



FIRST-TIER TRIBUNAL PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference : CHI/21UD/LIS/2021/0013

Property : The Coach House & 19/21 West Hill Road, St Leonards on Sea, East Sussex TN38 0NA

Applicant : Westhill Property Management Limited

Representative: Graeme John – Godfrey John & Partners

Respondent: The Lessees

Representative: ---

Types of Application: Determination of service charges - Section 27A Landlord and Tenant Act 1985 (the 1985 Act)

Tribunal Members: Judge P J Barber

Date of Decision: 16 July 2021

DECISION

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Decision

- (1) The Tribunal determines in accordance with the provisions of Section 27A of the 1985 Act, that the service charges for the Property in 2021 shall be payable in equal one-twelfth shares by each of the twelve lessees.**

Reasons

INTRODUCTION

1. The application received by the Tribunal was for determination of service charges payable for the year 2021, by the Respondent lessees to the Applicant landlord. The Applicant states that the Property is a converted nineteenth century terraced building, comprising 12 flats, some with their own gardens or terraces, and of varying sizes.
2. Directions were issued on 8 April 2021, providing for the matter to be determined by way of a paper determination, rather than by an oral hearing, unless a party objected; no objection has been received by the Tribunal and accordingly, the matter is being determined on the papers. The directions identified a single issue for determination, being the definition of the word “fair” as contained in the leases. The directions required the Applicant to serve a copy of the application and directions on each lessee.
3. The Applicant has provided an electronic bundle of documents to the Tribunal, comprising 86 pages and which included copies of the application, a specimen lease template, the directions, statement of case and various witness statements.
4. The template lease provided envisages a term of 125 years from 25 June 2015.
5. Due to Covid 19 restrictions, no inspection was carried out in respect of the Property.

THE LAW

6. Section 27A Landlord and Tenant Act 1985 provides that:-
 - (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, the date at or by which it is payable, and*
 - (d) *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)-(7)....

WRITTEN REPRESENTATIONS

7. Graeme John broadly indicated in his statement that the purpose of the application had been to clarify exactly how service charges are apportioned for each flat; he referred to the Seventh Schedule of the Leases, concerning the calculation and payment of the maintenance fund, including the definition of “the Maintenance Fund” in clause 1(i) of the Seventh Schedule, and also the definition in Clause 1(ii) of the Seventh Schedule:

“the Maintenance Charge Rent means a fair proportion of the Maintenance Fund attributable to the Flat”

Mr John stated that after considerable discussion with the lessees, it had not been possible to agree exactly what is meant by a “fair proportion”, adding that previous managing agents had divided the charges at different amounts unequally, but upon no logical basis. Mr John indicated that most service charges, where flats differ significantly in size, are based on relative floor area or value of each flat; he added that some calculations had been made to show the floor area for each flat.

Outline summary of leaseholder responses:

8. Laura and George Panayotou - Flats 19A & 19B: broadly stated that theirs were low ceiling basement flats for which their solicitor confirmed that they should expect service charges calculated at 5% and 7% respectively, on a pro rata to size basis. These lessees indicated that at a meeting in 2018, held after ownership of the freehold had changed, a majority had voted for an equal division of service charges being on the basis of 8.33% for each of the 12 flats; they appended a chart to show the percentages for all 12 flats based on floor area and asked the Tribunal to rule on this basis.

9. Janet and John Lane – Ground Floor Flat: broadly stated that they had purchased their flat in April 2021 and had been informed by their solicitor that the service charge was to be split equally, referring to and appending a copy of a resolution of the Applicant company made on 27 October 2018:

“IT WAS RESOLVED THAT: we all pay the same amount (ie 8.3333% or a Twelfth) to match the percentages of the Freehold we all own as well as the percentages of each lease holder`s voting rights.”

The view of these lessees was that the division had already been discussed and agreed, and should remain as per the company resolution; they referred to costly renovation works as being pending later this year and suggested that if any change is made, the cost of these works should remain as per the 2018 company resolution.

10. Marina Romito – Flat 3, 19 West Hill Road: broadly referred to the company resolution of 27 October 2018 and advocated adherence to that decision, referring to external works being due, for which she indicated that it would be unfair for lessees of flats with larger internal floor areas to have to pay more should unequal shares prevail.
11. Aoife McArdle & Benny Sweeney – Flat 4, 19 West Hill Road: broadly advocated an equal division of service charges on the basis that they had moved in to their flat in April 2019, were aware of significant repairs being pending, submitting that the layout of the building was complex, and that equal division would ignore the intricacy of each property – for which they said only 5 flats have gardens, and only 10 have balconies, decking or patios of varying sizes. On purchasing, they had accepted an equal split arrangement which they said, seemed fair.
12. Hannah Dinmore – Flat 21B West Hill Road: expressed a preference to continue with equal division of service charges as this is fair and had been voted for by the majority, adding that all benefitted from the building’s grand aesthetics as a whole and that all should be equally responsible for maintenance, referring to various differences between the flats and occupancy arrangements.
13. Larry Taylor – submitted that the issue of a “fair proportion” had come to light due to a substantial sum of money being needed to address various repairs; the previous managing agent had said it was up to the landlord and leaseholders to define “fair proportion”, and that when discussion had taken place, there was not 100% agreement as to equal proportions. Advocated a settled percentage and suggested a split based on floor space or bed space.
14. Maron O’Neill - purchased 5 years ago for long term retirement with affordable costs including service charges of approximately £85 per month, although it became clear that work had been done poorly before, and that further repairs would be needed. Referred to the majority vote in 2018 and said this was the fairest way forward, and that to change it now would be unfair and impose extra unexpected costs on some.
15. Ann Celia Brown – Flat 3, 21 West Hill Road: submitting that the current equal division is not fair or reasonable. Flat 3 is a smaller than average flat, with no outside space, and should be charged a smaller than average proportion.
16. Susan Hogg & Simon Lewis: supported equal shares, saying that most bought their flats six years ago, and only two have changed hands more recently. Submitted that the vote in favour of equal shares had been 9:3; if now based on floor space, then

some owners would face large increases for work now due, which they had not expected.

17. R F R Walters & N R Theobald – Flat 5, 21 West Hill Road: referred to the history of previous unequal proportions being unexplained; theirs is one of the smallest flats and it would be absolutely unfair to charge on an equal basis – there is nothing equal, beyond a share of the freehold. Condition of the building is intrinsically attached to the value of each apartment. Dismissive of proportions being based on council tax or number of bedrooms or market values which fluctuate; similarly, division on a means tested basis. Floor area suggested as the basis for division, with a chart appended indicating respective floor areas for all 12 flats.

18. CONSIDERATION

19. The Tribunal have taken into account all the case papers in the bundle.
20. The only issue for determination under Section 27A of the 1985 Act is as to the proper meaning of the words “fair proportion” in Clause 1(ii) of the Seventh Schedule.
21. The Tribunal notes that historically service charges had been levied by previous managing agents on an unequal basis although it appears that there had been no clear basis or rationale for such division. Inevitably, any change in proportions would please some lessees, but not others. In the first instance, the contractual provisions of the leases must be considered and in particular in this case, the ordinary and natural meaning of the words “fair proportion”. In general terms “fair proportion” may be taken to mean a fair and reasonable proportion appropriate to the property or its use, but the words used alone in the definition within the leases are not greatly helpful. It is perhaps curious that in the case, as here, of relatively recent leases, such imprecise language which is considerably open to interpretation, has been used; most contemporary residential leases tend to define very specifically the proportions of service charge payable. This is for good reason, given the importance of having a clearly understood and unambiguous contractual obligation, to enable, and readily facilitate, collection of the correct proportions of service charges from all lessees. Unfortunately, the words “fair proportion” used without further qualification or amplification, do not provide a proportion which is absolutely clear or beyond discussion.
22. The Tribunal notes the suggestions made by those Respondents who dissent from equal shares, mainly to the effect that proportions based on floor areas of the respective flats should be used. Certain of the lessees have helpfully provided charts to indicate those proportions, although it is not entirely clear from the papers in the bundle whether those respective floor areas and percentages have all been mathematically agreed and accepted in principle by the Applicant company and/or all the lessees.
23. The Tribunal also notes that the freehold owner is a limited company and that seemingly, each lessee is a member of that company. A formal resolution was apparently proposed and considered by the company at a meeting held on 27 October 2018; the background to that decision was explained as being:

“Background – a decision needs to be made on the percentages each lease holder pays in service and maintenance charges as well as the same percentages being applied to large works. For example External and Internal decorating of the estate”

A resolution was then passed, apparently on the basis of nine votes to three votes, in favour of each lessee paying the same amount or a twelfth in respect of such charges. Accordingly, the Applicant company has as freeholder and by a majority of 9 to 3, already made a decision regarding interpretation of “fair proportion” to the effect that this means equal shares.

24. As stated above, in the first instance, the obligations of the parties to a lease should be ascertained by looking at the contractual words and provisions used in such document. In this case, the rather vague term “fair proportion” has been used. The interpretation of these words is not assisted in the leases by any further or qualifying words; whilst interpretation on the basis of disproportionate shares according to floor space, would favour some, it would not please all the lessees. Inevitably in a choice between equal and disproportionate shares, some lessees will not be happy. The simple fact is that use of the words “fair proportion” is open to the possibility of differing interpretations. However, it is clear that the Applicant company passed, by a majority, a resolution in October 2018 in favour of equal contributions, namely one twelfth per flat; presumably that is the basis upon which service charges have been levied since then.
25. The Tribunal takes the view in the absence of any further or qualifying words, that one interpretation at least, of the words “fair proportion” would be equal proportions. It is not uncommon for residential lease service charges to be operated on the basis of equal shares, even though on the basis of a forensic analysis, there may be disbenefits and disadvantages for certain flats, which do not share certain facilities such as a lift, or a roof covering only part of a building. Equal division of service charges does at least provide a clearly ascertainable basis for the division of costs. Division on the basis of relative floor areas might be said also to achieve a degree of certainty, although even then, there is the possibility of dispute arising if any of the measurements of floor space is not definitively agreed by all lessees; no evidence of such definitive agreement has been provided. Accordingly, on balance, and taking account of the decision apparently made on a democratic basis in 2018 by the Applicant company in favour of equal share division of service charges, the Tribunal determines that in the circumstances of this particular case “fair proportion” shall mean equal one twelfth contributions by each lessee.
26. By way of clarification, this decision is purely in regard to the issue of proportions of service charges payable and it would remain open to leaseholders to challenge the actual amount of service charges incurred for the works at a later date, should they be minded to do so.

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case, by email to rpsouthern@justice.gov.uk

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

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.