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

Case Reference : **CAM/OOMA/LSC/2017/0002**

Property : **Flat 10, Corunna Court, Wellington Business Park, Dukes Ride, Crowthorne, Berkshire RG45 6AN**

Applicant : **Mr Paul Simon Gent**

Representative : **Mark Loveday of Counsel**

Respondent : **Kirkby Homes (Sunningdale) Limited**

Representative : **Lina Mattsson, Counsel**

Type of Application : **Application for a determination of liability to pay and reasonableness of service charges pursuant to Section 27A of the Landlord and Tenant Act 1985**

Tribunal Members : **Tribunal Judge Dutton
Mr D Brown FRICS Deputy Regional Valuer
Mrs N Bhatti**

Date and venue of Hearing : **Reading Employment Tribunal, Friar Street, Reading on 5th April 2017**

Date of Decision : **25th April 2017**

DECISION

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DECISION

The Tribunal determines that the landlord can only recover service charges relating to expenditure on Corunna Court and cannot recover expenditure in respect of the wider area known as Wellington Business Park for the reasons set out below.

BACKGROUND

1. The Applicant, Mr Paul Simon Gent is the lessee of Flat 10 Corunna Court, Dukes Ride, Crowthorne, Berkshire and the Respondent is his immediate landlord. By an application dated 21st December 2016 Mr Gent, with the support of his fellow lessees, sought to challenge the ability of the Respondent to recover an element of service charges in the year December 2015 to December 2016 which related to costs incurred in respect of the management of the estate known as Wellington Business Park. The sum in dispute by reference to the application was £713.33.
2. There were two issues which we needed to determine which were set out in the skeleton argument of Mr Loveday, Counsel for Mr Gent. Those were as follows: (i) Can the landlord only recover service charges relating to expenditure on Corunna Court or can it recover expenditure on the wider area of Wellington Business Park. (ii) If it was found that the Wellington Business Park elements are payable by the Applicant, then the question as to whether or not those costs were reasonable was to be considered.
3. Mr Gent's flat is situated within an estate known as Wellington Business Park owned and managed by Wellington Business Park Management Limited. Within that estate is an area known as Corunna Court which is a gated development of sixteen flats in two blocks. Corunna Court was a residential conversion from two industrial units previously known as Units 35 to 36 and 37 to 38 Wellington Business Park. It is understood that the residential development was undertaken by the Respondents and completed in mid 2015.
4. The freehold of Corunna Court is owned partly by the Respondent and partly by the management company Wellington Park Management Limited (Wellington). In the substantial bundle of papers before us it appears to be common ground that the freehold to what were the units 35 to 38 inclusive on Wellington Business Park is owned by the Respondents under title number BK461858. The file plan attached to that title number shows both the units now comprising the flats as well as other parts representing both car parking and some ancillary buildings. In addition to these areas, by a later transfer dated 29th May 2015, various smaller pieces of property were transferred to the Respondent under title number BK468770. The remainder of the land comprising Corunna Court is retained in the ownership of Wellington and is set out in title number BK351036. By and large this comprises the roads and paved areas as well as some grassed areas.
5. Of relevance to us is that Wellington also retained ownership of the access road into the estate and other parts under title number BK401345. It is not, we think, contested that the main access road into the estate from Dukes Road creating immediate access to Corunna Court is now adopted and maintainable at public expense.

6. We were supplied with very helpful skeleton arguments both by Miss Mattsson on behalf of the Respondent and Mr Loveday on the part of the Applicant. We do not propose to repeat what is said in those skeletons as these are documents common to both sides.
7. In addition to the skeleton arguments we were also provided with a bundle of papers (referred to above) which included witness statements from the Applicant, Mr Norman Peter Le Gross in support of the Applicant's case and Mr Terry Prosser who is the finance director for the Respondent.
8. The bundle also included a copy of the lease between the Applicant and Respondent which is dated 5th August 2015 and contains a number of clauses which are relevant to this application and which we will return to shortly.
9. In addition to the above documents, we had a number of transfers, documentation brought into existence at the time of the original sale of the lease to Mr Gent and other correspondence relevant to the dispute between the parties. There was also a draft deed of covenant between Wellington, the Respondents and Mr and Mrs Le Gross which was undated but which was referred to during the course of the hearing. We also had various official copies of the register and title plans relating to a number of title numbers, the relevant one we believe we referred to above.

LEASE TERMS

10. It is appropriate at this stage to set out what would appear to be the relevant terms of the lease as they feature largely in both in Mr Loveday's and Miss Mattsson's skeleton argument.
11. Paragraph 2 of schedule 4 contains the tenant's covenant to pay the service charges demanded by the landlord under paragraph 4 of schedule 6.
12. Under the definition section, Service Costs are defined as all costs reasonably and properly incurred "*providing the services and complying with law relating to the Retained Parts*". It also goes on to mention costs incurred in connection with the building and the provision of services and also in respect of common parts. Under the heading "Services" at page 6 of the lease, there are various definitions the important one for this case being sub-paragraph k which says the following:- "*paying all sums that are properly due and payable to the estate management company by the landlord in respect of the landlord's estate.*" In this instance, the estate management company is Wellington and the Landlord's Estate is defined as follows:- "*The land registered at HM Land Registry with title number BK461858 and BK351036 each and every part of the adjoining (and any neighbouring property in which the landlord has an interest) and known as 35 to 38 Wellington Court (postal address Corunna Court) Wellington Business Park, Dukes Ride, Crowthorne RG45 6AN.*" Here lies the nub of this dispute and as to what is understood by the 'Landlord's Estate'.
13. We agreed with Miss Mattsson and Mr Loveday that we would deal with the question posed in paragraph 2 above at (i) as a preliminary issue to determine the liability of Mr Gent to make payments in respect of services which related to the

wider estate known as Wellington Business Park and not confined to Corunna Court.

14. On behalf of the Respondent it is submitted that the Landlord's Estate includes the estate common area, which has no such clear definition within the terms of the lease. What can be said from the definitions element of the lease is that 'Adjoining Building' is defined as *"the land and building known as 35 to 36 (postal address Corunna Court) Wellington Business Park, Dukes Ride, Crowthorne RG45 6LS and in which the property is situated"*. 'Building' is defined as *"the land and building known as 37 to 38 (postal address Corunna Court) Wellington Business Park, Dukes Ride, Crowthorne RG45 6LS within the Landlord's Estate"* and 'Common Parts' is defined to include *"the front door, entrance hall, passages, stairways, stairwells and landings of the building (b) the external paths, hard standing, driveways, yards, stairs, garden, planted areas, cycle store and refuge area at the building and the adjoining building and (c) all remaining parts of the landlord's estate that are not part of the property or the flats and which are intended to be used by the tenants and occupiers of the Building and the Adjoining Building and the Flats and shown hatched Black and Grey on the plan"*. By way of digression, we should say that there is a plan included within the lease bearing reference T14/13/630 which shows Corunna Court edged in blue with hatched areas representing the accessways on both foot and by vehicle and also cycle and refuge stores together with electricity sub-stations.
15. Continuing in the definitions section of the lease, reference is made to Retained Parts which is defined as:- *"all parts of the Landlord's Estate other than the Property and the Flats including (a) the main structure of the building including the roof and roof structures, the foundation, the external walls and internal load-bearing walls, the structural timbers and the joists and the gutterings"* and going on to include *"all parts of the building lying below the floor surfaces or above the ceilings,(c) the external decorative surfaces., (d)the common parts (e)service media..(f) and boundary walls, fences and railings of the Building."* The tenant's proportion is stated to be 6.25% or such other percentage of the landlord acting reasonably may notify the tenant from time to time, this of course relating to the obligation to pay service charges.
16. Miss Mattsson for the Respondent drew our attention to references in the transfer of 29th May 2015 which in turn referred to an earlier transfer of 2nd July 1998. It was said that these transfers created the liability on the part of Wellington to pay service charges to the original owner TA Fisher and Sons Limited. These are service charges in respect of Wellington Business Park and there does not seem to be any dispute that Wellington had by transfers passed a responsibility to the Respondents to make a contribution in respect of service charges relating to the whole estate. The question we need to consider is whether any such obligation as there may be on the part of the Respondent to make contributions in respect of the totality of the business estate, should in part be passed to the Applicant.
17. Such liability to make contributions by the Respondent is it is said by Miss Mattsson are contained in the transfer dated 29th May 2015 and a deed of covenant of 13th June 2014. Miss Mattsson's original submission was that the covenants contained in the 1998 transfer run with the land and therefore pass to Kirkby and to the lessees under the terms of the lease. Reference was made to a deed of

covenant in draft form which appeared to be between Wellington, the Respondent and Mr and Mrs Le Gross, although undated and uncompleted, and in fact was submitted by Miss Mattsson not to be relevant to the application before us.

18. After this initial submission, Mr Loveday for Mr Gent took us through the bundle and his skeleton. The main plank of his argument was that the definition of the Landlord's Estate was such that it did not include any land outside Corunna Court, the extent of which was clearly shown on the plan attached to the lease and which we refer to above. Of particular reference is the wording under the definition of landlord's estate which says "*and known as 35 to 38 Wellington Court.*" This he said was in effect a catch all provision for what had gone previously under the definition of Landlord's Estate which is by reference to two title numbers and adjoining land. The confusion is to an extent caused by the words in brackets which are ("*and any neighbouring property in which the landlord has an interest*").
19. It was Mr Loveday's submission that the Landlord's Estate clearly lies within the narrow areas contained in the lease and shown on the Lease plan. The Respondent, he says, argues that '*each and every part*' includes an interest by way of easement enjoyed over the remainder of the estate, being what we might refer to as the business part. This easement it is said by the Respondent is an interest in land and therefore includes areas over which they enjoy rights provided they adjoin the two areas identified. For the Applicant Mr Loveday said this was wrong. Firstly, there are two specific title numbers mentioned under the definition of Landlord's Estate. The area itself is both narrowly defined in the lease and is defined on the ground by the fencing. Further, the wider area is not what is known as 35 to 38 Wellington Court and there is no hatching or colouring on plan T14/13/630 which is beyond the Corunna Park development. Whilst accepting that these easements are an interest in land, he did not accept that that was what was meant by the terms of the lease. It was, he said, to be remembered that at the time the lease was drafted, there was still likely to be ongoing negotiations to deal with those elements of the Corunna Estate which are referred to in title number BK468770. These were small segments of the original estate held by Wellington and which were transferred in May of 2015, close to the time when the estate was being conveyed away by the various leases. Mr Loveday's skeleton argument referred to the Supreme Court case of *Arnold v Britain and others [2015]UKSC:36[2015Ac1619]* where the interpretation of leases and written contracts was considered by the Supreme Court. We have noted what has been said in that regard.
20. For the Respondent, Miss Mattsson took us through the conveyancing history confirming that the development had been created in phases and that Corunna Court was phase 3 and had originally been developed in 1988. She pointed out to us the Second Schedule of the lease containing the rights which included reference to the benefits contained in the property registers of BK461858 and BK351036. There is no corresponding reference to any obligations under the Reservations section at Schedule 3. This was explained away on the basis that a positive covenant does not run with the land so that the obligations would not appear in the Reservation section of the lease. It was, however, known that there were easements and that those easements carried both rights and obligations.

21. Miss Mattsson then sought to explain the definition of the Landlord's Estate contained in the lease which we have set out in full above. She asserted that there were words missing and that the words in brackets either should not be there or should be repositioned. She said that there were in effect four descriptions contained in the clause defining Landlord's Estate. The first two were those specific to the title numbers. There then followed the wording '*each and every part of the adjoining*' and here she said there should be the word 'land' inserted or alternatively the letter 'L' should be put in front of the word 'and' which comes immediately after the bracketed words. It was then said that the words in brackets should appear towards the end of the clause. She did not consider that the post code was intended to be a limit to the land. She pointed out that the post code RG45 6AN, although appearing to be the post code for Mr Gent's flat, was inconsistent with the post code which appeared to refer to a lease to Kirkby Homes (Freeholds) Limited granted in 2016 which had the post code RG45 6LS. That was also the post code for the units as they were at the time of transfer to the Respondent in June of 2014. She did not consider that reference to neighbouring land was intended to include the small slivers of land contained under title BK468770. It was in her submission clear that the words in brackets were intended to refer to the wider estate and that accordingly the liability to contribute toward service charges arising from that wider part of the estate was recoverable from the Applicant and his fellow lessees.
22. We then had submissions in response to these points raised by Mr Loveday. His submission was that although we could include missing words to make the clause sensible, we must not go so far as to rewrite the terms of the lease. In his submission, the definition of Landlord's Estate made sense as he portrayed it.

FINDINGS

23. As we indicated to the parties at the hearing, we preferred the arguments of Mr Loveday than those of Miss Mattsson. This led us to the conclusion that the Applicant was not obliged to pay service charges in respect of the wider area of Wellington Business Park. Instead the obligation is confined to those items of expenditure incurred in respect of Corunna Court.
24. Our reasons for so finding are as follows. The document that we need to consider is the Lease. We are given assistance in this by the Supreme Court in the *Arnold v Britain* case. At paragraph 15 of that decision Lord Neuberger says this: "*When interpreting a written contract, the Court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean."* The Court then went on to say that the meaning had to be assessed in the light of (i) *the natural and ordinary meaning of the clause* (ii) *any other relevant provisions of the lease* (iii) *the overall purpose of the clause and the lease* (iv) *the facts and circumstances known or assumed by the parties at the time that the document was executed and* (v) *commercial common sense but* (vi) *disregarding subjective evidence of the parties' intentions."*
25. The judgment then went on to deal in more elaborate terms with those various issues. Of particular relevance, we note what is said at paragraphs 17 to 23 within

the judgment. These are set out in a somewhat edited state in Mr Loveday's skeleton argument. We have applied these provisions in this case.

26. We agree with Mr Loveday in his assessment of the meaning of the Landlord's Estate. We find that the definition within the lease is clearly intended to refer to the two title numbers, both of which lie entirely within the Corunna Court perimeter as shown on the lease plan. Each and every adjoining and neighbouring property in which the landlord has an interest, perhaps removing the brackets for the moment, in our findings clearly relates not only to the common ways, road, parking and grassed areas contained in title number BK351036, but also the additional pieces of land contained in title number BK468770, which was in the process of being transferred to the Respondent at the time, it would seem, the leases for the Flats were being prepared. It also seems clear to us that the use of the words "*and known as 35 to 38 Wellington Court*" ... is an intention to clarify and limit the extent of the Landlord's Estate to that which is consistent with the plan, which is itself defined and attached to the lease as referred to above. The postal address is clear, referring to the original industrial units and the reference to the post code is in our findings something of a red herring and would lie within the ambit of the Post Office to make such changes as it thought. Certainly, RG45 6AN is the post code for Mr Gent's flat by reference to the office copies of his title contained under reference BK471167.
27. We reject Miss Mattsson's argument that the neighbouring property is intended to extend the estate beyond the perimeter of Corunna Court. From a lessee's point of view, there is no need to pass over the remainder of Wellington Business Park. The roadway serving Corunna Court and reaching Dukes Road is without argument adopted and maintainable by the local authority. Accordingly, there is no need to make use of any of the land retained by Wellington and for which service charges are rendered to the Respondent. Furthermore, it seems to us that reference in the Rights under schedule 2, which specifically refers to the two title numbers, is intended to deal with the rights over the various accessways within Corunna Court estate which remain with Wellington under title number BK351036. There is no corresponding reference to any obligations under the terms of the transfers contained within the Reservation sections of the lease which for clarity purposes, and if the Respondent's case were to be accepted, we would have expected to see.
28. In our finding the lease works well with the construction put upon the terms by the Applicant. It is clear that Wellington still owns part of Corunna Court for which it is entitled to make service charge demands. As it happens, we understand that most of the maintenance works within the Corunna Court estate are undertaken by the Respondent. We do not consider that the lease intended for Mr Gent or his fellow lessees to have responsibility to discharge the costs associated with the remainder of Wellington Business Park.
29. That is inconsistent, it should be said, with the pre-contract documentation which was provided to Mr Gent under the 'General Information Sheet' prepared by Harrison LI Solicitors LLP for Kirkby. Under the heading 'Service charge and ground rent', no mention is made of any responsibility to contribute towards costs beyond Corunna Court. Reference is made in this document as well under 'Roads' indicating that vehicular and pedestrian access to the development is from Dukes

Ride, Crowthorne and then through Wellington Business Park which is adopted and publicly maintained. There is no suggestion that the use of the word 'Development' in this documentation goes beyond Corunna Court. This is consistent also with the terms of the service charge liabilities set out in that document. It should also be noted that in an email from the seller's solicitors to a Kate Martin in June of 2015, confirmation is given that the requirement to enter into a deed of covenant does not affect the service estimate. Indeed emails passing between the Managing Agents for Wellington and those for the Respondent shows that the Respondent appeared to be as surprised as the Applicant now is that there has been an obligation to make any contribution towards Wellington Business Park's services. This sets the scene and is relevant to point (iv) of the judgment of Lord Neuberger set out at paragraph 24 above. The commercial difficulties this might put the Respondent in does not allow us to re-write the definition of Landlord's Estate as suggested by Miss Mattsson.

30. As we have indicated above we find that the definition of Landlord's Estate is clear and in our finding does not include any area of land beyond that which is shown as Corunna Court and defined by reference to the lease plan referred to above. In those circumstances, therefore, we find that the Applicant is not obliged to make payments to the Respondent in respect of services that they may have a responsibility to pay to Wellington. The Applicant's obligation is limited to those services which directly relate to Corunna Court and no beyond the confines of that property.
31. At the conclusion of the hearing the question as to whether or not an order under Section 20C should be made. Miss Mattsson wished to make submissions to the effect that just because the Respondent had been unsuccessful, did not mean that an order under Section 20C should be made. It was not, she said, appropriate for the Respondent to be deprived of their costs because they were unsuccessful and that accordingly she urged us not to make such an order.
32. We heard all that was said but it seems to us to be just and equitable to make an order under Section 20C. The Applicant has been successful in his argument as to the terms of the lease and in those circumstances, we find it is appropriate to make the order that the Section 20C applies and that the costs of these proceedings are not recoverable as a service charge.
33. It follows that it was not necessary for us to consider the reasonableness of service charges rendered by Wellington. We are sorry that Mr Haldan and Mr Atkinson both of Hurst Warne, the managing agents for Wellington, were required to attend the hearing before us. This was as a result of a witness summons issued. We are grateful, however, to them for sparing the time to come but their assistance was not, for the reasons set above, required.

Judge: *Andrew Dutton*

A A Dutton

Date: 25th April 2017

ANNEX – RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-Tier at the Regional Office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional Office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28-day time limit, such application must include a request to an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (ie give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.