltd v Pratt[4].**

32. Although there was some argument in respect of interpretation of the authorities, broadly, the law is not in issue between the parties.

The validity of the service charge demands

33. The Respondent initially submitted that the demands were invalid for a number of reasons. In the light of the additional disclosure concerning the service charge budget calculations it was accepted by the Respondent that these correspond with the relevant service charge demands.

34. However, the thrust of the submission at the hearing and maintained in the supplementary submissions from Mr. Bradshaw was to the effect that the demands were invalidated by reason of the Applicant's decision to alter the proportion required under the lease.

[1] [2011] EWHC 1663 (Ch)
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35. The lease is explicit in its use of the word '*proportion*' and the calculation of those proportions dependent upon whether expenses related to the various blocks or the 'Mansion'. The principal difference being buildings and grounds related costs respectively.

36. The Tribunal was urged by the Applicant to take what Mr Beaumont referred to as a '*practical approach*' to the reducing numbers of flats and increase the share payable by the Respondent.

37. It is right to say that there is an attractive logic about such an approach. However, what Mr. Beaumont is actually asking the Tribunal to do is sanction a unilateral variation of the lease which has an inevitable impact upon the monetary liabilities of the leaseholders including the Respondent. No formal application pursuant to section 35 of the Act of 1987 was before the Tribunal.

38. The ability of a freeholder to incur expenditure that a leaseholder is expected to pay is, for good reason, extensively regulated and can only be authorised in accordance with the terms of the lease or if statute and/or regulation provide. Scrutiny of the lease in this case reveals no mechanism for that to be done and certainly not unilaterally by the Applicant.

39. As already pointed out, the lease carefully made reference to appropriate proportions and that the Respondent's liabilities were defined by reference to those proportions. Nowhere within the lease is there a provision for the modification of that proportion.

40. The Tribunal finds that there is no evidence of any lawful variation of the terms of the lease to reflect the increase in share of the Respondent; and, in the absence of an application pursuant to section 35 Landlord and Tenant Act 1987, the Tribunal is unable to adopt the practical course suggested by Mr Beaumont. Accordingly it is clear that the Applicant had no entitlement to seek the increased

share it did, either by the historical increase to 1/24th or, more recently, 1/20th in respect of the 'Mansion'.

41. In respect of the 1/8 share concerning the building, the Tribunal finds that the Applicant's approach to identifying sums said to be owed by the Respondent are wholly unclear and are not recoverable by reason of that lack of clarity.
42. Although necessary for the purposes of the consideration of matters of principle, in the interests of proportionality the Tribunal does not propose to engage in a page by page analysis of the documents set out in the three files provided by the Applicant. However, consideration of those documents reveals no compelling basis for the Tribunal to rely upon the evidence and/or submissions made by the Applicant in support of its case.
43. By way of an example, the Respondent's Counsel identified pages 553, 559, 561 and 562 as referring to 'odd' numbered flats. Clearly they were of no relevance to Flat 14. They are not the only documents which do not relate to the Respondent's flat.
44. This point was in part conceded by the Applicant: a concession which must be fatal to the argument that the Applicant accurately communicated outstanding sums to the Respondent.
45. In relation to repairs and maintenance, the documents were largely non-specific by reference to a block. The following are but a sample of the numerous documents from which it was impossible to identify whether the Respondent's flat was referred to: pages 118, 173, 355-365 and 407-426.
46. The Tribunal struggled to understand the basis upon which the Applicant sought to recover electricity payments for common areas. For example the reference to '*Landlord's lighting*' as set out on 443 is hopelessly vague; and the account numbers ending in 40 and 60 appear to have no relevance to flat 14

47. A further example is that the Applicant insisted it was entitled to be paid for emergency lighting in the Respondent's block in the period after 2011 despite the fact that it was not installed until 2016. Such demands for payment were incompetent at best and misleading at worst.
48. In any event the Applicant also conceded that invoices have been charged equally rather than being related to the individual blocks as per the requirements of the lease. Yet again the Applicant appears to have failed to apply the appropriate proportion as required by the lease and has failed adequately to render meaningful requests for payment in accordance with the lease.
49. It was also submitted that the Applicant was not obliged to present to the Respondent a break down in costs reflecting only her share. The Tribunal finds that that is not a true reflection of the wording of the lease. The Lease specifically refers to the Lessee's obligation to pay by reference to proportions of expenditure. Accordingly the Tribunal rejects the Applicant's supplementary submission to the contrary. That is, the notices are defective by failing to specify the Respondent's contribution.
50. In the light of the above, the Tribunal finds that the demands made by the Applicant were defective.
51. In the light of those findings the Application is dismissed.
52. Further, and in the light of the findings above, the Tribunal also concludes that it would be appropriate to direct, pursuant to section 20C of the Act of 1985, that the costs shall not be added to the service charge.

53. A party seeking permission to appeal this decision must make a written application to the Tribunal for permission to appeal. This application must be received by the Tribunal no later than 28 days after the date this decision is sent to the parties. Further information is contained within Part 6 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (S.I. 2013 No. 1169).

Judge Andrew McNamara

24 January 2019

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	**BIR/00CS/LIS/2018/0011**
Property:	**Flat 14 Oak Close, Gospel Oak, Tipton, DY4 0AY**
Applicants:	**David, Paula, Alan & Steven Mattey**
Representative:	**Mr. A. Beaumont instructed by Blue Property Management UK Limited**
Respondent:	**T Price**
Representative:	**Mr. S. J. Bradshaw, Direct Access Counsel.**
Type of Application:	**Application for a determination of liability to pay and reasonableness of service charges pursuant to s27A Landlord & Tenant Act 1985; and an application that the Applicant is prevented from recovering its costs pursuant to s20C of the Act of 1985.**
Date & Venue of Hearing:	**8 August 2018. The Tribunal reconvened on 2 further occasions, namely 15 October and 23 November 2018**
Tribunal Members:	**Judge A McNamara** **Mr R P Cammidge FRICS**
Date of Decision:	**24 January 2019**

DECISION

Introduction

1. This is an application for a determination of liability to pay and/or the reasonableness of service charges sought by the Applicant in relation to Flat 14, Oak Close, Gospel Oak, Tipton, DY4 0AY.
2. In addition the Respondent seeks an order that the Applicant should be prevented from seeking to recover the costs of this application via the service charge.
3. In its application dated 23 February 2018, the Applicant invited the Tribunal to consider the service charges for the periods 2009-10 to 2017 inclusive. The total amount in dispute was said to be £29,958.76 (this is the figure from the application and appears to apply to flats 9/10/14/24 in total)
4. This case is to be treated as a sample application since there are other applications relating to Flats 9, 10 and 24 Oak Close which have been stayed pending this decision.
5. The case was heard on 8 August 2018: the Tribunal heard from Counsel and, given the volume of information provided, the Tribunal reconvened on a further two subsequent occasions, on 15 October and 23 November 2018, to consider the material. In particular three volumes consisting principally of invoices.

The Lease

6. A lease for a term of 99 years was created between the parties' predecessors in title on 25 March 1974 and appeared at pages 11 to 33 of the hearing bundle.
7. For the purposes of this decision, the relevant provisions of the lease are as follows:

> *(1)…*
>
> *(iv) "The said development" shall mean the lessor's development at Oak Close Tipton…which includes the Mansion as hereinafter described…*

(vi) "The Mansion" shall mean the property described in the First Schedule hereto…

(viii) "The Flat" means the property hereby demised and described in the Second Schedule hereto.

(ix) "The Lessor's Expenses" means money actually expended and reserved for periodical expenditure by or on behalf of the Lessor during the term…in carrying out in respect of the Mansion the obligations specified in the Sixth Schedule hereto for the period ending on the Thirtieth day of June 1977 and for each and every subsequent year ending on the thirtieth day of June.

8. After dealing with the purchase price and ground rent, the document continued as follows:

1…

AND ALSO YIELDING AND PAYING during the said term:-

…(ii) The Lessee's proportion of the Lessor's Expenses on the days and in manner…provided…

(iii) Such other sum or sums in respect of the Flat which the Lessor from time to time during the said term properly shall be called upon to pay…

9. The Mansion was defined in the First schedule as follows:

ALL THAT land at Oak Close, Tipton

TOGETHER with the building flats garages driveways pathways gardens and grounds…shown for the purpose of identification only on the plan and…edged in green

10. The Flat was defined in the Second Schedule (not set out here).

11. Part II of the Second Schedule set out the Covenants by Lessee with Lessor and provided, amongst other things, as follows:

2. (i) To contribute and pay one equal 1/8th part of the costs expenses outgoings and matters mentioned in the First Part of the Eighth Schedule [EXPENSES OF THE BUILDING] and one equal 1/31st part of those mentioned in the Second Part of the Eighth Schedule [EXPENSES OF THE MANSION] together with Value Added Tax.

12. The succeeding subparagraphs identify that the service charge would be estimated by the Lessor by the service charge year end, that year ending on 30 June (iii); that the Lessee would pay in two instalments on 1 January and 1 July; and that a balancing payment was due every third year subject to any credit held by the Lessor (iv).

The Respondent's case

13. It is the Respondent's case that:
    a. *The service charge demands do not comply with the lease*
    b. *Elements of the charges are invalid as the Respondent is not liable under the lease*
    c. *'Many' are unreasonable*
    d. *That the Applicants are not entitled to recover costs by way of service charge*
    e. *Alternatively section 20C applies.*
14. Those bullet points were fleshed out by Mr. Bradshaw in §13 of his Skeleton argument and orally and were encapsulated in §s 14 to 16 of the Skeleton:
    a. *The Applicants failed until the end of 2017 to comply with the requirements of the lease in respect of the obligation to serve estimates of expenditure;*
    b. *The basis of the calculation is unclear: for example the increase in proportion from 1/31st to 1/24th and more recently 1/20th; and*

c. *There is no evidence that the certified statements of income and expenditure served upon the Respondent within 18 months of that expenditure being incurred; and, even if they were to be so interpreted, there is no statement to the effect that the Respondent would be required to contribute. It is said that they are defective notices under s20B(2) of the Act of 1985.*

15. Following the adjournment in part necessitated by the need for the production of further documents, Mr. Bradshaw prepared further written submissions on behalf of the Respondent.

16. In its supplementary written submissions, the Applicant objected in part to those submissions and suggested that where they amounted to the introduction of new evidence they should be excluded.

17. Since the Tribunal gave to each party the opportunity to deal with the additional disclosure it would be illogical to ignore the Respondent's submissions by way of response. To the extent that the Respondent sought to introduce additional material for the first time then the Tribunal will exclude it since there has to come a point at which the evidence is complete: it was not anticipated that any new material would be forthcoming.

18. In the Respondent's supplementary submissions it appears that:

    a. The Respondent is now content that the '*service charge budget calculations…correspond with the relevant service charge demands*'. There is still an issue with the proportion sought.

    b. The fire and health and safety risk assessments are said to be carried out by a company virtually indistinguishable from the Applicant;

    c. The appearance of the assessments is said to be repetitive and in any event excessive;

d. The principle of the cost of installation of emergency lighting is no longer in issue but is presented in an anomalous way;
e. Emergency lighting was not installed prior to August 2015 and so there should be no charge to the respondent prior to that time;
f. The cost of lighting checks is unreasonable and ought to be dealt with as caretaking;
g. Management fees are unreasonable (the Tribunal will rely upon its own expertise in this respect since the information provided by both parties is far too late); and
h. Elizabeth Walk is better maintained than Oak Close. Again this is based upon the additional evidence purported to be introduced late and so the Tribunal will exclude it. In any event the Tribunal did not carry out a comparative exercise as part of the discharge of its function in visiting the site.

The Applicant's case

19. In the document entitled '*Statement of Case in Response'* the Applicant dealt with the case as it then understood it, namely that the Respondent '*queried whether revised service charges were due and payable, as per Section 20B requirements'*. In short, the Applicant's case is that '*all invoices and demands have been served on time, and are payable and due from the Defendant in full*'.
20. Mr Beaumont, on behalf of the Applicant, submitted that the increase in the Respondent's share from 1/31st to 1/24th and now 1/20th was a logical reflection of the reduction in the size of the Applicant's freehold interest in the light of, amongst other things, a recent right to manage decision by the residents of one block.

21. It was also submitted that the Respondent had, prior to the involvement of Counsel, not made it clear that part of her complaint was that the Applicant had failed to accompany demands with budget or estimated figures in accordance with the lease. It was submitted that had the Applicant appreciated that that was part of the Respondent's case, then it would have produced appropriate copies. The Applicant required time to produce the purportedly absent documents, which, in part, explained the need for the Tribunal to reconvene.
22. Accordingly, at the conclusion of the hearing on 8 August 2018, the Tribunal directed that the relevant information should be provided by 22 August 2018.
23. The Applicant sought extra time for the serving and filing of the information as a result of which the directions were varied. Although the Respondent objected to the late service the Tribunal took the view that it was material to an issue which it had to resolve and so should be admissible.
24. Both parties had an opportunity to enter further written submissions.
25. The Applicant's response combined parts of the Respondent's submissions and also purported to introduce additional material. For the reasons set out above the Tribunal will exclude any additional material in the interests of finality.
26. As an aside it is surprising that comparator evidence, often informative in forming a view about the reasonableness of service charges, was not forthcoming until after the evidential clock had stopped. Nonetheless, the Tribunal has the know-how to resolve that issue.
27. In short the Applicant takes the view that the charges sought are both evidenced and reasonable.

The Law

28. Section 27A of the Landlord and Tenant Act 1985 provides as follows:

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29. Further, section 20C is also of relevance:

20C Limitation of service charges: costs of proceedings.
(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court [residential property tribunal] or leasehold valuation tribunal [or the First-tier 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.
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52. Further, and in the light of the findings above, the Tribunal also concludes that it would be appropriate to direct, pursuant to section 20C of the Act of 1985, that the costs shall not be added to the service charge.

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Judge Andrew McNamara

24 January 2019

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

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> *(1)…*
>
> *(iv) "The said development" shall mean the lessor's development at Oak Close Tipton…which includes the Mansion as hereinafter described…*

(vi) "The Mansion" shall mean the property described in the First Schedule hereto…

(viii) "The Flat" means the property hereby demised and described in the Second Schedule hereto.

(ix) "The Lessor's Expenses" means money actually expended and reserved for periodical expenditure by or on behalf of the Lessor during the term…in carrying out in respect of the Mansion the obligations specified in the Sixth Schedule hereto for the period ending on the Thirtieth day of June 1977 and for each and every subsequent year ending on the thirtieth day of June.

8. After dealing with the purchase price and ground rent, the document continued as follows:

1…

AND ALSO YIELDING AND PAYING during the said term:-

…(ii) The Lessee's proportion of the Lessor's Expenses on the days and in manner…provided…

(iii) Such other sum or sums in respect of the Flat which the Lessor from time to time during the said term properly shall be called upon to pay…

9. The Mansion was defined in the First schedule as follows:

ALL THAT land at Oak Close, Tipton

TOGETHER with the building flats garages driveways pathways gardens and grounds…shown for the purpose of identification only on the plan and…edged in green

10. The Flat was defined in the Second Schedule (not set out here).

11. Part II of the Second Schedule set out the Covenants by Lessee with Lessor and provided, amongst other things, as follows:

2. (i) To contribute and pay one equal 1/8th part of the costs expenses outgoings and matters mentioned in the First Part of the Eighth Schedule [EXPENSES OF THE BUILDING] and one equal 1/31st part of those mentioned in the Second Part of the Eighth Schedule [EXPENSES OF THE MANSION] together with Value Added Tax.

12. The succeeding subparagraphs identify that the service charge would be estimated by the Lessor by the service charge year end, that year ending on 30 June (iii); that the Lessee would pay in two instalments on 1 January and 1 July; and that a balancing payment was due every third year subject to any credit held by the Lessor (iv).

The Respondent's case

13. It is the Respondent's case that:
    a. *The service charge demands do not comply with the lease*
    b. *Elements of the charges are invalid as the Respondent is not liable under the lease*
    c. *'Many' are unreasonable*
    d. *That the Applicants are not entitled to recover costs by way of service charge*
    e. *Alternatively section 20C applies.*
14. Those bullet points were fleshed out by Mr. Bradshaw in §13 of his Skeleton argument and orally and were encapsulated in §s 14 to 16 of the Skeleton:
    a. *The Applicants failed until the end of 2017 to comply with the requirements of the lease in respect of the obligation to serve estimates of expenditure;*
    b. *The basis of the calculation is unclear: for example the increase in proportion from 1/31st to 1/24th and more recently 1/20th; and*

c. *There is no evidence that the certified statements of income and expenditure served upon the Respondent within 18 months of that expenditure being incurred; and, even if they were to be so interpreted, there is no statement to the effect that the Respondent would be required to contribute. It is said that they are defective notices under s20B(2) of the Act of 1985.*

15. Following the adjournment in part necessitated by the need for the production of further documents, Mr. Bradshaw prepared further written submissions on behalf of the Respondent.

16. In its supplementary written submissions, the Applicant objected in part to those submissions and suggested that where they amounted to the introduction of new evidence they should be excluded.

17. Since the Tribunal gave to each party the opportunity to deal with the additional disclosure it would be illogical to ignore the Respondent's submissions by way of response. To the extent that the Respondent sought to introduce additional material for the first time then the Tribunal will exclude it since there has to come a point at which the evidence is complete: it was not anticipated that any new material would be forthcoming.

18. In the Respondent's supplementary submissions it appears that:

    a. The Respondent is now content that the '*service charge budget calculations…correspond with the relevant service charge demands*'. There is still an issue with the proportion sought.

    b. The fire and health and safety risk assessments are said to be carried out by a company virtually indistinguishable from the Applicant;

    c. The appearance of the assessments is said to be repetitive and in any event excessive;

d. The principle of the cost of installation of emergency lighting is no longer in issue but is presented in an anomalous way;
e. Emergency lighting was not installed prior to August 2015 and so there should be no charge to the respondent prior to that time;
f. The cost of lighting checks is unreasonable and ought to be dealt with as caretaking;
g. Management fees are unreasonable (the Tribunal will rely upon its own expertise in this respect since the information provided by both parties is far too late); and
h. Elizabeth Walk is better maintained than Oak Close. Again this is based upon the additional evidence purported to be introduced late and so the Tribunal will exclude it. In any event the Tribunal did not carry out a comparative exercise as part of the discharge of its function in visiting the site.

The Applicant's case

19. In the document entitled '*Statement of Case in Response'* the Applicant dealt with the case as it then understood it, namely that the Respondent '*queried whether revised service charges were due and payable, as per Section 20B requirements'*. In short, the Applicant's case is that '*all invoices and demands have been served on time, and are payable and due from the Defendant in full*'.
20. Mr Beaumont, on behalf of the Applicant, submitted that the increase in the Respondent's share from 1/31st to 1/24th and now 1/20th was a logical reflection of the reduction in the size of the Applicant's freehold interest in the light of, amongst other things, a recent right to manage decision by the residents of one block.

21. It was also submitted that the Respondent had, prior to the involvement of Counsel, not made it clear that part of her complaint was that the Applicant had failed to accompany demands with budget or estimated figures in accordance with the lease. It was submitted that had the Applicant appreciated that that was part of the Respondent's case, then it would have produced appropriate copies. The Applicant required time to produce the purportedly absent documents, which, in part, explained the need for the Tribunal to reconvene.
22. Accordingly, at the conclusion of the hearing on 8 August 2018, the Tribunal directed that the relevant information should be provided by 22 August 2018.
23. The Applicant sought extra time for the serving and filing of the information as a result of which the directions were varied. Although the Respondent objected to the late service the Tribunal took the view that it was material to an issue which it had to resolve and so should be admissible.
24. Both parties had an opportunity to enter further written submissions.
25. The Applicant's response combined parts of the Respondent's submissions and also purported to introduce additional material. For the reasons set out above the Tribunal will exclude any additional material in the interests of finality.
26. As an aside it is surprising that comparator evidence, often informative in forming a view about the reasonableness of service charges, was not forthcoming until after the evidential clock had stopped. Nonetheless, the Tribunal has the know-how to resolve that issue.
27. In short the Applicant takes the view that the charges sought are both evidenced and reasonable.

The Law

28. Section 27A of the Landlord and Tenant Act 1985 provides as follows:

> *27A Liability to pay service charges: jurisdiction*
> *(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.*

(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 of an application under subsection (1) or (3).
(7) The jurisdiction conferred on [F4 the appropriate tribunal] in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.]

29. Further, section 20C is also of relevance:

20C Limitation of service charges: costs of proceedings.
(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court [residential property tribunal] or leasehold valuation tribunal [or the First-tier 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)…
(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.]

30. Additionally, section 35 Landlord and Tenant Act 1987 is also relevant:

35 Application by party to lease for variation of lease.

(1) Any party to a long lease of a flat may make an application to [the appropriate tribunal] for an order varying the lease in such manner as is specified in the application.

(2) The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely—

…

(f) the computation of a service charge payable under the lease.

31. Mr. Bradshaw, in his written submissions, also drew the Tribunal's attention to the cases of:

    a. **Brent LBC v Shulem B Association Ltd[1];**

    b. **Freeholders of 69 Marina v Oram[2];**

    c. **Barrett v Robinson[3]; and**

    d. **Bretby Hall Management Company Ltd v Pratt[4].**

32. Although there was some argument in respect of interpretation of the authorities, broadly, the law is not in issue between the parties.

The validity of the service charge demands

33. The Respondent initially submitted that the demands were invalid for a number of reasons. In the light of the additional disclosure concerning the service charge budget calculations it was accepted by the Respondent that these correspond with the relevant service charge demands.

34. However, the thrust of the submission at the hearing and maintained in the supplementary submissions from Mr. Bradshaw was to the effect that the demands were invalidated by reason of the Applicant's decision to alter the proportion required under the lease.

[1] [2011] EWHC 1663 (Ch)
[2] [2011] EWCA Civ1258
[3] [2014] UKUT 322 (LC)
[4] [2017] UKUT 70 (LC)

35. The lease is explicit in its use of the word '*proportion*' and the calculation of those proportions dependent upon whether expenses related to the various blocks or the 'Mansion'. The principal difference being buildings and grounds related costs respectively.

36. The Tribunal was urged by the Applicant to take what Mr Beaumont referred to as a '*practical approach*' to the reducing numbers of flats and increase the share payable by the Respondent.

37. It is right to say that there is an attractive logic about such an approach. However, what Mr. Beaumont is actually asking the Tribunal to do is sanction a unilateral variation of the lease which has an inevitable impact upon the monetary liabilities of the leaseholders including the Respondent. No formal application pursuant to section 35 of the Act of 1987 was before the Tribunal.

38. The ability of a freeholder to incur expenditure that a leaseholder is expected to pay is, for good reason, extensively regulated and can only be authorised in accordance with the terms of the lease or if statute and/or regulation provide. Scrutiny of the lease in this case reveals no mechanism for that to be done and certainly not unilaterally by the Applicant.

39. As already pointed out, the lease carefully made reference to appropriate proportions and that the Respondent's liabilities were defined by reference to those proportions. Nowhere within the lease is there a provision for the modification of that proportion.

40. The Tribunal finds that there is no evidence of any lawful variation of the terms of the lease to reflect the increase in share of the Respondent; and, in the absence of an application pursuant to section 35 Landlord and Tenant Act 1987, the Tribunal is unable to adopt the practical course suggested by Mr Beaumont. Accordingly it is clear that the Applicant had no entitlement to seek the increased

share it did, either by the historical increase to 1/24th or, more recently, 1/20th in respect of the 'Mansion'.

41. In respect of the 1/8 share concerning the building, the Tribunal finds that the Applicant's approach to identifying sums said to be owed by the Respondent are wholly unclear and are not recoverable by reason of that lack of clarity.
42. Although necessary for the purposes of the consideration of matters of principle, in the interests of proportionality the Tribunal does not propose to engage in a page by page analysis of the documents set out in the three files provided by the Applicant. However, consideration of those documents reveals no compelling basis for the Tribunal to rely upon the evidence and/or submissions made by the Applicant in support of its case.
43. By way of an example, the Respondent's Counsel identified pages 553, 559, 561 and 562 as referring to 'odd' numbered flats. Clearly they were of no relevance to Flat 14. They are not the only documents which do not relate to the Respondent's flat.
44. This point was in part conceded by the Applicant: a concession which must be fatal to the argument that the Applicant accurately communicated outstanding sums to the Respondent.
45. In relation to repairs and maintenance, the documents were largely non-specific by reference to a block. The following are but a sample of the numerous documents from which it was impossible to identify whether the Respondent's flat was referred to: pages 118, 173, 355-365 and 407-426.
46. The Tribunal struggled to understand the basis upon which the Applicant sought to recover electricity payments for common areas. For example the reference to '*Landlord's lighting*' as set out on 443 is hopelessly vague; and the account numbers ending in 40 and 60 appear to have no relevance to flat 14

47. A further example is that the Applicant insisted it was entitled to be paid for emergency lighting in the Respondent's block in the period after 2011 despite the fact that it was not installed until 2016. Such demands for payment were incompetent at best and misleading at worst.
48. In any event the Applicant also conceded that invoices have been charged equally rather than being related to the individual blocks as per the requirements of the lease. Yet again the Applicant appears to have failed to apply the appropriate proportion as required by the lease and has failed adequately to render meaningful requests for payment in accordance with the lease.
49. It was also submitted that the Applicant was not obliged to present to the Respondent a break down in costs reflecting only her share. The Tribunal finds that that is not a true reflection of the wording of the lease. The Lease specifically refers to the Lessee's obligation to pay by reference to proportions of expenditure. Accordingly the Tribunal rejects the Applicant's supplementary submission to the contrary. That is, the notices are defective by failing to specify the Respondent's contribution.
50. In the light of the above, the Tribunal finds that the demands made by the Applicant were defective.
51. In the light of those findings the Application is dismissed.
52. Further, and in the light of the findings above, the Tribunal also concludes that it would be appropriate to direct, pursuant to section 20C of the Act of 1985, that the costs shall not be added to the service charge.

53. A party seeking permission to appeal this decision must make a written application to the Tribunal for permission to appeal. This application must be received by the Tribunal no later than 28 days after the date this decision is sent to the parties. Further information is contained within Part 6 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (S.I. 2013 No. 1169).

Judge Andrew McNamara

24 January 2019